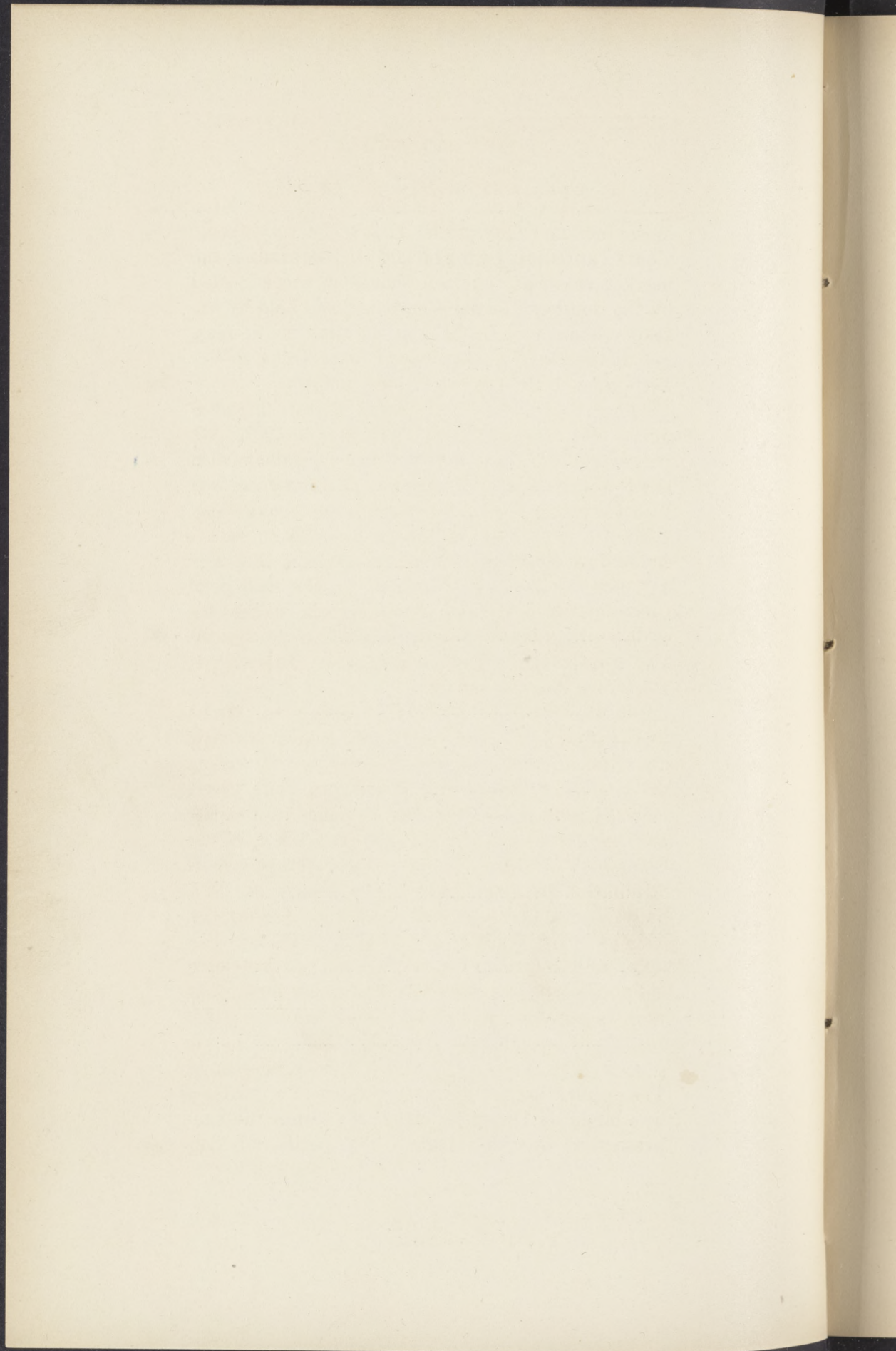


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Writ of Certiorari.

(Filed April 15, 1928.)

NEW JERSEY, To Wit:

The State of New Jersey to Carlo D.

[SEAL] Cella and our Circuit Court in and
for the County of Essex, GREETING:

We being willing, for certain reasons, to be certified of certain orders by the Circuit Court of Essex County made on March 24th, 1928, and April 7th, 1928, and rendered on an application by petition for the appointment of appraisers to appraise the full market value of fourteen shares of the common stock of Southern Power Company held by said Carlo D. Cella at the time of the merger and consolidation of said Southern Power Company with Duke Power Company and said Cella having dissented from the said agreement of merger, wherein Carlo D. Cella is petitioner and Southern Power Company and Duke Power Company are defendants:

We do hereby command you, the said Circuit Court in the County of Essex, that you send under the hand of your presiding judge and the seal of the Court, to our justice of our Supreme Court of Judicature at Trenton, on the 4th day of May, next as well the orders aforesaid as all proceedings had before you, with all things touching and concerning the same, as fully and entirely as they remain in our said Circuit Court, by whatsoever names the parties may be called therein, together with this our writ, that we may further cause to be done there upon what of right and according to the laws of this state should be done.

Witness, William S. Gummere, Esquire, Chief Justice of our Supreme Court at Trenton, this 14th day of April, in the year of our Lord, one thousand nine hundred and twenty-eight.

FRED L. BLOODGOOD,
Clerk.

JOHN MILTON,
Attorney for Prosecutors.

Allocatur.

This writ is allowed. Let it be sealed.

WM. S. GUMMERE,
Justice of the Supreme Court.

10

Return to Writ.

(Filed April 28, 1928.)

*To the Honorable Justices of the Supreme Court
of Judicature of New Jersey:*

20

In obedience to the command of this writ to Carlo D. Cella and the Circuit Court in and for the County of Essex, directed, I, the Presiding Judge of said Court, do send, under seal, to the Honorable Justices of the Supreme Court of Judicature of New Jersey, the orders of the said Circuit Court of Essex County dated March 24th, 1928, and April 7th, 1928, made on an application by petition for the appointment of appraisers to appraise the full market value of fourteen shares of the common stock of Southern Power Company held by said Carlo D. Cella at the time of the merger and consolidation of said Southern Power Company with the Duke Power Company and said Cella having dissented from the said agreement or merger, wherein Carlo D. Cella is petitioner and Southern Power Company and Duke Power Company are defendants, whereof mention is made in said writ, together with all things touching and concerning the same as fully and entirely as they remain in this court.

30

IN WITNESS WHEREOF, I have hereunto set my hand as such judge and caused the seal of the court to be affixed and attested by the Clerk there-

40

Return to Writ.

of this 28th day of April, one thousand nine hundred and twenty-eight.

WM. A. SMITH,
Judge of the Circuit Court in and
for the County of Essex.

Seal of
Essex County,
New Jersey.

10

ATTEST:

JOHN H. SCOTT,
Clerk.

Petition.

20

(Filed December 29, 1927.)

Between

CARLO D. CELLA,
Petitioner,

and

SOUTHERN POWER COMPANY, a
body corporate,
Defendant.

PETITION.

30

The petition of Carlo D. Cella, respectfully
shows to this Court:

1. Petitioner resides at 23 Pomander Walk,
Ridgewood, N. J.

40

Petition.

2. Defendant is a corporation organized under the laws of the State of New Jersey.

3. Petitioner is and has been for the past two years the owner of 14 shares of the capital common stock of the defendant corporation.

10 4. On or about December 2, 1927, defendant corporation merged with Duke Power Company, also a corporation organized and existing under the laws of the State of New Jersey and on or about December 3, 1927 the agreement of merger was filed in the office of the Secretary of State.

5. At the meeting of stockholders held to vote on said proposed merger on December 2, 1927, petitioner dissented and still dissents from accepting the terms of the agreement of merger.

20

WHEREFORE, your petitioner prays the Court:

1. To appoint three disinterested appraisers to appraise the full market value of your petitioner's shares of stock in defendant corporation pursuant to Sections 108 and 108½ of the General Corporation Law of New Jersey, and acts amendatory thereto.

2. To prescribe what notice shall be given to defendant of the application for the appointment of said three appraisers.

30

And your petitioner will ever pray, etc.

CARLO D. CELLA,
Petitioner.

Petition.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

CARLO D. CELLA, of full age, being duly sworn,
 according to law, upon his oath, deposes and says
 that he is the petitioner in the foregoing petition, 10
 and that the matters and things therein contained
 are true.

CARLO D. CELLA.

Subscribed and sworn to before me }
 this 28th day of December, 1927. }

FRANK PASCARELLA,
 a Master in Chancery of
 New Jersey.

20

Amended Petition.

(Filed January 3, 1928.)

ESSEX COUNTY CIRCUIT COURT.

Between

CARLO D. CELLA,
 Petitioner,

and

SOUTHERN POWER COMPANY, a
 body corporate,
 Defendant.

AMENDED
 PETITION.

30

The amended petition of Carlo D. Cella, of 23
 Pomander Walk, Ridgewood, New Jersey, re- 40
 spectfully shows to this Court:

Amended Petition.

10 1. That heretofore and on or about the 28th day of Deecember, 1927, petitioner as a dissenting stockholder of Southern Power Company, pursuant to statute therein made and provided, applied to this Court for the appointment of three appraisers to appraise his stock in South-
ern Power Company, which Company had on or about December 2, 1927, merged with Duke Power Company, also a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

20 2. That an order was made by Honorable William A. Smith, Judge of the Essex County Circuit Court, on the 29th day of December, 1927, directing that the 14th day of January, 1928, at 10 o'clock in the forenoon, at the Essex County Courthouse, be fixed as the time and place to hear the application of petitioner to have this Court appoint three appraisers to appraise the full market value of the stock owned by petitioner in Southern Power Company and that a copy of the order and petition be served on Southern Power Company on or before January 4, 1928.

30 3. Petitioner prays that Duke Power Company be made a party defendant to this proceeding.

40 Wherefore petitioner prays the Court for leave to amend his petition to include Duke Power Company as a co-defendant herein and for an order directing that the petition be so amended, and further prays that a copy of the original petition dated December 28, 1927, and the original order dated December 29, 1927, together with a copy of this order and this amended petition be served upon Duke Power Company, and further prays that a copy of this Order and amended petition upon which same is based be served upon Duke Power Company as the Court may direct.

Amended Petition.

And petitioner further prays that the title of this proceeding be amended to include Duke Power Company as a defendant herein.

And your petitioner will ever pray.

CARLO D. CELLA.

10

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

CARLO D. CELLA, of full age, being duly sworn, according to law, upon his oath, deposes and says that he is the petitioner in the foregoing petition, and that the matters and things therein contained are true.

CARLO D. CELLA.

20

Subscribed and sworn to before me }
this 3rd day of January, 1928. }

WILLIAM G. McLAUGHLIN,
Attorney at Law of New Jersey.

30

40

Affidavit of Service.

(Filed December 30, 1927.)

ESSEX COUNTY CIRCUIT COURT.

Between

10 CARLO D. CELLA,
Petitioner,

vs.

SOUTHERN POWER COMPANY, a
body corporate,
Defendant.

20

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

CARLO D. CELLA, of full age, being duly sworn
on his oath, says:

On December 29th, 1927, I served the annexed
order and annexed petition upon defendant,
Southern Power Company, by delivering to and
leaving true copies thereof with William T. Van-
derlipp, the duly authorized agent of the defendant
corporation at the office of said corporation, No.
790 Broad Street, Newark, N. J., at the same time
exhibiting to said William T. Vanderlipp, the orig-
inal order and petition which he duly examined.

CARLO D. CELLA.

Sworn to and subscribed before me }
this 30th day of December, 1927. }

40

FRANK PASCARELLA,
A Master in Chancery of
New Jersey.

Order.

(Filed January 3, 1928.)

ESSEX COUNTY CIRCUIT COURT.

Between

CARLO D. CELLA,
Petitioner,*and*SOUTHERN POWER COMPANY, a
body corporate, and DUKE
POWER COMPANY, a body cor-
porate,
Defendants.

ORDER.,

10

The amended petition of Carlo D. Cella having
been presented to this Court for leave to amend
the original petition dated December 28, 1927, for
the appointment of three appraisers of the stock
of petitioner in the Southern Power Company by
joining as codefendant the Duke Power Company
into which said Southern Power Company has
merged and directing that notice be given to said
Duke Power Company of said application which
is returnable before this Court at the Essex
County Court House, Newark, New Jersey, on
the 14th day of January, 1928, now therefore

20

30

It is on this 3rd day of January, 1928, Ordered
that Duke Power Company be joined as codefend-
ant in this proceeding and that notice of the mak-
ing of this order be given to defendants Southern
Power Company and Duke Power Company
which notice, together with a copy of this said
amended petition and of this order, neither of
which need be certified shall be served upon de-
fendants at least six (6) days before January 14,
1928, the date fixed for the hearing of the said

40

Order.

petition by serving the same on the registered agent or one of the officers of said respective corporations within this State, or by leaving the same at the principal office of said respective corporations within this State with the person in charge of said office and in addition thereto that
 10 a copy of the original petition and order thereon made be similarly served on the defendant Duke Power Company and

It is Further Ordered that the said petition and this order be filed in the office of the Clerk of the County of Essex.

WM. A. SMITH,
 Judge of the Essex County Circuit Court.

20

Order Fixing Time.

(Filed December 29, 1927.)

ESSEX COUNTY CIRCUIT COURT.

Between

CARLO D. CELLA,
 Petitioner,

30

and

SOUTHERN POWER COMPANY,
 a body corporate,
 Defendant.

ORDER
 FIXING
 TIME.

It appearing upon reading the petition of Carlo
 D. Cella, that petitioner is a stockholder of the
 40 defendant, Southern Power Company, and dis-

Order Fixing Time.

sents from accepting the terms of merger of defendant, Southern Power Company and Duke Power Company, and prays for the appointment of appraiser to appraise petitioner's stock in defendant corporation pursuant to statute in such cases made and provided.

It is on this 29th day of December, 1927, 10
ORDERED that the 14th day of January, 1928, at 10
o'clock in the forenoon at the Essex County Court
House be fixed as the time and place to hear the
application of petitioner to have the Court ap-
point three appraisers to appraise the full mar-
ket value of the stock owned by petitioner in de-
fendant corporation.

AND IT IS FURTHER ORDERED that a copy of this
order and the petition on which same was granted 20
be served on the defendant, Southern Power Com-
pany, on or before January 4, 1928.

WM. A. SMITH,
Judge of the Essex County District Court.

Affidavit of Service.

(Filed January 5, 1928.)

ESSEX COUNTY CIRCUIT COURT.

Between

10

CARLO D. CELLA,
Petitioner,*and*SOUTHERN POWER COMPANY, a
body corporate, and DUKE
POWER COMPANY, a body cor-
porate,

Defendants.

20

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

CARLO D. CELLA, of full age, being duly sworn,
on his oath, says:

30

On January 4th, 1928, I served the annexed
Order and the annexed Amended Petition upon
defendants, Southern Power Company and Duke
Power Company, by delivering to and leaving true
copies thereof with William T. Vanderlipp, the
duly authorized agent of both defendant corpo-
rations, at the office of said corporations, No. 790
Broad Street, Newark, N. J., at the same time ex-
hibiting to said William T. Vanderlipp the Original
Order and Amended Petition which he duly
examined.

40

At the same time I also served upon defendant,
Duke Power Company, copy of the original Order
dated December 29, 1927, and the original Petition
dated December 28, 1927, by delivering to and

Affidavit of Service.

leaving true copies thereof with said William T. Vanderlipp above mentioned.

CARLO D. CELLA.

Sworn to and subscribed before me }
this 4th day of January, 1928. } 10

FRANK PASCARELLA,
A Master in Chancery
of New Jersey.

Memorandum.

(Filed March 14, 1928.)

ESSEX COUNTY CIRCUIT COURT.

20

CARLO D. CELLA, <i>vs.</i> SOUTHERN POWER COMPANY, <i>et al.</i>	}	MEMORANDUM.
---	---	-------------

On Petition for the appointment of appraiser to appraise stock of a dissenting stockholder on the consolidation of corporations.

30

CARLO D. CELLA, Esq., Attorney *pro se.*

JOHN MILTON, Esq., Attorney for Respondent,
Duke Power Company.

SMITH, J.

This is an application made to the Circuit Court, pursuant to Section 108 of the Act concerning corporations revision of 1896, asking for the appointment of appraiser to appraise stock of a dissent- 40

Memorandum.

ing stockholder of a corporation which has been consolidated with another corporation.

10 The petitioner alleges to be a stockholder in the Southern Power Company, and that corporation was consolidated with the Duke Power Company and the certificate of consolidation was filed with
20 the Secretary of State on December 3, 1927, and the merger became effective as of that date, the merged corporation being the Duke Power Company. The original petition was filed on December 29, 1927, and the Southern Power Company was the party to said petition. On January 3, 1928, an amendment to the petition was filed and an order made thereon, and the court, by an order on that date directed the service of the application to be made upon the Duke Power Company and prescribed the notice given, and on the return day of said order the Duke Power Company appeared by counsel and contested the court's right to make the order or to act in the premises on the ground that the petition was not filed within time, and that the order was not made within time, and that the date of hearing was not fixed within time, and that the right of the petitioner had lapsed and the power of the court had expired.

30 The date fixed for the hearing and the service of the petition and order is not required by the statute to be within thirty days; the petition as amended and the order of the Court was made on January 3, 1928, a period of within thirty days from December 3, 1927, the date of filing the agreement of consolidation. The last day would have been January 2, 1928, but that day was a holiday and the petition could not have been filed on that date, as the Clerk's Office was closed. Therefore
40 it was proper and was within time to file the petition and make the order on January 3d.

Memorandum.

The Court will hear counsel as to the appointment of the appraisers on Saturday, March 24, 1928, at ten o'clock A. M. at the Court House in the City of Newark, when the Court will make the necessary order under the petition. If counsel can agree on the order being made at an earlier date they may do so and apply by consent on any Court day in the meantime. 10

WM. A. SMITH,
Judge.

March 13, 1928.

Stipulation.

20

ESSEX COUNTY CIRCUIT COURT.

CARLO D. CELLA,
Petitioner,

vs.

SOUTHERN POWER COMPANY, a
body corporate, and DUKE
POWER COMPANY, a body corpo-
rate,

Defendants.

On Application
for Appointment
of Appraisers to
Value Stock.

Stipulation.

30

It is hereby stipulated and agreed by and between the counsel for the respective parties hereto that the Memorandum filed on behalf of the petitioner in the case of Leon A. Andrus, petitioner, *vs.* Great Falls Company and Duke Power 40

Stipulation.

Company, defendants, shall be considered by the court on the similar motion made in this case.

Dated February 29, 1928.

10

CARLO D. CELLA,
Petitioner in *propria persona*.

JOHN MILTON,
Attorney for Defendants.

Order Appointing Appraisers.

(Filed April 5, 1928.)

ESSEX COUNTY CIRCUIT COURT.

20

CARLO D. CELLA,
Petitioner,

vs.

SOUTHERN POWER COMPANY, a
body corporate, and DUKE
POWER COMPANY, a body corpo-
rate,

30

Defendants.

On Application
for Appointment
of Appraisers to
Value Stock.

Order Appointing
Appraisers.

40

The petition of Carlo D. Cella setting forth that the said petitioner is the owner of fourteen (14) shares of the common stock of the Southern Power Company, one of the defendants herein, and that at a meeting of the stockholders of the defendant companies there was approved an agreement of merger and consolidation which was subsequently filed in the office of the Secretary of State of New Jersey, and that the petitioner herein appeared at

Order Appointing Appraisers.

said meeting and dissented from the adoption of said agreement of merger, and praying for the appointment of three disinterested appraisers to appraise the full market value of the stock owned by the petitioner herein pursuant to the provisions of Chapter 142, Laws of 1920 of the State of New Jersey, with the acts amendatory and supplemental thereto, having been presented to this Court, and 10

Whereas, by orders of this Court made on the twenty-ninth day of December, 1927, and on the 3rd day of January, 1928, the time and place where and when the said petition will be heard was designated as the 14th day of January, 1928, at the hour of ten o'clock in the forenoon of that day at the Essex County Court House, City of Newark, in the County of Essex, State of New Jersey, and 20

Whereas it appears to my satisfaction by the affidavit of Carlo D. Cella that due notice of the application for the appointment of appraiser and of the time and place of the hearing of same has been served upon the Southern Power Company and Duke Power Company, corporations of the State of New Jersey and the petitioner Carlo D. Cella, in *propria persona*, upon the return of the said order at the time and place named therein and assigned the defendants having moved to dismiss these proceedings on the ground that the same were not instituted within thirty (30) days of the filing of the merger agreement in the office of the Secretary of State, and this Court having heard and considered the matter and being satisfied that the said appraisers should be appointed, and no cause being shown to the contrary, it is 30

ORDERED that the defendant's motion to dismiss the petition herein and the proceedings thereon is denied, and 40

Order Appointing Appraisers.

I, William A. Smith, one of the Judges of the Essex County Circuit Court, by virtue of the power and authority vested in me by law, do hereby on the 24th day of March, 1928, appoint Andrew Van Blarcom, Charles B. Bradley and Farley Osgood, three disinterested appraisers to
 10 appraise the full market value of the stock owned by Carlo D. Cella, of the Southern Power Company, without regard to any depreciation or appreciation thereof in consequence of the said merger or consolidation, and for the purpose set forth in the said petition, to proceed herein in all respects as is directed by an act entitled "An Act to Amend Section I of the act entitled 'A supplement to an act entitled An Act Concerning Corporations' (Revision of Eighteen Hundred and
 20 Ninety-six, approved April 26, 1896) which supplement was approved April 10, 1920" being known as Chapter 142 of Laws of 1920, together with the acts amendatory and supplemental thereto.

And I do direct the said appraiser to cause to be given to Carlo D. Cella and the Southern Power Company and Duke Power Company, corporations of New Jersey, 5 days notice in writing of the time and place when and where they will meet
 30 and proceed to execute their duties under this appointment which said notice in writing may be served upon the last mentioned companies by leaving the same with the registered agent of said corporation.

AND IT IS FURTHER ORDERED that the said appraisers shall file their report with the Clerk of Essex County on or before the 26th day of May, 1928.

40

WM. A. SMITH,
 Judge of Essex County Circuit Court.

Supplemental Order Appointing Appraiser.

(Filed April 11, 1928.)

ESSEX COUNTY CIRCUIT COURT.

CARLO D. CELLA,
Petitioner,

vs.

SOUTHERN POWER COMPANY, a.
body corporate, and DUKE
POWER COMPANY, a body cor-
porate,
Defendants.

On Application
for Appointment
of Appraisers to
Value Stock.

Supplemental
Order Appoint-
ing Appraiser.

10

An Order having been made by this Court dated 20
the 24th day of March, 1928, appointing Charles
B. Bradley as one of the three disinterested ap-
praisers to appraise the full market value of peti-
tioner's stock in the Southern Power Company,
and said Charles B. Bradley, having requested the
Court to be excused from acting as such appraiser,
it is

ORDERED that Charles B. Bradley be and he
hereby is relieved as such appraiser, and

30

I, WILLIAM A. SMITH, one of the Judges of the
Essex County Circuit Court, by virtue of the
power and authority vested in me by law, do here-
by on this day of April, 1928, appoint Milo
W. Wilder, appraiser in lieu and place of said
Charles B. Bradley, to act with Andrew Van
Blarcom and Farley Osgood as three disinter-
ested appraisers to appraise the full market value
of the stock owned by Carlo D. Cella, of the
Southern Power Company without regard to any 40

Supplemental Order Appointing Appraisers.

10 depreciation or appreciation thereof in consequence of the said merger or consolidation and for the purpose set forth in the said petition to proceed herein in all respects as is directed by an act entitled "An Act to Amend Section I of the Act
entitled 'A Supplement to an act entitled An Act
Concerning Corporations' (Revision of Eighteen
Hundred and Ninety six, approved April 26,
1896)" which supplement was approved April 10,
1920, being known as Chapter 142 of Laws of
1920 together with the acts amendatory and supplemental thereto.

20 And I do direct the said appraisers to cause to be given to Carlo D. Cella, and the Southern Power Company and Duke Power Company, corporations of New Jersey, 5 days notice in writing of the time and place when and where they will meet and proceed to execute their duties under this appointment, which said notice in writing may be served upon the last mentioned companies by leaving the same with the registered agent of said corporation.

AND IT IS FURTHER ORDERED, that the said appraisers shall file their report with the Clerk of Essex County on or before the 26th day of May, 1928.

30

WM. A. SMITH,
Judge of Essex County Circuit Court.

Dated April 7, 1928.

40

Reasons in Certiorari.

(Filed April 26, 1928.)

NEW JERSEY SUPREME COURT.

SOUTHERN POWER COMPANY, a
body corporate, and DUKE
POWER COMPANY, a body cor-
porate,

Prosecutors,

vs.

CARLO D. CELLA and the CIRCUIT
COURT IN AND FOR THE COUNTY
OF ESSEX,

Respondents.

10

20

The Southern Power Company and Duke Power Company, the prosecutors in the above entitled proceeding, rely upon the following reasons in their application to have set aside and for nothing holden the orders of the Circuit Court in and for the County of Essex on March 24th, 1928, and April 7th, 1928, respectively, made in a certain proceeding wherein Carlo D. Cella is petitioner and Southern Power Company and Duke Power Company are defendants, on an application by petition for the appointment of appraisers to appraise the full market value of fourteen shares of the common stock of Southern Power Company held by said Cella at the time of the merger and consolidation of said Southern Power Company with Duke Power Company, said Cella having dissented from the agreement of merger:

30

1. Because the application for the appointment of appraisers was not made within the time limited by the statute in such case made and provided.

40

Reasons in Certiorari.

2. Because the application for the appointment of appraisers was not made in the manner provided by the statute in such case made and provided.

10 3. Because no notice of the intended application was given to the consolidated corporation, Duke Power Company, as required by the statute in such case made and provided.

4. Because the Southern Power Company lost its identity on December 3rd, 1927, and is not a proper or necessary party to this proceeding.

5. Because the application not having been made within the time limited by the statute, the court was without jurisdiction to proceed.

20 6. Because the said proceeding and all of them are in violation of the provisions of "An Act concerning corporations (Revision of 1896)" and the acts amendatory thereof and supplemental thereto.

Dated: April 25th, 1928.

JOHN MILTON,
Attorney for Prosecutors.

Stipulation of Fact.

NEW JERSEY SUPREME COURT.

SOUTHERN POWER COMPANY, a body corporate, and DUKE POWER COMPANY, a body cor- porate,	}	10
Prosecutors,		
<i>vs.</i>		
CARLO D. CELLA and the CIRCUIT COURT IN AND FOR THE COUNTY OF ESSEX,	}	
Respondents.		

It is hereby stipulated and agreed by and between the counsel for the respective parties hereto that on December 3rd, 1927, an agreement of merger between Southern Power Company and Duke Power Company, corporations of New Jersey, whereby Duke Power Company became the consolidated corporation, was filed in the Office of the Secretary of State of New Jersey. 20

JOHN MILTON,
Attorney for Prosecutors. 30

CARLO D. CELLA,
Attorney for Respondents.

Notice of Argument.

Notice of argument for the October, 1928, term of the Supreme Court was duly given and filed.

10

Opinion of Supreme Court.

(Filed December 7, 1928.)

No. 218, OCTOBER TERM, 1928.

NEW JERSEY SUPREME COURT.

20

SOUTHERN POWER COMPANY and
DUKE POWER COMPANY,
Prosecutors,

vs.

CARLO D. CELLA and CIRCUIT
COURT IN AND FOR COUNTY OF
ESSEX,
Respondents.

On Certiorari.

30

Argued October Term, 1928. Decided October Term, 1928.

JOHN MILTON, Attorney for the Prosecutors.

CARLO D. CELLA, Attorney in *propria persona*.

Argued before MINTURN, BLACK and
CAMPBELL, JJ.:

Per Curiam:

40

The legal question presented in this case is before us on a writ of certiorari which is intended

Opinion of the Supreme Court.

to review an order of the Essex County Circuit Court, appointing appraisers to determine the market value of fourteen shares of stock issued by the Southern Power Company, and held by the respondent Carlo D. Cella at the time of the merger of the said corporation with the Duke Power Company.

10

The agreement of merger was filed in the office of the Secretary of State December 3, 1927. On December 29, 1927, a petition, in which the Southern Power Company was named as defendant, was filed for the appointment of appraisers under sections 108 and 108a of the General Corporation Act. The court on the same day fixed January 11, 1928, as the day of hearing on the said petition and directed that a copy of the order, together with the petition, be served on the Southern Power Company on or before January 4, 1928. On January 3, 1928, the court allowed an amendment to the petition, naming the Duke Power Company as defendant, and praying that an order be made prescribing notice of hearing to be given to the said corporation. The Court ordered that at least six days' notice of hearing on January 4, 1928, be given to the Duke Power Company. A notice of hearing was served on the Southern Power Company on December 29, 1927, and on the Duke Power Company January 4, 1928.

20

30

On January 14, 1928, after hearing, the Court made an order appointing the appraisers. The first reason assigned against this action is that the Southern Power Company was neither a proper nor necessary party to the proceedings. The application for the appointment of appraisers was made on December 29, 1928, within the time prescribed by the statute. The petitioner then

40

Opinion of the Supreme Court.

acquired a status in court that entitled him to pray for and recover whatever was connected with and become a necessary incident of the relief afforded by the statute. The amended petition set up no new and distinct cause for relief, and the mere unnecessary description of the Southern Power Company as defendant in no wise prejudiced the Duke Power Company.

The next reason assigned is that the application for appointment of appraisers was not made in the manner provided by the statute, in that the petition failed to allege that neither of the merging corporations had a right to exercise any franchise for public use, or that the petitioner attended the stockholders' meeting, and did not vote in favor of the merger, and made no mention of the location of the chief office of the corporation.

The statute provides an informal proceeding in matters of this character, which does not require an adherence to the strict rules of pleading. If the petitioner by not attending the stockholders' meeting and voting in favor of the merger estopped himself from asserting, or waived, any right to the relief afforded by the statute, such fact could have been advanced at the hearing as a reason for not appointing the appraisers.

The next reason assigned is that the notice given was not within the time prescribed by the provisions of the statute. The pertinent language of the statute upon this subject (Sec. 108a) is as follows: "Such dissenting stockholder * * * may at any time within thirty days after the adoption and filing of the agreement of consolidation, apply by petition to the Circuit Court, on reasonable notice, to be prescribed by said court, to said consolidated corporation, for the appoint-

Opinion of the Supreme Court.

ment of three disinterested appraisers to appraise the full market value of his stock."

The prosecutor contends that this section requires that the petition must be filed, the notice of hearing given, and the hearing had all within thirty days of the filing of the merger agreement. With this construction of the act we do not agree, but apprehend that the reasonable and proper construction of the statute is that the petition be filed within the thirty days, whereupon the court will fix a time and place for the hearing and prescribe the notice to be given to the consolidated corporation. 10

In construing a somewhat analogous section of the traction act in the case of New Jersey and Hudson River Railway Company *vs.* American Electrical Works, 82 N. J. L. 391, Chancellor Pitney held that "The section contemplates a simple procedure, beginning with a mere petition followed by reasonable notice to the company and without elaborate refinements of any kind. The section ought to be liberally construed in aid of the proposed remedy, and the procedure under it ought not to be hampered by the imposition of technical conditions that are not expressed in its language." 20

Our construction of the act in question leads us to the same conclusion. For that reason we think the action of the Circuit Court should be affirmed, and the writ of certiorari is therefore dismissed. 30

NEW JERSEY SUPREME COURT,

v.

On Certiorari.
Rule of
Affirmance
and Remittitur.

30

Entered: December 13th, 1928.

CARLO D. CELLA,
Attorney for Respondents.

Notice and Grounds of Appeal.

(Filed January 14, 1929.)

COURT OF ERRORS AND APPEALS.

SOUTHERN POWER COMPANY and
DUKE POWER COMPANY,
Prosecutors-Appellants,

v.

CARLO D. CELLA and CIRCUIT
COURT IN AND FOR THE COUNTY
OF ESSEX,

Respondents,

On Certiorari.
Notice and
Grounds of
Appeal.

10

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To: CARLO D. CELLA, *Attorney for Respondents:*

PLEASE TAKE NOTICE that the prosecutors appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause upon the following grounds:

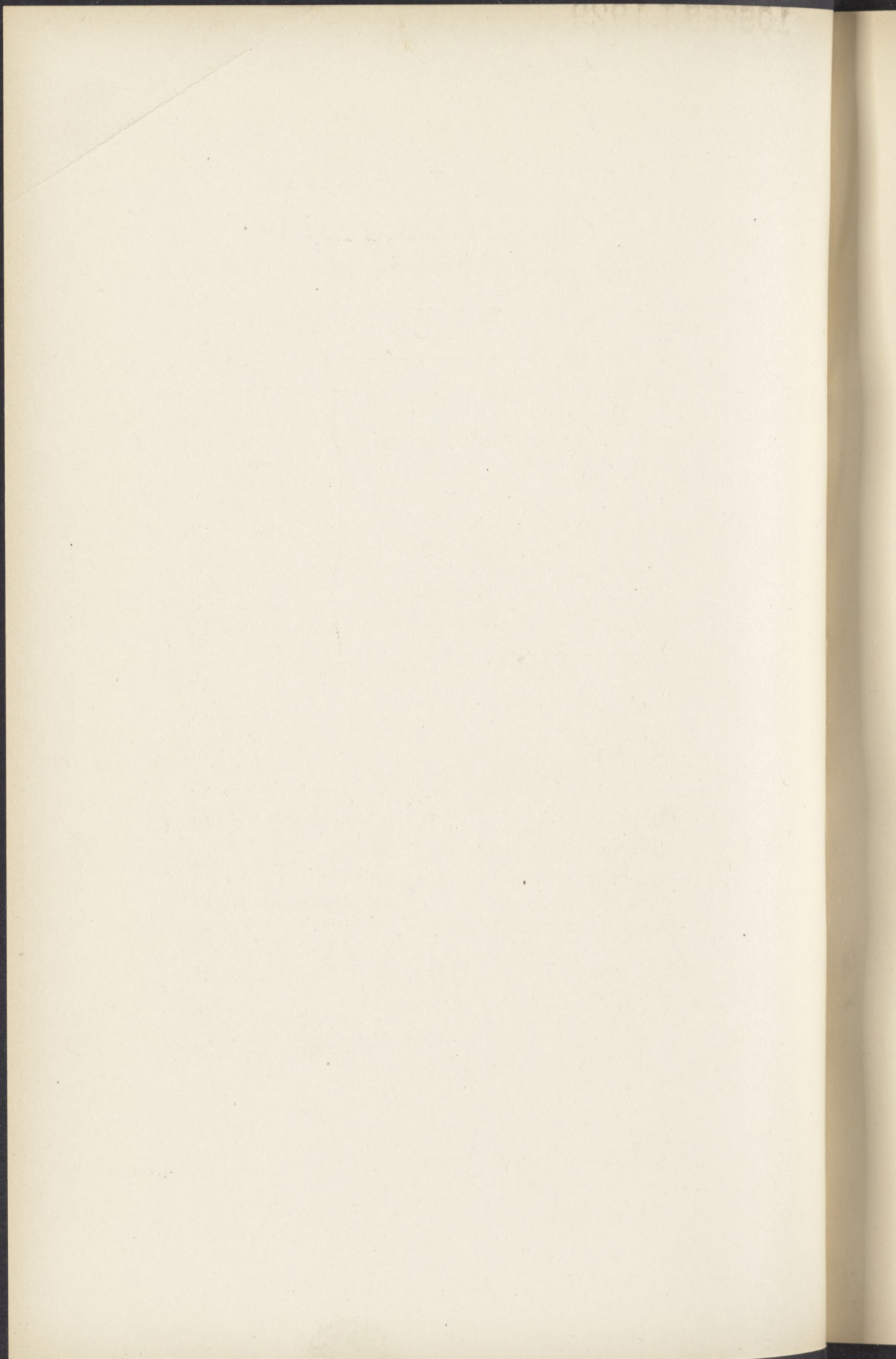
1. The Supreme Court erred in refusing to set aside the action of the Circuit Court of Essex County.

30

2. The Supreme Court erred in dismissing the writ of certiorari.

JOHN MILTON,
Attorney for Prosecutors-Appellants.

40



New Jersey Court of Errors and Appeals

SOUTHERN POWER COMPANY, a
body corporate, and DUKE
POWER COMPANY, a body cor-
porate,

Prosecutors-Appellants,

vs.

CARLO D. CELLA and the CIRCUIT
COURT IN AND FOR THE COUNTY
OF ESSEX,

Respondents.

ON
CERTIORARI.
ON APPEAL
FROM THE
SUPREME
COURT.

BRIEF FOR APPELLANTS.

This is an appeal from a judgment of the Supreme Court dismissing a writ of certiorari allowed by the Chief Justice to review an order of the Essex County Circuit Court appointing appraisers to appraise fourteen shares of the common stock of the Southern Power Company owned by the respondent Carlo D. Cella.

December 3rd, 1927, an agreement of merger between Southern Power Company and Duke Power Company, corporations of New Jersey, the consolidated corporation to be known as Duke Power Company, was filed in the office of the Secretary of State of New Jersey (Case, page 23).

December 29th, 1927, said Cella filed a petition in the Essex County Circuit Court naming the Southern Power Company as defendant and praying for the appointment of appraisers, in accordance with sections 108 and 108A of the General Corporation Act (Case, page 3).

December 29th, 1927, an order was made on said petition fixing January 14th, 1928, as the date for the hearing of the application and directing the service of a copy of the petition and order upon the Southern Power Company on or before January 4th, 1928 (Case, page 10).

January 3rd, 1928, said Cella filed an amended petition, praying for leave to amend his original petition to include Duke Power Company as a co-defendant and for an order directing that the petition be so amended (Case, page 5).

January 3rd, 1928, an order was made on this petition directing that Duke Power Company be joined as a co-defendant and that notice of the making of said order should be given to the defendants Southern Power Company and Duke Power Company, that they be served with said notice and copies of said amended petition and order at least six days before January 14th, 1928, the date fixed for hearing, and that Duke Power Company be served with a copy of the original petition and order (Case, page 9). Said order also directed the filing of the petition and order in the office of the clerk of the County of Essex.

No notice of any kind was given to the Duke Power Company prior to January 4th, 1928, when, as appears from Cella's affidavit (Case, page 12) the amended papers were served upon it.

Upon the date fixed by the Circuit Court for the hearing of the application, appellants appeared by counsel and contested the Court's right to make the order or to act in the premises on the ground that the petition was not filed within time and that the order was not made within time and that the date of the hearing was not fixed within time, that the statute had not been complied with, that the right of the petitioner had lapsed and the Court was without jurisdiction.

The Court overruled prosecutors' objection (Case, page 13) and made orders appointing appraisers (Case, pages 16-20).

Thereupon the prosecutors applied for a writ of certiorari to review the action of the Court, which was allowed.

From the judgment of the Supreme Court dismissing the writ (Case, page 28) this appeal is taken. The opinion of the Supreme Court is found at page 24.

The following reasons were relied upon by the appellants in the Court below (Case, pages 12, 22):

1. The application for the appointment of appraisers was not made within the time limited by the statute.
2. The application for the appointment of appraisers was not made in the manner provided by the statute.
3. No notice of the intended application was given to the consolidated corporation, Duke Power Company, as required by the statute.
4. The Southern Power Company lost its identity on December 3rd, 1927, and is not a proper or necessary party to this proceeding.
5. The application not having been made within the time limited by the statute, the Court was without jurisdiction to proceed.
6. The proceedings are in violation of the provisions of "An Act concerning corporations (Revision of 1896)" as amended and supplemented.

These reasons will be argued here under the following heads:

- I. The Southern Power Company is not a necessary or proper party to this proceeding.

II. The application for the appointment of appraisers was not made in the manner provided by the statute.

III. The requirement of the statute with respect to notice was not met by the respondent.

IV. The Circuit Court had no jurisdiction to appoint appraisers.

ARGUMENT.

It may be well at the outset to preface our discussion of the questions raised by this appeal with a brief statement of the fundamental principles of law.

A corporation, being the creature of the statute, brought into being only by the State's permission, it is fundamental that the statute is a part of the contract and that when a person buys his stock he buys it with all the obligations imposed by the statute.

The consolidation provisions of the statute are part of the stockholder's contract. The provision of these statutes with respect to appraisal of a dissenting stockholder's shares is based upon the theory that having deprived him of the right to prevent a consolidation and having abrogated the rule at common law requiring unanimous approval of a consolidation, a stockholder would be afforded a remedy in the event that he disapproved of the proposed consolidation. A dissenting stockholder is protected in so far as his legal rights are concerned if procedure is established by which he can obtain the value of his holdings in the event that he is not agreeable to the consolidation. If he fails to comply with the procedure thus established by the statute he is relegated to the position of one who does not dissent from the consolidation.

I.

The Southern Power Company is not a proper or necessary party to this proceeding.

It is stipulated in the record (Case, page 23) that the agreement of merger between the Southern Power Company and the Duke Power Company, the consolidated corporation to be the Duke Power Company, was filed in the Office of the Secretary of State on December 3rd, 1927. We contend that upon the filing of the merger agreement the Southern Power Company lost its identity and ceased to exist as an independent corporate entity and therefore cannot be a party to this proceeding. We think this is plain from the language of Section 106 of the General Corporation Act, which provides as follows:

“Upon making and perfecting the said agreement and act of merger or consolidation, and filing the same in the office of the secretary of state, the several corporations shall be one corporation * * * by the name of the consolidated corporation into which said other contracting corporation or corporations shall be so merged or consolidated * * *.”

Sections 108 and 108A, under which the respondent Cella instituted these proceedings, specifically provide that the judgment shall go against the consolidated corporation. There is no provision in the statute which permits the Court to make any order of any character against the old and absorbed corporation. This is a special proceeding, and the jurisdiction of the Court is only co-extensive with the provisions of the statute itself. The only rights and liabilities of the parties thereunder are those contained within such provision and nowhere in the provisions of the

statute under which the respondent Cella claims is the Court given power to pass a judgment or to make any order binding on the old corporation. If the Court cannot make any order as to the Southern Power Company then it necessarily follows that it is neither a necessary or a proper party to these proceedings. The proviso of section 107 protects the rights of creditors and lien holders and for that purpose the statute provides that the former corporation may be deemed to continue in existence. It does not continue in existence for the purpose of these proceedings. It cannot be successfully maintained that a stockholder of the company is a creditor or a lien holder and that under the General Corporation Act as such creditor he has a right to bring these proceedings. The respondent is proceeding under sections 108 and 108A, the only sections under which he may proceed to have his stock appraised, and these sections grant the right to stockholders only and not to others and therefore in this proceeding he is not a creditor in the sense that the term creditor is generally understood, but he is a stockholder acting under a special privilege conferred upon stockholders by the Corporation Act.

The Court undertook to amend the proceeding instituted against the non-existent Southern Power Company so as to add the Duke Power Company, the consolidated corporation, as a co-defendant (Case, pp. 5 and 9). This action of the Court was clearly erroneous.

In the case of *New Jersey and Hudson River Railroad Co.* against *American Electric Works*, 81 N. J. L., page 34, a similar proceeding was instituted under the Traction Act of 1893. The order appointing the appraisers was removed on certiorari to the Supreme Court and there attacked. The petitioner moved to amend the proceeding. Mr. Justice Garrison, who wrote the opinion for the Supreme Court, said:

“The petitioner (the defendant in certiorari) moves for an opportunity to amend in these particulars the proceeding in the Circuit Court, but has not directed our attention to any statute, nor satisfied us of any existing practice under which such an amendment could be made.”

In that case both sides were willing that the amendment should be made and under these circumstances the Court suggested that a stipulation be entered into by the parties to cure the defects. The Court concluded (p. 35) as follows:

“In default of the filing of such stipulation, the prosecutor may give notice of a motion for a rule for judgment in certiorari.”

The judgment of the Supreme Court in this case was affirmed on other grounds, the Court of Errors and Appeals expressly withholding any opinion as to whether or not the proceedings were amendable under the Practice Act of 1903, 82 N. J. L. 391, 399.

No authority whatever can be presented in support of the proposition that the respondent, by filing the petition, on December 29th, 1927, against the Southern Power Company, which in accordance with the plain provision of section 106 of the General Corporation Act became merged into Duke Power Company on December 3rd, 1927, acquired a status in court which entitled him to pray for relief against the Duke Power Company, the consolidated corporation.

II.

The application for the appointment of appraisers was not made in the manner provided by the statute.

A dissenting stockholder's right to have the value of his stock appraised upon a merger or consolidation is based solely on the provisions of sections 108 or 108A of the Corporation Act. The right did not exist at common law. The facts requisite to confer jurisdiction on the Circuit Court are clearly set forth in the sections referred to and the loss of any one of them would deprive the Court of its jurisdiction.

Let us briefly examine the petition of the respondent Cella:

1. It first sets out the residence of the petitioner.
2. That the defendant is a New Jersey corporation.
3. That the petitioner is the owner of capital stock of the defendant corporation.
4. That on December 2nd, an agreement of merger was filed in the office of the Secretary of State.
5. That at a meeting of the stockholders to vote on the merger, petitioner dissented and still dissents from the terms of the merger.

Now let us examine the Act to ascertain the jurisdictional requirements to make a good petition.

In the first place, it seems to us that the petition should state whether or not the defendant corporation, being the consolidated corporation, has the right to exercise any franchise for public

use. This seems to be absolutely essential because there are two sections to the Act, 108 and 108A, one as to corporations having the right to exercise public franchises, and one as to corporations that do not have that right. Since the sections are not identical, this allegation is necessary to give the Court jurisdiction in order that the Court may know under which section of the Act it is proceeding.

The next requirement of the Act is that the stockholder did not vote in favor of such agreement at the meeting of the stockholders called for the purpose of passing upon the agreement. There is no allegation in the petition that the stockholder attended at the meeting and did not vote in favor of the merger. If he voted in favor of the merger at the meeting and then afterwards dissented and filed his petition the jurisdictional fact would be absent and the Court would be precluded from proceeding. Therefore, there ought to be an allegation that the petitioner attended the meeting and did not vote in favor of the merger.

The Act next provides that such stockholder shall dissent from the merger and shall refuse to convert his stock into the stock of such consolidated corporation. The petition meets this in that there is an allegation that the petitioner did dissent from the adoption of the agreement and has refused to convert his stock.

The Act next provides that at any time within thirty days after the adoption of the agreement of consolidation the stockholder may apply by petition to the Circuit Court of the county in which the chief office of the corporation was or is located. In order to give the Essex County Court jurisdiction, there should be an allegation that the chief office of the corporation is in Essex County, New Jersey. This is a jurisdictional fact which the consolidated corporation might very well question

upon the return of the notice. The Act does not say "registered office" of the corporation. The Legislature uses the word "chief" office of the corporation, and if the Legislature meant registered office we wonder why it did not use that term. At any rate, the defendant, before the court determines upon the appointment of appraisers, should be afforded an opportunity to be heard as to the location of its chief office in New Jersey.

All of the facts necessary to confer jurisdiction upon the court are clearly set forth in the statute. Ignorance of the law will not excuse respondent's failure to comply with those provisions. The importance of the presence before the court of these facts is emphasized when we consider that section 108A provides:

"* * * the judgment upon the award as provided for therein, shall be a judgment against said consolidated corporation, and shall be a lien on all property and assets acquired by the consolidated corporation from the corporation so merged, subject only to such liens as exist against said property and assets at the time of such merger or consolidation."

The Supreme Court held that if the petitioner, by not attending the stockholders' meeting and voting in favor of the merger estopped himself from asserting, or waived, any right to the relief afforded by the statute, such fact could have been advanced at the hearing as a reason for not appointing the appraisers.

We think the Supreme Court overlooked the salient fact that the proceedings result in a judgment which *relates back* to the date of the merger or consolidation and that unless the consolidated corporation is able to secure an expeditious determination of the presence or absence of the jurisdictional requirements the business of the consoli-

dated corporation may be seriously imperiled. It would be unable to secure a mortgage on its real estate or to convey a clear title to the same until the matter was adjudicated. And if the court should subsequently determine that the jurisdictional facts were not present the consolidated corporation might be irreparably damaged or grievously prejudiced.

III.

The requirements of the statute with respect to notice was not met by the respondent.

The pertinent language of section 108 (and likewise of section 108A) is as follows:

“* * * such dissenting stockholder * * * may, at any time within thirty days after the adoption and filing of the agreement of consolidation, apply by petition to the Circuit Court * * * on reasonable notice to be prescribed by said court to said consolidated corporation * * * for the appointment of three disinterested appraisers to appraise the full market value of his stock * * *.”

The following is clearly the correct procedure:

1. That the stockholder should appear in Court signifying his desire to make an application to the Court by petition for the appraisal of his stock and ask the Court to prescribe the reasonable notice to be given to the consolidated corporation of the time when the petition would be presented to the Court and the application made.
2. The stockholder should then give the consolidated corporation the notice so prescribed by the Court, and good practice would dictate that the consolidated corporation should be furnished with a copy of the petition.

3. Upon the return of the notice the stockholder should present his petition to the Court and make the application, all of which must be done *within thirty days after the filing of the agreement of merger* in the office of the Secretary of State. The consolidated corporation should then be afforded an opportunity to controvert the allegations of the petition with respect to all of the jurisdictional facts.

The Supreme Court in its opinion stated that the prosecutor contended that the *hearing* must be had within thirty days. We made no such contention in the Court below and we make none here. But we did insist there, and we respectfully insist here that the petition must be *presented* to the Circuit Court within thirty days from the filing of the merger agreement *on notice* to the consolidated corporation, as directed by the statute.

We think that the procedure outlined in the provisions of the statute above quoted is too plain to admit of any interpretation other than that here given to it.

In the instant case the agreement of merger was filed in the office of the Secretary of State on December 3rd, 1927. The respondent, on December 29th, 1927, filed his first petition, naming the Southern Power Company as the sole defendant, without any notice, either to the Southern Power Company or to the consolidated corporation, the Duke Power Company, and filed his amended petition on January 3rd, 1928 (more than thirty days after the filing of the merger agreement), and without notice to the consolidated corporation, the Duke Power Company. *The Duke Power Company had no notice of the institution of this proceeding prior to January 4th, 1928, and the notice which it then received was not the notice required by the statute but a notice of a hearing with re-*

spect to the appointment of appraisers to be held on January 14th, 1928, the date fixed by the Court for said hearing.

The procedure outlined in this section of the Act is similar to that of section 62 of the Practice Act, Compiled Statutes, page 4071, which provides that the defendant, in a suit that has been commenced by a writ of *capias ad respondendum* may apply (to attack the truth of the statements contained in the affidavits upon which the order for arrest is made) for the taking of testimony at any time within thirty days after his arrest on notice to the plaintiff. Notice of the application must be given, and the application made, within thirty days after his arrest, and not later. *Ferenga v. Moskowitz*, 1 N. J. Misc. 169.

It cannot be said, without doing violence to the plain language of the statute, that it was intended to outline a procedure similar to that, for instance, of the Eminent Domain Act, 2 Comp. St., p. 2183, under which a petition is presented to a Justice of the Supreme Court who then makes an order assigning a time and place for the hearing of the application, etc., for if that were the intention of the Legislature it is rational to assume that it would have said so as it clearly did in the Eminent Domain Act.

If we substitute a definite period, say, eight days' notice, in the place of the language of the statute "reasonable notice to be prescribed by said court", the statute would then read as follows:

"* * * such dissenting stockholder * * * may, at any time within thirty days after the filing of the agreement of consolidation, apply by petition to the Circuit Court * * * on eight days' notice to said consolidated corporation * * * for the appointment of three disinterested appraisers to appraise the full market value of his stock * * *".

There certainly cannot be said to be any ambiguity in that language. It is susceptible of but one construction and that is the construction which we have here given to it.

The New York statute, provides for the making of the application at any time within sixty days on at least eight days' notice to the consolidated corporation. Business Corporation Law. Laws of 1909, Secs. 8 and 9. The practice under that statute is, of course, to give notice of the intended application.

The case of *New Jersey and Hudson River Railroad Co. vs. American Electric Works*, 82 N. J. L. 391 is relied upon by our adversary and was cited by the Supreme Court as authority for the construction which it placed upon this statute. That case arose under the Traction Act of 1893. Let us analyze it.

Three questions were presented, as follows:

First: The omission of the order appointing appraisers to provide for an estimation of the damages done to the stockholder by the consolidation. (There is no similar provision in the General Corporation Act.)

Second: The propriety of presenting the petition to the Chief Justice in the absence of the justice holding the circuit and of the Circuit Court Judge.

Third: The failure to recite in the order the absence from the state of the Justice and the Circuit Court Judge.

As to the first question, the Court found that the language of the order and the petition upon which it was based was sufficiently comprehensive to include the provision for an estimation of the damages. The determination of that question did not involve a construction of the language of the

Traction Act, and it is needless to add that the solution of the other questions had nothing whatever to do with the construction of the statute.

The Court did discuss the construction of the statute but its views are *obiter dicta* and are not binding upon this Court.

Let us now see what consideration should be given them:

The argument for a liberal construction of that statute, as we understand it, is builded upon the premise (page 397) that the consolidation provision of the statute was in effect a taking of the property of the minority stockholder for *public use*. If this argument is sound, then the consolidation provision of the General Corporation Act (Section 108A) is unconstitutional, since it is in effect a taking of private property for *private use*. But the complete answer to that argument is that the consolidation provision is not tantamount to a condemnation but on the contrary is an important obligation arising out of the stockholder's contract voluntarily entered into by him.

But however that may be, the statement of the requirements of the Traction Act contained in the following sentence (page 398): "The section contemplates a simple procedure beginning with a mere petition *followed by* reasonable notice to the company, etc." cannot nullify the plain language of that statute or of the statute here in question.

In *Douglas vs. Chosen Freeholders of Essex County*, 38 N. J. L. 216, 217, Chief Justice Beasley, speaking for the Supreme Court, said:

"Where that which is directed to be done is within the sphere of legislation, and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience, or even absurdity of the result is out of place. It is no province of the courts to

supervise legislation, and keep it within the bounds of propriety and common sense, so that even if in this case it can be demonstrated that the regulation in question was incommodious or even hurtful, an appeal for relief to the judicial power would be utterly in vain."

This view has been repeatedly adopted by the courts of this state and in the following cases:

Bullock v. Biggs, 78 N. J. L. 63;
Island Heights Co. v. Brooks (Court of Errors and Appeals), 88 N. J. L. 613;
In Re City of Passaic, 94 N. J. L. 384;
Weinstein v. Sheer (Court of Errors and Appeals), 98 N. J. L. 511;
Doherty v. Spitznagle, 139 Atl. Rep. 424;
In Re Freeholders of Hudson County, 6 N. J. Advance Rep., 1693, 1700.

In *Island Heights Co. v. Brooks*, *supra*, the present Chief Justice said:

"Where the purpose of the law makers is expressed in language so plain as to make it unmistakable, it must be enforced by the Courts as it is written, without regard to its wisdom, or its apparently unwise limitations. *Douglas v. Freeholders of Essex*, 38 N. J. L. 214, 216."

And he concludes:

"But, as we have already said, it is not a question of what would have been wise for the legislature to have enacted with which Courts are concerned, but what is expressed in the statute; and when the terms used therein clearly express the legislative intent, nothing remains to the Courts except the enforcement of that intent as expressed in the enactment."

In the case of *In Re Freeholders of Hudson County*, *supra*, Justice Kalisch, speaking for the Supreme Court, said:

“The Court is wholly without power to nullify a legislative act because of its being unreasonable. To attempt to do so would be to encroach upon the legislative prerogative under the constitution.”

The requirement of the statute with respect to notice was clearly not met by the respondent and the Circuit Court was without jurisdiction to proceed in the premises.

Another cogent reason for the construction of the statute contended for by the appellants is that the holder of a *single share of stock* of one of the merging companies, which may own extensive properties scattered throughout the United States and possibly throughout the world and the stock of which merging companies *has not been regularly sold upon any of the stock exchanges*, is placed in the position where he may subject the consolidated corporation to the annoyance, expense and great inconvenience of making an appraisal of the physical properties and other assets of the merged company in order to determine the value of his stock. While he would undoubtedly be entitled to do so if he complied with the statute, this no doubt was a consideration which moved the lawmakers to limit the period to thirty days from the filing of the merger agreement, and the statute should not be so construed as to extend it.

In the very recent case of *Prall vs. United States Leather Co.* (not officially reported, reviewed on certiorari, 143 Atl. Rep. 382), Henry E. Ackerson, Jr., C. C. J., held that the appraiser's fees and expenses must be borne by the consolidated corporation in view of the fact that the statute provides that the dissenting stockholder is entitled to the full market value of his stock without any depreciation in consequence of the merger.

IV.

The application not having been made within the time limited, the remedy afforded by the statute is unavailable to the respondent.

But even if the Court should hold that the proper construction of the statute is that the petition be presented to the Circuit Court within the thirty days without notice to the consolidated corporation and that thereupon the Court will fix a time and place for the hearing and prescribe the notice to be given to the consolidated corporation, we insist that the application was not made within the time limited by the statute and that therefore the remedy afforded by the statute is unavailable.

The remedy provided by this act did not exist at common law but is purely a creature of the statute. The statute creates the right and limits the time within which it must be exercised and if the right is not exercised within the time so limited the right itself is lost.

The principle is stated in 37 *Corpus Juris*, Section 51, p. 732:

“Where by statute a right of action is given which did not exist by the common law, and the statute giving the right fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition on such right and will control no matter in what forum the action is brought.”

and in 17 *Ruling Case Law*, Section 318, p. 952, as follows:

“Where a statute creates a new legal liability, with a right to a suit for its enforcement, provided the suit is brought within a designated period, the time within which the

suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. In such case it is treated as a condition attached to the right to sue."

Many cases are cited throughout the country in support of the text. The rule is one of universal application.

Such a statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist and the defendant is exempted from liability.

Partee v. St. Louis, &c. R. Co., 204 Fed. 970, 123 C. C. A. 292, 51 L. R. A. (N. S.) 721;

The Harrisburg, 119 U. S. 199;

Neganbauer vs. Great Northern, 99 N. W. (Minnesota) 620;

Rodman, Admrx. vs. Missouri Pacific, 70 Pac. Rep. 642; 59 L. R. A. 704; 65 Kansas 645—Kansas Supreme Court, 1902.

No excuse will serve to extend the time limited.

The case of *Rodman vs. Missouri Pacific*, *supra*, was an action for death in Kansas City. The accident occurred on April 14, 1896. The widow sued in accordance with Section 422A of the Civil Code. The action was removed to the United States Court. Subsequently, on December 1, 1898, the action was dismissed on motion of the plaintiff, without prejudice to bringing a future action. Meanwhile the widow had been appointed administratrix. The present action in the Kansas Court was in her representative capacity and was

commenced December 28, 1898, to recover under the provisions of the Civil Code, Section 422. Defendant answered pleading in bar the limitation contained in the act under which the suit was brought. The demurrer was sustained and the plaintiff below brought error. The following is taken from the opinion:

Section 422 provides that:—

“When the death of one is caused by the wrongful act or omission of another the personal representative of the former may maintain an action therefor against the latter * * * The action must be commenced within two years.

Section 422A provides action may be brought by widow, or next of kin, and it was under this section that the first action was brought which was removed to the Federal Court and dismissed without prejudice within a year next preceding the bringing of the present action.”

Section 23 of the Civil Code provides:—

“If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure.

The question is, did the pendency of the former action and the saving terms of this Section 23 suspend the operation of the limitation provided in Section 422 and permit the bringing of the action at bar more than two years after the cause of action arose?

A review of the authorities bearing upon the question controverted compels us to hold that the scope and effect of the act above quoted is not merely to provide a remedy for a cause of action existing independent of the

act itself, but to create a right of action where, prior to the passage none existed. As a part of the right itself, as a condition imposed upon and limitation of the exercise of the right granted, it is provided that the action upon which recovery is had must be commenced within two years from the time the right of action arose.

No excuse pleaded for delay in the commencement of the action for more than two years will avail, for the reason that no such excuse can, in law, be held sufficient. A limitation upon the time in which a pre-existing right of action may be exercised is governed by the general statute of limitations and in consequence falls within the saving provisions of Section 23 above quoted.

But the limitation in time of the commencement of the action here brought under the statute is imposed as a condition upon the exercise of the right itself, is special and absolute in its nature and is unaffected by the general provision of Section 23."

The provision of the statute in question is one where the right did not heretofore exist—a special right created by statute and the limitation fixed in the statute is a limitation of the right itself. This case must be distinguished from those where:

1. A right already exists and a statute has been set up limiting the time within which action must be commenced to enforce that right;
2. The parties have entered into an agreement concerning valuable rights and the day of the execution of the contract falls upon a holiday or a Sunday;
3. Action having been started within the time allowed by law, the day for the filing of the pleading or doing of some act in the course of a proceeding shall expire on a Sunday or a holiday.

The agreement of merger and consolidation was filed in the office of the Secretary of State on December 3rd, 1927. The petition presented to the Court on December 29th, 1927, which named the Southern Power Company as a defendant was abortive because under Section 106 of the Act the Southern Power Company had ceased to exist. The petition naming the Duke Power Company was not presented to the Court until January 3rd, 1928, and then without notice to the Duke Power Company.

The method of computation of time adopted by the Courts of this state is to exclude the *terminus a quo*, or in this case, the day upon which the merger agreement was filed in the office of the Secretary of State, to wit, December 3, 1927.

McCullough v. Hopper, 47 N. J. L. 189.

Twenty-eight days expired in December. January 2nd, marked the end of the thirty days within which the application could be made. The running of the period of limitation was not interrupted by the institution of a proceeding against Southern Power Company which had ceased to exist. The amended petition and order indicate upon their face that the application was not made until January 3rd, 1928—too late to secure the benefit of the statute or to confer jurisdiction upon this Court.

We anticipate that the petitioner will contend that because of the fact that January 2nd was a legal holiday, by force of our Holiday Act, 3 Comp. St. 3091-2, secs. 5 and 6, 1 Cum. Supp. 1787, secs. 113-5, 6, that his time was extended to January 3rd.

This proceeding is one unknown to the common law. As we have heretofore pointed out the time

fixed by the statute which creates the proceeding is a condition attached to the right itself. It is a statute of creation and the institution of the proceeding within the time it fixes is an indispensable condition to the maintenance of the proceeding and the proceeding not having been brought within the time limited in the statute no explanation or excuse for failing to do so is available to the respondent.

We submit that the cases above cited are dispositive of this question and that no excuse will serve to extend the time limited in the statute.

But our Supreme Court was called upon in the case of *Atlantic City v. Feretti*, 70 N. J. L. 489, to interpret the holiday statute and in that case the Court definitely held that that statute does not make holidays *dies non* as are Sundays. In that case the defendant was convicted under an ordinance of Atlantic City. The case was tried on the fourth of July. The defendant sued out a writ of certiorari to review the conviction and assigned as one of the reasons for reversal "that the prosecutor was forced to trial over his objection on a *dies non*, said conviction being had on a legal holiday, i. e., the fourth of July", and contended that by force of our Holiday Act, no Court could sit on a legal holiday.

In disposing of this objection, Justice Fort said:

"The Holiday Act of 1895 does not so enact. The statute states what days and parts of days shall be holidays and half holidays and then declares that 'the days and half days aforesaid shall be considered as the first day of the week, commonly called Sunday, and as public holidays or half holidays, for all purposes whatsoever as regards the transaction of business in the public offices of this State or counties of this state, on all other days or half days, excepting Sundays, such

offices shall be kept open for the transaction of business.' *Pamph. L.* 1895, p. 779.

"This statute does not prohibit a court from sitting on a holiday. It does not make holidays *dies non*, as are Sundays, except as regards the transaction of business in the public offices of the state or a county. The object of this provision of the act was to legalize the closing of public offices of the state and county offices by state and county officials."

* * * * *

"The Holiday Acts previous to that passed in 1895 did expressly provide that 'no court shall be held upon said days except in the cases where said courts would now sit upon the first day of the week.' *Pamph. L.* 1876, p. 73, *Pamph. L.* 1886, p. 386.

"The fact that this restriction upon the right of a court to sit on a holiday was omitted from the act of 1895 is clear evidence of legislative intent not to interdict sessions of the courts of the state upon a legal holiday."

The question which the Supreme Court was called upon to decide in the case of *Atlantic City vs. Feretti, supra*, was, does the Holiday statute make legal holidays *dies non*? The Court answered that question in the negative. The case could not possibly have turned upon any other question. We submit that this case was an important one in that the constitutional rights of the defendant were at stake.

We anticipate that in support of his argument that his time was extended by force of the Holiday Act, the respondent will rely upon the following cases:

Von de Place vs. Weller, 64 N. J. L. 155;
Feuchtwanger vs. McCool, 29 N. J. E.
 151;
Bohles vs. Prudential Insurance Co., 83
 N. J. L. 246;
Williams vs. Minsavich, 3 N. J. Misc. 565;
Melis vs. Goldstein, 4 N. J. Misc. 498.

In the case of *Von de Place vs. Weller, supra*, an appeal bond was presented to the Hoboken District Court for its approval and acceptance on March 6, judgment having been rendered against the defendant on the 28th proximo. The Court refused to receive the bond upon the ground that it had not been tendered within the time required by the statute, namely, five days after the rendition of the judgment. The last of the five days fell on Sunday and the tender of the bond was made on the Monday following. The defendant against whom the judgment was rendered applied to the Supreme Court for a writ of mandamus to compel the district court to approve and file the bond. The present Chief Justice, who wrote the opinion for the Court, expressly limited his decision to the point involved and held (p. 157): “ * * * where the last day falls on Sunday and the act is to be done *by the Court*, and not by a party, it may be done on the next practicable day”. We insist that this case is not authority for the proposition that a legal holiday is a *dies non*.

In the case of *Feuchtwanger vs. McCool, supra*, a motion was made that the answer be ordered to be taken from the files on the ground, *inter alia*, that it was filed out of time. It appeared that the time for answering expired on the 25th day of December. The answer was filed on the 26th. The Court held that the answer was filed in due time.

We think that this case and similar cases where the action having been started within the time allowed by law, the day for the filing of a pleading or the doing of some act in the proceeding expires on a Sunday or a holiday, can be readily distinguished from the instant case.

This case is cited in the opinion of the Supreme Court in *Von de Place vs. Weller, supra*.

In the *Von de Place* case the Court said (p.

156): "We think a similar rule should be adopted in construing statutory provisions requiring acts to be done by parties *in the course of judicial proceedings*." And continues: "This view is supported by the decision of the Chancellor in *Feuchtwanger vs. McCool*, 2 Stew. Eq. 251, * * *."

There are two cogent reasons why the *Feuchtwanger* case does not apply to the situation presented in the case *sub judice*. It will be observed that in that case the act to be done was the filing of a pleading "in the course of" a judicial proceeding. There is a vast distinction, it seems to us, between a statute of limitation or a statute giving rise to a conditional right such as that with which we are dealing and a mere procedural statute or rule of court. As we have heretofore indicated, the time limitation contained in sections 108 and 108A is a limitation upon a right itself and if the application required by the statute is not made within the time limited the right itself is lost. Surely no such effect can be claimed for a statute or rule of court prescribing the time for the filing of pleadings or other papers in the course of a judicial proceeding.

The other reason is that at the time the *Feuchtwanger* case was decided the holiday acts did make legal holidays *dies non*. The statute has since been amended. See *Atlantic City vs. Feretti*, *supra*.

The cases of *Bohles vs. Prudential Insurance Co.*, 83 N. J. L. 246; *Williams vs. Minsavich*, 3 N. J. Misc. 565, and *Melis vs. Goldstein*, 4 N. J. Misc. 498, are not in point. In all of those cases the act to be done fell on Sunday and not on a legal holiday. The case of *Atlantic City vs. Feretti*, *supra*, upon which we rely, was decided by the Supreme Court after the case of *Von de*

Place vs. Weller, *supra*, and expressly held that legal holidays are not *dies non*, as are Sundays.

We know of no reason why a litigant's time should be extended simply because the last day falls on a Sunday and we think this fact is a strong reason why the Court should not extend the rule to embrace legal holidays.

It results therefore that the time of the respondent was not extended by the fact that the last day fell upon a legal holiday and that his right to have this stock appraised in the manner prescribed by the statute expired on January 2nd, 1928, and that the Circuit Court was and is without jurisdiction to proceed further in the premises.

We desire to call attention to the fact that sections 108 and 108A do not direct the *filing* of the petition. The language of the statute is "apply by petition to the Circuit Court". To be sure when a suit is started by a petition, as for instance, in the Court of Chancery and an answer is required to be filed by the defendant, the proper thing to do with the petition is to file it with the Clerk of the Court, but we fail to appreciate any analogy between that practice and the procedure set out in sections 108 and 108A of the Corporation Act. The petitioner is required to secure an order and the petition is required to be presented to the Circuit Court.

In the case of *Hudson Electric Light Co. v. Town of Hudson*, 40 N. E. Rep. (Mass.) 109, a petition was filed by the Hudson Electric Light Co. against the inhabitants of the Town of Hudson to enforce an alleged obligation of the town to purchase the petitioner's electric light plant and property. The petition prayed for the appointment of commissioners to adjudicate as to the price to be paid by the town. The Massachusetts statute required the company to "apply by petition to the Supreme Judicial Court, or any

justice thereof, setting forth the facts, and praying an adjudication between the parties'', etc. The Court was of opinion that the petitioner applied to the Court, within the meaning of the statute, when it filed its petition in the clerk's office. The petition slept in the clerk's office without action for about two years and a half. If any such practice were adopted in this state in a proceeding of this character the result would be intolerable. The proceeding would cast a cloud upon the title of the real estate of the consolidated corporation and we know of no practice which would afford the consolidated corporation relief from the failure to prosecute the application with diligence. The practice in Massachusetts does provide for the dismissal of the petition on the ground of laches. This case only serves to emphasize the fact that to depart from the clearly expressed legislative will is a course fraught with grave danger. We submit therefore that it is no answer to say that the County Clerk's office was closed on January 2nd, 1928, and the petitioner was unable to file his petition. If the respondent had presented his petition to the Circuit Court within thirty days after the filing of the merger agreement on notice to the consolidated corporation, the date of the filing of the petition would be a matter of no consequence as the statute says nothing about *filing* the petition.

It is respectfully submitted that the judgment of the Supreme Court should be reversed and that the order appointing the appraisers be declared invalid and the proceedings set aside.

JOHN MILTON,
Attorney for Prosecutors-Appellants.

WILLIAM T. VANDERLIPP,
Of Counsel.

New Jersey Court of Errors and Appeals

SOUTHERN POWER COMPANY and
 DUKE POWER COMPANY,
Prosecutors-Appellants,

vs.

CARLO D. CELLA and CIRCUIT
 COURT IN AND FOR COUNTY OF
 ESSEX,

Respondents.

On Certiorari.

On Appeal from
 Supreme Court.

RESPONDENT'S BRIEF.

This proceeding comes before this Court on an appeal from the judgment of the New Jersey Supreme Court entered in this cause, which judgment dismissed the Writ of Certiorari and affirmed the action of the Circuit Court of Essex County in appointing appraisers to appraise the full market value of fourteen (14) shares of stock of Southern Power Company held by the respondent Carlo D. Cella at the time of its merger with Duke Power Company.

The Southern Power Company merged with the Duke Power Company on December 2, 1927 and the agreement of merger was filed in the office of the Secretary of State on December 3, 1927. (Case p. 23.)

On December 29, 1927, this respondent, Carlo D. Cella, who at that time and at the time of the merger was the owner of fourteen (14) shares of Southern Power Company stock, as a dissenting stockholder made his petition to the Essex

County Circuit Court for the appointment of three (3) disinterested appraisers to appraise respondent's said stock. (Case p. 3.) The Court ordered that notice of said application be served on the Southern Power Company before January 4, 1928, and that said application would be heard January 14, 1928 at the Essex County Court House, Newark, N. J. (Case p. 10.)

On January 3, 1928, respondent applied to the Court to amend his petition by joining Duke Power Company as a party (Case p. 5) and the Court ordered that Duke Power Company be made a party and that notice of said application for the appointment of appraisers, which was to be heard January 14, 1928, be also served upon Duke Power Company at least six (6) days before the date of hearing. (Case p. 9.)

The order fixing the hearing and a copy of the petition were served on Southern Power Company on December 29, 1927 and on Duke Power Company on January 4, 1928. William T. Vanderlip is the agent of both corporations and he is the person upon whom both the orders and the petitions and amended petitions were served on behalf of his respective principals.

The hearing on the application was had on January 14, 1928 and thereafter the Court made an order appointing appraisers (Case p. 8) which order was subsequently amended. (Case p. 11.)

On April 14, 1928, prosecutors-appellants applied for and were allowed a Writ of Certiorari to review said orders. (Case p. 1.) The matter was brought on for argument before the Supreme Court at the October, 1928 Term (Case p. 18) and the Supreme Court dismissed the writ and affirmed the orders of the Circuit Court and remitted the record to the Court below to be proceeded with in accordance with said judgment and the practice of said Circuit Court. (Case p. 21.)

POINT I.

The present appeal is premature.

The judgment of the Supreme Court dismissed the Writ of Certiorari and affirmed the orders of the Circuit Court of Essex County appointing appraisers to appraise the respondent's stock. Such a judgment is not a final one dispositive of the rights of the parties and in the words of Chancellor PITNEY in *Allgair vs. Hickman*, 82 N. J. L. 369, at page 371, "the question raises, *in limine*, whether the proceedings have reached such a stage as to admit of review by this court."

The *Allgair* case is analogous to the case *sub judice*. In that case a Writ of Certiorari was allowed by one of the Justices of the Supreme Court for reviewing an order to show cause made by the Court of Common Pleas why a license to keep an inn and tavern should not be revoked. The principal ground relied on by the prosecutor to set aside the order to show cause was that the petition was not verified as required by statute. The Supreme Court after hearing made an order dismissing the Writ of Certiorari and remitting the record to the Court of Common Pleas to be there proceeded with according to law and the practice of that court.

The two cases could hardly be more similar.

Speaking for the Court, Chancellor PITNEY says, at page 371:

"It will be observed at once that neither the Court of Common Pleas nor the Supreme Court has rendered any judgment that is dispositive of the matters in litigation. The court of first instance made only an order to show cause as the necessary preliminary of a hearing before that court of the merits of the controversy. Such hearing was interrupted in its

course by the issuance and service of a writ of certiorari. The Supreme Court dismissed that writ, but rendered thereon no judgment that was finally dispositive of the rights of the parties; on the contrary, it remitted the record to the Court of Common Pleas, to be there proceeded with according to law.

"Counsel for the plaintiff in error cites *Mowery vs. Camden*, 20 Vroom 106, and other cases, to support the contention that when a special tribunal is proceeding summarily in a matter over which it has not legally acquired jurisdiction, it is within the discretion of the Supreme Court to allow a certiorari to review its action before the final determination of the matter. This may be conceded, at least with respect to cases where the writ of certiorari is issued pursuant to the general supervisory power of the Supreme Court over inferior tribunals, as distinguished from the use of the certiorari as a substitute for the writ of error. See *Hinchman vs. Cook*, Spenc. 271, 272; *Mowery vs. Camden*, 20 Vroom 106, 109; *State, Hoxsey, prosecutor vs. City of Paterson*, 10 *id.* 489, 493.

"But that does not dispose of the very different question now presented, which is whether the order or judgment of the Supreme Court made in the certiorari matter is reviewable by this court. Our review by writ of error is limited to judgments that are in their nature final, the correction of mistaken decisions in interlocutory matters being postponed until the event of the litigation appears. Gen. Stat., p. 1391, §1; *Eames vs. Stiles*, 2 Vroom 490, 494; *Tomlinson vs. Armour & Co.*, 46 *id.* 748; *Defiance Fruit Co. vs. Fox*, 47 *id.* 482, and cases cited.

"Upon consideration, it is deemed clear that the judgment we are asked to review is not all dispositive of the controversy between the parties. Should we affirm the decision of the Supreme Court, it would still be necessary for the Court of Common Pleas to proceed with

the hearing and render judgment thereon, and that judgment would then be the subject-matter of review by the Supreme Court either on certiorari or on writ of error (we do not need to decide which), and the judgment of the Supreme Court thereon would be subject to review by writ of error out of this court. On the other hand, should we reverse the decision of the Supreme Court, we are still left without the materials for the rendition of a final judgment, for the matters of fact which are alleged as the basis of the legal contentions of the plaintiff in error remain unsettled.

"It seems clear, therefore, that the present writ of error is premature and should be dismissed."

Should this court determine that this appeal is properly brought at this time, respondent respectfully submits the following points on the merits of the case.

POINT II.

Section 108a of the General Corporation Act should be liberally construed.

Section 23 of the Traction Act (Comp. Stat., p. 5033, par. 119) is practically identical word for word with Section 108a of the General Corporation Act, the difference being that the former applies to street railway companies and the latter act to general corporations, such as the appellants herein. Both deal with mergers.

In construing the Traction Act, the Court of Errors has held that this section 23 should be liberally construed for the benefit of the dissenting stockholder seeking to have his stock appraised.

N. J. & Hudson River Ry. Co. v. Am. El. Wks., 82 N. J. L. 391.

In this case defendant-in-error was a stockholder of Hudson River Railway & Ferry Company which merged with the plaintiff corporation. Defendant dissented and pursuant to Section 23 of the Traction Act applied to the Bergen County Circuit Court to have appraisers appointed and its stock appraised. In the absence of the Circuit Court Judge, Supreme Court Justice GUMMERE made an order fixing the time for hearing the application and thereafter appointed appraisers. Plaintiff-in-error sought to review the order appointing appraisers by writ of error to the Court of Errors and Appeals on the grounds among others that the order appointing appraisers could only be made by a Circuit Court Judge and that the order appointing appraisers did not conform to the Traction Act of 1893 because there was no prayer in the petition for an ascertainment of the damages done to the stockholders, etc. On page 398 the Court says:

PITNEY, *Chancellor*. "The remedy afforded by section 23 of the Traction Act is not only voluntary as between the parties but is highly beneficial. The section contemplates a simple procedure, beginning with a mere petition *followed* by reasonable notice to the company, and without elaborate refinements of any kind. The section ought to be *liberally construed* in aid of the proposed remedy, and the procedure under it ought not to be hampered by the imposition of technical conditions that are not expressed in its language."

The Court below (see Opinion, Case, p. 27) concluded that the same construction should be placed on the act in question herein.

In *Beling v. American Tobacco Company*, 72 N. J. E. 32, Vice-Chancellor PITNEY seems to have gone even further and to seem to hold that many

months after the filing of a merger a dissenting stockholder may still apply to have his stock appraised.

In the *Beling* case the merger agreement was filed October 20, 1904. Complainant's first objection to the merger was made March 4, 1905. Suit in equity was begun thereafter by complainant to set aside the merger and compel the old corporation to continue in business until 1940, pursuant to its charter. The relief prayed for was denied by the Court, but the Court said at p. 44:

PITNEY, V. C. "I am willing, if complainant shall so wish it, to hear argument on the propriety of such a decree. If he does not wish it, I must advise that his bill be dismissed without prejudice to his right to his action at law, which, in my judgment, is ample to give him the full value of his stock at the time of the merger."

POINT III.

Application for the appointment of appraisers was made within the time prescribed by statute.

Section 108 (a) of the General Corporation Act of New Jersey says:

"* * * such dissenting stockholder
* * * may at any time within thirty days
after the adoption and filing of the agreement
of consolidation *apply* by petition to the Cir-
cuit Court of the County in which the chief
office of the corporation * * * was or is
located * * *."

The respondent filed his petition on December 29, 1927. The New Jersey Supreme Court in *Great Falls Power Company vs. Andrus*, New Jersey Adv.

Rep. Vol. VII, No. 1, Misc. Repts. p. 3 at page 4 says:

"The common practice in commencing suits by petition is to file the petition with the clerk of the court, and it has been held that to file a petition in the clerk's office is to 'apply by petition to the court.'

Hudson Electric Light Co. vs. Town of Hudson, 40 N. E. Rep. (Mass.) 709."

The Court by its order of December 29, 1927, set January 14, 1928, as the date of hearing of the application. The Court may prescribe what notice shall be given to the consolidated corporation of the hearing. This the Court in its discretion by its order of January 3, 1928, set as six days before the hearing.

If for the sake of argument we should concede prosecutors-appellants' contention that the application was not made until January 3, 1928, even then it would have been made within time, for thirty days after December 3, 1927, was January 2, 1928. This was a legal holiday and the Court was closed. The day was *dies non juridicus* (*Great Falls Power Company vs. Andrus, supra*). Application could still have been made the next day, January 3, 1928. This was done.

Holiday Act, Sections 5 and 6, Compiled Statutes, pp. 3091-3092 and 1 Cum. Supp. 1787, Secs. 113-5-6.
38 Cyc. 331.

"Both at common law and by statute, when the last day of a period in which an act is to be done falls on a *legal holiday*, that day is excluded and the act may be done on the next succeeding day."

Von de Place vs. Weller, 64 N. J. L. 155.

In *Feuchtwander vs. McCool*, 29 N. J. E. 151, the last day to file an answer fell on December 25th, Christmas, which was a legal holiday. The Court held that the answer which was filed on the next day "was filed in due time."

The Von de Place decision has been followed in:

Bohles vs. Prudential Insurance Co., 83 N. J. L. 246.

Williams vs. Minsavich, 3 N. J. Misc. Rep. 565.

Melis vs. Goldstein, 4 N. J. Misc. Rep. 498.

Stryker vs. Scudder, 33 L. J. 185.

In re James I. Manning, 35 L. J. 370.

In *Melis vs. Goldstein*, which was an action on a Mechanics Lien in the Passaic County Circuit Court, the last work to be done by plaintiff on the building was on September 11, 1924. The time to issue the summons expired four months thereafter or January 11, 1925, which was a Sunday. The summons was issued the following day, or January 12, 1925. The Court held that it was sufficient and within time to issue the summons on January 12th, 1925, and refused to dismiss the summons.

See also cases cited in *Great Falls Power Company vs. Andrus*, *supra*.

POINT IV.

The Southern Power Company did not cease to exist on December 3, 1927.

The inclusion of the Southern Power Company as a defendant was unnecessary and in no wise prejudiced the Duke Power Company (Case, p. 26, fol. 10). However the merged corporation con-

tinues in existence for the purpose of being sued, even though a cause of action is also given claimants against the consolidated corporation.

Section 107, Corporation Law of New Jersey.

When a stockholder dissents from the merger, and applies to have his stock appraised, he ceases to remain a stockholder and becomes a creditor for the amount which it is determined is the market value of his stock, and this amount becomes a judgment and a lien on all the assets received by the consolidated corporation from the corporations so merged subject to existing liens.

POINT V.

Notice to the Consolidated Corporation need not be given within thirty (30) days of filing of merger.

The statute provides that the application to the Circuit Court shall be made within thirty (30) days and that the Court shall prescribe what notice shall be given to the consolidated corporation.

The procedure in cases of a writ of *capias ad respondendum*, Sec. 62 of the Practice Act, Compiled statutes, p. 4071, is different than the procedure in this proceeding, for there the statute reads:

“Proof of truth of affidavits for arrest, etc.; reference; discharge of defendant, etc.— In actions commenced by writ of *capias ad respondendum* at any time within thirty days after a defendant shall have been arrested, a judge of the court out of which said writ issued may on the application of such defend-

ant *and* on notice to the plaintiff make an order for the taking of testimony concerning the truth of the proofs upon which the order for bail was made, * * *."

Clearly, the language of the statute by using the word "and" makes "notice to plaintiff" a condition precedent to the application to a judge. And the notice must be given to plaintiff by the applicant without any direction by the Court; whereas in the proceeding *sub judice*, notice of the hearing cannot be given to the corporation by the applicant *except* as directed by the Court, which also fixes the date of the hearing. It is also to be noted that in actions begun by writs of *capias ad respondendum*, the time of the judge to make certain orders is limited to thirty (30) days, while in the Corporation Act it is the dissenting stockholder's time to apply for a hearing which is limited to thirty (30) days.

Although the language used in Secs. 108 and 108a of the General Corporation Act is not the same as in Section 3 of the Act on Eminent Domain, p. 2183, Compiled Statutes, yet the procedure is identical in both cases. The only difference being that in Eminent Domain the Legislature fixed the time within which a hearing *must* be had and the number of days' notice which must be given, and the method thereof, whereas, in the General Corporation Act, these were left to the Court's discretion.

POINT VI.

Appellants' construction of this statute is absurd.

Appellants contend that in order that a dissenting stockholder may be entitled to have his stock appraised the petition must be filed, the notice of

hearing given and the application to the court for the appointment of appraisers must be had all within thirty days of the filing of the merger agreement.

Contra, see opinion of Supreme Court (Case, p. 27).

Appellant finds fault with the opinion of the Supreme Court which states that prosecutor (this appellant) contends "that the petition must be filed, the notice of hearing given, and the hearing had all within thirty days of the filing of the merger agreement"; that prosecutor did not say that the hearing must be had within thirty days but that the application must be made within thirty days. If an application to the Court on notice to the other side for the appointment of appraisers is not a hearing, what is it? The applicant must certainly speak to the Court and let the Court know what he seeks and the Court not being deaf will hear him and the other side if it cares to be heard.

Appellants' construction may be literal, but the appellants carry it to an absurdity.

State v. Clark, 29 N. J. L. 96, at p. 99—

WHELPLEY, *J.* "If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed. 1 Kent's Com. 462; *Commonwealth v. Kimball*, 24 Pick. 370; *United States v. Fisher*, 2 Cranch 400; 1 Bl. Com. 60."

Mendles v. Danish, 74 N. J. L. 333, at p. 336—

HENDRICKSON, *J.* "Where ambiguity exists or literal interpretation may lead to absurd

results, resort may be had to the principle that the spirit of the law controls the letter, 26 Am. & Eng. Encycl. L. 601."

See also:

Associates of the New Jersey Company
v. *Davison*, 29 N. J. L. 415.

Appellants' construction is the strictest possible construction of the statute, and although the Court of Errors has held in *N. J. & Hudson River Railway Co. vs. Am. Elec. Works, supra*, that a similar statute for appraisal of a dissenting stockholder's stock in a street railway company should be liberally construed, let us examine the effect of the strict construction contended by appellant and see its effects.

Under the appellants' construction, how many days after the filing of the merger has the dissenting stockholder in which to present his application to the Court? He cannot tell.

He cannot have thirty (30) days from said filing, for then even if he apply at 10 o'clock at the opening of court, he would have to serve notice on the corporation the same day, and have the application heard the same day before court adjourned, usually at four o'clock in the afternoon. But the statute says reasonable notice must be given the corporation of the time of the hearing on the application and it is doubtful whether any Circuit Court Judge would consider a few hours, such reasonable notice as the statute provides. Furthermore, Circuit Courts in order to expedite the matters that come before them in an orderly manner have calendars fixing motion days. It could hardly be expected that a motion to appoint appraisers would be permitted to interrupt and delay a jury trial, say at 3 P. M.

Assuming for the sake of argument that five days' notice of such a hearing to a corporation would be generally considered reasonable, then the application would have to be made within twenty-five (25) days of the filing of the merger. The thirtieth (30th) day the court would have to hear the application, no matter what other business be before the Court, otherwise a dissenting stockholder would lose all his rights to have his stock appraised. The Judge might be unable to hear the application on that day, either through death, illness or some other cause, and there might not be and in most counties there generally is not another Circuit Judge in the County. The defendant corporation cannot be asked to journey to another county and have another Circuit Judge hear the application and even if the corporation acquiesced, the statute provides the proceedings must be before the Circuit Court of the County where the corporation has its chief office. Having failed to have his application heard on the thirtieth (30th) day, the dissenting stockholder will have lost his right to have his stock appraised.

Suppose the Circuit Court Judge refuse to hear the application on the thirtieth (30th) day, after application and notice, what is the stockholder to do, rush out, get a mandamus and serve it, and *vi et armis* compel the Judge to hear the application that day?

The Legislature never meant to be absurd. In enacting Section 108a, it meant, as was said in the *N. J. & Hudson River Railway* case, that the "section contemplates a simple procedure beginning with a mere petition *followed* by reasonable notice to the company, and without elaborate refinements of any kind."

Appellants' objections that the "registered" office of the corporation is not the "chief" office and

that a dissenting stockholder may have voted to affirm the merger are "the elaborate refinements" mentioned by Chancellor PITNEY in the *N. J. & Hudson River Railway* case,—and even were they substantial objections, the appellants should set forth affirmatively any facts tending to support their objections. This they did not do, could not do, and cannot do.

POINT VII.

The cases and authorities in appellants' memorandum are not in point with the case at bar.

None of the cases cited by appellants overrule or decide contrary to the cases heretofore cited by this respondent.

The case of *New Jersey and Hudson River Railway and Ferry Company vs. American Electrical Works*, 81 N. J. L. 34, cited in Point I of appellants' brief, does not hold what the appellant contends. There an attempt was made to amend the order appointing appraisers and the Supreme Court said it could not do so, and at page 35 said:

GARRISON, J. "It would be very unfortunate, under these circumstances, if the only alternative were the dismissal of the proceeding or its retention in its present form. We think that the defendant may, if it will, do, in effect, what the protection of the petitioner requires, without involving the power of the Circuit Court to amend this statutory proceeding. In the interest of justice, such a course should be followed rather than one that is destructive, or at best wasteful, of the substantial interests of one or the other of the parties before the court.

"If the defendant will, within twenty days, pay the costs of the prosecutor and file in the

cause and serve upon the attorney of the prosecutor a stipulation that its petition and the order of the Circuit Court obtained upon it and all proceedings had or to be had thereunder shall be conclusively taken as based upon the twenty-third section of chapter 172 of the laws of 1893, and shall be treated to every intent as if said petition and order embodied with particularity the pertinent provisions of that act, the order of the Bergen Circuit Court will be affirmed within ten days thereafter unless during such time the attorney of the prosecutor shall give notice to opposing counsel and to this court of some objection to the form of such stipulation, in which case the matter will be disposed of upon the hearing on such objection."

The New York Statute (Business Corporation Law, Laws of 1909, Chap. 12, Secs. 8 and 9), relating to the right of a dissenting stockholder after merger to have his stock appraised cited under Point III of appellants' brief is distinguishable from the New Jersey Statute, Sections 108 and 108a of the General Corporation Act. In New Jersey the stockholder applies to the court and the court fixes the time of the hearing on the application and the notice which is to be given to the consolidated corporation. In New York, on the contrary, the stockholder fixes the date of the hearing and the Statute fixes eight days as the notice which must be given to the new corporation of said hearing, and the statute further fixes at sixty days the time within which said hearing shall be had. A comparison of the language of the two statutes shows that the practice in the two states is different although the general relief afforded dissenting stockholders is about the same.

The authorities cited by the appellant under Point III of its brief, to wit, *Douglas vs. Chosen Freeholders of Essex County*, 38 N. J. L. 214; *Bul-*

lock vs. Biggs, 78 N. J. L. 63; *Island Heights Co. vs. Brooks*, 88 N. J. L. 613; *In re City of Passaic*, 94 N. J. L. 384; and the other cases grouped with the above, are all cases in which the language of the statute or of the contract (as in the *Weinstein* case) was clear and unambiguous. There can be no quarrel with the decisions of the court in those cases. For, as was stated by Mr. Justice MINTURN, in the *City of Passaic* case, *supra*, at page 386, "Where an act is plain and unambiguous in its terms the rule is fundamental that there is no room for judicial construction, since the language employed is presumed to evince the legislative intent." Mr. Justice MINTURN was one of the three Justices of the Supreme Court who rendered the decision in the court below in this case from which the appellant takes this appeal. Apparently the learned Justice is convinced that the statute in the case *sub judice* does not mean what the prosecutors-appellants are contending for.

In setting forth "another cogent reason" for the construction of the statute contended for by the appellant, it seems to this respondent that the appellant is crossing a bridge before coming to it. When that bridge is reached let the court determine how it shall be crossed. Furthermore, the protection afforded by the statute to dissenting stockholders seeking to have their stock appraised does not attempt to differentiate between a stockholder holding one share and one holding 33-1/3% of the outstanding stock.

Ferenga vs. Moscovitz, 1 N. J. Misc. 169, cited under Point IV of appellants' brief, was a case in which defendant was arrested and held to bail. Defendant put up cash bail and appeared generally. After trial and judgment against him defendant sought a Rule to Show Cause why the order to hold to bail should not be set aside and sought

to sustain it by proof that the facts set in the affidavit on which the order for bail was made were untrue. The Court held "that this can only be done under Section 62 of the Practice Act not later than thirty (30) days. That period has long since elapsed and bars defendant from invoking Section 62 of the Act referred to."

The same is true of 37 *Corpus Juris*, Sec. 51, p. 732; 17 *Ruling Case Law*, Sec. 18, p. 952, *Rodman vs. Missouri Pacific* and the other cases cited by appellants under Point IV of their brief.

All these authorities merely hold that when a cause of action is limited by statute, the action must be brought within that period but none of these authorities state that when the last day of said period falls on a Sunday or a legal holiday that the plaintiff has not got until the whole of the next succeeding day to institute the action. Nor do they hold that a case must not only be commenced but also heard within the period fixed by statute.

McCulloch vs. Hopper, 47 N. J. L. 189, merely holds that the first day in which a cause of action accrues, is *not* to be counted. It decides nothing *contra* to *Von de Place vs. Weller*, *supra*, or *Feuchtwanger vs. McCool*, *supra*.

Atlantic City vs. Feretti, 70 N. J. L. 489, decided a different proposition of law. The only issue in that case was whether the recorder having tried defendant on a legal holiday had done something he was *prohibited* from doing and the Supreme Court merely held that he was not *so* prohibited, at p. 491:

"The fact that this restriction upon the right of a court to sit on a holiday was omitted from the act of 1895 is clear evidence of legislative intent *not to interdict* sessions of the courts of the state upon a legal holiday."

Wherefore, respondent respectfully submits that the appeal herein be dismissed, and the judgment of the Supreme Court be affirmed.

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