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New Jersey Court of Errors and Appeals.

SAMUEL JONES,
vs.
THE PROPRIETORS OF THE MORRIS AQUEDUCT. } *In Error.*

J. VANATTA'S ARGUMENT FOR APPELLANT.

In June, 1872, proceedings were commenced by the "Proprietors" to condemn certain lands and certain rights in and to running water belonging to Jones. In the course of those proceedings, an award was made, dated 23d August, 1872 (p 3 to 5).

On 13th January, 1873, Jones served two notices on the Proprietors, (p 5 and 6.) The one was notice of the presentation of a petition of Appeal to the Circuit Court of Morris County, on 21st of January, 1873, (that being the first day of the second term after the date of the award), appealing from the award.

The other notice was exactly like it, except it named the 28th of January, 1873, as the day on which the petition would be presented to the Court. One notice was served eight days before making the first application, and the other one was served fifteen days before making the second application. Both applications were made pursuant to notice. The one made on the 21st was continued until the 28th, (p 12, line 20.) And then the whole matter was certified to the Supreme Court for its advisory opinion.

By the 5th section of a supplement to the charter of the Proprietors, (Laws 1862, page 33,) it is provided that either party may appeal from the award "to the next, or second term of the Court of "Common Pleas of said County, by petition and notice thereof "served upon the opposite party two weeks prior to such term, or "published a like space in a newspaper published at Morristown, "which petition and notice so served or published shall vest in said "Court full power to hear and determine said appeal, &c."

By a supplement to the charter, approved April 3, 1872, page

1,068, it is provided that "the appeal from the award of said Com- "missioners shall be taken to the Circuit Court of said County, in- "stead of the Court of Common Pleas, as provided for in said sup- "plement; and the said Court shall have power to order a struck "jury," &c.

The Court denied the prayer of the petition, and ordered the petition dismissed, with costs. The sole ground of the judgment was the fact that two weeks' notice of the intention to present the petition was not served two weeks *prior to the first day of the term.*

The judgment is that the Circuit Court had not jurisdiction of the appeal, because the notice was not served two weeks before the first day of the term—(Page 12.)

The petition was presented to the Court at the right term of the Court, and the Proprietors had fifteen days' previous notice of the intention to present it; but the Court held the right of appeal gone, because the notice was not given fourteen days prior to the *first* day of the term.

I.

The petition of appeal was not presented at too late a term.

It was presented at the second term after the Commissioners were appointed.

The Chief Justice, (page 15, line 18 to 20,) says: "This act directs that the appeal shall be to the first, or second term of the Court, occurring *after* the award."

Reference to the 5th section of the supplement of 1862, which is the act he refers to, shows that statement to be a mistake. The language is: "To the next or second term of the Court of Com- "mon Pleas," &c. The words "*after the award,*" are not there. From what event the right of appeal is to be limited, is not stated in the act. As the award is the thing appealed from, the limitation of the right of appeal cannot be dated from any event prior to the making of the award. Nor ought the limitation of the right of appeal to be dated from the making, or date of the award. No copy of the award is required to be given to the land owner, nor are the Commissioners or Proprietors required to give any notice of the time when the award is made, or dated, or filed. Nor is there any time prescribed within which the award shall be filed or recorded. (See section 2, of supplement of 1862.) As the award is to the corpora-

tion, the Commissioners, of course, deliver it to this corporation, and it may hold it away from the files and records of the Clerk's office, for months, or years. If the right of appeal is to be limited from the making, or date of the award, the time for appealing may expire before the land owner can see the award, or know its date, or when it was made.

There is still another reason why the limitation of the right of appeal should not date from the date of the award. The mere making and filing of the award divests no title, gives no right of entry to the corporation, and in no way disturbs the land owner in the possession or use of his land. His title or possession can not be disturbed, until "the said corporation shall pay, or tender to "such owner or owners . . . . the amount of damages so "awarded." Supplement of 1862, Section 4.

Then, until the tender is made, the land owner has no occasion to appeal. Until then he does not know but that the corporation will waive, or abandon the award, and until then he has suffered no actual injury. And from that time, and not before, I submit, should the limitation upon his right of appeal commence to run.

The 4th section of the supplement of 1862, as well as the constitution of New Jersey, protects the land owner in the title to and possession of his land and the waters thereon until the compensation awarded is tendered to him, and, right after that, in the 5th section, the right of appeal is given in these words:

"That if either party feel aggrieved by said assessment and "award, such party may appeal to next or second term," &c. Next after what? Second term after what?

The last antecedent act, or event, is the tender—the really injurious act, to the land owner.

Then, the court erred in limiting Jones' right of appeal from a wrong period, from a period antecedent to the true one.

It does not appear by the proceedings, nor was there any proof, that any tender was ever made, nor, if made, when it was made.

The charter gives a right of appeal. That right can not be barred by interposing a plea of a statute of limitations, unless the party interposing such plea sustains it. Here the appeal could only be barred by proving a tender and the time of making it, so that the Court could see whether or not the limited time had expired after tender made. As there was no such proof, there was nothing shown to take away Jones' right of appeal.

But, if we date the period of limitation from the date of the award, the appeal was presented at a proper term. It was at the second term after the date of the award.

Case, page 15, line 20, the Chief Justice says: "And under the "force of this provision no reason appears why the petition might "not be presented *on any day during such term.*" A case directly in point is *Den vs. Fen*, 3 *Hals.* 133.

It is then very clear that the petition was not presented at too late a term.

II.

The notice given afforded all the benefits and advantages intended to be secured to the appellee by the notice prescribed, and was in compliance with the spirit, meaning and and intent of the act.

The giving of a notice of *an intention* to present a petition of appeal, where an appeal is a matter of right, in advance of its presentation to the Court, is a matter of the merest form and of no practical value or importance. In the Court of Chancery the appeal is first filed in the office of the clerk of that court, and *afterwards* served on the solicitor of the opposite side. In the Supreme Court, writs of error to this Court, which are writs of right, are lodged with the clerk of the court, and the first notice given to the defendant in error, is after the record has been returned into this Court, when he is served with a copy of the assignment of errors.

In the Court for the trial of small causes no notice of the taking of an appeal,—that it has been taken, or when it will be tried, is required to be given, and in practice none is given.

In the Circuit and Supreme Courts of the United States, the citation is not issued until after the writ of error or the appeal is lodged in the court in which is the record to be recovered. (1 Brightley's Digest, pages 257–8, §2.)

In all of these cases the fundamental idea is that the appeal or writ of error is not a new or separate suit, but an extension of and a further step in the original suit or proceeding.

In many cases of condemnation under special charters, the petition of appeal is filed with the clerk of the appellate court, and notice of the filing given *afterwards*. As, for example, Charter of Long Branch & Sea Shore R. R. Co., Laws of 1865, page 420, section 8; Charter of The Chester R. R. Co., Laws of 1867, page 509, section 8; Charter of The Caldwell R. R. Co., Laws of 1869, page 312, section 8, and in scores of other charters.

In many other cases, to appeal, nothing is required but to present a petition of appeal, and no notice before, or afterwards, except of trial, is prescribed. Examples of this will be found in the charters next named: The Camden & Pemberton R. R. Co., Laws of 1854, page 148, section 8; Burlington & Mount Holly R. R. Co., Laws of 1836, page 145, section 8; Freehold & Jamesburg Agricultural R. R. Co., Laws of 1851, page 205, section 8; The Hackensack & New York R. R. Co., Laws of 1856, page 345, section 9; The Hoboken, Ridgefield & Paterson R. R. Co., Laws of 1866, page 413, section 9; The Allentown R. R. Co., Laws of 1870, page 1113, section 9; The Atsion & Tuckerton R. R. Co., Laws of 1864, page 456, section 9, and many more.

In all these cases, and in all cases of appeals from the award of Commissioners, in condemnatory proceedings, the presentation of the petition of appeal to the appellate Court, is the appeal and is the thing which gives the Court jurisdiction of *the Cause*. Jurisdiction of *the person* of the appellee is another and a different thing.

The petition, in this case, although filed on the first day of the term, was presented to the Court and the allowance of its prayer asked for on Tuesday of the second week of the term. This application to the Court was in due time, as is manifest from the reading of the act and the opinion of the Chief Justice. Of that application the Proprietors had fifteen days' previous notice. Did not that give them every right the act was intended to secure? If the notice had been served twenty-two days before the application was made, the Proprietors could have had no benefit or advantage that they did not have from the fifteen days' notice.

Upon the motion to grant the prayer of the petition the Proprietors could but oppose it. Had they had no notice at all until after the prayer was granted, upon a two days' notice they could have moved to dismiss the petition and upon that motion they could have had the benefit of every thing available to them on the motion to grant the prayer of the petition.

It is not pretended that the course of practice which was pursued deprived them of any right, or subjected them to any inconvenience.

The phrase: "*to such term*" may be fairly construed and really means two weeks prior to *the time of presenting the petition*. That is the spirit, sense and intent of the language used. The sub-

stance and sense of the provision is that the appellee shall have two weeks' notice of the time and place of the application. If such notice is given so as to permit the application to be heard at the first or second term, each party has the full benefit of every right accorded to him by the act. In that point of view the statute was strictly complied with. Its sense and substance are fully satisfied.

The terms of the Circuit Court of the County of Morris are never less than four, and in some cases they are ten weeks in continuance.

The petition is in time if presented in the last week of the term, but under the construction of the Chief Justice it would go for nothing unless *notice* of its presentation had been given fourteen days *before* the *first* day of the term. If the petition were presented in the fourth week of the term there would need about forty days' previous notice of its presentation to be given; and, if presented in the tenth week of the term, there would need about eighty days' previous notice of its presentation to be given. Such a construction makes the act require an absurd and ridiculous thing to be done by an appellant. The Legislature had no such absurd intention.

III. JURISDICTION.

But, say the defendants, although the notice as given impaired no right of ours, and while it enabled us to do everything which we could have done had it been given two weeks before the first day of the term, yet the appeal cannot be entertained, because the Court had no jurisdiction; its power to hear and adjudge the appeal was gone, and gone because the notice was not given two weeks before the *first* day of the term.

In that position, I submit, there is manifest error.

The Circuit Courts, (Constitution, Art. VI, Section V, paragraph 2,) "in all cases within the county, except those of a criminal nature, have common law jurisdiction concurrent with the Supreme Court."

The general powers of the Court are adequate. The land was within Morris County; the parties resided in that county; the prior proceedings had all been had there; the court was held there; the appellants' petition was filed in that court on the first day of the second term. On the first day of the second week of that term, the motion was made, and of that motion the appellee had fifteen days' previous notice. The supplement of 1862 gave an appeal to both

parties. The supplement of 1872 recognized and amplified that right, but it took away from the Court of Common Pleas the right to entertain or adjudge the appeal. This supplement of 1872, for the first time, gave jurisdiction of such appeals to the Circuit Court. It said:

"And the appeal from the award of said commissioners shall be "taken to the Circuit Court of said county, instead of the Court of "Common Pleas, as provided for in said supplement."

The *practice*, in case of an appeal, as prescribed in the supplement of 1862, relates to an appeal to the Court of Common Pleas. The course of practice in the preliminary stages of an appeal to the Circuit Court, has not been prescribed by the Legislature. The act of 1872 does not prescribe within what time the appeal to the Circuit Court shall be taken, nor what notice thereof shall be given, nor does it say that the parties as to these matters or other matters of practice, shall be governed by the directions of the act of 1862 relative to appeals to the Court of Common Pleas.

These words: "As provided for in said supplement," in the act of 1872, refer *to the Court*, and *not to the practice*

The sense of the supplement of 1872 is quite manifest when we render it this way:

Instead of an appeal to the Court of Common Pleas, as provided for in the supplement of 1862, "the appeal from the award of "commissioners shall be taken to the circuit court of said county."

This rendering clearly and fully expresses the whole scope and meaning of that portion of the act of 1872, heretofore quoted on this page.

If it be asked what then is to be the course of practice in the Circuit Court, in cases of such appeals, I answer by quoting the 8th section of the Circuit Court Act, *Nixon Digest*, p. 130:

"The justices of the supreme court shall and may adopt and "settle uniform rules of practice in all matters not regulated by "law for the government of said circuit courts, and the same from "time to time alter, repeal and modify as occasion may require, "provided such rules are not contrary to the provisions of this act, "the laws and constitution of this State, or of the United States."

See Practice Act, Nixon Digest, § 107, § 118, § 207. Rules of Circuit Court, Nixon's Digest, p. 1091.—Rule 18 is as follows:

"In all matters not specially provided for in the foregoing rules, "the rules of the supreme court of this State, shall, so far as

"they are applicable, unless otherwise directed by statute, be the "rules of the circuit courts."

Now here was a case in the Circuit Court in which the legislature had not prescribed what preliminary notice should be given. If any such notice was necessary it was only a two days' notice, as prescribed by the rules of the Supreme Court.

The Chief Justice assumes that the practice prescribed for appeals to the Court of Common Pleas apply to appeals to the Circuit Court. This, I trust, I have shown to be an error. Then, proceeding upon that erroneous assumption, he says: (p 18, line 16) "It has been already said that the language of the provision in "question is too plain to admit of discussion. The right of appeal "is given, but it is limited by two conditions; first it must be made to "the first or second terms of the Court; and second a notice of "such appeal must be given two weeks before such term."

If these remarks be applied to an appeal to the Circuit Court, I respectfully submit that the provision in question is not plain in the sense in which it is put by the Chief Justice.

The right of appeal to the Circuit Court is given by the act of 1872, *without limitation, or condition.*

The limitations and conditions specified by the Chief Justice are not expressed in the act of 1872, and can be made applicable to an appeal to the Circuit Court only by construction.

Now, where the appellant is before the Court, as all admit, in due season, and the appellee has had full, reasonable notice of the appeal, it is not necessary or proper to defeat his appeal by construction—and an unreasonable, inequitable, harsh, unjust construction at that.

But, suppose the practice prescribed in the act of 1862 applies to an appeal to the Circuit Court. In that case I submit that the Circuit Court had full and complete jurisdiction of the appeal. The subject matter, the land, the water, the damages were within its jurisdiction.

When the appellant presented his petition of appeal to the Court, he was within its jurisdiction, and, beyond dispute, he was there in due time.

To make the jurisdiction absolutely perfect, it needed only *due* notice to the appellee. The sole purpose of that notice is to let him know of the appeal, so that he can be heard before anything is

done therein to his prejudice. For that purpose, and for that only, is he entitled to notice. If he gets notice so that he has a fair and reasonable opportunity to be heard, before anything is done in the appeal to his prejudice, the time and manner of giving that notice are immaterial. The substantial thing is, that he have such notice as to afford him a fair and reasonable opportunity to make his defence, or opposition. All else is form, and in no manner essential to the jurisdiction of the Appellate Court. Such opportunity the appellee had in this case, and that the notice was reasonable and sufficient is demonstrated by the fact that it enabled them to have every right and every opportunity of defence that could be attained by a notice served on every day after the award was made, until the motion was made to enter the appeal.

The judiciary act of Congress, of 1789, § 22, (1 Brightley's Dig. page 257, § 2—"Errors and Appeals,") provides for writs of Error and Appeals in the federal courts. "Decrees and judgments in civil "actions in a district court . . . . may be re examined, and "reversed or affirmed in a Circuit Court holden, &c., ... "upon a writ of error; whereto shall *be annexed and returned there-* "*with, at the day and place therein mentioned,* an authenticated "transcript of the record, an assignment of errors and prayer for "reversal, *with a citation* to the adverse party, signed by the judge, "&c., ... the adverse party having at least twenty days' "notice. And upon a like process may final judgments and de- "crees in civil actions and suits in equity in a Circuit Court, "brought there by original process, or removed there from courts "of the several States, or removed there by appeal from a district "court, ... be re-examined and reversed or affirmed in "the Supreme Court, the *citation* being in such case signed by a "judge of such Circuit Court, or justice of the Supreme Court, and "the adverse party having at least thirty days' notice."

The act of Congress, of March 3, 1803, § 2, (1 Brightley's Dig., p 260, § 9,) gives an appeal from final judgments and decrees of the district courts of the U. S., to the Circuit Court of the U. S., and it further provides that "from all final judgments, or decrees "rendered, or to be rendered in any Circuit Court, or in any dis- "trict court acting as a circuit court, in any cases of equity, of ad- "miralty and maritime jurisdiction, and of prize or no prize, an "appeal, where the matter in dispute, exclusive of costs, shall ex- "ceed the sum or value of $2,000, shall be allowed to the Supreme

" Court of the United States, and upon such appeal a transcript, " &c., ... shall be transmitted to the said Supreme Court " . . . . and such appeals shall be subject to the same rules, " regulations and restrictions as are prescribed in law in case of " writs of error."

The *citation* required by these acts is not under the seal of the Court. It is held to be simply a notice to the other party that the record is transferred into another Court: *Cohens v Virginia*, 6 *Wheat*, 411. In this case the Court by Marshall, Chief Justice, say: " And what is the citation? It is simply notice to the oppo- " site party that the record is transferred into another Court, where " he may appear, or decline to appear as his judgment or inclina- " tion may determine. As the party who has obtained a judgment " is out of Court, and may, therefore, not know that his cause is " removed, common justice requires that notice of the fact should " be given him. *But this notice is not a suit, nor has it the effect of* " *process.* If the party does not choose to appear he cannot be " brought into Court, nor is his failure to appear considered as a " default. Judgment cannot be given against him for his non-appear- " ance, but the judgment is to be re-examined and reversed, or, " affirmed in like manner as if the party had appeared and argued " his cause."

This authority shows that the notice of the intent to take the appeal is not essential to the jurisdiction of the Court, because, if the appellee does not appear, the appellant can go on and try his case in the absence of the appellee.

In Cohen's case, judgment had passed against him in the State Court of Virginia. He brought his writ of error to the Supreme Court of the United States. It was objected that a state could not be sued in the federal Court. The Chief Justice said (p 412): " It is, then, the opinion of the Court, that the defendant who " removes a judgment rendered against him by a State Court into " this Court, for the purpose of re-examining the question whether " that judgment be in violation of the constitution or laws of the " United States, does not commence or prosecute a suit against the " State, whatever may be its opinion, where the effect of the writ " may be to restore the party to the possession of a thing which he " demands."

He had previously (pages 411–412) illustrated this by reference to writs of error prosecuted against the United States. He said:

"The universally received opinion is, that no suit can be com-
"menced or prosecuted against the United States; that the judi-
"ciary act does not authorize such suits. Yet, writs of error,
"accompanied with citations, have uniformly issued for the remo-
"val of judgments in favor of the United States into a superior
"Court, where they have, like those in favor of an individual,
"been re-examined, and affirmed or reversed. It has never been
"suggested, that such writ of error was a suit against the United
"States, and, therefore, not within the jurisdiction of the Appellate
"Court."

On this ground, namely, that an appeal is not a suit against the corporation which has instituted the condemnatory proceeding, it is that the legislature has so often given an appeal without prescribing any notice to be given of an appeal, or, if requiring it, not requiring it to be given until after the appeal has been taken. The appeal is a mere continuation of the original proceeding. Hence, the notice of the appeal is not a jurisdictional fact, but only a matter of practice and like all matters of practice, directory.

The Court can and does have jurisdiction of the cause, i. e. the subject matter of the appeal, without notice to the appellee. The notice to him is merely a matter of fair and just practice; just as is a notice of trial after issue joined. There the Court have full jurisdiction of *the cause*, independent of the notice of trial; but if the verdict be rendered without notice of trial given to the defendant, it will be set aside because it is unfair and unjust practice. The jurisdiction of the Court is complete and it will remedy the wrong by vacating the verdict and ordering a new trial after due notice to the defendant.

But to return to the *citation* in appellate proceedings in the federal courts.

That the citation is not jurisdictional is manifest from the fact that if any defect or irregularity in that matter is not taken advantage of at an early stage of the proceedings, it is treated as waived. This, in view of the fundamental doctrine that consent, or acquiescence, cannot confer jurisdiction, is decisive. *McDonough vs. Millandon*, 3 *Howard*, 707.

So, where the parties were misnamed in the citation, the Court refused to dismiss the writ of error, because the errors were *merely formal* and could not have misled the party for whom it was intended. *Peale vs. Phipps*, 8 *Howard*, 257.

In Buckingham vs. McLean, 13 *Howard*, 150, the decree had been made at November term, 1848. At October term, 1849, an appeal was prayed for and granted. *No* citation was ever issued. At December term, 1850, the counsel of the Appellee entered a *general* appearance, but the motion to dismiss the writ of error was not filed until February, 1852. The Court said, p 151:

"The object of a citation on a writ of error, or on an appeal, *is* "*to give notice of the removal of the cause* and such notice may be "waived by entering a general appearance by counsel. When an "appearance is entered, the objection that notice has not been given "*is a mere technicality* and the party availing himself of it should, "at the term he appears, give notice of the motion to dismiss and "that *his appearance is entered for that purpose.*"

That that part of the federal statute which prescribes the citation is merely *directory* is made clear from those cases which hold that *no* citation is necessary in those cases in which it appears, or the Court *can presume*, that the Appellee was present in court when the appeal was taken. Thus, in *Reilley vs. Lamar*, 2 *Cranch*, 344, no citation had been issued. It appeared that the appeal had been prayed, in the Court below, at the same term at which the decree was made. It does not appear that the Appellee or his counsel, was *actually* present in court when the appeal was prayed for, but the Court *presumed* that he was present because it was done at the same term at which the decree was made.

Hudgkins vs. Kemp, 18 *Howard*, 537.

The San Pedro, 2 *Wheaton*, 142.

In *Innerarity vs. Byrne*, 5 *Howard*, 295, it was moved to dismiss the writ of error for the want of a citation. None appeared in the record. The Court said "the citation *was not necessarily* a part of "the record, it forming no part of the proceedings below. *The pre-* "*sumption is*, that one was issued when the writ of error was al- "lowed, and it may be proved aliunde."

It seems needless to remark that the Court never *presumes* the existence of a *jurisdictional* fact or circumstance.

In speaking of the provisions of the judiciary act of 1789, (the same I have hereinbefore quoted) in relation to writs of error and appeals, Mr. P. Phillips, a veteran practitioner in the Supreme Court of the United States, in the second edition of his work on the Practice of that Court, page 51, says:

"The provisions of the act, though generally strictly enforced,

"are, as to some of its features, regarded as *directory* merely. An ex-
"amination of the cases will show, that in much the greater number
"brought before the court, there has been neither 'an assignment
"of errors,' nor any 'prayer for reversal.' It has also been the
"rule to dispense with the 'citation,' where an appeal has been
"taken in open court during the term at which the decree was
"rendered. So, an appearance for a defendant in error or appellee
"has been considered as waiving *the necessity* for a citation, or
"curing a defective one." See *Massinas vs. Cavazos*, 6 *Wallace*, 359.

In this case the Court said, p. 359: "The act referred to also "says, that all these things must be returned together at the 'time "and place mentioned in the writ,' that is to say, on the *first* day of "the term next after the issuing of the writ. Yet we have repeat-"edly held that if returned on any day during the term we will hear "and decide the cause. It cannot, therefore be maintained, that a rig-"id and literal fulfilment of every thing prescribed in that section, is "an absolute and indispensable requisite to the appellate jurisdic-"tion of this Court."

That the citation is not a matter of jurisdiction, but of practice, not literally mandatory but directory, is shown by the observations of Chief Justice Taney in *Villabolos vs. United States*, 6 *Howard*, page 90. That was an appeal from the Superior Court of East Florida from proceedings had under an act which required an appeal, if taken at all, to be taken within four months after the decision should be pronounced. An appeal was filed with the clerk of the Court within the four months. That appeal should have been returned the *term* of the Supreme Court next thereafter. But nothing further was done and no citation was taken out until several years afterwards. The Chief Justice said: "Here the entry of "appeal was made in the clerk's office within four months from the "date of the decree and, therefore, within the time limited by law. "The *citation might, upon such an entry, have been issued after the "expiration of the four months.* But it must be issued and served "before the term of this Court next succeeding the entry of the "appeal."

In many cases the Supreme Court of the United States has enforced the statutes and rules as to practice with considerable strictnees, but, notwithstanding these cases, the fact is well established, that a citation, giving notice of appellate proceedings, is a matter

of practice and not of jurisdiction—directory and not a literal mandate.

The appellee, in the Court below, did not distinguish between *an appeal* and a *notice* of an appeal. The one is entirely distinct and different from the other. In the case in hand the appeal, i. e. the application to the Appellate Court, is admitted to have been made within the time limited for an appeal. Hence the case of *Hilyer vs. Schenck*, 2 *McCarter*, 398; *Morgan vs. Edwards*, 5 *Hurl. & Norm.* 415–17; *Regina vs. Middlesex*, 7 *Jurist*, 306; *Barclay vs Brown*, 7 *Paige*, 245, and similar cases, cited by the defendant in error, where *the appeal* was not presented, or demanded, in due form, within the time limited, are not applicable to the point in dispute.

Even in cases where *the appeal* itself was not *actually* demanded, or *actually* taken within the prescribed time, the courts may and have, where the equitable circumstances seemed to require it, allowed an appeal *subsequently* taken, or demanded. The following cases cited below, by the Appellee, show this;

Morgan vs. Edwards, 5 Hurl. & Norm. 417.
Lacy vs. Cox, 3 Green, 470.
Dyer vs. Ludlam, 1 Harrison, 531.

Besides these there are other similar cases:

Kennedy vs. Congle, 2 Green, 82–3.
Garrabrant vs. McCloud, 3 Green, 462.

In the Court below, by the now defendant in error, it was insisted that where the appeal was taken in time, but *notice* thereof was not served within the time prescribed *by statute*, the appeal must be dismissed. (It was insisted that there is a distinction between things prescribed by a rule of court and things prescribed by a statute.) In support of these propositions were cited, *inter alia*,

Jackson vs. Wiseman, 5 Wend. 136.
Ex parte Ostrander, 1 Denio, 680–1.
Barclay vs. Brown, 7 Paige, 245.
(In this case *the appeal* was not made within the time limited.)
United States vs. Curry, 6 Howard, 109.
Welch vs. Damon, 11 Gray, 383. (There *the appeal* was not taken in time.)
(The same is true of Gardner vs. Dudley, 12 Gray, 430.)

Castro vs. United States, 3 Wallace, 47–9.
Seymour vs. Judd, 2 Comstock, 465. (Here, again, *the appeal* itself was not demanded in time.)
(On the same ground the appeal was dismissed in Mayor vs. Schermerhorn, 1 Comstock, 423.)
(The same difficulty prevented the appeal in Townsend vs. Townsend, 2 Paige, 413.)
Bacon vs. Hart, 1 Black, 38.
Young vs. Whitcomb, 46 Barbour, 615.

The judgments, in many of these cases, rest upon the presumption that the appellant had abandoned, or waived his appeal, because he had not pursued it.

Others of the cases relied on by the defendant in error were in matters of small moment, in police affairs, which were required to be summarily tried and where public policy was against the delay of appeals. Such were *Pring vs. Estcourt*, 4 Man. Gran & S. 71. Peterbridge vs. Ash, Ibid. 74. Regina vs. Justices of Derbyshire, 7 A. & E. (N. S.) 193—53 E. C. Law. Peacock vs. The Queen, 4 J. Scott, N. S. 264 (93 E. C. L.) Stone vs. Dean, Ellis, B. & Ellis, 96 E. C. L. (See remarks of Lord Chief Justice Campbell in this case.) Norris vs. Carrington, 16 Com. Bench, 10 (111 E. C. L.) In re Banks Appellant vs. Goodwin, 3 Best & Smith, 548 (113 E. C. L.) Ex parte, Johnson, Ibid, 917.

The reasons controlling police proceedings like these have no application to cases like the one now before the Court where a citizen is to be permanently deprived of a part of his lands and to have another portion thereof permanently and seriously incumbered by burdensome easements.

But, in New Jersey, it is not true, in matters of practice, that where, by *statute*, a thing is required to be done on a particular day, it cannot be done, by permission of the Court, at another time.

Thus sections 22 and 23 of the Practice Act, Nixon's Dig. 724, says: that "The special bail *shall* be filed on the return day of the "capias ad respondendum, or on the day after."

"If special be not put in and perfected in due time, the plaintiff "may proceed on the bail bond, or rule the sheriff to bring in the "body of the defendant."

It is a common and frequent practice of the Supreme Court to extend the time in which to put in special bail. The statute says

the special bail *shall* be put in on the return day, or the day after. The Court says the *precise* time is not material. Why? Because a short, reasonable extension of the time deprives the plaintiff of no right and does him no injury.

In England, orders extending time in which to put in special bail were frequent and common. The order was made upon the terms "of "putting the plaintiff in the same state as he would have been in, "if bail had been put in in due time." 1 *Tidd's Prac.*, 249.

Again, where special bail is excepted to, the statute, Nixon's Dig. 725, § 28, prescribes that "the defendant *shall* procure his bail to "justify in eight days, exclusive, after such exception entered as "aforesaid, or shall add other bail who shall justify within said "eight days." This language, in form is mandatory, and yet every practising lawyer knows that the established practice of the Supreme and Circuit Courts is to extend the time in which bail may justify. We have, in the main, followed the English practice. 1 *Tidd's Prac.*, p 272.

In the former practice in actions of ejectment, Nixon's Dig., 736, § 95, it was, by statute, prescribed that,

"No plaintiff shall proceed to recover any lands or tenements "against a casual ejector, without ten days' previous notice being "given to the tenant in possession, if any there be," &c.

Under that act, in *Den vs. Lanning*, 4 *Hals.* 254, the notice annexed to the declaration warned the tenant to appear on the ninth day of September. The intent was that he should appear on the *first Tuesday* of September. The ninth day of September was Sunday. Gen. Wall moved to amend the notice by inserting the words "first Tuesday" in place of the "*ninth.*" In his affidavit of service, the Sheriff testified, that "he had notified the tenant to "appear on the first Tuesday of September." The Court, by Ewing, Chief Justice, said:

"The doctrine of amendment is a very salutary one. *When the* "*amendment may be made without producing to the adverse party* "*any injury whatever, it ought to be allowed and we apprehend it* "*may be done here.* . . . In the present case the defendant will "be precluded from no defence; he will not be compelled to go to "trial one moment sooner, by allowing the notice to be amended "by striking out the 'ninth day' and inserting the words '*second* "*Tuesday.*'"

It is obvious that the amendment shortened the time for appearance.

I cite this to show that, in practice, the Courts of New Jersey have treated *strict* compliance *as to time*, not material, where a moderate and reasonable deviation from it would cause no surprise, or injury to the other side.

(See in this connection, Den vs. Fen, 3 Hals., 133.)

In the old practice in ejectment, if the notice to appear was not regularly served, the plaintiff's action was not dismissed, but a rule was made on the defendant to show cause why the service actually made should not be held sufficient. *Den vs. Fen, 5 Hals,* 237.

The *test* of the sufficiency of the service which had been made was *whether it had afforded to the defendant all the substantial* benefits a regular service would have done. 5 *Hals.* 240, *Fen vs. Den,* 2 *Burrows,* 1181.

In the act relative to insolvent debtors, Nixon's Digest, p 411, §2 requires the petitioning debtor, after the Court has appointed a time to hear his application for a discharge, to "cause notice in writing, "at least thirty days previous thereto to be served on, or left at the "usual place of residence of, each of his creditors, if residing within "this State," &c.

In form this is mandatory. But in *Hogan vs. Hutton, Spencer,* 82, several creditors resident in the State had not been served with the prescribed notice, but it appeared that the failure to do so was unintentional and accidental. The Court held this omission not sufficient cause for refusing a discharge.

I might go into the statutes relating to the practice of the Court of Chancery. If we did so it would appear that there are many cases where *strict* adherence to a prescribed time is not deemed material. There, *time* is not deemed material, except in those cases where a disregard of it will deprive a party of some *substantial* right, or benefit which he cannot have but by a strict observance of time. A conspicuous and familiar illustration of this is found in the rules of that Court touching specific performance. Time is never treated as the essence of the contract unless it is made so by the contract, in express terms, or by necessary or irresistible implication. *King vs. Ruckman,* 6 *C. E. G.*, 599. Our courts have, in practice, adopted what Lord Mansfield said in *Rex vs. Loxendale,* 1 *Burrows,* 447, namely: "There is a known distinction between "circumstances which are of *the essence* of a thing required to be "done by an act of Parliament, and clauses merely directory. The "PRECISE TIME in many cases, *is* NOT *of the essence.*"

Our cases show that our courts treat a statutory direction as to *time* as not mandatory in cases where there is no substantial reason why the thing to be done may not as well be done after the time prescribed as before, or at, the prescribed time. If doing it in a reasonable time after the time prescribed will cause no substantial injury, or wrong, to the other side, the *precise* time is not material.

The *test* is not whether the legislature have indicated a *precise* time for doing the act, but whether the *nature*, or *effect* of the act to be done is such as to make it *necessary* to be done at the precise time indicated. If doing the same act at a reasonable time afterwards will accomplish every beneficial result intended to be attained by the act, then the time named is *directory*, not mandatory.

The substance of the act in question, as to appeals, was that an appeal should be had if applied for before the end of the second term, and that the appellee should have two weeks' notice of the application to enter the appeal. If such notice was given, the appellee had every right the act accorded to it. Any longer notice would have been senseless and useless.

Here it is established that the application *to the Court* was made to the Court within the time limited for that purpose, but the appellee insists it should have had, at least, twenty-one days' notice of the application, because the application was not made on the first day of the term. But the act entitles them to no more than fourteen days' notice, and any more is neither necessary, convenient, or beneficial.

IV.

The time prescribed for the service of the notice of application to enter the appeal is directory, not mandatory.

That provisions of a statute, although mandatory in form, may and often should be treated as merely *directory*, is too well established to be open to debate.

The correctness of this proposition is fully recognized by the opinion of the Chief Justice.

All, then, that remains is to ascertain, as nearly as may be, the limits of the rule in question and apply the rule to the case in hand.

At page 16, line 9, the Chief Justice says: "the legislative "will is to be ascertained not from the meaning of the text of the "statute alone, but from such words interpreted in view of *the* "*general object of the particular act.*"

Then again, on the same page, at line 31, &c., he says: "When "an act is authorized, or directed to be done by a written law, and "the time and mode of doing such an act are declared, it must, of "necessity, oftentimes, be a question in each particular instance "whether the *time* or mode so declared was so material in the eyes "of the law maker that he has made either an indispensable part of "the affair."

Let us pause at this point. It is admitted that, by the letter of the act, the appellant is in time if he applies, with his petition of appeal, to the Appellate Court at the "second term." He is not, by the act, required to make his application on the *first day* of the second term. There is no reason to suppose that the intent was to limit him to the first day, any more than there is to suppose that the intent was to limit him to the *first hour* of the first day of the term. If the application to enter the appeal is made on the first day of the term, then, according to the letter of the act, two weeks previous notice should have been given. But suppose, as in the case in hand, the application to the Court is not made until the *first* day of the *second week* of the term. What length of notice must be given in that case—14 days, or 21 days?

Why give 21 days' notice? The act says 14 days is sufficient. Fourteen days' notice for every practical purpose is as good, or better, than 21 days. Indeed, *any* preliminary notice is unimportant and of no practical value. In multitudes of similar cases, the the Legislature has dispensed with any such notice. If in many other cases a preliminary notice can be *entirely* omitted, why should a 21 days' notice be required in this case? Did the Legislature really mean and intend, where a petition of appeal was presented in the third week, the second term, and two weeks' notice had been given of its presentation, to deprive the appellant of his appeal, because the notice had not been given two weeks before the *first day of* the term? There can be no doubt but that if that question had been put to the Legislature, when the bill was pending, every member would have said NO. Supplements to charters, like the one in question, are prepared by the corporation. The language used is the language of the corporation. Its construction is to be favorable to the citizen and to the public—favorable to remedies for the injured land owner and not against him. *Black vs. Del. and Rar. Canal Co.*, 9 *C. E. G.* 455.

But, says the Chief Justice, page 18, line 9, &c.: "Every "requirement of the act must have the full effect the language "imports, unless such interpretation of the words will lead to great "inconvenience, injustice, or a subversion of some important object "of the act."

Now, in the charter and supplements thereto of the defendant in error, there is really nothing for the protection or benefit of the land owner but the appeal. The construction of the Chief Justice, based entirely upon the most thoroughly refined technicality, deprives him of even that right. His construction does subvert one of the most important objects of the act.

His interpretation, also, leads to manifest *injustice*, because it deprived the plaintiff in error of an appeal, while the granting of the appeal would not have deprived the Proprietors of a single right or privilege granted to them by their charter.

I do not regard the opportunity of depriving a citizen of his property, on insufficient compensation, by force of technical abstractions, as a right or privilege granted by the charter.

If ever there was a case where the *spirit* and *purpose* of an act should dominate its verbiage, this is that case.

The Chief Justice says, page 18, line 18, &c., that the right of appeal is limited by *two* conditions. 1st, That it be made at the first, or second term. 2d, That notice of the appeal be given two weeks before such term.

As before shown, these so called conditions are quite different in their nature and purpose. The one is as to the application to the Court and is jurisdictional, the other is an unimportant notice to the appellee—a mere matter of practice—in its nature and in view of its object merely *directory*.

He says they are reasonable. I answer, construed and applied reasonably and according to their purposes they are so—but construed and applied as they were by the Supreme Court they are not so.

The Chief Justice asks, "On what ground can they be dis- "pensed with?"

We do not ask to have either one dispensed with. We made the appeal at the second term. We gave two weeks' previous notice of the time and place of presenting the petition of appeal. With the one condition we complied literally—with the other we complied so as to fulfill its spirit and intention, and answer the purpose for which the notice was intended.

Moreover, had the appeal been granted, the appellee would have enjoyed, without limitation, restriction, or diminution, every right, privilege and advantage it could, or would have enjoyed had the notice of the intent to apply to enter the appeal been given two weeks before the *first* day of the second term. The Chief Justice does not show, nor can any one show, that this would not have been so.

THE TRUE RULE.

In ascertaining whether a statute is mandatory or *directory*, the true rule, I submit, is stated in *Cooley on Constitutional Limitations*, pp 77–78:

"Those directions which are not of the essence of the thing to "be done, but which are given with a view merely to the proper, "orderly and prompt conduct of the business and by a failure to "obey which the rights of those interested will not be prejudiced, "are not commonly to be regarded as mandatory; and if the act is "performed, but not in the time or in the precise mode indicated, it "may still be sufficient, if that which is done accomplishes the "substantial purpose of the statute."

See from page 74 to 78, and cases cited, and especially *Wheeler vs. Chicago*, 24 *Ill.*, 108, and *State vs. Lean*, 9 *Wis.*, 292.

Apply this rule to the case in hand.

Here everything required was done. Admit, for the sake of the argument, that the notice of the application which was made on the 28th of January, 1873, should have been given six days earlier. The notice was only intended for the proper, orderly and prompt conduct of the appeal, and as it was given two weeks before the application was made, the delay of the six days could not have delayed the trial of the appeal a single hour and could not have been prejudicial to any right of the Proprietors in respect to the appeal, therefore, the notice was clearly sufficient and the appeal should have been granted, irrespective and independent of the act of 1873.

The statutory provisions in question relate to the land owner's *remedy* for being deprived of his land against his will, and, therefore, they are to be liberally, equitably and benignly construed in promotion of the remedy. Pot. Dwarris on Stat. 231, 235, and that is especially so where it relates to an appeal. *Pearson vs. Lovejoy*, 53 *Barbour*, 407.

V.

The act of 14 *March*, 1873, *Laws* 1873, *page* 51, *does apply to this case.*

Jones' petition of appeal was filed on the 21st January, 1873. On that day a motion to allow and enter the appeal was made. The motion was not decided, but was continued until the 28th of the same month. The same, or a similar, motion was made on the 28th. Neither motion was granted or refused, but the Court concluded to certify the case to the Supreme Court for its advisory opinion. The case was argued in the Supreme Court at June term, 1873, and decided at November term, 1873.

Jones' appeal had been taken previous to the 14th of March, 1873, and was then pending, *undecided.*

The act applies to every case of condemnation which *had been*, or should be taken, where an appeal *had* been, or should be taken.

It could not have been made to apply more clearly or distinctly to Jones' case, except by expressly naming it.

Laws are not to be treated as retrospective unless the intent to make them so is clearly indicated. Here that intent is expressly declared, but the Supreme Court's devotion to the *letter* of the text is suddenly abandoned.

Here, the complaint against the application of this act to this case is that it disturbs *a vested right.* But vested right in what? They have no contract or conveyance from Jones, and have never paid him one cent of consideration for his lands or rights. Their vested right, if any, then, is in a *technical informality* which in no manner affected their substantial equities or rights. This sort of a right is one which the Legislature is not bound to regard or respect. Indeed, it is no right, but an obstruction to justice and equity, and it is the right and duty of the Legislature to remove it. *Cooley on Con. Limitations, p* 370.

A retrospective law which is *remedial* in mere matters of practice—intended to protect substantial rights and prevent them from being defeated by technical verbal objections which have no foundation in reason or justice, is not only within the poner of the legislature to pass, but is to be favorably and liberally construed.

Strongly in point is *Young vs. The Bank of Alexandria*, 4 *Cranch*, 384.

Bank of Columbia vs. Oakley, 4 *Wheat*, 245.

Sturges vs. Crowninshield, 4 *Wheat*, 200.

McLaren vs. Pennington, 1 *Paige*, 107–8.
Cooley on Con. Limitations, 301–2.
1 *Kent's Com.* 455.

In Bacon vs. Callender, 6 *Mass*, 303, 309, the statute in question was passed after the commencement of the suit, and the Court held that it regulated and governed the rights of the parties in that suit. The language of the statute in that case was similar to the language of the act in question and not more clearly retroactive.

On the 14th of March, 1873, the Circuit Court had rendered no judgment whatever. The Circuit Court asked the advisory opinion of the Supreme Court, *not* as to whether the appellant's motion *should have been* granted, but whether it *should be* (that is, thereafter,) granted. Case p 11, l 10.

Now, when the Supreme Court and the Circuit came to decide that question there was no law requiring two weeks' notice. The law then in force said, in the plainest language, that in *every* case where proceedings for condemnation had been taken and an appeal had been taken and any preliminary notice of appealing had been required, five days' notice of the presentation of the appeal should be sufficient notice thereof.

Why should the Court disregard and disobey that very explicit command?

Look at the answer given to this question by the Chief Justice, p 20, line 15:

"That this act provides for notice in case of appeals which "should be taken in the future, and those which had been thereto- "fore taken, is very clear, but this circumstance does not in "the least settle the question in dispute, which is whether it relates "to *a notice of appeal* which had been given before its enactment. "I have not found a word in this act manifesting such a purpose. "The entire clause relating to the notice denotes future action. In "case of a corporation, the declaration is that five days' notice "served '*by delivering the same*,' &c., '*or leaving the same* at the "principal office,' &c., shall be sufficient. The expression, served "by delivery, or by leaving, cannot without distinction be made to "mean a thing already done; in their natural and confined sense "the terms signify the reverse. To give the section the force con "tended for would require to reverse the legal rule of construction, "which requires every reasonable endeavor so to interpret the

"statutory text as to give the law a prospective and not a retro-
"active effect."

Well! suppose the Chief Justice is right in holding that that act does not apply to notices given prior to the passage of the act? What then?

The 2d section of the act is in these words: "That any and "every part of any public or special act contrary to the provisions "of this act be and the same is hereby repealed." 3d. "That this "act shall take effect immediately."

This repealed the requirement to give two weeks' notice contained in the charter of the Proprietors, and, as to the past, there was then no requirement to give any notice. What law was there which authorized the Supreme Court to say we should have given two weeks' notice? None whatever. The law upon which the Supreme Court based its judgment had been repealed three months before it heard and nearly eight months before it decided the case.

In the case of *The Town of Belvidere vs. The Warren Rail Road Company*, 5 *Vroom*, 193, the Supreme Court held that where a statute is repealed it must be considered as though it had never existed, except with regard to transactions passed and closed. That judgment was affirmed in this Court, 6 *Vroom*, 584; *Potter's Dwarris on Statutes*, p 160.

There was nothing in the act of 14 March, 1873, which saved the provision of the charter as to two weeks' notice in pending cases.

Therefore, if we adopt the Supreme Court's construction, it makes *any* preliminary notice unnecessary.

But, I respectfully submit that the construction of the Supreme Court is erroneous.

The act in question relates to *but one subject*—that is, the *time and manner of serving preliminary notices of appeal in certain condemnation cases.* There is no prescription or direction as to the contents of the notice.

Now, in what cases were the requirements of this act as to notice to apply?

The act says in *every case* where "an appeal *has been*, or shall "be taken."

In every such case if it appeared to the Court that five days' notice had been given, it is declared to be sufficient. That this was meant to apply to pending proceedings is demonstrated from

the fact that the provisions of former acts as to notice were, at once, wholly repealed and no saving was made as to pending cases.

If the Circuit Court had given judgment against the appeal *before* the approval of the act of 14 March, 1873, the case would have been different. The question *then* would have been whether the judgment was right *when it was given.* But here the question was what judgment should be given *after* the 14th March, 1873?

But, let us look again at the opinion of the Supreme Court. It says: "That this act provides for notice in case of appeals "which should be taken in the future, and those which *had been* "*theretofore taken*, is very clear."

Now the act relates *only* to PRELIMINARY notices of appeal and, when it applies, as it admittedly does, to appeals taken before the passage of the act, it, by irresistible necessity, applies to notices given *previous* to the passage of the act.

The act was to direct and control the judgment of the Courts as to appeals then pending and in those cases its mandate is that a five days' preliminary notice shall be adjudged sufficient notice in all cases thereafter adjudged.

As to appeals taken *before* the passage of the act there could be no future *preliminary* notice.

We are, therefore, forced to the conclusion that the act in question applies to the notice in this case, or else that it has dispensed, in this case, with the giving of any preliminary notice whatever.

Where the practice of the Courts is changed, by statute, during the pendency of a suit the rule is this "The *rights* of the parties must remain as they then existed, but *the remedy*, so far as it relates to *the practice* of the Court and the manner of ascertaining that right *must be according to the new law, as* far as the proceedings can be made conformable thereto without impairing the right." *Aymer vs. Gault*, 2 *Paige*, 284. Very squarely and strongly in point is *The People vs. The Herkimer Common Pleas*, 4 *Wend*, 210. There, pending an appeal, the statute as to costs, which was in force when the appeal was taken, was repealed. The Court held that the recovery of costs must be governed by the new law. The new statutes, said Marcy, Judge, "take up the proceedings in "causes pending where they find them and *where the statutes under* "*which the proceedings were commenced are repealed*, the subsequent

"proceedings *must* be regulated by the Revised Statutes,"—which were the new statutes.

Miller's Case, 1 *Wm. Blackstone*, 451.

Butler vs. Palmer, 1 *Hill*, 324.

Kay vs. Goodwin, 6 *Bing.* 582.

Here, then, it seems plain that whatever is to be said or done about the preliminary notice of appeal must be according to the ac, of March, 1873.

It can not be said that there was no appeal pending in March 1873. The fact is otherwise. The dispute is not as to that, but as to the *notice*. The act of March, 1873, does not abridge, or alter the right of *appeal*—it merely relates to *notice thereof*.

VI.

In the Supreme Court the Proprietors insisted that to entertain the appeal would impair their vested rights.

If we stop to inquire what rights of theirs in the premises had become vested, the proposition becomes ludicrous. They have no conveyance and no agreement. They have paid no consideration and have not had two years' possession. Their vested right, if it be one, is a right to *prevent justice* and to deprive Jones of his property at less than one fifth of its fair value. Their alleged vested right is well described and well characterized by Justice Woodworth in *The People vs. Tibbetts*, 4 *Cowan*, 392. He said: "the "pretence of the defendants does not merit the name of *right*." It relates to the *remedy*. Their proposition was this:

"After the award and the time for appealing has passed, the "right of each party become vested."

This, of course, means after the time for appealing has passed, and no appeal has been taken.

I will not discuss that kind of a case now. That is not the case before the Court. Here an appeal was taken before the time limited for that purpose had expired.

The proposition of the counsel of the Proprietors confounds *the appeal to the Court* with the *notice* which was to be given of the intent to move to have the appeal entered.

The cases he cited, and I suppose will cite again, are cases where the time for taking out, or serving a writ of error had fully expired before any writ was served, or taken out and the belated

writ was sought to be made good by subsequent legislation. Others of his cases, on this point, were where a party had, by the requisite period of possession, acquired a full, legal title to the property, and after that the legislature extended the length of time of possession requisite to constitute title.

But, in this case the *appeal* was in time. The act of 1873 divests them of no defence, on the merits, to the appeal. A charge of a few days in the length of a notice does them no harm and, from its very nature, must be at all times under the control of the Legislature and the Courts.

No better founded is their pretence that the Act of 1873 impairs the obligation of a contract. They have no contract with Jones and never had.

If their charter is a contract with the State it did not and could not contract that they should have Jones' land without just compensation first paid. It was no part of the contract with the State that the Proprietors should fix the amount of the compensation. The mode of ascertaining that could not be granted or delegated to the Corporation. It was remedial and from its very nature subject to variation. Even in cases of contracts, while the Legislature cannot deprive a party of any remedy which existed when the contract was made, there is no prohibition against conferring new or additional remedies, or enlarging or extending existing ones.

But the right and power of the State Legislatures to enact validating acts, making effectual acts which were ineffectual because the prescribed proceedings had not been pursued and exactly followed, has been fully established, and is no longer an open question.

Wilkinson vs. Leland, 2 *Peters*, 625.

NEW JERSEY

Court of Errors and Appeals.

SAMUEL JONES,

vs.

THE PROPRIETORS OF THE MORRIS AQUEDUCT.

} IN ERROR.

NEW JERSEY, *ss:*

[SEAL.]

THE STATE OF NEW JERSEY *to the Judge of the Circuit Court of the County of Morris,* GREETING:

Forasmuch as in the record and proceedings, and also in the giving of judgment of a certain petition of appeals, which was in our said Circuit Court before you, between Samuel Jones, petitioner, and The Proprietors of the Morris Aqueduct, from an award made by John W. Hancock, Benjamin M. Felch, and Albert R. Riggs, commissioners appointed by the Honorable Vancleve Dalrimple, a Judge of our said Circuit Court, for certain lands and waters taken from the said Samuel Jones of the said The Proprietors of the Morris Aqueduct, and for damages for the taking of said lands and water, manifest error hath intervened to the great

damage of the said Samuel Jones, as by his complaint we are informed. We being willing that the error, if any there be should in due manner be corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, that if judgment be thereupon given, then without delay you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things concerning the same, to our Court of Errors and Appeals, on the fourth Tuesday of March, in the year eighteen hundred and seventy-four, together with this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon what of right and according to law ought to be done.

Witness Theodore Runyon, our Chancellor, at Trenton, the tenth day of March, eighteen hundred and seventy-four.

HENRY C. KELSEY, *Clerk.*

JACOB VANATTA, *Attorney.*

This writ being presented to the Court, in the term of January, 1874, the same is ordered to be returned according to the command thereof.

V. DALRIMPLE.

The answer of the Judge of the Circuit Court of the County of Morris within named, the record and proceedings of the action whereof mention is within made, with all things concerning the same, I certify to the Judges of the Court of Errors and Appeals of the State of New Jersey, within specified, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

V. DALRIMPLE, *Judge, &c.*

A true copy:

HENRY C. KELSEY, *Clerk.*

We, *Albert R. Riggs*, *John W. Hancock* and *Benjamin M. Felch*, *Commissioners*, duly appointed by the Honorable *Vancleve Dalrimple*, one of the Justices of the Supreme Court of the State of New Jersey, on the application of the Proprietors of the Morris Aqueduct, a corporation of said State, made by petition in writing to said Justice, now remaining before him to assess and ascertain the amount of damages to be done to the lands of Samuel Jones by the erection and mainance thereon of the works, pipes, drains and reservoirs, and the diversion therefrom of the stream of water mentioned and described in said petition, and to appraise the value of certain lands therein described to be taken for a reservoir, and to assess all damages by said Jones sustained, or to be sustained, in consequence of such taking, and whatever by law we as such Commissioners are authorized or required to assess, as in and by the record of our said appointment now remaining before the said Justices, will more fully appear. And we, the said John W. Hancock and Benjamin M. Felch, having first severally taken and subscribed an oath before I. C. Rathbun, a Justice of the Peace of the County of Morris, faithfully to execute the duties of said appointment, and I, the said Albert R. Riggs, alleging myself conscientiously scrupulous of taking an oath, having duly affirmed according to law before William McNeely, Commissioner of Deeds for Morris county, that I would faithfully execute the duties of said appointment; and we having appointed Friday, the ninth day of August, 1872, at the hour of nine o'clock in the forenoon, at the hotel of Nathan B. Luse in Morristown, in said county, as the time and place when and where we would meet and proceed to execute the duties of our said appointment, and it having been duly proven to our satistaction by the oath of Edward A. Muir, that two weeks' previous notice in writing had been given to the said Samuel Jones of the time and place of such meeting, we, Albert R. Riggs, John

W. Hancock and Benjamin M. Felch, the said Commissioners, having met at the time and place aforesaid, and having viewed and examined the said premises and in part heard the parties as well as the said proprietors of the Morris Aqueduct, as the said Samuel Jones and the said proprietors of the Morris Aqueduct having exhibited to us a description in writing and by drawings and maps of the land and stream of water by them, sought to be taken and diverted, and of the use and occupation of, and excavations upon, the lands of said Jones, by them sought to be made, which writings and maps are hereto annexed and form part of this our award, and we having then, by consent of the parties, adjourned the further hearing of the said matter until the twenty-first day of August aforesaid, at the Court House in Morristown, at ten o'clock in the forenoon, at which time and place we did again meet and further hear the said parties, and did further adjourn the hearing of said matter until the twenty-second day of August, at the same hour and place, and which time and place we did again hear said parties, and did again further adjourn the said matter for consideration until the twenty-third day of August aforesaid, at the same hour and place, at which time and place we did meet, and having considered the allegations and evidence of the said parties do assess and appraise the value of the lands so to be taken by the said corporation, and the amount of damages, to be done as aforesaid, and all damages and compensations which by law we are authorized or required to assess in favor of said Samuel Jones, at the sum of twelve hundred dollars, and we do hereby and by virtue of the said appointment and the several acts of the Legislature composing the charter of said corporation, and in consideration of the damages and compensations so assessed and awarded against the said corporation, and in favor of said Samuel Jones, award the said The Proprietors of the Morris Aqueduct the lands, rights and privileges mentioned

and described in the statement, description and maps hereto annexed, and by them sought to be taken as aforesaid.

In witness whereof we have hereto set our hands and seals the twenty-third day of August, eighteen hnndred and seventy-two.

A. R. RIGGS, [L. S.]
JOHN W. HANCOCK, [L. S.]
BENJAMIN M. FELCH, [L. S.]

To the Proprietors of the Morris Aqueduct:

You will please take notice, that on Tuesday, the twenty-first day of January instant, at ten o'clock in the forenoon, or as soon th-reafter as the Court can attend to the same, I will present to the Circuit Court of the County of Morris a petition of appeal from the award of John W. Hancock, Benjamin M. Felch and Albert R. Riggs, commissioners appointed by Hon. Vancleve Dalrimple, one of the Justices of the Supreme Court of New Jersey, to assess and ascertain the damages to be done to my lands and compensation to be paid to me by said proprietors by reason and for and on account of the proposed taking and diversion of certain streams of water from my land and the erection and maintenance of certain works thereon, and of the taking and use of certain of my lands for the purpose of a reservoir by said proprietors, which lands are described in said proceedings and are situate in the Township of Morris, in the County of Morris, which award bears date on the twenty-third day of August, 1872, and is filed in the office of the Clerk of the County of Morris, and that I feel aggrieved by said assessment and award, and intend and do appeal therefrom.

Dated January 4, 1873.

Yours, &c., SAMUEL JONES.

State of New Jersey, }
Morris County, *ss.* }

George T. Werts of said county, of full age, being duly sworn on his oath saith, that he served a true copy of the within notice on Henry C. Pitney, personally, at his office on the thirteenth day of January, 1872, and left said copy in possession of said Pitney.

Sworn and subscribed before me, January 21, 1872. } GEO. T. WERTS.

EDWARD D. HALSEY,
Master in Chancery of New Jersey.

To the Proprietors of the Morris Aqueduct:

You will please take notice that on Tuesday, the twenty-eighth day of January instant, at 10 o'clock in the forenoon, or as soon thereafter as the court can attend to the same, I will present to the Circuit Court o the County of Morris a petition of appeal from the award of John W. Hancock, Benjamin M. Felch and Albert R. Riggs commissioners appointed by Hon. Vancleve Dalrimple, one of the Justices of the Supreme Court of New Jersey, to assess and ascertain the damages to be done to my lands and compensation to be paid to me by said proprietors, by reason and for and on account of the proposed taking and diversion of certain springs and streams of water from my land, and the erection and maintenance of certain works thereon, and of the taking and use of certain of my lands for the purpose of a reservoir by said proprietors, which lands are described in said proceedings and are situate in the Township of Morris, in the County of Morris, which award bears date on the twenty-third day of August, 1872, and is filed in the office of the Clerk of the County of Morris, and that I feel aggrieved by said assessment and award, and intend to and do appeal therefrom.

Dated January 13, 1873.

Yours, &c., SAMUEL JONES.

A true copy of original on file.

R. SPEER, *Clerk.*

To the Honorable the Circuit Court of the County of Morris:

The petition of Samuel Jones, of Morristown, in the County of Morris, respectfully shows—

That your petitioner is aggrieved by and dissatisfied with a certain award, bearing date the 23d day of August, 1873, made by Albert R. Riggs, John W. Hancock and Benjamin M. Felch, commissioners appointed by the Honorable Vancleve Dalrimple, one of the Justices of the Supreme Court of the State of New Jersey, upon the application of the proprietors of the Morris Aqueduct, a corporation of said State, to assess and ascertain the amount of damages to be done to the lands of your petitioner by the erection and maintenance thereon of the works, pipes, drains and reservoirs, and the diversion therefrom of the stream of water mentioned and described in said petition, and to appraise the value of certain lands therein described to be taken for reservoirs, and to assess all damages sustained and to be sustained in consequence of such taking, and whatever by law said commissioners are authorized or required to assess; your petitioner further shows that the following is a statement and description of the rights and privileges sought to be acquired by the said, The Proprietors of the Morris Aqueduct in the farm and lands of your petitioner, situate in the Township of Morris, in the County of Morris, to the westward of the town of Morristown, and on both sides of the turnpike road leading from Morristown to Mendham, as annexed to and referred to in said award.

First. The perpetual right to take and direct the small brook which runs through said farm at a point at or near an elm tree standing on the edge of the same, and distant six hundred and twenty-four feet on a course of north nine degrees east from a birch tree marked with a blaze and three notches on three sides, and which birch tree stands near said brook in a

swamp and is a corner of lands of your petitioner and of the said The Proprietors of the Morris Aqueduct, late Henry C. Pitney, and late Philips Phoenix, and which elm tree and point of diversion is distant about eight hundred and ninety three feet southerly from the turnpike bridge over said brook. Out of the above stated right of diversion is to be excepted and reserved to said Samuel Jones and his assigns, as the owner of said farm, the right to take and divert and use upon said farm the waters of four certain springs rising near the Jockey Hollow road, in a southerly direction from said point of diversion, two of said springs rising on the lands of said Jones, and the other two on the lands of one Tuttle, as shown on the annexed map.

Second. The right to lay down and repair, renew and forever maintain a water pipe of six inches diameter, three feet below the surface of the ground, and leading from the said point of diversion of said brook in a northerly direction across said farm to said turnpike road, and across the same to the lands of General Revere, and from thence along the turnpike to Morristown; the course of said pipe commencing at or near said elm tree, the point of diversion aforesaid, and running along or near the bed of said brook will be north about six degrees and thirty minutes east, until it reaches the turnpike road at the bridge over said brook.

Third. To erect, repair, rebuild and for ever maintain on said farm near said elm tree and point of diversion, a covered filter and gate house, made tight to hold water, ten by sixteen feet in size, and connected by water pipes with an open reservoir, as hereinafter stated, the location of which also appears on the map hereto annexed.

Fourth. To take and appropriate for a reservoir for water a lot of land lying on each side of said brook, and to the southward of said point of diversion, and described as follows: Beginning at a point one hundred

and seventy-five feet and six inches on a course of north fourteen degrees and twenty minutes east from a white birch tree marked on three sides with a blaze and three notches, the twelfth corner of a tract of land described in a deed of conveyance from Garret DeMott, Sheriff, &c., to Samuel Jones, bearing date May 12, 1863, and recorded in the Morris County Record of Deeds in Liber F 6, folios 550, &c., also a corner of land of the proprietors of the Morris Aqueduct, late H. C. Pitney, and running from said point (1) north, fifty-five degrees and forty-eight minutes west, fifty-eight feet; thence (2) north, one degree and twenty-one minutes west, two hundred and seventy-eight feet; thence (3) south, eighty-six degrees east, one hundred and eighty-four feet; thence (4) south, eight degrees west, one hundred and thirty-five feet; thence (5) south, twenty-five degrees and thirty-five minutes west, one hundred and seventy feet; thence (6) south, seventy-five degrees and forty-two minutes west, forty feet to the place of beginning, containing nine hundred and ninety-three thousandths of an acre of land, be the same more or less; also the right to convey the waters of said brook from the said land of the said The Proprietors of the Morris Aqueduct, late H. C. Pitney, by a pipe or covered drain by the shortest course to said reservoir to be as shown on said map.

Fifth. The right to lay down, renew, repair and forever maintain underdrains two feet at least below the surface of the earth, through the wet and swampy grounds of said farm, which lie to the southward of said point of diversion, including a covered drain in the earth along and just below the face of the dam to be erected on the land to be taken for a reservoir to catch the leakage thereof, and convey the same into said filter, as shown on said map.

And your petitioner further shows that in and by the said award the said commissioners did assess and appraise the value of the lands so to be taken by the said

corporation, and the amount of damages to be done, as aforesaid, and all damages and compensation which by law they are authorized or required to assess in favor of your petitioner at the sum of twelve hundred dollars, and did award to said The Proprietors of the Morris Aqueduct, the lands, rights and privileges hereinbefore mentioned and described, as by reference to said award will more fully appear. And your petitioner further shows that he appeals from the said assessment and award to this honorable court, and your petitioner humbly prays this honorable court to take cognizance of his appeal, and to award a venire for a jury to come before this honorable court, to assess the value of the said lands, and of the said damages to order that said jury have a view of said premises, and to make such orders and take and have such proceedings in the premises as shall be necessary to fully hear and determine the said appeal.

Dated January 21, 1873.

SAMUEL JONES,
By Jacob Vanatta, his attorney, &c.

A true copy of original on file.

R. SPEER, *Clerk.*

The foregoing petition having been filed in the office of the Clerk of the Circuit Court of the county of Morris, on the third Tuesday of January, 1873, and on that day, being the first day of the term, upon the notice hereto annexed, marked Exhibit A, a motion was made for leave to enter a rule or order of the Court pursuant to the prayer of the said petition, which motion was opposed and resisted by the said The Proprietors of the Morris Aqueduct, upon the ground that said notice had not been served upon them two weeks before the making of said motion. The Court did not decide the said motion on the 28th day of January, 1873, the said motion was renewed on behalf of the said petitioner, and in support thereof the counsel who made the motion offered in evidence the notice hereto annexed,

marked Exhibit B, and the acknowledgment of service thereon written. The said last-mentioned motion was opposed by the said The Proprietors of the Morris Aqueduct, on the grounds that said last-mentioned notice was insufficient in law, and that by reason of the insufficiency of the said two notices and of each of them, the petitioner's right of appeal was lost and gone.

The Judge holding the said Circuit Court conceiving the said case to be one of doubt and difficulty, hath directed the foregoing case to be made and stated, and he doth hereby certify the same to the Supreme Court, to be argued at the bar of the last-named Court upon the question whether the said motion of the said petitioner can and should be granted to the end that the said Supreme Court may give an opinion therein and certify the same to the said Circuit Court, according to the statute in such cases made and provided.

V. DALRIMPLE, *Judge, &c.*

A true copy :

BENJ. F. LEE, *Clerk.*

The Proprietors of the Morris Aqueduct, *ads.* Samuel Jones. } *On case certified from Morris Circuit Court.*

This cause having been argued at the last term of this Court by the counsel of the respective parties, and the Court having considered therein until the present term, and being now of the opinion that the proceedings of appeal taken and instituted by the said Samuel Jones from the award of commissioners set forth in said proceedings as certified to this Court, are defective, and did not and do not give the said Circuit Court jurisdiction to proceed therein. It is accordingly ordered that the Circuit Court of the County of Morris be, and it is hereby advised accordingly, and that the said petition of appeal of said Samuel Jones from said award

should be dismissed with costs, and no further proceedings be had thereon in said Court.

Entered Nov. 11, 1873.

On motion of PITNEY & YOUNGBLOOD,
Attorneys, &c.

I, Benjamin F. Lee, Clerk of the Supreme Court of the State of New Jersey, hereby certify that the foregoing is a true copy of an order made in the above stated cause by said Court, and entered in the minutes thereof.

In testimony whereof I have hereto set my hand and the seal of said Court, at Trenton, [L S.] this seventeenth day of November, A. D. 1873.

BENJ. F. LEE, *Clerk.*

The Proprietors of the Morris Aqueduct *ads.* Samuel Jones. } On petition of appeal from award of Commissioners.

Samuel Jones, above-named, having at the January term last past of this Court presented to the Court his petition of appeal from the award of Albert R. Riggs, John Hancock and Benjamin M. Felch, commissioners, and moved the Court to take action thereon, and the said motion being opposed by the said proprietors on the ground that the notice given of said appeal was insufficient, and gave the Court no jurisdiction of the same, and the Court having thereupon certified the question arising thereon to the Supreme Court for its advisory opinion, and now the said proprietors having presented to the Court a certified copy of an advisory order of the Supreme Court, that said proceedings of appeal are defective, and did not and do not give the Court jurisdiction therein, and directing that no further proceedings be had thereon in this Court, and that

the same be dismissed with costs, and the costs of the said The Proprietors of the Morris Aqueduct, having been duly taxed at the sum of dollars and cents. It is thereupon considered and adjudged by the Court that the said The Proprietors of the Morris Aqueduct, recover from the said Samuel Jones the said sum of dollars and cents, their costs aforesaid, and that the said petition of appeal be and the same is hereby dismissed.

A true copy :

HENRY C. KELSEY, *Clerk.*

OPINION.

When the words of a statute, directing the mode or time of doing an act, are clear, the provision cannot be deemed merely directory, unless the literal interpretation *will* will lead to a result so absurd or highly inconvenient as to demonstrate that such could not have been the legislative intent

A statute giving an appeal from the award of commissioners to the first or second term of the Circuit Court after such award, required a notice of such appeal to be given "two weeks prior to such term" —*Held* that this provision must be strictly complied with.

Held further that such notice was not regulated by the supplement to Practice Act, passed 14th March, 1873.

The defendant was incorporated in 1799, for the purpose of supplying the inhabitants of Morristown with water. By a supplement passed on the 17th of February, 1862, power was conferred to extend its works, and provision was therein made, in case the requisite lands and materials could not be obtained by agree-

ment, to have the damages assessed by commissioners in the usual form.

Section fifth contains the clause following, viz: "That if either party feel aggrieved by said assessment and award, such party may appeal to the next or second term of the Court of Common Pleas of said county by petition, and notice thereof served upon the opposite party two weeks prior to such term, or published a like space in a newspaper published at Morristown, which petition and notice so served and published shall vest in said court full power to hear and determine said appeal, &c." By the further supplement, passed 3d April, 1872, the appeal just mentioned is directed to be made to the Circuit Court of the county instead of the Court of Common Pleas.

In the present case, an assessment was made in August, 1872, and Mr. Jones, the petitioner, appealed therefrom to the Circuit Court of the County of Morris at the second term thereafter, which began on the 21st day of January, 1872. On that day, a motion being made in court to entertain said appeal and award a venire for a jury, such motion was opposed by the counsel of the proprietors of the Morris Aqueduct on the ground that the notice of appeal required by the supplement already referred to had not been given. It appearing that the notice in question had been served on the 13th January, 1873, the Court made no adjudication, and on the 28th of the same month the motion was renewed. On that occasion it was shown that on the 21st January, 1873, a second notice had been given signifying that this motion of the 28th would be made.

The question thus presented being deemed by the Court one of difficulty, was certified for the advisory opinion of this Court.

VANATTA—for the motion.

PITNEY—contra.

BEASLEY, *Chief Justice.*

Whether the notice of appeal from the award of the commissioners appointed to assess the value of the land of the petitioner and his damages is sufficient is the point in dispute. The statute in question declares that the party aggrieved by such award may appeal to the next or second term of the Court, "and that notice thereof shall be served upon the opposite party two weeks prior to such term." The appeal in this case was made to the first day of the second term, a notice thereof of one week having been given, but such course being perceived to be erroneous, the matter was laid over for a week; another notice being given conformably to this adjournment, the case therefore is presented of an appeal to a special day in term, and a notice thereof running back two weeks prior to that time. But I think it very clear that this is not a compliance with the statute authorizing this proceeding. This act directs that the appeal shall be to the first or second term of the Court occurring after the award, and under the force of this provision no reason appears why the petition might not be presented on any day during such term. But the notice of such appeal, with respect to time, is fixed with entire certainty and precision. The statutory provision is that it must be served on the opposite party "two weeks prior to such term;" that is, the term to which the appeal is addressed. It is impossible to draw in question the meaning of this language. The notice in the case before the Court was two weeks prior to the date of the application, but as it was not two weeks prior to the term at which such application was made, it is indisputably clear that the statute in this particular has not been complied with.

Upon the argument before the Court, an effort was made on two grounds to avoid the effect of this clear statutory expression. The first position taken was that the legislative direction with respect to the time for which notice of the appeal was to be given is not

mandatory, but merely directory. There have been a number of decisions which have, under special circumstances, held that neither the exact time nor the exact mode prescribed by statute for the doing of acts directed to be done is necessarily essential to the validity of the transaction. Upon looking into the cases referred to, and on an examination of others standing in the same line, I find they all rest upon the common principle that the legislative will is to be ascertained not from the meaning of the text of the statute alone, but from such words interpreted in view of the general object of the particular act. The adjudication are the results not of acts of interpretation, which is the mere finding of the true sense of the special form of words used, but of acts of construction, which Dr. Leiber in his Hermeneutics has properly defined as "the drawing of conclusions respecting subjects that lie beyond the direct expression of the text conclusions which are in the spirit, though not within the letter of the text." Logan and Political Hermeneutics, ch. 1. In the class of cases now under consideration, the absolute meaning of the terms employed have been for the most part clear; but in their application to the subject matter or in view of the paramount object of the law-makers, they have been deprived of some of their usual force and restricted in their operation. Such results have obtained because it has appeared to the Court, looking at the statutory language and its effects, that it was manifest that it would not have been the design of those who enacted the law to give the words the very power which they inherently possess. When an act is authorized or directed to be done by a written law, and the time and modes of doing such act are declared, it must of necessity, oftentimes, be a question in each particular instance whether the time or mode so declared was so material in the eyes of the lawmaker that he has made either an indispensable part of the affair. This idea is expressed by Ld. Mansfield in the case of Rex v. Lox-

dale, 1 Burr, 449, in which he says, "There is a known distinction between circumstances which are of the essence of a thing required to be done by an act of Parliament and clauses merely directory," what has been made a matter of the essence of the thing, can be ascertained only by judicial construction. In some cases it is palpably clear that time or mode is essential. Thus this Court properly maintained in Morrell v. Buckley, Spencer 668, that the provision requiring the Clerk, on issuing a writ of attachment, to enter in a book, to be kept for that purpose, the names of the parties and the time of issuing and sealing the writ was merely directory. The ground of that judgment is, that although the duty imposed on the Clerk is expressed in clear terms, it could not have been the design to make the legality of the proceedings depend on the obedience of this officer to this mandate. The inconvenience and unjust consequences of such a circumstance would have been so great as to forbid the Court from concluding that such a purpose was intended in the absence of express terms, or something equivalent, compelling to such a conclusion. This is an illustration of the plain text being controlled by the plain spirit of the law.

The case of the City of Lowell v. Hadley, 8 Met., 195, affords a similar illustration. The city ordinance required the superintendent of streets to make and report to the auditor of accounts of the expense incurred in building a sidewalk "within ten days of the finishing of the sidewalk," and the result reached was that the provision was simply directory. A regulation that if the report of the officer was not made within the period specified, the city should lose the expenses incurred by it would have been preposterous, and hence the refusal so to interpret the general command of the law. These cases, and many others of a like kind, rest upon a sure foundation. They are examples of judicial refections of the letter of the act to prevent it running into absurdity. Some of the cases seem to me to

have been pushed to an extreme, and have decided that circumstances were non-essentials which appear to have been of the very essence of the particular transaction. But the rule being so general it is hardly surprising that the results, each conclusion resting on peculiar grounds, should not be able to give universal satisfaction. However this may be, I am sure that the following proposition is established by the large majority of these authorities, viz: that every requirement of the act must have the full effect the language imparts, unless such interpretation of the words will lead to great inconvenience, injustice, or a subversion of some important object of the act.

Judging the question now considered by this test, it is clear that the petitioner cannot stand on the ground assumed by him. It has been already said that the language of the provision in question is too plain to admit of discussion. The right of appeal is given but it is limited by two conditions: first, it must be made to the first or second term of the Court; and second, a notice of such appeal must be given two weeks before such term. These restrictions upon the right are reasonable; they harmonize with the general scheme of this law, and they lead to no inequitable result. On what ground can they be dispensed with? If the time for notice can be disregarded, so also can the time in which the appeal is required to be made. It is obvious that if it should be declared that this provision is merely directory, that it simply suggests a convenient mode of proceeding, carrying with it no mandatory force, no rule whatever exists, either as to the time of appealing or of giving notice. Such a conclusion has the effect of entirely abolishing the requirement in question; plain language, aiming at a reasonable purpose, is not permitted to operate at all. I find no precedent for such a determination, and it seems opposed to all rational rules of statutory construction. This first ground should, I think, be overruled.

A second point remaining to be considered—

A statute purporting to be a supplement to the Practice Act was passed on the 14th of March, 1873, and it is contended that this law, having a retrospective operation, validates the notice of appeal, which has been given in the present case.

In the learned and able brief of the counsel of the Aqueduct Company, the broad position is taken in converse to the position just indicated, that this statute, if it has the retroactive effect ascribed to it, is void on the ground of its unconstitutionality. It is insisted that on the running out of the time limited for the appeal and notice, the rights and obligations acquired or impaired by the award of the commissioners became vested and absolute, and that therefore they cannot be disturbed or impaired by legislative action. Many cases of the utmost weght are cited, which appear to fully sustain this proposition. It certainly is a formidable suggestion, that after a right has become perfectly and ultimately established under the existing forms of law, that the law-making power can, at its pleasure, throw the subject open to a further litigation. If this be lawful it is obvious that it is difficult to say what adjudication becomes final. To say the least, my *prepossessions* are *opposed* to such a theory, but the question is one of great importance and has never been in its present form before our courts, and should not, consequently, be decided except when the particular case renders such a course necessary. Such an emergency does not seem to me at present to exist, because, according to my construction of the law in question, it has not a retrospective operation with respect to the point in controversy. The language of this act is as follows: "That in any and every case where proceedings have been or shall be taken by any private corporation, authorized to exercise or use the right or power of eminent domain, to exercise or employ that right or

power to acquire any lands, tenements, &c., an appeal has been or shall be taken from the award of commissioners, and notice is required by the charter of such corporation to be given of the presentation of the petition or of the making of the application to the Appellate Court to enter an appeal, five days' notice of the presentation of such appeal, or of the making of such applications served upon the opposite party in case of an individual personally or left at his or her usual place of abode, or in case of a corporation, by delivering the same to the president, secretary or treasurer thereof personally, or leaving the same at the principal office of the company, &c., shall be sufficient notice and sufficient service thereof."

That this act provides for notice in case of appeals which should be taken in the future, and those which had been theretofore taken, is very clear, but this circumstance does not in the least settle the question in dispute, which is whether it relates to a notice of appeal which had been given before its enactment. I have not found a word in this act manifesting such a purpose. The entire clause relating to the notice denotes future action. In case of a corporation, the declaration is that five days' notice served "*by delivering the same*," &c., "*or leaving the same* at the principal office, &c.," shall be sufficient. The expression, served by delivery, or by leaving, cannot without distinction be made to mean a thing already done; in their natural and confined sense the terms signify the reverse. To give the section the force contended for would require to reverse the legal rule of construction, which requires every reasonable endeavor so to interpret the statutory text as to give the law a prospective and not a retroactive effect.

I think the Circuit Court should be advised to dismiss this appeal, on the ground that the notice thereof was not given within the time prescribed by the statute.

ASSIGNMENT OF ERRORS.

SAMUEL JONES
vs.
THE PROPRIETORS OF THE MORRIS AQUEDUCT. } In Error.

Afterwards, that is to say on the day of April, in the year eighteen hundred and seventy-four, in the Court of Errors and Appeals, in the last resort in all cases, comes the said Samuel Jones, by Jacob Vanatta, his attorney, and says that in the record and proceedings aforesaid, and in the judgment aforesaid, there is manifest error in this, to wit: that by the said record it appears that judgment was given in the said Circuit Court that the said petition of appeal of the said Samuel Jones, presented to the said Circuit Court, be and the same was dismissed with costs to be taxed in the said Circuit Court and in the Supreme Court, when by the law of the land the said Circuit Court should have given judgment in favor of the said Samuel Jones, pursuant to the prayer of his said petition.

There is also manifest error in this, to wit: that in and by the said record and proceedings it appears that the said Circuit Court of the County of Morris was advised by the Supreme Court, by certificate, &c., that the proceedings of appeal taken and instituted by the said Samuel Jones are defective, and did not and do not give the said Circuit Court jurisdiction to proceed therein, and that the said petition of appeal of said Samuel Jones should be dismissed with costs, and no further proceedings be had thereon, and that said Circuit Court adopted and pursued said advice and gave judgment accordingly, whereas by the law of the land the said Circuit Court did have jurisdiction of said appeal, and the said Supreme Court should not have so as afore-

said advised or certified to the said Circuit Court, nor should the said Circuit Court have given judgment pursuant to said advice, but should have given judgment for the said Samuel Jones, pursuant to the prayer of his said petition of appeal.

Therefore, the said Samuel Jones prays that the judgment aforesaid for the errors aforesaid and for the errors appearing in the record and proceedings aforesaid, may be reversed, annulled, and for nothing holden, and that the said Samuel Jones may be restored to all things he has lost on occasion of the said judgment, and that the said The Proprietors of the Morris Aqueduct may rejoin to the said errors.

JACOB VANATTA.
Attorney of Plaintiff in Error.

The Morris Republican
Book and Job Establishment.