THE

DAUPHIN COUNTY REPORTS,

CONTAINING

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

EDITED BY

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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.

EDWARD SCHLAYER *vs.* GEORGE BOWERS, DEFENDANT, JAMES SANKEY, GARNISHEE.

Attachment execution—Demurrer to answers of garnishee—Practice.

Although a demurrer to the answers of a garnishee in an attachment execution is not the usual practice, it is not an improper form of setting the case down for hearing on the answers.

The general and proper practice is to put the motion for judgment against the garnishee in the shape of a rule to show cause.

The question of the liability of the garnishee must be determined from the answers alone.

Judgment will not be entered against the garnishee, unless he expressly or impliedly admits his indebtedness so distinctly as to leave no room for doubt.

Edward Schlayer *vs.* Geo. Bowers, Defendant, Jas. Sankey, Garnishee.

Judgment will not be entered against a garnishee when his answers deny all liability to the defendant, and there are no facts set forth from which an admission of liability might be implied.

An exception to the answers of a garnishee, after demurrer filed, is irregular. An exception is proper when the answers are not full and direct.

Attachment execution. Demurrer to answers of garnishee. C. P. Dauphin County, No. 424, June term, 1904.

Fred C. Miller and *S. H. Orwig*, for plaintiff.

James I. Chamberlin, for defendant.

Kunkel, J., Jan. 3, 1905.

This case comes before us on a demurrer to the garnishee's answers to the interrogatories filed. Although it is not the usual practice, it is not an improper form of setting the case down for hearing on the answers. Fox et. al. *vs.* Reed, 3 Grant, 81. The general and proper practice, however, is to put the motion for judgment against the garnishee on the record in the shape of a rule to show cause. Bank *vs.* Gross, 50 Pa., 229.

The question presented is whether upon the facts set forth in the answers the plaintiff is entitled to judgment; and in determining this question, it is well settled we must look to the answers alone. Bank *vs.* Gross, supra; McCallum *vs.* Lockhart, 179, Pa., 427. It is eqnally well settled that a judgment will not be entered against the garnishee unless he expressly or impliedly admits his indebtedness and liability so distinctly as to leave no room for doubt. Allegheny Savings Bank *vs.* Meyer, 59 Pa., 361; Conshohocken Tube Co. *vs.* Iron Car Co., 167 Pa., 592; McCallum *vs.* Lockhart, supra; Hagy *vs.* Hardin, 186 Pa., 428.

Here the garnishee, in his answer, denies all liability to the defendant and that he has any money in his hands belonging to him. He avers that the defendant entered into a written contract, a copy of which is furnished us with the answers, to erect a building for him for the consideration of $6,345, and that he paid to the defendant on account of the contract and for materials for the building the sum of $5,686.28; that the defendant failed to complete the building and that he, the garnishee, as provided by the terms of the contract, finished the building and in so doing expended the balance of the contract price for work and materials and for

the services of an attorney in resisting certain mechanics' liens which were filed against it. The sums, expended to which the demurrer is specifically addressed, are those paid to the contractor and architect employed by the garnishee after the failure of the defendant to complete the building, and that paid to the attorney in resisting the mechanics' liens. Whether these items are due from the garnishee to the defendant, under the contract which provided no liens should be entered against the building, and that upon the failure of the defendant to complete the building the garnishee should have the right to complete it and to deduct from the contract price the expense thereof, cannot now be determined. Whether any balance is due the defendant under the contract is for a jury to find. It is sufficient for the purposes of the demurrer to know that the garnishee claims that he had the right thus to expend the balance of the contract price and that he exercised it in the way he states. We think it proper to say that even if the garnishee had no right to charge the defendant with the attorney's fee of $150, it does not follow that the sum thus charged would be payable to the defendant and therefore to the plaintiff in the attachment. The answer avers that the garnishee, some time before the attachment was issued, accepted an order drawn by the defendant upon him in favor of J. J. Lynch for $300 for brick work done on the building, agreeing to apply to the payment of the order the amount which should remain in his hands after the expenses of completing the building had been paid. Lynch has received but $124.65, leaving still due him $175.35, a sum greater than the amount of the attorney's fee. Under these circumstances it would seem that the amount paid to the attorney, if the garnishee had no right to it, would be due to Lynch rather than to the defendant through whom the plaintiff must claim.

It is manifest that there is no express admission of liability to the defendant in the answer; nor are there any facts set forth from which an admission of liability may be implied. On the other hand there is a positive denial of any liability or indebtedness at all. Judgment against the garnishee, therefore, must be refused.

Subsequently to the filing of the demurrer, a paper which is called an exception was filed by the plaintiff in which he excepts to the payment made by the garnishee to the contractor who was employed after the defendant abandoned the

building; the ground of the exception being that the work, for which part of the payment was made, was done theretofore by the defendant. The plaintiff misconceives the office of an exception in a proceeding of this character. If the answers of the garnishee be not full nor direct, or if thay be not sufficiently specific, the practice is to except to them. There is no such complaint made here. The exception filed is irregular and out of place, but we have treated it as one of the causes of demurrer and it is disposed of in what we have already said.

Judgment against the garnishee is refused.

COMMONWEALTH OF PENNSYLVANIA EX-RELATIONE ALBERT MILLAR, ESQ., DISTRICT ATTORNEY, *vs.* C. H. MILLER, AMOS SMITH, H. M. NISSLEY.

Quo warranto—Boroughs—Election of Members of Council—Acts of June 14, 1836, and May 22, 1895.

A writ of *quo warranto*, directed to persons claiming the right to exercise the powers of members of a borough council, properly issues at the relation of the district attorney of the proper county.

At a borough election two persons should have been elected members of the borough council for the full term of three years, and one person for the term of one year to fill out the term of a member who had resigned. Three persons were returned as elected for the full term of three years. The number of votes received by each did not appear from the answer. *Held*, on demurrer to answer, that one of the respondents had been elected for a term which did not exist; that it was impossible to determine from the answer which two, of the three persons returned as elected, had been elected for the full term; that the burden rested on the respondents to show title to the office claimed; that judgment must be entered against one of the respondents because he was exercising an office or holding a term which did not exist, and against the other two because they had failed to show title.

Quo warranto. C. P. Dauphin County, No. 157, Commonwealth Docket, 1904.

W. H. Earnest, for plaintiff.

F. J. Schaffner, for defendant.

Kunkel, J., January 3, 1905.

Com. ex rel Millar, District Attorney *vs.* C. H. Miller, et al.

This is a proceeding by *quo warranto* upon the information of the district attorney of Dauphin county for the purpose of trying by what right the respondents are exercising the office of councilmen in the borough of Hummelstown. The respondents have filed an answer, repeating and admitting the averments contained in the suggestion for the writ, to which answer the commonwealth has demurred. The averments in the answer are substantially as follows:

The respondents, since the seventh day of March, A. D. 1904, have been acting, and are still acting, as councilmen in the borough of Hummelstown, claiming to hold and exercise the office by virtue of an election held in the borough on the nineteenth day of February, A. D. 1904, at which election they were each returned as elected to the office for the term of three years. Under the Act of May 22, 1895 (P. L. 1895, 109), two councilmen should have been elected at that election for a term of three years and one councilman for the unexpired term of a former councilman who had resigned. Nevertheless the ballots which were used and voted at the election were printed with the names of the three respondents on them as candidates for the office of councilmen for terms of three years, and they were returned as so elected.

Upon this state of facts it is clear that one of the respondents was voted for and returned as elected for a term which did not exist, and, therefore, he is not entitled to act as a councilman. Commonwealth *vs.* Baxter, 35 Pa., 263; Commonwealth *vs.* Fletcher, 180 Pa., 456. Which one of the three it is who was thus returned it is impossible to determine from the answer. The number of votes which each received does not appear. If it did appear, under Gilroy *vs.* Commonwealth, 105 Pa., 484, it might be held that the two who recevived the highest number of votes were legally elected to the two terms of three years which should have been filled at that election. The writ, however, calls upon the respondents to show by what right they are acting as councilmen, and it is incumbent on them to show their right. The principle is well established that in a proceeding of this kind the burden rests upon the respondent of showing a good title to the office whose function he claims to exercise. High on Extraordinary Legal Remedies, sec. 629. This burden the two repondents who received the highest number of votes have failed to discharge. They are content to rest upon their answer. The

answer does not show the number of votes received by each, nor does it identify the two who received the highest number. It does not disclose a right in any of the respondents to the terms it is conceded should have been filled at the election held on February 19, 1904.

Judgment must therefore be entered against the three respondents—against one because he is exercising an office, or holding a term, which does not exist, and against the others because they have failed to show title.

The proceeding is brought upon the information of the district attorney of the county. That he is the proper person to institute the proceeding cannot well be questioned. By the terms of the Act of June 14, 1836, the writ of *quo warranto* may be issued upon the suggestion of the attorney general or his deputy in the respective county. The district attorney occupies the position formerly filled by the deputy attorney general, and now takes the place of a principal, whose powers are measured by those which previously belonged to the deputy. Gilroy *vs.* Commonwealth, above cited; De Turk *vs.* Commonwealth, 129 Pa., 151; Commonwealth *vs.* Haesler, 161 Pa., 92; Commonwealth *vs.* Young, 2 Pearson, 164.

Judgment is directed to be entered upon the demurrer in favor of the commonwealth and against the respondents.

IN RE PLANTING OF TREES ALONG PUBLIC ROADS.

Supervisors—Rebate on taxes on account of trees planted along public roads—Records of abatements—Act of June 2, 1901.

Under the Act of June 2, 1901, P. L. 610, it is the duty of the supervisors of a township to allow a rebate on road taxes for trees planted along public roads, in accordance with the terms of the act, and to keep a permanent record of all trees upon which such rebate is allowed. If the supervisors refuse to perform these duties they should be compelled to do so by mandamus.

Attorney General's Department. Opinion to H. A. Surface, Economic Zoologist.

Fleitz, Deputy Attorney General, January 4, 1905.

I am in receipt of your communication of recent date, enclosing the letter of D. J. Santmeier, of White Haven, asking

for certain information relative to the Act of June 2, 1901 (P. L. 610).

The act in question provides that

"Any person liable to road tax, who shall transplant to the side of the public highway on his own premises any fruit, shade or forest trees of suitable size, shall be allowed by the supervisor of roads, or boards of supervisors of roads, where roads run through or adjoin cultivated lands, in abatement of his road tax, one dollar for every two trees set out."

It imposes certain conditions and restrictions in regard to the manner in which the trees shall be set out and maintained, and, in section 4, it is provided that "No person shall be allowed an abatement, as aforesaid, of more than one-quarter of his said annual road tax."

Section 7 of the act contains the following:

"It shall be the duty of the supervisor of roads, or the boards of supervisors of roads, to keep a permanent record in a book especially prepared for that purpose, and which book shall be the property of the township, of all trees upon which the said abatement, as hereinbefore mentioned, has been granted, and when any tree or trees have been removed, with or without the consent of the supervisor of roads, or boards of supervisors of roads, the date thereof shall be distinctly entered in said book."

This act is a part of the general purpose of the recently adopted and wise system of legislation to encourage the planting and preservation of trees throughout the commonwealth, and should be rigidly enforced.

It appears that the road supervisor of the township in which Mr. Santmeier resides refuses to observe the plain mandate of this act and allow the rebate claimed under its terms. He also refuses to comply with his oath of office and procure and keep a permanent record of all the trees in the township upon which an abatement is allowed in a book especially prepared for that purpose.

This offense is too grave to be overlooked or condoned. Public officials cannot be permitted to deliberately ignore or treat with contempt the laws defining their duties, and I am of opinion and advise you that, in this case and in similar ones brought to your attention, a peremptory demand should be made upon the supervisors to comply with the plain and mandatory requirements of this salutary law, and if they still

refuse, an action in mandamus should be instituted in the local courts to compel them to carry out its provisions.

BUILDING AND LOAN ASSOCIATIONS.

Building and Loan Associations — Powers — Ultra vires Acts—Acts of April 29, 1874, and June 25, 1895.

The following acts by building and loan associations are *ultra vires* and should be stopped by the Commissioner of Banking:

1. The establishment and maintenance of branch offices in various places in the commonwealth.

2. The making of permanent investments in office buildings or lands and other buildings, disregarding and far in excess of the provisions of the Act of 29th of April, 1874, which only permits the purchase of real estate in which the association has a mortgage, judgment or other creditor interest; or real estate purchased for the purpose of sale to its shareholders, to be exercised within ten years.

3. The making of collateral loans, without limiting such loans to the cases contemplated by the Act of April 10, 1879.

4. Increasing the expense of managing the association to an extent not warranted by the amount of business done and paying salaries to officials, grossly disproportionate to the value of the service rendered.

5. Charging an admission or withdrawal fee, ordinarily of a dollar a share, which is not looked upon as a liability of the association and is not so carried on its books, but deducted at once from the common fund and put into an expense account for the purpose of paying these increased salaries and expenses.

6. Discriminating in the rate of interest paid to various classes of shareholders.

7. Adopting what is called the "double mortgage" feature, i. e., issuing two bonds, each for one-half the amount of the money loaned, one of which is assigned or sold to outside parties to secure money loaned the association which guarantees the payment of the bonds and retains possession of the mortgage.

8. The issuing of policies of insurance or contracting with certain of its members to insure their lives, and in the event of their death the policy is made payable to the association, and the shares of stock are matured, the association getting the benefit of the difference between the face of the policy and the amount of money still owed by the shareholder upon his stock.

The law has drawn, in its wisdom, distinctions between building associations, banks, trust companies, real estate companies and insurance companies, and established as to each a statutory system of its

own. Confusion of these, or usurpation on the part of one class of the rights and powers of others, is wholly unauthorized.

Although a strict application of the forgoing principles may work hardships in particular instances, there is sufficient discretion vested in the Department of Banking to enable it to deal with particular cases upon the state of facts arising therein in such a manner as to avoid harshness or resulting hardships to the particular association affected.

Attorney General's Department. Opinion to Hon. Robert McAfee, Commissioner of Banking.

Carson, Attorney General, January 5, 1905.

Replying to your recent requests for opinions upon various points touching the powers, practices and management of building associations, I state my views in the form of a single communication.

The evident purpose of the legislature in enacting broad and liberal laws for the organization, control and government of these corporations was to serve a public necessity by creating co-operative associations, by means of which poor people, or those in moderate circumstances, could borrow money to build homes which might be paid for on the instalment plan. They were intended to be a benefit to the small borrower, and also to serve as a safe and profitable investment to the small investor; and for this reason they were exempted from the operation of the laws relating to usury and the other limitations and restrictions imposed upon corporations for profit alone; the wisdom of this action and this legislation has been abundantly shown throughout the commonwealth by the excellent results and benefits accruing to the shareholders of the many institutions which have been running for years along the old legitimate lines.

In recent times, however, the sharp competition in business, the low rate of interest and the springing up of savings banks have narrowed and restricted the legitimate purposes of these associations, and this condition has given rise to many questionable expedients and policies on the part of the officials in charge of many of them. Most, if not all, of these innovations were clearly not contemplated by the legislature at the time of the passage of the various acts regulating these corporations, and nearly all of them are encroachments upon the legitimate domain of other corporations, as well as of doubtful advantage to the welfare of the shareholders in building and loan associations.

Building and Loan Associations.

The original building and loan association was essentially a local institution, drawing its entire membership from a town or a section of a town, and was usually composed of men in the same walk of life and actuated by a common purpose. The officers were usually willing to serve without any, or at least with very small, compensation and the total expenses were kept at the lowest possible point. The funds which accumulated monthly were loaned promptly to shareholders for the building of homes and, in the event of their being no demands for loans, by the system of forcing withdrawals investing members were obliged to take their money and cancel their stock. The apparently large rate of interest derived from the premiums bid, as well as the interest paid on the part of the borrowers sanctioned by law, inured to the benefit of the borrower as well as the investor in the early maturity of the stock. The large profits made by the investing members were only incidental to the business itself, the chief purpose of which was making loans to the men desiring to build homes for themselves and their families.

But these large profits attracted the attention and excited the cupidity of persons who sought to modify the system, by engrafting features of dangerous character and questionable legality, and this resulted in the formation of many associations conducted on what is known as "The National Plan," having for their main purpose the benefit of the investor and the officers of the company, rather than the commendable purpose of building homes for those in the poorer walks of life. These men were not content with the simple and inexpensive methods of the originators, but carried on their operations and managed their associations on lines clearly not in the contemplation of the legislature and not within the spirit or letter of the law. Aided by clever agents and alluring literature, these operations soon reached a magnitude and importance which challenged investigation and the result was that most of them eventually became bankrupt, entailing great loss and hardship upon the deluded shareholders.

The legislature of this state, by the Act of 11th day of May, 1901, P. L. 153, provided that all foreign companies of this character should be required to make a deposit of $200,000 with the commissioner of banking to protect the local shareholders, and this action, supplemented by the earnest and efficient service of the state department having these

matters in charge, practically put a stop to the operation of foreign corporations. There are, however, quite a large number of domestic corporations of this character still in existence, the conduct and management of which are open to the same objections which applied to those driven beyond our borders. Briefly they are as follows:

1. The establishment and maintenance of branch offices in various places in the commonwealth.

2. The making of permanent investments in office buildings or lands and other buildings, disregarding and far in excess of the provisions of the Act of 29th of April, 1874, which only permits the purchase of real estate in which the association has a mortgage, judgment or other creditor interest; or real estate purchased for the purpose of sale to its shareholders, to be exercised within ten years.

3. The making of collateral loans, without limiting such loans to the cases contemplated by the Act of April 10th, 1879.

4. Increasing the expense of managing the association to an extent not warranted by the amount of business done and paying salaries to officials, grossly disproportionate to the value of the service rendered.

5. Charging an admission or withdrawal fee, ordinarily of a dollar a share, which is not looked upon as a liability of the association and is not so carried on its books, but deducted at once from the common fund and put into an expense account for the purpose of paying these increased salaries and expenses.

6. Discriminating in the rate of interest paid to various classes of shareholders.

7. Adopting what is called the "double mortgage" feature, i. e. issuing two bonds, each for one-half the amount of the money loaned, one of which is assigned or sold to outside parties to secure money loaned the association which guarantees the payment of the bonds and retains possession of the mortgage.

8. The issuing of policies of insurance or contracting with certain of its members to insure their lives, and in the event of their death the policy is made payable to the association, and the shares of stock are matured, the association getting the benefit of the difference between the face of the

policy and the amount of money still owed by the shareholder upon his stock.

It is my deliberate conclusion that each and all of these acts are *ultra vires* and without warrant of law, and should be stopped at once by your department. It is a well-settled principle that a corporation can do nothing without direct authority of law. To justify its acts it must be able to point to the specific language of a statue by which it is permitted. Viewed in this light, each one of the above features is illegal.

1. There is no law permitting the establishment of branch offices.

2. It is contrary to the purpose for which these associations were organized for them to make permanent investments in any kind of property, although they may take such property as the result of procedure or foreclosure upon bonds or mortgages, or under the authority of the Act of April 29, 1874, in clause 9 of section 37.

3. Making collateral loans on other than their own stock or real estate of the borrowing stockholder is essentially a prerogative and power of banking institutions and in no wise appertains to the building and loan association business.

4. The extraordinary expenses made necessary by the elaborate offices and the high salaried officials of building and loan associations, conducted on the national plan, is contrary to the letter and the spirit of the law establishing and regulating these institutions.

5. The courts have decided that the directors of building and loan associations stand in the relation of trustees to the shareholders and have no right to deduct any part of the money paid in by the latter for the expenses of the management of the concern, but that such expense must be paid out of the earnings or profits of the association.

6. It is clear that any discrimination in the rate of interest paid to the various classes of shareholders is illegal, but that each is entitled to his pro rata share in the earnings as each must stand his pro rata share of any losses which occur. The objection to the issuing of prepaid or full paid stock which bears a fixed rate of interest, paid at stated intervals, arises from this fact. No shareholder is legally entitled to receive more than his pro rata share of the earnings, and if interest is paid in excess of these earnings to any class of

shareholders, it works an injustice to the holders of non-interesting bearing stock.

7. These associations have no right to borrow money except for the temporary purposes contemplated by the Act of June 25, 1895, P. L. 303, or to sell bonds, as such transactions are foreign to the purpose for which these institutions were incorporated, and are encroachments upon the prerogatives and rights of banking companies.

8. The issuing of polices of insurance upon the lives of certain of the shareholders is not within the purpose for which these associations were incorporated and is a discrimination against the shareholders not so insured, and is also open to the objection of conflicting with the laws governing the writing of insurance under licenses granted by the insurance commissioner upon the lives of persons within this commonwealth, and no report of the same is made to the insurance department.

Under the laws of the commonwealth an agent of a life insurance company must procure a license from the insurance commissioner of the commonwealth and make a report of the amount of business done annually to that department. There are certain other regulations and restrictions provided by law which are not complied with by the agents of building and loan associations writing this class of business.

Again, the practice of taking out insurance policies on the lives of shareholders and borrowers alike, which policies are assigned to the association, is also objectionable for the reason that, in the case of the shareholder, the association has no insurable interest in his life which could be collected if the claim were disputed by the insurance company, and even in the case of a borrowing member, after a certain time the amount of the policy is largely in excess of the insurable interest which the association might legally have by reason of its being a creditor.

The law has drawn, in its wisdom, distinctions between building associations, banks, trust companies, real estate companies, and insurance companies, and established as to each a statutory system of its own. Confusion of these, or usurpation on the part of one class of the rights and powers of others, is wholly unauthorized.

I am not unmindful of the fact that, in dealing with this subject in a general way, a strict adherence to the principles

laid down may work a hardship and possibly an injustice in particular cases, but there is sufficient discretion vested by law in your department to deal with particular cases upon the state of facts arising therein in such a manner as to avoid harshness or resulting hardships to the particular association affected.

In conclusion permit me to add a word or two to guard against a possible misconstruction of my views on the subject of an over-issue of stock, as stated in my opinion of February 5, 1904. I adhere to my view there expressed, but I do not mean that new shares in various series of stock cannot be issued in place of shares that may have been matured and retired or cancelled. This would be admissible under the Act of April 29, 1874, section 37, which provides that "new shares may be issued in lieu of the shares withdrawn or forfeited," the limitation being that "at no time" shall the capital stock aggregate more than one million dollars—assuming that to be represented by the par value of all shares properly outstanding, in successive series.

LEVAN COHEN *vs.* CONGREGATION CASSEUR ISRAEL, HARRISBURG, PENNSYLVANIA.

Affidavit of defense—Sufficiency—Set off.

Where the plaintiff in an action of assumpsit has promised to contribute and pay, to the defendant in the action, a certain sum of money for the purchase of land and the erection of a synagogue, provided others contribute to the same object, and others have contributed and the land has been purchased and the synagogue built, an affidavit of defense alleging plaintiff's promise and failure to contribute, the contribution of others, and the purchase of land and erection of the synagogue, is sufficient to prevent judgment; and plaintiff's unpaid subscription may be set off against the amount claimed in the action.

Motion for judgment for want of sufficient affidavit of defense. C. P. Dauphin County, No. 190, June Term, 1904.

Jas. A. Stranahan, for plaintiff.

John E. Fox, for defendant.

Kunkel, J., Aug. 17, 1904.

The plaintiff moves for judgment for want of a sufficient affidavit of defense. His claim is not denied, but it is averred that he is indebted to the defendant in an amount greater than that for which the action is brought. The ground upon which the motion is based is not stated in the written motion filed in the case, nor was it stated with definiteness at the argument when the motion was heard. We are unable to see why the affidavit of defense is insufficient. It avers, in substance, that the plaintiff promised to contribute and to pay a certain sum of money to the defendant towards the purchase of land and the erection of a synagogue, provided others would contribute to the same object, and that upon the faith of the promise other persons did contribute and the defendant purchased the land and built the synagogue. It further avers that the plaintiff has refused to pay the sum he promised to contribute, and that the same is due and owing by him to the defendant. The defense is set forth with particularity as to the time the promise was made, the amount promised, the location of the land to be purchased, and the names of several of the other persons who contributed.

Touching the binding quality of a promise such as is here averred, the authorities are harmonious to the effect that, if it is acted upon by the promisee and the work done for which the proposed contribution was intended, on the faith of the promise, it is binding on the promissor upon the ground that the detriment or disadvantage which follows to the promisee is a valuable consideration therefor, or upon the principle that the promissor is estopped from denying his liability: Caul *vs.* Gibson, 3 Pa., 416; Ryerss *vs.* Trustees Presby. Congregation of Blossburg, 33 Pa., 114; Shober *vs.* Lanc. Co. Park Assn., 68 Pa., 429; Reimensnyder, Admr. *vs.* Gans. 110 Pa., 17; Helfenstein's estate, 77 Pa., 328. The subject is fully discussed in First Congr. Church of Kane *vs.* Gillis, 17 C. C. Rept., 614.

In the present case it is averred that the promise was made by the plaintiff and that upon the faith of it the defendant purchased the land and erected the synagogue. We think if this be established it is a defense to and may be set off against the plaintiff's claim.

The motion for judgment is therefore refused.

GEORGE A. WOLF *vs.* CHARLES BROWN.

Landlord and tenant—Proceedings to recover possession.

In a proceeding to recover possession, under the Act of December 14, 1863, the jurisdiction of the justice must appear affirmatively on the face of the record; otherwise the proceeding is void.

Certiorari. C. P. Dauphin County, No. 217, June Term, 1904.

D. L. Kauffman, for plaintiff.

F. B. Wickersham, for defendant.

Kunkel, J., Aug. 5, 1904.

It is not necessary to refer in detail to the exceptions filed to this record. It is sufficient to say that the proceeding before the justice purports to be brought under the Act of December 14, 1863, to recover the possession of demised premises. In such a proceeding it is necessary that the jurisdiction of the justice should appear affirmatively on the face of the record or the proceeding is *coram non judice* and utterly void; Graver *vs.* Fehr, 89 Pa., 460. The jurisdiction is special and the record of the justice must contain every essential to support his judgment; Given *vs.* Miller, 62 Pa., 133.

An examination of this record fails to show that the lessor was quietly and peaceably possessed of the premises before the demise to the defendants. It fails to show the duration of the term or that the term was fully ended, or that three months' previous notice was given of the lessor's desire to repossess the premises. These are matters of fact which the act of assembly requires to be shown by due proof, and if they do not appear by the record to have been found by the justice the proceeding is void; McDermott *vs.* McIlwain, 75 Pa., 341; Spotts *vs.* Farling, 2 Pearson, 295; Given *vs.* Miller, supra; McGinnis *vs.* Vernon, 67 Pa., 149; Bedford *vs.* Kelly, 61 Pa., 491.

There are other irregularities and defects which are fatal to the validity of this proceeding. The record does not show the judgment authorized by the act of assembly, but a judgment for a sum of money and not stated to be for damages sustained. It does not show that any proof was offered to support the complaint. It does not show the location of the premises sought to be recovered. It does not show that the

summons was served in the manner prescribed by the Act of July 9, 1901. It shows that the warrant of possession was issued without a judgment for the possession of the premises entered against the defendant. Indeed it is difficult to conceive of a record defective in more particulars than the one before us.

The judgment of the justice is reversed, and the proceeding is set aside.

Collateral Inheritance Tax.

Collateral inheritance tax—Exemption of bequests for the preservation of burial lots—Act of March 5, 1903.

The Act of March 5, 1903, P. L. 22, exempting certain bequests from the payment of collateral inheritance tax, applies to a bequest in a will executed prior to its passage, if the death of the testator occurred subsequent to the passage of the act.

A will contained the following bequest: "I give, devise and bequeath unto the Security Company of Pottstown, Pennsylvania, the sum of five thousand dollars, in trust, to invest and keep the same invested in good, reliable securities, with full power to alter, change and reinvest the same as often as it may deem advisable, for the benefit of said trust estate, and the net income thereof to pay to the Board of Trustees of the . . . . . Church, in . . . . . township, ... county, Pennsylvania, for the purpose of keeping in good order and repair the wall, gate, enclosure and ground of the . . . . . graveyard, also in the aforesaid . . . . . township, ... county, Pennsylvania, and particularly the lot comprising the three . . . . . monuments and the graves of . . . . . and the . . . . . and the . . . . . enclosed by said monuments and contiguous to them. And I hereby authorize and direct the president of said Board of Trustees to designate a member of said Board, at a compensation of five dollars per year, whose duty it shall be to see that the provisions of this clause of my will are complied with, and to employ a competent person, at a reasonable compensation for each year, to keep in good order and repair said graveyard and the lot in which the beforementioned . . . . . and . . . . . and . . . . . are buried. The above mentioned employee is also to dig up by the roots, at least once a year, all thistles, briars, elders, carrots and other noxious weeds, and when needed to have the grounds manured and lawn grass seed sown therein.

Held, that the language of the bequest was too broad and general in its terms to entitle it to exemption from collateral inheritance tax, under the Act of March 5, 1903.

Collateral Inheritance Tax.

Attorney General's department. Opinion to W. P. Snyder, Auditor General.

Fleitz, Deputy Attorney General, December 21, 1904.

I have your letter of recent date, in which you express a desire for an official opinion as to whether or not a certain case falls within the provisions of the Act of 5th of March, 1903 (P. L. 12), which reads as follows:

"That hereafter all bequests and devises in trust, for the purpose of applying the entire interest or income thereof to the care and preservation of the family burial lot or lots of the donor, in good order and repair perpetually, shall be exempt from liability for collateral inheritance tax. This act shall take effect on and after the first day of January, one thousand nine hundred and four, and shall not apply to any bequest or devise, as aforesaid, made prior to that time."

It appears from your letter and the papers accompanying it that a resident of this commonwealth made and executed his will prior to the passage of the above mentioned act, but died subsequent to the date on which it was to take effect, to wit: January 1, 1904. In that will there was an item as follows:

"I give, devise and bequeath unto the Security Company of Pottstown, Pennsylvania, the sum of five thousand dollars, in trust, to invest and keep the same invested in good, reliable securities, with full power to alter, change and reinvest the same as often as it may deem advisable, for the benefit of said trust estate, and the net income thereof to pay to the Board of Trustees of the . . . . . Church, in . . . . . township, ... county, Pennsylvania, for the purpose of keeping in good order and repair the wall, gate, enclosure and ground of the . . . . . graveyard, also in the aforesaid . . . . . township, ... county, Pennsylvania, and particulary the lot comprising the three . . . . monuments and the graves of . . . . and the . . . and the . . enclosed by said monuments and contiguous to them. And I hereby authorize and direct the president of said Board of Trustees to designate a member of said Board, at a compensation of five dollars per year, whose duty it shall be to see that the provisions of this clause of my will are complied with, and to employ a competent person, at a reasonable compensation for each year, to keep in good order and repair said graveyard

Collateral Inheritance Tax.

and the lot in which the beforementioned . . . . . and . . . . . and . . . . . are buried. The above mentioned employee is also to dig up by the roots, at least once a year, all thistles, briars, elders, carrots and other noxious weeds, and when needed to have the grounds manured and lawn grass seed sown therein."

These facts have raised two questions upon which you desire an official opinion.

1. Whether the will, having been executed prior to the time when the act went into effect, comes within the exemption contained in the act.

2. If the act applies to the will in question, whether the bequest, as above set forth, comes within the exemption contemplated by its terms.

1. The Act of 4th of June, 1879 (P. L. 88), provides, in the first section, "That every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

There is nothing in the will under consideration which expresses any contrary intent, and therefore we must interpret it in accordance with the language of this act, and, although as a fact it was made and executed previous to January 1, 1904, it is presumed to have been executed since that date, because the testator died subsequent to that time.

I am, therefore, of opinion and advise you that the Act of 1903 applies to the will in question and to the devises and bequests made therein, if there be any such which fall within its terms and are entitled to the exemption which it provides.

2. A careful examination of the language of the item creating this bequest or devise in trust discloses the fact that it is too broad and general in its terms to be entitled to the exemption from payment of collateral inheritance tax provided by the clear and explicit language of the said act. It is a well settled rule that all statutes granting exemptions from the general revenue laws of the state must be construed strictly. All bequests and devises in trust, which are entitled to the exemption provided by the act, must be for the purpose of applying the "entire interest or income thereof to the care and preservation of the family burial lot or lots of the donor," while the devise in question provides that the entire

income from the trust estate of $5.000 shall be paid to the trustees of a certain church for the purpose of keeping "in good order and repair the wall, gate, enclosure and ground" of a certain graveyard, and "particularly" the lots in which are interred the remains of members of the testator's family and other persons not of his own immediate family, so far as the record before us goes. The purpose of the devise or bequest contained in the will in question is too broad to fit the narrow terms of the act, and for this reason I am of opinion and advise you that the trust estate so created is not entitled to the claim for exemption from payment of the collateral inheritance tax imposed by the general law.

Highway Improvement.

Highway Improvement—Act of April 15, 1903.

Under the Act of April 15, 1903, P. L. 188, the state cannot advance the portion of the cost of improving a public road which is to be paid by the county or township through which the road passes.

Attorney General's Department. Opinion to Joseph W. Hunter, Commissioner of Highways.

Fleitz, Deputy Attorney General, January 24, 1905.

I am in receipt of your letter of recent date, in which you ask for an offical opinion upon the following question, arising under the provisions of the Act of 15th of April, 1903, P. L. 188.

Should the contractors for reconstructing township roads with state aid be paid in full by the state highway department before the department receives the respective shares of the county and township due on the contract; in other words, should the state pay the entire bill of the contractors for performing a certain piece of work before receiving any or all of the moneys due from the county and township on said work?

I understand that, in some instances, there is considerable delay on the part of the county and township authorities in paying their proportionate share of the expense of highway improvements under the provisions of this act, and that the contractors doing the work are much hampered thereby. Un-

fortunately the framers of the bill did not take into account the contingency of this condition arising, and have not provided specifically for its relief.

Section eight provides:

"The state's share of the expense of highway improvement or maintenance, under the provisions of this act, shall be paid by the state treasurer upon the warrant of the state highway commissioner, attested by the chief clerk of the state highway department, out of any specific appropriations made by the legislature to carry out the provisions of this act; and the share of the county in which said highway improvement, as herein provided, has been made, shall be a charge upon the funds of said county, and shall be paid by the county treasurer upon the order of the county commissioners. The share of the township or townships in which the said highway improvement, as herein provided, has been made, shall be paid by the township supervisors or commissioners, as other debts of said township, or townships, are paid. The state highway department, the county commissioners of the county, and the supervisors or commissioners of the township, or townships, in which any highway is being improved under the provisions of this act, may, with the approval of the state highway commissioner, make partial payments to the contractor or contractors performing the work, as the same progresses; but not more than two-thirds of their proportionate shares of the contract price for the work shall be paid, in advance of the full completion of the same, by either the state highway department, the county, and the township or townships, so that at least one-third of the full contract price shall be withheld until the work is satisfactorily completed and accepted, and the exact proportions of the cost thereof apportioned to the state, county and township, or townships: Provided, That a cash road tax be levied by each township, where such road improvement is being made, to meet the cost of such permanent road improvement as is provided in this act."

From this language it is clear that the respective shares of the state, county and township may be paid by the authorities of each to the contractors from time to time as the work progressed. While the contract is entered into between the contractor and the state highway commissioner, in behalf of the commonwealth, the method of payment, as pointed out in

section eight, is that the state shall pay its proportion in a certain way, and that the proportion of the county shall be paid by the county treasurer upon the order of the county commissioners and be a charge upon the funds of said county, and the proportion due from the township shall be paid as other debts of said township are paid. It also provides for partial payments to the contractor or contractors, with the approval of the state highway commissioner by the state, county and township authorities. As the warrant of law upon which you must rely for your official acts limits the payments to be made by you to the state's share of the expense, I can see no way in which this difficulty can be overcome, except by amending the act. It will be readily perceived that if the county and township authorities do not properly pay their shares of the expense, the work of construction will be greatly hampered, and reputable and responsible contractors will be loth to undertake the work. Lamentable as this result is the act leaves you no discretion in the matter. It must be obeyed as it now is, and I, therefore, advise you that you will not be justified in paying more than the state's proportion of the expense to the contractor upon the completion of his work. He must then look to the county and the township authorities for the remainder due him under his contract. In this he is not without remedy.

As a condition precedent to the signing of the contract by the state highway commissioner on behalf of the state, section nine provides:

"No contract for any highway improvement shall be let by the state highway department, nor shall any work be authorized under the provisions of this act, until the written agreements of the county commissioners of the county and the supervisors or commissioners of the township or townships, in which said proposed improvement is to be made, agreeing to assume their respective shares of the cost thereof, as hereinbefore provided, shall be on file in the office of the state highway department, and shall have been approved as to form and legality by the attorney general or the deputy attorney general."

This is a covenant entered into by the local authorities with the state, agreeing to bear their proportions of the expense, and can be enforced by legal proceedings, but these proceedings must be brought by the contractor.

IN THE MATTER OF OBJECTIONS TO THE NOMINATION PAPER OF DAVID CHALLENGER, CANDIDATE FOR CONSTABLE IN THE NINTH WARD OF THE CITY OF HARRISBURG, REPRESENTING THE INDEPENDENT PARTY OR POLICY.

A nomination paper verified by the affidavit of five persons, three of whom were not signers of the paper itself, is defective but may be amended under the Act of July 9, 1897, P. L. 228.

Under the Act of July 9, 1897, 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.

Objection to nomination paper. C. P. Dauphin County, No. 149, March Term, 1905.

W. S. Snyder, for objection.

James I. Chamberlin, contra.

Kunkel, J., February 10, 1905.

The affidavit which accompanies this nomination paper is made by five persons, three of whom, it appears, are not signers of the paper itself, as required by the Act of 1893, amended by the Act of 1897 (P. L. 1897, p. 228). In this respect the paper is defective and the question presented is whether such defect is amendable. 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 Nominations, 208 Pa. 108.

We are therefore of the opinion that the defective affidavit

may be amended, but inasmuch as it has already been amended by the affidavit filed Feb. 9, 1905, with the county commissioners, and the signatures to the nomination paper and the qualifications of the signers, are by the amendment, vouched for by the affidavit of five signers, there is no need to make any further direction with respect thereto. What we have said disposes of the first objection. As to the second objection, no sufficient evidence has been offered to sustain it, and it is therefore overruled.

We accordingly adjudge the nomination paper of David Challenger, as amended, to be valid and the prothonotary is directed to certify this judgment to the county commissioners.

ESTATE OF EDWARD G. COLLIER, DECEASED.

Decedents' estates—Delay in filing account—Interest—Compensation.

When an administrator has not invested money in his hands, but has not used it for his own purposes, he will not be surcharged with interest merely on account of a delay of two years in filing his account, without proof as to the circumstances of the delay.

The duty of an administrator is to administer, not to invest.

The amount of compensation to which an administrator is entitled must depend upon the circumstances of the particular case. Usually the measure is five per cent. on the personal estate which comes into his hands, but it is not a fixed measure. The compensation varies according to the character of the services, the responsibility incurred and, in connection with the latter, the amount of the estate.

The amount which came into the hands of an administrator, between the filing of a partial account and the filing of his final account, was $1,172.72. The credit asked for his time, trouble and responsibility was $83.84, which included $18.84, expenses incurred in attendance upon an audit through which the bulk of the estate was collected. *Held*, that the charge was not excessive under the circumstances.

Exceptions to account of administrator. Orphans Court of Dauphin County.

L. B. Alricks, for exceptions.

H. L. Lark, contra.

Kunkel, J., February 6, 1805.

Estate of Edward G. Collier, Deceased.

Two exceptions have been filed to this account, and we are asked to pass upon them without the intervention of an auditor. By the first exception it is urged that the accountant should be surcharged with interest on the money which came into his hands; by the second, that his claim for compensation is excessive.

No testimony has been taken in support of either exception, but the fact is agreed upon that the sum of $1,172.72, almost the entire estate with which the accountant has charged himself, came into his hands on December 17, 1902, about two years prior to the filing of his account. It is also agreed that the accountant did not invest the fund at interest, or use it for his own purposes during that time.

As to the first exception, in the absence of proof respecting the circumstances of the delay in filing the account, and in paying over the money, we are not sufficiently advised to enable us to determine whether the accountant should be charged with interest on the fund. He did not invest the fund. He was not bound to do so. His duty was to administer, not to invest. He did not use the fund for his own purposes, and we cannot find that he retained it wrongfully without proof. We cannot say, from the mere fact of the delay in accounting for the time stated, that he should be charged with interest. We think it is incumbent on the exceptant to show something more, without which the exception must be dismissed.

As to the second exception, the amount of compensation an administrator is entitled to must depend upon the circumstances of the particular case. Usually the measure is five per cent on the personal estate which comes into his hands, but it is not a fixed measure. The compensation varies according to the character of the services, the responsibility incurred and, in connection with the latter, the amount of the estate. The rule is fair compensation for the amount and character of the labor. Wistar's Estate, 192 Pa., 289. The amount of money which came into the hands of the accountant since the filing of his first account, as appears by his present account, is $1,172.72. The credit he asks is $83.84, which includes $18.84 for expenses incurred by him in attendance upon an audit for the purpose of collecting the sum which constitutes the bulk of the estate. Apart from the cash paid for these expenses, the amount charged for time, trouble and responsi-

bility is $65.00, but $6.37 more than five per cent. on the estate administered. We are not prepared to say that under the circumstances, so far as we have been given light upon them, the charge is excessive.

The exceptions are dismissed and the account is confirmed.

IN RE ASSIGNED ESTATE OF JOHN H. SHEESLEY.

Judicial sales—Misrepresentations by purchaser.

It is well settled that any device or misrepresentation of a purchaser, at a public judicial sale, which prevents a fair sale is a fraud on the debtor and on the creditors whom it affects; and as to them the purchaser does not acquire a good title if thereby he intends to obtain and actually does obtain the property for less than it otherwise would have brought.

If a purchaser, at an assignee's sale of real estate, represents that he is not buying for himself but for another, and by such representations deters others from bidding and has the property knocked down to himself, exceptions to the confirmation of the sale by creditors of the assignor will be sustained and the sale set aside, upon the offer of a higher price by one of the exceptants, accompanied by a bond to secure the amount of the bid offered and the costs of a re-sale.

Exceptions to confirmation of sale. C. P. Dauphin County, No. 536, January Term, 1904.

John E. Fox, for exceptions.

John Fox Weiss for James J. Lynch, purchaser.

Frederick M. Ott, for Annie E. Enders, judgment creditor.

Wm. M. Hain, for assignees.

Kunkel, J., February 10, 1905.

Objection is made to the confirmation of this sale by the East End Bank, of Harrisburg, and Byron Sheesley, creditors, and John H. Sheesley, the assignor. The substantive ground of the objection is that the purchaser, James G. Lynch, represented at the time of the sale that he was bidding for Byron Sheesley, while in fact he was bidding for himself, and that by this device he deterred others from bidding, and had the

property knocked down to himself at a price below that which it otherwise would have brought. Testimony has been taken for and against the objection thus raised. The exceptant, Byron Sheesley, testifies that before the sale Lynch agreed with him to attend the sale and buy the property for him. This Lynch denies. Whether there was such an agreement between them we are not called upon to decide in this proceeding. Whatever may be the truth concerning it, this at least is fully established by the testimony, that Lynch did say at the time of the sale to Byron Sheesley and to W. L. Gorgas, who was present at the sale in the interest of Byron Sheesley under some arrangement which does not definitely appear, that he was bidding for Byron Sheesley. It also appears that, relying upon this representation, neither Sheesley nor Gorgas bid upon the property, and it was knocked down to Lynch. After the sale Lynch declared he had not been bidding for Sheesley, but that he had been bidding upon and had bought the property for himself. Both Sheesley and Gorgas testify that they would have bid, had not Lynch told them he was bidding for Sheesley, and Gorgas testifies he would have bid higher. No evidence has been offered to show that the price obtained is less than the fair value of the property, but an offer is made by one of the exceptants, accompanied by a bond to secure the same, to bid, on a re-sale, $8,700, $423 more than the bid at which the property was knocked down to Lynch, and to pay the costs and expenses of a re-sale. Upon this state of facts we must refuse to confirm the sale. We cannot approve a sale brought about under the circumstances here disclosed. It is well settled that any device or misrepresentation of a purchaser, at a public judicial sale, which prevents a fair sale is a fraud on the debtor and on the creditors whom it affects, and as to them the purchaser does not acquire a good title if thereby he intends to obtain and actually does obtain the property for less than it otherwise would have brought. Walter vs. Gernant, 13 Pa., 515; Gilbert vs. Hoffman, 2 Watts, 66; Abbey vs. Dewey, 25 Pa., 413; Sharp vs. Long & Brady, 28 Pa., 433; Oram vs. Rothermel, 98 Pa., 300; Woodruff vs. Warner, 173 Pa., 302; Power vs. Thorp, 92 Pa., 346. Here Lynch obtained the property by representing that he was bidding for Sheesley, when in fact, as he subsequently and now claims, he was bidding for himself. Taking him at his word now, his representation

then made was false. It is quite clear he could have had no other intention when he made the representation that he was bidding for Sheesley, than to obtain the property for less than Sheesley or Gorgas would have bid. His representation deterred them from bidding. That the property would have brought more had he not misrepresented his attitude at the sale is fairly probable, inasmuch as more is now offered for it. Besides Gorgas says he would have bid more. It follows therefore that his misrepresentation at the sale was a wrong to the assignor and creditors, of which the assignor at least in the present case has a right to complain.

The objecting creditors are not shown to have been injuriously affected by Lynch's misrepresentation. It has not been shown that either of them will participate in the increased price which has been offered, and so far as they are concerned it does not appear that any injury has been done. But the assignor, who has the right to have his property bring for the payment of his debts what a purchaser is willing to pay, has been injured to the extent that the misrepresentation lessened the purchase price. We are not unmindful that other creditors who make no objection have an interest in the price that Lynch bid for the property, and that their rights must not be overlooked. Yet, as a bond has been given for the payment of the increased bid and the expense of a re-sale, their rights are thereby secured. In view of the foregoing considerations we refuse to confirm the sale. It is therefore set aside and an order will be made for a re-sale upon application being made therefor.

Mileage of Judges.

Compensation of judges—Mileage—Acts of April 14, 1903, and June 4, 1883.

The Act of April 14, 1903, P. L. 176, repeals the Act of June 4, 1883, P. L. 74.

Under the Act of April 14, 1903, a judge is not entitled to mileage when performing his duties within the district for which he is commissioned.

Attorney General's Department. Opinion to W. P. Snyder, Auditor General.

Carson, Attorney General. February 20, 1905.

You have asked me for my official opinion as to whether section 7 of the act approved April 14, 1903 (P. L. 176), entitles a judge to mileage when performing his duties within the district for which he is commissioned, the inquiry being based upon a claim of one of the judges to the right to charge mileage for traveling through his district composed of two counties.

The Act of 4th of June, 1883 (P. L. 74), in section 3, gave to judges, "in addition to annual salary," mileage at the rate of fifteen cents per mile for every mile necessarily traveled within their respective districts in performing their official duties. There is nothing in this act which makes any distinction between districts composed of several counties and a district composed of one county.

This department has ruled under this act during the administration of my predecessor, in an opinion by the Deputy Attorney General (see opinions of Attorney General, April 8, 1902, Report of Attorney General for that year, page 26), that the law did not intend payment of mileage to a judge not residing at the county seat for mileage to and from his residence to the county seat, where he must hold court. To this ruling and the reasoning sustaining it I adhere.

The Act of 14th of April, 1903 (P. L. 175), the constitutionality of which has been recently sustained by the Supreme Court, in section 7, provides that no judge shall receive any compensation for official services rendered other than the salary fixed by that act, except mileage and actual expenses incurred when holding court *outside* of the district for which he is commissioned, and all acts, or parts of acts, inconsistent therewith were thereby repealed.

In my judgment, the act of 1883 is inconsistent with the act of 1903, and is therefore repealed. It has been urged that there is no inconsistency, but that the two acts are *in pari materia*, and can stand together—the first applying to compensation for traveling within the district; the second applying to mileage outside the district.

The distinction thus drawn is superficial and vanishes the moment the language of the recent act is considered. The provision of the last act is express that "No judge . . . shall receive any compensation for official services rendered, other than the salary fixed by this act, except mileage and actual expenses incurred when holding court outside of the district for which he is commissioned." This is a general prohibition applicable to every judge and to every district, irrespective of the fact whether the district embraces one or more counties. The exception is—and it is the only exception—that for official services rendered and actual expenses incurred outside of the district mileage shall be allowed. This is tantamount to saying that all mileage *within* a district is disallowed. Unless the words mean this the provision is senseless. Hence, while it is true that the acts are *in pari materia*, yet they cannot stand together, for there is an utter repugnancy between them, the first act allowing mileage within the district and the second act prohibiting generally any compensation outside of the new salary except only mileags *without* a district. This is tantamount to a prohibition against mileage within a district. The act of 1883, therefore, falls, being cut away by the new provision. In other words, the effect of the act of 1903 is to be drawn, not from the exception, but from the general provisions of the statute.

It is clear that mileage is regarded by both statutes in the light of compensation. The earlier act provides for mileage within a district "in addition to such annual salary," and the later act prohibits compensation "other than the salary fixed," except mileage outside of the district. Hence, when by the later act there is a prohibition against any compensation other than the regular salary, except mileage outside of a district, it is clear that there can be no allowance for mileage within the district, for, were such mileage allowed, it would be, and must be, viewed as additional compensation.

Again, it is argued that the act of 1883 was special, to meet the conditions where two or more counties comprise a

Mileage of Judges.

district, and to provide for such particular conditions was the statute passed. It is sufficient to say that no such distinction between districts is stated in the act. It is applicable to all alike, and no particular conditions are provided for, either expressly or impliedly.

Again, it is argued that the compensation must be uniform, and that each servant of the commonwealth must be placed on the same plane with all others of his class, and that their compensation be equal; that judges whose districts are composed of two or more counties are required to travel several thousand miles each year in attendance upon regular and special terms of court, while this expense is saved to judges whose districts embrace but a single county.

This exception is specious rather than sound. The uniformity of the act of 1903 has been recently sustained by the Supreme Court. It is applicable to all judges and to all districts, and the only exception made is as to mileage outside of a district. Differences in the distances traveled by judges within their districts can no more be measured under the statute as it now reads than differences in the amount or quality of their work. It is clear that no inquiry could be instituted to ascertain whether one judge had one hundred cases more than another in the course of a year, or that he had written more or longer or more learned opinions upon more important questions than his neighbors in the same time. Such questions cannot be raised or determined under the guise of an attempt to enforce uniformity. If the act be, as it undoubtedly is in its terms, uniform, there can be no measure taken of individual differences in the amount of labor performed, whether physical or mental.

In my judgment, no claim can be made by judges for mileage within their districts, and I so advise you.

In the Matter of the Application of Gustav A. Knoblauch, Jr., of the Ninth Ward, Harrisburg, Pa., for License to Sell Vinous Spirituous Malt and Brewed Liquors.

Liqaor law—Acts of May 13, 1887, and March 31, 1856.

The Act of May 13, 1887 P. L. 108, does not contemplate the granting of a license to sell liquors at a place necessary for the accommodation of the public merely.

It intended that a license to sell liquor might be granted where it is made to appear primarily that the place is necessary to accommodate the public and entertain strangers or travelers, or that it is necessary for the accommodation of the public and travelers. The necessity to accommodate the public and entertain strangers or travelers, or the necessity to accommodate the public or travelers is the primary requisite.

When the accommodation of the public and travelers is shown, the right to sell liquor may follow.

The right to sell liquors is an artificial and not a natural right. The right to accommodate the public and entertain strangers and travelers is not a legislative right.

When the necessity for public accommodation and the entertainment of strangers and travelers is shown, a license to sell liquor may attach as an incident.

When the necessity for the accommodation of the public and travelers is shown, a license to sell domestic wines, malt and brewed liquors may be accorded.

Bed rooms and beds and accommodation to the public and travelers are the passports to a license to sell liquors at a hotel or restaurant.

The Act of May 13, 1887, is supplementary to the Act of March 31, 1856, and the latter act is not repealed by the former.

The applicant for license in this case asked the Court to grant him a license for the sale of vinous, spirituous, malt or brewed liquors, or any mixture thereof, at retail, at a place described as the restaurant on the first floor of the passenger station of the Philadelphia and Reading Railway, situate on Market Street, in the Ninth Ward of the City of Harrisburg, Pennsylvania.

The license was refused for the following reasons:

First, because the applicant did not desire to be licensed to keep a hotel, inn or tavern, and because the applicant did not have, for the exclusive use of travelers, at least four bed rooms and eight beds," as required by the provisions of the ninth section of the Act of March 31, 1856 P. L. 200.

Second, because the petition offends against the provisions of the fourteenth section of said act P. L. 203, which restricts the license of an eating house or restaurant to the sale of domestic wines, malt or brewed liquors.

Knoblauch's License.

Application for license. Quarter Sessions of Dauphin County. No. 1. Retail Liquor Licenses, 1905.

John T. Brady, for application.

Jas. A. Stranahan, for remonstrance.

Weiss, P. J., March 7, 1905.

Gustav A. Knoblauch, Jr., filed his petition January 27, 1905, and therein asked the Court to grant him "a license for the sale of vinous spirituous malt or brewed liquors or any mixture thereof at retail" at a place described as "the restaurant on the first floor of the passenger station of the Philadelphia and Reading Railway, situate" on Market Street in the Ninth Ward of the City of Harrisburg, Pennsylvania.

The petition sets forth that the premises are owned by the "Philadelphia and Reading Railway Company," and that the place desired to be licensed "is necessary for the accomodation of the public."

A remonstrance, signed and filed by a number of citizens of the Ninth Ward, sets forth that the license asked for "is not necessary for the accomodation of the public and the entertainment of strangers and travelers," that " there is no authority of law for the granting of said license under said petition," and that "the granting of said license would be detrimental to the public good."

The applicant is a citizen of the United States, of temperate habits and good moral character, and is a person suitable to be entrusted with a license to sell liquor.

The place is "necessary for the accommodation of the public and travelers" and a license to "authorize the sale of domestic wines, malt and brewed liquors" might properly be granted "for the keeping of an eating house" or restaurant, if the application in this instance were for an eating house or restaurant.

The license prayed for is refused for the reason that it is not desired to be "licensed to keep a hotel, inn, or tavern, and, bacause the applicant "does not have for the exclusive use of travelers, at least four bed-rooms and eight beds" as required by the provisions of the ninth Section of the Act of March 31, 1856 (P. L. 200).

It is refused for the further reason that the petition offends against the provisions of the 14th Section of said Act

(P. L. 203), which restricts the license of an eating house or restaurant to "the sale of domestic wines, malt or brewed liquors."

The petitioner does no task for either a hotel or restaurant license, but for a license to sell liquors of all kinds, or admixtures thereof, at a place designated in the petition.

The Act of May 13, 1887 (P. L. 108) does not contemplate the granting of a license to sell liquors at a place necessary for the accommodation of the public merely.

In view of the legislation theretofore had relating to the sale of liquors in this and some other counties, it intended that a license to sell liquor might be granted where it is made to appear primarily that the place is necessary to accommodate the public and entertain strangers or travelers, or that it is necessary for the accomodation of the public and travelers. The necessity to accommodate the public and entertain strangers or travelers, or the necessity to accommodate the public or travelers is the primary requisite.

When the accommodation of the public and travelers is shown, the right to sell liquor may follow.

The right to sell liquors is an artificial and not a natural right. The right to accommodate the public and entertain strangers and travelers is not a legislative right.

When the necessity for public accommodation and the entertainment of strangers and travelers is shown, a license to sell liquor may attach as an incident. When the necessity for the accommodation of the public and travelers is shown, a license to sell domestic wines, malt and brewed liquors may be accorded. Bed-rooms and beds and accommodation to the public and travelers are the passports to a license to sell liquors at a hotel or restaurant. But it is difficult to conceive of a necessity for a license to sell liquors for public accommodation at a given place. A place where liquor is sold at retail is simply a drinking place and the Act of May 13, 1887, does not contemplate the granting of a license for that purpose at a place.

It must be assumed that the legislature had in view the rule that the privilege to sell liquors flows from the fact established that accommodation to the public and entertainment of strangers and travelers is or are necessary, when it enacted the Act of 1887, and intended to embody the principle in the statute.

Knoblauch's Licenses.

Our predecessors granted hotel and restaurant licenses when the necessity for the entertainment of strangers and travelers and public accommodation was shown and believed, as we recall their views, that the Act of 1887 was supplementary to the Act of 1856, and that the latter Act was not repealed by the former. This view has obtained by the court as it is now constituted. All applications for license to sell liquor at retail ask for a hotel or restaurant license and they are granted upon the assumption that the requisites prescribed by the Act of 1856 are unrepealed.

The vice of this application is that it prays the privilege or right to sell vinous and spirituous liquors, as well as that of selling malt or brewed liquors, at a place kept as a restaurant by the petitioner. The facts disclosed at the hearing of the application and remonstrance would warrant the granting of a license to sell domestic wines and malt and brewed liquors at the restaurant kept and conducted by the applicant. but there is no authority to grant a license to sell vinous and spirituous liquors, and domestic wines and malt and brewed liquors, at a place kept to accommodate the public and travelers as and for an eating house or a restaurant.

The application for the license is refused because the petition does not set forth the requisites for an hotel, as required by the 8th Section of the Act of 1856. It is refused because the petition asks for the sale of liquors, viz, vinous and spirituous liquors, not authorized by the 14th Section of the Act of 1856, nor by the Act of March 2, 1867 (P. L. 40). These sections authorize the sale of domestic wines, malt or brewed liquors only where application for license to keep an eating house, beer house, or restaurant is made.

Under this view of the law it is not necessary to consider the necessity of a license for the accommodation of the public.

EDWARD C. HANNA *vs.* RT. REV. JOHN W. SHANAHAN, BISHOP OF HARRISBURG.

Wills—Construction.

The will of testatrix provided as follows: I give and bequeath unto my beloved husband, all my property, real, personal and mixed, of whatever nature and kind and wheresoever the same shall be at the time of my death, to and for his own use absolutely, and after his death the same, if any remaining, to be divided among my heirs share and share alike. *Held* that the husband took an estate in fee.

Motion for judgment for want of sufficient affidavit of defense. C. P. Dauphin County, No. 252, January term, 1905.

B. F. Umberger, for plaintiff.

John A. Herman, for defendant.

Kunkel, J., March, 8, 1905.

The question which is raised by this motion is whether the plaintiff has a fee simple estate in the land agreed to be purchased by the defendant.

He acquired title to the land under the will of his wife, which provides, *Inter alia*, as follows: "Item, I give and bequeath unto my beloved husband, Edward C. Hanna, all my property, real, personal and mixed, of whatever nature and kind and wheresoever the same shall be at the time of my death, to and for his own use absolutely, and after his death the same, if any remaining, to be divided among my heirs share and share alike." The husband is the only beneficiary under the will, excepting the son and the heirs of the deceased daughter of the testatrix, to each of whom is given the sum of five dollars.

It is quite clear that by the first part of this clause the estate devised to the plaintiff is a fee simple estate; Oswald *vs.* Kopp, 26 Pa., 516. Is it reduced to a less estate by the succeeding language? We think not. There is nothing inconsistent in the language with that which precedes, or which militates against the absolute estate given. Indeed, its effect is just the contrary. It recognizes the right of the plaintiff to dispose of and use the property devised as he may see fit. Such right is the characteristic which marks the absolute ownership of property. We think the case is ruled by Jauretche *vs.* Proctor, 48 Pa., 466; Church *vs.* Disbrow, 52 Pa., 319; Good *vs.* Fichthorn, 144 Pa., 287; Evans *vs.* Smith

166 Pa., 625; Gilchrist *vs.* Empfield, 194 Pa., 397; Bailey *vs.* Ry. Co., 208 Pa., 45; and that the plaintiff took a fee simple estate under his wife's will. The affidavit of defence is therefore insufficient to prevent judgment, and the motion for judgment is sustained.

Judgment is accordingly directed to be entered in favor of the plaintiff for the sum of $4,000, with interest from October 5, 1904, the amount to be liquidated by the prothonotary.

COMMONWEALTH OF PENNSYLVANIA, EX RELATIONE HAMPTON L. CARSON, ATTORNEY-GENERAL, VS. FREDERICK P. HELLER, MATTHAN HARBSTER, EDWARD ELBERT AND SOLOMON H. CLOSE.

Quo Warranto—Pleading—Demurrer.

In the suggestion for a writ of quo warranto, at the relation of the attorney general, the attorney general may call on the defendants to show by what authority they claim to hold title to their offices, or he may complain of specified acts done in violation of law, or both. It becomes the duty of the defendants thereupon to show by what authority they claim to exercise the offices they hold or the liberties and franchises, as commanded by the writ. The burden rests upon them.

In a writ of quo warranto the respondents have the affirmative in the pleadings.

A plea to a writ of quo warranto that fails to state any facts that constitute a legal warrant for the exercise of the powers of the office claimed by the defendant, and is argumentative only, is bad on demurrer.

Hampton L. Carson, Attorney General, and Walter S. Young, for commonwealth.

William J. Roorke and Cyrus G. Derr, for defendant.

Weiss, P. J., March 13, 1905.

The attorney general instituted proceedings by information in the nature of a *quo warranto*, and in the suggestion filed by him complains of Frederick P. Heller, Matthan Harbster, Edward Elbert and Solomon A. Close, that they are exercising and using the office of commissioners of water for the city of Reading without warrant or legal authority; that the board of commisioners of water, of that city was created by a special act, approved March 21, 1865, P. L. 455,

and a supplement thereto, approved April 12, 1866 P. L. 888; that the city of Reading is a municipal corporation of the third class and is governed by the provisions of the Act of May 23, 1889; that the said Frederick P. Heller, Matthan Harbster, Edward Elbert and Solomon A. Close were elected commissioners of water for the city of Reading, pursuant to the provisions of the Act of 1865 and have exercised and do exercise and use the office of commissioners of water for the city without legal warrant, authority or appointment; that the councils of the city of Reading have not at any time taken the proper and necessary measures to carry out the provisions of Article XII of the Act of May 23, 1889, relating to the establishment of a water department; that the provisions of the Act of 1865 were repealed by the Act of May 23, 1889 (P. L. 277) and by the Act of June 4, 1901 (P. L. 391) and that a writ be allowed to issue directed to Frederick P. Heller, Matthan Harbster, Edward Elbert and Solomon H. Close, requiring them to show by what authority he or they claims or claim to exercise or use the office of commissioners of water for the city of Reading.

The writ was served upon the defendants, December 19, 1904, and on the 31st. of December, 1904, they filed a plea that the commonwealth ought not to have its action against the defendants, because that the city of Erie had become incorporated pursuant to an Act of Assembly, April 14, 1851 P. L. 631 and having in 1878, accepted and become subject to the provisions of the Act of May 23, 1874, P. L. 230 whereby it became a city of the third class; that prior to the Act of May 23. 1889, the city of Erie had owned and had title of the water works by conveyance to a board of water commissioners, and that the said city of Erie had erected water works in conformity with authority conferred by the said special Act of Assembly; and thereby say that the commonwealth ought not to have or maintain its action.

The commonwealth demurred to this plea, March 2, 1905, and for cause of demurrer says: That the plea fails to state any facts which constitute a legal warrant, authority or appointment for exercising the office of commissioners of water of the city of Reading; that it does not state the time of their election nor that the said election was held in conformity with the provisions of the Act of 1865, and that the plea is uncertain and ambiguous and argumentative.

In commonwealth vs. Commercial Bank, 28 Pa. 387, it is held that "the attorney general may disclose in his information the specific ground of forfeiture, or he may merely set forth the franchises alleged to have been illegally exercised and call upon the defendant to show by what authority they are held. The plea should either deny the facts or set forth the authority. The replication may then allege the acts relied on as working a forfeiture. This may be denied or demurred to by the defendant."

The rule is laid down in Angell and Ames on Corporations, Sec. 756, that "to a writ of quo warranto, or an information in the nature of one, the defendant must either disclaim, or justify, and the state is bound to show nothing * * * * * * * * * * * * The defendant cannot plead *non usurpavit*, for the object of the proceeding is to ascertain, by enforcing the defendant to set forth by what warrant or authority he exercises the office or holds the franchise." The rule is stated in People vs. Thacher, 55 N. Y 529, to be that "when the right of a person exercising an office is challenged in a direct proceeding by the attorney general, the defendant must establish his title, or judgment will be rendered against him."

The attorney general may call on the defendants to show by what authority they claim to hold title to their offices, or he may complain of specified acts done in violation of law, or both. It becomes the duty of the defendants thereupon to show by what authority they claim to exercise the offices they hold or the liberties and franchises, as commanded by the writ. The burden of showing that they have a right to act as commissioners of water, and take charge of the water department of, the city of Reading, rests upon them.

That the attorney general may have particularized, in his suggestion for a *quo warranto*, does not operate to their disadvantage. He may have set out more than was necessary, and if so it enables the defendants to answer the complaint more fully and advantageously. They can predicate nothing upon the fact that he has stated more than is required in his suggestion. Their duty is to show cause.

This they attempt to do by a plea. By that is intended, of course, to set forth in legal form the facts upon which they rely as a defense and the respondents have the affirmative in the pleadings. To thrive they must justify. They must

show that they have legal warrant and authority to use and exercise the office of commissioners of water of the city of Reading.

The reply may be best characterized by saying that it does not disclose the authority required to be shown, at least not affirmatively.

It avers that the city of Erie was incorporated by a special act of assembly; accepted the provisions of the Act of 1874, and thereby became a city of the third class; and that the board of water commissioners had acquired title, pursuant to said special act, by conveyance to them, and that the city of Erie had not taken title to the water works in its corporate name.

We are given to understand thereby that the Act of 1865 is not repealed by the second section of Article XII of the Act of May 23, 1889 P. L. 309, which relates to cities of the third class taking title to water works by conveyance to them in their corporate name.

We are to draw the inference from the matter of this plea that the respondents have the right to hold and exercise the duties of commissioners of water of the city of Reading.

The plea does not assert such right nor does it contain any statement of a *fact* which constitutes a ground of defense. The defendants may answer, plead, or demur to the suggestion filed, but they must state facts which constitute a legal warrant, authority or appointment for holding or exercising the office of commissioners of water of the city of Reading. They have failed to do so, and the demurrer must be sustained.

It is not deemed proper to enter judgment against the defendants in the proceeding, and they are allowed thirty days within which to answer or plead, in accordance with the views herein expressed and as may be required.

S. L. MOTTER VS. KENNETT TOWNSHIP ELECTRIC COMPANY, AND W. C. FARNSWORTH, THE PRESIDENT, C. RAYMOND FRITCHER, THE SECRETARY, AND W. C. FARNSWORTH, C. RAYMOND FRITCHER AND S. S. WERT, THE DIRECTORS THEREOF; KENNETT GAS LIGHT COMPANY, AND W. C. FARNSWORTH, THE PRESIDENT, C. RAYMOND FRITCHER, THE SECRETARY AND W. C. FARNSWORTH, EDWARD H. WERT AND C. RAYMOND FRITCHER, THE DIRECTORS THEREOF; KENNETT GAS FUEL AND HEATING COMPANY, AND W. C. FARNSWORTH, THE PRESIDENT, C. RAYMOND FRITCHER, THE SECRETARY, AND W. C. FARNSWORTH, EDWARD H. WERT AND C. RAYMOND FRITCHER, THE DIRECTORS THEREOF.

Corporations—Merger—Act of May 29, 1901.

A corporation organized under the Act of April 29, 1874, and its supplements, for the manufacture and supply of gas for light only, a corporation organized under the Act of April 29, 1874, and its supplements, for the manufacture and supply of gas for all purposes, other than light, and a corporation organized under the Act of May 8, 1889, for the supply of light, heat and power by means of electricity, having the same territorial limits, may merge and consolidate under the provisions of the Act of May 29, 1901.

Injunction. C. P. Dauphin County, No. 347, Equity Docket.

John G. Gilbert, for plaintiff.

W. C. Farnsworth, for defendant.

Weiss, P. J., March 17, 1905.

The plaintiff, in a bill, filed complains of the defendants, the Kennett Gas Light Company, the Kennett Gas Fuel and Heating Company and the Kennett Township Electric Company and says that the first named company was incorporated under the provisions of the Act of April 29, 1874 P. L. 73 and its supplements and that by virtue of letters patent, issued August 11, 1904, was authorized to manufacture and supply gas for light only to the public in Kennett township, Chester county, Pennsylvania, and to such persons, partnerships and corporations residing therein or adjacent thereto, as may desire the same; that the second named company, the Gas Fuel and Heating Company, was incorporated under the provisions of the same Act of Assembly, and that by virtue of letters

patent, issued the same date, was authorized to manufacture and supply gas to the public for all purposes for which gas can be used, other than for light, in the township of Kennett, Chester county, and the state of Pennsylvania, and to such persons, partnerships and corporations residing therein or adjacent thereto as may desire the same; that the third named company, the Kennett Township Electric Company, was incorporated under the provisions of the same act of assembly, and its supplement, presumably the Act of May 8, 1889, P. L. 136 and that by virtue of letters patent, issued April 1, 1903, was authorized to supply light, heat and power by means of electricity to the public in Kennett township, county and state aforesaid, and to such persons, partnerships and corporations residing therein or adjacent thereto as may desire the same.

That the plaintiff is the owner of forty shares of the capital stock of the Kennett Township Electric Company, of the par value of one hundred dollars each, upon which fifty per centum or two thousand dollars has been paid.

That the directors of the three stated companies, on February 7, 1905, entered into an agreement under the corporate seals of the respective companies for the merger and consolidation of the said campanies into a single corporation by the name, style and title of the Kennett Township Gas and Electric Company, by the terms of which all the property and franchises of the three companies are to become transferred and vested in the merged company.

That the agreement was submitted to the stockholders of each of the companies, at separate meetings duly held for the purpose of voting upon the adoption or rejection of said agreement, and that the plaintiff attended the meeting of the stockholders of the Kennett Township Electric Company and protested and voted against the adoption of the agreement to consolidate, but that a majority in amount of the stock of the said Kennett Township Electric Company, as did a majority in amount of the stock of the other two companies, voted for the adoption of the agreement; that the said corporations are without authority to enter into an agreement of merger and consolidation for the reason that two are organized for the purpose of manufacturing and supplying gas, and the other for the supply of electricity, and that there is no authority of law for the creating and existence of the Gas and Electric Company having the powers and franchises of the three de-

fendant companies, and that the agreement was unlawful and void.

The bill charges that the said companies, and the president, secretary and directors thereof, are about to file the joint agreement entered into by them, together with the certificates of the secretaries, in the office of the secretary of the Commonwealth to the end that letters patent may be issued creating the Kennett Township Gas and Electric Company into a body corporate, possessing all the property and franchises belonging to the three named companies, and an injunction is prayed that the said three companies, their presidents, secretaries and directors, be restrained from filing the said agreement of consolidation and merger, or a copy thereof, in the office of the Secretary of the Commonwealth or from accepting letters patent from the commonwealth purporting to erect and create a new corporation with the rights and franchises now belonging to the three stated companies.

To this bill the defendant companies demur, and, for cause of demurrer, show that the matters complained in the plaintiff's bill are insufficient to maintain his action for the reason the said companies are authorized and empowered by law to merge and consolidate and to form a single corporation possessing all the property rights and franchises theretofore belonging to each of the three companies, defendants.

It need not be stated that the demurrer admits the facts which are well and sufficiently pleaded, and there is no need to find the facts specifically.

Among the matters set forth in the bill is the fact that, by the terms of the agreement entered into by and between the three defendant corporations, it is provided, among other things, that "the stockholders of the Kennett Township Electric Company shall receive capital stock of the new corporation to the amount of ten thousand ($10,000.) dollars at par, consisting of one hundred (100) shares, which stock shall be divided among the stockholders, pro rata, in proportion to their respective holdings of stock in the Kennett Township Electric Company."

It is also a fact that the plaintiff is the holder and owner of forty shares of the capital stock of the Kennett Township Electric Company, and that at the meeting held by the stockholders of that company, to vote upon the question of the adoption or rejection of the agreement entered into by the

directors of each of the three corporations, he voted in favor of the rejection and against the adoption of the agreement to merge and consolidate, though a majority in amount of the stock of the company of which he was a share holder, together with a majority in amount of the stock of the other two companies, voted for the adoption of the said agreement.

If there were any complaint that it is sought by the terms of the agreement to impose upon him stock of the new company intended to be formed, for the stock he holds in the Kennett Township Electric Company, an injunction might probably for this reason be granted. The Act of May 29, 1901 P. L. 349 in its 5th. section makes provision for the payment for the value of the stock of a dissenting holder, but he does not ask an injunction for this reason, and so far as we know has not made application to the proper court for the appointment of appraisers, and it must be assumed that he is not dissatisfied with this feature of the agreement.

The cause is made to rest on the sole ground that it is unlawful for the three defendant companies to merge and consolidate in and with the proposed new company.

The Act of 1901 is an act supplementary to the Corporation Act of 1874 and provides "for the merger and consolidation of certain corporations."

The Act of 1874 authorizes the formation of certain corporations, the Act of 1901, authorizes a merger and consolidation.

In its features relating to the method of precedure, the latter act is almost a rescript of the Act of March 24, 1865 P. L. 49, authorizing the consolidation of certain railroad companies.

It makes it lawful for a corporation, organized under or accepting the provisions of the Act of 1874, or any of its supplements, to buy and own the capital stock of any other corporation and to merge its corporate rights with and into those of any other corporation and authorizes the transfer of the property and franchises of either (both) of such companies intending to merge and the investiture of such rights and privileges in the company into which such merger is sought to be made, and thereupon the rights, property, privileges and franchises theretofore vested in each of the existing companies shall become vested in the new corporation.

The provision of the first section of the Act of 1901, which relates to the purchase and ownership of the capital stock by one from another which may intend to merge, is at variance with the subsequent sections providing for the meetings of the stockholders to vote upon the adoption or rejection of the agreement to merge, if by that is meant the acquisition and ownership of the capital stock by one of another or others before a consolidation can be completed. There would be no stockholders of the selling company to vote for or against the adoption of the agreement to merge at the special meeting required to be called for that purpose.

It must be taken to signify that the stockholders of the existing companies may agree to accept capital stock of the company to be formed by the merger in payment of the stock held by them in the corporation intending to merge.

The certificate required by the Act of 1874 requires no more in this behalf, than that the number of shares subscribed by each person shall be designated, together with the number and par value of the shares into which the capital stock is to be divided. The subscriber to stock pays the unpaid part of his stock when the incorporated company issues and delivers it. So he may sell his stock in an existing company, intending to merge with another into the merged company, and take stock in the consolidated corporation when the merger is consummated.

The capital stock of a corporation is owned by the shareholders of course, and the corporation could not buy or sell the capital stock.

What may and must be done to effectuate a merger is the execution of a joint agreement by the directors of corporations intending to consolidate, which must contain the matters prescribed by the act, and must be submitted to the stockholders of each company at separate meetings to be called for the consideration of the agreement, and its adoption or rejection by ballot.

A vote by a majority in amount of the entire capital stock of the companies intending to merge, and the required certification authorizes the agreement to be taken as the act of consolidation.

In this case the Gas Light Company and the Gas Fuel and Heating Campany and the Electric Company seek to merge and consolidate. The Act of May 8, 1889 amends

sub-division eleven of Section 2, second class, of the Act of 1874, and makes it read "the manufacturing and supply of gas, or the supply of light, heat and power by means of electricity, or the supply of light, heat or power to the public by any other means."

The Kennett Gas light Company is authorized to manufacture and supply gas for light only; the Kennet Gas Fuel and Heating Company to manufacture and supply gas for all purposes for which gas may be used other than for light; and the Kennett Township Electric Company to supply light, heat and power by means of electricity to the public. Territorially they are the same. There is thus a gas light company, a gas heating company, for fuel is used to produce heat, and an electric company. The exercise of their seperate functions and franchises comprises light, and heat by gas; and light heat and power by means of electricity, and the language of the amended clause covers the manufacture and supply of gas or the supply of light, heat or power by means of electricity. The defendant companies and their respective shareholders have manifested their intention in the way pointed out by law, to conjoin their several rights, privileges and franchises, which are alike in their general features, and authorized to be exercised by the same general law, in one body politic by a different name, but for the same purposes in the same territorial limits, and it does not appear that so doing violates any law or constitutional inhibition.

On the other hand there is authority to enter into the proposed agreement of merger and consolidation, and for the formation of a new company thereby, having the powers, privileges and franchises of the corporations intended to be merged.

Having the right to merge and consolidate and having proceeded in the manner directed by law, it follows that the agreement of merger and consolidation, together with the certificate of the secretaries of the companies to the result of the balloting, certifying the fact, may be filed in the office of the Secretary of the Commonwealth. and the matter concluded as provided by law without hindrance.

The relief prayed for in the bill by the complainant is refused and the bill dismissed at his costs.

A decree may be drawn in accordance with the foregoing, which the Prothonotary will enter *nisi*, to which exceptions may be filed within ten days.

COMMONWEALTH EX REL. THE ATTORNEY GENERAL *vs.* THE GRAY'S MINERAL FOUNTAIN COMPANY.

Corporations—Application for Charter—Statement of Property Taken on Account of Subscription to Capital Stock—Scire Facias to Repeal Letters Patent—Quo Warranto—Parties—Acts of June 14, 1836 and April 29, 1874.

While the writ of *scire facias* to repeal letters patent is probably still available, the writ of quo warranto is a concurrent remedy where the question concerns a corporate franchise, although the attack may be made because of matters preceding the grant of the patent.

Clause iv. of section 2 of the Act of 1836, which reads as follows: "In case any association or number of persons shall act as a corporation, or shall exercise any of the franchises or privileges of a corporation, within the respective county, without lawful authority," was intended to describe individuals who had no formal charter.

Clause v. of section 2 of the Act of June 14, 1836, which reads as follows: "In case any corporation, as aforesaid, shall forfeit by misuser or non-user its corporate rights, privileges or franchises, or shall do, suffer or omit to do, any act, matter or thing whereby a forfeiture thereof shall by law be created, or shall exercise any power, privilege or franchise not granted or appertaining to such corporation," covers the case of corporations that are formally such, those that are at least *de facto* corporations with a *prima facie* title.

In a writ of quo warranto to test the validity of the charter of a corporation, because of matters preceding the grant of letters patent, the corporation is the proper defendant.

Failure to pay ten per cent. of the capital stock to the treasurer of a proposed corporation, before the grant of letters patent, and failure to state in the application that part of the capital stock is to be issued for property are fatal to the defendant and justify a judgment of ouster in a writ of quo warranto at the relation of the attorney general.

Property contributed in payment of subscriptions to the capital stock of a corporation, before the grant of letters patent, can not be treated as cash for the purpose of making up the ten per cent. required to be paid to the treasurer of an intended corporation by section 3 of the Act of April 29, 1874.

If property is to be taken in payment of subscription to the capital stock of an intended corporation, the application for the charter should so state.

Quo warranto. C. P. Dauphin County, No. 304, March term, 1888.

W. S. Kirkpatrick, Attorney General, and *Pearson Church*, for commonwealth.

Commonwealth *vs.* The Gray's Mineral Fountain Company.

M. E. Olmstead and *A. L. Richmond*, for defendant.

McPherson, J., March 13, 1889.

This case was tried before the court without a jury under the Act of 1874. We find the facts to be as follows:

FINDINGS OF FACT.

1. Before Sept. 20, 1886, an application was prepared under the General Corporation Act of 1874, asking the Governor to incorporate the Gray's Mineral Fountain Company. In that application, which is made part of this finding, the capital stock of the company was stated to be $30,000, of which, *inter alios*,

John B. Wilber had subscribed $500.
Faber & Sherred had subscribed $300.
T. T. Root had subscribed $200.
A. Kelley had subscribed $200.
E. P. Russell had subscribed $200.
Sherwood & Agnew had subscribed $400.
R. R. Snow had subscribed $600.
J. R. Ceere, had subscribed $100.
A. R. Bullock had subscribed $100.
Dr. John H. Gray had subscribed $15,000.
T. T. Root, in trust, had subscribed $9,600.

2. As originally prepared and presented, the application was signed, acknowledged and sworn to by only three persons. The Governor declined to approve it in this form and it was sent back for correction. Afterwards two more subscribers joined in the signature, acknowledgment and affidavit, and thereupon letters patent were, on Dec. 7, 1886, duly granted.

3. The application states that "$3,000, being ten per cent. of the capital stock, has been paid in cash to the treasurer of said corporation," whereas only $150 had been paid in cash to the treasurer before Sept. 13, 1886, and only $1,000 before Dec. 7th.

4. While the application for a charter was pending, work was being done on a hotel which the corporation intended to erect for the purposes of its business, and during the period between Sept. 13th and Dec. 7th the following sums were paid to J. B. Wilber, contractor and builder:

Faber & Sherred paid $300 by accepting store orders to

that amount drawn on them by Wilber in favor of his workmen;

J. R. Ceere paid $100 in the same way;

A. R. Bullock paid $100 in the same way;

Sherwood & Agnew paid $400 by furnishing lumber to that amount;

T. T. Root paid $400 in cash.

In addition, the proposed corporation accepted from R. R. Snow a house and lot in payment of his subscription of $600, a lot from A. Kelley in payment of his subscription of $200, and a piano from E. P. Russell in payment of his subscription of $200. J. B. Wilber, also, used $500 of his own money in the erection of the hotel, which was accepted in payment of his subscription of $500.

None of these sums were paid to the treasurer, but all the persons named in this paragraph received credit on their respective stock subscriptions to the several amounts stated.

5. It was not intended that any part of Dr. Gray's subscription of $15,000 should be paid in cash, but full paid stock to that amount was to be issued to him for a lease of certain real estate and mineral water privileges of which he was the owner. This fact was not stated in the application.

6. T. T. Root's subscription for "$9,600 in trust" was not in trust for any one, and it was not intended to hold him personally bound thereby.

7. The application with its endorsements was not recorded in the county of Crawford, where the chief operations of the corporation were to be carried on, until Feb. 8, 1888.

8. This writ of quo warranto was issued on March 1, 1888.

CONCLUSIONS OF LAW.

This case requires us to decide three questions, viz:

1st. Whether the proceeding by quo warranto at the suit of the attorney general is an appropriate remedy for violations of law alleged to have been committed before the granting of letters patent to a corporation;

2d. If the proceeding be appropriate, whether the writ should issue against the corporation, or against the individuals claiming the right to exercise the franchise;

3d. If the writ be properly issued against the corporation, whether the facts before us call for a judgment of ouster.

1st. It may be that in England the proper remedy for such violations of law would be a *scire facias* to revoke the letters patent. This writ issues either out of Chancery, or the court of Queen's bench, or the court of the jurisdiction by which the letters were granted, and the judgment, if adverse to the defendant, requires the letters to be delivered up, in order that they may be physically cancelled. Foster, Sci. Fa., 73 L. L. *pp. 12, 228-9, 242, 274-5, 368. Grant, Corp., 80 L. L. *40. 8 Bac. Abr., 608. In America this writ does not seem to have been much used for the purpose stated. It is referred to as a remedy in various text-books and decisions, but very few examples of its exercise are to be found, and the remedy by quo warranto is often named as equivalent. Morawetz, Priv. Corp., §§ 148, 648, 656, Redf. Rys., pp. 701, 706, Ang. & A. Corp. (10 Ed.) § 778. Green's Brice 786 and note, People *vs.* R. R. Co., 15 Wend. 113, 30 Am. Dec. 30 & note, Regents *vs.* Williams, 9 G. & T. 365, 31 Am. Dec. 111, High, Ext. Leg. Rem. § 647. We can find but few instances where a *scire facias* was used against the letters patent of a corporation. State *vs.* Bank, 2 McMull. Law 439, 39 Am. Dec. 135, Turnpike Co. *vs.* State, 3 Wall. 210.

Our own reports throw little light upon the subject. The writ of *scire facias* to repeal letters patent is mentioned by Justice Duncan, dissenting, in Turnpike Co. *vs.* Henderson, 8 S. & R. 237; and in Turnpike Co. *vs.* McConaby, 16 S. & R. 145, there is a dictum that either *scire facias* or quo warranto may be used to forfeit a charter which has been fraudulently obtained. To the same effect is the language of the court in McConaby *vs.* Turnpike Co., 1 P. & W. 435, but no instance of this use can be found, and only one (Com. *vs.* Boley, 1 W. N. 303,) where it was used to repeal a patent of any other kind. It seems safe to say, therefore, that while the writ of *scire facias* to repeal letters patent is probably still available, the writ of quo warranto is a concurrent remedy where the question concerns a corporate franchise, although the attack may be made because of matters preceding the grant of the patent.

This conclusion, which rests upon general grounds, we believe to be supported also by clause v. of § 2 of the Act of 1836, P. L. 621, which allows the writ of quo warranto. "In case any corporation as aforesaid shall forfeit by misuser or non-user its corporate rights, privileges or franchises, *or shall*

do, suffer or omit to do any act, matter or thing whereby a forfeiture thereof shall by law be created, or shall exercise any power, privilege or franchise not granted or appertaining to such corporation." The words we have italicised are broad enough to authorize full inquiry into any matter or thing which is a legal cause of forfeiture, although it may have preceded the grant of the patent; and indeed seem intended, *inter alia*, to include precedent grounds of forfeiture, since the other members of the sentence apparently refer only to grounds of forfeiture arising after the charter has been granted, and enumerate such grounds very fully.

2d. Upon the second question also we have no Pennsylvania decision, the point having been passed over in Com. *vs.* Ry. 52 Pa. 510, and the authorities elsewhere are in conflict. High Ext. Leg. Rem. § 661 & note, People *vs.* R. R. Co., 30 Am. Dec. 34, People *vs.* Clark, 70 N. Y. 518, People *vs.* Richardson, 4 Cow. 97 & note, People *vs.* Bank, 6 Cow. 217, Com. *vs.* Turnpike Co. 5 Cush. 510, State *vs.* Bank, 33 Miss. 474, Atty. Gen. *vs.* Bk., 2 Dong. (Mich.) 359, State *vs.* Gas Light Co., 18 O. St. 262, State *vs.* Sherman, 22 O. St.—, Society *vs.* Cleveland, 1 West. Ref. 506, Holman *vs.* State, 3 Ib. 744, North *vs.* State, 5 Ib. 535, New Jersey *vs.* Borough, 12 Cent. R. 813, Rex *vs.* Pasmore, 2 Term R. 244, State *vs.* Bradford, 32 Vt. 50, 2 Kent* § 313. The objection made here, that the corporation is not the proper defendant, is technical and is mainly supported by the argument that to sue a corporation as such admits its corporate existence. In some cases this argument derives much force from the inconvenience of allowing a charter to be collaterally attacked, but we do not think it ought to prevail where there is a corporation de facto and the state is directly attacking its apparently valid charter. When such an attack is made, the issue must ultimately be the validity of the charter, whoever may be the parties on the record. If individual stockholders are made defendants and called upon to show by what warrant they exercise certain franchises, they must reply by setting up the charter, and the state must rejoin by denying its validity for specified reasons. If the corporation itself be made defendant, the same form may be followed, or the state may, as here, specify its charges in the first instance, to which the corporation must then make some appropriate reply. The substance of the matter is the same, whoever is called upon to defend, and there is this

technical reason in favor of proceeding against the corporation: that, if it be made defendant, the rights of all parties are represented, since the corporation represents its stockholders as well as itself, whereas if the stockholders alone be made defendants the corporation as such is not represented, and its de facto charter may be taken away in a proceeding to which it is not a formal party.

The argument from inconvenience may also be properly allowed to have considerable weight. The corporation can always be found and served with process, while stockholders are often numerous, are widely scattered and constantly changing. If, however, they must all be served in order that the judgments may bind their rights, perplexing questions will continually arise which by their very number may sometimes break the remedy down before the principal question can be reached. An example will illustrate the difficulty. In State *vs.* Gas Light Co., 18 O. St. 262, it was decided that to issue the writ against a corporation defendant admitted its corporate existence. Consequently, when soon afterwards the attorney general desired to attack the franchises of the Pitts., Ft. W. & Chic. Ry. Co., he was unable to sue the corporation as such, and had before him the practically impossible task of reaching the individual stockholders. He did not attempt it, but proceeded against three specified directors and other persons not named "too numerous to be brought upon the record." The directors appeared and pleaded, and the court, evidently feeling the difficulty of binding the rights of individuals who were not even named, had never been served with process and had never appeared, was obliged to assume that in the absence of a contrary averment the three directors represented all the parties in interest. State *vs.* Sherman, 22 O. St.—Surely such an assumption was little less than violent, but without it the case must have come to an end merely from the labor and expense of finding and serving every owner of the property affected by the proceeding.

These considerations strengthen our belief that clause iv. of § 2 of the Act of 1836, which reads as follows: "In case any association or number of persons shall act as a corporation, or shall exercise any of the franchises or privileges of a corporation, within the respective county, without lawful authority," was intended to describe individuals who had no formal charter; while clause v, already quoted, covers the case

of corporations who are formally such, those who are at least de facto corporations with a prima facie title. In our opinion, the present suit against the corporation is against the right defendant.

3d. It is not necessary to pass upon the effect of T. T. Root's subscription of $9,600 "in trust," or upon the delay in recording the application with its endorsements, since we feel bound to hold that the failure to pay to the treasurer ten per cent. in cash of the capital stock before the letters patent were granted, and the failure to state in the application the facts concerning Dr. Gray's subscription of $15,000, are fatal to the defendant's case and require us to enter a judgment of ouster.

Section 3 of the Act of 1874, P. L. 76, provides *inter alia* that "The certificate for a corporation embraced within the second class * * * shall also state that ten per centum of the capital stock thereof has been paid in cash to the treasurer of the intended corporation, and the name and residence of such treasurer shall be therein given." Section 17 P. L. 81, provides, *inter alia*, that "Every corporation created under the provisions of this act, or accepting its provisions, may take such real and personal estate, mineral rights, patent rights and other property as is necessary for the purposes of its organization and business, and issue stock to the amount of the value thereof in payment thereof, and the stock so issued shall be declared and taken to be full paid stock and not liable to any further calls or assessments; and in the charter, and the certificates and statements to be made by the subscribers and officers of the corporation such stock shall not be stated or certified as having been issued for cash paid into the company, but shall be stated or certified in this respect according to the fact." These provisions do not require discussion; their meaning is plain. A proposed corporation must have in the hands of its treasurer a certain proportion of cash before it can be lawfully chartered, and if subscriptions have been paid in property, or are to be thus paid, this fact must be sufficiently detailed in the application. The purpose of either section is also plain; a definite cash capital must be at once available for corporate business, and the public must not be deceived by a subscription which is apparently liable to corporate calls but which is really fully paid. A further reason for the requirement of § 17 is this: If the company's capital is partly

made up of property at the very beginning of the enterprise, the public is entitled to know the extent of this contribution, the character of the property and the value put upon it by the corporation. Both sections are seriously concerned with the company's credit, and both must be strictly complied with. They are conditions precedent to incorporation, and if they are not fulfilled and the state is deceived in reference thereto, the charter obtained by such deception, whether it be fraudulent, or as here, merely the result of mistake, is only a charter de facto, and is voidable at the suit of the attorney general.

It is true that in the present case property was contributed by the subscribers before Dec. 7 to an amount exceeding the ten per cent. required by the act, but it was not cash and we cannot treat it as such without setting aside the plain language of the statute. Faber & Sherred paid the contractor's workmen by delivering goods from a store; so did Ceere and Bullock; Sherwood & Agnew delivered lumber to the contractor; Snow and Kelley made over real estate to the company, and Russell delivered a piano. All this was done before the company was chartered and, if the property specified was taken in payment of stock subscriptions, the application should have so stated in accordance with § 17 above quoted.

The question of a company's power under the Act of 1874, *after* incorporation, to receive property in payment of stock subscriptions is not before us. Under other legislation there have been several decisions, some of which are Carr *vs.* Lefever, 27 Pa. 413, R. R. *vs.* Steward, 41 Pa. 54, Nippenose Co. *vs.* Stadon, 68 Pa. 256.

Upon the whole case, therefore, we hold that the commonwealth is entitled to judgment, that the defendant be ousted and altogether excluded from the franchise to be a corporation under the name of the Gray's Mineral Fountain Company, and that the commonwealth recover its costs from the defendant. The prothonotary is directed to enter this judgment if exceptions be not filed according to law.

In re Appointment of Deputy Secretary of Internal Affairs.

Deputy Secretary of Internal Affairs—Powers—Appointment—Acts of April 24, 1903, and April 18, 1895.

The Act of April 24th, 1903, P. L. 294, repeals so much of the Act of April 18th, 1895, P. L. 38, as relates to the appointment and commissioning of the deputy secretary of internal affairs, the latter act authorizing and empowering the secretary of internal affairs to make the appointment, and repealing that portion of the earlier act which provided that, on the recommendation of the secretary of internal affairs, the governor should commission a person as deputy secretary.

The deputy secretary of internal affairs can exercise all of the powers specifically conferred upon him by the Act of April 18th, 1895, which, in this respect, is not affected or repealed by the Act of 24th of April, 1903.

The deputy secretary of internal affairs is authorized to act for the secretary of internal affairs in all matters pertaining to the office, signing his name as deputy secretary of internal affairs.

Attorney General's Department. Opinion to Isaac B. Brown, Secretary of Internal Affairs.

Carson, Attorney General, February 5, 1904.

In answer to your letter, relating to the deputy secretary of internal affairs, I have the honor to reply that, in my judgment, the Act of 24 th of April, 1903, P. L. 294, repeals so much of the Act of 18 th of April, 1895, P. L. 38, as relates to the appointment and commissioning of the deputy secretary, the latter act authorizing and empowering you to make the appointment, and repealing that portion of the earlier act which provided that, on the recommendation of the secretary of internal affairs, the governor should commission a person as deputy secretary.

As the law now stands, you are specifically authorized to appoint the deputy secretary of internal affairs, and he holds his office at your pleasure. He can also exercise all of the powers specifically conferred upon him by the Act of 18th of April, 1895, which, in this respect, is not affected or repealed by the Act of 24th of April, 1903.

On the 9th of September last, at the request of the governor, I gave him an official opinion that he was not required to issue a commission to the deputy secretary of internal affairs. If you are not acquainted with the terms of that

opinion, it will be my pleasure to send you a copy of it. If you already have a copy, I ask you to note an error in the type writing. In the copy now before me it appears that, in speaking of the act of 24 th of April, 1903, it is stated "In my judgment, it reapeals the act of 1895 in its entirety." This is an error so far as the words "in its entirety" are concerned. The sentence should read "In my judgment, it repeals the Act of April, 1895, *pro tanto*.

As to the powers of the deputy, outside of the specific enumeration of them in the second section of the Act of 1895, I am clear that at common law your deputy has the right and the power to act for you in the transaction of all of the business of the department. The word "deputy" is used without a qualifying adjective, such as "special deputy," and I interpret it in the general sense which has been uniformly attached to the word "deputy."

Bouvier, in his law dictionary, defines a deputy as "One authorized by an officer to exercise the office or right which the officer himself posesses, for and in place of the latter." He quotes with approval Comyn's Digest, title "office," to the following effect: "In general, ministerial officers can appoint deputies unless the office is to be exercised by the ministerial officer in person." He also states "in general, a deputy has power to do every act which his principal may do; but a deputy cannot make a deputy.

Anderson, in his dictionary of law, gives the following definition:

"Deputy. One who acts officially for another; the substitute of an officer———usually of a ministerial officer."

The American and English Encyclopedia of Law defines the word as follows:

"A deputy is one who, by appointment, exercises an office in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable. He must be one whose acts are of equal force with those of the officer himself, must act in pursuance of law, perform official functions, and is required to take the oath of office before acting."

Wharton, in his law dictionary, states that a deputy differs from an assignee or agent in that an assignee has an interest in the office itself, and does all things in his own name, for whom his granter shall not answer, except in special

cases; but a deputy has not any interest in the office, and is only the shadow of the officer in whose name he acts. And there is a distinction in doing an act by an agent and by a deputy. An agent can only bind his principal when he does the act in the name of his principal; but a deputy may do the act and sign in his own name, and it binds his principal; for deputy has, in law, the whole power of his principal."

The definition given in the Century dictionary is as follows:

"A deputy is a person appointed or elected to act for another or others; one who exercises an office in another's right; a lieutenant or substitute. In law, one who by authority exercise's another' office or some function thereof, in the name or place of the principal, but has no interest in the office. A deputy may in general perform all the functions of his principal, or those specially deputed to him, but cann again depute his powers. Specifically———a subordinate officer authorized to act in place of the principal officer, as, for instance, in his absence. If authorized to exercise for the time being the whole power of his principal, he is a general deputy, and may usually act in his own name with his official addition of deputy."

In the Confiscation cases, reported in 20 Wallace's reports of the Supreme court of the United States, page 111, Mr. Justice Strong, is disposing of an objection which had been urged against proceedings in the District court, to the effect that they had not been signed by the clerk of the court, but had only been signed by the deputy clerk, used these words:

"This was suffcient. An act of congress authorized the employment of the deputy, and in general a deputy of a ministerial officer can do every act which his principal might do."

The legal and the popular definitions agree, and I am of opinion that, inasmuch as the act which authorized you to appoint a deputy uses the term in its general and not in a special sense, the deputy secretary of internal affairs is authorized to act for you in all matters pertaining to your office, signing his name as "deputy secretary of internal affairs." To require you to personally sign every paper or certificate would be to deprive you of that duty and the commonwealth of that service which it was the purpose of the Acts of 8th of

May, 1876 P. L. 143, 2nd of May, 1887 P. L. 78, 18th of April, 1895 P. L. 38, and 24th of April, 1903 P. L. 224 to secure.

In re Election in Old Forge Borough.

Elections—Loss of official returns.

The will of the people, as expressed in a regular and legal election properly held, cannot be set aside or rendered null and void by a failure, on the part of the constable, to file the returns in accordance with the law.

When the question of increasing the number of justices of the peace has been properly submitted to the qualified electors of a borough and a majority returned in favor of such increase, upon due proof of the submission and a majority in favor of the increase, the additional justices authorized may be appointed, although the official returns of the election cannot be found.

Attorney General's Department. Opinion to Hon. Samuel W. Pennypacker, Governor.

Carson, Attorney General, March 23, 1904.

Your letter of recent date, enclosing affidavits and other papers in reference to the claim of certain citizens of Old Forge, Lackawanna County, that that borough is entitled to an additional justice of the peace, increasing the number from two to three, and asking for an official opinion upon the same, has been received.

It appears that Old Forge was organized under the general borough law, and consequently was originally empowered to elect two justices of the peace, but on account of its rapid growth, and its large territorial extent, at the February election in 1899, the question of increasing the number of the justices of the peace from two to three, was properly submitted to the qualified electors of the said borough, and a majority vote was returned in favor of said increase. It also appears by an affidavit made by Matthew Bean, who, at the time, was constable of the borough, that all the requirements of law regulating such elections were complied with and immediately following the election true duplicate returns of the same were

made out, and in compliance with law, he filed one of the returns in the office of the prothonotary of Lackawanna County, and transmitted the other by mail to the Governor of the commonwealth. The records of the executive department fail to show that the return transmitted to it was ever received, and it appears that the return to the prothonotary of Lackawanna County has been mislaid and cannot be found.

On account of the incomplete state of the records no commission has been issued to any justice elected to fill the vacancy caused by this increase, and the question now submitted to me is whether such a vacancy now exists as would justify you in appointing a person to fill the office.

It was held by Attorney General McCormick, in a somewhat similar case, that the will of the people as expressed in a regular and legal election properly held, cannot be set aside or rendered null and void by a failure on the part of the constable to file the returns in accordance with the law, and that upon proof being made that such an election was held, and such an increase provided, the vacancy thus created legally existed, and could be filled either by a gubernatorial appointment or by an election, although several years had elapsed since the vote on the matter had been taken. In this conclusion of law I concur, and it has been followed in several cases since.

I am, therefore, of the opinion and advise you that by the legal action of the electors of the borough of Old Forge, that borough is entitled to three justices of the peace, and, inasmuch as there are but two now in commission, a vacancy exists which you are authorized to fill by appointment until the first Monday of May, 1905.

In re Application for Charter of Providence Hydro Electric Company.

Corporations—Application for charter—Statement of purpose.

In an application for a charter, the powers of the corporation should not be enumerated in the statement of purpose.

Attorney General's Department. Opinion to Hon. Samuel W. Pennypacker, Governor.

Carson, Attorney General, March 23, 1904.

I herewith return the application of the Providence Hydro Electric Company. I have passed my pencil, in the shape of parenthetical marks, about the words which, in my judgment, should be omitted from this application. The full statement of the purpose for which the company is formed, in exact conformity with the Act of Assembly, terminates with the word "therefrom." The words "with the right to generate electric current and supply the same at any place or places" do not embrace the statement of a purpose, but the statement of a power conferred by Act of Assembly of 2nd of July, 1895; P. L. 425. The extent of the power is not stated in the Act of Assembly, nor do I find any judicial determination of the extent. It is not usual, nor do I think it good form, to enumerate powers in the statement of purpose. Nor do I like to see so broad a power stated in the absence of any specific words which would justify it, and in the absence of any judicial decision. It is true that the Act of 1895, after giving authority to make, erect and maintain the necessary buildings, machinery and apparatus for developing power and current, all of which must be necessarily localized, contains a clause which empowers the company "to distribute the same to any place or places, with the right to enter upon any public road street, lane, alley or highway for such purposes, and to alter, inspect and repair its system of distribution: Provided, that no such company shall enter upon any street or alley in any city, borough or township of this commonwealth until after the consent, to such entry, of the councils of the city or borough or supervisors of the township in which such street or alley may be located shall have been obtained." Exactly how far these words authorize a water company to go in the distribution of its power I am not advised. I therefore return the application to you for such action as you may see fit to take under the circumstances,

In re Justices of the Peace in Mechanicsburg.

Boroughs—Justices of the peace.

When, under a misconception of the law, ward justices of the peace have been elected in a borough entitled to elect borough justices only, and there is but one borough justice in commission, a vacancy exists which may be filled by appointment by the governor.

Attorney General's Department. Opinion to Hon. Samuel W. Pennypacker, Governor.

Carson, Attorney General, August 3, 1904.

I am in receipt of, and have carefully examined, the papers in the application of J. C. Reeser for a commission as justice of the peace in the borough of Mechanicsburg, to fill the vacancy now existing in the said office, caused by the decision of this department that the borough in question is entitled only to borough justices, and asking for an official construction of the law in this matter.

It appears that the borough of Mechanicsburg was incorporated under the Special Act of April 12, 1828, P. L. 308, which act does not fix the number of justices. The various supplements to the charter, down to June 21, 1839, P. L. 376, are also silent as to the number of justices to which the borough is entitled. Section 1 of the last named act, however, provided that in each borough not divided into wards two justices of the peace shall be elected. Mechanicsburg was not then divided into wards, and it never subsequently proceeded to increase the number of justices in accordance with the provisions of the said law. In pursuance of a resolution of council, on application to the court, an order was granted on August 21, 1857, whereby the General Borough Act of April 3, 1851, was adopted as the charter of the borough of Mechanicsburg, and the provisions of the original charter in conflict therewith were annulled By the Act of April 13, 1868, P. L. 989, the borough was divided into two wards, and it was therein stipulated that one of the two justices to which Mechanicsburg was then entitled should be elected in each ward. On November 19, 1879, a petition was filed in the Court of Quarter Sessions of Cumberland, asking for a division of the South Ward on account of its size and extent. These proceedings were begun in pursuance of the General Act of Assembly of May 14, 1874, P. L. 157, commonly known as The

General Borough Law. The South Ward was divided into the First and Second Wards, in accordance with the prayer of the petitioners. By a similar proceeding, begun at the same time, the North Ward was also divided into two wards, the Third and Fourth. Subsequently, by a similar proceeding, under the same act, the First Ward was divided into two wards, thereby creating what is known as the Fifth Ward. By reason of this action the borough was brought for all purposes under The General Borough Law, and from that time forth the borough has been entitled to only two justices of the peace, who should have been elected for the whole borough. However, through a misconception of the law as to justices, the wards proceeded to elect ward justices up until the present time. There is at present only one justice in commission in said borough who was regularly elected as a borough justice; the other regularly elected borough justice died on October 17, 1903, while in commission, thereby leaving a borough justice vacancy to be filled by appointment, and for this appointment the applicant, J. C. Reeser, is a candidate.

Under all the circumstances of the case, I am of the opinion, and advise you, that a vacancy exists in the office of justice of the peace in the borough of Mechanicsburg, which you are authorized by law to fill.

BUCKEYE WAREHOUSE COMPANY *vs.* ROBERT H. GRAUPNER.

Equity—Parties.

A bill in equity, to restrain the defendant from discharging sewage into a sewer passing through plaintiff's land and to compel him to disconnect his drainage pipes therefrom, is not defective for want of parties because other persons who use the sewer under claim of right are not made parties.

Objection to bill for want of parties. C. P. Dauphin County, No. 344, Equity Docket.

Homer Shoemaker and *Geo. R. Barnett*, for plaintiff.

Snodgrass & Snodgrass, for defendant.

Kunkel, J., March 21, 1905.

The plaintiff disputes the right which the defendant has been exercising to use a sewer which passes through and under its premises. It complains also of the offensive character of the sewage discharged into the sewer from the defendant's property. The defendant asserts his right to use the sewer for the purpose of draining his property, and denies that the character of the sewage is other than that which he has a right to discharge into it. He avers besides that another person has the right to use the same sewer, and is exercising this right in connection with his property. He objects to the plaintiff's bill because such person is not joined as a party defendant, and asks that the bill be dismissed. We cannot understand how the right of the other person is related to that of the defendant so as to make him a necessary party to the bill. The plaintiff in his prayer for relief does not ask that the sewer shall be closed, but that the defendant shall be required and directed to disconnect the pipes on his premises from it, and that he be enjoined from using it. If his prayer be granted, and the relief which he seeks is obtained, in no way will the right of the other be affected. If the other person has a right to use the sewer, the disconnection of the defendant's pipes will not interfere with that right. If he has no right, the plaintiff is not bound to object, but may permit him to use the sewer.

The objection to the bill for want of parties is overruled.

IN RE ECONOMY BUILDING AND LOAN ASSOCIATION OF LEBANON, PENNSYLVANIA.

Rules of Court—Power of Court to Change—Binding Force of.

A rule of court has the force of law, and is binding upon the court, as well as upon the parties to an action.

A rule of court is a law which the court has power to change but which, while in force, it is its duty to observe.

A rule to take depositions, entered under a rule of court which authorizes the entry of such rule as of course, will not be set aside upon motion.

Motion to set aside rule to take depositions. C. P. Dauphin County, No. 96, Commonwealth Docket, 1900.

Thos. H. Capp and *Chas. H. Bergner*, for motion.

Snodgrass & Snodgrass and *A. Frank Seltzer*, contra.

Weiss, P. J., April 12, 1905.

A petition by stockholders of the Economy Building and Loan Association of Lebanon, Pennsylvania, was presented to the court, asking that the order appointing auditors to make distribution of the fund in the hands of George B. Woomer, receiver appointed by decree of this court May 9, 1900, upon the filing of his second account, be enlarged so as to enable an inquiry to be made into matters relating to the first account of the receiver, respecting which prior account the petition for the rule says "that no decree of absolute confirmation was ever entered by your honorable court on said first account, to which exceptions had been filed, except the decree of confirmation of the Auditor's report."

The petition was filed, and a rule granted February 6, 1905, on the receiver to show cause why the confirmation of his first account should not be opened and the petitioner permitted to file exceptions thereto *nunc pro tunc*.

An answer was filed February 27, 1905, in which, among other things, it is stated "that the balance ascertained to be in the hands of this respondent", speaking in reference to the first account, "by the said auditor has been fully paid out in accordance with the decree of said auditor and confirmed by your Honorable Court".

A rule to take depositions of witnesses to be read in evidence was taken on behalf of the petitioners, whereof due notice was given to the respondent or his counsel and we are

now moved to set aside the rule to take depositions and numerous reasons are assigned in support of this motion.

The rule of court relating to depositions provides as follows: " A rule to take depositions to be read in evidence after any rule to show cause has been granted, or upon the hearing of any motion, application, appeal or argument, solely to the Court of Common Pleas, the Court of Quarter Sessions, or to the Orphans' Court, may be entered by any party in interest as of course, giving reasonable notice, not less than five days, to the adverse party or his attorney of the time and place of taking such depositions".

It has long ago been held that a rule of court has the force of law, and is binding upon the court, as well as upon the parties to an action.

The rule to take depositions may be entered as of course, and it is not necessary for the party entering it to obtain leave of court. Under the rule of court a party in interest is entitled to enter a rule to take depositions and the petitioners say that they are stockholders of the Building Association and are parties in interest. If the rule of court has the force of law and is binding alike upon the court as upon the parties to a proceeding, we are powerless to afford the relief prayed bv the respondent.

It may be that the petitioners take nothing by their depositions, but to grant this motion would be a denial of the right which the rule of court accords them.

It is a law which we have the power to change, but which while in force it is our duty to observe.

The petitioners have a right to lay relevant facts before us and it therefore becomes our duty to pass on the sufficiency of the evidence presented.

The answer to the rule to show cause admits certain matters complained of in the petition therefor, but claims that the respondent had a right to take the credits in the first account and assigns reasons which if deemed insufficient may be made matters of surcharge by the court.

It also recites that the mingling of trust funds with his individual funds in the matter of his first account does not affect the integrity of the management of the trust and avers that he faithfully administered the same.

It further avers that all other matters relate to the second account, which with exceptions filed, has been referred to

and is now before auditors for adjudication and that the other things complained of are not the subject of review by the court.

All this, as well as the reasons assigned in support of the motion to set aside the rule to take depositions, may gainsay the right of the petitioners to take aught by the rule to show cause.

But the answer to the rule to show cause is not a mere admission of the complaint made by the petitioners. It is as well an explanation and an averment of the faithful behavior in the conduct of the trust, as an avoidance of the conclusion sought to be drawn from the subject matter of the petition for the rule to show cause.

The reason for the denial of the motion to set aside the rule to take depositions is that the rule of court gives either party the right to take depositions without application to the court therefor, and especially is this so in a case where matters of issue are or may be raised and intended for the consideration of the court.

The motion is accordingly refused.

Hummelstown Water Company vs. Harrisburg and Hummelstown Street Railway Company.

Equity—Injunction—Boroughs—Use of Streets.

A preliminary injunction will not be continued when neither the right which the plaintiff asserts is about to be invaded by the defendant, nor the injury which it apprehends will result from its act is beyond doubt.

By permission of council a water company had laid its pipes in the streets of a borough. Subsequently the borough council passed an ordinance authorizing a street railway company to lay its track on the streets of the borough already occupied by the pipes of the water company. The pipes of the water company lay at a depth of from two and one half to four feet below the surface. The surface of the street over the water company's pipes was smooth firm macadam, about four inches deep. The ordinance granting to the railway company the right to lay its tracks upon the streets provided that the tracks should be laid in the center of the streets, and that the railway company macadamize the streets between its rails with limestone of proper size, and also for eighteen inches outside of the rails. The depth to which the railway company intended to excavate for the purpose of laying its tracks was sixteen inches. The water company filed a bill in equity averring that by reason of the laying of the tracks of the railway company, its pipes would be more liable to freeze and more difficult of access. A preliminary injunction was granted. *Held*, on motion to continue injunction, that the grant to the water company was subject to the use of the street and the disturbance of the surface for such purpose as streets and highways are ordinarly used.

Motion to continue injunction. C. P. Dauphin County. No. 349, Equity Docket.

Lyman D. Gilbert and *F. J. Schaffner*, for plaintiff.

Chas. H. Bergner and *C. H. Backenstoe*, for defendant.

Kunkel, J., April 19, 1905.

From the evidence submitted on the hearing of the motion to continue the preliminary injunction we find the following facts:

The plaintiff is a corporation authorized to supply and at the present time is engaged in supplying water to the borough of Hummelstown and its inhabitants, and for that purpose occupies Main street in the borough with its water pipes, having so occupied the street with the consent of the borough authorities for the past ten years or more. The surface of

the street which covers the plaintiff's pipes is firm, compact macadam, about four inches deep, and the pipes lie at a depth below the surface varying from two and a half feet to three feet eight inches, or probably four feet. The defendant, a street railway corporation, has located its roadbed on Main street over and above the plaintiff's water pipes for a distance of about two thousand feet, and is about to dig and excavate the soil of the street immediately over the pipes for the purpose of laying its tracks and building its road. The depth to which the surface of the street is intended to be excavated is about sixteen inches. The defendant corporation has been granted the right by the borough council to occupy Main street and to lay its tracks and build its roadway thereon, and is attempting to occupy the street as directed and required by the ordinance. The ordinance provides that the tracks shall be laid in the centre of the street, and that the roadbed shall be macadamized. The provisions of the ordinance which relate to the location of the tracks and the building of the road are as follows: "The said tracks shall be laid in the centre of the streets occupied. The said railway company shall be required to macadamize with limestone of proper size between the rails and for a distance of eighteen inches outside of each rail at the time of construction of said railway on streets occupied by it, and shall keep the said portion of said streets and highways in good order," and further, "If at any time hereafter the streets, the use of which is hereby granted, shall be paved with any other material than limestone, the Harrisburg and Hummelstown Street Railway Company shall conform in paving their portion with the same material as that used by the borough."

In the laying of the tracks and the construction of its roadbed, the defendant corporation intends to follow the grade of the street, to excavate to the depth of about fifteen or sixteen inches, and to use broken stone and earth tamped between the ties. The length of the ties to be used will be eight feet and their width six inches, and they will be laid about two feet apart from one another. Under the ties there will be two inches of macadam, and the top of the ties will be filled in with broken stone and limestone screenings, and the whole track will be covered with limestone screenings and rolled with a traction engine, after which it will be opened to travel over it until full preparation is made for the operation

of the road. The space between the tracks will be crowned across the centre from rail to rail. The whole construction will result in placing over the plaintiff's pipes one and a half or two inches more material than is there now. The ordinance which authorized the defendant corporation to occupy the street with its tracks provides further in its twelfth section: "The granting of permission to the Harrisburg and Hummelstown Street Railway company to occupy the aforesaid streets shall not prevent or prohibit the Hummelstown Water company from excavating under the tracks of the said Harrisburg and Hummelstown Street Railway Company for the purpose of making connections and repairing the water mains, or in any wise interfere with or abate the rights and privileges heretofore granted and now possessed by the Hummelstown Water Company." There is no averment or proof that the corporation defendant is not doing, or does not intend to do, the work of laying its tracks in the manner required by the ordinance. It is not avered that the defendant will change the grade of the street, or will not make its roadbed with the material and in the way designated by the ordinance. It is not averred, nor does it appear in proof, that the pipes of the plaintiff are or will be uncovered and exposed, or in any way interfered with by the work which is proposed to be done by the defendant upon the street.

The plaintiff complains that the excavation of the street in the manner contemplated and threatened by the defendant corporation will result in the substitution for the firm, compact surface now covering and protecting its water pipes, a loose, uncompact, porous covering, which will be a less protection than the present surface, and thereby the water in its pipes will be exposed in the winter season to the danger of freezing.

It contends that, under the twelfth section of the ordinance above quoted, the corporation defendant has the right to do what it proposes to do only on the condition that it will not interfere with the rights and privileges of the plaintiff granted to it by the borough and now in its possession; and that the disturbance of the surface of the street covering its pipes in such an interference. This contention is necessarily based upon the hypothesis that the plaintiff has the right to have the surface of the street, so far as it covers its pipes at least, remain as it is and undisturbed. Is this claim on the

part of the plaintiff clear? We think not. To say the best we can for it, it is exceedingly doubtful. It was given the right to lay its pipes in the street, but we can find nothing in the case which shows that this right was to exclude the use of the street and the necessary disturbance of the surface soil for such other purposes as streets and highways are ordinarily used. Nor was the exclusive right recognized by the borough authorities as being possessed by the plaintiff in the ordinance which granted the defendant corporation the right to build its road on the street. The ordinance directed it to build its road in the centre of the street and the reservation of the right to the plaintiff to excavate under the defendant's tracks for the purpose of repairing its pipes and connections shows that the council knew the road was to be located over the line of pipes. From the direction to build the roadway on the street over the plaintiff's pipes there is necessarily implied the right to dig up and to excavate the surface soil to the extent necessary for that purpose. It can not be that the right to dig up the street was granted on the condition that it should not interfere with the opposing right to have it preserved intact. That would amount to no grant at all. Hence, the only other conclusion to be reached is that the right to the undisturbed condition of the street is not one of the rights and privileges of the plaintiff which the ordinance intended should not be interfered with by the defendant corporation. The right here asserted by the plaintiff nowhere appears to have been expressly given, and besides seems to be denied by the borough itself.

The injury which the plaintiff apprehends is that its pipes will be in great danger of freezing by the substitution of the roadbed for the compact macadam surface which now covers them. Whether this injury ever will be suffered is very questionable. We are not satisfied that the substituted roadbed, constructed and built in the manner and with the materials required by the ordinance and contemplated by the defendant corporation will be a less protection to the plantiff's pipes than the present surface of the street. The witnesses for the defendant testified that it will be equally as good. At least it is certain that there will be no immediate danger that the pipes will freeze, and it is a matter of grave doubt that after the roadbed shall have been constructed and covered with stone and limestone screenings, tamped and rolled, and

then left open for travel upon it, by the time the cold weather is here it will be a less protection to the pipes against the cold than the present surface and that there will be more danger that they will freeze than if the surface was now left undisturbed.

Although it is averred in the bill as a further injury that access to the pipes for the purpose of replacement and repairs will be made more difficult and dangerous by the construction of the roadbed over them, yet this injury was not pressed upon us at the argument. However, it is virtually disposed of by what we have already said. Without the right to the undisturbed surface of the street the inconvenience or injury complained of is such as must be suffered by one whose rights are not superior to the rights of others occupying the street by consent of the municipality.

It is quite manifest therefore that neither the right which the plaintiff here asserts is about to be invaded by the defendant, nor the injury which it apprehends will result from its act is beyond doubt. Yet in order to entitle it to a continuance of the injunction, the right must be clear and the injury must not be doubtful. "It is incumbent upon the party seeking relief by interlocutory injunction to show some clear, legal, or equitable rights and a well founded apprehension of immediate injury to those rights; "High on Injunctions, Section 7. "The rule is firmly established that a preliminary injunction will not stand when the complainant's right is in doubt; Hagerty vs. Lee, 45 N. J. Eq., 255; Minnig's App., 82 Pa. 373 "In general, clear, legal or equitable right free from doubt must be satisfactorily shown to authorize a preliminary injunction;" Hilliard on Injunctions, Section 16. Where it is not clear that the injury which the plaintiff apprehends will result from the contemplated act, a preliminary injunction ought not to be allowed. "If the injury be doubtful, eventual, or contingent, equity will not interfere by injunction; Rhodes vs. Dunbar, 57 Pa., 274; Morgan vs. City of Binghampton, 102 N. Y., 500. The remedy by injunction is extraordinary and should not be afforded when there is doubt that the injury feared will ever be realized.

We are not satisfied so far as the case has been presented to us on this motion that the work which the defendant is about to do will be an invasion of the plaintiff's right, or will

result with any degree of certainty in the injury which it apprehends.

The motion to continue the preliminary injunction is therefore overruled and the injunction is dissolved.

IN RE CONTESTED ELECTION OF SCHOOL DIRECTORS OF THE WEST WARD OF THE BOROUGH OF WILLIAMSTOWN, DAUPHIN COUNTY, PENNSYLVANIA.

Elections—School Directors—Computation of Votes for Terms of Different Lengths.

When school directors are to be elected for terms of different lengths and the terms of office have been designated on the ballots, the votes for the different candidates should be counted for the term for which they were cast.

Petition to contest election of school directors. Quarter Sessions of Dauphin County, No. 226, March Sessions, 1905.

John R. Geyer and *John Fox Weiss*, for petition.

Kunkel, J., April 26, 1905.

The facts averred in this petition are not denied, no answer having been filed by the respondents whose election is disputed. The petition sets forth and the evidence taken upon the hearing shows that at the election for school directors, held in the west ward of the borough of Williamstown, on the twenty-first day of February, A. D. 1905, two school directors were to be elected, one for the term of three years, the other for the term of two years; that Joseph Shissler received 122 votes for the term of three years, that David J. Kinsey received 168 votes for the term of two years, and Charles Fromme, who was a candidate for the term of two years as well as a candidate, for no specified term, received in all 139 votes. The election board, notwithstanding Joseph Shissler was the only candidate voted for, for the term of three years and received 122 votes for that term, returned David J. Kinsey, who was voted for only for the two year term, as elected for the term of three years, and returned Charles Fromme, whose total vote was less than that received

by David J. Kinsey for the term of two years, as elected for that term. This result was evidently arrived at by the mistake on the part of the election board in counting the votes without regard to the terms for which they were cast. It is apparent that the conclusion thus reached by the board as to the legal effect of the vote cast was erroneous, and the return was incorrect. The terms of office having been designated on the ballot and the candidates having been voted for, for the respective terms, the votes ought to have been counted for them for the term for which they were cast; Milligan's App., 96 Pa., 1222; Gilliland Case, 96 Pa., 224; Chamberlin vs. Hartley, 152 Pa., 544. If they had been so counted it would have appeared that Joseph Shissler received all the votes which were cast for the term of three years, and David J. Kinsey the greater number of votes which were cast for the term of two years, and return should have been made accordingly, that they were elected, the former for the three year and the latter for the two year term.

The return, as made, must therefore be set aside, and Joseph Shissler is hereby adjudged to be the duly elected school director for the west ward of the borough of Williamstown for the term of three years and David J. Kinsey the duly elected school director from the said ward for the term of two years and it is ordered that the costs of the proceeding be paid by the school district as per Act of May 19, 1874 Sec. 9, P. L. 1874 P. 208.

IN RE PETITION OF A. PERRENOD ET AL. FOR A WRIT OF QUO WARRANTO AGAINST THE CONSOLIDATED STOCK EXCHANGE OF PHILADELPHIA.

Quo Warranto—Corporations—Proceedings to Forfeit Charter—Acts of June 14, 1901 and June 14, 1836.

The language of clause 5, section 2, of the Act of 1836, P. L. 622, relating to writs of quo warranto and mandamus, as well as the language of the third section of the same act, is not limited by the distinctions between corporations of the first and second classes under the Act of April 29, 1874, P. L. 73.

When a corporation has obtained an existence *de facto*, under color of law, the validity of its formation can be attacked only in proceedings to which the state is a party.

The proceedings are not necessarily at the instance of the district attorney of the county in which the court sat when granting the charter.

The court which granted the charter cannot, *suo motu* under the circumstances of the present case, enter a rule to show cause why the decree granting the said charter should not be annulled.

The writ of quo warranto is an appropriate remedy for violations of law alleged to have been committed before the granting of the letters patent.

Attorney General's Department.

Carson, Attorney General, May 5, 1905.

This is an application for a writ of quo warranto against a corporation chartered by a court as a corporation of the first class, but charged, *inter alia* with usurping and exercising, the franchises of a corporation of the second class. It is not usual for the attorney general to express an opinion upon any matters involved in an application for a writ of quo warranto, nor do I intend to start a new practice; but as the present application involves novel features, I deem it proper to discuss briefly the questions involved. These are four in number:

1. Whether the proceeding by quo warranto at the suit of the attorney general is an appropriate remedy for alleged violations of law on the part of a corporation of the first class; or whether the proceeding should be at the instance of the district attorney of the county in which the charter by a court was granted, or whether the court can at its own instance enter a rule to show cause why the decree granting the said charter should not be annulled.

2. Whether, if the proceeding at the suit of the attorney general be proper, the writ should issue against the corpora-

tion or against the individuals claiming the right to exercise the franchise.

3. Whether the writ of quo warranto is an appropriate remedy for violations of law alleged to have been committed before the granting of letters patent.

4. Whether, the writ being appropriately applied for, there is sufficient to justify a judicial investigation.

Dealing with these questions in their order, I am of opinion:

1. That the writ of quo warranto is an appropriate remedy, and that it can be set in motion by the attorney general. I rely upon the language of the Act of June 14, 1836, P. L. 622, relating to writs of quo warranto and mandamus, and upon the decision of Judge McPherson, in the case of Commonwealth ex rel. Attorney General *vs.* the Gray's Mineral Fountain Company, 46 Legal Intelligencer, 118, 8 Dauphin County Reports 47. In that case it was clearly shown, after an interesting historical review of the English cases and our own precedents, that, while the writ of *scire facias* to repeal letters patent is probably still available, yet the writ of quo warranto is a concurrent remedy, where the question concerns a corporate franchise, even though the attack may be made because of matters preceding the grant of letters patent.

It is true that the case was one of a corporation of the second class; but I am clearly of opinion that the language of clause 5, section 2, of the Act of 1836, as well as the language of the third section of the same act, is not limited by the distinctions between corporations of the first and second classes under the Act of April 29, 1874, P. L. 73.

That act, by the third section, prescribed the mode in which charters of both classes should be granted; but, when once chartered, whether by the courts or by the Governor, the associates and their successors become a corporation, at least *de facto*, and are entitled to the general powers conferred upon both classes alike by the first section. When a corporation has obtained an existence *de facto*, under color of law, the validity of its formation can be attacked only in proceedings to which the state is a party. Turnpike Road Company *vs.* McConaby, 16 Sergeant & Rawle, 140; Commonwealth *vs.* Allegheny Bridge Company, 20 P. S., 185; Hinchman, appellant, *vs.* Turnpike Company, 160 P. S., 150.

I am also of the opinion that the proceedings are not necessarily at the instance of the district attorney of the county in which the court sat when granting the charter. It is true that the Act of May 3, 1850, P. L., 64, provided that a district attorney should "conduct all criminal or other prosecutions in the name of the commonwealth, or when the state is a party, which arise in the county for which he is elected, and perform all the duties which now, by law, are to be performed by deputy attorney generals;" yet in the case of Commonwealth *vs.* the Commercial Bank, 28, P. S., 395, it was distinctly held that the act did not take away the authority of the attorney general to institute the proceeding.

In Christ's Church charter, 8 Pennsylvania County Court Reports, 28, it was held by Judge McPherson, in a case where a court had granted the charter, that, after proceedings and decree regular in form, an alleged substantial defect may only be set up by quo warranto at the suit of the attorney general. See also remarks of McMichael, J., in the case of Travaglini et al. *vs.* Societa Italiana et al., 5 Pennsylvania District Reports, 441.

The rights of district attorneys appear to be confined to cases instituted to test the title to county or township offices and officers not commissioned by the Governor (Pepper & Lewis' Digest, 29,017). Without expressing a definite opinion upon this point, and without committing myself or my successors to interference in local cases, I prefer in the present case, where the charge is that a corporation chartered by a court is usurping the franchises of a corporation chartered by the Governor, to exercise the power which I have, and which, were it the case of a corporation chartered by the Governor, belongs exclusively to me or to the deputy attorney general.

I am also of the opinion that the court which granted the charter cannot, *suo motu*, under the circumstances of the present case, enter a rule to show cause why the decree granting the said charter should not be annulled. This point was ruled by the court of Common Pleas of Lancaster County in the matter of the charter of the Independent Associated German Reformed and German Lutheran Muddy Creek Church, of East Cocalico township. Vol. 5, Lancaster Bar, No. 36, under date of January 31, 1874.

The ruling was made upon the language of the Act of October 13, 1840, section 13, which was closely similar in its

terms to the language of the Act of April 29, 1874, P. L. 73. This was followed by the decision of the Supreme Court in National Endowment Company, 142 P. S., 450, where it was held that, when a court of common pleas, in the exercise of the powers conferred upon it by the Act of April 29, 1874, and its supplements, had granted a certificate of incorporation to an association within the purview of these acts, the charter could be annulled only by means of a writ of quo warranto.

The power which was exercised by Judge Morrison, in the court below, in the foregoing case, was justified because no act of assembly had authorized the incorporation of the company whose charter was revoked. Its charter was absolutely void and conferred no rights, and therefore the court below was justified in revoking the order which gave it an apparent validity. In the present case, however, the granting of the charter is based upon the decision of Judge Ewing, in re application of the Pittsburg Stock Exchange, 43, Pittsburg Legal Journal, 308, and hence it cannot be said that the charter was void *ab initio*.

The circumstances of the two cases differ so materially that, in my judgment, the Consolidated Stock Exchange has obtained a *de facto* existence, and, having obtained it, it is beyond the reach of a rule to show cause, and its franchises can be challenged only by proceeding by a writ of quo warranto.

2. Having determined that a proceeding at the suit of the attorney general is proper under the circumstances, I am of opinion that the writ should issue against the corporation, and not against the individuals claiming the right to exercise the franchise. The point is squarely ruled by Judge McPherson in Commonwealth ex rel. Attorney General *vs.* the Gray's Mineral Fountain Company, 46 Legal Intelligencer, 118, 8 Dauphin County Reports 47, in which he clearly demonstrates the impossibility of bringing in all stockholders, and plants his ruling upon the strong ground of public policy to avoid insuperable inconvenience.

3. I am of opinion that the writ of quo warranto is an appropriate remedy for violations of law alleged to have been committed before the granting of the letters patent. The case just quoted is express authority upon this point. The facts disclosed upon the hearing indicated that while the learned judge who granted the charter relied upon the case in re application of the Pittsburg Stock Exchange, 43 Pittsburg

Legal Journal, 308, yet it is not clear that he considered the action of Judge Ewing in ruling that before a charter such as the present one could be granted by the court it was necessary to make the constitution and by-laws of the society a part of its application for a charter, so as to enable the court to pass intelligently on the question whether the purposes were lawful and not injurious to the community.

The ruling of Judge Ewing was based upon an application for charter of the Braddock Club, 37 Pittsburg Legal Journal, 163, and it was held that, until the application was accompanied by an exhibition to the court of the constitution and by-laws, setting forth how its members were to be admitted, how membership was to be lost, either voluntarily or by act of the corporation, what methods were to be adopted for the assessment and collection of dues for the support of the corporation, the application would be refused, with leave to counsel to ask to withdraw the application for amendment.

A similar ruling was made by Paxson, J., in re the charter of the Philadelphia Artisans' Institute, 8 Philadelphia Reports, 229, in which the learned judge dwelt with particularity upon the requisities of court charters of incorporation. These features are also discussed by Chief Justice Lowrie in the case of the National Literary Association, 30 P. S., 150.

There is room for difference of opinion as to whether or not the purpose of "establishing and maintaining an exchange or salesroom in which the members may meet to conduct the business of buying and selling bonds, stocks and commercial securities of all descriptions" was within the purview of the statue declaring as a lawful purpose "the protection of trade and commerce."

Judge Ewing, in the Pittsburg case before referred to, admitted that it was a close question, but came to the conclusion that the business of buying and selling stocks was trade and commerce within the meaning of the statue.

It appears to me that there is a distinction between engaging in trade and commerce or conducting operations of trade and commerce and the estabiishment of an association for the purpose of protecting trade and commerce.

However this may be, it is quite clear that the features dwelt upon by Judge Paxson and Chief Justice Lowrie, and considered necessary by Judge Ewing before he would grant a charter to the Pittsburg Exchange, were not present at the

time of the application for a decree granting a charter to the Consolidated Stock Exchange of Philadelphia.

I am of opinion that the court cannot of itself institute a rule to show cause why the decree thus obtained should not be annulled, and that it is proper to grant the application in order that a judicial inquiry may be instituted.

4. Having determined that the writ of quo warranto has been appropriately applied for and should be allowed, I refrain from expressing any judgment upon the facts developed before me, but certify that, in my judgment, there is sufficient to justify a judicial investigation.

For these reasons the prayer of the petition for a writ of quo warranto is granted.

RAYMOND HARRISON LEITZEL, BY HIS NEXT FRIEND AND FATHER, WM. H. LEITZEL, AND WM. H. LEITZEL, IN HIS OWN RIGHT, *vs.* THE HARRISBURG TRACTION COMPANY.

Negligence.

The plaintiff, a boy nine years of age, and a companion, about twelve years of age, were following after a loaded wagon. The wagon and the boys and the defendant's car were moving in the same direction. The driveway was rough, having been shortly before filled up with crushed stones, was about seventeen feet wide, and ran along parallel with defendant's tracks. The wagon was visible to the motorman on the car for a distance of twelve or thirteen hundred feet from the point where the accident occurred. The plaintiff's companion climbed upon the wagon, but was put off by the driver. The plaintiff did not succeed in getting on, and walked after the wagon for some distance about two or three feet from it, pretty close to it. The plaintiff testified in chief that about the time the injury was received he was walking between the wagon and the tracks, there being a space between them about two feet wide. On cross-examination, however, he testified that he was walking right behind the wagon until he stepped out and the car struck him. The other boy testified that he had already gotten off the wagon and that the plaintiff was walking behind with him and went to go across the tracks and stepped in front of the car. The corner of the fender struck him and he fell on the side of the track from which he came. It was also in evidence that the motorman sounded his gong for at least one hundred feet before the accident, and that the car was stopped within a few feet of the place where the boy was struck, the front wheel of the car only going over his leg, and the car being stopped before the second wheel of the truck came in contact with him. *Held*,

on motion to take off non-suit, that there was no evidence of negligence sufficient to take the case to the jury.

Motion to take off non-suit. C. P. Dauphin County. No. 365 June Term, 1903.

C. B. McConkey and *J. G. Gilbert*, for plaintiff.

Wolfe & Bailey, for defendant.

Kunkel, J., May 5, 1905.

The plaintiff, Raymond H. Leitzel, a boy nine years of age, and a companion about twelve years of age, were following after a loaded wagon drawn by a team of four horses on Derry street just outside the limits of the city of Harrisburg. The wagon and the boys were going in the direction of the city and the defendant's car was moving up grade in the same direction. The driveway was rough, having been shortly before filled up with crushed stones, was about seventeen feet wide, and ran along parallel with defendant's tracks. The wagon was visible to the motorman on the car for a distance of twelve or thirteen hundred feet from the point where the accident occurred. The plaintiff's companion climbed upon the wagon but was put off by the driver. The plaintiff did not succeed in getting on, and walked after the wagon for some distance about two or three feet from it, pretty close to it. The plaintiff testified in chief that about the time the injury was received he was walking between the wagon and the tracks, there being a space between them about two feet wide. On cross-examination, however, he testified that he was walking right behind the wagon until he stepped out and the car struck him. The other boy testified that he had already gotten off the wagon and that the plaintiff was walking behind with him, and went to go across the tracks and stepped in front of the car. The corner of the fender struck him and he fell on the side of the track from which he came. It was also in evidence that the moterman sounded his gong for at least one hundred feet before the accident, and that the car was stopped within a few feet of the place where the boy was struck, the front wheel of the car only going over his leg, and the car being stopped before the second wheel of the truck came in contact with him. Upon this state of facts we considered it our duty at the trial to withdraw the case from the

jury because, in our judgment, it disclosed no evidence of negligence on the part of the defendant.

It will be observed that it was not then, nor is it now, contended by the plaintiffs that the defendant was negligent because of the rate of speed at which the car was moving, or because of a failure to sound the gong, or to have the car under control, or because of any other act of omission or commission, but solely because the motorman did not anticipate the sudden movement of the plaintiff upon the track in front of the car, and avoid the collision with him. The plaintiff contends that the case should have been submitted to the jury, and in support of his contention refers us to the cases of Jones *vs.* United Traction Company, 201 Pa., 344, and to Kroesen *vs.* Railway Company, 196 Pa., 26, as ruling this case. An examination of those cases will show a marked and essential difference between them and the case at bar. The former case was that of a very young child, two years old' wandering about and upon the tracks of the defendant, and because she was wandering and therefore likely to turn one way or the other, all which was apparent to the motorman in time to avoid collision with her, his failure to anticipate that she would wander in front of his car and thus avoid the collision was held evidence of negligence sufficient to go to the jury. In the latter case a child four years of age was crossing the track. She had already crossed and was about to recross. She was in a state of alarm and confusion, standing in the middle of the track, having walked there, a distance of twelve feet, while the car, when she started to recross, was one hundred and twenty feet away. Had the motorman looked ahead he would have seen the child standing in the middle of the track, confused and alarmed, and because of her state of alarm unable to avoid the car. The case was held to be for the jury. In the one case there was presented to the motorman a child wandering upon the track and likely to move in front of the car, in the other case a child standing in the middle of the track, unable, by reason of her alarm and confusion, to move out of danger. The negligence in both those cases consisted either in not seeing the situation of the child, or, if seeing it, in entirely ignoring it. The situations presented in them were quite different from that which presented itself to the motorman in the present case. Here the boy was following the wagon on the roadway, with nothing to indicate that he

would suddenly turn upon the track, and in this respect especially is the case distinguishable from that of Jones *vs.* United Traction Company, supra, in which there was every thing to suggest the likelihood of the child getting in front of the car. The plaintiff was following after the wagon close to the track. The car was proceeding within the control of the motorman and at a very slow rate of speed, at the same time signalling its approach. The motorman could see the wagon and the boys following it, and for that reason evidently he was moving towards them and the team slowly and sounding his gong. What was there in the situation before him to suggest to him or require him to anticipate that the plaintiff who was intent upon following the wagon, so far as the motorman could see, just as the car reached him would step suddenly to the side upon the track in front of it? There is nothing in the evidence, that we can discover. In what, then, did the motorman fail? Was it his duty to refrain from passing the boys and the wagon? Was it his duty to follow behind them until the wagon or the boys left the street? Was it his duty to stop the car and chase the boys away from behind the wagon before he proceeded past it? If such was not his duty, of what act of negligence was he guilty? What act of omission or commission has he been guilty of which would make him blamable for the unfortunate injury to the boy? He sounded his gong. He approached the boys and the wagon with the car under his control and at a very slow rate of speed, and just as he reached them the plaintiff stepped in front of the car and was injured. It is not the case of running upon him while in the space between the tracks and the wagon, so that he was caught there and because of the narrow way was struck by the fender, for the evidence shows that he stepped upon the tracks. His collision with the car was due to his sudden movement towards and upon the track. It is the duty of the plaintiff to show that his injury was due to some act of negligence on the part of the defendant. This, as we view the evidence, he has not done.

We think the case comes within the class of cases where a child suddenly and unexpectedly runs or steps in front of a moving car and gives rise to an imminent danger against which there is no opportunity to guard, as exemplified in the following cases: Chilton *vs.* Central Traction Co., 152 Pa., 435; Funk *vs.* Electric Co., 175 Pa., 559; Kline *vs.* Electric

Co., 181 Pa., 276; Pletcher *vs.* Scranton Traction Co., 185 Pa., 147; Gould *vs.* Union Traction Co., 190 Pa., 198; Miller *vs.* Union Traction Co., 198 Pa., 639.

Upon a careful review of the evidence submitted by the plaintiff we are of the opinion that it was not sufficient to justify the jury in finding that the defendant was negligent, and that therefore the case was properly withdrawn from their consideration.

The motion to take off the non-suit is overruled.

COMMONWEALTH OF PENNSYLVANIA, EX REL., HAMPTON L. CARSON, ATTORNEY GENERAL, *vs.* THE STANDARD TRUST COMPANY, OF BUTLER, PENNSYLVANIA.

Corporations—Receivers—Discharge.

A Receiver of a corporation will not be discharged while there are collectible claims due the corporation outstanding and unpaid.

Rule to discharge receiver. C. P. Dauphin County. No. 46 Commonwealth Docket, 1904.

Williams & Mitchell, for rule.

Lyon, McKee & Mitchell, contra.

Kunkel, J., May 3, 1905.

As we are given to understand by the petition for discharge, and by the answer filed thereto, the affairs of the defendant company have been so far administered that all its debts have been paid, but there remain in the hands of the receiver several notes, the property of the company, aggregating the sum of $20,000 or more, which have not yet been wholly collected, and there exist also certain claims unadjudicated, which, it is averred, the company has against some of its stockholders.

The Act of Assembly under which the receiver was appointed provides that he shall take charge of the corporation's property and wind up its business; and further provides: "Such receiver shall proceed and wind up the business and affairs of said corporation under and subject to the order of the court." Section 9, Act of February 11, 1895, P. L. 1895, 4. The company is dissolved, and the receiver was appointed

to wind up its affairs. It cannot be said so long as there are collectible claims due to the company outstanding and uncollected that its affairs are wound up; and until all its assets have been converted into money for distribution it is evident that the duties of the receiver have not been fully performed, nor the purposes of his appointment accomplished. To discharge him under the circumstances we think would be premature. The prayer of the receiver to be discharged is therefore denied and the rule herein granted is dismissed.

J. C. Buffum and Company *vs.* The Thomas J. Beck Company.

Justices of the Peace—Judgment—Service of Writ—Return.

The judgment of a justice of the peace will not be set aside on certiorari, where the record of the justice shows that the judgment was entered after hearing proofs and allegations and that the defendant and one witness in his behalf were sworn.

A defendant who appears in response to a writ issued by a justice of the peace and makes his defense cannot afterwards question the legality of the service or return.

Certiorari. C. P. Dauphin County. No. 326 January Term, 1905.

O. G. Wickersham, for plaintiff.

H. M. Bretz, for defendant.

Kunkel, J., May 5, 1905.

Two exceptions have been filed to this record. The first avers that it does not show that any evidence was given in support of the plaintiff's claim. From an examination of the record, it appears that judgment was entered "after hearing proofs and allegations." It also appears that a hearing was held at which the defendant was sworn as well as one witness in his behalf.

The great weight of the authorities is no doubt to the effect that the record of the justice should show that evidence was given in support of the plaintiff's claim, otherwise the judgment will be reversed; Young vs. Getz, 6 Dist. Rep.,

78; and the case there cited; but we have failed to find any authority that goes so far as to to hold that when the record shows that proofs and allegations were heard the judgment will be disturbed. On the other hand it has been held that the record of a justice is sufficient if it shows that judgment was entered after hearing proofs and allegations without expressly showing that witnesses were sworn; Baker vs. Rickart, 2 Dist. Rep., 195; Roushey vs. Fritz, 10 Kulp, 79; York Caramel Co. vs. Ferez, 17 Pa. C. C. Rep., 129. It is true in Wolf vs. Sailer, 10 Dist. Rep., 601, where the record showed that the attorney and agent of the plaintiff was sworn, and also showed that no evidence was heard in support of the plaintiff's claim, the judgment was set aside. But that was so because the general showing as to the proofs was contradicted by the specific showing with respect to them. There was the like contradiction in the record in Penna. Trust Fire Ins. Co. vs. Lenker, 5 C. C. Rep., 667.

In the case before us the judgment was rendered "after hearing proofs and allegations," and after the defendant and one of his witnesses were sworn. It is claimed that there is nothing to show that any witnesses were sworn for the plaintiff, or evidence was given in behalf of his claim. We cannot assume this to be the fact in the face of the record which shows that proofs and allegations were heard. "Proofs" implies legal proof which could only be given on oath; York Caramel Co., 17 C. C. Rep., 129. The record is quite consistent with the theory that the plaintiff's claim was not disputed, but admitted by the defendant who at once proceeded to make his defence. Had the claim been disputed the defendant could have insisted that proof be offered to sustain it and if this had not been done, he would be in a position to ask that judgment be reversed for this cause. But he went on, as the record shows, with his defense. His witnesses were sworn and judgment went against him. Probably his own testimony and that of his witness established the plaintiff's claim, but did not satisfy the magistrate as to the defense set up to it. However that may be, every presumption must be made in favor of the proceedings consistent with the record, and when there is that on the record from which it may fairly be inferred that evidence was given in support of the plaintiff's claim, and especially, as in the present case, where the record shows that proofs and allegations were heard, the

judgment ought not to be set aside. The first exception cannot be sustained.

The second exception which questions the validity of the return of the summons cannot avail the defendant. He appeared in response to the writ. It is therefore too late to complain of the legality of the service or of the return.

Both exceptions are overruled and the judgment of the alderman is affirmed.

ALICE B. KINNEY, TRADING AS R. D. KINNEY & COMPANY TO THE USE OF ROBERT D. KINNEY, *vs.* THE HARRISBURG MANUFACTURING AND BOILER COMPANY.

Affidavit of Defence—Affidavit to Amended Statement.

It may be that in a proper case, where there is added to a statement by an amendment something of substance which is not covered or put at issue by the affidavit of defence already filed, the court will direct a further affidavit of defence to be made.

But plaintiff may not demand another affidavit of defence from the defendant, where the affidavit to the original statement has been held to be sufficient, by merely changing the form of pleading, or by setting forth the evidence by which it is claimed the cause is sustained.

To entitle a plaintiff to judgment the statement must be self-sustaining and the judgment must follow as the necessary legal result of the averments which it contains.

Motion for judgment for want of affidavit of defense. C. P. Dauphin County, No. 366, September term, 1903.

Robt. D. Kinney, for plaintiff.

Edwin W. Jackson, for defendant.

Kunkel, J., March 8, 1905.

The plaintiff moves for judgment for want of an affidavit of defence to her amended statement. The defendant filed an affidavit of defence to the original statement treating it as averring that it had made a contract with the plaintiff to make and furnish her certain boiler drums and that it failed to perform the contract according to its terms. In its affidavit it denied that it made the contract with the plaintiff, either by itself or through the agency of another, and

that it had any contractual relation whatever with her. Upon motion for judgment the affidavit of defence was held by this court to be sufficient. Subsequently the plaintiff was given leave to file an amendment to her original statement, and she now moves for judgment for want of an affidavit of defence to the amended statement. The amendment introduces nothing into the statement which is not answered by the affidavit of defence which has been filed. It is but another form of declaring on the alleged contract and a recital of the evidence in support of it. It may be that in a proper case, where there is added to a statement by an amendment something of substance which is not covered or put at issue by the affidavit of defence already filed, the court will direct a further affidavit of defence to be made; Jones *vs.* Gordon, 124 Pa., 263. But we do not think that the plaintiff may demand another affidavit of defence from the defendant, where the affidavit to the original statement has been held to be sufficient, by merely changing the form of pleading, or by setting forth the evidence by which it is claimed the cause is sustained.

Besides it is questionable whether the plaintiff would be entitled to judgment upon the statement even if no affidavit of defence had been filed at all. Neither the original statement nor the amendment directly avers that any contract was made by the defendant with the plaintiff. In the original statement the language of the averment is, "engaged itself to make and furnish." It is not averred that the defendant's engagement was with the plaintiff. In another place the averment proceeds, "relying upon the representation and assurances of the defendant that the drums offered to be delivered were in fact the two drums that the defendant had engaged itself to make and furnish." Here is the like failure to aver an agreement or contract on the part of the defendant with the plaintiff; and nowhere in the statement is there a clear, direct averment that there was a contract between them. The language of the amendment is equally indefinite. The amendment avers "that the hereinbefore engagement of the defendant in the premises was made for the benefit of the plaintiff, as being the real party interested in the integrity of the defendant's performance thereof," * * * that the consideration of said engagement moved primarily from the plaintiff to the defendant, through the hereinbefore mentioned Burham & Granger, who are designated by the defendant in

its hereinafter mentioned correspondence had with the plaintiff as its "Philadelphia people," meaning thereby, as plaintiff believes and avers, the selling agents of the defendant. Here there is no averment that the engagament referred to was made with the plaintiff by the defendant, or by Burham & Granger, its alleged agents. There is no clear and precise averment of a contract between the parties, but an indefinite averment from which the contract or liability of the defendant is sought to be deduced. The right of the plaintiff to judgment on a statement of this character is questionable. To entitle her to judgment, her statement must be self-sustaining and the judgment must follow as the necessary legal result of the averments which it contains; Fritz *vs.* Hatchway, 135 Pa., 274; Ellis *vs.* Bank, 161 Pa., 241. If her action is founded on a contract made with her by the defendant, or its agent, it is not averred, but is left to inference. Without such averment it cannot be said that the contract liability of the defendant to the plaintiff clearly appears.

The motion for judgment is overruled.

Destruction of Diseased Cattle.

State Live Stock Sanitary Board—Destruction of Diseased Cattle—Act of May 21, 1895.

The State Live Stock Sanitary Board has no authority to recommend or make payment of the value of animals destroyed in an effort to prevent the spread of dangerous, contagious or infectious diseases, except in instances where a member of the board or one of its duly authorized agents has first made a careful investigation and examination of the suspected cattle and, after finding them diseased, shall either agree with the owner as to their value or, failing in this, have an appraisement made under the provisions of the law, prior to the destruction of the animals.

There is no law on the statue books of this state which authorizes a veterinary surgeon, not acting under the direction of the board, to condemn and kill cattle or to direct that the same shall be done. Neither is there any implied or express responsibility resting upon the commonwealth to pay for the cattle so killed.

Attorney General's department. Opinion to Dr. Leonard Pearson, Secretary of Live Stock Sanitary Board.

Fleitz, Deputy Attorney General, May 4, 1905.

Destruction of Diseased Cattle.

I have before me your letter of recent date, enclosing an application to your Board for the payment of the loss sustained by the killing, under the instruction of a veterinary surgeon, of a cow alleged to be afflicted with tuberculosis. You state in your communication that it has not been the practice of your Board to allow compensation where the animal killed has not been inspected and appraised, prior to said destruction, by one of your duly authorized agents, nor until the said inspection has disclosed a condition which made it necessary to condemn and kill the animal to prevent the further spread of the disease with which it was afflicted, and you ask for an official opinion as to whether the course you have been pursuing is correct, or if your Board is warranted or justified in paying for cattle killed on account of being afflicted with tuberculosis or other contagious diseases, upon the advice of a veterinary surgeon not acting under your direction.

The Act of May 21, 1895, (P. L. 91), establishing the State Live Stock Sanitary Board of Pennsylvania, authorizes and empowers your Board to condemn cattle, and destroy them after inspection, if the result shows that it is necessary, and provides clearly the method of ascertaining the value and making payment for the same, in Section 3 of said Act, which reads as follows:

"Section 3. That when it shall be deemed necessary to condemn and kill any animal or animals to prevent the further spread of disease, and an agreement cannot be made with the owners for the value thereof, three appraisers shall be appointed, one by the owner, one by the commission or its authorized agent, and the third by the two so appointed, who shall, under oath or affirmation, appraise the animal or animals, taking into consideration their actual value and condition at the time of appraisement, and such appraised price shall be paid in the same manner as other expenses under this act are provided for; Provided, That under such appraisement not more than twenty-five dollars shall be paid for any infected animal of grade or common stock, and not more than fifty dollars for any infected animal of registered stock, nor more than forty dollars for any horse or mule of common or grade stock and not to exceed fifty per cent. of the appraised value of any standard bred, registered or imported horses."

Destruction of Diseased Cattle.

Other sections of this Act invest your Board and its agents with very broad discretionary powers, and place upon it the important duty of providing for the control and supervision of dangerous, contagious or infectious diseases of domestic animals throughout the commonwealth. This power of taking and destroying private property for the public good is one which can be conveyed only by the explicit terms of the law, and should be entrusted only in safe, intelligent and conservative hands. The law very properly provides that where your Board finds it necessary to take so radical a step, suitable compensation shall be made to the person sustaining the loss of his property, and it points out how the value of the animal or animals to be so destroyed shall be ascertained. These steps are all necessarily precedent to the destruction of the animals, and to deviate from the method pointed out by the act, either by permitting investigation and compulsory destruction of live stock by unauthorized persons or in allowing compensation to the owners after such unauthorized step, would be a serious departure from the letter and spirit of the act.

I therefore advise you that your Board has no authority to recommend or make payment to persons of the value of animals destroyed in an effort to prevent the spread of dangerous, contagious or infectious diseases, except in instances where a member of your Board or one of its duly authorized agents has first made a careful investigation and examination of the suspected cattle, and, after finding them diseased, shall either agree with the owner as to their value, or, failing in this, to have an appraisement made under the provisions of the law prior to the destruction of the animals. There is no law on the statute books of this state which authorizes a veterinary surgeon, not acting under the direction of your Board, to condemn and kill cattle or to direct that the same shall be done. Neither is there any implied or express responsibility resting upon the Commonwealth to pay for the cattle so killed.

COMMONWEALTH OF PENNSYLVANIA, EX REL. JOHN P. ELKIN ATTORNEY GENERAL, *vs.* MONONGAHELA BRIDGE COMPANY.

Quo Warranto—Corporations—Sale of Entire Capital Stock—Admissions by Counsel.

The sale of the entire capital stock of a bridge company to a city does not vest in the city the title to the bridge structure, with its approaches and appurtenances, nor justify judgment of ouster, in a writ of quo warranto against the bridge company at the suit of the commonwealth.

In a proceeding by quo warranto, at the suit of the commonwealth to annul the charter of a bridge company, an admission in writing by the attorneys for the commonwealth that, after a city had taken the defendant's bridge by condemnation, under the Act of May 26, 1893, P. L. 155, and had instituted proceedings to ascertain damages, the city changed its plan and determined to acquire control only of the bridge by the purchase of the entire capital stock, is material to the issue and binding upon the commonwealth.

Quo warranto. C. P. Dauphin County, No. 131. Commonwealth Docket, 1900.

Hampton L. Carson, Attorney General, *A. W. Duff*, *Homer Shoemaker* and *Lyman D. Gilbert*, for plaintiff.

T. D. Carnahan and Wm. Watson Smith, for defendant.

WEISS, P. J., May 29, 1905.

The Attorney-General of the Commonwealth; in a suggestion filed in this court September 11, 1900, complains that he has been informed by and through the Pittsburg and Birmingham Traction Company, a corporation of the state of Pennsylvania, of various matters in said suggestion contained, done or omitted to be done by the Monongahela Bridge Company, which it ought not to have done, or which it ought not to have omitted to do; and suggests that by reasons of the matters in said suggestion set forth, and by reason of the misuser of its rights, privileges and franchises by the said defendant company that a writ of Quo Warranto be awarded requiring it, the said Monongahela Bridge Company, to say by what authority it claims to exercise the rights, liberties and franchises of a corporation, and especially by what authority it claims to exercise the right, liberty and privilege of collecting tolls from the Pittsburg and Birmingham Traction Com-

pany, and why the letters patent issued to it, the said Bridge Company, should not be declared null and void.

The writ prayed for was awarded the same day, an answer filed October 2, 1902, an amendment to the suggestion December 15, 1903, and an order that the defendant answer, plead or demur, to which, January 21, 1904, replication was made and filed.

On December 9, 1904, an agreement was filed in the proper office whereby the parties to the action dispensed with a trial by Jury.

The parties made an agreement admitting facts in which they reserved "all objections to the relevancy or materiality of the facts so admitted." Numerous objections were made by counsel, who desired bills of exception noted to all "rulings of evidence" adverse to either of the parties as though the requests were made at the time the ruling was made and the same are accordingly hereby noted. There was also oral testimony taken and the cause was fully argued, April 19th, 1905.

The facts deemed material to be considered are:

1. The Monongahela Bridge Company was incorporated by and under an Act of Assembly approved March 19, 1810 P. L. 101, entitled "An Act to authorize the government to incorporate a company for erecting a bridge over the River Monongahela, opposite Pittsburg in the County of Allegheny," to which various acts supplementary were enacted.

2. The Pittsburg and Birmingham Passenger Railway Company was incorporated under the provisions of an Act of Assembly approved April 13, 1859 P. L. 749 and authorized to construct a railway across the said Monongahela Bridge from Smithfield street to and beyond Carson street.

The Railway Company was authorized, in 1889, to operate its road by means of cable instead of horse power, and in 1890 was authorized to propel its cars by electricity in addition to cable power under the name of the Pittsburgh and Birmingham Traction Company. An agreement was entered into August 15, 1889, by and between the Bridge Company and the Railway Company whereby the former agreed to reconstruct and widen its bridge and provide a sufficient roadway to enable cable cars to cross upon double tracks, and in May, 1890, a supplemental agreement was made between the Bridge Company and the now Traction Company, whereby

the latter company was authorized to propel its cars by means of electricity.

The Railway Company agreed to, and did, advance a large sum of money towards the reconstruction of the bridge and was to liquidate the amount advanced by tolls. The tracks and approaches and personal fixtures upon completion, except the cable, became the property of the Bridge Company.

3. At a meeting of the stockholders of the Bridge Company, held May 8, 1895, D. Herbert Hostetter, James M. Bailey, and Herbert Dupuy were appointed a committee with full power to act as they deemed proper in the matter "of the acquisition or the condemnation of the Monongahela Bridge and its approaches by the city of Pittsburgh," which committee reported to the board of directors, April 14, 1896, that the city of Pittsburgh had passed an ordinance offering to buy the shares of stock for a gross sum of seven hundred and fifty thousand ($750,000.) dollars, and would assume payment of the bonded indebtedness of two hundred and fifty thousand ($250,000.) dollars additional, and that an agreement was drawn between the city and the committee whereby all the stock of the Monongahela Bridge Company was transferred to the city and other parties, subject to the outstanding mortgage debt of two hundred and fifty thousand ($250,000.) dollars and subject also to the two contracts between the Bridge Company and the Traction Company. The city paid for the stock in cash, or its equivalent, and on maturity also paid the bonded debt. Thirteen of the shares of the stock of the Bridge Company were not assigned to the city but were transferred, one each, to persons who were at the time connected as officials with the city of Pittsburgh. Authority to transfer every of the shares of stock was endorsed in blank on the certificates, though these shares still stand in the names of persons to whom assigned on the books of the Bridge Company. There was no transfer of property of the Monongahela Bridge Company or any franchises, and so far as the evidence shows, no sale of the property, appurtenances or franchises belonging to the Bridge Company, though the committee of three appointed at the stockholder's meeting of May 8, 1895, was authorized to sell the structure and approaches, or all the capital stock of the company. The board of directors of the Bridge Company resigned and their places were filled by persons,—officials of the city of Pittsburgh.

4. Foot passengers and horse and wagon traffic have not paid any toll for crossing the bridge since April 11, 1896, at which time the city acquired the stock of the Bridge Company, though compensation is claimed from the Traction Company under and in accordance with the contracts, for crossing the part of the bridge known as the cable roadway.

5. Repairs and work done to the structure of the bridge have been made at the instance of, and paid for by, the city, and whatever revenues were derived were paid into the city treasury.

6. Since the election of membership in the Board of Directors of those officially associated with the city of Pittsburgh, April 14, 1896, the only minutes in the books of the Bridge Company are those of October 26, 1896, May 22, 1897, July 29, 1897, and July 31, 1897.

7. The Traction Company brought suit against the Bridge Company May 1, 1896, for the recovery of one hundred fifty-two thousand five hundred eighty-two and thirty-one one hundredth ($152,582.31) dollars, a part of the money advanced by the Traction Company to the Bridge Company towards the reconstruction of the bridge for the propulsion by electricity or traction of cars on double tracks across the bridge, pursuant to a proviso in the agreement or agreements between them, which use of the addition to the bridge was "for a period not longer than forty years." The suit was so proceeded in that judgment was rendered in favor of the defendant.

8. In 1898, the Bridge company brought suit against the Traction Company to recover tolls claimed to be due the Bridge Company, and judgment was entered in favor of the Bridge Company, October 9, 1899, in the sum of seven thousand eighty-seven and fifty one hundreth ($7,087.50) dollars, and against the Traction Company.

9. The city of Pittsburgh by ordinance was authorized, March 29, 1893, to increase its indebtedness for the purpose of erecting and purchasing bridges over the Monongahela River for public use, and pursuant to another ordinance enacted September 9, 1895, proceedings were instituted to ascertain damages for taking and appropriating the property, rights and franchises of the Monongahela Bridge Company.

Viewers were appointed who awarded damages for the taking of the defendant bridge, which were discontinued by the city in consequence of its determination "that instead of

acquiring the bridges under condemnation proceedings it would acquire control of them by contract, by purchase from the stockholders of the entire capital stock of said companies."

An ordinance was passed April 4, 1896, which provided for the purchase and acquisition, by the city, of the Monongahela Bridge with the approaches and appurtenances, by the purchase of the entire stock of the Bridge Company; the Controller was authorized and directed to purchase and acquire an absolute and unconditional title to the said Monongahela Bridge and all the franchises" for a stated sum freed from all liens, incumbrances, contracts, or indebtedness, except a certain designated indebtedness and except the contract between the Bridge Company and the Traction Company, which contract was to be assigned by the Bridge Company to the city of Pittsburgh, and was to continue in full force between the city of Pittsburgh and the Traction Company, any ordinance or part of one in conflict with the provisions of this, was repealed.

There is no testimony to the effect that the Monongahela Bridge Company accepted the offer tendered by this ordinance to purchase and acquire title to the bridge and franchises.

10. In 1897, the Monongahela Bridge Company took and filed an appeal from the settlement made against it for tax on capital stock by the accounting officers of the Commonwealth to No. 375 Commonwealth Docket, 1897, and among the specifications of objection states "that since the 13th. day of April, 1896, the entire capital stock of the Monongahela Bridge Company has been owned absolutely by the city of Pittsburgh;" that no tolls have been collected; that the property so acquired has been managed, operated and controlled as like property of the city; that no dividends have been declared; that the organization of the company has been maintained solely for the purpose of determining whether or not certain written contracts between the Bridge Company and the Traction Company relative to the payment of tolls can be enforced by the city; and "that the purpose and effect of the sale to the city of Pittsburgh of all the shares of the capital stock of the Monongahela Bridge Company were to convey the entire property of the Monongahela Bridge Company to the city of Pittsburgh." The appeal was tried and a verdict

rendered, December 2, 1898, for the defendant, and a discontinuance entered the same day by the Attorney-General.

DISCUSSION.

The city of Pittsburgh did not become the owner of the property of the Monongahela Bridge Company, by the purchase of the shares of stock from the holders. The title to the property remained in the Bridge Company just as it was before the stockholders sold their shares. The city became sole stockholder, except as to the shares which were held by the city officials.

It has the same dominion over the corporate property as the former stockholders had, but it owns nothing beyond what it bought.

It is said, however, that the relinquishment of tolls unto the traveling public other than the Traction Company was a discrimination which operated to the detriment of the public and was an act violative of its franchise. The city might make the bridge free to all, but it cannot make free from tolls a part or class of the traveling public, and subject the Traction Company to the payment of tolls agreed to be paid by it, for the right of carrying passengers across the bridge upon its cars.

The number of cars hauled across the bridge during each year at the rate of seven and one-half (7½) cents for a single trip afforded the measure and amount which the Traction Company was to pay half yearly to the Bridge Company towards the extinguishment of the total sum advanced for reconstruction. The minimum amount was fifteen thousand ($15,000.) dollars for each year during the first seven years, and seventeen thousand ($17,000.) dollars each year thereafter during the term of the contract. The tolls were to be ascertained by the Traction Company and paid to the Bridge Company, except the sum of three hundred ($300,00) dollars per month which was to meet the amount of tolls then being collected for the passage of horse cars. If on the expiration of forty years the revenues were insufficient to extinguish the amount expended for reconstruction the unpaid portion was to be cancelled. Thereafter the Bridge Company pursuant to a contract with the Traction Company procured a strip of land to widen the approach to the bridge, and the former contract was modified so that that the new roadway was adapted to the running of cars by electricity as well as cable.

Ordinarily the taking of toll for traveling is a continuing right. It is not limited in point of time to years. Tolls are not specfically appropriated to the repayment of a debt, nor does the right to take cease, when a debt is discharged. As a rule they are not a means of reckoning a total payable towards the extinguishment of an advancement for reconstruction. They do not vary according to the length of a car or wagon, nor are they affected by the seating capacity of a car or cars.

They are designated tolls in the contracts, and the Bridge Company under the supplementary Act of May 18, 1871 P. L. 906 was authorized to charge a toll of ten cents "for every carriage, wagon, buggy, or other wheeled vehicle," which in Bridge Co., *vs* Traction Co., 114 Pa. 478, was held not to include street cars, so far as concerned the right to take the statutory rate of toll.

When the traction Company had ascertained the amount of the toll at seven and one-half (7½) cents for each car of sixteen or less feet in length and the additional amount for any increase in length, it was and is required to pay the same to the Bridge Company, not less however than the minimum, as a credit upon the advancement. By whatever name designated, it is a fund ascertained from the number, rate, and length of cars carried, and payable to cancel an obligation. The Traction Company owes a particular debt, which it has contracted to pay in the manner pointed out by the agreement. It must continue this until the payments equal the advancement with interest, "whether sufficient cars cross the bridge to amount to "fifteen thousand ($15,000.) dollars or seventeen thousand ($17,000.) dollars each year or not.

Usually the toll-payer does not make repairs to a bridge structure nor indemnify the owner against loss and damages to persons and property caused by him, and this, with other obligatory convenants, made by the Traction Company, differentiates the case and places it in a situation apart from foot passengers and drivers of vehicles crossing the bridge. It is a traveler in a class by itself, so constituted by its express contract with the Bridge Company. It must ascertain the yearly amount due from the carriage of cars, and pay the same to the Bridge Company, which is bound to credit the same "upon the total sum of money advanced for reconstruction." Ordinary travelers pay the customary tolls, or did until April 11, 1896, when the city purchased the stock, since which time

no toll was exacted from foot passengers, horse, wagon and carriage traffic. The latter class no longer pays tolls which were imposed under charter schedule. The Traction Company pays tolls under contract schedule, which are readily ascertainable and certain.

There is no infraction by the Bridge Company of the franchise granted it by the commonwealth, arising from the continuing duty on the part of the Traction Company to pay toward the extinguishment of a debt owing it by the Bridge Company.

One of the complaints in the suggestion is that the Bridge Company lacks authority to collect tolls from the Traction Company.

It may be that the latter's interests lie in absolution from its contract obligations. It may be the real party in interest in the proceedings. The right to take toll by the Bridge Company is a contract right, which is not deemed to be an invasion of a corporate right, and it does not lie with the Traction Campany to inveigh against its own undertaking. The public are accommotated in traveling facilties by the passage of cars across the addition built to the bridge, and what promotes public convenience works no harm to the Commonwealth and is not cause for blotting out corporate life.

Neither is the suggestion persuasive that by the action of the Bridge Company,—by which is intended the acts or omissions of the individnal corporators—it surrendered its corporate rights.

Suffering an act to be done by the corporation, which destroys the end and aim of its creation is tantamount to a surrender of its franchises.

The relinquishment of the right to take tolls is not an act subversive of the purposes for which the corporation was created, for that enures to the benefit of the traveling public. Taking toll is a right given by the act of incorporation. But a bridge may be maintained, and many are so operated, without the right to take toll.

The duty of repair to render it safe for travel exists apart from the right to take toll, and a company may be mandamused or indicted for neglecting the duty of repairing.

It must be concluded that the Bridge Company did not do any acts of commission or omission in this respect, des-

tructive of its corporate ends or in surrender of its corporate existence.

It is asserted that the proceeds of the sale of bonds authorized to be issued by the city of Pittsburgh could not be applied to any purpose other than the erection and purchase of bridges over the Monongahela River, and that the application of this fund to the purchase of capital stock only was ultra vires and illegal. The determination of this question would contribute nothing to the solution of the issue, which is whether the Monongahela Bridge Company offended in any way against the commonwealth's grant. Neither the city of Pittsburgh nor the shareholders of the Bridge Company are parties to the action.

It is doubtless the duty of a corporation, by the exercise of proper diligence and care, to protect the rights of shareholders from unauthorized transfers. But the shareholders parted with their shares voluntarily, and there is no complaint by them that their interests as cestuis que trust were not protected by the trustee.

The contention is not deemed instructive.

Stress is attached to the suggestion that the Bridge Company misused its rights, privileges and franchises.

A misuser is a neglect or disregard of the corporate trust, or such a perversion of it to private purposes, as in some manner to lessen the utility of the corporation to those for whose benefit it was instituted, or to work some public injury. High on Ex. Leg. Rem. Sec. 666.

To constitute a ground of forfeiture for this reason, or in cases where there is shown a total non-user of the franchise, it must appear that the acts or omissions complained of have been repeated and wilful, and that they concern matters which are of the essence of the contract between the corporation and the State, Comth. *vs.* Bank, 28 Pa. 389.

The stockholders disposed of the shares of stock to the city of Pittsburgh. It was in a sense a voluntary act, but the city had proceeded in taking the bridge property by ordinance, and viewers appointed at its instance had assessed and reported damages. It "determined that instead of acquiring bridges under condemnation preceedings it would acquire control of them by contract, by purchase from the stockholders of the entire capital stock of said companies." This is an admitted fact, subject to the objection that it is irrelevant and inadmis-

sible. The sale of the stock, while assented to, was more like the assent which a pupil gives when the head-master of the school points his wand of authority at him.

It intimates broadly what the Bridge Company understood as being acquired by the city's purchase of the stock by contract in respect of the control of the bridge. The shares are in the nature of choses in action and merely evidence of property. They are mere demands for declared dividends, and differ from movable property, which is capable of possession and manual apprehension. Angell & Ames on Corp. Sec. 560.

In Slaymaker *vs.* Bank, 10 Pa. 375, it is held that "although bank-shares may be said to indicate or represent the proportion of interest which the share holder has in the property of every kind belonging to the company, yet it cannot be said with any propriety that he is in actual possession of the common property of the bank, any more then the owner of a bond or note is in possession of the money of which it is the representative. The only possession the holder has is the certificate, which is merely the evidence of his interest, as title-deeds are of *title* to land, but not of the possession."

It was evident that there was no inroad upon the sovereign domain by the Bridge Company, arising from the sale of the shares of stock by the holders and owners.

It is contended with some emphasis that the ordinance of the city of Pittsburgh relating to the submission of the question of increasing its indebtedness for the purpose of erecting and purchasing bridges over the Monongahela River for public use, to the electors of the municipality; and the ordinance authorizing the issuing of bonds therefore; and the joint resolution of councils authorizing the entry upon, taking, and appropriating the property, rights and franchises of the Monongahela Bridge Company for public use; and the ordinance providing for the purchase and acquisition by the city of the bridge with the approaches and appurtenances, by the purchase of the entire stock of the Bridge Company, "if the same can be done" together with the proceedings had and things done thereunder, vested in the city "an absolute and unconditional title to the Monongahela Bridge Company and all its franchises, together with the approaches thereto, and to the contract between" the Bridge Company and the Traction Company. From this proposition there must be dissent.

The city is sole stockholder. The amount contributed by the stockholders to the fund enables them to draw dividends and a proportionate share of the fund upon dissolution. The legal title to the fund, as that to all the property in which the fund is invested, is in the corporation and not in the stockholders or stockholder. Comth. *vs.* Fall Brook Coal Co. 156 Pa. 494.

The parties to this litigation in express terms agreed that instead of acquiring the bridge "under condemnation proceedings it would acquire control" by contract, and the manner of its acquisition of control was by the purchase of the entire capital stack. To determine this question, the fact admitted is both relevant and material. What the city acquired by the purchase of the stock is control of the bridge. This does not offend against any charter rights of the Bridge Company and this is the chief concern of the commonwealth. The ownership of the bridge property by the city may make for the interests of the Traction Company, and if so, a court should not do aught to promote them in this proceeding.

That the Bridge Company, by reason of the sale of the capital stock by the owners, after a taking by ordinance of the city, incomplete and perhaps invalid by reason of the non-observance of the statutory requisite in giving bond, and a discontinuance by the city of the proceedings by which damages for the taking were awarded, should be held to have disposed of its property and denuded itself of its corporate functions, is a staggering proposition; and another equally unstable is that the price paid by the city for the stock, should in view of the action had, be declared a compromise by the Bridge Company with the city for its property.

The Commonwealth also presents the view that in 1897, in an appeal by the Bridge Company from a tax settlement entered to No. 375 Commonwealth Docket, it assigned, as an objection among the specifications "that since the 13th. day of April, 1896, the entire capital stock of the Monongahela Bridge Company has been owned absolutely by the city of Pittsburgh," and that the property so acquired by the city has been managed, operated and controlled as like property of the city, and adds "that the purchase and effect of the sale to the city of Pittsburg of all the shares of the capital stock of the Monongahela Bridge Company were to convey the entire property of the Monongahela Bridge Company to the city of Pitts-

burgh." The appeal was tried, a verdict rendered for defendant December 2, 1898, and the same day a discontinuance was entered by the Attorney General. The facts were the same as to the purchase of stock. The effect in the tax case was admitted, and in this case is claimed. In the tax case the admission operated as an instrument of exemption, and in this case is invoked as an instrument of destruction. The interest of the Commonwealth lies, in this case, in the direction of preservation of the charter in this respect for the reason that it may recover taxes from the corporation existing. By annihilation, the city of Pittsburgh may profit. This in itself would be no controlling reason, if by the purchase of the stock by the city, a forfeiture of the corporate franchise should be declared. But the admission by the commonwealth of the fact is that by the acquisition of the entire capital stock by the city, it acquired control only of the bridge, and no reason is manifest why forfeiture should be a consequence of the right of control secured by the cantract.

The commonwealth thus having agreed that a fact to be considered in this case is that the city of Pittsburg determined it would acquire control of the bridge by contract, namely by purchase of the entire capital stock, and take control of the bridge through the medium of its ownership of the stock, instead of acquisition under condemnation proceedings, it would be inequitable to allow a denial of this assent by an affirmation that the Bridge Company stated otherwise at another time and place and in another action.

The practical use in maintaining the *status quo*, in the absence of any infraction of the commonwealth's grant, is that the city of Pittsburgh, the stockholder, he held liable for taxes due the state on capital stock,—which represents franchises as well as other property of the company: Comth. *vs.* Railroad Co., 165 Pa. 54,—that it keep the bridge in repair and safe for travel, and that the Traction Company be held to the observance of its contract with the Bridge Company.

It is submitted that this feature of the case discloses no encroachment upon the commonwealth's rights. and affords no immunity to the Bridge Company from state taxation, if otherwise it is liable. The only parties who may be benefited by an otherwise declaration are the municipality of Pittsburgh and the Traction Company, who are not parties to the controversy.

A board of directors was elected after the purchase of the stock by the City, October 26, 1895, which organized on the same day and elected a president, secretary and treasurer. There appear no minutes of any meeting or meetings of the board of directors after July 31, 1897. If their terms have expired a new board may be constituted. Meanwhile the members of the board may hold over, or if any are deceased a new board may be elected. This situation does not work a forfeiture of the charter.

Neither the relation of the Traction Company to the Bridge Company or to the city of Pittsburgh, nor that of the Bridge Company to the city, gives affront to the commonwealth.

It is the unfilial relation of the Bridge Company to the Commonwealth, and the undutiful acts which it does or omits to do, that may constitute ground for forfeiture of its charter.

What matters it to the commonwealth that the Traction Company may have entered into an improvident bargain with the Bridge Company, so long as the commonwealth's rights are unassailed?

What matters it to the commonwealth that the city of Pittsburgh became sole stockholder and in its municipal character appropriated the bridge, had damages assessed, discontinued the same, and freed the traveling public from tolls, as contemplated by the original charter of the bridge, so long as the privileges and grant of the commonwealth are unsullied?

What matters it to the commonwealth that the stockholders parted with their shares, and that the title to and property of the Bridge company remain as heretofore, so long as the contract between the commonwealth and the Bridge Company was not thereby imperiled or broken?

There are apparent no encroachments upon the contract betweenthe commonwealth and the Bridge Company showing a diminution of the utility of the company to those for whose benefit it was created, or causation of any public injury. Judgment of ouster must be refused and the Monongahela Bridge Company held guiltless of usurping, or exercising unlawfully, the franchises, privileges or powers of the commonwealth.

Judgment is to be entered in favor of the defendant pursuant to this decision unless exceptions are filed thereto in the

proper office within thirty days after service of notice upon the parties or their attorneys that the same has been filed in the office of the Prothonotary.

In re Election of Superintendents of Public Schools.

Common Schools—City, County and Borough Superintendents—Act of April 9, 1867.

Under section 13 of the Act of April 9, 1867, P. L. 51, it is not necessary that a person elected to the office of city, county or borough superintendent of public schools, should have taught in the common schools of the state, within three years of the time of his election.

Attorney General's department. Opinion to Nathan C. Schaffer, Superintendent of Public Instruction.

Fleitz, Deputy Attorney General, May 31, 1905.

I have before me your letter of recent date, enclosing the certificate of election of James N. Muir as Superintendent of Public Schools of the city of Johnstown, as well as a petition signed by a number of the school directors of said city, protesting against the issuing of a commission by you to the said James N. Muir, and alleging that he is ineligible under the law for the reason that he has not taught in the public schools of the state within the past three years. It appears, however, from the papers in the case that Mr. Muir has taught successfully at Lafayette College, situated at Easton, and the University of Pennsylvania at Philadelphia during this time.

In response to your request for an official opinion as to whether or not you can legally issue a commission to Mr. Muir as the duly elected superintendent of schools in Johnstown, I beg to submit the following:

Section 13 of the Act of April 9, 1867, provides

"That no person shall hereafter be eligible to the office of county, city or borough superintendent, in any county of this Commonwealth, who does not possess a diploma from a college legally empowered to grant literary degrees, a diploma or State certificate issued according to law by the authorities of a State normal school, a professional certificate from a county, city or borough superintendent of good standing.

Election of Superintendent of Public Schools of Johnstown

. . . . . Nor shall any such person be eligible unless he has a sound moral character, and has had successful experience in teaching within three years of the time of his election."

There is nothing in your communication or the papers before me to show that the election of Mr. Muir was not due and legal in every respect. The certificate of election, signed by the president and secretary of the board, complies with the requirements of the law in every particular, and it is to be presumed, in the absence of proof to the contrary, that the full measure of the legal requirements has been fulfilled. The language of the act above quoted by no means bears out the contention that the teaching required during the three years prior to election should be done in the public or common schools of the state; indeed, it would be a manifest absurdity to insist that a person qualified to teach successfully in the higher institutions of learning should be excluded from holding the position of superintendent of public schools while a teacher in the common schools would be eligible. The intent of the act was clearly to provide that only persons of experience in teaching should be eligible to superintend those engaged therein. There is nothing whatever in this case which would indicate that, even technically, Mr. Muir is not entitled to his commission.

I therefore advise and instruct you that, upon the facts submitted to me, it is your duty to issue this commission.

CONRAD, ET AL., *vs.* PENNSYLVANIA RAILROAD COMPANY.

Statements—Amendments—Surprise—Continuance.

The allowance or disallowance of a motion to continue is discretionary with the court, and for this reason ought to be determined with care.

A motion to amend may be made at any time during the course of the proceedings, and preparation for the trial of a case must be made subject to the contingency of its being allowed.

A continuance of a cause upon an allegation of surprise, consequent upon an allowance of an amendment of a plaintiff's statement, either immedlately before or during the course of the trial, does not follow as of course, but does follow if, and when, in the exercise of a sound discretion by the court, prejudice or disadvantage or deprivation of a right would otherwise come to a defendant.

Motion for new trial. C. P. Dauphin County, No. 265, September term, 1904.

J. G. Gilbert and *Chas. H. Bergner*, for plaintiff.

Lyman D. Gilbert, for defendant.

Weiss, P. J., June 1, 1905.

After the plaintiffs had offered some testimony, counsel moved an amendment to their statement, so as to read on the line next above the last line on page 1, "during the spring flood of 1902," instead of "during the spring flood of 1901." The motion was not seriously contested, and was allowed. The defendant then plead surprise, and moved a continuance of the cause.

During the discussion of the motion to amend it was stated, and not gainsaid, that the embankment in the Susquehanna River was not erected, nor begun to be erected, in the spring of 1901. This fact was known to the defendant, and the suggestion that it came prepared to defend only against the complaint that the injury done, if any was done, during the spring flood of 1901, was not deemed persuasive and the continuance was accordingly not allowed and the trial proceeded.

The allowance or disallowance of a motion to continue is discretionary with the court, and for this reason ought to be determined with care. Folker *vs.* Satterlee, 2 Rawle, 213; Tassey *vs.* Church, 4 W. & S., 141.

The substantial part of the complaint was that the erection of the embankment caused the current of the river to be

changed and deflected from its accustomed channel, and that thereby the waters were cast against and upon the plaintiff's land lying on the opposite side of the river. The time during which the injury was alleged to have been sustained was descriptive rather than substantive, and might with propriety have been omitted from the statement. In that case the defendant would have been obliged to come prepared to defend against a recovery for injury sustained by a flood during any period, within statutory limits, prior to the bringing of the suit. Counsel knew that a motion to amend may be made at any time during the course of the proceedings, and preparation for the trial of a case must be made subject to the contingency of its being allowed.

The Act of Assembly provides that in case an amendment is allowed the cause may be continued, if desired by the adverse party. The desire of the adverse party may, of course, not be arbitrary, otherwise the discretion of the Court would be nugatory. It must mean that the desire manifested by the adverse party is a matter for the consideration of the Court, and the discretion residing in the Court ought to be exercised in his or its favor whenever injury is believed otherwise to be entailed.

In this case the defendant knew that the embankment was not in process of erection "during the spring flood of 1901," and the contention that it came prepared to defend against a recovery of damages occasioned by flood during that period is not impressive.

Evidently the counsel for the plaintiff were misinformed in respect of the time, and it ought to be assumed that they would not bring suit for the recovery of damages and knowingly state themselves out of court.

It cannot be said that counsel for defendant would need prepare a defence when it was known that the plaintiffs claimed damages during a period when no embankment existed. That which imperils a plaintiff's case on his own showing, and makes it fall by reason of its own weakness, is not a defence.

The rule deducible from the foregoing is, that a continuance of a cause upon an allegation of surprise consequent upon an allowance of an amendment of a plaintiff's statement, either immediately before or during the course of the trial, does not follow as of course, but does follow if, and when, in

the exercise of a sound discretion by the court, prejudice or disadvantage or deprivation of a right would otherwise come to a defendant.

The motion for a new trial must be denied the defendant, and the same is accordingly overruled.

JOSEPH L. MYERS *vs.* DONALD MCFARLAND.

Negligence—Rate of Speed of Bicycle—Questions for the Jury.

Plaintiff was struck and injured by a bicycle ridden by defendant. Plaintiff testified that he was walking across a street and defendant shot out from behind an automobile and struck him. Defendant testified that "he was going slow." A companion testified that "they were not going fast." Held on motion for a new trial, that the rate of speed at which defendant was riding, and whether plaintiff was placed in a position of unexpected peril, were properly left to the jury.

Motion for new trial. C. P. Dauphin County, No. 125, March term, 1904.

Paul A. Kunkel, for plaintiff.

Chas. H. Bergner, for defendant.

Weiss, P. J., June 1, 1905.

The reasons assigned for a new trial are:

1. Error in submitting to the jury the question of speed at which the defendant was traveling, and

2. Error in submitting to the jury the question whether the plaintiff was put in sudden peril by the act of the defendant, and

3. In not giving binding instructions to the jury for defendant.

The plaintiff in his testimony says that McFarland, the father, was driving an automobile, followed by his son, who was riding a bicycle along Third and Reily streets where the plaintiff was injured, and that "the son shot out from behind the automobile and never rung no bell, and struck me and knocked me down."

This expression conveys the idea of velocity much more graphically and much more accurately than the customary description of a stated speed in a fixed time. Going at the rate

of so many miles an hour requires comparison, and our experience demonstrates the difficulty and inaccuracy of determining with any degree of certainty the speed at which a fast moving conveyance is propelled. We say of a train of cars or a bicycle or automobile that it was going such a distance in a given time, but we have no fixed standard by which to compare the speed of a moving object, and accordingly no means of fixing the time required to cover a distance in feet or miles.

When we say that a rider on a vehicle, capable of being driven swiftly, shot out or shot by, the idea of velocity or great speed is at once presented to the mind, and at the same moment the thought is suggested that the speed may be beyond safety.

Even if the expression is extravagant, it affords a jury some guide to enable them to determine that the speed at which the vehicle was going was great, and that it may have been negligence on the part of the rider to drive at that rate of motion.

The defendant says that he and his companion also on a bicycle, were "going slow." The companion says that they were not "going fast." There is a wide difference between shooting out from behind an automobile and going slow or not going fast, and this feature of the case was properly left to the jury to decide.

The plaintiff says he was walking across Third street at the upper or north side of Reily. At that point there is a track on Reily street as well as on Third street and a switch connecting the track on Third street going up and going down Third. He was between the two rails of the Third street tracks or on the rail when the automobile crossed and went up back of him; kept on walking and did not turn northward to look after the automobile not stop to look after it.

Another witness says that the plaintiff was coming across the street in answer to his beckon, and that the bicycle was coming up behind the automobile.

If the plaintiff "was walking and standing at the same time, hardly deciding what he was doing," it may well be that he was confused and put in a position of uncertainty, especially as the bicyclists were in the rear and but a short distance behind the automobile.

There is no error apparent in the trial of the cause and the motion for a new trial is overruled.

Construction and Maintenance of Fish Ways.

Fish Law—Construction and Maintenance of Fish Ways.

A dam constructed by a corporation during the spring and summer of 1901, is subject to the provisions of the Act of May 29, 1901, requiring the construction and maintenance of fish ways.

Attorney General's Department. Opinion to W. E. Mechan, Commissioner of Fisheries.

Fleitz, Deputy Attorney General, May 31, 1905.

I have before me your communication of recent date, enclosing a letter from the secretary and treasurer of the Pennsylvania Power Company, in which he makes certain statements in reference to the construction of a dam owned and operated by that corporation. From these statements it appears that the dam in question was constructed during the spring and summer of 1901. You ask for an official opinion as to whether or not, this being the fact, the corporation is subject to the provisions of section 13 of the Act of May 29, 1901 P. L. 307, which reads as follows:

"That from and after the passage of this act, any person, company or corporation, owning or maintaining a dam or dams, or who may hereafter erect or maintain a dam or dams, in any waters in this commonwealth, shall immediately, on a written order from the Fish Commissioners, erect therein such chutes, slopes, fishways or gates as the commissioners may decide necessary, to enable fish to ascend or descend the rivers at all seasons of the year; and any person, company or corporation refusing or neglecting to comply with the provisions of this section, shall forfeit and pay the sum of fifty dollars for every month he or they so neglect, which sum or sums shall be recovered by civil suit and process, in the name of the commonwealth, and when collected shall be paid into the treasury of the state for the use of the Fish Commissioners. If, after the lapse of three calendar months, the person, company or corporation owning or maintaining said dam or dams, shall neglect or refuse to erect or place the appliances as directed by the Fish Commissioners, the Board of Fish Commissioners are empowered to enter upon such dam or dams, and erect such slopes, chutes or fishways or gates as they may decide necessary; and the cost thereof shall be charged against the person, company or corporation owning

or maintaining such dam or dams, to be recovered by the Board of Fish Commissioners by civil suit and process, in the name of the Commonwealth: Provided that where, by reason of any dam or dams having been constructed prior to the requirement by law of the placing of chutes, slopes or fishways therein, or for any other reason, the owner or owners of, or person or persons maintaining, such dam or dams cannot be compelled by law to pay the cost of erecting slopes, chutes or fish-ways, as provided in this section, the cost of erecting such slopes, chutes and fish-ways by the Fish Commissioners, as provided in this section, shall be paid by the Commonwealth of Pennsylvania, out of the funds not otherwise appropriated, upon warrants drawn by the Auditor General upon the State Treasurer. The Auditor General to be furnished by said Fish Commissioners with an itemized statement of the cost of such construction, which must be approved by him before he shall draw a warrant for the payment of the same."

I am clearly of the opinion that the said corporation is subject to the foregoing provisions. In an official construction of the act in question to H. C. Demuth, Esq., treasurer of the Board of Fish Commissioners, on January 23, 1902, a copy of which communication I enclose herewith, I set forth at length my views upon the effect of this act under circumstances somewhat similar to those in the case now before your department, and have no reason to depart from the conclusions which I reach therein.

CONSTRUCTION OF PUBLIC ROADS UNDER STATE SUPERVISION.

Construction of Public Roads by State Aid—Acts of April 15, 1903 and May 1, 1905.

The Act of May 1, 1905, was intended to take the place in every particular of the Act of 15th of April, 1903, P. L. 188, and to supply the same. The whole law relating to the building of public roads under state supervision and by state assistance, is to be found in the Act of 1905. Wherever there is an apparent conflict between the two acts, the former one is to be ignored altogether and the latter is to control.

Under section 9 of the Act of May 1, 1905, the entire amount apportioned by the state for the year ending June 1, 1905, shall be apportioned to the counties that had in that year applications requiring the expenditure of a sum greater than the amount of the apportionment alloted to them.

The money apportioned June 1, 1904, will revert to be redistributed on the first day of May, 1905.

As the Act of 1905 is the only law on the subject at present, its provisions regarding payment to contractors during the progress of the work apply as well to those whose contracts antedate the approval of the Act of 1905 as to those made subsequently to that date.

If an improved road is constructed, either in a township or an adjoining borough to the line of the borough making application, the said application falls within the purview of the act and should be considered.

It was the clear intent of the legislature that the Act of 1905 should carry with it as an appropriation only the unexpended balance of the $6,500 000 provided by the law of 1903, and that intent should control.

The new schedule of salaries, created by the Act of 1905, technically goes into effect upon the signing of the act by the Governor, but, as the appropriation made by the legislature to meet the increased salaries does not become operative until the end of the fiscal year, May 31st, this part of the law should be ignored and the new salaries take effect when the appropriation made will be sufficient to meet them.

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

Fleitz, Deputy Attorney General, June 1, 1905.

I have before me your letter of recent date, asking for an official construction of the Act of May 1, 1905, relating to the establishment of your department, and governing and regulating the building of public roads by the state under your supervision. The questions you submit are as follows:

1. At what date does money, apportioned June 1, 1903, and not applied for by a given county, revert back to be redistributed?

2. At what date does money, apportioned June 1, 1904, revert back to be redistributed?

3. Do the provisions of the Act of 1905 as to payments to contractors during progress of the work apply to those whose contracts antedate the Governor's approval of the Act of 1905?

4. Must an improved road have been constructed or applied for on both sides of the borough, in which lies a section of road for which state aid is asked, or can an application be approved for a section of a state road lying in a borough, to the line of which on one side only an improved road has been constructed?

5. When the Act of 1905 was drafted the sum of $143,767.53 had been expended under the Act of 1903, which appropriated $6,500,000 for the public roads, thus leaving an unexpended balance of said fund amounting to $6,356,232 47. This unexpended balance is the amount of the appropriation carried by the act of 1905. After the latter act had been prepared, but before it received the Governor's approval, it was found necessary to make further payments on account of outstanding contracts. Said payments aggregate $1,929 01, leaving an unexpended balance of $6,355,203.46, which is understood to have been repealed by the Act of 1905. The sum appropriated by the Act of 1905 to replace this unexpended balance is therefore $1,029.01 greater than the balance remaining unexpended on May 1, when the Act of 1905 was approved. Should this difference be apportioned to all the counties in the state? If so, should it be considered as a part of the apportionment of 1903, or the apportionment of 1904? Or, to avoid the annoyance of such a step, could it be ignored, and the intent of the Act of 1905 be accepted, said intent being to continue in force exactly the same appropriation as was made by the Act of 1903?

6. At what date does the new schedule of salaries take effect, May 1, when the act become operative, or June 1st, the end of the fiscal year?

I will take these questions up *seriatim*, and dispose of each in its proper turn, without reciting the questions, but I desire to premise my specific answers with the general statement that the Act of May 1, 1905, was intended to take the place in every particular of the Act of 15th of April, 1903 P. L. 188, and to supply the same. In other words, the

whole law relating to your department and to the building of public roads under state supervision and by state assistance, is to be found in the Act of 1905. Therefore, wherever there is an apparent conflict between the two acts, the former one is to be ignored altogether and the latter is to control.

1. A part of section 9 of the Act of 1905 provides "that aid shall be apportioned among the several counties of the commonwealth according to the mileage of township or county roads in said counties, but the said amount shall remain in the state treasury until applied for under the provisions of this act: Provided, that if the appropriation, so apportioned by the state, shall not be so applied for before the first day of May in each year, the amount so apportioned and set aside for that county, or the amount thereof not applied for, shall be apportioned as herein provided for, to the counties that had, in that year, applications requiring the expenditure of a sum greater than the amount of their apportionment." As this became the law by the signature of the Governor on the first day of May, the former method of apportioning money is superseded and the entire amount apportioned by the state for the year ending June 1, 1905 shall be apportioned under the foregoing authority to the counties that had in that year applications requiring the expenditure of a sum greater than the amount of the apportionment alloted to them.

2. The money apportioned June 1, 1904, under the foregoing rule of construction, will revert back to be redistributed on the first day of May, 1905.

3. As the Act of 1905 is the only law on the subject at present, its provisions regarding payment to contractors during the progress of the work apply as well to those whose contracts antedate the approval of the Act of 1905 as to those made subsequently to that date. You are at present to be guided entirely by the provisions of section 18 of the Act of 1905 in making such payments.

4. There is nothing in the language of section 17 of the Act of 1905 to indicate that it was the intent of the legislature to require an improved road to have been constructed or applied for on both sides of a borough or boroughs in which a section of a public road may lie, for which state aid is asked, the only requirement being that "an improved road shall have been previously constructed in an adjoining township or borough to the line of the borough making

the application." I am therefore of the opinion and advise you that, if an improved road is constructed either in a township or an adjoining borough to the line of the borough making application, the said application falls within the purview of the act and should be considered.

5. It was the clear intent of the Legislature that the Act of 1905 should carry with it as an appropriation only the unexpended balance of the $6.500 000 provided by the law of 1903, and that intent should control. Technically, the recital of the unexpended balance in the Act of 1905 might be held to carry that amount in full, but, as payments had been made out of the fund subsequently to the preparation of the new bill and prior to its becoming a law, good faith, as well as the duty enjoined upon all public officers to carry out the intention of the legislature, as expressed in acts governing the various State Departments, required that the amount paid out, to wit: $1,029 01, shall be left out of the apportionment, and only the actual unexpended balance of the original appropriation be used.

6. The new schedule of salaries, created by the Act of 1905, technically goes into effect upon the signing of the act by the Governor, but, as the appropriation made by the legislature to meet the increased salaries does not become operative until the end of the fiscal year, May 31st, I am of the opinion that this part of the law should be ignored and the new salaries take effect when the appropriation made will be sufficient to meet them; that is to say, on the 1st of June, 1905.

In conclusion I desire to reiterate what I said at the beginning of this opinion: that the new Act of 1905 today stands in place of and supplants absolutely the Act of 12th of April, 1903, and should be taken as a guide on all matters of doubt, without reference to any conflicting or ambigious language in the Act of 1903. The Act of 1905 was most carefully prepared to meet the exigencies not provided for by the former act, and which were disclosed by the experiences of the two years operations under that act. It was designed and made a law in order that your department might be strengthened for the splendid work that it is doing in improving the public highways for the benefit of the people of the commonwealth.

Use of Seines in the Ohio River.

Fish Law—Use of Seines in Ohio River and Tributaries—Destruction of Illegal Nets.

It is unlawful to use a seine for any purpose whatever in the Ohio River and contiguous streams, for the reason that these rivers do not contain any fish which may lawfully be caught with a seine at any time of the year, unless it be carp, which, under the Act of April 26, 1905, may be taken by a seine having a mesh of four inches, between September 1st, and June 20th.

It is the duty of fish wardens in cases where they have knowledge of seines being used from or kept upon house boats in the Ohio River or streams contiguous thereto, to demand the production of the receipt or permit issued by the authorities, allowing the owners of the seine to use the same for the capture and destruction of carp, and upon the failure or inability of the proper parties to produce said bond, to seize and confiscate any illegal net or nets so found.

Attorney General's Department. Opinion to W. E. Meehan, Commissioner of Fisheries.

Fleitz, Deputy Attorney General, June 7, 1905.

Your letter of recent date, asking for an official opinion relative to the authority and duty of your wardens to seize and confiscate any nets or seines carried on house boats in the Ohio River or its branches within this commonwealth, received.

After a thorough examination of the Acts of Assembly upon this subject I am satisfied that it is unlawful to use a seine for any purpose whatever in the Ohio River and contiguous streams, for the reason that these rivers do not contain any fish which may lawfully be caught with a seine at any time of the year, unless it be carp, which, under the Act of April 26, 1905 may be taken by a seine having a mesh of four inches, between September 1st, and June 20th. The law provides that before a seine can be used for the capture of carp, a bond must be given by the person so using the same, which bond must be approved by the court of the county in which the owner of the seine resides.

Section 37 of the Act of May 29, 1901, distinctly provides that "the possession of nets.....or other devices prohibited or not permitted by law, shall be *prima facie* evidence of the violation of this act."

It is therefore the duty of your wardens, in cases where

they have knowledge of seines being used from or kept upon house boats in the Ohio River or streams contiguous thereto, to demand the production of the receipt or permit issued by the authorities, allowing the owners of the seine to use the same for the capture and destruction of carp, and upon the failure or inability of the proper parties to produce said bond, to seize and confiscate any illegal net or nets so found.

State Tax on Personal Property.

State Tax on Personal Property—Failure of Legislature to make Appropriation Necessary to Carry Out Provisions of Act—Act of April 17, 1905.

It is a well settled principle of construction that where the legislature imposes additional burdens upon officials, there should be adequate compensation provided, and when no provision is made for the increased expense of collecting data, and where, in fact, there is no adequate force provided to carry the law into effect, nor appropriation made to secure it, the whole matter should be held in abeyance and not put into effect until such time as the legislature shall make a suitable appropriation and provision for the proper machinery necessary to carry out its terms.

The Act of April 17, 1905, is inoperative on account of the failure of the legislature to make any appropriation to meet the expenses necessary to carry out its provisions.

Attorney General's Department. Opinion to W. P. Snyder, Auditor General.

Carson, Attorney General, June 6, 1905.

I have before me your letter of even date herewith, enclosing a copy of an act of the recent legislature, numbered 134, approved the 17th day of April, 1905, and asking for an official opinion as to whether or not it is your duty to attempt to put the provisions of the same into effect.

The purpose of the act in question is concisely and clearly expressed in its title, which is as follows:

"An act amending the fifth, seventh and eighth sections of a further supplement to an act, entitled 'An act to provide revenue by taxation,' approved the seventh day of June, Anno Domini one thousand eight hundred and seventy-nine, which

further supplement was approved the first day of June, one thousand eight hundred and eighty-nine; authorizing and requiring the auditor general of the commonwealth to make a return for personal property taxes for defaulting persons, copartnerships, unincorporated associations, limited partnerships, joint-stock associations or corporations, wherein there has been a failure or refusal of the aforesaid to make returns properly verified, and upon the failure or refusal of the assessors and board of revision of taxes or county commissioners to make a proper return for said personal property taxes; also authorizing and requiring the auditor general of the commonwealth to collect the taxes in accordance with the returns made by him, and requiring the recorder of deeds and prothonotaries of the various counties to file daily records in the auditor general's office, as they are required to file in the commissioner's office or with the board of revision of taxes; also requiring the county commissioners or board of revision of taxes to file with the auditor general copies of all returns made for personal property taxes, and requiring the record of the county commissioners or board of revision of taxes to be opened to the inspection and use of the auditor general."

It imposes upon the recorder of deeds in each of the counties of the commonwealth the duty of certifying to you a list of mortgages entered and satisfied in his office *each day*. It also directs that the prothonotary of each county shall certify a similar list to you of the judgments entered of record or satisfied in his office *each day*, and, in addition to this, it is made the duty of the commissioners of each county to certify to your department a correct copy of the return of each individual taxable for personal property subject to taxation for state purposes.

You set forth in your letter that there was no provision made to enable your department to tabulate, compare and make use of the returns required by the act; that the legislature also failed to make any appropriation to pay for the greatly increased clerical force which would be necessary for you to put the provisions of the act into effect; neither was there any provision made for the payment of the various county officials for the increased labors imposed upon them by its terms.

The intention of the act apparently was to increase the facilities for ascertaining the amount of personal property tax

due from taxables, in the first instance, to the state, but, in the last analysis and primarily, to the counties, for the reason that, under the present law, three-fourths of the amount of money so raised is returned by the state treasurer to the counties for their local needs. Under the provisions of the law in force prior to the adoption of this act, the county commissioners of the various counties made the personal property tax assessment and forwarded the aggregate amount so assessed to the board of revenue commissioners of the commonwealth. When the tax so levied and collected has been paid through the medium of the county treasurer to the state treasurer, one-fourth of the total amount is deducted for the use of the state, the other three-fourths being returned to the treasurer of the county for use in local purposes. The percentage retained by the state is so small as to afford, in many instances, only a meager compensation to the officials who are required to do the work. The imposition of this additional burden upon state officers, the primary object of which will be to increase the amount of taxes paid and inuring largely to the benefit of the counties, without proper provisions for the increased expense to the state, is conclusive evidence that this legislation was not well considered. It is a well settled principle of construction that where the legislature imposes additional burdens upon officials, there should be adequate compensation provided, and when, as in this case, no provision is made for the increased expense of collecting data, and where, in fact, there is no adequate force provided to carry the law into effect, nor appropriation made to secure it, it is my opinion that the whole matter should be held in abeyance and not put into effect until such time as the legislature shall make a suitable appropriation and provision for the proper machinery necessary to carry out its terms.

I therefore advise that you correspond at once with the various county officials affected by the act and inform them that you have neither the means, the force, nor the room to perform the duties which it seeks to lay upon your department, and that they will not be required to furnish the reports specified until such time as a subsequent legislature shall make it possible for your department to do the work which it is sought to impose upon you by this piece of legislation.

REPAYMENT OF FINES COLLECTED UNDER UNCONSTITUTIONAL LAW.

Repayment of Fines Under Unconstitutional Law—Costs.

There is no provision in the law that authorizes the repayment of fines collected, prior to the decision in Commonwealth *vs.* Kebort, from persons convicted under the Act of June 26, 1895, of selling adulterated liquors.

The commonwealth is not liable for costs on her own prosecutions, whether civil or criminal.

Attorney General's Department. Opinion to B. H. Warren, Dairy and Food Commissioner.

Carson, Attorney General, June 10, 1905.

You have asked for an official opinion with regard to the repayment of fines collected by the commonwealth in pure food prosecutions. I assume that what is meant is a prosecution under the Act of June 26, 1895, for the sale of adulterated liquors, and that inasmuch as the portion of the act declared unconstitutional by the chief justice in the case of Commonwealth *vs.* Kebort is limited solely to the adulterations of liquor, the question which you put must be restated so as to embrace solely the matter of repayment of fines collected by the commonwealth in prosecutions hitherto brought for the adulterations of liquor, and I take it that the word liquor must be read in the narrow sense of an intoxicant, because in my judgment the decision of the court does not relate to prosecutions brought by you for the adulteration of milk or other liquids which are recognized as food.

With the question thus limited, I answer that there is no provision in the law which would authorize the repayment by the commonwealth or by you, as the commonwealth's officer, of fines already collected. At the time the prosecutions were brought and the money was received through the payment of fines, you were acting within the terms of an act of assembly presumed to be constitutional, and sustained by a decision of the Superior Court which had not been reversed. Section 5 of this act distinctly provided that all penalties and costs for the violation of its provisions should be paid to the Dairy & Food Commissioner or his agent, and by him paid into the state treasury to be kept as a fund separate and apart for the use of the department of agriculture for the enforcement of

the act, and to be drawn out upon warrant signed by the secretary of agriculture and the auditor general. The moneys must therefore be treated as state moneys and in the treasury of the state, and whether actually paid to the state treasurer or still in your hands awaiting payment makes no difference because it is your duty to pay the same into the state treasury. There is no statute which would authorize your drawing a warrant or having a warrant drawn by the secretary of agriculture to be joined in by the auditor general upon the state treasurer for the reimbursement or repayment of these fines, and the moneys being in the state treasury, cannot be drawn out without specific appropriation, section 16 of article III of the constitution providing expressly that "no money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof." Inasmuch as the legislature has not authorized the secretary of agriculture or yourself to draw warrants for any such purpose, and there is no such appropriation of the fund now in the state treasury arising from the source indicated, there can be no such return made.

Aside from this it is a general principle of law that the commonwealth is not liable for costs. We have followed a fixed and certain principle prevailing in England, that at the common law the king neither receives nor pays cost in any case, unless especially directed by act of parliment or assembly. In the case of Irwin *vs.* Commissioners of Northumberland County, 1 S. & R., 505 and also McKeehan *vs.* The Commonwealth, 3 Penna. State, 153, it was held that the commonwealth stands in the place of the king. The subject is further discussed in Commonwealth *vs.* Johnson, 5 S. & R., 194, and Lyon *vs.* Adams, 4 S. & R., 443. In the case of Commonwealth *vs.* Philadelphia County, 8 S. & R., 151, the court, in speaking of a kindred subject, said: "The recognizance is not granted to the county; the county is not the assignee of the state; it can neither release the action, nor mitigate nor remit the forfeiture. The commonwealth is not liable for costs on her own prosecutions, whether civil or criminal. This exemption, whether it be called prerogative or privilege, is founded on the sovereign character of the state, amendable to no judicial tribunal, subject to no process." Wadlinger on the law of costs in Pennsylvania, (p. 163). See also American & English encyclopedia of law, vol. 4, page 316, where it

is said: "The general terms of an act giving costs do not include the state or national governments; and, in the absence of express provisions, costs are not awarded in favor or against them, and in actions of a public nature, conducted in good faith for the public benefit, costs are rarely awarded against public officers."

I am of opinion, therefore, that you cannot make repayment of fines. This general answer is sufficient to cover the matter of costs referred to as growing out of the liquor prosecutions pending, but not yet disposed of, which you will now be called upon to deal with in view of the decision of the supreme court. With the responsibility or legal liability of the county or counties you have nothing whatever to do. Your standpoint is that of a commonwealth's officer and you should act accordingly, leaving to the course of events and to such steps as counsel for the parties defendant may see fit to employ, the determination of the proper method of raising the legal question.

I herewith return you the letters accompanying the request for my opinion.

APPROPRIATION TO THE EASTERN PENITENTIARY.

Constitutional Law—Title of Act—Act of May 11, 1905.

That portion of the Act of May 11, 1905, which provides that eight hours shall constitute a day's labor for employes of the Eastern Penitentiary, violates section 3 of article III of the Constitution of Pennsylvania, and is void. The remainder of the act is unaffected by the unconstitutionality of this proviso.

Attorney General's Department. Opinion to Samuel W. Pennypacker, Governor.

Carson, Attorney General, June 10, 1905.

I have duly considered the communications of William G. Huey and Charles D. Hart, respectively the president and secretary of the board of inspectors of the Eastern State Penitentiary, which were forwarded to me by you with a request for my official opinion.

By an act approved the 11th day of May, 1905, entitled "An act making appropriations to the Eastern State Peni-

tentiary" there was provided for the two fiscal years beginning June 1st, 1905, the sum of $137,360.00 for salaries of officers "provided that eight hours should constitute a day's labor and any deficiency in salaries caused by this proviso may be paid out of the contingent fund of said penitentiary." You approved this item in the sum of $130,000.00 and withheld your approval of the remainder of said item. The board of inspectors have inquired whether your action extended to the proviso that eight hours should constitute a day's labor and while you have expressed an individual opinion, that nothing in the paragraph is affected by withholding the approval except the amount of the item, you have referred the entire correspondence to me with a request for my opinion.

In my judgment the proviso that eight hours should constitute a day's labor, is unaffected by your action in approving the item for a less amount than that named in the act. The question then arises whether the proviso—that eight hours shall constitute a day's labor—is to be read as a condition, performance of which is necessary to the receipt by the Eastern State Penitentiary of the item appropriated, reduced by the extent of your disapproval. The matter is one of consequence to the institution. I am informed that if the eight hour law should become operative, a very much larger sum than that appropriated would be necessary, and there is no contingent fund with which to meet it; and that, under existing circumstances, it would revolutionize the present administrative management of the institution. I have no difficulty in reaching the conclusion that the proviso as to the eight hour law has no place in a special appropriation bill, and that it may be disregarded by the inspectors upon the simple ground that this portion of the act is unconstitutional. The act is entitled "An act making appropriations to the Eastern State Penitentiary;" there is nothing in the title to disclose the legislative intention to introduce into the management or discipline of the institution the eight hour rule. The result is to render so much of the act as the title gives no notice of, unconstitutional. The balance of the act is entirely unaffected. This has been distinctly ruled in the well considered cases of the Union Passenger Railway Company's Appeal, 81 Pa. State Reports, 91, Allegheny County Homes' Appeal 77 Pa. page 77 and Carother's Appeal 118 Pa. St. page 488. The provisions of section 3 of Article III of the Constitution of Penn-

sylvania has been entirely ignored. The constitution provides "that no bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title." It is beyond reach of dispute that the act in question is not a general appropriation bill, and that if it was the purpose of the legislature to introduce the eight hour rule into the Eastern State Penitentiary, such a purpose ought to be made the subject of a definite bill and its purpose should be clearly expressed in the title. This has not been done. A covert attempt has been made to introduce the eight hour regulation into the management of the institution by injecting it into an appropriation bill in the shape of a proviso; and there is nothing in the title to put the legislators or the public upon notice as to the contents of the bill. Even had the purpose been expressed in the title, the act would have been unconstitutional on the ground of embracing more than a single purpose; but inasmuch as the act relates to appropriations and the title refers exclusively to such purpose, it follows that the portion of the act which is not disclosed in its title and which introduces a definite substantive and independent proviso, may be rejected under the authorities quoted, leaving the appropriation to stand, so far as this item is concerned, affected only to the exlent of your withholding of approval in the sum of $7,360.00.

I am of opinion, therefore, that the inspectors can claim the amount appropriated by this act, as reduced by your act, without being required to introduce into the management of the institution, the eight hour rule.

Pure Food Laws.

Pure Food Laws—Prosecutions for Selling Adulterated Liquors —Acts of June 26, 1895, May 27, 1897 and April 27, 1905.

The decision of the Supreme Court in Commonwealth *vs.* Kebort, declaring unconstitutional the Act of June 26, 1895, so far as it was assumed to apply to drink, does not affect the act in its application to the adulteration of food. The decision does not cover such liquids as milk, cream or buttermilk, because such liquids are foods.

So far as the adulteration of food is concerned, the powers of the Dairy and Food Commissioners remain as before the decision in Commonwealth *vs.* Kebort, but he cannot under the Act of June 26, 1895, prosecute violaters of its terms in the matter of drink.

The Department of Health cannot punish such offenders under the Act of April 27, 1905.

Under the Act of May 25, 1897, P. L. 85, the State Pharmaceutical Examining Board cannot prosecute the ordinary liquor seller, even though the liquor be adulterated.

Attorney General's Department. Opinion to B. H. Warren, Dairy and Food Commissioner.

Carson, Attorney General, June 22, 1905.

I have examined the papers sent me by Mr. Schock, consisting of Professor Cochran's special report on analyses of liquor, certain chemist's reports, the opinion of the superior court in the case of the Commonwealth *vs.* Kebort, and the opinion of Chief Justice Mitchell in the same case, and read them in the light of certain memoranda submitted by you.

The opinion of the chief justice in effect declares the Act of June 26, 1895, P. L. 317, unconstitutional so far as it was assumed to apply to drink. The decision, however, does not change the effect of the act in as far as it applies to the adulterations of food. I do not read the decision of the supreme court as covering such liquids as milk, cream or buttermilk, because such liquids are regarded as food. So far, therefore, as the matter of adulterations of food are concerned, your powers and duties continue as formerly, but you cannot prosecute, under this act, violaters of its terms in the matter of drink. You ask whether or not the department of health can prosecute such offenders under the terms of the act creating a department of health, approved the 27th of April, 1905. Sections 5, 7, 8, 9 and 14 are the only ones from which such a

power could be inferentially derived. A careful examination of them satisfies me that they are not specific enough to justify criminal prosecutions for such acts as you have hitherto been in the habit of prosecuting, nor is there anything in the title of the act creating a department of health and defining its powers and duties which would give notice to legislators or citizens that violations of the law in the matter of adulterations of drink could be prosecuted by the department of health or its officers. In other words, the very objection which proved conclusive in the opinion of the chief justice when dealing with the defects of the title to the Act of June 26, 1895, could be urged against the act creating a department of health were it stretched to the point of covering prosecutions. Nowhere in the act creating a department of health is it made the duty of the commissioner of health to institute such prosecutions, and a careful examination of it leads me to believe that the protection of the health of the people of the state, and the determination and employment of the most efficient and practical means for the prevention and suppression of diseases do not contemplate the prosecution of individuals selling adulterated liquor. It would be unwise to attempt to stretch that statute in that direction or to cover such offences. This is but a general view. If there be any specific action contemplated in a specific class of cases, I prefer to be specifically interrogated, for it may be that some regulation of the department of health could be devised to correct or restrain the sale of adulterated liquors by anyone on the ground of danger to the public health. This, however, presents a different question from that before me.

I am of opinion that the State Pharmaceutical Examining Board can prosecute offenders who manufacture for sale, offer for sale, or sell adulterated drugs and medicinal preparations. The powers of that board are defined by the Act of 25th of May, 1897, P. L. 85, but their powers are not bestowed upon the department of health and cannot be exercised by that department; nor do I think that the State Pharmaceutical Examining Board could prosecute the ordinary sellers of liquor, even though the liquor be adulterated. My reading of the statute confines its provisions to the sale of drugs and medicinal preparations.

There is a part of our general criminal code which may be of interest. Let me call your attention to section 1 of the Act

Pure Food Laws.

of 14th of April, 1863, P. L. 389, which declares that "It shall be unlawful for any person or persons to make use of any active poison, or other deleterious drugs, in any quantity or quantities, in the manufacture or preparation, by process of rectifying or otherwise, of any intoxicating malt or alcoholic liquors, or for any person or persons to knowingly sell such poisoned or drugged liquors in any quantity or quantities, and any person or persons so offending shall be deemed guilty of a misdemeanor." Section 5 of the same act provides that on conviction the convict shall be sentenced to pay a fine not exceeding $500.00, and to undergo an inprisonment not exceeding twelve months or both or either in the discretion of the court. The second section provides that manufacturers shall brand their names on barrels and also the words "containing no deleterious drugs or added poison," and shall also certify the same fact or facts to the purchaser over his, her or their own proper signature. The third section provides that possession of drugged liquor shall be deemed *prima facie* evidence of a violation of the provisions of the act, and the fourth section provides that any suspected article or specimen of intoxicating malt or alcoholic liquor shall be subjected to analysis by some competent person to perform the same under the direction of the court before which the case is tried, and such analysis duly certified under oath shall be deemed legal evidence in any court in the state.

The duty of enforcing this Act of April 14, 1863, is imposed under the law upon the district attorney. I herewith return the papers which you sent me.

IN RE SALARY OF HARBOR MASTER OF PORT OF PHILADELPHIA.

Constitutional law—Salary of public officers—Act of May 11, 1905.

All officials holding commissions under appointment from the governor fall within that list of public officers whose salaries cannot be increased during the time in which they are exercising the powers and duties of the office under an executive appointment, whether for a term or at will.

The harbor master of the port of Philadelphia is a public officer, within the meaning of section 13 of article III of the Constitution of Pennsylvania, and the person holding that office at the time of the passage of the Act of May 11, 1905, is not entitled to the increased salary provided by that act.

Attorney General's Department. Opinion to Wm. P. Snyder, Auditor General.

Fleitz, Deputy Attorney General, June 20, 1905.

You have asked me to advise you officially what position you should take about paying the harbor master of the port of Philadelphia the increase of salary provided by the last legislature, under the Act of 11th of May, 1905, which appropriates for the payment of the salary of the harbor master for two years the sum of $10,000, an increase over the amount theretofore fixed by law.

The office of harbor master was created by the Act of 20th of March, 1803, 4th Smith's Laws, 472, which provided that the governor should appoint and commission a person to be harbor master of the port of Philadelphia, subject to removal by him at will. There is no later act of assembly which fixes a definite term and the present incumbent was appointed and commissioned by the governor, to hold at his will. I am of opinion that the provisions of the Constitution of Pennsylvania, as contained in section 13 of article III apply to this case, and that a salary cannot be increased during the incumbency of the occupant of an office of an executive character where, as in this case, the office is one to be filled by appointment, and the appointee is in service under the appointment at the time the increase of salary is made. This construction harmonizes with all of the provisions of the constitution, and puts each department of the government on an independent basis. The legislature is regulated by article II, and the

compensation of its members is provided for by section 8, and the provisions of this section have no relation to any other branch of the government. In the same way the judiciary department is regulated by article V and the compensation of the judges is controlled by sections 18 and 26 of said article, and these provisions have no relation to ony other branch of the government. In the same way the executive department is regulated by article III, and its provisions have no relation to any other branch of the government. The decision of the supreme court in the case of the Commonwealth ex rel. *vs.* Mathues does not apply to the present inquiry. That decision relates entirely to the judiciary department which, under the constitution, stands upon a distinct footing, and is entitled to the benefit of special provisions in the constitution which were held to be unaffected by those of section 13 of article III. That section, in my judgment, relates to executive officers, and prohibits an increase of salary during an existing term where the officer is elected, or during the time of his service under an appointment where he is appointed. The exact language is "No law shall extend the term of any public officer, or increase or diminish his salary or emoluments after his election or appointment." It would be too strict a construction to hold that because there is no term fixed for the office of harbor master the provision does not apply. That would be to make the word "term" the controling one in the section, whereas it is clear that the provisions of the section are two fold, that there shall be no extension of a term when fixed by an act of assembly, and that there shall be no increase of salary during a term to which an officer is elected, or after his appointment where he is appointed. The word "appointment" being unlimited by the context, must relate to cases where the appointment is at will, as well as to cases where there is an appointment to an office with a fixed term.

I do not now decide, as the point is not raised, that clerks, stenographers, messengers and other employes come within the terms of the constitution as recited in this section and article, but as to all officials holding commissions under appointment from the governor I am satisfied that they fall within that list of public officers whose salaries cannot be increased during the time in which they are exercising the powers and duties of the office under an executive appointment, whether for a term or at will. I advise you therefore

that the harbor master at present in office can receive no portion of the increase of salary, but is limited to that already fixed by law.

GETTYSBURG BATTLEFIELD MEMORIAL COMMISSION.

Gettysburg battlefield memorial commission—Act of July 18, 1901.

Upon its proper organization, the Gettysburg Battlefield Memorial Commission is entitled to receive the amount appropriated by the Act of July 18, 1901, P. L. 755.

Attorney General's Department. Opinion to Wm. P. Snyder, Auditor General.

Fleitz, Deputy Attorney General, June 28, 1905.

I have before me your letter of recent date, asking for official advice as to whether or not the money appropriated by the Act of July 18, 1901 P. L. 755, entitled "An act making an appropriation for the erection of a monument or memorial structure on the battlefield of Gettysburg, in memory of the volunteer soldiers, sailors and marines from Pennsylvania, who participated in the late civil war, one thousand eight hundred and sixty-one to one thousand eight hundred and sixty-five," is now available, if the commission provided for in the act should desire to carry out the work proposed by said act at this time.

This act provides that immediately after its passage the governor of the commonwealth shall appoint nine citizens of Pennsylvania, at least seven of whom shall have served in the union army in the war of the rebellion, who shall constitute a commission to be known as "The Gettysburg Battlefield Memorial Commission." It provides further that the said commission shall serve without compensation other than their actual and necessary expenses, and that they shall select a suitable site on the Gettysburg battlefield for the erection of a monument or such memorial structure as the commission shall determine, in memory of the gallant services of the soldiers of Pennsylvania in that battle. They are also given authority to select and decide upon the design for the said monument or memorial structure and the material of which it

shall be constructed, and to make contracts for its construction, but they are limited by the terms of the law to make no contracts in excess of the appropriation made and the total cost of the monument was not to exceed the sum of $250,000. Of this sum not more than $50,000 was made available during the two fiscal years beginning June 1, 1901, and not more than $50,000 to be available during the two fiscal years beginning June 1, 1903. The balance of the appropriation, namely, $150,000, or so much thereof as may be necessary, was to be paid during the two fiscal years beginning June 1, 1905. The appropriations in question to be paid by the state treasurer upon warrants drawn by the auditor general from time to time as the work progressed, upon specifically itemized vouchers approved by the proper officers of the said commission.

When this bill came before the governor for his action, he approved it in the sum of $150,000 only, and withheld from it his approval of the item appropriating $50,000 for the two fiscal years beginning June 1st, 1901, and from the item appropriating $50,000 for the two fiscal years beginning June 1st, 1903, thus reducing the appropriation to the sum of $150,000, which amount should not be available until June 1st, 1905. I understand he also appointed the commission provided for in the bill, and that the persons so appointed have accepted the trust reposed in them and are now ready and willing to go on with the work if it shall be determined that the amount appropriated by the act is now available.

After a careful consideration of all the facts in the case, together with the act itself, I am clearly of the opinion, and advise you, that if the commission is now ready to organize and go ahead with the work provided for in the act, they are entitled to receive from the state treasurer the amount of money appropriated by its terms, to wit: $150,000.

THE BALTIMORE BASE BALL COMPANY OF BALTIMORE CITY *vs.* JOHN F. HAYDEN.

THE BALTIMORE BASE BALL COMPANY OF BALTIMORE CITY *vs.* LEWIS D. WILTSE.

Equity—Preliminary injunction—Parties.

The office of a preliminary injunction is to maintain the status quo until the merits of the controversy can be fully heard and determined; and the status quo which will be preserved by preliminary injunction is the last actual, peaceable, noncontested status which preceded the controversy.

A preliminary injunction may be made mandatory only in exceptional cases.

Defendants engaged severally to play base ball for plaintiff during the season of 1905, and contracted not to render services as ball players during said season to any other person, corporation or association. On June 22, 1905, defendants refused to render further service to plaintiff and entered into a contract with the York Athletic Association to play base ball for the remainder of the season. On June 27, 1905, plaintiff obtained an injunction, preliminary until hearing, restraining defendants from playing base ball with said York Athletic Association, the purpose being by such restraint to compel them to return to the service of plaintiff. *Held*, on motion to continue the preliminary injunction, that as defendants had already severed their connection with plaintiff, they could not be compelled to return to its service or cancel their contract with the York Athletic Association by continuing a preliminary injunction; that the York Athletic Association had a right to be heard before its contract with the defendants was declared invalid. Injunction dissolved.

Motion to continue preliminary injunction. C. P. Dauphin county, Nos. 553, 554, Equity Docket.

M. W. Jacobs, for plaintiff.

Snodgrass & Snodgrass, for defendant.

Weiss, P. J. July 6, 1905.

Before June 22, 1905, the defendants had engaged severally with the complainant to play ball, known as base ball, during the season of 1905, which commenced April 26, and ended September 23, and had contracted not to render services as ball players during the time specified with any other person, corporation or association.

On June 22, 1905, the defendants without the consent of the complainant and in violation of their several contracts,

refused to render further service as ball players for the said company, and articled with another association known as the York Athletic Association with which they were and have been playing.

On June 27, 1905, the complainant applied for and obtained an injunction, preliminary until hearing, to restrain them from violating their contracts and from playing base ball for the York Athletic or any other company, and Saturday, July 1, was fixed to hear a motion to continue.

The cause was fully argued July 3, and the continuance of the injunction is the matter for consideration.

The office of a preliminary injunction is to maintain the status quo until the merits of the controversy can be fully heard and determined and "the status quo which will be preserved by preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy." Frederick vs. Huber, 180 Pa. 572; Audenried vs. Phila. & Reading R. R. Co., 68 Pa. 370.

In this case the defendants had severed their relation with the complainant and had engaged with another association in like service, before the preliminary injunction was awarded.

A preliminary injunction may be made mandatory only in exceptional cases as where there is a "race against the law," or as in Whiteman vs. Fuel Gas Company, 139 Pa. 492, where the defendant shut off gas from a flint glass manufactory which it had covenanted to supply with natural gas. The remedy restored the status quo and instantly brought the onflow of gas. But the termination of the relationship with the complainant by the defendants, unbecoming and unjustifiable as it was, does not beget a situation which would warrant the continuance of the injunction. It would not compel the defendants to return to the service of the complainant. All it would accomplish is their restraint from playing with the York Athletic Association.

The purpose is by such restraint to compel their return to the complainant, but this is not the province of a preliminary injunction obtained after the act done. It may be done on final hearing.

As was said in Mocanaqua Coal Co. vs. N. C. R. W. Co., 4 Brewster, 158, "The injunction here prayed for, though not in form, is in reality strictly mandatory and as ruled by the court in banc in Audenried vs. The Phila. & Reading R.

R. Co. * * * * such an injunction can be properly granted only on final hearing."

When the injunction was served the new relation was consummated, and the case does not present features so exceptional as to take it out of the rule.

It is only in this circuitous way that the defendants may be made to return to their former service.

The violation of the contract, whether considered in respect of the breach of its affirmative or negative provisions, does not present a case which would justify a chancellor in making an order mandatory in its nature.

The preliminary injunction cannot restore the defendants to the service of the complainant, nor compel them to cancel the contract made with the York Athletic Association.

There is another view which inclines a court to refuse the motion to continue the injunction. The York Athletic Association is a party to the contract with the defendants, and whatever rights it may have, if any, cannot be passed upon in this proceeding.

It has at least a right to be heard before the contract may be declared invalid.

We are thus brought to the conclusion that the continuance of the injunction would not only not restore the defendant players to the Baltimore Base Ball Company, complainant, but that it could not nullify the contract or contracts entered into with the York Athletic Association, and that there is no warrant, under the facts disclosed, to make the preliminary injunction mandatory.

We are urged by counsel for the defendants to make prompt disposition of the motion, and at the risk of clear statement we do so to expedite the cause. The conduct of the defendants gives them no claim for haste, and that of the Athletic Association is also not promotive of right dealing.

The motions to continue the preliminary injunctions are overruled and the injunctions dissolved.

Election of Superintendent of Schools in the City of Franklin.

Common Schools—Election of City Superintendent—Meetings of directors.

A City Superintendent of Common Schools, who received the votes of a majority of the directors, at a meeting regularly called and at which all of the directors were present, is legally elected and should be commissioned, even though all of the preliminary steps required by the Act of April 9, 1867, P. L. 53, had not been taken.

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

Fleitz, Deputy Attorney General, June 28, 1905.

Your communication of recent date, together with papers relating to the election of a superintendent of public schools of the city of Franklin, received.

It appears from the evidence submitted to me that, at a meeting of the school board of the city of Franklin, held on Tuesday, April 25th, 1905, at which four members were present, it was suggested that, inasmuch as the term of the superintendent would expire on the first Monday of June, a meeting of the board be held on Tuesday, May 2nd, 1905, for the purpose of holding an election to fill the vacancy so caused, and that said meeting of April 25th, 1905, was adjourned with a motion to meet on the day mentioned, to wit: the first Tuesday in May, being the second day thereof, for the purpose of electing a superintendent and transacting any other business that might properly come before the board.

At the meeting held on May 2nd, 1905, which meeting was attended by all the members of the board, the minutes of the preceding meeting were read and approved, and the matter of the compensation to be received by the superintendent for the ensuing year was taken up and the salary fixed at eighteen hundred dollars, which was the amount paid that official during the previous year. Some other business was regularly attended to, and then the board proceeded to the election of a superintendent. The president, William J. Bleakley, presented the name of N. P. Kinsley for re-election. Director Bell presented the name of C. E. Lord. There being no other names presented, the president directed the secretary to call the name of each director, which was done, and the result of the ballot

disclosed the fact that two directors, Bleakley and Bensinger, had voted for Prof. Kinsley, and four directors, Mitchell, Doolittle, Fleming and Bell, had voted for C. E. Lord. After the meeting had adjourned the president, Bleakley, and the secretary, Bensinger, both of whom had voted for Kinsley, the defeated candidate, refused to certify the election of Lord to your department, as required by law, and mandamus proceedings were instituted in the court of common pleas of Venango county to compel them to make such certification.

On June 13, 1905, the president judge of that judicial district disposed of the case by handing down an opinion directing the president and secretary of the school board of the city of Franklin to certify to you the proceedings of the school board at the meetings above referred to, following the usual form so far as the facts in the case would warrant, and directing that a copy of the minutes of the meetings of the board be attached to the certification. Bleakley and Bensinger contended that the action of the board in electing Prof. Lord as superintendent was illegal because all of the preliminary steps provided for by the Act of April 9, 1867, P. L. 53, had not been taken, and that the meeting of the board of directors had not been legally called nor regularly organized.

An inspection of the minutes of the proceedings and an examination of the law do not sustain this contention. The calling of the meeting of May 2nd and the election of a superintendent *viva voce* by a majority of the whole number of directors present, were in strict compliance with the letter of the Act of Assembly, as was also the fixing of the compensation to be paid to the superintendent so elected for the ensuing year. The point raised that proper notice had not been given loses its force when taken in connection with the fact that every member of the board was present, and that no objection was made at that time by anyone to the manner in which the meeting had been called or the form of organization under which it proceeded to transact the business of the election of a superintendent. I am unable to find anything in the proceedings which conflicts with the law in any particular, and the same general principle governing elections of all kinds applies here. This principle is well stated in the American and English encyclopoedia of law, 1st edition, vol. vi., page 344, section 18, as follows:

"The general principles drawn from the authorities are

that honest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election unless they affect the result or at least render it uncertain."

Such conditions do not arise in this case. The meeting was held on the day fixed by law for that purpose. It was attended by every person entitled to vote thereat. The business before the meeting was definitely and specifically stated, and proceeded with without objection, every member present participating therein. Prof. Kinsley receiving two votes and Prof. Lord receiving four votes. Under the facts it is clear that the officers of that meeting have no valid or legal ground upon which to contest this action of the board. The final determination of this question, under the law, rests with you, and it is your duty to consider the objections made to the legality of this election and to decide whether or not the commission shall issue to the person returned as having been elected to the office of superintendent.

It may be urged by the protestants that more than thirty days have passed since the election was held, and that, because the certificate required by law to be filed with you within that time has not been received, therefore your jurisdiction has lapsed. This objection has no controlling force, for the reason that the present condition exists through the failure on the part of the officers of the meeting to comply with the act, and, inasmuch as they are the protestants, they are not in a position to take advantage of the delay which their failure to perform their duty has brought about.

I am of the opinion and advise you that, under all the circumstances of this case, a commission as superintendent of the common schools of the city of Franklin, should be issued to C. E. Lord, who has been legally elected to that position.

In re Credit on Road Tax by Using Wide Tired Wagons.

Road law—Wide tires—Credit on road tax—Act of April 24, 1901.

It is the duty of the supervisors of all the townships of the commonwealth to allow the credit given by the Act of April 24, 1901, P. L. 99, to persons using draught wagons with tires not less than four inches in width, not only on the work tax levied for road purposes but on the money tax levied also.

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

Fleitz, Deputy Attorney General, June 28, 1905.

I am in receipt of your communication of recent date, enclosing a letter from Mr. John McGonnell, of Waterford, Pa., and asking for an official opinion upon the question which he submits therein.

The point in controversy arises over the construction of the Act of the 24th of April, A. D., 1901, P. L. 99, entitled "An act to encourage the use of wide tires upon wagons upon public highways of this commonwealth, and providing penalties for its violation," the 1st section of which reads as follows:

"Section 1. Be it enacted, etc., that every person who shall subscribe to an affidavit that he has owned and used or used exclusively during the preceeding year, in hauling loads of two thousand pounds weight and over on the public roads of this commonwealth, draught wagons with tires not less than four inches in width, shall, for each year after the passage of this act, be credited by the supervisor of highways of the respective district in which such tax is levied and assessed with one-fourth of the road tax assessed and levied on the property of such person. And when any tenant shall by contract be or become liable for road taxes assessed against the premises leased to him, he may secure the benefits of this act upon making affiadavit herein before specified, as to the exclusive use by him of such wagons as are herein before designated. Provided, however, such credit shall not exceed in any one year to any one person, five days labor on the highways, or its equivalent in cash. And every supervisor of roads is hereby authorized and empowered to administer the oath herein before mentioned."

In re Credit on Road Tax by Using Wide Tired Wagons.

Mr. McConnell states that the supervisors or commissioners in his township are willing to credit one-fourth of the road tax assessed and levied on the property of a person complying with the terms of this act in so far as the work tax is concerned, but are not willing to allow a similar rebate on the money tax assessed and levied. There is absolutely no warrant of law for this discrimination. The intention of the legislature, as evidenced by this plain and explicit language, was to encourage the use of wide tires on wagons in order that the public roads might be improved and the credit provided for by the law applies unquestionably to both work tax and money tax. In many townships of the commonwealth the work tax has been very wisely abolised and all road taxes are now paid in cash in those localities. It would work a peculiar hardship, and one not contemplated by the legislature, to the residents of such townships where so earnest a disposition to improve the public roads is manifested, if the credit conferred by this beneficial act should be denied them. The state is spending large sums of money annually under the direction of your department for the purpose of building and improving the public highways and every encouragement to keep these roads in proper condition should be carried out in a broad spirit.

I am therefore of the opinion, and advise you, that it is the plain duty of the supervisors in all the townships of the commonwealth, to allow the credit given by the above act to those persons complying with its terms, not only on the work tax alone, but on the money tax assessed and levied as well.

S. ALTER KENNEDY *vs.* ANNIE V. OREM, ERRONEOUSLY STYLED ANNIE V. KENNEDY.

Divorce — Validity of marriage between person divorced on ground of adultery and paramour—Ejectment—Act of March 13, 1815.

When the ground of divorce is adultery the capacity of the guilty party to re-marry is not fully restored. The incapacity arising out of the former marriage still remains, notwithstanding the divorce, so far as marriage to the paramour is concerned while the injured party is living.

Under section 9, of the Act of March 13, 1815, 6 Smith L. 286, a marriage between a man or woman divorced on the ground of adultery and the person with whom the adultery was committed, is void, if contracted during the life of the former husband or wife of the divorced person.

Where a marriage is void under section 9, of the Act of March 13, 1815, ejectment will lie for land belonging to one of the parties in the possession of the other.

Ejectment. C. P. Dauphin County, No. 279, March term, 1904.

Andrew S. McCreath and *F. M. Ott*, for plaintiff.

Albert Miller, for defendant.

Kunkel, J., July 7, 1905.

This is an action of ejectment and is submitted to us under an agreement to try it without a jury, as provided by the Act of Assembly of May 22, 1874.

FACTS.

The facts of the case have been agreed upon by the parties and we find them to be, so far as they are material, as follows:

First. The plaintiff, S. Alter Kennedy, is the owner of a life estate in the land described in the statement on file in this action; it having been the property of his late wife, Amelia Kennedy, formerly Amelia Erb, who died intestate on July 23, 1897, leaving to survive her one child, Alice Kathleen Kennedy, now aged eleven years, and her husband, the said S. Alter Kennedy.

Second. The defendant, Annie V. Orem, also styled Annie V. Kennedy, was formerly the wife of Thomas J. Orem, of the city of Harrisburg, Dauphin County, Pennsylvania, from whom she was divorced by the court of common pleas of

this county by decree entered on December 16, 1901, to No. 503 of June term, 1901; the cause for divorce, as shown by the testimony in said proceeding, being adultery with the said S. Alter Kennedy, the plaintiff in this action.

Third. The said Thomas J. Orem was still living on February 4, 1904.

Fourth. On March 11, 1902, the said S. Alter Kennedy and Annie V. Orem, the parties to this action, went before a minister of the gospel in the said city of Harrisburg, and said minister performed a marriage ceremony between them; and thereafter they co-habited at No. 224 Cumberland Street, in the city of Harrisburg, the same property which is described in the statement on file in this action; and they continued to so co-habit until the latter part of February, 1903, after which time the said defendant continued to reside upon said land, and still continues to enjoy possession of the same.

DISCUSSION.

The only defense which is made to this action is that the plaintiff is the husband of the defendant, and that for that reason he can not maintain it against her in the absence of proof that she deserted him, or separated herself from him without sufficient cause. The plaintiff does not claim that defendant deserted him, but denies that he is her lawful husband. It will thus be seen that the question in the case upon which the controversy turns is that of the validity of the marriage entered into by the parties on March 11, 1902.

According to the facts as agreed upon and found, at the time this marriage was contracted the defendant was the divorced wife of another then living, which divorce had been granted because of her adultery with the plaintiff. The marriage was, therefore, entered into by the defendant in disregard of the prohibition contained in section nine of the Act of Assembly of March 13, 1815 (6 Smith L. 286). This section reads as follows: "The husband or wife who shall have been guilty of adultery shall not marry the person with whom the said crime was committed during the life of the former wife or husband."

In Stull's Estate, 183 Pa., 629, in commenting upon the status of the guilty party under the ninth section of the Act of 1815, it is said: "By the ninth section it will be perceived there is an absolute prohibition of any subsequent marriage

between the guilty person and the paramour during the life of the former wife or husband. It forbids the marriage relation to be contracted in the most general terms. The guilty party 'shall not marry the person with whom the said crime was committed.' A personal incapacity to marry is imposed."

The incapacity of the guilty party to marry the paramour necessarily arises out of the reasonable interpretation of the eighth and ninth sections of the Act of 1815. The eighth section of the act declares what shall be the effect of a divorce and of the annulment of a marriage in the following terms: "After such sentence nullifying or dissolving the marriage all and every the duties, rights and claims accruing to either of the said parties at any time theretofore in pursuance of the said marriage shall cease and determine, and the said parties shall severally be at liberty to marry again in the like manner as if they had never been married." Then follows the ninth section, quoted above, restricting the effect of the divorce as declared in the eighth section by prohibiting the party guilty of adultery from marrying the person with whom the crime was committed during the life of the injured party. The eighth section declares the general effect of the divorce. The ninth section restricts the general effect as declared in the eighth section in the case of a divorce on the ground of adultery. Thus the meaning of the two sections is plain. The marriage in all cases of divorce or of annulment of marriage shall be dissolved so as to permit both the parties to freely marry again as if they had not been married, but in the case of the dissolution of a marriage on the ground of adultery, the marriage shall not be dissolved so as to permit the guilty party to marry the paramour during the life of the injured party.

Under this interpretation the legal effect of the divorce is to restore to the parties the capacity to marry which they did not have because of the existence of the marriage which is dissolved; but when the ground of divorce is adultery the capacity of the guilty party is not fully restored. The incapacity arising out of the former marriage still remains, notwithstanding the divorce, so far as marriage to the paramour is concerned while the injured party is living.

This view of the subject is taken under statutes similar in character in William *vs.* Oates, 5 Iredell 535, and Calloway *vs.* Bryan, 6 Jones, 569. In the former case it is said: "It is,

however, concluded by all that if the statute contains prohibitory words on the offending party, that party cannot marry, and the incapacity arising out of the first marriage continues, notwithstanding the divorce." And in the same case it is further said: "It is sufficient to invalidate a second marriage to show a prior one and the parties still living, and it is for the parties to such second marriage to show a capacity to contract newly acquired. That the party attempts by showing the divorce, but that confers the capacity on one of the parties only, and expressly withholds it from the other. * * * * The case stands as to her precisely as if there never had been a divorce and *pro hac vice* the first marriage is still subsisting."

It would follow from this that the former marriage of the defendant was not dissolved so as to permit her to marry the plaintiff, but as to her marriage with him it obtained just as though a divorce had not been decreed, while as to every body else it was dissolved and at an end. She was not, therefore, by the divorce from her former husband relieved from the incapacity to marry arising out of her former marriage, so as to be able to lawfully contract marriage with the plaintiff. It is apparent, therefore, that, as the defendant had no capacity to enter into the marriage of March 11, 1902, the marriage was void and she did not acquire any marital rights by virtue of it; Stull's Estate, 183 Pa., 625; Immendor's Estate, 21 C. C. Rep., 208.

It is suggested by the defendant that the marriage is not void, but voidable; that it is good until declared to be void in a proceeding brought for that purpose. But this cannot be so; for as we have seen the defendant was not capable of contracting the marriage, no more than she would have been before the divorce. Had she contracted the marriage before the divorce, her husband living, the marriage would have been absolutely void, so too the marriage contracted since the divorce, which did not at all restore her capacity to marry as respects the paramour, is void.

Besides, if the ninth section be taken to be a prohibition against marriage with the paramour, disassociated from the eighth section, and not a declaration of the modified effect which the divorce shall have, to interpret the marriage to be voidable merely, would render the prohibition of no effect. If the marriage were to be held good until one or the other of

the parties should take steps to dissolve it, or have it declared void, the prohibition contained in the section would be practically nullified, for a proceeding might never be instituted by either of the parties to have it dissolved, or, if instituted, the court might not interfere, preferring to leave the parties where they placed themselves; Adams *vs.* Adams, 2 Chester Co. Rep., 560; or, if inclined to interfere and grant relief from the marriage, it might be difficult to find authority for exercising jurisdiction in such a case. To hold the marriage to be voidable merely would render the section inoperative.

CONCLUSIONS OF LAW.

For these reasons we conclude

1. That the marriage of March 11, 1902, between the plaintiff and the defendant was void.

2. The plaintiff is not the lawful husband of the defendant.

3. The action can be maintained.

4. The plaintiff is entitled to the possession of the land described in the statement.

Judgment is therefore directed to be entered in favor of the plaintiff for the land described in the statement, if exceptions be not filed within the time limited by law.

CHARLES W. RANK, MANAGER *vs.* E. M. HALDEMAN, DEFENDANT, MARY H. ARMSTRONG, GARNISHEE.

Attachment execution—Spendthrift trusts.

The owner of real estate cannot, by creating a spendthrift trust for himself, retain the use and enjoyment of his property and yet place it beyond the reach of his creditors.

The income from property, conveyed by the owner upon a spendthrift trust for himself, is subject to attachment in the hands of the trustee.

Attachment execution. C. P. Dauphin County, No. 392, September Term, 1903.

Lewis M. Nieffer, for attaching creditor.

Levi B. Alricks, for garnishee.

Kunkel, J , July 20, 1905.

This is a motion for judgment against the garnishee. By the answer which has been filed it appears that the defendant, on the 9th day of May, 1896, conveyed to the garnishee all his real estate in trust to manage and care for it, and out of the income therefrom to pay his debts then owing and the remainder thereof to him during his life. The principal object of the conveyance, as is averred, was to prevent the defendant from encumbering his real estate and to protect him against his own improvidence. Pursuant to the trust thus created the garnishee has been receiving the income from the real estate, has been applying it to the defendant's debts, and paying to him for his support the sum of twenty-five dollars per month. If it is admitted that there has come into the hands of the garnishee since the service of the attachment sufficient income to pay the interest on the mortgages still remaining upon the real estate, the taxes and repairs, and the debt of the plaintiff in this proceeding with interest and costs, but not to pay also twenty-five dollars per month to the defendant. By this is meant, as we understand it, that the garnishee has enough money in her hands, due to the defendant, to satisfy the plaintiff's claim. She, however, contends that this money is not subject to attachment for the defendant's debts incurred subsequently to the conveyance in trust.

It is quite clear that under the trust the garnishee is bound to pay to the defendant out of the net income which

she receives the sum of twenty-five dollars per month for his support and whatever remains after the payments of the debts. If she should fail to pay, he would have his action against her to recover that which is due. This being so, his creditors may attach it.

But it is suggested that the trust is a spendthrift trust, the object for which the defendant conveyed his property in trust being to prevent him from encumbering it and to protect him against his own improvidence. This, however, we do not think is a sufficient reason for absolving that part of the income which is payable to him from liability for his debts. We know of no instance, nor have we been referred to any, where the right of a person is recognized so to dispose of his property, while retaining the use and enjoyment of it, as to place it beyond the reach of his creditors. The trust here is different from a spendthrift trust, inasmuch as it was created by the debtor himself. It is not so in the case of a spendthrift trust. That is created by some one other than the debtor, who may dispose of his property as he chooses so far as the creditors of the cestui que trust are concerned, and this is the principle upon which such trusts are sustained: Overman's Appeal, 88 Pa. 376.

Upon the facts set forth in the answer we are of opinion that the plaintiff is entitled to judgment, and judgment is accordingly directed to be entered in favor of the plaintiff against Mary H. Armstrong, the garnishee, in the sum of one hundred and twenty-five dollars, with interest from the 6th day of April, 1903, and costs, the amount to be liquidated by the prothonotary; said judgment and costs to be paid out of the moneys and effects of the defendant, E. M. Haldeman, admitted to be in the garnishee's hands.

WILLIAM F. WEBER *vs.* THE CITY OF HARRISBURG.

Negligence—New Trial—Surprise—After Discovered Testimony.

In an action against a city for damages for injuries sustained by falling over a cable, the case is for the jury, when the evidence as to the condition of the cable, the extent to which it was covered and the extent to which it was visible, is conflicting.

The question of contributing negligence, involving the finding of disputed facts, is for the jury.

The complaint that the defendant was taken by surprise, by the proof on the part of the plaintiff of actual notice of the alleged dangerous obstruction, is not well founded, when the person to whom such notice was given was in court and called as a witness for defendant, but was not questioned with respect to notice.

After discovered evidence will not be considered on a motion for a new trial when the court is not satisfied that the evidence could not have been discovered, by due diligence, in time to have been used at the trial.

Motion for a new trial. C. P. Dauphin County, No. 240, September term, 1904.

John E. Fox, for plaintiff.

D. S. Seitz, for defendant.

Kunkel, J., July 12, 1905.

1. Several reasons have been assigned in support of this motion, but the principal reason, and the one which was urged upon us at the argument, was our refusal at the trial to declare as a matter of law that the plaintiff was negligent in not seeing the cable over which he stumbled. After careful consideration of the case, we are not satisfied that in so refusing we committed error. The evidence relating to the condition of the cable,—the extent to which it was covered, and to which it was visible,—was discrepant. It is quite clear we could not have taken the question of its condition away from the jury. Upon this question depended necessarily the further question, whether the plaintiff could have seen the cable with the exercise of proper care. The question of contributory negligence, involving as it did the finding of disputed facts, was one which the jury alone could determine.

2. The complaint that the defendant was taken by surprise by the proof on the part of the plaintiff of actual notice of the alleged dangerous obstruction is not well founded. The superintendent of the defendant, to whom actual notice

was shown to have been given, was present in court at the trial and was called as a witness in its behalf, but was not asked anything with respect to notice. Had the defendant desired to show by the superintendent anything in denial of the claim of actual notice, it had then an opportunity so to do.

3. The after discovered evidence that the plaintiff was unable to practice his profession because of a previous injury to his arm and fingers, and because he suffered with rheumatism, is not shown. The depositions which were taken in support of this reason show on the contrary that he practiced his profession continuously to the time of the accident. Nor is the evidence of his previous injury and of his rheumatism necessarily in conflict with the evidence given at the trial as to his earning capacity at the time of and prior to the injury. The evidence submitted is not in our judgment sufficient to affect the verdict in any wise. Besides, we are not satisfied that this evidence could not have been discovered by due diligence in time to be used upon the trial.

The motion for a new trial is over-ruled, and judgment is directed to be entered on the verdict in favor of the plaintiff upon payment of the jury fee.

BALTHASER HARLACHER *vs.* THE BOROUGH OF STEELTON.

Municipal Corporations—Water rates—Act of April 29, 1874.

A municipal corporation is not within the second proviso of the seventh clause of the thirty-fourth section of the Act of April 29, 1874, P. L. 95.

The Act of April 29, 1874, embraces only such corporations as are incorporated under it and the remedy given for unjust or excessive charges for gas or water was intended to prevent the abuse of the exclusive privilege granted to such companies.

A municipal corporation which furnishes water to its inhabitants, unlike a private corporation which is managed and controlled by comparatively few individuals and for solely private gain, is in the control of the electors of the municipality, and any abuse of its power, in furnishing water or in imposing upon its consumers unequal or exorbitant rates, may be remedied by a vote of the people, changing the officers by whom the rates are fixed.

A municipal corporation which furnishes water to its inhabitants is entitled to charge for the water it furnishes such rates as will yield it a fair profit.

Balthaser Harlacher *vs.* The Borough of Steelton.

A system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable.

Complaints that the water rates fixed by a borough are unequal and excessive may be heard and considered and given their true weight, when steps are taken to collect the amount claimed.

A borough furnishing water to its inhabitants is not exercising a municipal function, but is in the position of a private water company.

The water rates fixed by a borough were as follows:

BOARDING AND LODGING HOUSE KEEPERS.

Proprietors of boarding and lodging houses, or either, keeping more than five boarders or roomers, for each five boarders and roomers, or fraction thereof, above the first five in the same dwelling house, $6.00.

"Water closets in said boarding houses, for every five boarders or roomers, or fraction thereof, above the first five in same dwelling, $2.00.

Bath tubs in said boarding houses, for every five boarders or roomers, or fraction thereof, above the first five in same dwelling, $3.00.

PRIVATE DWELLINGS.

Hydrant in yard and spigot in kitchen, or both for one family,	$ 6 00
Each additional spigot, with basin or without basin,	1 00
Each additional family in same dwelling, after the first,	4 00
Pave wash or screw nozzle on hydrant in yard or dwelling house for hose,	3 00
Pavement wash without other supply,	5 00
Bath tubs,	3 00
Water closet, self-closing, in house or yard, or both,	2 00
Water closet, not self-acting,	6 00
Urinals, according to jet or use,	$2 00 to 5 00

HOTELS AND RESTAURANTS.

One or two hydrants or spigots, with or without basin,	$15 00
Each additional basin,	2 00
One bath tub,	5 00
Each additional bath tub,	3 00
Water closets, self-closing, each,	3 00
Urinals, each,	3 00
Beer pump,	10 00

Held, on bill in equity by the owner of a boarding house, that the rates were not discriminating or unfair.

Bill in equity. C. P. Dauphin County, No. 324, Equity Docket.

James A. Stranahan, for plaintiff.

Frank B. Wickersham, for defendant.

Balthaser Harlacher *vs.* The Borough of Steelton.

Kunkel, J., July 20, 1905.

By this bill the plaintiff seeks to test the validity of the ordinance which fixes the water rates in the borough of Steelton, the defendant, and to be relieved from the payment of the charges for water which was furnished by the borough to his houses located within its limits.

FACTS.

From the admissions in the answer and the testimony taken upon the final hearing, we find the following facts:

1. The plaintiff is the owner of eight houses in the borough of Steelton, which were occupied by his lessees in the year 1903 as boarding houses. During that year the defendant furnished water to the houses and charged therefor the following amounts: For house, South Front street, No. 717, $12; No. 719, $12; No. 721, $12; No. 723, $12; No. 725, $12; No. 727, $16; No. 729, $16; No. 731, $12.

2. The charges were made under an ordinance passed the 20th day of March, 1903, entitled, "A supplement to 'an ordinance providing for the election of water commissioners, prescribing their duties, fixing water rates and directing to whom they shall be paid,' approved November 15th, 1899, fixing the rate for boarding and lodging house keepers," which provides as follows:

"Boarding and Lodging House Keepers."

"Proprietors of boarding and lodging houses, or either, keeping more than five boarders or roomers, for each five boarders and roomers, or fraction thereof, above the first five in the same dwelling house, $6.00."

"Water closets in said boarding houses, for every five boarders or roomers, or fraction thereof, above the first five in same dwelling, $2.00."

"Bath tubs in said boarding houses, for every five boarders or roomers, or fraction thereof, above the first five in same dwelling, $3.00."

"The water commissioners shall have power, on refusal of said boarding or lodging house proprietors to furnish them with the number of boarders or lodgers kept in each dwelling, when requested so to do, to fix such water rate for said dwelling, as, in their judgment, shall be fair and equitable."

3. The ordinance to which the foregoing ordinance is a

supplement provides, so far as the rates affect other properties of like character with the plaintiff's in the borough, as follows:

"WATER RATES.

PRIVATE DWELLINGS."

"Hydrant in yard and spigot in kitchen, or both for one family,	$ 6 00
Each additional spigot, with basin or without basin,	1 00
Each additional family in same dwelling, after the first,	4 00
Pave wash or screw nozzle on hydrant in yard or dwelling house for hose,	3 00
Pavement wash without other supply,	5 00
Bath tubs,	3 00
Water closet, self-closing, in house or yard, or both,	2 00
Water closet, not self-acting,	6 00
Urinals, according to jet or use,	$2 00 to 5 00

Sprinkling streets with pavement wash will only be allowed by special contract."

"HOTELS AND RESTAURANTS."

"One or two hydrants or spigots, with or without basin,	$15 00
Each additional basin,	2 00
One bath tub,	5 00
Each additional bath tub,	3 00
Water closets, self-closing, each,	3 00
Urinals, each,	3 00
Beer pump,	10 00
For other privileges,	special rates."

4. The defendant is a municipal corporation incorporated under the Act of Assembly of April 3, 1851, P. L. 1851, p. 320, and supplies water to its inhabitants by virtue of the authority granted it in paragraph XX. of that act.

5. The rates fixed by the ordinances mentioned have not produced income sufficient to meet the expenses of operating and maintaining the plant, but on the other hand, the plant has been operated at a loss for the years 1901, 1902 and 1903.

Considerable testimony was taken upon the question of the correctness of the amounts charged for the water furnished to the houses, the plaintiff disputing the amounts upon the

ground that there was not the number of boarders in the houses as claimed by the defendant, but, under the view we take of the case, it is not necessary to decide this question.

The plaintiff contends that the schedule of rates fixed by the ordinance discriminates against boarding houses as compared with the rates charged other consumers of water in the borough and that the rates are excessive. He prays that inquiry be made into the charges for the water furnished to his houses, that the rates fixed in the ordinance be decreased, and that the ordinance under which they are made be declared invalid.

DISCUSSION.

It is manifest from the plaintiff's bill that the remedy which he seeks is that which is provided by the second proviso of clause 7 of section 34 of the Act of Assembly of April 29, 1874, (P. L. 1874, 95) which provides as follows: "And provided further, That the court of common pleas of the proper county shall have jurisdiction and power upon the bill or petition of any citizen using the gas or water of any of said companies to hear, inquire and determine as to the charges therefor for gas or water so furnished, and to decree that the said bill be dismissed, or that the charges shall be decreased, as to the said court may seem just and equitable, and to enforce obedience to their decrees by the usual process." We do not think that the act of 1874 was intended to embrace municipal corporations. The language of the proviso is "any of said companies." By its very terms it embraces only such corporations as are incorporated under it and which by another section are given the exclusive privilege to furnish water to the localities in which they operate. Although the exclusive privilege may now be taken away by the Acts of June 2, 1887, P. L. 1887, 310, and June 24, 1895, P. L. 1895, 267, it is obvious that the remedy given for unjust and excessive rates or charges was intended to prevent an abuse of the exclusive privilege granted. But a municipal corporation which furnishes water to its inhabitants, unlike a private corporation which is managed and controlled by comparatively few individuals and for solely private gain, is in the control of the electors of the municipality, and any abuse of its power in furnishing water or in imposing upon its consumers unequal or exorbitant rates may be remedied by a vote of the

people, changing the officers by whom the rates are fixed. The same reason which evidently prompted the legislature to supply a remedy in the case of a private corporation does not prevail in the case of a municipal corporation. It is clear from the terms of the proviso, as well as from the evident reason for the legislation, that a municipal corporation is not within its scope. However, even if the remedy provided by the proviso referred to be available against a municipal corporation, the plaintiff has not in our judgment established his right to relief in the present case. The defendant, like a private corporation subject to the proviso, would be entitled to charge for the water it furnishes such rates as will yield it a fair profit. As was said in Brymer *vs.* Butler Water Co., 179 Pa. 231: "Water companies are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable." As we have seen, the income of the defendant from the rates complained of has not been sufficient, during the past three years, to pay the cost or expense of operating its plant and the necessary betterments thereto. We cannot, under these circumstances, hold that the schedule of rates is unreasonable or excessive, and for this reason alone the bill, so far as it is intended to effect a decrease of the rates, cannot be sustained.

Nevertheless the plaintiff contends that the court has power, in the exercise of its general equitable jurisdiction, to give the relief here prayed for against the unjust discrimination and excessive charges for the water furnished to his houses. This would undoubtedly be so if he presented a case calling for equitable interference, but, as we view his case, he has not done so. The matters of which he complains, the unequal and excessive rates and the exorbitant charges for the use of the water in his houses, may be heard, considered and given their true weight when the defendant shall take steps to enforce the collection of the amount which is claimed from him. As we look upon the case, the plaintiff has failed to show anything which entitles him to equitable relief. It is no doubt true that the defendant, in as much as in furnishing water to its inhabitants it is not exercising a municipal

function, but in respect thereto is in the position of a private water company: Fund Society *vs.* Philadelphia, 31 Pa. 175; Wheeler *vs.* Philadelphia, 77 Pa. 338; Appeal of Grumm, 12 Atlantic Rep. 855; Girard Life Ins. Co. *vs.* Philadelphia, 88 Pa. 393; Smith *vs.* Philadelphia, 81 Pa. 38; Rieker *vs.* Lancaster City, 7 Super. Ct. 149, has no right to make arbitrary and discriminating rates for the water it furnishes, but is bound to treat all with reasonable equality. Yet we are not satisfied, after an examination of the ordinances which fix the water rates, that the defendant has unfairly discriminated against the plaintiff, or, in other words, that the rates fixed for boarding houses are unfair or unequal as compared with the rates fixed for other consumers of water in the borough. A comparison of the rates for dwelling houses and hotels with those for boarding houses will hardly show that there is any unreasonable discrimination against the latter. For private dwellings six dollars is charged for hydrant in yard and spigot in kitchen for one family, and for each additional spigot one dollar, and for each additional family four dollars, and for hotels fifteen dollars is charged for one or two hydrants or spigots with or without basins. In boarding houses the rate is six dollars for each five boarders or roomers or fraction thereof above the first five. No charge is made for use of water by boarders until they number more than five. In dwelling houses the rate is two dollars for each self-closing water closet and six dollars for not self-closing, while no charge is made for water closets for boarders in boarding houses unless the boarders number more than five, when a charge of two dollars is made for each five or fraction of five above the first five boarders. It will appear from this comparison that the first five boarders and the owner of the boarding house and his family may use the water for the same rate which each dwelling house containing one family pays, no liability attaching for the use of the water by boarders until they reach the number of six. And although as much is charged for one boarder as for five after the first five, yet for the first five nothing is charged. However this may be, it is evident there could be no fixed rate established for boarding houses, where the number of the occupants is constantly changing and the quantity of the water used continually varies, as there can be for a dwelling house, where the number using the water is more or less permanent. Under all the

evidence submitted in the case we cannot say that the rates fixed by the ordinance for boarding houses are discriminating or unfair, or that the method of computing the charges for the water furnished to them is capricious or arbitray. Upon the whole case we are satisfied that the bill must be dismissed.

CONCLUSIONS OF LAW.

We therefore conclude:

1. That a municipal corporation is not within the second proviso of the seventh clause of the thirty-fourth section of the Act of April 29, 1874.

2. That the plaintiff is not entitled to the remedy against the defendant provided by the proviso.

3. That the plaintiff has shown no ground for equitable interference.

Accordingly we direct the following decree to be entered *nisi* by the prothonotary:

And now, the.....day of July, A. D. 1905, this cause came on to be heard and was argued by counsel, and upon consideration thereof it is ordered, adjudged and decreed as follows, viz.: That the bill be dismissed at the cost of the plaintiff.

MONTHLY BALANCES OF DAIRY AND FOOD DIVISION, DEPARTMENT OF AGRICULTURE.

Dairy and Food Division of the Department of Agriculture —Payment of monthly balances into state treasury.

Under the general appropriation Act of 1905, the balance on hand to the credit of the Dairy and Food division of the Department of Agriculture, arising from licenses, fines and all other sources, except the appropriation made in said act, must, on the first day of each month, be paid into the state treasury for the use of the commonwealth; but all bills properly contracted, prior to that date, should be met out of moneys on hand, up to and including the last day of the month.

Attorney General's Department. Opinion to O. D. Schock, assistant Dairy and Food Commissioner.

Carson, Attorney General, July 18, 1905.

Replying to the request of the Hon. N. B. Critchfield, secretary of agriculture, presented to me through you, for an opinion as to the payments which should be lawfully made for services, material, etc., performed or delivered in May, 1905, out of the unexpended surplus remaining to the credit of the account of the Dairy & Food division, I answer that the matter is entirely covered by the proviso to the general appropriation act, which reads as follows:

"Provided, that all sums of money remaining on hand to the credit of the Dairy & Food division of the Department of Agriculture on the first day of June, 1905, and all sums of money which may be thereafter received by said division arising from licenses, fines and all other sources whatsoever, except this appropriation, shall, on the first of each and every month, be paid into the state treasury for the use of the commonwealth."

In my judgment no payments can be made except for such items as are included in the regular vouchers representing services, material, etc., performed or delivered during the month of May, 1905. The line must be drawn here and cannot be extended. The duty of turning over the balances attaches immediately after the first of June, 1905, but I am of opinion that any bills properly contracted by your department prior to that date can be, and should be met out of the moneys on hand up to and including the last day of May, 1905. Should any balance remain after making such payments, of course such balance should be turned over, but the balance existing on

the last day of May is certainly a proper fund out of which payments can properly be made for items of service or material arising out of contracts, either express or implied, which are made prior to that date. The act is explicit upon this point, and the matter needs no further discussion.

Form of Deed to State Live Stock Sanitary Board.

State Live Stock Sanitary Board—Form of deed for farm purchased for purpose of Board.

The deed for a farm purchased by the State Live Stock Sanitary Board, for the purpose of conducting research work, should convey the title from the grantor to the State Live Stock Sanitary Board, for the use of Commonwealth of Pennsylvania.

Attorney General's Department. Opinion to Leonard Pearson, Secretary of State Live Stock Sanitary Board.

Fleitz, Deputy Attorney General, July 19, 1905.

I am in receipt of your letter of recent date, in which you state that it is proposed by the State Live Stock Sanitary Board to purchase a farm for its use under authority conferred by the Act of Assembly, approved the 11th day of May, 1905, P. L. 516, for the purpose of conducting research work of the diseases of animals, and asking for an official opinion as to the form of the deed that should be used in this transaction.

I have given the matter special consideration and in view of the fact that the State Live Stock Sanitary Board is composed entirely of state officers who hold their positions on this board by reason of their official capacity in various other departments of the state government, I am of the opinion and advise you, that the deed for the said farm should convey the title from the grantor to "The State Live Stock Sanitary Board for the use of the Commonwealth of Pennsylvania."

Expenses of Game Commissioners.

Board of Game Commissioners—Payment of expenses of members—Acts of June 25, 1895, and May 21, 1901.

Under the Act of May 21, 1901, the members of the board of game commissioners may be paid their actual expenses incurred in the performance of their official duties out of the fund arising from penalties collected by the game protectors appointed by the board.

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

Fleitz, Deputy Attorney General, July 19, 1905.

I am in receipt of your letter of yesterday, in which you ask for an official opinion on your legal right to pay the actual expenses incurred in the performance of their official duties by members of the board of game commissioners, out of funds in your hands other than those appropriated by the Legislature for other specific purposes. I understand that you have a fund arising from penalties collected by game protectors appointed by your board, which may be expended by you for the use of the game commission.

I have made a careful examination of the acts of assembly covering this matter, and find that the Act of the 25th day of June, 1895, entitled "An act to provide for the appointment of game commissioners for the commonwealth of Pennsylvania, defining their duties and empowering them to appoint game protectors," contains the following language in the latter part of Section 4: "Provided, That no commissioner, protector or other officer, authorized by this act shall claim or receive any compensation for his services or for expenses incurred in the discharge of his duties." This standing alone and unmodified in any way by subsequent legislation, could bear no other construction than that no part of any money coming into your hands, either by appropriation made by the Legislature or otherwise could be used for the purposes therein set forth.

I find, however, that on the 21st day of May, A. D. 1901, Governor Stone approved an act entitled "A supplement to an act, entitled 'An act to provide for the appointment of game commissioners of the commonwealth of Pennsylvania, defining their duties and empowering them to appoint game protectors,' approved the twenty-fifth day of June, Anno Domini one

Expenses of Game Commissioners.

thousand eight hundred and ninety-five; extending the powers of said protectors, making disposition of fines received by them, and regulating their pay." Section 5 of said supplement reads as follows: "That the game protectors, so appointed, shall receive salary or pay per day, as may be agreed upon by the game commission, with expenses not to exceed two dollars per day outside of traveling expenses, said expense account to be itemized and presented under oath. All moneys coming to any game protector as his part of any fine or penalty, under existing law, wherein he is the prosecutor, shall belong to the game commission, and shall be surrendered by said protector to the secretary of the said commission for its use: Provided, That the combined expense account of the game commission shall not exceed the amount set apart by law to their use."

It is clear from this language that the legislature intended by this supplement to the Act of 1895 to provide for the pay of the game protectors and to create a fund from the fines or penalties collected which should belong to the game commission, and to be used in its discretion for the payment of expenses and generally carrying the law into effect. I am therefore of the opinion and advise you, that under the authority conferred by the Act of the 21st day of May, 1901, you have a right to pay the expenses of the game commission from this fund so collected and turned over to you by the several game protectors of the commonwealth. These expenses should be restricted, however, so as to include only such items as were made necessary in the performance of their official duties as members of the game commission.

APPROPRIATION FOR STATE HOSPITAL FOR THE INSANE AT NORRISTOWN.

Appropriations—Deviation from requirements of act—Act of May 11, 1905.

When an act of assembly making an appropiation for the construction of temporary wards to relieve the overcrowded condition of an insane hospital requires the construction of the buildings in accordance with plans and specifications mentioned in the act, and it afterwards develops that the buildings cannot be constrected in accordance with said plans and specifications within the appropriation made in the act, the trustees of the hospital may modify the plans to an extent sufficient to bring the cost of the buildings within the amount of the appropriation, if the buildings constructed in accordance with the modified plans substantially comply with the requirements of the act.

Only the gravity of the situation and the imperative necessity for the new buildings justified a deviation from the language of the act making the appropriation.

Attorney General's Department. Opinion to trustees of State hospital for the insane at Norristown.

Carson, Attorney General, July 21, 1905.

I have your letter written in behalf of the trustees of the State Hospital for the Insane for the Southeastern District of Pennsylvania at Norristown. You call my attention to the recent Act of Legislature, approved May 11, 1905, making an appropriation in the following language:

"For the purpose of erecting, completing and furnishing with all necessary equipment four temporary ward buildings, for the accommodation of the patients, in said hospital, now confined in corridors and other unsuitable quarters in the present hospital buildings; said temporary wards to be fireproof, one story in height, well lighted, properly heated and ventilated, with all modern sanitary appliances and arrangements, and according to plans and specifications now on file in the office of the auditor general the sum of seventy thousand dollars, or so much thereof as may be necessary, said sum to include all costs and expenses incident thereto; and that, in order that the needed relief may be available for the patients in said hospital in the shortest possible time, it is hereby directed that the contract for the above mentioned temporary wards shall be let within thirty days after the approval of this act."

Appropriation for State Hospital for the Insane at Norristown.

You state that in pursuance of this act the trustees advertised for bids for the construction of the buildings according to the plans mentioned in the statute; that these plans and specifications provided for a fire-proof building constructed of corrugated iron; that eight bids were received from responsible bidders, and all of them exceeded the appropriation by more than ten thousand dollars; and that the appropriation of seventy thousand dollars related to the furnishings and equipment, as well as the buildings, while the bids received were for the buildings alone; you state further that, after the bids were opened, and it was discovered that a contract could not be awarded on the plans provided for in the act, the architect revised his plans, substituting wood for corrugated iron, and making various other changes whereby the bids had been brought within the amount authorized by the Act of Assembly, and that there would be a sufficient margin to provide for the furnishing, if construction were made according to the revised plans. You state further that these plans departed widely from those that are referred to in the Act of Assembly, as on file in the auditor general's office, and further that it is impossible to construct and equip the building for the amount appropriated if the plans specified in the act shall be followed.

You ask whether the trustees would be justified in adopting the changed plans, whereby the cost could be brought within the amount of the appropriation, and you ask further whether, if the trustees are not justified in so doing, they have any duties whatever to perform under the act because of the insufficiency of the appropriation for the purpose specified.

I reply that this is a delicate question and only the gravity of the situation and the imperative necessity for new buildings would justify a deviation from the very explicit language of the act making the appropriation. A similar question has arisen at Danville, and in a conference with the trustees and the auditor general, held at this department last week, I suggested that the architect who drew the first plans, which are placed on file in the office of the auditor general, should be consulted, and that if he could prepare new plans providing for a practically fire-proof construction, consisting largely of concrete, and would certify that the amount of wood necessarily involved in said construction would not

interfere with the fire-proof character of the buildings, practically considered, then it would seem to me that the requirements of the act were substantially complied with. It must be borne in mind that the chief object sought to be remedied by this legislation is the scandalously crowded condition of these hospitals, and it would be sticking in the bark to deny relief to the unfortunate inmates because the appropriation made for this purpose proved to be inadequate to cover the expense of the buildings as originally planned. It must be observed that there is nothing whatever in the act which requires the buildings to be of corrugated iron. The main requirements are that the temporary wards shall be fire-proof, one story in height, well lighted, properly heated and ventilated, with all modern sanitary appliances and arrangements.

It is true that the further statement is made "according to plans and specifications now on file in the office of the auditor general," but to give a controlling operation to this portion of the statute would be to defeat the main purpose of the law. The statute must control the plan and not the plan the statute. The statute cannot be changed, the plan can be changed. The law certainly does not require the performance of the impossible, and there is a long line of decisions that where, for any reason, it is physically impossible to comply strictly with the directory part of a statute, that portion may be ignored so long as the primary intention of the legislature is carried out and a substantial compliance is practicable. Hence, in my opinion, the sensible and proper thing to do is to have the architect modify the plans, requiring him, however, to certify that, in his judgment, the new plan is of a practically fire-proof construction. This being so, the duty remains upon the trustees to carry out the terms of the statute so that its beneficient purpose may not be defeated.

In Estate of Jerome T. Barnitz, Deceased.

Wills—Advancements.

It is settled by abundant authority that a debt may, by a testator, be converted into an advancement, although the child from whose share in the decedent's estate the deduction is to be made, was not a party to it and had no knowledge of an intention to effect a coversion.

It is also well settled that a debt may be turned into an advancement, after the remedy for the debt is barred by the statute of limitations. All that is essential is that the intention to change be manifested by clear and positive evidence.

Testator's will provided inter alia as follows: "After the death of my said wife Mary H., or when my youngest child shall arrive at the age of twenty-one years, whichever event shall happen first, I order and direct that all my estate real and personal, not hereinbefore disposed of, shall be sold at public or private sale, as may be deemed best, and the proceeds arising therefrom, after my said wife Mary H. (if living) shall have received her dower interest according to law, shall be equally divided amongst all my children, (subject to such advancements as have been or shall be made to them or any of them)." In an account book kept by testator were several charges against one of his sons, after which were written in testator's handwriting "To be charged as part of his legacy." There were also found three notes signed by the son on the back of which were written in the testator's handwriting "To be charged as part of his legacy." There were no dates to these endorsements. *Held* upon exceptions to auditor's report, that the amounts charged in the book and the amounts of the notes were advancements.

Exceptions to Auditor's report. Orphans Court of Dauphin County.

Hargest & Hargest, for exceptions.

D. S. Seitz, contra.

Weiss, P. J. February 22, 1905.

Jerome T. Barnitz died testate September 12, 1902, and left surviving him a widow and seven children, one of whom, James D. Barnitz, is the contestant in this case.

His will is dated May 22, 1888, was probated September 20, 1902, and in it, among other clauses, after making provision for his wife, is contained as follows: "After the death of my said wife Mary H., or when my youngest child shall arrive at the age of twenty-one years, whichever event shall happen first, I order and direct that all my estate real and personal, not hereinbefore disposed of, shall be sold at public

or private sale, as may be deemed best, and the proceeds arising therefrom, after my said wife Mary H. (if living) shall have received her dower interest according to law, shall be equally divided amongst all my children, (subject to such advancements as have been or shall be made to them or any of them) as follows, James D. Barnitz, Elizabeth K., intermarried with John R. Shoemaker, Charles H. Barnitz, George P. Barnitz, Mary C. Barnitz, Alice B. Barnitz, and Latrobe M. Barnitz, share and share alike."

Among his effects was found a book labeled "Day Book", "J. T. Barnitz", on page 86 of which is written in the testator's hand-writing in pencil "1884", and in ink:

"James D. Barnitz Acct. Dr.

To five hundred dollars paid for support of child 500.00

1885

Feb. 5, Paid to M. Hodge (lawyer Akron) for Jim. 35.00

To be charged as part of his legacy $535.00

1897

April 19 Paid to J. D. B. on account to be charged as part of his legacy 100 00

and three notes of which the following are copies:

"Akron, O., Dec. 12, 1883.

$250.

One year after date I promise to pay to the order of J. T, Barnitz two hundred and fifty dollars at value received.

James D. Barnitz."

"Akron O.; Mch. 12th, 1884.

$150.

Ninety days after date I promise to pay to the order of J. T. Barnitz or order one hundred and fifty dollars at value received. Jas. D. Barnitz."

Due June 10th, 1884.

"Akron O.; June 10, 1884.

dols

Ninety after date I promise to pay to the order of J. T. Barnitz one hundred and fifty dollars at no interest.

Value received. Jas. D. Barnitz.

On the back of each of the three notes is written in ink and in the handwriting of the testator, the words:

"To be charged as part of his legacy".

There is no date to the indorsements on the notes, nor is there a date to the words set opposite to the charge in figures $535.00 in the day book "to be charged as part of his legacy", which words are apparently in the same ink as the entire entry of "1897 April 19", though different in the color of the ink from the rest of the entry on the stated page in the day book.

The words "to be charged as part of his legacy" bear no signature.

The testator died possessed of personal property and real estate, and at a conference had by the members of the family it was agreed that James D. Barnitz was to be paid a full share with the other children out of the personal effects and that the matter of the moneys charged, loaned or advanced to him should be adjusted or determined upon a distribution of the proceeds of the real estate.

The real estate was sold, an account presented to and confirmed by the court and an auditor appointed to make distribution of the balance in the hands of the executrix.

James D. Barnitz made claim for an allowance of a full distributive share without any deduction for the moneys received by him from his father during the latter's lifetime.

On behalf of the executrix of the will, it was claimed that the payments made by the father to his son were advancements and as such should be deducted from the distributive share otherwise awardable to the latter.

The auditor in his report deducted the sum of eleven hundred and eighty-five ($1185) dollars, which is the aggregate of the moneys received by James D. Barnitz from his father, from his distributive share, to which exceptions were filed and are now before us for consideration.

The day-book was at one time intended to charge the son James with an indebtedness, and the notes were in like manner evidences of indebtedness.

There was, however, entered in the book, as well as endorsed on each of the notes, by the testator, though unsigned, the statement "to be charged as part of his legacy". When this entry was made, and when the statements on the notes were written does not appear with any certainty.

It is reasonable to assume that the statements are not contemporaneous with the charge or charges in the book, nor with the dates of the notes. They were debts, and the writ-

ten statements whenever made, were manifestly intended to stamp upon the entries and the notes a different character. If they were thereby converted into advancements, there could not be thereafter a recovery upon them. It was an act of the testator complete and unchanged in his lifetime, whereby he divested himself of all property in the moneys theretofore or at some time theretofore recoverable, which was to take effect in possession after his death.

It is settled by abundant authority that a debt may, by a testator, be converted into an advancement, although the child from whose share in the decedent's estate the deduction is to be made, was not a party to it and had no knowledge of an intention to effect a conversion.

It is also well settled that a debt may be turned into an advancement, after the remedy for the debt is barred by the statute of limitations as this debt was at the time of the death of the testator. All that is essential is that the intention to change be manifesfed by clear and positive evidence.

In the case under consideration all the notes given by the son to the father bear date prior to the date of the execution of the will, and the entries in the day book, except that of April 19, 1897, wherein the father states that he paid to J. D. B., evidently intending his son, "on account to be charged as part of his legacy" $100., also antedate the will.

The endorsements and entries do not bear the signature of the father, and are not evidenced by the solemnities required in a will.

But the statements declare unmistakably that the relation of debtor and creditor was to cease and it follows that after their making them there could no longer be a recovery on the book account and the notes, even if at the time the statute of limitations could not have been invoked by the debtor. The statements or declarations made by the father were intended to effect a change, and the natural inference is that the change made in writing and in apt language, was intended to convert and did convert the debt into an advancement. If this is so, the amount received by the son from the father is deductible from the former's distributive share even if the father had died intestate.

The provision in the will that the proceeds of his property shall be equally divided amongst all the testator's children "subject to such advancements as have been or shall be made

to them or any of them" share and share alike, in view of the foregoing, frees the case from the objection urged by the claimant's counsel that he contemplated advancements, strictly speaking, and did not refer to specific debts changed by the terms of the will into advancements. If the written statements were made prior to the date of the will, the direction in the will is clear. If they were made after the date of the will, they were none the less advancements and attach under the language "as have been or shall be made".

It must be taken that the declarations in the day book and on the notes "to be charged as part of his legacy" together with the provisions in the will, constitute a charge against the distributive share of James D. Barnitz.

The ground upon which this case must rest is upon the direction by the testator in his last will that the proceeds of his property shall be equally divided among all his children subject to any advancement made to any child or children at the time of its execution or thereafter to be made, and upon the declarations made in writing by him in his day book and endorsed on the notes unrevoked, that the debts theretofore owing by his son James D. Barnitz shall be charged against his legacy by which term was intended his distributive share in the estate of his father.

The exceptions taken to the report of the auditor, all of which relate to this subject-matter, must be dismissed, and the report confirmed, which is accordingly done.

FISH BASKETS.

Fish baskets—License to maintain for the purpose of taking eels—Act of April 27, 1903.

Under the Act of April 27, 1903, P. L. 319, a license to operate a fish basket with wing walls for the purpose of taking eels confers that privilege only on the person named in the license, and that person alone has the right and authority to operate a fish basket constructed in accordance with the law.

The discretionary power of the Commissioner of Fisheries in matters of this kind is broad enough to permit him to deviate from the strict letter of the law in individual cases where such a construction would work a manifest hardship to an honest holder of a license, who might, for some unforeseen reason, such as a temporary physical disability, find it necessary to have assistance in fishing the basket, or to have work done temporarily by some one else under his direction and authority, but in all such cases the written permission of the department should first be applied for and obtained.

Attorney General's Department. Opinion to W. E. Meehan, Commissioner of Fisheries.

FLEITZ, Deputy Attorney General, September 27, 1905.

I have before me your letter of recent date, in which you ask to be officially advised whether the license to operate a fish basket with wing walls for the purpose of taking eels, under the provisions of the act of April 27th, 1903 (P. L. 319,) is to be considered as a privilege granted to a particular person or a permit issued for the use of a specific apparatus; in other words whether it is the person or the thing to be operated which is licensed by the state.

In order to arrive at a proper conclusion, it is necessary for us to consider the language of the act so that the intention of the legislature may be understood. The law distinctly provides that the license is to be issued to a person who must be a citizen of this commonwealth; that the written application made to the department for the granting of the license must bear "the name and place of residence of such applicant and his description as near as may be"; and that the said certificate or license when issued, "shall authorize the owner thereof to take eels from the waters of this commonwealth as provided in the first section of this act. Said certificate or license shall not be transferable, and shall be exposed for examination upon demand."

In the light of this language it is perfectly clear that the intention of the legislature was to permit eels to be taken in this manner by certain persons duly licensed by the department, under certain restrictions and regulations named in the act. It is equally clear, and I therefore advise you, that the right granted by the license can be enjoyed only by the person named therein, and that this person alone has the right and authority to operate a fish basket constructed in accordance with the law.

"I desire, however, to advise you further that your discreationary power in matters of this kind is broad enough to permit you to deviate from the strict letter of the law in individual cases where such a construction would work a manifest hardship to an honest holder of a license, who might, for some unforseen reason such as a temporary physical disability, find it necessary to have assistance in fishing the basket, or to have work done temporarily by some one else under his direction and authority, but in all such cases the written permission of your department should first be applied for and obtained.

Fish Baskets.

Fish baskets—Moveable bottom—Width between slats—Act of April 27, 1903.

Under the Act of April 27, 1903, P. L. 319, the entire bottom of a fish basket used for taking eels must be removable, and must be taken out at sunrise and kept out until sunset.

The half-inch space between the slats, required by the act, must exist at all times, without regard to the space left when the basket was constructed, or the subsequent effect of the action of the water upon it.

Attorney General's Department. Opinion to W. E. Meehan, Commissioner of Fisheries.

Fleitz, Deputy Attorney General, September 27, 1905.

I have before me your communication of the 20th inst., asking for an official opinion upon several questions which have arisen in regard to the proper legal construction to be placed upon the language of the first section of the act of April 27, 1903 (P. L. 319,) which reads as follows:

"That from and after the passage of this act, it shall be

lawful to catch eels in the waters of this commonwealth, by use of fish baskets with wing walls; provided, that every basket so used shall be made of slats not less than one-half inch apart, with a moveable bottom which shall be taken out of each basket so used at sunrise and be kept out until sunset; and no basket shall be used or operated for the taking or catching of eels, excepting from the twenty-fifth day of August to the first day of December in each year; provided, that the penalty for using said basket at any other time, or in any other manner than is authorized by this act, and for catching and taking any other fish than eels from the streams or waters of this commonwealth by the use of such baskets, shall remain as heretofore."

You asked to be advised on these two points:

1. Whether the words "with a moveable bottom, which shall be taken out of each basket so used" mean that the entire bottom of the falls must be taken out or only a portion thereof.

2. Whether the words "That every basket so used shall be made of slats not less than one-half inch apart" mean that this space shall be determined at the time the basket is constructed or after it has been placed in position to be fished, and after the wood is swollen by contact with the water.

In reply to the first question I beg to say that, giving the words used by the legislature their proper meaning, it is obvious that the word "bottom" means the entire bottom and not a portion thereof. I therefore advise you that, to comply with the letter and the spirit of the act, the entire bottom of the fall must be removable and taken out, in accordance with the provision of the law, at sunrise and kept out until sunset.

In regard to your second question, the evident intention of the legislature was to provide for a space of not less than one-half inch between the slats in the basket while the same was being fished, in order that small fish drawn into the basket should have proper means of escape. It therefore follows that the space provided by the act, to wit: one-half inch between the slats, must be preserved at all times without regard to the space between the slats at the time the basket was constructed; otherwise, any person charged with a violation of the law in this regard might set up the plea, that, at the time the basket was constructed, a sufficient space had

been left to comply with the requirements, but that by continued exposure to the water the wood had become swollen and the space correspondingly decreased. I am therefore of the opinion, and advise you, that the half-inch space between the slats provided for by the act must exist at all times. Any deviation therefrom constitutes an offense which should be properly and promptly punished.

IN THE MATTER OF OBJECTIONS TO CERTIFICATE OF NOMINATIONS NOMINATING W. W. WALLOWER AS COUNTY COMMISSIONER; RUDOLPH K. SPICER AS RECORDER; JOHN J. NOLL AS REGISTER; JAMES H. NOVINGER AS DIRECTOR OF THE POOR; AND L. W. HOOVER AS AUDITOR, AS THE CANDIDATES OF THE DEMOCRATIC PARTY OF DAUPHIN COUNTY.

Nomination of candidates—Party rules—Ratification of irregular changes.

The members of a political party can, of their own accord, assemble and ordain or change any rules, or ratify any proposed rules not in violation of statute law or public policy. Such action would be the highest expression of the party's will and, by whatever proper means assembled, would be the sovereign act of the party.

Nominations made by the collective body of a political party would be valid.

If a county committee has proceeded in accordance with party rules in making important changes in party government, it requires a repudiation by the voters to nulify its action.

If, in an effort to change the rules, important requirements of the rules have not been observed, it requires an affirmative majority vote to give sanction to the action.

The county committee of the Democratic party of Dauphin county changed the method of making party nominations from the delegate system to the direct vote or primary election system. In making this change, the party rules governing such changes were not strictly followed. Notice of the time of holding the primary election was given by the county chairman, and three thousand three hundred and thirty-six votes were cast for the different candidates. The candidates receiving the largest number of votes, were duly certified as the nominees of the Democratic party. Objections were filed on the ground that the change in the method of nominating candidates had not been made in accordance with the rules of the party. *Held*, that the action of the voters at the primary election was not a ratification of the new rules,

but the exercise by them of the power to make party nominations, and that the certificates of the nominations thus made were valid.

Objections to certificates of nomination. C. P. Dauphin County, No. 395, September term, 1905.

James A. Stranahan and *Charles B. McConkey*, for objections.

Snodgrass & Snodgrass and *Wm. K. Myers*, contra.

Weiss, P. J., September 27, 1905.

A certificate was filed in the office of the County Commissioners of Dauphin County August 7, 1905, which declared that William W. Wallower was nominated by the Democratic Party of the county for County Commissioner; Rudolph K. Spicer for Recorder of Deeds and Clerk of the Orphans' Court; John J. Noll for the office of Register of Wills; James H. Novinger for that of Director of the Poor; and L. W. Hoover for County Auditor. An amended certificate of nomination was filed in the same office September 6, 1905.

Objections were filed August 22, 1905, to the nomination certificates of the stated nominees, which on September 12, 1905, were heard and submitted for determination.

The rules of the Democratic party of the county, in force prior to 1905, provide, among other things, that they "may be repealed or amended by a majority vote of the members of the Democratic county committee at a meeting called for the purpose of considering such repeal or amendment, but no amendment or motion to repeal or alter these rules shall be acted upon by the committee for at least one month after it has been presented to said committee, at a regular or special meeting, due notice of all regular or special meetings being given by the chairman to each member at his post-office address and by publication in at least one newspaper in Harrisburg." They also require the presence of "at least a majority of the members" of the county committee to make amendments to the rules; that five days' personal notice be given by the chairman to the members of the county committee "and ten days' publication in one newspaper" of all meetings, and that "the county convention shall be held at such time as directed by the county committee" which is composed of one person from each election district and is the governing body.

The method by which nominations of candidates for

county offices were made was by what is sometimes called the delegate system.

A change in the method of nominating candidates was discussed and desired by most of those actively interested in the management of the party's affairs, and at a meeting of the county committee held April 3, 1905, amendments to the rules were proposed by one who held a proxy and entitled, as he says, to sit in that meeting only, but not acted upon, which were on motion referred to a sub-committee of three, which was authorized and empowered to report a code of rules at a subsequent meeting not earlier than one month thereafter. Some weeks later the committee of three was appointed by the chairman, one of which was the member sitting in the April meeting by proxy. Proposed amendments were to be in the possession of the county committee for consideration one month before, and for intelligent, action.

A meeting of the county committee was held May 17, 1905, at which a majority of the members were present, whereat a report of the committee of three, unsigned by one through no omission by him, was presented which contemplated a change from the delegate system to the primary or direct vote method of making nominations for county offices.

A motion to adopt the proposed amendment begat considerable opposition by reason of the infraction of the rule that they may not be acted upon by the committee until the expiration of one month from their presentation.

But the advocates had evidently made accurate calculation as to the probable result, and the motion to adopt the reported amendments was declared carried.

The complement of the county committee is one hundred (100). There were at that time twelve vacancies and present at the meeting of May 17, a few more than fifty persons entitled to seats in the committee, and acting.

Whether called amendments or a code of rules, they constitute a fairly complete chart for the government of the political affairs of the party. They direct that two weeks' notice of the time fixed for holding the primary election shall be published in at least one of the Harrisburg daily papers and provide for a return of the vote to be presented at a meeting of the county committee for the purpose of counting the votes returned and issuing certificates of nomination to the chosen nominees.

A call was issued by the chairman in a newspaper of general, circulation, July 22, 1905, which designated August 5, 1905, for holding the Democratic primaries, and gave directions respecting the returns and computation. He also prepared precepts for the members of the committee to make known to the Democratic voters the time and place for holding the primary elections, the purpose, and the fact that voting will be direct for the candidates, together with instructions to the county committeemen defining their duties.

The notices were sent out on Monday preceding the primary election and the tickets on Wednesday preceding August 5.

The question raised for decision is the validity of the nominations made after the changed rules were adopted by the county committee on May 17, 1905. They were adopted at the meeting held that day, notwithstanding the rule theretofore in force which required that a motion to repeal or alter the rules shall not "be acted upon by the committee for at least one month after it has been presented to said committee at a regular or special meeting," due notice whereof was to be given by the chairman to the members of the committee.

It must be assumed that the Democratic party of Dauphin county, through properly constituted agencies, adopted the rules governing its affairs prior to May 17, 1905. By those rules the county committee became the governing body and was charged with the duty of organization and with the management and conduct of its fortunes. Authority was given to that committee to "repeal or alter" the rules in the manner prescribed.

The committee acted in disregard of the rules called into being by the Democratic party, in making or attempting to make a radical change in the method of nominating candidates for the county offices, and if this were the only feature presented for consideration, it would probably be the duty of a court to decide that the amendments or code of rules were not properly adopted.

At the meeting of the committee on April 3, 1905, Dennis McCarthy was unanimously elected chairman and O. C. Bender and Aaron F. Klugh in like manner secretaries of the county committee, for the ensuing year.

Whether authoritatively acting in his capacity as chairman, or as an individual, McCarthy invited the Democratic

voters of the county to assemble on August 5, and make nominations for county offices by ballot, in which he stated that the candidate receiving the greater number of votes should be declared the nominee for the designated office and that the returns were to be computed on August 5, 1905.

This communication, published at least ten days before the day fixed for the primary election, afforded intelligence to the Democratic voters which enabled them to act or decline to act in conformity with the call, and to determine whether they desired to make nominations by a direct vote.

At the time named three thousand three hundred and thirty-six (3336) votes were cast for the various candidates, which was not as great in number by many votes as were cast at some general elections by the Democratic voters of the county.

It was however generally understood that a direct vote for the candidates could be cast, and there is no testimony that any votes were cast against the proposed change. There is nothing shown by the testimony to indicate an absence of knowledge on the part of the voters respecting the fact that a primary election would be held on a certain day or that the subject matter to be acted upon was not fully understood. The voters appeared in sufficient numbers throughout the different districts in the county to invite the conclusion that they did know.

It is manifest that the body of Democratic voters could of their own accord assemble and ordain or change any rules or ratify any proposed rules, not violative of statute law or public policy, and nominations made by such collective body would be valid. Indeed that would be the highest expression of the party's will. By whatever proper means assembled, that would be the sovereign act of the party.

The Democratic party knew, or had fairly ample means of knowing, that its followers could meet at a fixed time and make choice by means of a ballot, of the candidates preferred for nomination. All the intending voters of the Democratic party of the county did so meet on the same day at well known places, and determined by "the highest in vote" the nominees for the offices to be voted for at the November election.

It is undoubted that if the county committee had proceeded according to the rules in the matter of making impor-

tant changes it would have required a repudiation or an undoing by the voters to nullify the validity of the action.

This is so because the committee was entrusted with the power to repeal or amend the rules. When it is made to appear that in an effort to change the rules important requisites of the rules were unobserved, it required an affirmative majority vote by the members of the party to give sanction to nominations.

What the voters did was not so much a ratification of the projected new rules, as it was the exercise by them of the supreme power which resided in them to make party nominations.

It may be that the action of the county committee of May 17, deprived some of those interested in the party, from acquiring the knowledge intended to be conveyed under the old rules by the required lying over for a period of one month of proposed changes in the rules.

Scant facilities were afforded the electors to vote otherwise than what they did.

But what is more significant, they had knowledge derived from the published call and the tickets, and otherwise disseminated, and at some inconvenience and pains they could readily have voted in accordance with their otherwise actual preferences.

The powers of the county committee are circumscribed by the rules; those of the voting body by the law. Within the rules the committee is all potent. Within the law the members of the party are all powerful.

There was not only no protest against the holding of a primary election on August 5, but a general acquiescence and participation in it by members of the Democratic party, and this action must be accepted as a waiver of any irregularity in calling it or its results.

The objectors do not show us that the result of the election would or might have been changed, if the electors of districts in which there were no committeemen or in which no elections were held, had full knowledge by publication or otherwise of the holding of the primary election, nor that there is complaint by the electors of such districts.

The proceedings of probably the majority of the committee from April 3, were characterized by a disregard of prescribed methods, which to say the least, does not merit com-

mendation. Actual turbulence was indeed absent, and it is the fact that an election was held in which the large body of Democratic electors participated, and of the purpose of which they had knowledge and by their votes sanctioned, that imparts verity to their action.

It is not necessary to declare that the rules adopted at the meeting of the committee on May 17, are invalid.

What we do decide is that the nominations made by the voters of the Democratic party at the primary election held August 5, 1905, were made by competent authority, and that the certificate of nominations, though made by persons who were also chairman and secretaries under the rules in force April 3, was duly executed; and this because nominations certified in substantial compliance with law and expressive of the will and action of the highest electoral body ought to receive countenance in a court.

Returns of the primary election held in accordance with the published request of July 22 and July 24, were presented at a meeting of the Democratic county committee August 7, 1905, and by or before that body computed, the officers of which were by the members of that committee "directed to certify their nominations to the proper authority." The nominations designated in the minutes of that meeting were those of county commissioner, recorder, register, director of the poor, and auditor.

There was thus a county committee in undisputed existence, elected on April 3, 1905, for one year ensuing, which, computed the votes cast August 5, and the proper officers of which, namely the chairman and secretaries, were directed to certify the nominations made, who observed the injunction.

There is thus a lawful nominating body and a properly constituted certifying body, and while there were marked irregularities, a careful review of the facts requires us to adjudge the certificate of nominations valid.

The prothonotary is directed to certify this judgment to the commissioners of the county of Dauphin.

In the Estate of Mary Hocker, Late of the Borough of Steelton, Pennsylvania, Deceased.

When an aged woman has lived with her married sister for ten years, as a member of the family, there can be no recovery for boarding, lodging, washing and care, for the six years immediately preceding her death, in the absence of an express contract.

Statements made by the decedent that she would make a will in favor of her sister, so that she should have something for the work she had done for her, that her sister had done much for her and had taken care of her, that she did not want her sister to get nothing for her trouble, are not sufficient to support a claim by the sister for payment for the services thus rendered out of the estate of the decedent.

Decedent lived with her married sister for ten years. During that time she did chores about the house, but devoted most of her time to piecing quilts, the materials for which she purchased and paid for. She occupied a room on the second floor as a sleeping apartment, and had some articles stored on the third story. She took her meals with the family, did some marketing and at times looked after the children. She was nearly seventy years of age when she died, and was a person of simple habits and few needs. She left an estate valued at $4,500. The sister presented a claim for $3,120 for boarding, washing, lodging and care for six years immediately preceding her death. *Held*, on exceptions to the report of an auditor who had disallowed the claim, that a family relation was intended to be, and was established, and that the claim was properly disallowed.

Exceptions to Auditor's Report. Orphans' Court of Dauphin County.

R. W. Woods, for exceptions.

S. H. Zimmerman, contra.

Weiss, P. J., October 12, 1905.

Mary Hocker died at the home of her sister, Annie Longnecker and her husband, William Longnecker, in Steelton, April 10, 1903. She died intestate and was unmarried. She was living with her mother in the village of Oberlin until the mother died in 1892, when she brought with her to the house of her sister a bedstead, a few chairs, a carpet, and probably other articles of furniture, all of insignificant value. Her estate amounted to about four thousand five hundred ($4,500.00) dollars, and the balance for distribution according to a statement of amount reported by the auditor upon agreement, was three thousand nine hundred eleven and seventy-nine one-hundredth ($3911.79) dollars. Claim is made upon

the fund in the hands of John Hocker, administrator of the goods, etc., as follows:

"To William Longnecker and Annie Longnecker, now for the use of Annie Longnecker,

To boarding, washing, lodging, and care of Mary Hocker, deceased, for six years immediately prior to her death at $10.00 per week, ... $3120.00."

Brothers and sisters, in all seven, survived her, one of whom, Adam Hocker, died since, who left surviving him six children.

She lived at the house of her sister ten years, and during that time she did chores in and about the house, but devoted most of her time to piecing and patching quilts, the material for which she purchased and paid for.

She occupied a room on the second floor as a sleeping apartment, had some articles which she prized stored on the third story, and sat on the first story during working hours, engaged mostly in quilting. She took her meals with the Longnecker family, did some little marketing, looked after the children at times, and generally pottered about the premises.

She was nearly seventy years old when she died, and was a person of simple habits and few needs. The decedent and Annie Longnecker were decended from the same ancestor, and their manner of living together has all the indicia of a family arrangement. The trend of the testimony—that which instructs the understanding and moulds the judgment—leads irresistibly to the conclusion that the family relation was intended to be, and was, established. No presumption arises from the fact that Mary Hocker and Annie Longnecker were sisters, that the latter may not recover. Being sisters, they lived together under the same roof, ate at the same table, and demeaned themselves towards each other as members of the same family.

It must accordingly be found that Mary Hocker came to live with her sister, Annie Longnecker, not in the relation of one who was intended or expected to pay for board, lodging, or care, but that she lived with Annie Longnecker on the footing of a member of the family, and continued that relationship until the time of her death.

It follows that Annie Longnecker is not entitled to receive any part of the fund for distribution by reason of the

claim she has presented to the auditor for allowance.

There was no contract made at the time Mary Hocker came to live with her sister that she should make payment for any necessaries furnished, or attention bestowed.

She was ailing and taking medicine at times, was confined to the house and bed during several sicknesses, and was bedfast a few days during her last illness. The care and nursing given her by Annie Longnecker, were such as would naturally appeal to members of a family, and would be discharged as kindly services, or prompted by the laws of hospitality,—such as friendly neighbors might gladly do.

If appreciable services had been rendered, and family relations had not existed, or there had been an engagement to pay, recovery might be had according to the terms of the contract or the value of the services. Usually an implied promise to compensate for services rendered is raised. But no such promise is implied from services rendered by and among those living together as a family.

It must also be noted that during the time Mary Hocker had shelter at the house of her sister, no demand was made by her or her husband for payment of board, rent, or services. It is said in Keeley's Estate, 6 Dist. Repts., 685, that "claims which, though on their face accruing for years, are not presented as legal demands until alter the death of the alleged debtor, come before the court discredited by the claimant's own acts, and every intendment will be made against them."

After stating in Neal's Executors *vs.* Gilmore, 79 Pa. 427, that "nothing is better settled than that while the performance of labor by one for another, raises an implied assumption to compensate, yet this implication may be rebutted by proof of circumstances showing such a relation between the parties as repels the idea of a contract," the opinion of the supreme court proceeds in this language: "In cases of this character—claims against the estates of decedents for services rendered by members of their family, it is important that the reins should be held by courts with a firm and steady hand."

In Malcontier's Estate, 16 Phila. Repts., 369, the law is again aptly stated: "The claim of the exceptant is clearly within the class always regarded by the courts with suspicion, and never allowed except upon full and satisfactory proof, that the relation of debtor and creditor was intended by the parties, and upon that understanding the services were ren-

dered by the one and accepted by the other. If that be shown, then the law will imply a contract to pay a reasonable compensation. But if it be not shown, then a contrary presumption arises, and the claim will be rejected as an 'after-thought.' That appears to be the case in the present instance."

The decedent was known to have a goodly estate, and doubtless was crusty at times. Nothing was said about remuneration. It may have been entertained, and probably hoped that, notwithstanding Mary Hocker may have been queer, she would remember her sister in the disposition of her property. Disappointment is not a synonym for a promise, and "after-thought" is not the equivalent of fore-thought. Nor does the claim derive support from what Mrs. Cumbler, her sister, testifies. Mary Hocker told the witness several years before she died "that she would make a will for me and Annie, so that Annie should have something for the labor and work Annie had done for her." * * * * * "And when I took her interest money out she often said to me she wants me to settle up her affairs, so that Annie will get something, that Annie does much for her and takes care of her." * * * * * "She did not want Annie, of course, not to have anything for the trouble; then she said you bury me, buy me a tombstone and give Annie some, and what is left divide between all the brothers and sisters living."

In Neal's Executors, 79 Pa. 427, the plaintiffs stated that if the defendants "would stay until they were of age" * * * * they "at their death would give them what they had." It was held that this was a mere declaration of intention and had "none of the marks of a contract."

The law relating to this subject has been wisely and repeatedly settled and it would be useless to cite further authorities.

It is sufficient to conclude that the facts found by the auditor, are warranted by the testimony, and that he is abundantly sustained by the authorities in his conclusions of law. The exceptions filed to the auditor's report are accordingly overruled, and the report is confirmed.

IN RE RENEWAL COMMISSION CONTRACTS OF SECURITY LIFE AND ANNUITY COMPANY OF AMERICA.

Life insurance—Renewal commission contracts—Discrimination between insurants of same class—Acts of May 7, 1889, and July 2, 1895.

Contracts between life insurance companies and certain classes of insurants designated as "advisory boards" and "special advisers," by which such insurants receive commissions or advantages not given to other insurants of equal expectation of life, violate the Act of May 7, 1889, P. L. 116, as amended by the Act July 2, 1895, P. L. 430.

The yearly renewal commission contract of the Security Life and Annuity Company of America, the yearly renewal commission contracts of the Bankers' Life Insurance Company of the city of New York and the special adviser's contracts of the State Life Insurance Company of Indiana violate the Act of May 7, 1889, as amended by the Act of July 2, 1895.

Attorney General's Department. Opinion to Israel W. Durham, Insurance Commissioner.

CARSON, Attorney General, December 11, 1903.

I have examined the copies of the yearly renewal contracts, the special adviser's contract and the application for appointment as special adviser, which you sent me, and I have considered in connection therewith the act of May 7, 1889 (P. L. 116), and the amendments thereto, approved July 2, 1895 (P. L. 430). I am of opinion that the contracts referred to are in substantial violation of the above acts, because they discriminate in favor of individuals, between insurants of the same class and equal expectations of life, in the amount or payment of premium or rates charged for policies, and special favors, benefits, considerations and inducements not specified in the policy contract of insurance. The inequality of the terms and conditions of the contracts, so coupled with policies of insurance, are quite apparent, and, in my judgment, are improper under the law.

To reach this conclusion it is but necessary to compare the provisions of the contracts with those of the statute. The yearly renewal commission contract of the Security Life and Annuity Company of America, with an office in Philadelphia, after reciting that the company has the good will and favorable influence of many of the leading business men of the country, and, that, to extend the benefits and advantages

of the company and to further increase its business throughout the United States, an advisory board shall be composed of well-known citizens whose good will and favorable influence shall be a considerable factor in sustaining the present high standing of the company, provides that, in consideration of the foregoing and the continued favorable influence, good will and assistance in building up the company of the holder of the certificate, the company, to compensate the person therein named for his services, agrees to create from its expense appropriation a special renewal commission fund each year during the succeeding forty years, based on the number of thousands of dollars of insurance which the company shall have in force in the United States on the 30th day of June of each year, and which was issued during the ten years between July 1, 1903, and June 30, 1913, both inclusive.

The company further agrees to appoint not to exceed four hundred members of said board, and in the event of any such member forfeiting his membership therein his place will not be filled, but the number of persons who shall thereafter be considered as members of said board shall thereby to that extent be forever decreased. On June 30, 1904, and annually thereafter, during the period of the forty years mentioned above, the company shall determine the number of thousands of dollars of such insurance then in force; also the number of members then remaining in said board; and each member shall at all times be entitled to representation in said board in each distribution of funds in the proportion of one unit to each one thousand dollars of insurance (and proportionately for other amounts) upon which he has caused the company to receive the regular premiums, and for the number of units written in the contract. Within sixty days from June 30, 1904, and annually thereafter, during the period specified above, and during the continuance of the contract A B of .....shall each year be paid such sum of money as shall be obtained by dividing an amount equal to twenty-five cents for each one thousand dollars of said insurance then remaining in force by the total number of units represented by the then persistent members of said board, and by then multiplying the quotient thus obtained by the number of units of representation to which the holder of the certificate shall be entitled in each distribution of funds in which he shall participate, less any agent's license fee paid by the company for

the holder of this contract; this payment being his compensation for his assistance in securing and retaining on the books of the company the insurance on which the amount of said fund is based. This yearly renewal contract is issued and will remain in force upon the two following conditions, which are agreed to by the holder thereof: First, that the person therein named shall annually furnish to the company, upon its request, the names of ten people, residents of his county, whom he deems insurable; second, that he shall cause the company to receive the regular premiums on an amount of insurance aggregating at least.....thousand dollars. Should the person named in the certificate die or fail to comply with either of the above two conditions, then it may be construed that he has ceased to give the company the benefit of his influence, good will and assistance, required under the contract as a consideration for which payments are to be made thereunder, and the company may then cancel the agreement and discontinue further payments to him thereunder.

The yearly renewal commission contract issued by the Bankers' Life Insurance Company of the city of New York is similar in form and substance to that just analyzed, except that it boasted of its possession of the good will and influence of leading bankers in and around the city of New York, and then proposed to appoint an advisory board of five hundred Pennsylvanians without regard to their fitness or knowledge as life insurance agents, upon terms of like injustice to other policy holders.

The same vicious features of preference and inequality appear in the application for appointment as special adviser, and the special adviser's contracts issued by the State Life Insurance Company of Indianapolis, Ind., except that the agent, while agreeing to maintain in force a certain amount of insurance placed through his efforts, is not required, as a condition of his appointment, to take a policy on his own life. There is nothing, however, to prevent him from doing so if he so wills it. The temptation is strong that he will. There is nothing attractive in it to a "leading" business man who knows nothing of the calling of soliciting life insurance, and to whom the compensation as agent, pure and simple, would be but meager, unless it be the feature of endeavoring by this means to scale down the cost of his own personal insurance.

It remains but to quote the provisions of the act of 7th of May, A. D. 1889 (P. L. 116), as amended by the act of 2d o July, 1895 (P. L. 430). The act provides:

> "That no life insurance company doing business in Pennsylvania shall make or permit any distinction or discrimination in favor of individuals, between insurants of the same class and equal expectations of life, in the amount or payment or premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes, nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract, other than as plainly expressed in the policy issued thereon, nor shall any such company or agent pay or allow, or offer to pay or allow nor shall any insurant receive directly or indirectly, as inducements to insurance, any rebate or premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance."

Severe penalties are prescribed for violations of the act. The company, as well as its agent or agents, or any person violating the foregoing provisions of the law, shall be guilty of a misdemeanor and upon conviction shall be sentenced to pay a fine of $500 on each and every violation, where the amount of insurance is $25,000 or less, and for every additional $25 000 insurance or less there shall be an additional penalty of $500, and the offender or offenders so convicted shall thereupon be disqualified from acting as life insurance agents for the period of three years thereafter, and the fine or fines shall be collected as fines are by law collectible, one-half to be paid to the informer and one-half to the county treasurer for the benefit of the common school fund in the county where the offense is so committed.

It cannot be successfully contended that the foregoing contracts are bona fide contracts of agency. There is no specified commission; there is no selection because of the special fitness or knowledge of the agents so chosen. It would be difficult to determine whether there was any mutu-

ality in the contract and whether, if broken on either side, the damages would be susceptible of accurate ascertainment. It cannot be doubted that the members of these so-called advisory boards, which are never called together and never intended to be called together, selected not because of their special skill or knowledge as solicitors of life insurance, but because of their alleged "influence," "good will and assistance" as business men of repute in helping the company by naming other citizens of their district deemed to be insurable, but who will not and cannot share the benefits, valuable considerations and inducements to activity conferred by the certificate of appointment, are in the receipt of that which is not specified in the policy contract of insurance, and constitute by themselves a favored class, receiving for services so vague as to be incapable of definition a distinct pecuniary reward, which in effect, reduces the cost of their own insurance, and places all those who may be induced to insure through their efforts, but who cannot enter the favored class, at an appreciable disadvantage as the result of discrimination against them.

The only decisions of a court of last resort which I have been able to find are those of the State of Michigan. In the case of the State Life Insurance Company *vs* Strong, 127, Mich., 346, the Supreme Court, affirming a decision of the court below, and in disposing of the contention of counsel that the contract of insurance was separate and distinct from the advisory representative contract, said: "We are of opinion that they were both a part of one transaction.....and within the prohibition of the statute."

Subsequently, in mandamus proceedings against the Insurance Commissioner, 128 Mich. 85., the court sustained the commissioner in holding that a general statute, forbidding discrimination among insurants, applied alike to assessment and legal reserve associations.

The decisions are in the line of the rulings of the Attorneys General and the Insurance Commissioners of several states, and are a safe guide for you to follow.

In re Executive Agents' Application Mutual Reserve Life Insurance Company.

Life insurance—Acts of May 7, 1889, and July 2, 1895.

The special renewal contract, referred to in the Executive Agents' Application of the Mutual Reserve Life Insurance Company. violates the Act of May 7, 1889, as amended by the Act of July 2, 1895, P. L. 430, in that it extends certain benefits and favors to a special class of policy holders not enjoyed by the policy holders at large,

Attorney General's Department. Opinion to David Martin, Insurance Commissioner.

Carson, Attorney General, October 19, 1905.

I have examined the form of Executive Agents' Application to Mutual Reserve Life Insurance Company, and also the Special Renewal Contract which constitutes a part of the application, inasmuch as it is expressly referred to in the first paper in such a manner as to incorporate its provisions therewith.

I am of opinion that these papers differ in no material respect from the Yearly Renewal Contract passed upon by me in my opinion addressed to the Hon. Israel W. Durham, Insurance Commissioner, under date of December 11th, 1903, and published in the volume of Official Opinions of the Attorney General, 1903-4, page 192 (*8 Dauphin County Reporter, 182*). In that opinion I held that such contracts were in violation of the Act of May 7, 1889 (P. L. 116), and its amendment by Act of July 2, 1895 (P. L. 430), because they discriminate in favor of individuals.

It is noticeable that in Article III of the Special Renewal Contract of The Mutual Reserve Life Insurance Company there is a provision which makes the feature of assurance on the life of the agent a vital one, and it is this feature which stamps the matter as containing more that a mere agent's contract, and converts it into an effort to secure business by extending certain benefits and favors to a special class of policy holders which are not enjoyed by policy holders at large. These features are vicious and illegal, and vitiate the contract. It is not necessary for me to add anything to the reasons which I set forth in the opinion to which I have referred.

Support of Indigent Persons During Quarantine.

Responsibility of poor directors and county commissioners—Support of indigent persons during quarantine.—Act of June 13, 1836.

Under the provisions of the Act of 13th of June, 1836, P. L. 541, and subsequent legislation, it is the duty of the poor directors of the district, or the county commissioners in counties where there are no poor directors, to provide sustenance for all indigent persons residing within their respective districts who are afflicted with disease, or who are kept from their regular employment by reason of any quarantine established by the Department of Health under authority of law in cases of epidemic within the commonwealth.

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

Fleitz, Deputy Attorney General, October 3, 1905.

I have before me your letter of recent date, asking for an official opinion upon the duties and responsibilities of poor directors or of the county commissioners in counties having no poor directors, to provide sustenance for indigent persons afflicted with disease or who are kept from their regular employment by reason of the establishment of quarantine by your department in case of epidemics.

I have made a careful examination of the various acts of assembly, and the judicial interpretations thereof upon this question, and am of the opinion, and advise you, that, under the provisions of the Act of 13th of June, 1836, P. L. 541, and subsequent legislation, it is the duty of the poor directors of the district, or the county commissioners in counties where there are no poor directors, to provide sustenance for all indigent persons residing within their respective districts, who are afflicted with disease, or who are kept from their regular employment by reason of any quarantine established by your department under authority of law in cases of epidemic within the commonwealth.

RESPONSIBILITY FOR CARE OF INJURED INDIGENT PERSONS.

Responsibility for care of injured indigent persons—Hospitals receiving state aid — Attorney General's Department — Practice.

It is not the practice of the Attorney General's Department to give official opinions except at the request of state officials who, under the law, have a right to be advised by the attorney general upon all questions relating to the discharge of their duties.

The Act of June 13, 1836, P. L. 541, and its supplements imposes upon the directors and overseers of the poor the care and maintenance of indigent injured persons, and a hospital built and partially supported by voluntary contributions of charitable persons, in which an indigent injured person has received maintenance and treatment, is entitled to compensation from the proper poor district, and this notwithstanding the fact that such hospital receives an appropriation from the state.

Attorney General's Department. Opinion to H. F. Yost, solicitor board of poor directors, Somerset County.

FLEITZ, Deputy Attorney General, October 4, 1905.

Your letter of recent date to the attorney general, asking for an opinion upon the following state of facts, received.

It appears that an indigent person injured in a mine at Boswell, was sent to the Memorial hospital at Johnstown, Pa., for treatment. The authorities of the hospital now submit to the poor directors of Somerset county, a bill at the rate of a dollar a day for the maintenance and treatment of the patient while in that institution. You ask to be advised whether or not the hospital has a right to demand payment from your board for the treatment furnished under these conditions, inasmuch as it receives an appropriation for maintenance from the state.

In reply, I desire to say that under the practice of this department, we do not give official opinions except at the request of state officials who, under the law, have a right to be advised by the attorney general, upon all questions relating to the discharge of their duties. The question you submit, however, is so often referred to this department, that I am constrained to relax the rule and to give you an opinion which may shed some light upon a matter fast becoming of widespread interest to the people of the commonwealth. There are a number of state hospitals located at various points in the coal fields, constructed by the state and maintained wholly by

appropriations made by the legislature for that purpose. These hospitals were erected and are maintained for the purpose of affording free treatment to those persons injured in and about the mines who are too poor to pay for the proper and necessary medical attention. They are conducted or managed by boards of trustees appointed by the Governor, and are state institutions in every sense of the word. Any person applying for admission to these hospitals must satisfy the proper authorities that he is unable to pay for such treatment. Unless he can show that this is the fact, they should refuse to admit him at all, or if there be extenuating circumstances, he should be admitted only as a paying patient. It is, however, contrary to the policy of the state that those institutions should receive paid patients generally, and thus enter into competition with other worthy institutions under private ownership and management. It is likewise impossible many times for these state hospitals to accept all of the indigent patients who may apply for treatment, and in that event, preference must be given to that class for which the hospital was originally constructed, to wit: those injured in and about the mines. The trustees of these institutions have full power to act in accordance with the facts before them in each individual case, and it is their duty to protect the state against impositions upon its charity.

There is another class of hospitals doing splendid work for suffering humanity, built and partially supported by the voluntary contributions of charitable persons in the various cities and towns of the state, and to this class belongs the Memorial hospital of Johnstown. They are controlled by boards of directors elected by the contributors, or in some instances appointed by the courts, the method of selecting depending entirely upon the charters and by-laws of the hospitals. The state has nothing to do with their management or control, although it makes, in many instances, liberal appropriations to assist in the maintenance of the unfortunates who apply to them for treatment. Before appropriations are made to these institutions, they are required to satisfy the appropriation committees of the legislature and the Governor, that the work they are doing is a necessary and charitable one, and that the money appropriated will be used for the benefit of the suffering indigent of the state. How that aid shall be distributed, in what proportion, and to what patients

is entirely a question for the local management to determine. The state has not seen fit to impose restrictions or limitations upon the authority of the local management to select the objects of its charity, and until it does this by legislative enactment, bills of the kind presented to your board for the treatment of the indigent injured, must be paid, because the Act of 1836, P. L. 541, and its supplements imposes upon the overseers and directors of the poor primarily the care and maintenance of this unfortunate class.

Costs in Prosecutions Under Pure Food Laws.

Pure food laws—Witness fees and mileage of special agents.

The special agents of the Dairy and Food Division of the Department of Agriculture are entitled to witness fees and mileage in cases under the pure food laws in which they testify. But as the state has made an appropriation for the payment of the expenses of these special agents, they should account to the Dairy and Food Commissioner for the costs taxed to them, in all cases in which they have already received from the department money to cover their expenses.

Attorney General's Department. Opinion to O. D. Schook, Deputy Dairy and Food Commissioner.

Carson, Attorney General, October 19, 1905.

Your letter addressed to the Governor has been by him referred to me.

You state that, in connection with the enforcement of the dairy and food laws of this commonwealth, the commissioner employs a number of duly sworn special agents. Upon receiving the analytical reports, prosecutions are ordered through such agents when violations of the law are discovered. You ask whether, in settling such cases, it would be legal for a special agent to add his mileage or witness fee to the fine and analytical fee, and retain the mileage so collected for his personal use, it being understood that his actual and necessary expenses incurred in the performance of such official duties are invariably included in his monthly account and paid by the commissioner from the appropriation provided for the payment of such expenses. You say that Commissioner Warren has directed you to write upon this subject, believing that one or more of the special agents have adopted the course

indicated; that a private investigation is in progress; and that you need hardly add that the commissioner would not knowingly sanction any conduct or transaction on the part of his official force that is not entirely legal and legitimate. The Governor has requested me to instruct you in regard to your duties in this matter.

I have examined Wadlinger on Costs, the acts of assembly relating to the Dairy and Food Department, and the acts relating to the payment of mileage and witness fees in criminal cases. I am unable to discover any reason, in law, why the special agents of the Dairy & Food department should not have taxed as costs their mileage and witness fees, notwithstanding the fact that their expenses are provided for biennially in the appropriation for the expenses of the Dairy and Food department.

The general appropriation Act of May 11, 1905, P. L. 581, appropriates twenty thousand dollars "for the payment of the travelling and other necessary expenses of the special agents of the Dairy and Food division of the Agricultural Department." Provision is thus made for the travelling expenses of these special agents. The Act of July 3, 1885, P. L. 256, is entitled "An act to establish uniform compensation to be allowed witnesses in civil and criminal cases before justices of the peace and alderman in the several counties of this commonwealth," and provides *inter alia*, "that from and after the passage of this act all witnesses in civil and criminal cases before justices of the peace and aldermen, shall be entitled to compensation as follows:

This act is general in its scope and there is no limitation whereby the special agents of the Dairy and Food Department are excluded from the benefits therein provided. The Act of May 19, 1887, P. L. 134, relating to costs and the manner of computing mileage is also general in its character and applies to all witnesses. These special agents are not expressly excepted from the provisions of these general acts, nor can they be excepted by implication; and, while it may be objectionable for special agents, when serving as witnesses in criminal cases, to tax up witness fees and mileage as part of the costs of a case, when their necessary expenses for travelling, etc., have been provided for by a general appropriation made to the Dairy and Food Commissioner for the purpose, yet they cannot be legally deprived of their witness fees and mileage.

This is a strictly legal view of the case. I am of opinion, however, that the appropriation made by the Act of May 11, 1905, was for the purpose of putting the department into the possession of a fund on which it could draw without hesitation for the payment of the travelling expenses of its special agents engaged in the prosecution of its work, without requiring those agents either to prepay their own expenses or await reimbursement by collecting them out of the party against whom the costs are taxed. Of course the allowance of expenses to a witness for travelling, as well as his *per diem* allowance, is in the nature of compensation to the witness for the inconvenience and loss of time occasioned to him by being called away from his own proper business and giving testimony for the benefit of the public or the private litigant in support of interests entirely foreign, in a personal sense, to those of the witness himself, and in this sense the moneys so taxed and so collected are the property of the witness, of which he cannot be deprived.

I am of opinion, however, that this view cannot be taken of it so far as your own special agents are concerned. They are not called away from private business of their own; they are engaged in the prosecution of their duty in aiding you to enforce the laws relating to your department. Hence, in no sense do they undergo a personal loss for which they should be reimbursed; and I suggest, therefore, that it would be proper for you to make an order upon your special agents that, wherever witness fees and mileage in criminal prosecutions, brought at the instance of your department, wherein such agents appear as witnesses, are taxed, and they have already received from your department moneys for the purpose, they shall account to you for the costs so taxed and so received, and shall not apply them to their own individual use.

J. W. Wetzel and Conrad Hambleton, trading as Wetzel & Hambleton, vs. George R. Alleman.

Justices of the peace—Appeals.

Courts have no power to interpose to save an appeal which has been filed after the time allowed by law, as a mere matter of indulgence.

The court will allow an appeal to be filed, after the time limited by the statute has expired, only when the equitable ground upon which such relief is asked has been clearly established.

Defendant filed a transcript of appeal five days after the time limited by the statute had expired. In an answer to a rule to strike off the appeal, defendant averred that he had been prevented from filing the transcript by serious illness. This averment was denied by the plaintiffs. No testimony was offered by defendant in support of his averment. Rule absolute.

Rule to strike off appeal. C. P. Dauphin County, No. 51, June Term, 1904.

D. S. Seitz, for plaintiff.

Oscar G. Wickersham, for defendant.

Kunkel, J., October 11, 1905.

This appeal was filed too late. It was filed five days after the time limited by the statute. In answer to the rule to strike it off the defendant avers that he was prevented from filing it within the required time by serious illness, which continued from the time when he received the transcript from the alderman to the time when he filed it in the prothonotary's office, a period of two months. Upon the matters thus averred the plaintiffs have joined issue. The burden of sustaining his averment, therefore, rests upon the defendant, but he has offered no testimony to support it, and we are in no way advised respecting the circumstances of his illness. As the case is presented, it shows an appeal filed after the time allowed by law, an averment by the defendant in excuse of the delay, and a denial of the averment by the plaintiffs. Upon this presentation we cannot sustain the appeal. The cause which the defendant assigns for his delay is not established, and we cannot act upon it. We have no power to interpose to save an appeal which has been filed after the time allowed by law as a mere matter of indulgence; Schrenkeisen et al. *vs.* Kishbaugh et al., 162 Pa., 45; Ward *vs.* Letzkus, 152 Pa., 318; but may do so only when the equitable ground

upon which relief is asked has been clearly established; Newton *vs.* Hofsomer, 5 Kulp, 420, 16 Cyc., 39.

The rule to strike off the appeal is made absolute.

Commercial Fertilizers.

Commercial fertilizers—Responsibility for injury resulting to manufacturers or importers from publication of analysis.

A manufacturer or importer of commercial fertilizers cannot recover damages from the Secretary of Agriculture in the event of injury resulting to the business of the manufacturer or importer because of the publication by the secretary of the results of his analysis of samples of commercial fertilizers, or because of prosecutions instituted by the secretary to enforce the provisions of the Act of 25th of March, A. D. 1901, P. L. 57.

A business injury may result to the manufacturers or importers of commercial fertilizers by the publication of the analysis of their fertilizers, or by prosecutions under the Act of March 25, 1901, P. L. 57; but the injury does not arise from the publication of the analysis, or from the prosecution, but from the violation of the law by the manufacturer or importer injured.

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

Carson, Attorney General, October 19, 1905.

You desire to be officially advised whether the manufacturer or importer of commercial fertilizers can recover damages from the Secretary of Agriculture in the event of injury resulting to the business of the manufacturer or importer because of the publication by the Secretary of the results of his analysis of samples of commercial fertilizers, or because of prosecutions instituted by the Secretary to enforce the provisions of the Act of 25th of March, A. D. 1901, P. L. 57.

I answer unhesitatingly that no such damages can be recovered. The act in question is entitled "An act to regulate the manufacture and sale of commercial fertilizers; providing for its enforcement and prescribing penalties for its violation." The first section provides that every package of commercial fertilizer sold, offered or exposed for sale for manurial purposes within the commonwealth, shall have plainly stamped thereon the name of the manufacturer, the place of manufacture, the net weight of its contents, and an analysis stating the percentage contained of nitrogen in an available form, of potash soluble in water, or soluble and reverted phosphoric

acid, and of insoluble phosphoric acid, with a proviso that any commercial fertilizer which shall contain none of the above named constituents shall be exempt from the provisions of the act.

The act further provides for affidavits on the part of every manufacturer or importer of the amount of sales made by each within the commonwealth during the last preceding year, upon which certain sums become payable to the State Treasurer, and every manufacturer is enjoined at the same time to file with the Secretary of Agriculture a copy of the analysis required by the first section of the act.

The third section empowers the Secretary of Agriculture to collect samples of commercial fertilizers, either in person or by his duly qualified agents or representatives, to have them analyzed and to publish the results for the information of the public.

For the purpose of enabling this duty to be properly performed, the fourth section of the act authorizes the Secretary of Agriculture and his assistants, agents, experts, chemists, detectives and counsel to obtain access, ingress and egress to all places of business, factories, farms, buildings, carriages, cars and vessels used in the manufacture, transportation or sale of any commercial fertilizer. You and your subordinates are also clothed with power to open any package or vessel containing, or supposed to contain, any commercial fertilizer, and to take therefrom samples for analysis upon tendering the value of said samples.

The fifth section makes it a misdemeanor for any person to sell, offer or expose for sale any commercial fertilizer without the analysis required by the first section of the act, or "with an analysis stating that it contains a larger percentage of any one or more of the above named constituents than is contained therein, or for the sale of which all the provisions of the second section have been complied with." The same section further provides that, upon conviction, the offending party shall forfeit a sum not less than twenty-five dollars, and not exceeding one hundred dollars, for the first offense, and not less than two hundred dollars for each subsequent offense. The section closes with the mandatory words: "It shall be the duty of the Secretary of Agriculture to enforce the provisions of this act, and all penalties, costs and fines recovered shall be paid to him or his duly authorized agent, and by him

be immediately paid into the state treasury, to constitute a special fund to be used in accordance with the provisions of section six of this act."

The sixth section creates a special fund, from which the cost of selecting samples and making analyses and other expenses incident to the carrying into effect of the provisions of the act shall be paid.

The seventh section contains a definition of the term "commercial fertilizer."

This statute imposes upon you a specific duty, and clothes you with ample authority to discharge that duty. You are the public officer designated by statute to enforce this particular branch of the law. It has been well said that "an officer is a part of the personal force by which the state acts, thinks, determines, administers and makes its constitution and laws operative and effective. He is an arm of the state and always on its side." People *vs.* Koler, 59 N. E., 716; 166 N. Y., 1; 52 Lawyers' Reports, Annotated, 814; and American State Reports, 605.

Again it has been said: "Public officers are the agents of the community which they represent, but a public officer is not the agent of each individual member of the community." Bayha *vs.* Carter, 26 S. W., 137; and in the case of the Board of Worcester County School Commissioners *vs.* Goldsboro, 90 Md., 193, it was said, when considering the definition of the term "public officer," that "the nature of the duties, the particular method in which they are to be performed, the end to be attained, the depository of the power conferred and the whole surroundings must be all considered."

The duty imposed by law upon a state officer should and must be performed without fear of action for damages by persons supposed to be aggrieved. The general principle is well established that a ministerial officer, acting within his authority and with due care, is not liable to any person who may be injured by his acts. Mecham on Public Officers, Section 661; American and English Encyclopedia of Law, Vol. XIX, title "Public Officers," page 490.

It is abundantly clear that the Legislature, by the Act of 25th of March, 1901, P. L. 57, has provided two methods of enforcing compliance, on the part of a manufacturer or importer, with the provisions of the first and second sections: First, by authorizing the publication by the Secretary of Agriculture

of the result of his analysis of samples taken by him for purposes of analysis; and, second, by bringing prosecution. These acts, therefore, are clearly within the limits of your power, and all that you are required to do is to exercise due care in the selection of agents, experts and chemists, so that the result arrived at may be determined scientifically and, under circumstances, securing, as far as practicable, an orderly investigation and a careful ascertainment of the facts.

You do not, however, stand as an insurer of results. A mistake even, if one be made, if an honest one, is what the law terms *damnum absque injuria*, which means a loss without an injury. It is a phrase used to describe a loss arising from acts or conditions which do not create a ground of legal redress. Marbury *vs.* Madison, 5 U. S., 1 Cranch, 137; Pennsylvania R. R. Co. *vs.* Lippincott, 116 P. S., 472; 2 American State Reports, 618.

It may be that a business injury may result to the manufacturer, either from the publication of the results of the analysis or from a prosecution, as provided for in section five, but it is quite clear that the injury does not result from the prosecution, but from the violation of the terms of the law on the part of the manufacturer, and it is the very dread of these results which was contemplated by the legislature as a corrective of the action of an otherwise reckless manufacturer or importer. As the publication is one of the means of enforcing the act, and as a prosecution is another means of enforcing the act, it follows that whatever results may happen cannot be laid personally to the charge of the Secretary of Agriculture, even though damages might result to some one who has been caught in a violation of the law. The whole policy of the enforcement of laws rests upon the theory that the state, as a part of its police power, has the right to control the action of its citizens. It can act only through the agency of state officers, and these officers are held to be entirely free from responsibility for their acts, if the acts are within the limits of the power bestowed by the law, and the prosecution or the publication has been made in good faith.

In re Nomination Papers by the Lincoln Party in the County of Berks.

Nomination of candidates—Nomination papers—Amendment.

A nomination paper containing the names of candidates to be voted for by the electors of the entire state, and containing also the name of a candidate for a state office, to be voted for by the electors of a particular district, is not for that reason invalid.

A nomination paper nominating candidates to be voted for by the electors of the entire state, but without the requisite number of signers for that purpose, and nominating also a candidate for a state office, to be voted for only by the electors of a particular district, and having the requisite number of signers for that purpose, is valid for the purpose for which it has a sufficient number of signers.

It will be assumed that the Secretary of the Commonwealth received the paper for the purpose for which it had sufficient signers and for no other purpose.

If the signatures of the signers of a nomination paper are not properly vouched, leave will be given to amend the paper in this respent.

Objections to nomination paper. C. P. Dauphin County, Nos. 72 and 73, January Term, 1906.

Snodgrass & Snodgrass, *S. J. M. McCarrell* and *Wm. H. Beckley* for objections.

James A. Stranahan and *B. M. Nead*, contra.

Weiss, P. J., October 21, 1905.

A nomination paper was signed, and filed in the office of the Secretary of the Commonwealth, October 3, 1905, by some six hundred persons who state they are qualified electors of the county of Berks and state of Pennsylvania, and represent the Lincoln party or policy, putting in nomination five persons as candidates for state offices, and one person as a candidate for a district office, that of judge of the courts in Berks county.

The third section of the ballot Act of 1897, P. L. 223, provides, among other things, "that where the nomination is for any office to be filled by the voters of the state-at-large, the number of qualified electors of the state signing such nomination paper, shall be at least one-half of one per centum of the largest vote for any officer elected in the state, at the last preceding election at which a state officer was voted for. In the case of all other nominations, the number of qualified

electors of the electoral district or division, signing such nomination paper, shall be at least two per centum of the largest entire vote for any officer elected at the last preceding election in the said electoral district or division for which said nomination papers are designed to be made."

Objection is made and filed that the parties "purporting to represent the Lincoln party or policy of the state of Pennsylvania in and for the county of Berks, have no legal right to file a paper containing the names of candidates for state offices at-large, together with the name of a state office in a district or part of the said state in the same paper."

The nomination paper does not contain the signatures of the number of qualified electors necessary to nominate state officers-at-large, but does contain the signatures of a number of qualified electors sufficient to nominate a district officer.

We are of the opinion that the nomination paper filed in so far as it purports to put in nomination candidates for state officers-at-large, is invalid by reason of the lack of the number of qualified electors signing it, but is not invalid for the reason assigned in so far as it purports to put in nomination a candidate for a state office in the county of Berks. The qualified electors of Berks county can vote for a judge for that district or division if the number signing represents the percentage prescribed, and the vouchers qualify properly.

We will assume that the Secretary of the Commonwealth when he received the paper, received it for the purpose for which it had sufficient signatures and for no other, and thus its reception was a paper nominating only the candidate for the district office.

Another objection is that the thirteen papers together constituting the nomination paper filed "are separately and collectively invalid and fatally defective for the reason that each of said thirteen papers is insufficiently vouched for in that none of said thirteen papers is vouched for by the affidavit of at least five of the signers of any of them as required by law."

The testimony shows that some of the vouchers saw but few electors sign the papers to which the former made affidavit, and it was not claimed but frankly admitted by counsel that the signatures and qualifications of the signers were not properly vouched for except in a few instances.

The nomination paper is defective and must be so

adjudged, and leave is given the signers of the paper or papers to have the signatures of the electors vouched as provided by the act, within a period of five days; otherwise it is invalid.

The view that the nomination paper purporting to put in nomination candidates for state offices-at-large is invalid and that, so far as it nominates a state officer in a district wherein the electors resident only may vote, is not for that reason invalid, and that defects may be corrected by amendment, is deemed equitable, though a single day is only afforded in this case to determine important objections. The prothonotary is directed to certify this judgment to the Secretary of the Commonwealth so far as it declares invalid the nomination paper in respect of nominations made for state offices-at large, and, subject to the sufficiency of the amendment, the nomination by papers of the candidate to be voted for in the district composed of the county of Berks may be valid.

In the Matter of the Application of Joseph Gardner Bradley for Permission to Register as a Student of Law.

A rule of court has the force of law and is binding upon the court, as well as upon the parties to an action, and cannot be dispensed with to suit the circumstances of any particular case.

The rules of court of Dauphin County, regulating admission to its bar, require, inter alia, that applicants for admission must have been registered in the office of the prothonotary for three years, pursued the prescribed course of study and passed an examination at the end of each year. A graduate of the Harvard Law School who had not registered in accordance with the rules applied to the court by petition for permission to register as a student, as of the date when he began his studies at the law school, stating in his petition that he had not registered because unaware that registration was required. Application refused.

Petition for leave to register as a student at law. C. P. Dauphin County, No. 189, January Term, 1906.

Lyman D. Gilbert for petition.

Weiss, P. J., November 1, 1905.

Joseph Gardner Bradley graduated from Harvard University in June, 1901. He commenced the study of law at the following autumn term of the law school of that university,

prosecuted the studies prescribed, and graduated and received a degree therefrom in June, 1904.

He desires permission to register in order that he may become a member of the bar of Dauphin County and practice law.

To enable him to do so certain rules adopted by the court must be complied with, without which admission to the bar cannot be had.

One of these requires that an intending student must pass a preliminary examination upon prescribed subjects, before he can register; or such preliminary examination may be waived by the board of examiners in case the applicant "has been graduated in arts or in science from a college in good standing."

After registry the student must pursue a course of study during at least three academic years of eight month each, and be examined at the end of each academic year upon the subjects prescribed for that year.

This applicant failed to apply for leave to be registered and failed in producing a certificate from his intended preceptor as required, and assigns for the omission the reason "that he was unaware that such registration was required by the rules" of court "in order to obtain admission to your (the) bar."

He prays that permission be granted him to make application to the board of examiners to register "as a student of law as of the second day of September, 1901."

The fact that the petitioner was "unaware" that registry was required is simply saying that he made no inquiry. Ordinary diligence would have afforded the information, and we are asked to depart from a rule of court in consequence of inattention.

A rule of court has the binding effect of a statute.

"Independently of all authorities to be found in the books, it is self-evident that justice could not be administered in an orderly manner, under a complex system of laws, without rules regulating the practice of courts of justice": Barry *vs.* Randolph, 3 Binney, 278; Snyder *vs.* Bauchman, 8 S. & R., 338.

"A rule of court thus authorized and made has the force of law and is binding upon the court, as well as upon the parties to an action, and cannot be dispensed with to suit the

circumstances of any particular case" : Thompson *vs.* Hatch, 3 Pickering, 515.

Whether an applicant "passes the preliminary examination or is permitted to study without examination" as in the case of graduation from a college in good standing, "his term of three years will not begin to run until the date of registration." If he be allowed to register in the office of the Prothonotary of the county as of September 2, 1901, his three year term of study must be pursued and the course prescribed must be followed subject only to a variation of the order of the course, in case he is studying at a law school.

He may, after registry, pursue his studies in the office of a practicing attorney or in a law school, or partly in the office and partly in the school, but he must first matriculate.

We assume that the board of examiners would not accept the certificate of graduation from an approved law school as a sufficient passport for admission to the bar, even if the candidate presenting it had been registered. The student must pursue a defined course of study during each of the three academic years and must be examined at the end of each year upon the subjects prescribed for that year. The only discretion given the Board of Examiners is that "the order may be varied if he is studying at a law school." Doubtless the board would not be exacting in such case if the student qualified in the branches prescribed, though graduation and registry do not in themselves assure admission.

In a paper read before the American Bar Association during the present year, the Dean of Harvard Law School is quoted as saying, in 1904, that "at a time when law schools needed fostering there was a plausible excuse for making the school's diploma a card of admission to practice. But at the present time to say of a law school that it needs this factitious inducement to attendance is to impeach the quality of the school. In truth it is a detriment to a school if its diploma admits to practice in a given state."

The applicant has not pursued any of the studies prescribed by the course under the tutelage of a preceptor, because he was not registered, and the lack of this requisite was due to his own inattention. The examinations in course are written, and may at the discretion of the board also be conducted orally and no student may be passed "unless he received a grade not lower than seventy-five on a scale of a

hundred." These rules are binding on us, and the applicant upon registry as of September 2, 1901, could not possibly conform to them. He could not study in course in whole or in part in the office of a practicing attorney of this bar, He could not be examined by the board upon the subjects prescribed at the end of each academic year, unless the rules are set at naught.

We are asked to disregard the rules relating to examinations for registration and admission to the bar, and that for the reason that the petitioner was "unaware" that registration was a prerequisite to "begin the study of law."

And this too, notwithstanding the fact that every member of the bar in practice since the adoption of the rules, has observed its provisions respecting registry, and the course of study, uncomplainingly.

To authorize registry as of four years and more ago would be both a non-observance of our own rules, and a scant tribute to the fidelity of those who observed their provisions.

To harmonize such action with entire fairness would be a difficult task.

What may be done with propriety is this. A year or more ago a petition was presented by the same applicant asking that the petition be referred by special order to the Board of Examiners for admission to the bar, in which the reason for omission to register is given, that the applicant was "unaware that such registration was required." For reasons satisfactory to the court and at the instance of the petitioner's counsel action upon it was delayed.

The delay may have prompted the applicant to defer further effort to prepare for the study of law, and for that reason it is deemed fair to allow registration, upon qualifying himself, as of June 1, 1904, at or about which time the former petition was presented and heard. We are reminded that the applicant is a gentleman of learning, good character and standing, and that the rule relating to registry is of minor importance in a case where the qualification to practice law is by study and training shown to exist.

It is sufficient to say that registration is required under the rules of the State Board of Law Examiners and that requisite is prescribed by most, if not all, of the rules of the lower courts.

It must have been regarded as of some significance, or

the learned in the higher and lower courts would not have promulgated a canon of such general application.

The applicant may present himself before the local board of examiners at some early time and submit himself to a preliminary examination, or this may be dispensed with upon compliance with the rule relating to graduation from a college in good standing, and the board may certify, after he exhibits a proper certificate from his intended preceptor, permission to Joseph Gardner Bradley to register as a student who wishes "to begin the study of law."

Thereupon he may, if the board of examiners so determine, be examined at such time as the members may find convenient, in the branches or course of study prescribed for the first year; and at the end of the second year from June 1, 1904, he may be by the board examined in and upon the treatises prescribed by the course of study during the second year, and if qualified in manner required by the rules, may prosecute the studies prescribed for the third and last year, and after examination be admitted to practice in the several courts of this county.

In this way the applicant may acquire admission to the bar and know that he pursued the same curriculum as his fellows.

IN RE OBJECTIONS TO THE SUBSTITUTED NOMINATION PAPER OF THE TAXPAYERS' PROTECTIVE PARTY OF THE COUNTY OF ELK, PUTTING IN NOMINATION LUTHER A. HAYES FOR THE OFFICE OF ASSOCIATE JUDGE FOR SAID COUNTY.

Nomination of candidates—Substituted nominations—Number of signers to substituted nomination paper—Act of June 10, 1893.

Under section 11 of the Act of June 10, 1893, P. L. 424, a substituted nomination paper must have the number of signers that would have been necessary upon the original nomination paper, and two-thirds of this number must have been signers of the original paper.

A substituted nomination paper, signed by two thirds of the persons who signed the original paper, but not having the number of signers that would have been necessary upon the original paper, is invalid.

Objections to substituted nomination papers. C. P. Dauphin County, No. 166, January Term, 1906.

James A. Stranahan, *B. M. Nead* and *B. Frank Nead* for objectors.

KUNKEL, J., November 2, 1905.

Several objections have been filed to this substituted nomination paper, but it will not be necessary to consider more than one of them, as we deem that one fatal to its validity. The objection to which we refer raises the question of the sufficiency of the number of the signers to the paper.

The paper attempts to nominate a candidate in place of one who was theretofore nominated, but who withdrew, and is signed by two-thirds of the citizens who made the original nomination, but is not signed by the number required by the act of assembly to make an original nomination. The 11th section of the Act of Assembly of 1893, P. L. 1893, 424, provides: "In case of the death or withdrawal of any candidate nominated as herein provided, the party convention, primary meeting, caucus, or board, or the citizens who nominated such candidate, may nominate a substitute in his place, by filing in the proper office, at any time before the day of election, a nomination certificate or paper which shall conform to all the requirements of this act in regard to original certificates or papers." Then follows a proviso which permits such substitute nomination to be made by a committee duly authorized to do so, and provides the manner in which such nomina-

tion shall be verified. It is further provided: "That in case of a substituted nomination paper not filed by a committee, but signed by citizens, it shall only be necessary that two-thirds of the signers of the said paper shall have been signers of the original paper."

We think the meaning of the section is clear. It permits the citizens who made the original nomination to make a substitute nomination in case of the death or withdrawal of the candidate, but requires the papers making such substitute nomination to conform to all the requirements of the act in regard to original papers. One of these requirements relates to the number of the signers, and is as follows: "The number of qualified electors of the electoral district or the division signing such nomination paper shall be at least two per centum of the largest entire vote for any officer elected at the last preceding election in the said electoral district or division for which said nomination papers are designed to be made"—Act of 1897, P. L. 223. The paper before us lacks this number of signers, and, unless there be something found in the act which reduces the number thus required, the nomination paper fails to comply with the act in this particular and for that reason must be declared void.

But it was contended at the argument that the second proviso to the section under consideration declares that "it shall only be necessary that two-thirds of the signers of the substituted nomination paper shall have been signers of the original paper," and that this means that the number of signers to a substituted nomination paper shall only be two-thirds of those who signed the original paper. We do not so construe the proviso. We can find nothing in it that modifies the direction in the body of the section that the substituted nomination paper shall conform to all the requirements of the act in regard to original papers, or that can be held to lessen the number of the signers thus made necessary by such direction. On the contrary, the very designation in the proviso of the number of the signers of the substituted paper who shall have been signers of the original paper implies that there shall be a greater number of signers, of which the two-thirds mentioned form but a part, and, as we have seen, that number is the same as is required in the case of an original nomination paper. There is nothing in the proviso that would bear the construction contended for. It merely

designates how many of the signers of the original paper shall sign the substituted paper, and its manifest purpose is to relieve the citizens who are compelled to make a substitute nomination from unnecessary trouble and inconvenience and at the same time to insure their substantial identity with those who signed the original paper. We are therefor of the opinion that this paper is not signed by the number of signers required by the act of assembly, and was not entitled to be filed. It is accordingly adjudged to be invalid, and the prothonotary is directed to certify this judgment to the Secretary of the Commonwealth.

IN THE MATTER OF OBJECTIONS TO AMENDED NOMINATION PAPERS BY THE LINCOLN PARTY OF BERKS COUNTY, PENNSYLVANIA, PLACING IN NOMINATION JAMES N. ERMENTROUT FOR JUDGE OF THE SEVERAL COURTS OF SAID COUNTY.

Nomination of candidates—Nomination papers—Vouching of signatures and qualification of signers—Act of July 9, 1897.

Proof of service of an unsigned copy of objections to a nomination paper, upon the candidate named in said paper, with notice that said objections would be filed in the office of the secretary of the commonwealth, and in the court of common pleas, is a substantial compliance with the Act of July 9, 1897, P. L. 223.

The affidavits made by vouchers to the signatures to a nomination paper, were as follows: "That they personally inquired of each of the signers to the foregoing nomination paper as to their signatures thereon"' other than several not seen, '·and are satisfied that the said signatures are in each case in the proper handwriting of the signers; that all of the persons whose signatures are attached to said nomination paper are qualified electors of the county of Berks, as learned by them, and each of them by inquiry, and that the statements in said nomination paper are true to the best of their knowledge and belief."

The form prescribed by the secretary of the commonwealth was as follows: "That the signatures attached to the foregoing nomination paper are in the proper handwriting of the qualified electors named therein; that all of the persons whose signatures are attached to said nomination paper are qualified electors of the county of Berks, and that the statements in said nomination paper are true to the best of their knowledge and belief." *Held*, on objections to the sufficiency of the affidavits, that the affidavits were in substantial compliance with the form prescribed.

Lincoln Party's Nomination.

Nominations lawfully made ought to be sustained, and to that end form itself, ought not to be decisive, if the substance prescribed by the form, is preserved.

Objections to nomination paper. C. P. Dauphin County, Nos. 72, 73, 177, and 178. January term, 1906.

Snodgrass & Snodgrass, S. J. M. McCarrell and *Wm. H. Beckley* for objections.

Jas. M. Stranahan and *B. M. Nead*, contra.

Weiss, P. J., November 2, 1905.

Nomination papers were filed some days ago, to which objections were heard, and it was so proceeded in that they were declared defective and leave was given to amend.

The amendments concern the vouching by affidavit to the signatures and qualifications of the signers of the paper, and the objections are that the affidavits of the several vouchers are not in the form designated by law and prescribed by the Secretary of the Commonwealth; that the amendments are insufficient in that the vouchers do not certify that the signatures are in the proper handwriting of the signers, or had personal knowledge thereof, or had obtained admission from the signers in that behalf; and that the affidavits are further defective in that they do not disclose personal knowledge respecting the qualifications of the signers as electors.

It is also complained that there was no proof of service of notice upon the candidate of the proposed objections as required by law.

The affiant to this service served a copy of the objections upon the candidate which was unsigned, together with a notice that the same would be filed in the office of the Secretary of the Commonwealth and in the Court of Common Pleas, which were so filed.

We are of the opinion that the copy of the objections gave full notice to the candidate, though not signed by any one, and that the proof of service by the affiant afforded the candidate an opportunity to be heard, and was a substantial compliance with the act. The motion made by the nominee's counsel to set aside the objections filed to the nomination papers, for this reason, must fail and is refused.

The objectors pressed upon our attention the fact that the vouchers to the amended papers, which were several in num-

ber, were not vouched by the same persons, except in a few instances, who vouched to the original papers, and that the affidavits to the several papers as amended were not in conformity with the requirements of law and not in the form prescribed by the Secretary of the Commonwealth, as directed by law. The act says: "No other form than the ones so prescribed shall be used for such purpose." The affidavits made by the new and other vouchers to the several papers constituting in all the nomination papers set forth "that they personally inquired of each of the signers to the foregoing nomination paper as to their signatures thereon," other than several not seen, "and are satisfied that the said signatures are in each case in the proper handwriting of the signers; that all of the persons whose signatures are attached to said nomination paper are qualified electors of the County of Berks, as learned by them and each of them by inquiry, and that the statements in said nomination paper are true to the best of their knowledge and belief."

The form of the affidavit prescribed by the Secretary of the Commonwealth and attached by the original vouchers is "that the signatures attached to the foregoing nomination paper are in the proper handwriting of the qualified electors named therein; that all of the persons whose signatures are attached to said nomination paper are qualified electors of the County of Berks, and that the statements in said nomination paper are true to the best of their knowledge and belief." The difference pointed out as material is that the vouchers to the amended papers say that they are "satisfied" that the signatures are in the proper handwriting of each of the signers, and that thereby they usurp the functions of the court and make that which satisfies themselves constitute sufficiency. The affidavits were hurriedly and carelessly drawn, and if the form varies substantively from that prescribed by the Secretary of the Commonwealth they are fatal. Nominations lawfully made ought to be sustained, and to that end form itself ought not to be decisive, if the substance prescribed by the form is preserved.

The thing required by the form is that the vouchers make oath that the signatures attached are in the proper handwriting of the qualified electors. The thing set forth in the affidavits of the new vouchers is, they say on oath, that they personally inquired of each of the signers as to their signa-

tures, and are satisfied that the signatures in each case are in the proper handwriting of the signers, and that they are qualified electors of the county.

It was the personal inquiry of the signers as to their signatures that caused the vouchers to become "satisfied" that the signatures are in the proper handwriting of the signers.

The vouchers were told by the signers, and in that way became "satisfied" that the signatures are in their own handwriting.

It is not necessary that the vouchers must see all the signatures affixed to the paper. It is sufficient that they know the signatures, or that they are told by the signers that the signatures are their own. And when, upon inquiry, they learn from the signers themselves that their signatures are in their own proper handwriting it is hazardous to say that the substance of the prescribed form is disregarded.

They were "satisfied," or what is the same thing, they acquired the knowledge that the signatures of the subscribers to the paper were in their proper handwriting, from personal inquiry of the signers, and this does no violence to the form or subject-matter of the prescribed formula. The conclusion reached is, that for this reason the vouching is not invalid.

Nor is the objection that the persons vouching were not the same as the original vouchers more tenable. We adjudged the papers defective and allowed time to amend in that the signatures to the nomination papers were not properly vouched. They are now sufficiently vouched, and the affidavits accompany the nomination paper. The persons vouching were signers of the papers, are qualified electors of Berks county, so far as is disclosed to us, and the vouchers qualified within the time allotted for amendment.

The nomination papers in the foregoing cases, now amended, are adjudged valid, and the prothonotary is directed to certify this judgment to the Secretary of the Commonwealth.

Jonas C. Brinser *vs.* D. L. Kaufman.

Justices of the peace—Summons—Return.

In computing the time between the date of a summons issued by a justice of the peace and the return day, the rule is to exclude the day on which the summons is dated and include the day on which it is returnable.

The case of Barber *vs.* Chandler, 17 Pa., 48, in which it was held that the day on which the summons issued and also the return day should be counted in computing the time between the issuing of the summons and the return day, was overruled by Cromelein *vs.* Brink, 29 Pa., 522, and the legislature, by Act of June 20, 1883, P. L. 136, has prescribed a different rule.

A summons issued March 13, 1905, returnable March 17, 1905. On certiorari the judgment was reversed.

Certiorari. C. P. Dauphin County, No. 79, June Term, 1905.

Jonas C. Brinser p. p., for plaintiff.

D. L. Kaufman, for defendant.

Kunkel, J., November 2, 1905.

The first exception which is filed to this record must be sustained. The Act of Assembly of 1810 provides that a summons shall be made returnable not more than eight nor less than five days after its date; and in computing the time the rule is to exclude the day of the date and to include the day of the return; Act of Assembly of the twentieth day of June, 1883, P. L. 1883, p. 136; Ferris *vs.* Zeigler, 5 Phila., 529 (5 Kulp, 396); Smythe *vs.* Morgan, 2 Kulp, 507; Harlan *vs.* Tripp, 21 Pa. C. C., 116; Comth. *vs.* Richer, 10 W. N. C., 142; Bigham *vs.* Redding, 19 Pa. C. C., 200; Cromelein *vs.* Brink, 29 Pa., 522; Yohe *vs.* Rockel, 9 Kulp, 441. The record in the present case shows that the summons was dated the 13th day of March, 1905, and was made returnable the 17th day of March, 1905. Applying the rule above stated, the summons was made returnable four days after its date, less than the number of days directed by the act of assembly. This is an error that is fatal to the proceeding, there being no appearance on the part of the defendant.

Upon the argument we were referred to the case of Barber *vs.* Chandler, 17 Pa., 48, where it was held that the day of issuing the summons and also the day of the return, are to be counted in computing the time. But that case was in effect

overruled by Cromelein *vs.* Brink, cited above, Bigham *vs.* Redding, 19 Pa. C. C., 200; Goldman *vs.* Tettlebaum, 10 D. R., 53; and besides the legislature has since laid down a different rule from the one there announced; Act of June 20, 1883, P. L. 1883, 136. The defendant, therefore, not having been summoned according to law, the justice had no jurisdiction of him and the proceeding must be set aside. The judgment is accordingly reversed and the proceeding is set aside.

Supplies for Department of State Police.

Department of State Police—Purchase of supplies—Act of May 2, 1905.

Under the Act of May 2, 1905, P. L. 361, the superintendent of state police is not required to advertise for bids for supplies for his department.

Attorney General's Department. Opinion to John C. Groome, Superintendent of State Police.

Carson, Attorney General, November 2, 1905.

I have your request for an official opinion as to whether you are required by law to advertise for bids for uniforms, arms, equipments and horses for the department of state police, under the Act of 2nd of May, 1905, P. L. 361.

A careful examination of the statutes relating to advertising, fails to disclose any provision relating to your department, and I find nothing in the act creating your department, which makes it obligatory upon you to advertise. The fourth section provides that it shall be the duty of the superintendent of state police to provide for the members of the police force suitable arms, uniforms, equipments, and where it is deemed necessary, horses, and to make such rules and regulations, subject to the approval of the Governor, as are necessary for the control and regulation of the force.

There are many Acts of Assembly relating to cities and other state departments and state commissions which, in specific terms, impose the duty of advertising for bids before awarding contracts for supplies, but these are so specific in their application as to exclude the idea of applying generally to all contracts which may be made under the authority of the state, and as there is nothing in the statue particularly relat-

ing to your department which requires it, I answer unhesitatingly that you are not obliged to advertise for these supplies.

The practice in the adjutant general's department is to purchase supplies or material out of which uniforms are made, without advertising. I am satisfied that if you pursue the ordinary course of a prudent business man, of obtaining from dealers in the goods required, samples and estimates of price, and then purchase in such a manner as satisfies your judgment that the interests of the state are protected by securing good and proper material at fair business prices, this is all that you can be reasonably required to do.

In re Filling of Vacancies in House of Representatives.

House of Representatives — Vacancies — Special elections — Duty of Speaker.

Upon the calling of a special session of the legislature, it is the duty of the Speaker of the House of Representatives to issue writs for special elections to fill any vacancies that may exist in the membership of that body. The writs should be directed to the sheriff of the proper county, and should fix the date on which the election shall be held. The date fixed should not exceed thirty days from the issuing of the writ.

Attorney General's Department. Opinion to Henry F. Walton, Speaker of the House of Representatives.

Carson, Attorney General, November 16, 1905.

Honorable Samuel W. Pennypacker, governor of the commonwealth of Pennsylvania, having issued a proclamation calling the members of the legislature of this state to meet in special session on January 15, 1906, it becomes necessary to hold special elections in certain districts where vacancies exist in the membership of the lower house. As speaker of the house of representatives you have the authority, and it is your duty, to issue writs, in pursuance of the constitution of this commonwealth, to supply said vacancies, which shall be directed to the sheriffs of the proper counties, and shall particularly fix the days on which the elections shall be held to supply such vacancies. I am of opinion, and advise you,

that the time appointed by you in said writ for the holding of said special elections shall not exceed thirty days after the issuing of said writ. Section 38 of the Act of 1839, P. L. 519, provides:

"Every writ for holding a special election, as aforesaid, shall be delivered to the sheriff, to whom the same shall be directed, at least fifteen days before the day appointed for such election, who shall forthwith give due and public notice thereof throughout the county, at least ten days before such election, and shall send a copy thereof to at least one of the inspectors of each election district therein."

In re Filling Vacancies in State Senate.

Senate—Vacancies—Special elections—Duty of Lieutenant Governor.

Upon the calling of a special session of the legislature, it is the duty of the Lieutenant Governor to issue writs for special elections to fill any vacancies that may exist in the Senate. The writs should be directed to the sheriff of the proper county, and should fix the date on which the election shall be held. The date fixed should not exceed thirty days from the issuing of the writ.

Attorney General's Department. Opinion to William M. Brown, Lieutenant Governor.

Carson, Attorney General, November 16, 1905.

Honorable Samuel W. Pennypacker, governor of the commonwealth of Pennsylvania, having issued a proclamation calling the members of the legislature of this state to meet in special session on January 15, 1906, it becomes necessary to hold a special election to fill the vacancy now existing in the eighth senatorial district, caused by the death of Hon. Horatio B. Hackett. As speaker of the senate you have the authority, and it is your duty, to issue a writ, in pursuance of the constitution of this commonwealth, to supply the said vacancy, which shall be directed to the sheriff of Philadelphia county, and shall particularly fix the day on which the election shall be held to supply such vacancy. I am of opinion, and advise you, that the time appointed by you in said writ for the holding of said special election, shall not exceed thirty days after the issuing of said writ. Section 38 of the Act of 1839, P. L. 519, provides:

"Every writ for holding a special election, as aforesaid, shall be delivered to the sheriff, to whom the same shall be directed, at least fifteen days before the day appointed for such election, who shall forthwith give due and public notice thereof throughout the county, at least ten days before such election, and shall send a copy thereof to at least one of the inspectors of each election district therein."

IN RE-RESIGNATION OF GEORGE W. MINTZER, MEMBER OF THE HOUSE OF REPRESENTATIVES FOR THE SESSION OF 1905–06, FROM THE FIRST DISTRICT OF PHILADELPHIA.

Public officers—Resignation of—Power to recall—Proper officer to receive.

In Alabama, California, Iowa, Nebraska, Nevada, New York, Virginia, and in a circuit court of the United States, it has been held, in unqualified terms, that a public officer has the right to resign his office at any time at his own pleasure, without the assent of the appointing power, and that, in the absence of any statute to the contrary, an absolute and unconditional resignation vacates an office from the time the resignation reaches the proper authority, without any acceptance, express or implied, on the part of the latter.

The weight of authority, however, and the obvious dictates of public policy require that the right shall be declared in a much more restricted manner, because an office being regarded as a burden which it is the duty of the appointee to bear for the public benefit, it follows that a public officer can not resign his office without the consent of the appointing power, manifested either by an acceptance of his resignation or by the appointment of another in his place.

Where statutes prescribe to whom the resignation of a public officer is to be made, the legislative provision must be complied with; but, in the absence of such a provision, it is properly made to that officer or body that is by law authorized to act upon it, by appointing a successor or calling an election to fill the vacancy.

In Pennsylvania there is no statute which prescribes to whom the resignation of a member of the House of Representatives shall be tendered, but the case falls within the principle that a resignation is properly tendered to that officer or body that is by law authorized to act upon it, by appointing a successor or calling an election to fill the vacancy.

The speaker of the House of Representatives is the proper officer to receive the resignation of a member of that body, during a recess of the legislature.

Where the resignation of a member of the House of Representatives

was intended to take effect immediately, and was delivered with that purpose to the officer authorized to receive it, it cannot be withdrawn even with the consent of the latter.

Attorney General's Department. Opinion to Henry F. Walton, Speaker of the House of Representatives.

Carson, Attorney General, Nov. 16, 1905.

I herewith acknowledge receipt of a letter from you, couched in the following terms:

"On April 14, 1905, I received the following letter from Hon. George W. Mintzer, Sr., who at that time was a member of the House of Representatives for the session of 1905–'06 from the First District of Philadelphia:

"'I respectfully tender my resignation as a member of the House of Representatives, session of 1905–'06, from the First District, to take effect immediately.'

"This letter was handed to me by Mr. Mintzer at my office, and at his request, on April 15, 1905, I sent the following letter to John M. Walton, city comptroller of Philadelphia:

"'I beg leave to inform you that I have received this day the resignation of George W. Mintzer, Sr., as a member of the House of Representatives, session of 1905–'06, to take effect immediately.'

"Upon November 14, 1905, I received the following from Mr. Mintzer:

"'My resignation as a member of the Legislature not having been accepted, I hereby withdraw the same, and give you notice that it is my intention to perform the duties of the office until the expiration of the term for which I was elected.'

"Inasmuch as the Honorable Samuel W. Pennypacker, Governor of the Commonwealth, by his Proclamation, has convened a session of the Legislature from January 15, 1906, I find that 'Whenever a vacancy shall occur in either house, the presiding officer thereof shall issue a writ of election to fill such vacancy for the remainder of the term.'

"Will you kindly render me an opinion as to whether or not a resignation thus made to me, as Speaker of the House of Representatives, between a regular and special session such as I have designated, the resignation having been filed with me and accepted, is legal, and therefore cannot be withdrawn? If so, whether or not it is my duty, as Speaker of the House of

Representatives to issue a writ for the special election to be held in said district to fill said vacancy?"

The point presented is a novel one in this state, and I reach my conclusion after a careful examination of such authorities as exist elsewhere. It must be observed that this is a claim on the part of one who was an active member of the House during the session of 1905 to recall his own resignation, presented after adjournment *sine die*, on the ground that it has not been accepted—a position depending upon two propositions: First, that an acceptance is legally necessary to make the resignation effective; and, second, that, in point of fact, there was no acceptance.

I shall deal with these propositions in their order. In Alabama, California, Iowa, Nebraska, Nevada, New York, Virginia, and in a circuit court of the United States, it has been held, in unqualified terms, that a public officer has the right to resign his office at any time at his own pleasure without the assent of the appointing power, and that, in the absence of any statute to the contrary, an absolute and unconditional resignation vacates an office from the time the resignation reaches the proper authority, without any acceptance, express or implied, on the part of the latter. State *vs.* Fitts, 49 Ala., 402; People *vs.* Porter, 6 Cal., 26; Gates *vs.* Delaware County, 12 Iowa, 405; State *vs.* Mayor, 4 Neb., 260, State *vs.* Clarke, 3 Nev., 566; Gilbert *vs.* Luce, 11 Barbour (N. Y.), 91; Olmsted *vs.* Dennis 77 N. Y, 378; Bunting *vs.* Willis, 27 Grattan (Va.), 144; U. S. *vs.* Wright, 1 McLean (U. S.), 512.

The weight of authority, however, and the obvious dictates of public policy require that the right shall be declared in a much more restricted manner, because an office being regarded as a burden which it was the duty of the appointee to bear for the public benefit, it followed that a public officer could not resign his office without the consent of the appointing power, manifested either by an acceptance of his resignation or by the appointment of another in his place. This was required in order that the public interests might suffer no inconvenience from the want of public servants to execute the laws. This is the substance or Mr. Justice Bradley's opinion in Edwards *vs.* United States, 103 U S., 471. The same principle is stated by Chief Justice Ruffin, of North Carolina, in the case of Hoke *vs.* Henderson, 4 Dev. (N. C.) 1, and is

sustained by a large number of cases cited with approval in Throup's Public Officers, Section 409; Mecham on Public Officers, Sections 409–414; 19 American and English Encyclopedia of Law—title, "Public Officers"; sub-title, "Resignation."

Conceding, then, the necessity of acceptance, the first consideration is: To whom is the resignation to be made? If an acceptance be necessary, it is clear that it must be by a party having the power to accept, and if the resignation be presented to the wrong person or body, acceptance as well as resignation would be futile. The authorities are agreed that, where statutes prescribe to whom the resignation of a public officer is to be made, the legislative provision must be complied with, but, in the absence of such a provision, it is properly made to that officer or body which is by law authorized to act upon it by appointing a successor or calling an election to fill the vacancy. Meechem on Public Officers, Section 413; Edwards *vs.* United States, 103 U. S., 471; Pace *vs.* People, 50 Ill., 432; McGee *vs.* State, 104 Ind., 444; Gates *vs.* Delaware County, 12 Iowa, 405.

In this state there is no statute which prescribes to whom the resignation of a public officer is to be made in a case such as the one under consideration, but the case falls within the principle that a resignation is properly made if made to that officer or body which is by law authorized to act upon it by appointing a successor or calling an election to fill the vacancy. Mr. Mintzer presented his resignation to you as the presiding officer of the House, of which he was a member, the House having adjourned *sine die*. The constitution provides, in article 2, section 2, that "whenever a vacancy shall occur in either house the presiding officer thereof shall issue a writ of election to fill such vacancy for the remainder of the term." This provision for issuing writs to fill vacancies by the presiding officer of each house is substantially the same as the 19th section, article 1, of the constitution of 1790. Buckalew on the constitution, page 31. The Acts of 2nd July, 1839, P. L. 519, and of 16th of January, 1855, P. L. 1, were passed to give effect to the constitutional provision, and are still in force. Both of these acts imposed the duties of issuing writs to fill vacancies upon the speakers of the respective bodies in which the vacancies occur, such vacancy occurring during the recess.

I am of opinion that you were the proper person to address in the matter of resignation under the foregoing authorities—first, because, the House not being in session, you were the only official representative of the House who could be reached; and, next, because the duty is specifically imposed upon you of issuing writs to fill vacancies occurring during recess, the legislature having been required by the Governor to meet at a time previous to the next general election. The case is squarely within the language of the Act of 16th of January, 1855, P. L. 1. It would be absurd to contend that a member, attempting to resign, should be required to address every member of an adjourned body, and it would be equally without reason to contend that a resignation could not be made during a recess. That vacancies can occur during a recess is manifest from the language of the constitution as well as from the language of the statutes above referred to. To hold that no vacancy can arise until the resignation presented to the speaker in recess is presented by him to the House at its next regular session, would be to destroy the legislative provisions as to the filling of vacancies occurring during a recess in a case where the legislature is required by the Governor to meet at a time previous to the next general election, a case covered by the Act of 1855, or else the word "vacancy" must be limited to the case of a vacancy occurring through death, a limitation of the use of the word for which I perceive no authority whatever. The word is used in a general sense in the constitution and the statutes without qualification. A vacancy may arise from death, resignation or otherwise; but, however occurring, it is none the less a vacancy.

I am of opinion, therefore, that the resignation of Mr. Mintzer was properly presented to you, and that you had the power to accept it. The only remaining question is whether you did accept it, and this presents the proposition as to whether there was an actual acceptance.

There is nothing in the law which prescribes any specific mode of acceptance. The acceptance may be manifested either by a formal declaration or by the appointment of a successor, or by any unequivocal circumstance showing an intention to act upon the resignation. Meechem on Public Officers, Section 415, and cases cited; 19 American and English Encyclopedia of Law—title, "Public Officers," page 562T and 562U. In Pace *vs.* People, 50 Ill, 432, and in Gates *vs.* Delaware

County, 12 Iowa, 405, it was held that acceptance of a resignation is presumed where the written resignation of an officer is received and filed in the proper office without objection. And in Van Orsdall *vs.* Hazard, 3 Hill (N. Y.), 248, the court, by Mr. Justice Cowen, said:

"Where no particular mode of resignation is prescribed by law, and where the appointment is not by deed, it may be by parole; as, by the incumbent declaring to the appointing power that he resigns his office, or will continue to serve no longer, and requesting an acceptance of his resignation. Nor need the acceptance be in writing. It is enough that the office be treated as vacant; for instance, by appointing a successor."

There can be no doubt, upon the facts as detailed by you, of the intention of Mr. Mintzer to resign, and of your acceptance of his resignation. He presented his resignation to you as a member of the House of Representatives, session of 1905–'06, to take effect immediately. He handed the letter containing the resignation to you at your office, and, at his request, on the day subsequent to the date of his letter, you notified the city comptroller of Philadelphia that you had received the resignation of Mr. Mintzer as a member of the House of Representatives, session of 1905–'06, to take effect immediately.

These acts are unequivocal in their meaning. The language and conduct of Mr. Mintzer leaves no room for doubt as to his mental attitude, acquiesced in by him for more than six months thereafter, and your act in notifying another officer of the fact of resignation, particularly as that notification was given at the request of Mr. Mintzer himself, indicates an acceptance of his resignation. It was a public declaration by you of the fact, made at the request of Mr. Mintzer himself, and presumably for his benefit. Although it is not stated in your letter, it is clear that there was some reason for the notification to the city comptroller, and that such notice was necessary to enable him to perform some official act. If such act inured to the benefit of Mr. Mintzer, it is clear that not only did he resign his place, but that he desired public announcement of the fact to be made by you to an officer whose action was of importance to himself. He has thus acted in such a manner as to entirely negative the thought that his resignation was tentative, or that it depended upon some future action

of the House, of which he had been a member. The very language of the resignation itself indicates that it was to take effect immediately, and bound you to immediate action. This, under the case as stated, you took without delay.

I am of opinion that a resignation so given cannot be withdrawn. The doctrine of the law on this point is well stated in Biddle *vs.* Willard, 10 Ind., 62, and to the same effect are State *vs.* Boeker, 56 Mo., 17; Rodgers *vs.* Slonaker, 32 Kan., 192; State *vs.* Clarke, 3 Nev., 519. In the first case it was said:

"A prospective resignation may, in point of law, amount to a notice of the intention to resign at a future day, or a proposition to so resign, and for the reason that it is not accompanied by a giving up of the office—possession is still retained, and may not necessarily be surrendered till the expiration ot the legal term of the office, because the officer may recall his resignation—may withdraw his proposition to resign. He certainly can do this at any time before it is accepted; and after it is accepted he may make the withdrawal by the consent of the authority accepting, where no new rights have intervened."

But, as was said in State *vs.* Hauss, 43 Ind., 105, where the resignation was intended to take effect immediately, and has been delivered with that purpose to the officer authorized to receive it, it cannot be withdrawn even with the consent of the latter; and the same ruling has been made in other cases. Yonks *vs.* State, 27 Ind., 236; Queen *vs.* Mayor, 14 Queen's Bench Division, 908. The effect of the decision in Pace *vs.* People, 50 Ill., 432; Gates *vs.* Delaware County, 12 Iowa, 405; and State *vs.* Fitts, 49 Ala., 402, is that an accepted resignation cannot be withdrawn.

It is clear from the language of Mr. Mintzer's resignation that he was not presenting a proposition to resign, but that he unequivocally tendered his resignation, to take effect immediately. Any other construction would be inadmissible.

I am of opinion, therefore, that a vacancy exists in this case, arising from a resignation properly presented to you and accepted by you, acquiesced in by Mr. Mintzer, and that it is not within his power to recall the same. New rights have intervened, the rights of a constituency to be represented by a member chosen to fill a vacancy arising during the recess of the legislature from a cause, not only contemplated, but cov-

ered by the terms of the Act of January 16, 1855, which provides that the method of filling vacancies shall be as prescribed by the Act of 2nd July, 1839, section 35, P. L. 526, and particularly by section 37 of the last named act.

I reach the same conclusion from another point of view. Should you determine not to issue a writ in this case, it is tantamount to a decision that your previous act amounted to no acceptance, and that the attempted recall of the resignation is operative to save the rights of Mr. Mintzer as a member of the House. In this way it would be impossible to hold a special election with a view of filling the vacancy, and a wrong would be done to the constituency hitherto represented by Mr. Mintzer, for that constituency would be left without a representative during the special session of the Legislature, as called by the Governor, if the House, in judging of the qualifications of Mr. Mintzer as a member, should determine that he had resigned to you as the proper officer, and that your acceptance of his resignation was a valid acceptance. In this way the constituency of the First Legislative District would be deprived of representation.

On the other hand, if a special election is held, Mr. Mintzer may either be re-elected, or, should he decline to stand as a candidate and maintain his present position, he could appear before the House and claim his right to the seat, challenging the right of the specially elected member to fill the vacancy, and in this way both parties would be heard and an opportunity given for the presentation of their respective claims, and the road thus be opened for a determination by the House, which, whichever way decided, would not result in depriving the District of a representative.

I therefore instruct you that in this and in all similar cases it is your duty to issue a special writ for the filling of a vacancy in the First Legislative District of Pennsylvania.

ADMISSION TO SOLDIERS' ORPHAN SCHOOLS.

Soldiers' Orphan Schools—Adopted children of soldiers—Act of May 27, 1893.

The word "children," as used in the various acts regulating admission to soldiers' orphan industrial schools, means offspring.

The grandchildren of an honorably discharged soldier of the Rebellion, Spanish-American or Philippine wars, who have been legally adopted by such soldier, are not entitled to admission to soldiers' orphan schools.

Attorney General's Department. Opinion to Levi G. McCauley, President Commission of Soldiers' Orphan Schools.

FLEITZ, Deputy Attorney General, November 29, 1905.

I have before me your recent letter, in which you request an official opinion upon the following question: Are the grandchildren of a soldier who served in the war of the Rebellion, Spanish-American or Philippine wars legally entitled to be admitted to the schools of the soldiers' orphan commission, if the grandfather has legally adopted said children?

The whole system of soldiers' orphan schools was done away with and the Pennsylvania soldiers' orphan industrial school system substituted by the Act of May 27, 1893, P. L. 171. We must therefore find the law governing these schools and defining the persons entitled to admission therein, either in that act or in its supplements.

Section 7 of the act, referring to the children who shall be eligible for admission to the schools, provides as follows:

"Preference in admission shall be as follows: 1. Full orphans, the children of honorably discharged soldiers, sailors or marines who served in the war for the suppression of the Rebellion, and were members of Pennsylvania commands, or having served in the commands of other states or of the United States, but residents of Pennsylvania at the time of enlistment. 2. Children of such honorably discharged soldiers, sailors or marines as above, whose father may be deceased and whose mother living. 3. Children of such honorably discharged soldiers, sailors or marines, as above, whose parents may either or both be permanently disabled."

This act was amended April 13, 1899, to include "orphans of honorably discharged soldiers, sailors or marines of the Spanish-American war;" and, by the terms of the Act of 17th

Admission to Soldiers' Orphan Schools.

of April, 1905, the commission of soldiers' orphan schools was authorized and required to admit to the Pennsylvania soldiers' orphan industrial school or soldiers' orphan schools "orphan or destitute children of honorably discharged soldiers, sailors and marines of the Philippine war."

There is nothing in any of the legislation on this subject to indicate that the benefits provided for the children of soldiers, sailors and marines of the various wars could in any possible way apply to the grandchildren of such soldiers, sailors and marines. It follows that, if the children you mention are entitled to admission to the schools at all, it must be because of their legal adoption and not because of their relationship to their soldier ancestor. The question for determination, therefore, is whether adopted children of a soldier, sailor or marine can be legally admitted.

It was held in a New Jersey case, Tepper *vs.* Supreme Council of the Royal Arcanum, 45, Atl , 111, that, "orphans, as used in the constitution and by-laws of a beneficial association, designating beneficiaries of the deceased persons, as widows, orphans and other dependents of the deceased person, means the children, in the proper sense of the word, of the deceased member, and children means offspring."

The same rule has been frequently stated in the decisions of the courts of our own state. In Schafer *vs.* Enue, 4 P. F. Smith, 304, it is said, in an opinion handed down by Mr. Justice Strong: "Adopted children are not children of the person by whom they have been adopted."

In Commonwealth *vs.* Nancrede, 8 Casey, 389, the same court, in an opinion delivered by Chief Justice Lowrie, holds that an adopted child is not exempt from the payment of collateral inheritance tax, and states the rule in the following language:

"If the heirs or devizees are so in fact, they are exempt. All others are subject to the tax. Giving an adopted son a right to inherit does not make him a son in fact, and he is so regarded in law only to give the right to inherit, and not to change the collateral inheritance tax law. As against that law he has no higher merit than blood relations of the deceased, and it is not at all to be regarded as a son in fact."

Therefore, giving the words their ordinary and legal meaning, an adopted child does not come within the provisions of the act of assembly creating your commission and

designating the beneficiaries of the state's charity distributed by it. If the legislatures had intended those benefits to extend to children by adoption, it would have been easy to say so in plain and unambiguous terms. The failure to do so leaves us no alternative but to accept the words used in their true legal meaning, and this is not broad enough to include such children. The state has been most generous and bountiful in its provision for the education and maintenance of the children of those who bore arms in defense of their country, but it has not seen fit to extend this charity to the children adopted by soldiers; possibly for the reason that such a course might open wide the door for a constantly increasing burden upon the treasury of the state in providing for the children of those who remained at home attending to their usual avocations, and whose only claim to such aid rests upon the fact that they were fortunate enough to induce some soldier to take the legal steps necessary to adopt them.

I am, therefore, of the opinion, and advise you, that the various acts in question apply only to the children of the soldiers, sailors and marines of our various wars, and that, in this connection, the word "children" means offspring.

Loans of Savings Banks.

Savings banks—Loans upon security of capital stock—Construction of charter.

A savings bank and loan company whose charter contains the provision "that the capital stock of said bank shall be taken and considered as the security required by law for the faithful performance of its duties as executor, administrator, trustee or receiver, and shall be liable in case of default," cannot loan money upon its own stock as collateral security.

A loan by a corporation, upon the security of its capital stock, may well be regarded as an impairment of its capital; for it is tantamount to a return *pro tanto* to the stockholder of the moneys originally paid in, either by himself or by some prior holder in the chain of title.

A savings bank and loan company chartered by special act of assembly, prior to the constitution of 1874, whose charter has been renewed under the provisions of the Act of June 3, 1885, P. L. 201, is subject to the provisions of the constitution of 1874.

Such corporation also becomes subject to the Act of February 11, 1895, P. L. 4, creating a banking department, and to the Act of June 14, 1901, P. L. 561, which prohibits any banking institution, trust company or savings institution having capital stock from taking as security for any loan or discount any part of its capital stock.

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

CARSON, Attorney General, November 29, 1905.

I have your letter of recent date, stating that a certain corporation under the supervision of your department has been loaning money upon its own stock as collateral security for the loans, claiming that, as its charter antedates the new constitution, it does not come within the prohibition of the Act of June 14, 1901, P. L. 561, and claiming particularly that it is acting strictly within its charter powers in making such loans, because the 4th section of its charter provides that "the said corporation shall have authority to invest its funds in the purchace of the stock of this commonwealth, or of the United States, or other stocks and bonds, on real or personal securities, or in such other manner as may be deemed appropriate and safe."

This conclusion is unsound; and if the corporation has been so advised, I instruct you to ignore it, and to proceed in such a manner as to enforce compliance with the Act of 1901. I have examined the charter, which is by special Act of

Assembly prior to the constitution of 1874. The purpose is stated to be that of a savings bank and loan company: its business was to receive on deposit any sum offered not less than a dollar, and to transact any other business transacted by banks in this commonwealth, and to receive and become the depository of all trusts and such other funds as might be paid into or be under the control of the courts of the state and the laws of the same within the county of..... The payment of deposits was carefully regulated and the capital is expressly referred to in the 3rd section of the charter as being raised "*for the security of the depositors of the said corporation.*" This thought is enlarged by a provision in the supplement to the charter:

"*That the capital stock of said bank shall be taken and considered as the security required by law for the faithful performance of its duties as such executor, administrator, trustee or receiver, and shall be liable in case of default.*"

It is manifest that these provisions are intended to secure for the depositors, as well as for trust estates, the protection of the capital, and this protection would be seriously impaired by any such pledging of its shares. A loan by a corporation upon the security of its capital stock may well be regarded as an impairment of its capital, for it is tantamount to a return *pro tanto* to the stockholder of the moneys originally paid in either by himself or by some prior holder in the chain of title.

The provisions of the charter above referred to are not and cannot be controlled by the 4th section, which does not apply to loans, but in express terms applies to *investments:* a fair reading of the clause does not embrace even a purchase of its own stock, much less a loan. Upon a fair construction of the charter itself and its supplement, the right to make such loans does not exist.

The contention that the new constitution and subsequent legislation do not govern is also without foundation. The charter was to continue for but twenty years, and the legislature expressly reserved the right to alter, revoke or annul the same at any time when it shall be deemed necessary for the public good. The twenty years expired in 1888 and the institution was rechartered, or, to speak more correctly, its charter was renewed for another twenty years, under the provisions of the Act of June 30, 1885, P. L. 201, the only act

then applicable. This act expressly subjected the charter to the new constitution, and that instrument, in article xvi, section 6, provides that "no corporation shall engage in any business other than that expressly authorized by its charter." The charter does not and did not in express terms, confer any such power, but, as has been seen, impliedly excludes the power to make such loans.

The corporation, under its renewed charter, came under the terms of the Act of February 11, 1895, P. L. 4, creating a banking department, and is subject to your supervision, particularly if it acts in a manner to impair its capital. The Act of 14th of June, 1901, P. L. 561, expressly prohibits any banking institution, trust company or savings institution, having a capital stock, theretofore or thereafter incorporated, from taking as security for any loan or discount a lien on any part of its capital stock, but the same surety (*sic*), both in kind and amount, shall be required of persons, shareholders and not shareholders; nor shall it become the purchaser or holder of any of its capital, except under conditions not necessary to be considered in this connection.

The corporation in question is sinning against the law, and should be checked. The charter does not confer, in express terms or even by implication, any special power denied by the Act of 1901, but even if it did, such power would fall under the circumstances detailed in the history of the renewal.

In re Cumberland Road.

Cumberland road—Disposition of proceeds of sale of buildings belonging to the state and used in connection with said road.

The proceeds of the sale of the buildings belonging to the state and formerly used in connection with the old Cumberland Road may be used by the State Highway Commissioner in the improvement of said road, under the provisions of the Act of April 10, 1905.

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

Fleitz, Deputy Attorney General, Oct. 17, 1905.

I have before me your letter of recent date, asking for an official construction of the Act of 10th of April, 1905, P. L. 129, entitled "an act relating to the management, care and maintenance of the National, or Cumberland, road, and freeing the same from tolls, and making an appropriation therefor."

This act provides in terms that the portion of the old National road lying within the state of Pennsylvania, shall hereafter be under the care and management of your department, and shall be maintained and kept in repair by you at the cost of the state. It repeals the former acts under which the road was managed by officers appointed by the governor, and maintained out of revenues received from the collection of tolls.

This historic old highway, originally constructed by the national government, and afterwards by it legally transferred to the commonwealth of Pennsylvania, had fallen into a generally dilapidated condition, and the revenues derived from the collection of tolls were wholly inadequate to maintain it in a safe condition for the travelling public. The bridges were falling down and the entire road was in an unsafe and dangerous condition. The act under discussion provides an appropriation of one hundred thousand dollars, whereof an amount not exceeding fifty thousand dollars shall be available during the first year following the passage of the act, and the remainder to be expended in the following year.

It also provides that "the several officers now in charge of portions of the said road, under existing laws, shall hand over to the state commissioner of highways the custody and control thereof, and deliver to him any property belonging to

the state in their hands and charge, and shall pay to the said commissioners such moneys as shall be found to be in their hands, respectively, upon settlement of their accounts according to existing laws."

It is further provided that the collection of the tolls from the travelling public shall cease, and all buildings belonging to the state in connection with the road may be either leased by you or, in your judgment, sold, after advertisement to the highest responsible bidder.

In carrying out the provisions of this act above quoted, a certain sum of money has accrued in your hands, and you desire to be specifically advised as to what disposition shall be made of this fund, as the act itself is silent upon this point.

In the absence of specific directions contained in the law itself, and inasmuch as this fund was created by its terms, I am of the opinion, and advise you, that it may be used under your authority and in your discretion in carrying out the provisions of section 3 of the act, by putting the road in good condition and making such permanent repairs as may be necessary in connection with the specific appropriation made by the legislature for that purpose.

Coatesville Hospital.

Appropriations—Quarterly payments—Act of May 13, 1903

A hospital to which had been appropriated the sum of $10,000, or so much thereof as might be necessary for its maintenance, for the two fiscal years beginning June 1, 1903, and which did not receive the proportion of the appropriation due for the first quarter of the fiscal year beginning June 1, 1903, because the auditor general had been informed that the hospital had not been open to receive patients, is entitled to receive the amount so withheld, upon showing that the hospital had been open for a short time before the end of the quarter, that considerable expense had been incurred in making preparation for the maintenance of patients, and that its maintenance account shows a deficit greater than the amount withheld.

The practice in the auditor general's office, of distributing the amount of an appropriation quarterly over the whole period, is a matter of convenience in book-keeping.

Attorney General's Department. Opinion to W. P. Snyder, Auditor General.

Carson, Attorney General, October 19, 1905.

You call my attention to the Act of the 13th of May, 1903. P. L. 372, by which there was appropriated to the Coatesville hospital, adjoining the borough of Coatesville, in Chester county, Pennsylvania, for the two fiscal years beginning June 1, 1903, the sum of ten thousand dollars, or so much thereof as may be necessary, for the purpose of maintenance, and you state that, through some inadvertance, the treasurer of the institution wrote a letter to your department during the administration of your predecessor, stating that, for the first quarter of the fiscal year, commencing June 1, 1903, the hospital was not open to receive patients, and for this reason the appropriation for that quarter was not allowed them; that they have since presented the facts to you, showing that the hospital was open for a very short time before the end of that quarter, and that considerable expense had been incurred in making preparation for the maintenance of the patients, and for the opening during that quarter; that they have made application for the sum which was not allowed them at the time, to wit: the sum of $1250; and that, at the end of the fiscal year, to wit: May 31, 1905, they found that for the first two years, ending at that time, they have a deficit considerably in excess of the amount that was

Coatesville Hospital.

not allowed them for the quarter; and that they have renewed their application for the amount.

I am satisfied that the institution ought to receive the balance due it on its appropriation for the two years. It needs but an inspection of the Act of Assembly making the appropriation to show that the lump sum of ten thousand dollars, if so much shall be necessary, is appropriated to the hospital for the two fiscal years for the purpose of maintenance. Nothing in the act specifies that the fiscal years shall be divided into quarters. A practice has grown up, which is entirely proper, for the auditor general to distribute the amounts of appropriations quarterly over the entire period. This, however, is for the convenience of bookkeeping and in order that there may be a proper watch kept npon state appropriations. The very fact, however, that at the end of the last fiscal year, May 31, 1905, their maintenance account shows a deficit much greater than the amount which they claim to be entitled to, establishes the justice of their claim and the propriety of its allowance. I therefore advise you to draw a warrant in favor of the Coatesville hospital in the sum of $1,250.00, and charge the same to the appropriation made under the act referred to.

IN RE AMERICAN GUARANTY COMPANY OF CHICAGO.

Foreign corporations—Construction of charter—Statement of purpose.

The American Guaranty Company of Chicago, a foreign corporation organized for the purpose of compiling and furnishing information in regard to the standing of individuals, firms and corporations, is not authorized under its charter, nor under the statement of its purpose, as filed in the office of the Secretary of the Commonwealth of Pennsylvania, to sell endowment bonds and guarantee to pay insurance premiums.

Attorney General's Department. Opinion to David Martin, Insurance Commissioner, and J. A. Berkey, Commissioner of Banking.

CARSON, Attorney General, November 3, 1905.

My attention has been called to the fact that the American Guaranty Company, of Chicago, with an office at Fourth and Wood streets, Pittsburg, is engaged in selling endowment bonds and also guaranteeing to pay insurance premiums. This company registered on the 21st day of December, 1904, in the office of the Secretary of the Commonwealth, and the paper filed shows that it declares itself to be engaged in transacting the business of agent for firms, individuals and corporations, entering into contracts with firms, individuals and corporations, acting as receiving and disbursing agent. The attorney general of Illinois states that the object of the corporation, as set forth in the papers filed in the office of the secretary of state, is "To compile and furnish information in regard to the standing of individuals, firms or corporations." He adds that in his judgment they have no legal power to sell endowment bonds and guarantee to pay insurance premiums.

I have been furnished with a copy of the bond issued by it and of the coupons attached thereto. The bond in substance sets forth that the company covenants and guarantees to pay to the borrower, or if registered, to the registered owner thereof, on the 5th day of 190 , and upon due surrender of this indenture at its general office in the city of Chicago, Illinois, U. S. A., to pay $1,000, in gold coin of the United States of America, and the said company further promises to pay interest upon the said sum in like gold coin, at the rate of five per centum per annum, at ts office in the city of Chicago, on the 1st day of each and

every , until the maturity of this bond and upon presentation and surrender of the respective interest coupons thereto attached, as they severally become due.

In witness whereof, the American Guaranty Company of Chicago, has caused this instrument to be executed in its name by its president and secretary, and at its general office at Chicago, this . . . . . day of . . . . . 19 . . . . . Secretary. . . . . President.

It is observed that this instrument is not under seal and is therefore not properly a bond.

The form of coupon attached is as follows:

THE AMERICAN GUARANTY COMPANY,
of Chicago.

On the fifth day of . . . . . 19 , will pay to the bearer at its general office in the city of Chicago, Illinois, fifty dollars, being one year interest on its bond.

No. . . . $50.00

JAMES L. BIGELOW,
Treasurer.

I have also been furnished with copies of papers which read as follows:

United States of America.
No. 22504.
AMERICAN GUARANTY COMPANY,
of Chicago.

KNOW ALL MEN BY THESE PRESENTS, that whereas . . . . . hereafter styled, nominator, has paid to the American Guaranty Company of Chicago, five hundred dollars in advance and agrees to pay a like sum on the fifth day of . . . . . hereafter until installments for . . . . . years have been made.

Now therefore the said American Guaranty Company hereby covenants and guarantees that on the fifth day of . . . . . Nineteen Hundred and . . . . . , upon due surrender of this Indenture, provided it is then in force to pay unto . . . . . , hereafter styled Nominee, the sum of . . . . . dollars in gold coin in the United States of America, less the amount of any loans made thereon, or in lieu thereof, and at the option

of the holder, to deliver at its home office ten year five per cent. Coupon Gold Bonds of equal value on due surrender of this contract, said bonds to be in the form of the specimen bond herewith. The application herefor and the privileges and conditions on the third page hereof, form a part of this contract.

IN WITNESS WHEREOF, The American Guaranty Company of Chicago, has caused this instrument to be executed in its name and by its proper officers and at its general offices at Chicago, Ill., this . . . . . day of . . . . . 19 .

. . . . . Secretary. . . . . President.

PRIVILEGES AND CONDITIONS.

1. As security for the redemption of this Indenture, the American Guaranty Company convenants and agrees that it will have and keep assigned, transferred and delivered in trust, Sundry moneys, or other securities such as banks and trust companies are authorized to invest in, first mortgages on real estate, or bonds issued by the United States of America or municipalities thereof to such an amount as shall equal in the aggregate seventy-five per cent. of the reserve value of this obligation.

2. The nominator may, after two full years' installments have been made, surrender this Indenture, and upon such surrender, duly made, receive a paid-up certificate for the amount shown in the schedule endorsed hereon, the maturity date of said paid-up certificate to be coincident with the maturity date of this Indenture; said paid-up certificate, at its maturity, is payable in gold coin or in ten year five per cent. interest bearing bonds of equal value, at the option of the holder. Or upon surrender of this Indenture the company will pay in cash therefor, at its general office, a sum not less than the full reserve as shown in the schedule hereon, less the amount of any loans remaining unpaid.

3. The nominee, executors, administrators, legal representatives or assigns may renew this Indenture to full maturity upon the same terms and conditions as the nominator. Or they may surrender this Indenture and when duly surrendered receive either the paid-up certificate or the reserve value as shown in the schedule hereon.

4. This Indenture is issued with the express understanding that the nominator may at any time during its continuance

substitute any other person or persons as nominee by giving written notice accompanied by this Indenture, such change to be duly endorsed hereon.

5. Should default be made at any time hereafter in the payment of any installment due under this contract the company will waive such default and accept payment of said installment, provided the amount thereof with interest thereon at five per cent. per annum from date of default be tendered to it within sixty days after such default.

6. All payments provided in this obligation to be made either by or to the owner hereof are due and payable at the general offices of the American Guaranty Company in the city of Chicago, Illinois, and such payments due the company may be made elsewhere only when exchanged for its receipt, signed by its president, vice president, secretary, treasurer or cashier.

LOANS.

7. The American Guaranty Company will pay the owner or legal holder hereof a sum not less than the full reserve as shown in the schedule accepting said Indenture as collateral security for said loan.

SCHEDULE.

Amount of paid-up certificate to which the holder hereof shall be entitled after installments for 2 years shall have been paid.			Reserve value or amount that the company will loan the holder hereof after it has been in force 2 years.		
At end of	1st	year, $———	At end of	1st	year, $———
	2nd	" 2,000		2nd	" 560
	3rd	" 3,000		3rd	" 960
	4th	" 4,000		4th	" 1,440
	5th	" 5,000		5th	" 2,000
	6th	" 6,000		6th	" 2,640
	7th	" 7,000		7th	" 3,360
	8th	" 8,000		8th	" 4,160
	9th	" 9,000		9th	" 5,040
	10th	" 10,000		10th	" 6,000

Amount of paid-up certificate to which the holder hereof shall be entitled after installments for 2 years shall have been paid.	Reserve value or amount that the company will loan the holder hereof after it has been in force 2 years.

In re American Guaranty Company of Chicago.

At end of	11th year, $	———	At end of	11th year, $	6,400
	12th "	———		12th "	6,800
	13th "	———		13th "	7,200
	14th "	———		14th "	7,600
	15th "	———		15th "	8,000
	16th "	———		16th "	8,400
	17th "	———		17th "	8,800
	18th "	———		18th "	9,200
	19th "	———		19th "	9,600
	20th "	———		20th "	10,000

8. No agent has the right or power to modify this Indenture or bind the company by any promise or representation, information or statement not contained herein.

L. W. Pitcher,
Secretary.

This contract at maturity is convertible into 5 per cent. ten year gold coin at the general offices of the American Guaranty Company in the city of Chicago, Illinois, U. S. A.

Convertible Contract.
No: 22504
of the
American Guaranty Company
of Chicago.
Period 10-20 years.
Amount $1000.
First payment $500.
Nominator:
. . . . . .
Residence:
. . . . . .

$. . . . . 190 .

Received from the AMERICAN GUARANTY COMPANY OF CHICAGO, ... dollars in full for all claims under the within contract terminated by . . .
. . . . . .
. . . . . .

Witness . . . . . .

Disposition of Illegal Fishing Devices Found in Lake Erie.

I call your attention to this matter, as in my judgment the company is not authorized under its charter, nor under the statement of its purpose, as appearing by the paper on file in the office of the Secretary of the Commonwealth, of Pennsylvania, to transact any such business as is embodied in these papers. Any information you have concerning the company you will oblige me by communicating as early as practicable.

Disposition of Illegal Fishing Devices found in Lake Erie.

Disposition of illegal fishing devices found in Lake Erie—Act of April 2, 1905.

Under the Act of April 2, 1905, the Commissioner of Fisheries has the power to confiscate nets and other fishing devices illegally used in the waters of Lake Erie, although the owners of such devices be unknown.

The confiscation of nets and other illegal fishing devices is merely an additional penalty imposed upon persons violating the law, and the Commissioner of Fisheries has authority to seize and confiscate such devices in cases where the owners cannot be found or apprehended, as well as where this is done.

Attorney General's Department. Opinion to W. F. Meehan, Commissioner of Fisheries.

Fleitz, Deputy Attorney General, November 29, 1905.

I am in receipt of your letter of recent date, relative to the Act of April 2, 1905, entitled "An act to classify the species of fish in such parts of boundary lakes," etc. You quote the language of section 7 and section 12 of the act and ask whether under the wording of the said sections your department has the right, in case its officers find any nets set in the water of Lake Erie, within the jurisdiction of Pennsylvania, between the fifteenth day of November in any year and the fifteenth day of March of the succeeding year, which time is made by the said act a closed time for the use of such devices, to seize and confiscate the said nets or devices, even though the persons operating said nets are not captured and no arrests can be made and the department has no knowledge of the ownership of said nets.

In reply, I advise and instruct you that, as the confiscation of the nets and devices is merely an additional penalty imposed upon the persons guilty of violating the law, you have the power and authority to seize and confiscate the nets in all cases where the owners cannot be found or apprehended, as well as where this is done.

REBUILDING OF COUNTY BRIDGES BY STATE.

Bridges—Fees of engineer—Act of June 3, 1895.

The customary compensation of an engineer for preparing "such plans and specifications as may be necessary" for a county bridge under the Act of 1895, P. L. 130, before the contracts are awarded, is three per centum of the contract price of the bridge.

Exceptions to the engineer's bill. C. P. Dauphin Co. Nos. 27 and 28, Com. Dock., 1902.

Robt. Snodgrass, for engineers.

Asa S. Keeler, for county commissioners of Wyoming county.

SIMONTON, P. J., Dec. 12, 1902.

The Act of June 3, 1895, P. L. 130, authorizing the commonwealth to rebuild county bridges under certain circumstances, directs (inter alia) that when a report of viewers in favor of a bridge has been confirmed by the court, "the court shall order and decree such rebuilding, and thereupon it shall be the duty of the board of public grounds and buildings immediately to proceed and have prepared in conformity with the report of the viewers such plans and specifications of the proposed bridge as may be necessary;" and § 7 of the act provides that "the fees and expenses to be allowed the viewers and inspectors and the proper charge for the preparation of the plans and specifications of such bridge, the cost of advertising, costs of all legal proceedings, and all other costs and expenses whatsoever shall be paid by the county or counties in which the bridge is located; and the amount of the fees and expenses herein provided to be paid shall be fixed by the court according to the circumstances of the case upon notice to the county commissioners."

Rebuilding of County Bridges by State.

By proper proceedings under the act, two bridges were ordered to be built in Wyoming county, and thereupon the board of public grounds and buildings employed Oscar E. Thomson, consulting engineer, to prepare the plans and specifications. The bridges were contracted for by the Board in accordance with the plans and specifications prepared by Mr. Thomson, the contract price of the one being $20,950, and of the other, $141,375. After the contracts were made and before the construction of the bridges, Mr. Thomson presented his bill to the county commissioners of Wyoming county, charging $8,116.25 for "survey, profile plans, detailed drawings and specifications," being five per cent. on the total contract price. To this charge the county commissioners have excepted, alleging that it is "excessive and exorbitant."

The testimony taken at the hearing shows, and we so find, that the customary compensation of bridge engineers for preparing plans, specifications and working drawings for a bridge, and superintending its construction, is five per cent. of the contract cost of the bridge; and for preparing the plans and specifications without superintendence it is three per cent. The Act of 1895 provides in terms for the preparation of plans and specifications only, and makes no provision for superintendence, and the bills rendered in these cases are for "survey, profile plans, detailed drawings and specifications."

Mr. Thomson testified that he understood he was employed to superintend the construction of the bridges, also. If so, that is work not yet completed for which compensation is not yet due, and is not charged for in the bills now before us. It would seem important that the construction should be superintended by some competent person; what arrangement has been made between the board and the engineer with respect to this does not clearly appear in the testimony, and there is some ambiguity in the act with respect to the question whether the counties are required to pay for this inspection. As § 7 provides that they are, in addition to the enumerated "costs and expenses," to pay "all other costs and expenses whatsoever," it would seem reasonable that, if the cost of supervision is necessary to be incurred, the counties should bear it. As the bridges are not yet completed, this question need not be decided now. We can approve the bills at this time for preparing plans and specifications only, and we shall fix this at the customary rate of three per cent.

Rebuilding of County Bridges by State.

A number of bills have been presented by engineers other than Mr. Thomson, to some of which exceptions have been formally filed by the respective county commissioners, while others have been referred by the commissioners to the court without formally filing exceptions; and testimony has been taken and counsel have been heard with respect to most of the bills. As the act of 1895 requires that all fees and expenses to be paid by the counties "shall be fixed by the court according to the circumstances of the case," and as in our opinion a controlling circumstance in all the cases is that there is an established rate of charges for services of this kind, as we have found above, the compensation of all the engineers employed by the board, as well those to whose bills exceptions have been filed as those whose bills have not been formally excepted to, will be at the same rate.

And that there may be no misunderstanding we state distinctly that we decide nothing now except that we fix the engineer's fees for preparing "such plans and specifications as may be necessary" before the contracts are awarded at three per centum of the contract price of the respective bridges.

IN THE MATTER OF THE OPENING OF SECOND STREET, FROM ITS PRESENT TERMINUS NEAR PINE STREET, TO ADAMS STREET, IN THE BOROUGH OF STEELTON.

Boroughs—Ordinances—Validity—Exceptions to report of viewers appointed to assess damages for opening street—Acts of March 21, 1806, and April 3, 1851.

Under section 13 of the Act of March 21, 1806, the validity of a borough ordinance, passed under the power conferred by the Act of April 3, 1851, P. L. 320, can be tested only by appeal to the court of quarter sessions of the proper county.

Appeal from report of viewers. C. P. Dauphin County, No. 239. March Term, 1893.

Frank B. Wickersham and *M. W. Jacobs* for the borough of Steelton.

Weiss & Gilbert and *W. F. Darby* for Pennsylvania Steel Company.

SIMONTON, P. J., July 5, 1893.

The first exception raises a question of fact which must be settled, if at all, by an appeal and a trial by jury.

The basis of all the other exceptions is an objection to the legality and validity of the ordinance of December 7, 1892, upon which the petition for the appointment of the viewers was based. This ordinance was passed under the powers conferred upon the borough by the Act of April 3, 1851, P. L. 320. Section 27 of said act provides that "complaint may be made to the next court of quarter sessions of the proper county, by any person, upon entering into recognizance with sufficient security according to law to prosecute the same with effect, and for the payment of costs, for any grievance in consequence of any ordinance, regulation, or act done or purporting to be done in virtue of this act; and the determination and order of the said court thereon shall be conclusive."

"Upon the complaint of any person or persons aggrieved by any regulation under the provisions of this act in relation to the laying out, widening, and straightening the roads, streets, lanes, alleys, courts and common sewers, or the opening, grading, or other regulations thereof; the said court shall take such order as may be just and reasonable, and the final order of the said court shall be conclusive."

The Act of March 21, 1806, section 13, declares: "That in all cases where a remedy is provided or duty enjoined, or anything directed to be done by an act or acts of Assembly of this commonwealth, the directions of the said acts shall be strictly pursued, and no penalty shall be inflicted or anything done agreeably to the provisions of the common law, in such cases, further than shall be necessary for carrying such act or acts into effect." In Borough of Beltzhoover *vs.* Gollings, 101 Pa. 293, this act was held to apply to the provisions of the Act of May 24, 1878, relative to claims for damages alleged to be caused by changing the grade or lines of streets or alleys. And in Hanover Borough's Appeal, 150 Pa. 202, it was held that where a borough has passed an ordinance, under the Act of April 3, 1851, for the widening of a street, the proceedings to carry it out by the appointment of viewers can be had under the Act of May 16, 1891, which is held not to repeal the Act of April 3, 1851; and in the appeal of Lizzie F. Young, in the matter of the widening of the same street referred to in 150 Pa. 202, the Supreme Court, in their opinion filed May 31, 1893, say: "The validity of the ordinance widening Frederick street was not an open question in this case," and affirmed the judgment of the court below, in which it was held that the ordinance in that case was not attacked in the way required by law, because no appeal was taken, from the passage of the ordinance, to the court of quarter sessions.

We think we cannot avoid the same conclusion here. No appeal was taken in this case to the court of quarter sessions and as this is the mode prescribed by the Act of April 3, 1851, in which the validity of an ordinance passed by a borough council under the authority conferred by said act may be contested; no other course can be pursued, in view of the provisions of the Act of March 21, 1806."

As this view of the matter, if correct, goes to the root of the exceptions, it is unnecessary to discuss the other questions incidentally involved in them. If the ordinance stands it must be operative according to its terms, and if we cannot question its legality and validity in this proceeding, it is useless for us to discuss the motives which lead to it adoption.

The exceptions from two to eight, inclusive, are overruled without prejudice to an appeal by the exceptants, if taken within the time prescribed by law, on the question of the amount of damages.

COMMONWEALTH OF PENNSYLVANIA, EX REL. HENRY C. MCCORMICK, ATTORNEY GENERAL, *vs.* FRANK REEDER, SECRETARY OF THE COMMONWEALTH.

Constitutional law—Limited voting—Act of June 24, 1895.

This case was argued before the Supreme Court, on appeal, October 15, 1895, the question involved being the constitutionality of the Act of June 24, 1895, creating the Superior Court. Judge Simonton held the act to be unconstitutional because of the provision that no elector should vote for more than six of the seven judges of the Superior Court to be elected. Judge McPherson concurred formally, but filed a dissenting opinion. The Supreme Court reversed the judgment of the court below in an opinion by Dean, J. Williams, J., filed a dissenting opinion in which Sterrett, C. J., concurred. The case is reported in 171 Pa. p. 505.

The opinions of the judges of the trial court have never been reported, and as they are on opposite sides of a question upon which the Supreme Court divided, they will not be without interest in the discussion of a question that is apparently not wholly free from doubt,

The petition for the mandamus and the opinions of the trial judges follow.—[Editor.]

Petition for mandaums. C. P. Dauphin County, No. 20, Commonwealth Docket 1895.

M. E. Olmsted, John P. Elkin, Deputy Attorney General, and *Henry C. McCormick,* Attorney General, for commonwealth.

Jas. A. Stranahan, for defendant.

To the Honorable the Court of Common Pleas aforesaid:

The petition of Henry C. McCormick, the above-named relator, respectfully represents—

That by an act entitled "An act to regulate the nomination and elction of public officers, etc.," approved the tenth day of June, 1893, it is made the duty of the Secretary of the Commonwealth to prepare forms of all ballots to be cast in elections for public offices within this commonwealth, and also all other forms made necessary or desirable by the act, and furnish the same to the county commissioners of each county, who are required by the act to procure further copies of the same, at the cost of the county, and furnish them to the

election officers or other persons by whom they are to be used. It is provided in said act that instructions may be printed on such ballots, indicating to the voter the number of candidates for whom he may be entitled to vote for any office, and also that there shall be on each of said ballots "as many blank spaces as there are persons to be voted for by each voter for said office," and in the twenty-seventh section of said act it is provided that if a voter marks more names than he is entitled to vote for for an office, his ballot shall not be counted for said office, and that "none but ballots printed in accordance with the provisions of the act shall be counted for any purpose."

That at the ensuing general election to be held in November, 1895, there are to be elected seven judges of the Superior Court, in accordance with the provisions of the Act of June 24, 1895, P. L. 212, establishing the said court, but it is, in the first section of the said act, provided that "no elector may vote, either then or at any subsequent election, for more than six candidates upon one ballot for the said office."

That said provision, intended to restrain each elector from voting for more than six when there are seven candidates to be elected, is unconstitutional and void, because in conflict with the provisions of the Constitution of Pennsylvania, and particularly with section 5 of Article I, which declares that "elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage;" section 1 of Article VIII, which provides that every male citizen twenty-one years of age, possesing certain qualifications, "shall be entitled to vote at all elections," and section 15 of Article V, providing for the election of all judges required to be learned in the law, other than judges of the Supreme Court, requiring them to be elected by the qualified electors and prescribing no limitation upon the right of each elector to vote for as many candidates as there are judges to be elected.

That the said provision for limited voting being unconstitutional, as aforesaid, the general election to be held in November, 1895, will, if conducted upon that basis and by the use of an official ballot so prepared as to make it impossible for electors to vote for more than six candidates for judge of the Superior Court, so far as concerns the choice of candi-

dates for that office, be invalid, thus requiring a new election to be held to the great cost, damage and detriment of the commonwealth.

That your relator did, upon the ninth day of October, 1895, demand of Frank Reeder, Secretary of the Commonwealth, at his office in the City of Harrisburg, that in making up the form of the official ballot to be used at the general election in 1895, and in giving instructions and performing the other duties imposed upon him by law in relation to said ballot and the said election, he would, disregarding that provision of the Act of June 24, 1895, which declares that "no elector may vote, either then or at any subsequent election, for more than six candidates upon one ballot for the said office," prescribe such form of ballot and give such instructions as will ensure to each elector throughout the commonwealth the right and privilege of voting for seven candidates for judges of the Superior Court if he shall so desire.

That the said Frank Reeder, Secretary of the Commonwealth, did, then and there, refuse to comply with the said demand and to prescribe such form of ballot or give such instructions, and did declare that the official ballot and the instructions in relation thereto, as prepared by him, do, so far as candidates for the office of judge of the Superior Court are concerned, limit and restrict each elector to vote for six candidates only, and do not provide or permit that he shall vote for more, but, on the contrary, are designed to prevent him from so doing, being prepared in accordance with the aforesaid provision of the Act of June 24, 1895, limiting the rights of electors in that regard.

That your relator is without other adequate and specific remedy at law, and, therefore, prays this honorable court to order a writ of mandamus to be issued forthwith, directed to Frank Reeder, Secretary of the Commonwealth, as aforesaid, commanding him to prepare and send to the county commissioners of each county in the commonwealth such form of ballot and to give such instructions in relation thereto and in all other matters so perform the duties imposed upon him by law in relation to said ballot or the said election as to provide that each qualified elector of this Commonwealth, desiring so to do, may, at the next ensuing general election, to be held on Tuesday, the fifth day of November, 1895, as aforesaid, be permitted to vote for seven candidates for the office

of judge of the Superior Court, and your relator will ever pray.

SIMONTON, P. J., October 12, 1895.

The necessity for a speedy decision of this question prevents us from doing more than indicating briefly the reasons which lead us to the result which we have reached. Indeed, as our judgment is to be immediately reviewed, we would content ourselves with a decision merely, without stating any reasons, if we did not believe that our duty to the Supreme Court requires us at least to indicate the considerations which have determined our conclusion, which we proceed at once to do.

In our opinion section 5 of the Declaration of Rights has no bearing upon the controversy. The section declares, "elections shall be free and equal;" but as the question is presented before election it involves simply a determination of the voter's right, and when the case is decided this will be determined, and he will be allowed to exercise his right in accordance with the decision of the court of last resort. It will then have been definitely determined whether he has a constitutional right to vote for seven, or whether the provision is lawful which restricts him to a vote for six; and as he will therefore be free to exercise that which has been decided to be his right, the election will be free and equal.

But we do not believe that the first section of Article V, which provides that the judicial power of this commonwealth shall be vested in a Supreme Court, in certain other specified courts, "and in such other courts as the General Assembly may from time to time establish," confers the power upon the legislature to provide that the judges of the Superior Court should be appointed, (except as therein provided until the first Monday of the succeeding January), or to direct or control the qualifications of the electors, for, in our opinion, section 15 of that article requires that the judges of this court, as well as the judges of the common pleas, shall be elected by the qualified electors; and, therefore, section 1 of Article XII, which provides "that all officers whose selection is not provided for in this Constitution, shall be elected or appointed, as may be directed by law," has no bearing upon the present controversy; because the judges of the Superior Court are officers whose selection *is* provided for by the section of the judiciary article to which we have just referred.

As we view it, therefore, the whole case depends upon the meaning to be given to the following words found in section 1 of Article VIII, "every male citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections;" and particularly upon the meaning of the words, "shall be entitled to vote at all elections." The commonwealth contends that this language means that the qualified voter shall be entitled to vote for each officer to be elected, and if this is really the meaning the commonwealth's contention must be sustained. On the other hand, it is contended on behalf of the respondent, that this language means merely that the voter shall be entitled to take part in all elections, and that where there is (as in the present case) a group, or a board of officers to be elected he has not clearly received the right to vote for all the members of that group or board, and that he does vote at the election for this group even if his vote is restricted to some only of its members.

We think the construction contended for by the commonwealth is correct. If any less force be given to the language in question, there is no logical halting place, and the whole matter of cumulative voting and minority representation has been left by the Constitution in the power of the legislature, to be moulded and changed from time to time as it may see fit or as partisan exigencies may demand. It may apply either principle to the election of members of the legislature or to any or all other offices when two or more persons are to be elected at the same time. But in our opinion, when the constitutional convention dealt with the subject of minority representation, it applied it wherever it intended it to be applied, and the legislature cannot apply it to any other subjects on the well-known principle that no constitutional qualification of a voter can be abridged, added to or altered by legislation. Page *vs.* Allen, 58 Pa. 338.

The right to vote is, as is conceded by all publicists, not a natural right. It rests, therefore, upon and is in this state conferred, assured, and defined by the constitution. But if we inquired by what part of the constitution, we find that it is by the clause in question. No one has ever doubted that this clause standing by itself confers the right contended for by the commonwealth, "to vote for each officer to be elected." For if it is not conferred by this clause it is not conferred at all; and, therefore, even in the absence of legislative re-

striction the voter could not cite any warrant for his right to vote for all officers. But it has always been assumed that, in the absence of any legislative restriction, this clause conferred the right to vote for all officers. But it is now contended on behalf of the respondent that it confers merely the right to vote but not to vote for all. But if it did not confer the right to vote for all, this right has not been conferred at all, and does not exist, even in the absence of restrictive legislation. For it is conceded that if it is conferred the legislature cannot abridge it. The question therefore really is, whether the constitution has conferred and defined the right of every voter to vote for all officers at every election, or whether it has merely assured such voter the right to cast a vote on every election day, leaving it to the legislature to define the number of the officers to be voted for, for which he may vote. But we cannot bring ourselves to believe that the framers of the constitution intended to leave such an important right as that of the exercise of the elective franchise so obscure and ill-defined, or to doubt that the general understanding of the individual voter that the same instrument which conferred upon him the right to vote at all assured his right to vote for a candidate for every office to be filled at any given election.

Much stress is laid by the learned counsel for the respondent upon the fact that the legislature in a few cases, with respect to inferior offices before the adoption of the constitution, and in one or two instances since, restricted the right to vote so as to provide for minority representation. We do not think, however, that the construction of the clause in question should be controlled or, indeed, in view of the weighty reasons leading in the opposite direction, influenced by the fact that the legislature has in these few instances assumed to exercise the power referred to. The constitution included, and thus ratified, some of the provisions of this nature made by the legislature before its adoption; and we think the principle that the expression of one is the exclusion of others may well be applied in aid of the construction which we have given to the clause, and that it is therefore to be assumed that all the restrictions upon the right of the voter to vote for every officer to be elected, which the constitution intended should exist, are contained therein.

The time at our disposal does not permit us to make any

extended examination or citation of cases bearing upon the question before us. We content ourselves with one or two references. In Hays *vs.* The Commonwealth, 82 Pa. 518, the charter of a private corporation, which provided that "at all general meetings or elections by the stockholders each share of stock shall entitle the holder thereof to one vote," was construed to mean that each stockholder had the right to cast one vote for each officer to be elected, as well as one vote on each resolution proposed at any general meeting, so that a stockholder owning one share would have one vote for each of the ten directors to be elcted.

In State *vs.* Constantine, 42 Ohio St. 437 (51 Am. Rep. 833), the Supreme Court of Ohio decided that the provision of their constitution—identical with ours in this respect—that each qualified elector "should be entitled to vote at all elections" conferred the right "to vote for each officer whose election is submitted to the electors." McIlvaine, J., delivering the opinion of the court, said: "By this article we have no doubt that each elector is entitled to vote for each officer whose election is submitted to the electors as well as on each question that is submitted. This implication fairly arises from the language of the constitution itself, but is made absolutely certain when viewed in the light of circumstances existing at the time of its adoption. No such thing as minority representation or cumulative voting was known in the policy of this state at the time of the adoption of this constitution in 1851. The right of each elector to vote for a candidate for each office to be filled at an election had never been doubted." The reason here given for absolute certainty does not exist in this state, where, as we have seen, minority representation has been to a slight extent provided for by the legislature; but we cite the case as one of the few which have been referred to bearing upon the question. And as we have already said, we are not prepared to give any controlling weight to the action of the legislature, especially when it is invoked in justification of its own action in the present case.

On the well-settled principle that the acts of an officer elected in accordance with the provisions of an Act of Assembly thereafter decided to be unconstitutional, are valid so far as relates to the public, a decision that the clause of the Act of 1895 in question is unconstitutional could not have any effect upon the validity of the official action of any of the

officers heretofore elected under provision of Acts of Assembly providing for minority representation. For a leading authority on this subject, see State *vs.* Carroll, 38 Conn. 449 (9 Am. Rep. 409).

For the reasons thus briefly and hastily given, as well as for others which we cannot stop to state, we conclude that the clause in the Act of June 24, 1895, which restricts the right of each elector to vote for more than six candidates for the office of judge of the superior court, is unconstitutional and therefore void, and we direct judgment to be entered in favor of the commonwealth and against the respondent.

McPherson, J., October 12, 1895.

I find myself unable to agree with the construction which Judge Simonton thinks should be borne by section 1 of Article VIII. In the view which he has taken and has supported with his accustomed force, this section means that the voter is entitled to vote for each officer to be elected, and if this is really the meaning the commonwealth's contention ought to be sustained. But the words are clearly susceptible of more meanings than one; they may be construed as the commonwealth contends; and they may be as readily construed to mean that the voter is entitled to take part in all elections. To this construction I am disposed to incline. I do not mean that the voter could be prohibited altogether from voting for a particular office;—when only one officer is to be chosen, the right to vote for that officer is unquestionable;—but simply that where there is (as in the present case) a group or a board of officers to be elected, the constitution does not clearly confer the right to vote for all the members of that group or board; the elector *does* vote at the election for this group even if his vote is restricted to a part only of its members.

A different conclusion was reached by the Supreme Court of Ohio in State *vs.* Constantine, 42 Ohio St. 437—reported also in 51 Am. Rep. 833—but the principal, indeed the only reason given by the court for construing the similar language of the Ohio constitution does not exist here. Chief Justice McIlvaine says that "No such thing as minority representation or cumulative voting was known to the policy of this state at the time of the adoption of this constituion in 1851. The right of each elector to vote for a candidate for each of-

fice to be filled at an election had never been doubted. No effort was made by the framers of the constitution to modify this right, and we think it was intended to continue and guarantee such right by the provision that each elector 'shall be entitled to vote at all elections.' Such right is denied by this statute, which provides for the election of four members of the board of polic commissioners, but denies to any elector the right to vote for more than two persons for such commissioners." This is the ground upon which he construes the constitutional provision of the State of Ohio, which is similar to our own, to mean that every voter is entitled to vote for a candidate for each office to be filled.

In Pennsylvania, however, the legislative power to limit the power of the voter has been exercised for many years. So far as I am aware, it was first put forth in 1839, when the legislature applied it to election officers. Section 4 of the Elections Act, passed in that year, P. L. 519, prohibited the voter from voting for more than one inspector out of two, and this provision continued in force until the adoption of the present constitution. The constitution which was in force in 1839 provided that elections shall be free and equal, and that every white freeman having certain qualifications shall enjoy the rights of an elector—provisions which are substantially identical with those now before us for construction—but although this restriction of the Act of 1839 was necessarily brought to the notice of the citizen in every election district once in each year, yet so far as I am advised, the constitutionality of the provision was never challenged. In 1867, P. L. 62, the power of the voter was again and in like manner restricted An act passed in that year provided for the election of two jury commissioners, but forbade the voter to vote for more than one. So far as I know, neither was any opposition ever made to this statute upon constitutional grounds, although it has been before the courts on several occasions. A few years later, when a constitutional convention was to be chosen, the legislature, in 1872, again applied the same principle of restricted voting to the choice of the delegates who afterwards framed the present constitution. These instances show a legislative construction of the constitutional provision existing before the year 1874, and a popular acquiescence in such construction, which seems to me to be entitled to great weight. The convention of 1873

approved the principle of restricting the vote for certain offices. and transferred the restriction in the case of election officers from the statute to the constitution itself—no doubt in order to protect it from future partisan attack. The convention proceeded also to extend the restriction to certain elections for judges of the Supreme Court, and to provide that county commissioners, county auditors and the magistrates in Philadelphia should also be chosen in this manner;—evidently intending, as I believe, to put this method of choice with regard to these particular officers beyond legislative control, but not intending to say by implication, as the commonwealth now argues, that no other officers whatever could be chosen by this method.

If the commonwealth's argument is sound, it must follow that no jury commissioner has been lawfully elected in Pennsylvania since the adoption of the present constitution; for the method of electing these officers by a limited vote still depends upon the Act of 1867, and if the commonwealth's position is correct this act has been repealed by the constitution as inconsistent therewith. The jury commissioners now in office are officers de facto only, and the decision now made is a decision that they hold their offices by an illegal tenure. How far this may be regarded as disqualifying them from proceeding further,—for example, from filling the jury-wheel for the coming year,—is a question which will doubtless come up in due time for decision.

Considering, therefore, the knowledge which the constitutional convention must have had of what had taken place throughout the state for more than thirty years, it does not seem too much to say, that before the words which they used are given a construction which would overturn a long-continued practice having so much of fairness to recommend it in certain conditions and in the selection of certain officers, the language ought to show clearly that the change was intended. In my opinion, the language which the framers of the constitution chose does not come up to this requirement. It must be remembered that the right to vote is not upon the same plane as the right to life or to liberty; it is not one of the so-called "natural" rights, and, therefore, one who offers to vote must show a legal warrant for the privilege which he desires to exercise. It seems to follow that, so far as the Constitution has not fixed the qualifications of the voter

and the manner of exercising his right to vote, the whole subject remains within the legislative power; and if it does thus remain, I think the power has been lawfully exercised by the act now before us.

The legislatures which have met since 1874 certainly did not believe that the above quoted clause from Article VIII had abolished the legislative power to restrict the voter in the manner and to the extent theretofore exercised, for they have never changed the method of voting for jury commissioner, which still rests upon the Act of 1867; and we have thus a similar legislative construction, similarly acquiesced in by the voters, for a further period of twenty years supporting the view I have hereinbefore endeavored to state. This, I think, is entitled to much consideration. The language of a constitution is to be construed in its ordinary and popular meaning, and a construction which has passed without challenge for more than half a century cannot be lightly set aside. In other directions, also, the principle of the limited vote has been applied. In 1873, P. L. 566, it was applied to the appointment of mercantile appraisers in Philadelphia; in 1875, P. L. 16, to the election of a committee on tax appeals by councils of certain cities; in 1876, P. L. 124, re-enacted in 1893, P. L. 468, to the election of assessors by councils in cities of the second class; and in 1889, P. L. 318, re-enacted in 1895, P. L. 120, to the election of a board of appeals by councils in cities of the second class. It is true that these are not instances of officials chosen by popular vote, but they are extensions of the principle; they are founded upon similar considerations of fairness and justice, and are obviously intended to prevent unchecked partisan control in matters which concern important interests and affect large classes of citizens. These considerations could not be overlooked in the erection of so powerful a tribunal as an intermediate court of appeal, and they furnish a strong argument for sustaining the limitation now in question, unless the constitution *clearly* forbids it.

I do not think a clear prohibition is to be found. On the contrary, the language of the suffrage article seems to me to be fairly capable of two constructions; and in that condition of affairs I would feel at liberty to adopt the meaning which is recommended by equity and by public policy, and which has been accepted and acted upon by legislatures and

by voters alike throughout the whole period from 1839 to the present day.

So far as this particular election is concerned, the question is of so little practical importance that it scarcely matters what the decision may be. Each of the great parties in the state has nominated six candidates only, and it is now too late either to add another name to the regular groups or to put another person on the ticket by nomination papers. Neither can these twelve candidates, and the candidates of other parties who are now in nomination, be presented to the voter in one column with instructions to vote for seven; the law requires that the party groups must be printed in separate columns, and this requirement will, of course, be obeyed. The average voter, therefore, who in the vast majority of cases knows little or nothing about the respective candidates, will be obliged to do one of three things, either to vote his party ticket and do no more, or to vote the party ticket and choose one other name at random from the other groups, or to mark seven names chosen at random from all the groups which will have a place upon the official ballot. In this dilemma it is certain that the average voter will cast his ballot for the six candidates of his party, and will go no further. He will not value highly a privilege which he can only exercise by voting for a political opponent, and especially when he must be conscious that he is exercising it in the dark. The comparatively few voters of the state who know the candidates will select intelligently seven names, as they would have selected six, and the total result will be simply this: The average voters of the majority party will elect the six party candidates, while a limited number of the majority voters will be free to vote for one or more in some other group. Stated in another way, the result will only be to distribute a few more votes among the minority candidates, and perhaps to render it more uncertain which of them will succeed.

Neither is it important to settle the question for the future. It is as certain as anything not capable of mathematical demonstration can be, that seven judges of this court will never again be chosen at the same election; and the question could only arise in case the whole court was to be renewed at the same time.

Practically, therefore, the decision is of little consequence; but if a constitutional right of the voter has been in-

vaded by the clause in controversy, it is the duty of the court so to declare whether the consequences be great or small.

Believing that no constitutional right has been invaded I would refuse the mandamus. But I have no wish to enforce my personal opinion by a dissent. On the contrary, I prefer that the conclusion reached by the president judge should stand as the action of the court, and, therefore, I concur formally in the judgment.

Maccabee Societies.

Corporations—Foreign beneficial societies—Application for registration—Discretion of Insurance Commissioner—Similarity of Name—Acts of April 6, 1893, and June 25, 1895.

Under the Acts of April 6, 1893, P. L. 7, and June 25, 1895, P. L. 280, the Commissioner of Insurance can refuse to register a foreign beneficial association, on account of its similarity in name to another foreign beneficial society already registered.

Attorney General's Department. Opinion to Commissioner of Insurance.

Carson, Attorney General, February 26, 1903.

You have called my attention to section 2 of the Act of April 6, 1893, P. L. 7, and section 1 of the Act of June 25, 1895, P. L. 280, and request an opinion whether you, as commissioner of insurance, can at your discretion refuse registration to a foreign fraternal beneficial society bearing a strong similarity in name to one already registered and having a number of lodges and a large membership in Pennsylvania.

Accompanying your letter are a number of papers showing there is already registered with your department a fraternal beneficial society of the state of Michigan under the title of "Knights of the Maccabees for Pennsylvania," and protesting against the registration of a fraternal beneficial society from the state of Michigan under the title of "Knights of the Modern Maccabees of Michigan." Similar protests are lodged in behalf of the "Supreme Hive, Modern Ladies of the Maccabees of the World," and "The Great Hive, of the Ladies of the Maccabees of the State of Pennsylvania,"

against the registration of "The Ladies of the Modern Maccabees for Michigan," and the "Knights of the Modern Maccabees of Michigan."

I am of opinion that you are at liberty to refuse the present applicant for registration solely upon the ground of the close similiarity in name and title to that of the society already registered in Pennsylvania. With the merits of the contention between these societies you have nothing whatever to do, nor can you pass upon the contested questions of power or priority of status in the home state. Neither can you determine the rights of competing subordinate lodges. It is sufficient for you to guard your department and the public against the confusion that will arise from the close similarity in the titles of societies engaged in precisely the same kind of work. The present applicant is seeking to enter territory occupied by a society already registered and publicly known under a designation which has been appropriated by it through priority of application and registration.

Your power to exercise a discretion in this matter does not rest upon section 2 of the Act of April 6, 1893. If that section stood alone, you would have no discretion in the matter, but the Act of June 25, 1895, P. L. 280, must be read in this connection. That act relates to fraternal beneficial or relief societies as defined in the Act of April 6, 1893, and provides that the commissioner of insurance shall be appointed as the attorney in this state of any foreign society seeking admission into this state, on whom process can be served. It is expressly provided that any lawful process, which is served on said attorney, shall be of the same legal force and validity as if served upon the association itself, and that the authority shall continue in force so long as any liability remains outstanding in this state. Service upon such an attorney shall be deemed sufficient service upon the association. It is made the duty of the commmissioner of insurance, when served with process, immediately to notify the association of such service, and copies must be forwarded. A record is to be kept showing the day and hour upon which service is made, and other formalities must be observed by the commissioner of insurance. This undoubtedly requires careful action on the part of the commissioner of insurance, as agent, in order to guard effectually the rights of the principal. The commissioner of insurance has a right to protect himself

against liability to error in the transaction of the business of his principal, and to this end it is reasonable that he should require that his principal should do business under a name and title so far distinct and individual that no confusion may arise either in his own department or in the public mind as to the identity of the principal for whom he is acting. The introduction of a qualifying adjective is so slight as to effect no real change in the title. Names so closely similar as those under consideration are objectionable, and you can reject the present application upon the principle of *idem sonans*.

In re Victor Coal Company.

Corporations—Amendment of charter—Extension of time or territory—Act of June 13, 1883.

A corporation of the second class, under the Act of April 29, 1874, cannot extend its term of existence or enlarge its territory by an amendment to its charter under the Act of June 13, 1883, P. L. 122.

That which affects the corporate life or term of existence of a corporation does not come within the true meaning of the term "amendment."

Attorney General's Department. Opinion to Samuel W. Pennypacker, Governor.

Carson, Attorney General, February 5, 1904.

I have examined the papers submitted to me in the matter of the request of the Victor Coal Company to be advised whether it would be permitted to amend its charter by an extension of its term and territory, without the payment of further bonus, and now express my views thereon.

It appears that the Victor Coal Company was incorporated on the 12th of January, 1888, for the term of twenty years, for the purpose of "carrying on the business of mining coal in the county of Clearfield, in the State of Pennsylvania, and in the said county of purchasing and leasing coal lands and opening and working the same; and for mining, quarrying, shipping, transporting, buying and selling coal, and with the power of erecting, constructing, purchasing and owning such buildings, machinery and other appliances of whatever

nature necessary or convenient in the conduct or management of the said business." The company now desires to amend its charter by making the term thereof perpetual, and by removing the limitation upon the territory in which it may carry on its operations. It proposes to accomplish this under the provisions of the corporation amendment Act of 13th of June, 1883, P. L. 122. This act provides, *inter alia,* as to corporations formed for profit under the Act of April 29, 1874, or any of its supplements, that whenever such corporation shall desire "to improve, amend or alter the article and conditions of the charter or instrument upon which said corporation is formed and established, it shall and may be lawful for such corporation to apply to the Governor of this Commonwealth for such improvement, amendment or alteration in the manner provided by this act."

Under the practice that has grown up under the act, the certificate of amendment goes to the governor through office of the secretary of the commonwealth, with such recommendations as the secretary may feel called upon to make; and in the present case the position is taken by the state department that a certificate proposing to amend a charter by extending the term of its existence and removing the limitation upon the territory in which it may operate, will not meet with the approval of the secretary unless it be accompanied by an amount of money sufficient to pay a bonus of one-third of one per cent. upon its authorized capital stock, just as though such certificate of amendment were an application for a charter for a new corporation.

On behalf of the applicant it is urged that this is a new ruling, reversing the practice of the department under the Act of 1883, and that, before going to the trouble and expense of advertising its intention to apply for an amendment to its charter, as provided by that act, the Victor Coal Company desires to present to you, through counsel, several considerations why this ruling should not obtain.

The matter is learnedly and ably discussed in the papers submitted, turning chiefly upon the payment of bonus, it being contended, on the one hand, that none of the statutes authorizing amendments of charters require the payment of a bonus as a prerequisite, and, on the other hand, that the payment of the bonus should be exacted because the amendments suggested practically amount to a re-chartering of the corpora-

tion. It must be observed that so far as the form of the request is concerned, the application is not for the re-chartering of a corporation, nor is it an application for a new charter. The time for that has not arrived, because the present charter term does not expire until 1908. But, whatever the form in which it is presented, the real question is, whether the proposal to make the term of the charter perpetual—it now being limited to the term of twenty years—and the removal of the limitation upon the territory in which it may now carry on its operations, constitute improvements or alterations within the meaning of the Act of June 13, 1883?

It may be conceded that if the proposed changes are within the meaning of the act, there is no statute imposing a bonus as a condition of their allowance. On the other hand, if the proposed changes are not within such meaning, then the question of bonus need not be discussed at the present time.

The Victor Coal Company was chartered under the provisions of the Act of April 29, 1874, as a corporation of the second class. It was required by that act that the application of an intended corporation must set forth, *inter alia,* the place or places where its business is to be transacted and the term for which it is to exist. The fourth section provided that "The charter for incorporations named in this act may be made perpetual, or may be limited in time by their own provisions." It is clear that an amendment, under the Act of 1883, to be effective as an amendment, must be deemed and taken to be part of the original charter. If the life of that original charter is circumscribed by a period of its own limitation, whatever amendments, valid in themselves, are attempted, must necessarily be operative during the life of the charter and would necessarily expire with it. That which affects the corporate life or term of existence of a corporation, does not, in my judgment, come within the true meaning of the term "amendment." The statute gave to the applicants the option of stating a term or of making their charter perpetual. They saw fit to select the former. They contracted with the state upon that basis. If a charter be a contract, the right should, at least, be mutual, and the state should have the same latitude of objection to a change in the terms of a charter, which consists of a grant of its own sovereignty, and which by agreement has been specifically limited in time, as the incorporators would have were an attempt made by state ac-

tion to abrogate any of the provisions of a charter or to impair the obligations of a contract.

The doctrine of the Dartmouth College case must be extended equally to the protection of the commonwealth as well as to the protection of the incorporators. It does not affect the validity of this position to argue, as is done in this case, that the corporation might have had a perpetual charter for precisely the same price that it paid for a limited charter. The all-sufficient answer to this is that it saw fit to apply for a limited term and got it. Now that it finds itself in the position of desiring to extend its corporate life, it must do so on the basis of a new contract, and it cannot, under the guise of an amendment operative only within the time limits prescribed in the original charter, seek to give an indefinite duration to a grant of state sovereignty which, by the express contract between the parties, was limited in duration.

The illustration put by the state department, that there is no difference in principle between the renewal of a charter and the renewal of a lease of real estate, strikes me as apposite. It is asked what would be said of the lessee if, upon the expiration of his lease, he should demand of the lessor a perpetual lease without compensation? It is no answer to this proposition to argue that, if the original lease contained a stipulation that upon its expiration it might be renewed and made perpetual without the payment of any further rental on the part of the lessee, it would probably be said of the lessee, in case he exercised his option, that he was merely insisting upon his rights. This argument is based upon the assumption that the Act of 1883 authorized the Victor Coal Company to extend its term indefinitely, and that, therefore, the Act of 1883 constituted a part of the contract with the State. This is a begging of the major premise. The whole question is, what is the true meaning of the Act of 1883? If it authorized such a change in the charter as is contended for in this case, then undoubtedly the Act of 1883, being passed prior to the incorporation of the company, would constitute a portion of the contract made between that company and the state, but, inasmuch as, in my judgment, the Act of 1883 does not sanction such a change as an amendment, alteration or improvement of the charter, the Act of 1883 cannot be made to cover the case in such a way as to read into it the gift of perpetual life and the further gift of

extended territory unnamed and unthought of at the time of the incorporation.

Attorney General Cassidy, under date of September 28, 1883, ruled that a telephone company could not extend its territorial limits to counties not named in its original charter within the meaning of the Act of June 13, 1883, and discusses in detail the question whether the addition of territory could be fairly considered an improvement, amendment or alteration within the meaning of the act. While dealing with the question of an extension of territory he uses language which is equally pertinent to the extension of time within which a corporation has to live. He says:

> "When we speak of the improvement of a charter we obviously mean the improving or bettering of the charter already granted, and if the operations of such charter are confined to prescribed limits, we mean it is improved within those limits. Hence, we think that the addition of territory to a limited charter is not an improvement within the meaning of this act.
>
> "Is it an amendment? To amend a thing, as defined by Webster, is to change it in any way for the better, to remove what is erroneous, superfluous, faulty and the like; to supply deficiencies, to substitute something else in place of what is removed. The word is synonomous with to amend, correct, reform, rectify. An amendment, therefore, is change or alteration for the better, a correction of faults or errors, an improvement, a reformation, an emendation * * * In respect to the amendment of a charter of incorporation, the amendment must relate to the charter as originally granted, and if it does not correct, improve, reform, rectify or alter something in the original charter, it is not, properly speaking, an amendment to that charter. * * * Hence I am led to the conclusion, after a very careful consideration, that the proposed extension of this charter to new territory is not an amendment within the fair meaning of the Act of 1883. Of course, this conclusion relates only to the question in hand. Whether it would also apply to a corporation whose territorial limits are not prescribed in its charter, I do not pre-

tend to decide. I am also construing the act in its relation to charters which are thus prescribed, the extension of which into new territory, by general amendment, ought not to be allowed except under clear warrant of law.

"I do not deem it necessary to consider particularly whether the proposed amendment is an alteration within the meaning of the act, since it will scarcely be claimed that it falls within that designation alone. It does not pretend to alter in any proper sense any article or condition in the original charter, and if not, it cannot be said to be such an alteration as is contemplated by the act."

Reference should also be made to the opinion of Deputy Attorney General Snodgrass, under date of March 21, 1884, where, in an application for a water company to amend a charter by extension of its territory, the amendment was allowed by virtue of the express provision of the third section of the Act of 1883, as follows:

"That nothing herein contained shall authorize the amendment, alteration, improvement or extension of the charter of any gas or water company so as to interfere with or cover territory previously occupied by any other gas or water company."

It is plain that this conclusion was reached because there was a legislative grant of the right to extend its territory on the part of a water company, the only limitation being upon the interference or occupation of territory previously occupied by any other gas or water company.

I see nothing in the opinion of Deputy Attorney General Snodgrass to modify the conclusions reached by Attorney General Cassidy, and just as he concluded that the extension of territory could not come within the meaning of the words "improve, amend or alter," so I cannot see how the extension of the term of corporate existence can come within the meaning of those words. A perpetual charter is no better legally than a limited charter; that is to say, there is nothing defective in a twenty years charter, merely because it is limited in term. And there is nothing defective in a limitation

as to territory. As to time and place it is perfect. If the extension of the territory of a telephone company is not within the meaning of the words "alter," "improve," "amend," neither is the extension of the time of the corporate existence of a coal company. Such an extension is not an amendment, improvement or alteration in any sense of these words. It is in substance the creation of a new term, the creation of a new corporation, the creation of a contract with the state, within new bounds. The words cannot mean that any alteration or amendment which the applicant may consider an improvement must be allowed. That would be to make the applicant the sole judge of the valute of the alteration attempted, and to ignore the standpoint of the state. It might well happen that at the time of the expiration of the term the state might prescribe an increase of bonus as her gifs of sovereignty advanced in value. To deprive the state of that right now, would be to sacrifice her rights without consideration. A contract must bind both of the contracting parties.

In my judgment the request should receive a negative answer.

Duquesne Brewing Company.

Corporations—Amendment of charter—Act of June 13, 1883.

A purpose, not in conformity with the original object of a corporation, cannot be introduced into its charter by amendment under the Act of June 13, 1883, P. L. 122.

Attorney General's Department. Opinion to Samuel W. Pennypacker, Governor.

Carson, Attorney General, March 23, 1904.

I herewith return the certificate of amendment of the Duquesne Brewing Company of Pittsburg.

I cannot advise you to approve of this amendment. The amendments of charters are controlled by the terms of the Act of 13th of June, 1883, P. L. 122. The third section of that act requires the proposed improvement, amendment or alteration of the charter to be produced to the governor, who "shall examine the same, and if he find it to be in proper form, and that such improvements, amendments or alterations are or will be lawful and beneficial and not injurious to the community, and are in accordance with the purposes of the charter, he shall approve thereof and endorse his approval thereon."

There is a provision also in section 4 which forbids a change in the objects and purposes of such corporation as shown by its original charter. The amendment proposed in this case contemplates the selling, leasing, or other disposition from time to time of any of the real estate of the corporation —a purpose which does not appear to me to be in conformity with the original object of the charter, and which might make it impossible to carry on the purposes of the corporation because of a diminution of its assets or a change in the character of its property.

CITY OF HARRISBURG *vs.* HARRISBURG CEMETERY ASSOCIATION.

Taxation—Exemption—Sewer assessment—Act of February 14, 1845.

An act of assembly incorporating a Cemetery Association provided that "the said cemetery shall be forever free from taxation." *Held,* that an assessment for a proportionate part of the expense of constructing a sewer in front of the cemetery was within the exemption.

Rule to strike off lien. C. P. Dauphin County, No. 275, April term, 1882.

SIMONTON, P. J., November, 1886.

The act incorporating the Cemetery Association defendant, passed February 14, 1845, enacts that "the said cemetery shall be forever exempted from taxation." The association was organized under this act, and has expended large sums in the purchase of ground for cemetery purposes. It has therefore given a legal consideration for this exemption from taxation and has a contract right to claim it. No authorities need be cited on this point.

The only question then is whether an assessment for a proportional part of the expense of constructing a sewer in front of the cemetery, is within the exemption.

It is true that the rule is that "the intention to exempt must be expressed in clear and unambiguous terms; and that all exemptions are to be strictly construed, and embrace only what is within their terms;" Cooley on Taxation p. 146; and that it has been held in a multitude of cases, that although special assessments for local improvements are levied by virtue of the taxing power of the state, and can be justified only on that ground, and are therefore in a general sense taxes, they are, nevertheless, not within a general exemption from taxation. Cooley pp. 147, 148, citing the cases.

But our recent cases of Olive Cemetery Co. *vs.* Philadelphia, 12 N. 129, and Erie *vs.* Church, 9, Out. 278, declare a somewhat different doctrine, and rule this case in favor of the defendant. An exemption "from taxation accepting for state purposes" as in the first case; or "from all and every county, city, borough, bounty, road, school and poor tax," as in Erie *vs.* Church, is certainly no broader than the exemption contained in the charter of this defendant which declares that "the said cemetery shall hereafter be forever exempt from taxation."

Therefore, on the authority of these cases, we hold that the cemetery of the defendant is not subject to the lien in question, and the rule to show cause why it should not be stricken off is made absolute.

FRANCIS JORDAN, ASSIGNEE OF HENRY R. MOSSER, *vs.* MOSSER, SADDLER & MUSSELMAN, LIMITED, AND FRANKLIN B. MUSSELMAN AND ALBERT G. HOPKINS.

Equity—Pleading—Multifariousness.

A bill in equity sought to have an assignment of an interest in a limited partnership declared void, and also to have a valuation and appraisement of that interest made. *Held*, on demurrer, that the bill was multifarious.

Demurrer to bill in equity. No. 138, Equity Docket.

SIMONTON, P. J., December 15, 1890.

We think two distinct matters, in which different parties are concerned, are joined in this bill. As we understand it, there are two distinct purposes; one to have a certain assignment of an interest in the limited partnership, called the Mosser interest, decreed to be void; the other to have a valuation and appraisement of that interest made.

If the plaintiff fails in the first purpose, he has no interest in the second; if he succeeds in the first, defendant, Hopkins, who interposes this demurrer, has no interest in the second. Yet the second must be determined in the progress of the suit and before it can be known who has succeeded in the first; for both must be litigated at the same time if the bill is sustained in its present form. Thus either plaintiff or defendant, Hopkins, will be forced to meddle with matters during the progress of the suit with which it will be finally determined he has no concern. And the same will be the case with at least one of the other defendants, W. F. Sadler. All he is interested in is in the valuation, yet as the bill now stands he is made a party to the litigation as to the ownership of the Mosser interest.

Again plaintiff asks to have the appraisement of the Mosser interest ascertained in this proceeding; plaintiff may not be the owner of it and Hopkins may, and if he is he may wish to have its value determined in the way pointed out by the Act

of June 12, 1874, as amended by the Act of June 25, 1885. Furthermore, Hopkins is made a defendant in this bill, but if he succeed in establishing his ownership of the Mosser interest, plaintiff will have no further motive for carrying on the suit and Hopkins, one of the defendants, would then be the only person who ought to be and would have any interest in being the plaintiff.

We think this statement of the nature of this bill as it now stands is enough to show that the demurrer on the ground of multifarious must be sustained, and that it is the interest of all parties that this should be done and that the two questions sought to be litigated in this bill should be determined in separate proceedings. If authorities for this proposition are needed, they may be found in Sawyer *vs.* Noble, 55 Maine, 227, Jerdein *vs.* Bright, 4 L. T. Rep. (N. S.), 12; Dial *vs.* Reynolds, 96 U. S., 340, and Quin *vs.* Power, 18 W. N. C., 285.

We do not think the question whether the plaintiff, if the owner of the Mosser interest, could have it appraised in any other way than that prescribed by the acts above referred to is necessarily before us at this time, and we, therefore, express no opinion upon it.

The demurrer to the bill because of its multifariousness is sustained. If plaintiff elects to amend the bill so as to confine it to one cause of action and to one set of defendants, he may do so within ten days; if he does not the bill will be dismissed.

COMMONWEALTH vs. I. P. MORRIS COMPANY.

Corporations—Tax on Capital Stock Irregular Payment.

A manufacturing corporation returned certain securities, in which a part of its capital stock was invested, for taxation by the state to the Board of Revision of Taxes of the city of Philadelphia, and paid the state tax thereon to the receiver of taxes by whom it was paid into the state treasury. The commonwealth afterwards settled an account for tax on the capital stock represented by these securities. *Held*, that the former payment, while irregular, was a discharge of the commonwealth's claim.

Appeal from accounting officers. C. P. Dauphin County, No. 93, January term, 1894.

MCPHERSON, J., February 12, 1894.

This case was tried without a jury under the Act of 1874. We find the facts to be as follows:

1. The defendant is a corporation of this commonwealth chartered in 1875 or 1876 for the purpose of "manufacturing, repairing and selling every description of steam engines, boilers, machinery, castings, iron buildings, boats and ships, and carrying on a general machine business." (P. L. of 1876, page 239). It is not engaged in the brewing or distilling of spirits or malt liquors and does not possess the power of eminent domain.

During the tax year ending the first Monday of November, 1887, it was exclusively organized for manufacturing purposes and was actually engaged in manufacturing machinery within the state.

2. During the said year the defendant had a capital stock of $350,000 upon which dividends aggregating six per cent were declared.

During the same year part of its capital stock was invested in the following securities:

Car Trust of New York, Series F.,	$12,965.17
N. Y. & Pacific Car Trust, Series D.,	10,000.00
Phil. Wil. & Balto. Trust 4's,	20,835.00
Penn. R. R. cons. 5's,	9,850.00
Car Trust, New York 2 Series D.,	7,900.00
North Pa. R. R. gen. mortg. 7's,	6,041.59
Lehigh Valley R. R. cons. 6's,	18,109.50

North Pacific (Miss. Div.) 6's, ... 4,000.00
Lehigh Coal & Nav. Trust 7's, ... 11,125.00

Total, ...$100,826.26

3. For the year in question the defendant returned these securities for taxation by the state to the Board of Revision of Taxes of the City of Philadelphia, and paid the state tax of three mills thereon to the Receiver of Taxes by whom it was afterwards paid into the state treasury.

4. The settlement in controversy is based in part upon the facts averred in the company's petition for exemption—in which the value of the above securities was given as "about 101,000" and the value of the whole of the company's property was given as "about 660,000"—and **taxes** $\frac{101.00}{660.00}$ of $350,000 (or $53,560 of capital stock) at three mills under the Revenue Act of 1879.

There is no real dispute about this matter. Assuming (but not deciding)that the capital stock invested in these securities would now be taxable if the tax had not already been paid, we are of opinion that this previous payment is a full defence to the commonwealth's claim. It is true, that the payment to the Receiver of Taxes was irregular (to say the least), but it was a payment at the same rate as is now demanded, namely, three mills; it was made to an agent of the state, and the money has reached the treasury. Neither was it an actual or attempted payment upon a different account from that now in suit, but was intended to be, and really was, a payment upon this very subject of taxation. It must therefore be regarded in equity as a discharge of the present claim.

We direct judgment to be entered for the defendant unless exceptions are filed according to law.

W. B. GIVEN, RECEIVER OF THE LANCASTER COUNTY MUTUAL LIVE STOCK AND CHATTEL THEFT INSURANCE COMPANY *vs.* J. M. RETTEW.

Mutual Insurance Companies—Cash and assessment policies—Liability of policy holder—By-laws.

While it is true that each person insured in a mutual insurance company becomes a member by the fact of insurance, it is not true that every member becomes liable to assessment. Those who are insured upon the cash plan have already made their full contribution to the common fund and cannot be further burdened.

An insurance company, although organized upon the mutual plan, has the power to issue cash policies.

A policy of insurance based upon a distinctly specified cash premium, of which a part was paid when the policy was delivered, and the remainder was payable, and was afterwards paid, in two installments, is not liable to assessment.

If a member of a mutual insurance company knows the by-laws of the company, and accepts them as part of his contract,—for example, if they are referred to therein—they bind him; but if he makes a contract which excludes them in any particular, in that particular they do not bind him.

Assumpsit by receiver to recover assessment. C. P. Dauphin County, No. 117, March term, 1894.

MCPHERSON, J., February 19, 1894.

This case was tried without a jury under the Act of 1874. From the papers offered in evidence and the agreement of the parties we find the following facts:

1. The Lancaster County Mutual Live Stock and Chattel Theft Insurance Company is a corporation of this Commonwealth duly chartered on August 26, 1885, under the Insurance Act of May 1, 1876, P. L. 53. Its principal place of business was in the county of Lancaster, but its articles of association (or charter and certificate) were never recorded in that county, or in any other county of the commonwealth.

2. The company began the business of insurance against theft, as authorized by its charter, and continued to carry it on until February, 1892, when it was dissolved by a decree of this court. The plaintiff was appointed receiver and in July of that year was empowered "to lay an assessment of twelve per centum on all amounts insured in said company on policies

which were assessable on the twenty-fifth day of September, 1891, under the provisions of section seven of the by-laws."

In accordance with this order the assessment was laid; whereupon in September and October certain policy-holders who had been assessed petitioned the court to rescind the order, alleging various matters of defence. These petitions were refused in April, 1893, but expressly without prejudice to any right of the petitioners to make whatever defence they might desire when suits were brought to collect the assessment.

All the papers of record in Commonwealth *vs.* Lancaster County, etc., Co. No. 479 Sept. Term, 1891, Dauphin C. P. are made part of this finding.

3. The present suit is brought to recover the sum of Forty-eight dollars duly assessed by the receiver upon the defendant's policy of $400, but of which the payment is refused because it is alleged that the contract between the company and the defendant is non-assessable.

The defendant's application and policy, his two promissory notes and the company's by-laws, are made part of this finding. The defendant had no knowledge of the by-laws at the time the contract was made.

4. When the policy was issued in September, 1890, the defendant paid $5.25 to the company's agent, being the cash premium stated in the policy; and also delivered his two promissory notes for $4.00 each in the ordinary form (except that they were non-negotiable), payable in one and two years respectively, being the annual payments referred to on the face of the policy and spoken of on the back of the policy as "conditions of insurance." These notes were duly paid at maturity.

CONCLUSIONS OF LAW.

If the defendant is liable in this action his liability must rest upon the ground, that he became subject to assessment merely by joining the company and in spite of the silence of his policy on this subject. We do not think this ground can be successfully maintained. It is true that each person insured in a mutual company becomes a member by the fact of insurance, (Susquehanna Ins. Co. *vs.* Perrine, 7 W. & S. 348); but it is not true that every member is liable to assessment. Those who are insured upon the cash plan have already made their full contribution to the common fund and cannot be further bur-

dened; Schimpf *vs.* Ins. Co. 86 Pa. 373, Lycoming Ins. Co. *vs.* Com. 10 W. N. 230.

The plaintiff concedes the soundness of this proposition, but avers that the policies of this company were all assessable because no others could be issued under section 34 of the Act of 1876 (P. L. 63), which declares that "Companies incorporated under this act must be organized upon the joint stock or mutual plan, and the power to insure upon both plans shall not exist in the same corporation...."; This argument was not much pressed, however, and we need only say in reply—as was said in Schimpf *vs.* Ins. Co.—"We must not confound a stock policy with a cash policy. They are essentially different. The payment of a cash premium does not decide the character of 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 on 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...." This is the "joint stock plan" referred to by the Act of 1876. "Mutual companies on the other hand are somewhat of the nature of a partnership; 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." This is the "mutual plan" referred to by the act; and it seems to us quite clear that the section in question simply forbids the incorporation of a company to insure upon both plans at the same time, and is not concerned with the kinds of policies which a mutual company may issue. This company, therefore, although organized upon the mutual plan, had the power to issue cash policies; and it seems to follow that if the defendant's policy was of this description the mere fact of his membership did not necessarily imply a liability to assessment.

If then we turn to the defendant's contract, we find no language therein which either expresses or implies that assessment thereof is possible. Neither in the application, nor in the policy, nor in the "conditions of insurance" endorsed upon the policy, nor in the notes given as part of the premium, is there the remotest allusion to the possibility of future assessment; but the whole contract is plainly based upon a dis-

tinctly specified cash premium, of which a part was paid when the policy was delivered, and the remainder was payable, and was afterwards paid, in two installments.

This is insurance upon the cash plan as explained in Schimpf *vs.* Ins. Co., and there would be no ground at all for the plaintiff's contention if it was not for the company's seventh by-law, which provides as follows: "Each and every person insured shall thereby become a member of the company, and shall be liable to pay his or her proportion of all losses and expenses at such time or times as the directors for the time being may require, in proportion to the amount insured by such member." Even this language is ambiguous. It does not in terms speak of assessment, and while it may mean that future assessments are to be expected, the inference might also be drawn that the due "proportion of all losses and expenses" chargeable to a cash policy was estimated in advance and charged against the policy; and especially might this inference seem reasonable, if it was observed that each note accompanying a cash policy was made for a definite proportion, namely, one per cent of the amount insured by such policy. And as this proportion was to be paid in any event, even if there were no losses or expenses to be met thereby, it might fairly be said that these notes were given for assessments estimated in advance to cover contingent losses and expenses, and therefore that the obligation of the by-law was fully met when the notes were paid.

But, assuming the by-law to refer only to future assessments, the question remains: Was the defendant bound by it? It certainly was not brought to his notice before the policy was issued. The company's charter was never recorded; its by-laws were not printed upon its policies and are in no way alluded to therein; the defendant did not know their contents, and they are not referred to in his contract either directly or indirectly; and therefore the only knowledge with which the defendant can be fairly charged is such as he might derive from the fact that the corporation was called a "mutual" company. But this word does not necessarily imply that every policy would be liable to assessment. Mutual companies may issue cash policies as well as policies subject to assessment, and therefore the defendant was not bound to suppose that, when the company offered him a policy which upon its face was for cash alone, nevertheless there might be a by-law which contra-

dicted the face of the policy and turned it into a contract liable to assessment.

The plaintiff argues, however,—and this is the point upon which most stress is laid,—that the defendant, being a member of the company, is bound by its by-laws, and cites several cases in support of this proposition; among them, Mitchell *vs.* Ins. Co., 51 Pa. 402 and Burger *vs.* Ins. Co. 71 Pa. 422. The proposition is not denied, but it does now apply. In the cases cited the point decided was that, *after* the insured had become a member, he was bound to learn the rules of the company and to be governed by them as to his future conduct; for example, as to selling the property insured, or as to obtaining additional insurance thereon. But this does not affect the present question, which has to do solely with the relations between the company and an applicant for insurance *before* he becomes a member. Upon this question there is an early case (Ins. Co. *vs.* Perrine 7 W. & S. 351) which held the applicant to be bound by a regulation of which he did not have actual knowledge; the decision being put upon the ground that, as the applicant was bound to know from the act of incorporation (P. L. of 1839, page 124) that he was about to become a member, the court would presume that he had made himself acquainted with the company's regulations. This ruling may still be valid upon the precise point then involved; but it has several times been distinguished, and as a general proposition can certainly not be sustained. The modern cases do not presume that the applicant knows what common experience has taught us that he does not know, but they treat him as a stranger to the company until the contract is made and until membership is thus acquired; (Ins. Co. *vs.* Woodworth, 83 Pa. 223, Eilenberger *vs.* Ins. Co. 89 Pa. 469, Kister *vs.* Ins. Co., 128 Pa. 563, Meyers *vs.* Ins. Co. 156 Pa. 425;) and accordingly the essential inquiry is concerning the terms of that contract; Ins. Co. *vs.* Staats 4 Py. 319. If he knows of the by-laws and accepts them as part of his contract,—for example, if they are referred to therein—they bind him; but if he makes a contract which excludes them in any particular, in that particular they do not bind him.

In the case before us the company had the lawful power to make two kinds of contracts; one, assessable, and the other, non-assessable. It offered the defendant a non-assessable contract; he accepted it, and became a member upon those terms. Neither the company, therefore, nor the receiver, can now sub-

stitute a different contract for the agreement which was then made, and recover upon a term to which the defendant did not agree, either expressly or by any reasonable implication.

The case of Dettra, Receiver, &c., *vs.* Kestner, 147 Pa. 566 was decided upon other grounds and does not conflict in the least with the conclusion just stated. There, the contracts were assessable and were enforced in spite of certain fraudulent inducements held out by the company; the reason being, that the rights of innocent third persons had intervened and required that the defence of fraud should be excluded and the contracts upheld. Here, the contract is non-assessable, and the insured has already discharged every obligation which it lays upon him. Under such circumstances not even an innocent third party can call upon him to do anything more.

We conclude therefore that the plaintiff is not entitled to recover, and direct the prothonotary to enter judgment in favor of the defendant if exceptions are not filed according to law.

Motor Vehicles.

Motor vehicles—Acts of April 23, 1903, and April 19, 1905.

The Act of April 19, 1905, P. L. 217, repeals and supersedes the Act of April 23, 1903, P. L. 268, and is the state law regulating the operation of automobiles and motor-vehicles.

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

Fleitz, Deputy Attorney General, November 9, 1905.

I am in receipt of your letter of recent date, asking for an official interpretation of the Act of 19th of April, 1905 (P. L. 217), entitled:

"An act relating to automobiles, or motor-vehicles; regulating the speed limit upon the streets and public highways of the commonwealth; providing for the licensing of the operators thereof by the State Highway Department, and fixing the amount of said license; regulating the service of process and of proceedings of actions in damages arising therefrom; and prescribing the penalties for the violations of the provisions of the same."

Among other questions you ask whether this act is supplementary to or repeals the Act of 1903 (P. L. 268), entitled:

"An act relating to automobiles, or motor-vehicles; providing for the registration thereof; regulating the speed limit upon the public highways within this commonwealth; providing for the licensing of the operators thereof, and fixing the amount of the license; regulating the service of process and of proceedings in actions of damages arising therefrom; and prescribing the penalties for the violation of the provisions of the same."

In order to arrive at a correct understanding of the meaning, purpose and scope of the Act of 1905, it is necessary to carefully study both the above mentioned acts and the conditions which existed at the time of their passage, and which were intended to be remedied or relieved.

The popular use of automobiles, or motor-vehicles is of recent origin and growth, and until the passage of the Act of 1903 there was no special law applying to them, affecting or controlling their operation, but the legislature in that year, recognizing the possibilities of danger to the traveling public because of the reckless and unskillful manipulation of these machines, placed upon the statute books this act, which, at the time, was considered broad and comprehensive enough to correct any existing abuses, and to provide ample protection for the public. As indicated by its title, it provided for the registration of motor-vehicles and the licensing of the owners or operators thereof, for the purpose of ascertaining the identity of the machine and fixing the responsibility of the person liable for any damage which might be done by it in the course of its operation. It further provided for regulation of speed and the conduct of the operators toward the traveling public, and the penalties to be imposed for any violation of its terms.

In the two years which elapsed between the Legislature of 1903 and that of 1905 controversies arose regarding the operation of the act, and the court of Erie County, in an opinion handed down by Judge Walling, declared that the Sixth Section, requiring the owners of automobiles to take out a license, was inoperative, because at variance with the language of the title. This left the registration of the machine as the only means of identifying the owner or the person in whose charge it might happen to be at the time of an accident. It was also found that in several minor particulars the law failed to meet the requirements demanded by the greatly increased

number of these machines upon the streets and highways of the commonwealth.

For these reasons, the same member of the Legislature, who introduced the Act of 1903, presented the Act of 1905, and from all the information I am able to obtain, as well as the similarity of the titles and the context of both Acts, I am satisfied that the latter was intended to supersede and repeal the former, and to constitute the entire law of the state upon the subject to which it relates.

It provides, as did the former act, a general method of regulation and supervision by seeking to identify and control, not the machine, but the operator, who is required to secure, from your department, a license, paying the fee therefor, before he may legally operate a motor-vehicle of any kind upon the streets and highways of the commonwealth. At the time of the issuing of a license to the applicant, your department is required to furnish the licensee with two tags, bearing a number, not less than five inches in height, which tags are to be placed upon the front and the rear of the machine, and no other license number or tags may be legally exposed on said machine while the same is operated in Pennsylvania.

Section 5 fixes the maximum rate of speed at which motor-vehicles may be operated within the corporate limits of any of the cities or boroughs of the state, at not greater than a mile in six minutes, and outside the corporate limits of these municipalities the lawful rate of speed shall not exceed one mile in three minutes, with the proviso that, in townships of the first class, the commissioners, under certain conditions, may fix by ordinance a speed rate of not less than one mile in six minutes in the sections of the township where they consider such rate necessary for public safety; and it is provided further that, notwithstanding the maximum speed above stated, no person shall drive an automobile at a greater speed than is reasonable under the circumstances obtaining at any time or at any place.

Section 6 provides that each motor-vehicle shall carry "during the period from one hour after sunset to one hour before sunrise at least one fixed lightd lamp" in front, and one red light behind, and shall also be equipped with a good and sufficient brake and a proper signal device. This section further regulates the operation of motor-vehicles and the attitude and conduct of those in charge thereof toward the traveling public.

Section 7 provides that any person operating a motor-vehicle in this state must carry the license issued by your department, and be able to show the same upon the request of any officer.

Section 9 contains specific directions to constables and police officers of the commonwealth as to their duties in carrying out the provisions of the act.

Section 10 provides that any person violating the act shall be subject to a fine or penalty of not less than ten dollars nor more than twenty-five dollars for an original offense, and a fine of not less than twenty-five dollars nor more than one hundred dollars for the commission of a second offense. It also provides that the second conviction shall be followed by the revocation of the license held by the person so offending.

Section 12 was apparently transferred bodily from the former act to the one under discussion, without consideration on the part of those having the bill in charge as to what its effect would be. It is inconsistent with the remainder of the act, and, so far as the exemption from its provisions of "any motor-vehicle which any manufacturer or vendor of automobiles may have in stock, and not for hire or for his private use" is concerned, it is inoperative and futile, for the reason that none of the provisions referred to apply to motor-vehicles or automobiles at all, but only to the persons engaged in operating them.

After a careful consideration of the whole matter I am of the opinion and advise you that the Act of 1905 was intended to and does supersede and repeal the former act, and constitutes the law of the state upon this subject.

That all tags, bearing license numbers, with the exception of the two furnished by your department, must be removed from motor-vehicles while the same are being operated within the limits of this Commonwealth.

No city, borough or other municipality may legally fix a maximum speed limit within its boundaries less than the speed limits provided for in Section 5 of the act.

No motor-vehicle, whether automobile or bicycle driven by a motor, may be lawfully driven, ridden or operated upon the streets and highways of the state after the first day of January, 1906, unless the operator thereof shall have first obtained from your department a license for that purpose, and shall have further complied with all of the regulations and requirements imposed by this act.

MERGER AND CONSOLIDATION OF THE BELLEVUE AND PERRYVILLE STREET RAILWAY AND THE HOWARD AND EAST STREET RAILWAY COMPANIES.

Street Railways—Merger—Act of May 29, 1901.

The Act of May 29, 1901, P. L. 349, authorizes the merger and consolidation of street railway companies.

In dealing with an act of assembly which has not been declared unconstitutional by the courts, it is not part of the executive function to undertake to set it aside upon a line of argument that, if addressed to a court, might induce it to declare the act to be in violation of the constitution.

While the governor is sworn to obey the constitution and to uphold the laws, yet this does not clothe him with judicial authority or impose upon him the responsibility of passing upon questions which can be more properly addressed to the courts.

When the papers in a merger proceeding show the combined capital stock of the merging corporations to have been $26,000 and the capital stock of the corporation formed by the merger to be $750,000 letters patent to the new corporation should be withheld.

There is no law authorizing the term of a corporation formed by the merger of other corporations, to be fixed at 995 years.

The increase of capital stock authorized by the Act of May 15, 1889, P. L. 205, is the amount necessary to equalize the interests of the parties to the joint agreement.

Attorney General's Department. Opinion to Samuel W. Pennypacker, Governor.

CARSON, Attorney General, June 8, 1904.

I have examined the articles of consolidation and merger between the Bellevue and Perrysville Street Railway Company and the Howard and East Street Railway Company, which you submitted to me with a request to advise you whether you should grant letters patent to the consolidated corporation under the terms of the Act of 29th of May, 1901, P. L. 349.

That act provides, in section 3, that the merger and consolidation shall not be complete and no "such consolidated corporation shall do any business of any kind until it shall have first obtained from the Governor of the Commonwealth new letters patent, and shall have paid to the State Treasurer a bonus of one-third of one per centum upon all its capital stock in excess of the amount of capital stock of the several corpora-

tions so consolidating, upon which the bonus required by law has been theretofore paid."

It has been contended that the Act of 1901 is not applicable to this case, but that the proceedings are governed entirely by the Act of May 16, 1861, P. L. 702, and its supplements, on the ground that the Act of 1901 is supplementary to an act entitled "An act to provide for the incorporation and regulation of certain corporations," approved the 29th day of April, 1874, and therefore inapplicable to railway mergers. I find, on comparing the two acts, that the earlier act entitled "An act relating to railroad companies" stood as a model for the later one. The structure and order of subjects are identical, and, in most of the important features common to both acts, the phraseology is the same.

I find, in section 1 of the Act of 1901, that the enacting clause embraces corporations other than those authorized or organized under the terms of the Act of April 29, 1874, because, after providing that it shall be lawful for any corporation, now or hereafter organized under or accepting the provisions of the Act of April 24, 1874, or any of the supplements thereto, the additional words appear "or of any other act of Assembly authorizing the formation of corporations," which are words in themselves broad enough to include railroads.

This construction is confirmed by the proviso which appears also in section 1, to the following effect:

"Provided, That nothing in this act shall be construed so as to permit railroad, canal, telegraph companies which own, operate or in any way control parallel or competing roads, canals or lines, to merge or combine."

The plain meaning of this proviso, coupled with the generality of the preceding words, leads to the conclusion that railroads, other than those which own, operate or control parallel or competing lines, are within the terms of the act. This seems to me a fair construction of section 1 in its entirety. Section 5 speaks of *any* corporation which shall become a party to an agreement of merger and consolidation hereunder" without confining the reference to corporations organized under the Act of April 29th, 1874.

The argument is pressed, however, that the act is unconstitutional because of a lack of definiteness in its title, which fails, it is urged, to give notice of the fact that railway companies are included. The title reads as follows:

"An act supplementary to an act entitled 'An act to pro-

vide 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."

Unless the act itself be read, the title does not indicate the kinds of corporations which can be merged and consolidated, unless, indeed the professional knowledge be borne in mind that the Act of 29th of April, 1874, does not relate to railroads. It requires, therefore, the knowledge of an expert lawyer, one trained in corporation law, and particularly in railway statutory law, to know that the reference to the Act of 29th of April, 1874, is tantamount to the exclusion of railroads. Without this knowledge the title clearly points to the main fact that the act provides for the merger and consolidation of *certain* corporations, and when the first section is read it will be perceived that the act applies, not only to corporations now or hereafter organized under the Act of 29th of April, 1874, or any of its supplements, but that it also relates to corporations formed under any other act of assembly authorizing such formation, limited, however, by the proviso that, so far as railroads are concerned, railroads which own, operate or control parallel or competing roads or lines are excluded from the terms of the act. If the main purpose of a title be to point the reader to the subject-matter of the act, and not to furnish an index of its contents, then the conclusion would be that the act applied to the merger and consolidation of certain corporations, the exact character of which was not specified in the title, but which could be ascertained only from a reading of the act itself, unless, indeed, there be superadded to the reading of the title professional knowledge of the fact that the Act of April 29, 1874, and its proper supplements, do not relate to railroads.

The act contains but one subject, to wit: the consolidation and merger of corporations. The title in this respect, by the use of the word "certain," compels the reading of the statute itself in order to ascertain its scope and extent. I am doubtful whether a title to an act can be declared unconstitutional because, if a certain element of professional expert knowledge be added thereto, and that expert knowledge be read, so to speak, into the title of the act itself, it would be found to be narrower in its scope than at first indicated. This, however, is a question of construction, and lies at the basis of the contention that the act should be declared unconstitutional because of a lack of clear designation in its title of the subject-matter

of the act. Or it might be contended that the subject of railroads, as covered by a supplement to the Act of April 29th, 1874, was not germane to the subject of the original act.

In my judgment both of these are questions for the courts and not for the executive. It must be borne in mind that the Act of 29th of May, 1901, was duly approved by the then governor of the state, and stands upon the statute book as an existing law, which so far as I know, has never been interpreted by the courts or declared to be unconstitutional. I do not perceive that it is a part of the executive function, in dealing with an act of assembly which has not been declared unconstitutional by the courts, to undertake to set it aside upon a line of argument which, if addressed to a court, might induce it to declare the act to be in violation of the constitution. To do so would require the exercise of judicial power which belongs to a separate department of the government. While the governor is sworn to obey the constitution and to uphold the laws, yet this does not clothe him with judicial authority or impose upon him the responsibility of passing upon questions which can be more properly addressed to the courts. For one governor to substitute his own judgment for that of his predecessor, (for judgment must necessarily have been exercised at the time that the act was approved), would be to substitute the individual judgment and discretion of a successor in the office of governor for that of his predecessor, and practically to annul an act of assembly approved by a previous governor upon the ground that the act was unconstitutional and should not have been approved. This does not constitute a part of the executive function. I am of opinion that it is not within the scope of your duty or authority to consider the question, but that you are bound, for the purposes of executive administration of the law, as it is found upon the statute book, to enforce its provisions and to assume the constitutionality of the act.

I therefore conclude that the Act of 1901 does relate to the merger and consolidation of railroads, and as the Supreme Court has held that railways are within the term "railroads," the act is applicable to the case in hand.

The papers themselves are objectionable: first, because of the provision in the agreement for a capital stock of $750,000, which is $724,000 in excess of the aggregate of the capital stock of the constituent companies. The capital stock of the constituent companies in the aggregate amounts to the sum of $26,000. In the case of the Bellevue and Perrysville Street

Railway Company it is $5,000, and in the case of the Howard and East Street Railway Company it is $21,000. The capital of the consolidated companies amounts to the sum of $750,000.

The Constitution of Pennsylvania, in section 7 of Article 16, declares:

"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 Act of February 9, 1901, was passed to carry into effect this constitutional provision, requiring sixty days' notice of the proposed increase by publication of the time of the meeting of the stockholders, called to act on the subject, and specifies with particularity the proceedings to be taken, and requires further than returns showing the increase shall be filed in the office of the secretary of the commonwealth within thirty days thereafter, and provides a penalty for neglect or omission to make the return. Thus was a specific method provided for the increase of capital stock. The papers filed do not disclose that such steps have been taken.

It is true that to the papers filed is attached an affidavit of the secretary of each company that there was a waiver of the notice of the meetings of the stockholders required by the act, and there has been a practice prevailing to permit the sixty days' notice to be waived, such waiver being evidenced by a paper, signed by all the stockholders, filed with the proceedings. It is, in my judgment, doubtful whether such practice can be followed in proceedings involving the creation of a corporation under the merger and consolidation act, but even were this allowed, in the present case there is no waiver filed signed by all the stockholders.

It further appears that the term of the constituent companies, as consolidated, is fixed by the papers at 995 years. Neither the Act of 1861 nor of 1901 authorizes the term of a consolidated company to be fixed at such a figure.

There are other defects apparent in the paper. If the Act of April 27, 1864, P. L. 617, entitled "A supplement to an act entitled 'An act relating to railroad companies,'" applies, then the papers are in conflict with such act, for that act provides that, while the company into which such merger shall take place, may make such increase in its capital stock as may be expedient in carrying such merger or consolidation into effect, yet

such increase shall not be more than the amount of the capital stock, and shares of the company or companies so merged and consolidated. Again it appears on the face of the papers that the Bellevue and Perrysville Street Railway Company is a corporation chartered on the 12th of November, 1902, and is, with its extensions, 6.02 miles in length. The Act of May 14th, 1889, P. L. 211, distinctly requires that no articles of association shall be filed and recorded in the office of the secretary of the commonwealth, and no charter shall be issued for such purpose, until at least $2,000 of stock for every mile of railroad proposed to be made shall have been subscribed thereto, and ten per centum thereof paid in good faith in cash, but this company, as set forth in the articles of merger, has a capital stock of but $5,000, of which only 35 shares of a par value of $50 had been subscribed, and ten per centum, or $175, has been paid in cash to the treasurer of the company.

It further appears that the Howard and East Street Railway Company has a capital stock of $21,000, of which amount only 140 shares of a par value of $50 had been subscribed for, and upon this ten per centum, or $700, had been paid in in cash to the treasurer of the company, which is less than the amount required by the above mentioned act.

The articles of merger further provide that these two companies, with a joint capital stock of but $26,000, and only a small part of the same subscribed for, shall constitute a new company, which shall have an authorized capital stock of $750,000, "all of which shall be taken and deemed as full paid up and shall be presently issued." The articles of merger also provide that the "shareholders of the present Bellevue and Perrysville Street Railway Company shall receive full paid up capital stock of the new corporation to the amount of $500,000 at par value, consisting of $10,000 shares, which stock shall be divided among said stockholders pro rata in proportion to their holding of the capital stock of the said Bellevue and Perrysville Street Railway Company." The articles also provide that the stockholders of the Howard and East Street Railway Company shall receive full paid up capital stock of the new corporation to the amount of $250,000, at par value, consisting of 5,000 shares, which stock shall be divided among said stockholders pro rata in proportion to their holdings of the capital stock of the Howard and East Street Railway Company."

There is attached to the articles of merger an affidavit made by James D. Callery, president, and G. A. Gilfillan, prin-

cipal engineer, that the cash value of the property of the Bellevue and Perrysville Street Railway Company is equal to the amount of stock to be issued to the stockholders of the said company under the articles of consolidation and merger, to wit: $500,000. There is a like affidavit made by James D. Callery, president, and T. Uhlenhaut, Jr., principal engineer of the Howard and East Street Railway Company, that the actual cash value of the property of that corporation is equal to the amount of stock issued to stockholders under these articles of association, to wit: $250,000 of the capital stock of the new company.

It is apparent from an examination of this state of facts that such issue of stock on the part of the consolidated company is in violation of the Act of April 27th, 1864, P. L. 617, as well as the later Act of 1889, P. L. 211, and that the charters of these companies were issued inadvertently and erroneously in view of the statement which they themselves set forth in their articles of merger. It is contended that this is done under the authority of the Act of 15th of May, 1889, P. L. 205. I do not perceive in this act authority for so vast an increase. The authority seems to be limited to what would be "necessary to equalize the interests of the parties to the said joint agreement."

For the foregoing reasons I am of opinion that the letters patent should be withheld.

I herewith return the articles of consolidation and merger, dated the 17th day of February, 1904.

PROCEEDINGS OF A MEETING OF THE MEMBERS OF THE BAR OF DAUPHIN COUNTY, PENNA.

Called to Take Action Upon the Death of

Hon. John H. Weiss.

President Judge

The following notice had been posted in the Office of the Prothonotary:

"BAR MEETING.

"At the suggestion of many members, I hereby call a meeting of the Dauphin County Bar, to be held in the Court Room No. 1, Saturday morning, at 10 o'clock, to take appropriate action upon the death of President Judge John H. Weiss.

"B. F. Etter."

MEMORIAL MINUTE AND ADDRESSES.

In Court Room No. 1, Court House,
Harrisburg, Pa., *Saturday, November* 25, 1905.

The hour of 10 o'clock A. M. having arrived, Robert Snodgrass, Esquire, announced:

Gentlemen of the Bar: In the absence of Mr. Etter, who was expected to discharge this duty, it seems to devolve upon me to call this meeting to order, and I do so by moving that Judge Kunkel act as Chairman.

Mr. McCARRELL: I second the motion.

The motion was unanimously agreed to.

Mr. SNODGRASS: Judge Kunkel will please take the chair.

Honorable GEORGE KUNKEL: The next thing in order is the selection of secretaries.

Mr. STROH: I nominate John C. Nissley and William M. Hargest, Esquires.

Honorable GEORGE KUNKEL: Will those gentlemen please come forward and take seats.

Mr. GILBEBT: It becomes my sorrowful duty to move that a committee of seven be appointed by this Chair to prepare, and to report for the consideration of this meeting, a minute upon the death of our late President Judge, John H. Weiss.

Mr. McCARRELL: I second that.

The motion was agreed to.

Honorable GEORGE KUNKEL: The Chair will appoint on that committee, Mr. Gilbert, Mr. Olmsted, Mr. Bergner, Mr. Snodgrass, Mr. Backenstoe, Mr. B. M. Nead and Mr. Geyer.

Mr. GILBERT: Will that committee please retire with me?

After its deliberations, the committee returned to the meeting.

Mr. GILBERT: Mr. Chairman, the committee instructs me to report the following minute with respect to the death of our former President Judge, John H. Weiss.

MINUTE.

John H. Weiss, the sixteenth President Judge of the Courts of Dauphin County, died at his home in Harrisburg, on the morning of the twenty-second day of November, 1905, in the sixty-sixth year of his age.

He was the eldest son of John and Martha Weiss, and was born in Schaefferstown, in Lebanon County, on the twenty-third day of February, 1840. His early years were

passed in labor upon the farm, where his parents lived, and in attendance upon the common schools in the neighborhood, where his education began. He continued his studies in the Millersville State Normal School and completed them in 1863, as a graduate of Jefferson, now Washington and Jefferson College. His faithfulness to duty was early attested by the distinction he gained as a scholar in those institutions of learning.

He commenced the study of law in 1863, in the office of Hon. David Mumma, and pursued it with such diligence, understanding and devotion that when he was admitted, on the fifth of December, 1865, as an attorney-at-law of this court, he had already given full assurance of his early usefulness and eminence at this Bar. His success in his profession was immediate, and he quickly gained a numerous and important clientage which he steadily enlarged and maintained until he passed from the labors of a lawyer to those of a judge. His conduct as a lawyer commanded and rewarded the long trust the public placed in him. In all his professional work he was ideally faithful to the welfare of all his clients, shrinking from no study, however severe, and declining no labor, however arduous, which could promote or safeguard their interests. He was pre-eminently a safe counselor and his advice was much desired by reason of its rare sense and wisdom. He did not delight in speech to juries, preferring to avoid it; but, to an extent that he never would admit, he had, and when required he used, the gift of clear statement and sensible presentation of the causes of his clients, which profoundly influenced the jurors who listened to him.

Amid all his professional cares, he did not neglect his duty as a citizen. For many years, he was a leader in the politics of his city and county, and a trusted adviser in those of the State. He was a man of large public spirit, of sincere interest in the welfare of his fellowmen, and of much service, in useful and disinterested ways, to his city and its people. His friendships were many and true, marked on his part by manifold acts of endearing tenderness and ended only by death.

The charm of scholarship and the grace of culture adorned him, and until the end of his days he delighted in

literature, in painting, and in all the arts which refine life and console the spirit. He was an attendant of the Presbyterian Church, and had an unshaken belief in the truths of religion as revealed in the Holy Scriptures. He was a devoted son and brother, and his home was blessed by his love for his wife and children, and by their love for him. His nature was social, his hospitality generous, and his kindness of heart and its many manifestations, associated, as they were, with knowledge and humor, made his society a pleasure to his fellowmen. His many excellences of mind and character, of temperament and manner, were so plain to the public view that when Judge McPherson resigned his office of additional law judge of this district to accept the office of District Judge of the United States, Judge Weiss was, on March 14, 1899, appointed his successor, in answer to the unanimous request of the members of this bar, and he was chosen by the people of this district, without division of party, at the November election of 1899, to be his own successor for the full judicial term of ten years.

He continued to serve as additional law judge until the death of Judge Simonton cast upon him the office of presiding judge of these courts. His years of judicial service were less than seven in number. But brief as that service was, it was long enough to prove, by many tests, that Judge Weiss had maintained unimpaired the high renown of the bench of Dauphin County for ability, for learning, for justice, for honor and for humanity, and to make his death a loss to the administration of the law, and a personal sorrow to every member of this Bar.

Mr. GILBERT: Mr. Chairman, completing the instructions given me by the committee, I respectfully move the adoption of this minute, and that, if it be adopted, that it be recorded upon the records of this Court and that a copy of it be sent to the family of Judge Weiss.

Mr. OLMSTED: Mr. Chairman: But little more than two short years have elapsed since this Bar was called together to take action upon the death of a beloved President Judge.

He who presided over that meeting of the Bar has himself been called to join his predecessor in that high office, and we are again called upon to mourn the loss of a President Judge whom we all loved and whom we all respected.

John H. Weiss, as the minute shows, was the son of a farmer of Lebanon County. He inherited but little of this world's goods; he inherited little save a good constitution and those traits of character most often found in the children of sober, industrious Christian parents. Whatever of success he achieved in life, whatever of fame or fortune he acquired, was due, in large part, to his own patient, persistent endeavor. Although no man loved more than he to mingle with his fellows, I have never known a more industrious man nor one who made more orderly disposition of his time. The things to be done each day were, as far as possible, planned in advance and the hours for doing them. He was most precise and punctual in the keeping of every engagement and in the carrying out of every plan.

It was my good fortune, some years ago, to take a trip abroad in a company of which he may be said to have been the controlling spirit. Even before he left Harrisburg he had planned every minutest detail of that somewhat extended trip, embracing many lands and many cities, and nothing could persuade him to deviate one hair's breadth from the schedule he had thus planned; so that any friend at home, having a copy of it, could at any time have stuck a pin in the map at the point where he was at that hour. The habits of study, of care, of method and of industry, which he acquired in early youth, he never relinquished, and they had much to do with his success in life. As a lawyer, he was hard-working, painstaking, studious and careful. Busy as he was, he found some time each day to devote to social companionship, and to every circle he was a genial, welcome addition. It was but a short time before he became a prominent, and he was soon a leading, figure at the Bar. In early life, as the minute indicates, as a sort of side issue, he took delight in politics. For nearly, if not quite, a quarter of century, he was county chairman of the party in whose principles he believed, and took a very active part—was a leading figure—in its affairs, having the more

influence because he sought no office for himself. He conducted many stirring political campaigns, but such was his management of them, so great his courtesy and generosity toward his political opponents, that when Judge McPherson retired from this Bench to take that place among the Federal judiciary to which President McKinley had appointed him, the eyes, not only of the Bar, but of all the people, irrespective of party affiliations, turned to John H. Weiss as his logical successor. If not absolutely contrary to his personal desire, certainly without his expressed wish, he was appointed to fill the vacancy, and at the next regular election was elected his own successor as the nominee and choice of both the great political parties and by the unianimous vote of the people.

Judge Weiss was not unmindful of the glorious traditions of this justly distinguished court. He was not over-confident of his ability to keep its exceedingly important work up to its past exceedingly high standard, but he resolved to bend every efforts to that end. How well he succeeded we all know. But above all he determined, so far as should lie within his power, to do equal and exact justice, without fear, favor or affection. Matters which a less sensitive nature might have dispatched in less time he made the subject of careful thought, and I verily believe that he shortened his life by anxiety, lest in some case, in some way, he should unwittingly do somebody an injury. No lawyer ever tried a case before him without being convinced of his singleness of purpose and that his only desire was to hold the scales of justice with equal poise. If he made any mistakes, we know that they were due to the fallibility of human judgment. They were certainly few, for his rulings, when appealed from, were almost invariably sustained by the Supreme Court.

To the members of the Bar he was courteous, patient, gentle and kind, particularly to the younger members. He was singularly free from ostentation or display and shrank from appearing a prominent or central figure about which important events were revolving. To each member of the Bar he was a brother, and, together, we were simply striving to ascertain the law and the facts of the particular matter in controversy. I believe it was Mr. Chief Justice Sharswood who, in discus-

sing the proper relation of the bench and the bar to each other, happily expressed it in the sentence: "We are all one brotherhood." Mr. Chairman, Judge Weiss, I believe, was the living embodiment of that sentiment, and no jurist was ever more successful in making it felt and appreciated by those who practiced before him.

Distinguished as were his services at the bar and upon the bench, we shall remember not so much the lawyer and not so much the judge as we shall remember the man and the friend. His was a character which endured the test of long and intimate association. The better he was known, the better he was liked. In his personal attachments he was firm and faithful. He had that about him which made him interested in many people, and which drew many people close to him. The loyalty of his great friendship knew "no variable ness, neither shadow of turning." He left no promise unperformed.

I wish, Mr. Chairman, that I had words to express the tribute of friendship I fain would pay his memory on this sad occasion. In his death this community has lost a valued citizen, the State an upright and just judge, and each member of this Bar may well feel that he has sustained a great personal loss. The unwelcome angel has indeed borne him from us. We say that he is dead, and in a sense he is, but in a nobler, more endearing sense,

"To live in hearts we leave behind,
Is not to die."

Mr. Chairman, I think the minutes well express the sentiments of this Bar toward our lost friend, our departed judge. I second the motion for their adoption.

Mr. LEVI B. ALRICKS: Mr. President, it seems to me that owing to the fact that I had the longest acquaintance with John H. Weiss, I will say, of any member of the Bar who has so far addressed this meeting, I ought to say a few words. The minutes presented by the committee express the character of the man, there is no doubt about that; so I will not go into that just now.

John H. Weiss and I first became acquainted when he and I were law students, he in the office of Hon. David Mumma, I in the office of my father, Hamilton Alricks. In 1865, we met on the street, and he said to me, "I had intended to apply for my examination at next court, when, I understand, you are to apply," or "you are to be applied for, but I have made an engagement with George J. Bolton to act as his cashier at the Columbia House, Cape May; so that I will not be examined at the same time you are." That was a great disappointment to me, I confess. Afterwards I saw him, while acting as cashier at the Columbia House, Cape May, and he discharged his duties there just as faithfully as he discharged his duties afterwards at the bar and upon the bench of this court. Some three months afterwards, he was admitted to the bar.

On one occasion, I happened to meet his father, in my father's office, and he was a very agreeable old gentleman, as old, perhaps, as some of the older members of this bar, and I was very much pleased with him, I assure you. He was not quite as tall as his son, John H. Weiss, but he had a very benign face and had the manners of a perfect gentleman. Although I did not meet him more than once that I can recall, the father of John H. Weiss, I am quite sure, was one of nature's noblemen.

In the practice at the bar it never was my good fortune, or, rather, it was rarely my good fortune to be associated in the trial of a case with John H. Weiss. On the contrary, with few exceptions, I seemed to be engaged on the other side. He was always courteous; he never neglected the interests of his client; but, as the minute seems to intimate, he never cared to make a jury speech, and yet he was one of the few members of that bar that somehow I rather feared to meet before a jury. There was an earnestness, there was a directness, and it may have been a personal influence about the man, that made him unconsciously a very strong advocate of whatever cause he undertook.

We all know that upon the bench he was courtesy itself to all members of the bar. Of course, it may be that sometimes we members of the bar, not perhaps discharging our duties as fully to the court as we ought, in our zeal for our

client's cause, may have made him somewhat impatient, but he never forgot that he was the judge, and he treated us all with uniform respect.

My acquaintance with him, as I have said, began when I was a law student, although he was a few years my senior. It ended, of course, only with his death.

I might say to the members of the bar here that it is just two weeks to-day when I had the last interview with Judge Weiss, in the presence of Judge Kunkel, and he was as agreeable as any gentleman could be; and, of course, the recollection of that last interview will remain with me until my death. I had the kindest feelings toward Judge Weiss. I know that he was one of the most painstaking judges we ever had—indeed, they all have been painstaking. He was an industrious man, and he sought to do equal and exact justice between all suitors. He was not, when he was practicing at the bar, what we call a criminal lawyer; that is, he did not seem to try very many criminal cases, but whenever he did come into court—criminal court—he discharged his duties zealously, faithfully and with profit to his client.

I fully agree with the minute as presented, and trust, of course, it will be finally unanimously adopted.

Mr. BENJAMIN L. FORSTER: When, a short while ago, we were called upon to mourn the loss of a fellow-member of the bar, I felt then that I had for the last time taken an active part in public grief, and keep silence in the presence of the dead; but when I learned that Mr. Etter, the senior member of this Bar, would be unable to add a tribute to the memory of the late Judge Weiss, then, and then only, did I feel that, however lamely done, a few moments should be given by me to the memory of one who, still young in years, has been called from the highest position it is given man to fill—a judgeship—and a position in which, I feel I voice the sentiment of every member of the Bar, he, for the last six years had been the upright judge, earnestly striving to hold the balance even between man and man, knowing only his duty, in the awful responsibility; timid, no, that is not the word, cautious in his own opinions and ever ready to listen to the arguments

of counsel and pleas for mercy at the bar lest he, from a want of knowledge or judgment, should do injustice to the suitor in the court or to the unfortunate who stood before him, trembling at the majesty of the law. All this weighed heavily upon him, for in the years that he was a judge, he had not learned to look upon a trial in the civil side of the court as a lottery, or a sentence imposed upon a wrongdoer as a perfunctory discharge of duty.

Judge Weiss, whose name now makes a part of the history of his native State, was born, if not born, he spent the years of his young life, on a beautiful farm in Lebanon County, through which meandered a "babbling brook," noted for its trout, which must, often in after life, have reminded him of the lines:

"I wind about and in and out,
With here a blossom sailing,
And here and there a lusty trout,
And here and there a grayling.

And here and there a foamy flake
Upon me as I travel,
With many a silvery water-break,
Above the golden gravel.

And draw them all along, and flow
To join the brimming river,
For men may come and men may go,
But I go on forever."

He, too, has joined "the brimming river," to "go on forever."

He had found time in a busy life and amid his legal studies to make himself familiar with English classics and develop a strong natural taste for the best in art, without being a bit pedantic in the one or critical in the other.

Happy in his domestic relations, he married, in 1870, Mary Virginia, daughter of the late John E. Fox, of Philadelphia, and for years well able to cultivate his taste for literature and art, an extensive acquaintance with the public men of his native State, and his amiability made him pleasant

to meet outside of his profession and official position, and added much to the charm of his personality.

We, then, gentlemen of the Bar, have reason to mourn his loss, and remember it was good for us to have known him, and to remember also that the loss it not unto us alone. Thousands will mourn with us the apparently, to us and to them, untimely taking off.

Mr. NISSLEY: I feel that I would be untrue to my highest desires this morning if I did not add a word, and just a word, to what has been said with respect to him whom we desire to honor this day.

I met Judge Weiss in his office on Second street, at a time when I came to consult him about reading law. In a few minutes he gave me advice that changed the whole course of my life. I remember, in after years, when I was admitted to the Bar, I thanked him for the advice given me at that time, to which he replied: "How cautious we should be when giving advice to young men."

He had a most happy and cheerful disposition, which endeared him to all who came in contact with him, either in business or socially. His devotion to his profession was an inspiration. He was an untiring, patient and efficient worker. As a lawyer, he was careful and safe; as a judge, cautious and watchful, always showing the keenest interest in cases being tried or argued before the court. He had a keen sense of humor, and many were the remarks made at time most suitable and effective; but this trait of his character was always under control, but could be used most effectively when required.

He was charitable to all, keenly alive to the faults of human nature, and most tender toward the unfortunate. Being for many years a member of the Board of Examiners for admission to the Bar, he came in contact with the ambitious prospective lawyer, and many were the valuable suggestions given by him to those who contemplated pursuing the arduous duties of the profession. He had mastered the principles of the law, yet he was a close student and diligent in searching the cases.

I can hardly refrain at this time from referring to the last interview I had with him, in his chambers. After having had his attention to the matters of business which I brought before him, he asked me to take a seat, and we talked of many subjects, and the trend of the conversation finally led on to religious matters; and I never heard a more beautiful exposition of the office of the Holy Spirit than what he gave me at that time, and, singularly enough, the last thing I said to him, as I went out of the door, was: "Thou are not far from the kingdom." They were the last words I said to our departed judge.

I had the highest respect for him, and I feel deeply his loss. Our Bar has lost an active and faithful lawyer, a learned and able judge; our city a distinguished and honored citizen. His absence will be keenly felt and his memory greatly cherished.

Mr. BERGNER: Many years of close, intimate and unselfish friendship with Judge Weiss, beginning almost in my boyhood and continuing beyond the grave, force me to speak when I would much rather be silent. Judge Weiss possessed lovely characteristics and, to my mind, they have appeared with ever-gathering brightness since the bell above us tolled out his demise. As a son he reverenced his parents. In his talks concerning his early home life, while he always kept the humorous situations in the background, there was plainly discernible the great love of the son for the mother and the undying affection of the mother for the son. As a parent, he was always kind and indulgent to his children, but ever solicitous for their future.

As a friend we all knew him. His kindness, care, consideration we have all experienced. His genial spirit and kindly methods brought the bench and bar so close together as almost to efface the dividing line. He was our friend, and in the grief of the last few days it has been hard to understand why the hand we loved to press is cold and the voice we loved to hear is still. As a lawyer, his work and success are written large in the formal records of this court.

He labored long and constantly in his profession to be right, and he succeeded because he deserved success.

As a judge you knew him last and probably best. He brought to this bench greatness in his great desire to be right and just. When discussion had ended and decision was reached he was not content to leave the matter; his thought was still the question: Am I right? May I not be wrong? I doubt if in his entire judicial career he passed upon even one subject to finality, to which his mind did not afterwards revert in an effort to re-examine the correctness of his decision.

I do not think he cared much that he was the incumbent of the office, but he had great pride that in his position he was brought into close and intimate contact with the members of his court. The love and kindness he invariably extended to us all smoothed the asperities of our duties and our respect and affection made less burdensome the official labors which so often worried him.

Almost his last conscious talk was of you, my brethren. In my last meeting with him, but a comparatively few minutes before the fatal stroke fell, he spoke of the court appointed for this week and expressed the fear that his illness might delay the business and bring inconvenience to some of you. Even then in the grasp of death, his thought turned to you. Judge Weiss was not upon the bench long enough that his judicial work may be hallowed by that sacredness which seems to cling around the decision of those judges whose services span through a generation or more, but his fame will be long enduring as a judge who, with great, loving kindness sought to be just rather than great.

Mr. GEYER: It is with considerable hesitation that I rise to speak, but the kindnesses of Judge Weiss toward me during his lifetime have been so unremitting that I would feel myself an ingrate if I did not at this time add my mite to the tribute that has been here paid to his memory. You have heard much of his bearing and ability from those better fitted to judge them than I. Many of you knew him intimately in his private life and can better speak of his worth as a man; others of you knew him as an associate when a

practitioner at the bar; I knew him only as the able representative of the dignity of the law, and the kindly administrator of justice under its forms.

My acquaintance with him began in 1899, when, in company with my preceptor, Senator Fox, I called upon him as the chairman of the Examining Committee concerning my registration as a student. His appointment to succeed Judge McPherson had just that day been made public, and he spoke of it in great humility, deploring his unworthiness for the position for which he was the unanimous choice of the Bar and of the public, and in which his record has shown that his hesitation and distrust of his own ability were but the modesty of the truly great.

As a judge, his two qualities which most impressed me were the impending sense of the responsibility of his position and the kindness of his heart. When on the bench, it seemed to be his great desire entirely to forget himself and to act impersonally as the officer of the law; and he lost no opportunity to impress this duty upon the other officers of the court. I shall never forget how that, on one occasion, while prosecuting before him in the Quarter Sessions he noticed that I was very much humiliated because of a verdict of acquittal found by one of the juries, and, calling me to him, he remarked, "That verdict was righteous, and it is only your zeal that prevents you from seeing it. Remember, we sit here to administer justice, and the duty of the prosecuting counsel is not to secure convictions but to assist us in administering it." And, on another occasion in chambers, when speaking of the relative duties of the practitioner, both as an advocate and as an officer of the court, he said, "After all, the law is the mistress of us both, and it should be the aim of the court and the bar alike to learn just what the law is. An attorney may be able to win his case by refusing to cite to the court an adverse decision which has escaped the research of the opposing counsel, but in time the law will vindicate herself and it will not redound to his credit."

The second quality, and the one that most endeared him to the people, was the tenderness of his heart. He never imposed a sentence but he did it reluctantly, and he often de-

plored the fact that in the punishment of the offender some innocent wife or mother was made to suffer. The culprit was given every opportunity to make any explanation that he might have, and when finally he was sent to prison he was made to carry with him the conviction that it was the officer of the law that sentenced him, while the man on the bench was yearning for his reformation. His ear was ever open to the plea of the dependent family, and it was manifest that he suffered when he was compelled to disregard it, and many a man upon whom sentence was suspended was brought forcibly to realize his duty towards his wife and children by the earnest, kindly admonition of Judge Weiss.

And now that he himself has been summoned by the Death Angel before the great, final tribunal, and there, in accordance with its rules, he has appeared in person, we may confidently hope that his faults, and he had only those to which human flesh in its nature is heir, will receive the same tender consideration which he, while on earth, always accorded to poor, erring humanity.

Mr. McCARRELL: Mr. Chairman and brothers of the Bar: We are gathered here this morning because the bench, the bar, the community and State has sustained a great loss. Another of the great president judges of this important court has finished his judicial labor and entered into rest.

It was my privilege to know Judge Weiss from very soon after the time when I came to Harrisburg, now nearly forty years ago, and from the time that I first met him, down unto the day of his going hence, I enjoyed his friendship and he did mine. He had, in a most remarkable degree, the confidence and the respect not only of the members of the bar, but of the entire community in which he lived and performed his life-work. It was my privilege to be associated with him often in the trial of causes and my misfortune on frequent occasions to have him as opposing counsel. The cause of his client was always most carefully prepared, because Judge Weiss was a careful student of the law, delighted in the studying of principles and decisions, and was always well informed upon every subject, whether you discussed a question with

him in his office or came into court to try a client's cause. He understood the principles of the law and delighted to study them, and he was well equipped and deserved the great success which he won as a lawyer at this bar.

When he assumed the judicial position, it was, as has been said, with hesitation upon his part, but he met the important duties of that high place with an earnest desire and determination to do equal and exact justice, and we can all bear testimony here to-day to the patience with which he heard argument in every case and the great care which he devoted to the consideration and the decision of every cause. He feared that he might unwittingly do injustice, and he labored hard and long to avoid the doing of that which would in any cause be, in any sense, unjust, and he won for himself a high name as judge in this important court.

He was interested in all the affairs of the community in which he lived. He was public spirited, and gave thought and attention to every subject in which his fellow-men were interested.

It was my privilege to be associated with him for many years as a member of the Law Examining Board, and I shall never forget the kindness which he always manifested to the young men who came before us for preliminary or final examination, to be admitted to the bar; and I shall never forget, either, my brethren, his knowledge of history and of literature and of the various subjects upon which it was necessary to examine candidates for preliminary registration. To all of these young men, he had a kindly disposition, and those of them who are here to-day and who appeared before that Board, I know will testify to the kindness and the courtesy extended to them by Judge Weiss, as the President of that Board.

He was interested in the cause of education and of literature as well. He was interested in his old alma mater. We came from the same institution, he a graduate of Jefferson, and I, a little later, of Washington, which two colleges soon afterwards were united under the name of Washington and Jefferson. In his college days, he made the acquaintance of some men who afterwards became prominent, both at the

bar and in the pulpit, and of them he often spoke in the highest and kindliest terms, and together, talking over the affairs of our alma mater, we spent many a pleasant hour; and, to show his interest in it, he aided in establishing in Washington and Jefferson College the German Prize Fund, and was a contributor to that fund for many years, down to the present time. He was interested in everything that pertained to the welfare of man.

Reference has been made to his father and his mother. I shall never forget the frequent occasions upon which he spoke to me about the early home and the kind regard and affection with which he spoke of his father and of his mother, and the training they gave him; he spoke of it with gratitude; he honored his father, he honored his mother; he believed in the principles of their religion, and delighted to talk of the things which they had done for him. He was a delightful friend and companion. He was a great judge. In all the relations of life he was faithful, and his integrity was recognized by this community in which he lived, for, although he had taken part in many political contests, yet when he was named for the high judicial office, his name appeared upon the ballot of all parties, and he was the unanimous choice of the people of this district. In all the relations of life, he was faithful and honest, and has left for himself and for his family a name and a reputation of which they may well be proud.

But he has gone; he has passed beyond the shadows of earth, and his eyes have greeted the glory of the eternal morning. We shall miss his genial presence, his cordial greeting and hearty handgrasp; but through all the coming years there will live within us pleasant memories of the days we have spent together, and those memories, I am sure, will make us ever grateful that he lived and that we enjoyed his rare companionship.

Honorable GEORGE KUNKEL: Are there any others who wish to speak?

JUDGE KUNKEL: Gentlemen of the Bar: Before I put the motion to adopt these resolutions, I wish to add to that

which has been so beautifully and fittingly spoken my tribute to the memory of our late President Judge, my associate upon this bench.

For almost two years my relations with him have been necessarily most intimate, and they have afforded me many opportunities to learn and to measure to no inconsiderable degree the qualities of his mind and heart. His kindly disposition, his cordial good-will to all those with whom he was associated were marked characteristics of his life, as well when he went in and out among us as a member of this bar as when he adorned the bench now made vacant by his death. While memory lasts these qualities will last to those who enjoyed the sweet influences of his friendship and his love. The things of this earth may pass away, things that are seen and are handled; the earthly mold with which life has been breathed may pass away, yea, even life itself depart; but the attributes that attract to that life will survive and live in fond and undying recollection.

In the adminstration of the law our deceased brother brought to the office of judge a keen sense of the right, and a firm and conscientious determination to reach the justice of the cause which he heard; and this disposition of mind showed itself not only in the trial of the cause in court, but especially in consultation in chambers and in his seasons of deliberation and thought. No judge was more careful in the discharge of his duties. No judge more sensible of the grave responsibilities of his office. By his learning, by his industry, by his patience, by his modesty he adorned the bench and won the esteem of all those with whom he associated, and by his considerate and kindly nature he endeared himself to the hearts of his fellows in the law; and therefore it is that to-day, not perfunctorily but with the profoundest sincerity, we join in doing honor to his memory.

If the members are ready for the question, it will now be put.

Mr. GILBERT: Mr. Chairman, if you will permit a brief trespass on your time, I would like to say that since I have been sitting here I have been very much disturbed by conflict-

ing emotions. If I were to consult my own feelings I am sure that I would be conscious of discharging to the uttermost the duty of friendship to him who has gone, by silence. But when you arose a moment ago to submit to the suffrage of this meeting this minute, a thought of almost overpowering nature came to me, and it was that if I were gone and he were here, he certainly would rise and say something about myself; and that if he could utter his thought this day, it would be that I, so long his partner and his friend, should say a final word of esteem and of affection for him.

Lest my silence be misunderstood, I break it with great personal pain; because associations have pressed upon me of the tenderest nature, ranging back over many years of his life and mine, which almost choke my utterance.

You remember when he was nominated in this very room for the office of additional law judge; and, notwithstanding the many men in this community of greater gifts of speech and of long and tender association with himself, he personally asked me to present his name and to speak my thought of his worth as a man, and as a lawyer, and as a person to be considered in connection with the high office of judge. This morning I have re-read the estimate which, as his partner and his friend, I uttered about him and they were these:

> "By blood and birth, by sympathy and sentiment, and by the varied experience gathered in a wide and large life passed among us, he belongs to our community; knows its tone and temper; understands our disposition, measures our deserts and can apportion and apply our law according to our needs. No other man in our time has entered upon judicial life with the same large and excellent knowledge of public affairs and with a greater ability for their understanding and sane treatment. He has no experience to gain at the expense of the public, for the discharge of judicial duty; that has long since been won and made his own by strenuous and successful professional experience. No possible suitors in his court will surpass in dignity and power those who have been his clients, and as a judge he will be called upon to decide no causes exceeding in importance, in dif-

ficulty and variety of issue, those he has considered and argued as a lawyer. No case will be too great for his ability, and none so small as to escape his patience. To a judgment whose tested wisdom I have never seen excelled he adds a love of useful and liberal study; a candid spirit ; an open and a patient mind, and an industry incapable of limit and unconscious of fatigue, when truth requires its exercise. These qualities, exercised as they have been and will be with kindness of heart and charity of soul to all men, and with a sense of honor like a double conscience, make a rare sum of human excellence and mark him who owns them as the man fashioned by nature and by labor to be a great public servant in the high office of a judge of his people."

After that convention adjourned, Judge Weiss spoke to me with reference to these remarks, and said that he differed entirely in estimate of himself, but I remarked that time would confirm my opinion.

A scant seven years have passed since then, and he has made and ended his record as a judge; but that record, I think, entitles him to stand forever in the roll of the great judges of this great court.

The minute was unanimously adopted by a rising vote.

The following letter was read and, on motion, it was ordered to be incorporated in the minutes of the meeting:

"Pittsburgh, Nov. 24.

"Hon. Geo. Kunkel:

"My Dear Judge: I see by the papers the death of Judge Weiss. I noticed a week or so ago that he was very sick; so that the result is not so unexpected as it otherwise might be. But however warned, we are never quite prepared for the death of friends, and it is difficult to realize that he is gone, never to return. I thought a great deal of Judge Weiss, and I shall miss him greatly. You will see by the heading of this letter that I am in Pittsburgh, where I am holding court, and can not, therefore, attend his funeral as I otherwise certainly should. Will you please convey to the members of the Bar my extreme regret that such is the case.

Yours very truly,

(Signed.) "R. W. ARCHBALD."

Mr. BERGNER: Mr. President, I have been requested to

say, through you, to the members of the Bar that the family of Judge Weiss expects the Bar to attend the funeral this afternoon in a body; and I, therefore, move that when this meeting adjourn, it adjourn to meet at 1:30 o'clock this afternoon, and the members be prepared to go to the house in a body and attend the services—meet at the Court House at 1:30, prepared to go from here, in a body, to the house.

The motion was seconded by Mr. L. B. Alricks.

The motion was agreed to.

At 11:45 o'clock A. M. the meeting adjourned, to reconvene at 1:30 o'clock P. M., pursuant to motion.

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