New Jersey Court of Errors and Appeals

CARLTON GODFREY and HENRY WEIDERHOLD, *Prosecutors-Respondents,* *vs.* BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ATLANTIC, and CLARENCE M. LIDDLE and WILLIAM H. PFEIFFER, trading as LIDDLE & PFEIFFER, *Defendants-Appellants.*	*On Certiorari.* *On Appeal &c.*

Brief for Defendants-Appellants, Clarence M. Liddle and William H. Pfeiffer, Trading as Liddle & Pfeiffer.

Facts.

This is an appeal from an order of the Supreme Court of the State of New Jersey setting aside under certiorari certain resolutions of the Board of Freeholders of the County of Atlantic passed on November 8th, 1916, and November 24th, 1916, (C., pp. 21 and 27), and the award of a contract to the defendants-appellants in accordance with such resolutions, such resolutions purporting to authorize the extraordinary repair or reconstruction of the main highway between Philadelphia and Atlantic City commonly known as White Horse Pike, and a certain portion of a road commonly known as the Ocean Boulevard, in the County of Atlantic, authorizing a bond issue to pay therefor, and conditionally awarding a contract for the performance of such work to the lowest bidders, Liddle & Pfeiffer, the defendants-appellants,

whose bid for such work was in the sum of $693,443.48.

The resolution of November 8th, 1916, purporting to authorize such improvement, bond issue and award included the following proviso:

> "Provided, further, that this award shall not be binding upon the Board of Freeholders of the County of Atlantic, nor shall any contract be entered into, nor any bonds offered for sale under resolution heretofore passed, to be issued for the purpose of paying for the contract herein mentioned, if Chapter 285 of the Laws of 1916 is adopted by the voters of this state at the election held November 7th, 1916; that in the event said law is adopted by the voters of this state, this award and all proceedings touching the work herein referred to, and the award of the bid shall be null and void."

On November 24th, 1916, subsequent to the adoption of the above resolution, the Board of Chosen Freeholders of the County of Atlantic passed a further resolution authorizing such improvement, the issue of bonds to pay therefor, and awarding the contract to Liddle & Pfeiffer for the same sum, subject to the proviso that the contract for the work should not be executed until the bonds issued to pay therefor had been sold and the moneys received therefrom, but omitting the proviso as to the effect of the adoption of the 1916 Act, and reciting specifically in such resolution that it was passed for the express purpose of obviating any effect which the adoption of such act might have had upon its previous award of the contract to the defendants-appellants.

The sole question at issue is whether such resolutions, or either of them, constitute a valid

present award of the contract to the defendants-appellants, subject to the sale of the bonds and the receipt of the proceeds by the Board of Chosen Freeholders.

It is admitted that the above Act of 1916 was adopted by the voters on November 7th, 1916; that the proceedings resulting in the award of the contract to the defendants-appellants are based upon Chapter 122 of the Laws of 1914; and it is further admitted by the defendants-appellants that the proceedings authorizing the bond issue to pay for such work are based upon Chapter 252 of the Laws of 1916.

Grounds of Appeal.

1. The resolutions of the Board of Chosen Freeholders of the County of Atlantic, passed November 8th, 1916, and November 24th, 1916, and the authorization of the bond issue, and the award of the contract to defendants-appellants, Liddle & Pfeiffer, thereunder, are in all respects lawful, regular and valid.

2. The work contemplated by such resolutions, the award of such work and the bond issue to pay therefor, are duly and legally authorized by such resolutions, and by the statutes in accordance with the provisions of which such action by the Board of Chosen Freeholders of the County of Atlantic was taken.

3. Such resolution of November 8th, 1916, was valid, the condition contained in such resolution as to the adoption of Chapter 285 of the Laws of 1916 by the people of the State of New Jersey being invalid and without effect.

4. Such resolution of November 8th, 1916, was invalid by reason of the condition contained therein as to the adoption by the people of the

State of New Jersey of Chapter 285 of the Laws of 1916, and the award of such contract by such resolution of November 24th, 1916, and the authorization of the bond issue are, therefore, valid.

5. Such resolution of November 8th, 1916, with such condition as to the adoption by the people of the State of New Jersey of Chapter 285 of the Laws of 1916 was valid, but was validly reconsidered, rescinded and repealed by said resolution of November 24th, 1916, which resolution constituted a valid award of such contract and authorization of such bond issue.

6. Such resolution of November 8th, 1916, was neither an award of such contract nor a rejection of bids for the work contemplated thereby, and such resolution of November 24th, 1916, was, therefore, valid as a full authorization of the award of such contract and the authorization of such bond issue.

7. The advertisement preceding the award of such contract and the authorization of such bond issue, was due and legal.

8. Such resolutions of November 8th, 1916, and November 24th, 1916, were valid, in that they expressly provided that "Such contract shall not be entered into between the parties unless the bonds to be issued for the purpose of paying for said extraordinary repairs shall have been sold and delivered, and the money received therefor."

9. Such resolutions of November 8th, 1916, and November 24th, 1916, are valid, in that it was unnecessary for the money to be in hand before the award of the contract for the work contemplated therein.

10. P. L. 1914 page 203, referred to in the provisions of such resolutions of November 8th,

1916, and November 24th, 1916, is constitutional, and due and legal authority for the carrying out of the work and issuance of the bonds contemplated by such resolutions of November 8th, 1916, and November 24th, 1916.

11. The issuance of the bonds contemplated by the provisions of such resolutions of November 8th, 1916, and November 24th, 1916, is duly authorized by virtue of the provisions of the so-called Pierson Municipal Bonding Act (P. L. 1916, page 525).

Brief of Argument.

Points of Law.

I. The public improvement contemplated by the resolutions of November 8th, 1916, and November 24th, 1916, are duly and legally authorized by Chapter 122 of the Laws of 1914.

The following facts appear on the record, and are not subject to controversy:

(1) White Horse Pike is a "County Road" and as such is an improved road under the definition embodied in the Road Revision Act, Chapter 395 of the Laws of 1912.

(2) White Horse Pike is in need of extraordinary repairs or reconstruction, being the fact found by the Board of Freeholders, as appears by the record. (C., p. 7.)

(3) Nothing appears by the record which indicates that the work contemplated to be done under the contract in question, in this case, is in fact anything but extraordinary repairs or reconstruction.

That the work contemplated is actually extraordinary repairs or reconstruction is clearly seen—

(a) By the construction of the statute, itself, Chapter 122, P. L. 1914;

(b) By settled judicial construction of the meaning of such words as applied to the improvement of highways.

A. BY THE CONSTRUCTION OF THE STATUTE, ITSELF, CHAPTER 122, P. L. 1914.

Let us assume for the sake of argument that the work contempated results in a new type of pavement from that now existing, although such fact does not appear in the record.

Chapter 122 of the Laws of 1914 is an alternative provision for Section 27 of the Road Act of 1912 (Chapter 395, Laws of 1912), and is effective and applicable under its terms when Section 27 of the Road Act cannot be applied.

The subject matter of the Act of 1912 and such Section 27 of the Act of 1912 is the same, both dealing with extraordinary repairs or reconstruction of improved public roads or county roads within the state.

If the work contemplated to be done on the White Horse Pike had been approved by the Commissioners of Roads and an appropriation of state money made by him to aid in the doing of the work, the same question would have arisen as has been raised by the prosecutors-respondents when the work has actually been undertaken under Chapter 122 of the Laws of 1914.

It is urged on behalf of the defendants-appellants that the work contemplated to be done

on the road in question could not be done under any provision of law now existing, if it was not in fact authorized either by the 27th section of the Road Act, or by Chapter 122 of the Laws of 1914.

The prosecutors-respondents argued below that the work could be done under other acts since it was "the building of a new road or a permanent improvement." It is clear that the work is not the building of a new road, inasmuch as the return itself (C., p. 6) shows that the work is to be done upon an existing county road, and cannot, therefore, be a new road; nor is it conclusive in any sense to say that the work will constitute a permanent improvement, for the reason that an extraordinary repair or a reconstruction is a permanent improvement, but one of a limited character, which limitations prevent its being carried out under the provisions in other acts.

In order to take this matter up in more detail let us examine the Road Act of 1912, Chapter 395. Such examination will disclose that three principal objects were sought thereby to be accomplished:

1. The taking over by counties of existing highways controlled by townships, boroughs, etc., in order to improve them "by the construction of a macadamized road, or a telford or other stone road, or a road constructed of gravel, oyster shells or other similar materials, with or without plastic binder, in such manner that the same, or whatever materials constructed, shall, with reasonable repairs thereto, at all seasons of the year be firm, smooth and convenient for travel."

This improvement is directed to be made by the counties, with the approval and under the

supervision of the State Commissioner of Roads, and by state aid. When the road is improved it thereafter becomes a "County Road," and the authority conferred by the act on the counties and for state aid is thereby exhausted.

2. The next object is the keeping in repair of the roads so improved, and it is clear that the repairs contemplated in this provision of the Road Act (Section 11) are ordinary repairs which will result in the restoration of the surface originally constructed.

3. The third object is embodied in Section 27 of the Road Act, and involves something additional to that contemplated in the 11th section.

In order to indicate what this additional object is, it will be useful to make a brief statement of road legislation in the State of New Jersey.

Until comparatively recent times, roads in this state were laid out and opened under the supervision of the Courts of Common Pleas, by the surveyors of the highways; they were worked by the overseers of the highways, and were, in fact, primitive in every respect. The only function committed to the counties in connection with the roads was the erection and maintenance of bridges over streams and rivers.

The need for improved highways extending beyond the limits of the townships was met by private enterprise, in the form of toll roads or turnpikes. Practically coincident with the abandonment of the turnpike or toll roads in the state there were authorized by law county road boards with power to improve highways within the limits of the county and without reference to the townships or other subordinate munici-

palities within its limits. A typical instance of this development was the Essex Public Road Board, which constructed in the County of Essex a system of highways which were for many years the best example of road making, not only in the state, but perhaps in any state of the country.

The special acts creating county road boards were succeeded by a general act, revision of 1877, creating county road boards for the purpose of "Laying out, opening, constructing, improving, ornamenting and maintaining one or more free public roads."

The next step was taken in 1888, P. L. 1888, page 397, when boards of freeholders upon referendum were authorized to open, lay out, construct and maintain any public road; followed in 1889 by an act under which it is provided that it shall be lawful for boards of freeholders "to acquire, improve and maintain, and assume full and exclusive control of any public road." This act directs that such roads shall thereafter be designated as "County roads and thereafter improved."

In 1894, P. L. 1894, page 128, the Legislature abolished county road boards and vested their powers and duties in the board of freeholders.

About the year 1890 the development of the bicycle and the public use of it, amounting practically to a craze, undoubtedly stimulated legislative provision for the improvement of the highways of the state.

Chapter 223 of the laws of 1895, page 424, is "An act to provide for the permanent improvement of public roads in this state," and is the first general act for the improvement of roads by counties with the aid of moneys advanced by the state. This act provides "The

specifications shall require the construction of a macadamized road or a telford road, or other stone road, or a road constructed of gravel, oyster shells or other good materials, in such manner that the same, of whatever materials constructed, shall, with reasonable repairs thereto, at all seasons of the year be firm, smooth and convenient for travel."

This act was superseded by Chapter 97 of the Laws of 1903, "An act to provide for the permanent improvement of public roads in this state," which provides for the improvement of roads by the "construction of a macadamized or a telford or other stone road, or a road constructed of gravel, oyster shells or other good material, in such manner that the same, of whatever materials constructed, shall with reasonable repairs thereto at all seasons of the year be firm, smooth and convenient for travel."

Then followed Chapter 58 of the Laws of 1905, entitled, "An act to provide for the permanent improvement of public roads in this state (Revision of 1905)," which authorized the improvement of roads by state aid "By the construction of a macadamized road, or a telford or other stone road, or a road constructed of gravel, oyster shells or other good material, in such manner that the same, of whatever materials constructed, shall with reasonable repairs thereto at all seasons of the year be firm, smooth and convenient for travel."

It will not escape the notice of the Court that the use of substantially the same language in the description of the improvement contemplated by these acts indicate the belief of the legislators that roads improved in the manner designated could be expected "with reasonable repairs thereto at all seasons of the year to be

firm, smooth and convenient for travel." In other words, that when the improvement authorized was in fact made so that the road became a county road, no other or further work would be required to maintain it, with the exception of ordinary or reasonable repairs. This expectation was undoubtedly based upon the experience of other states and of France and England in particular with macadam or telford roads, or gravel or shell roads, which indicated that with reasonable ordinary repairs roads once improved could be maintained with a surface firm, smooth and convenient for travel, of the character then using the roads, namely, vehicles drawn by horses.

The Court will also be impressed that nowhere in these acts is there a provision for the making of anything except ordinary repairs, which are required to be made entirely at the expense of the counties in which the roads were located.

In the period between 1905 and 1910 there developed the use of horseless vehicles of various types, resulting in a road traffic of an entirely different character, and requiring a road surface of much more resistance and endurance quality than telford, macadam, shell or gravel roads. The result was the creation of a condition requiring new legislation and other provisions than those contained in the series of acts referred to.

Chapter 171 of the Laws of 1910 is "An act concerning the repair of county roads where the State Commissioner of Public Roads is authorized to use state funds in payment of the whole or part of such repairs, and authorizing the boards of chosen freeholders to issue bonds for their share of the cost of such repairs."

Section 1 provides: "Whenever any county road of this state now is or may hereafter be in need of extraordinary repairs," etc.

Chapter 235 of the Laws of 1909 had already authorized and directed the payment of moneys received from registration fees, license fees or otherwise of motor vehicles to the Commissioner of Public Roads as a fund for the repair of such improved roads throughout the state as said Commissioner should designate.

Chapter 171 of the Laws of 1910, above referred to, was in fact incorporated in the revision of the road law of 1912 as Section 27 thereof, to accomplish the same purpose as was intended to have been accomplished by the law of 1910, namely, to make provision for the resurfacing of roads to meet the new conditions arising from the use of automobiles, autotrucks, and other road engines.

We submit that it is apparent from the review of the legislation that the *"improvement"* contemplated and described in the road acts, including the act of 1912, was the construction of "A macadamized road, or a telford or other stone road, or a road constructed of gravel, oyster shells or other similar materials, with or without plastic binder, in such manner that the same, of whatever materials constructed, shall, with reasonable repairs thereto, at all seasons of the year be firm, smooth and convenient for travel;" followed by the assumption of responsibility for the road by the counties as county roads, and that when this had once been done the authority of the counties and the state in that respect was exhausted; and that it was intended to be exhausted, for the reason that it had been expected that such roads could be maintained with ordinary repairs in the condi-

tion described in the act; and that without the sanction and authority of Section 27 of the Road Act of 1912, or the preceding act of 1910, nothing could be done with roads so constructed, excepting the maintenance of them as macadam, telford, gravel or shell roads, as they have been originally constructed.

It seems clear, therefore, that the appearance of the words "extraordinary repairs" in Chapter 171 of the Laws of 1910, and of the words "extraordinary repairs or reconstruction" in Chapter 27 of the Road Act of 1912, and of the words "extraordinary repairs or reconstruction" in Chapter 122 of the Laws of 1914, resulted from the necessity of making provision for the construction of road surfaces on roads already improved, of a different character from that originally constructed, in order to meet the traffic conditions arising from the use of automobiles.

It is, therefore, clear that this public improvement of highways, defined by the words "extraordinary repairs or reconstruction," was not previously authorized by legislation, and that this is exactly the character of the work authorized by the Freeholders of Atlantic County by its resolutions of November 8th, 1916, and November 24th, 1916. Further, a conclusive answer to the contention of the prosecutors-respondents is found in the context of the words "extraordinary repairs or reconstruction," found in Section 27 of the Road Act of 1912, and in Chapter 122 of the Laws of 1914. In both cases it is provided that there shall be submitted to the Commissioner of Roads plans and specifications prepared by the County Engineer, showing the repairs or reconstruction contemplated, and which plans and specifications are subject

to approval or disapproval by the Commissioner of Roads.

This provision is manifestly inappropriate to ordinary repairs, or repairs of the character insisted upon by the prosecutors-respondents as the only ones authorized by law. The requirement for the submission of plans and specifications is identical with that used for the construction of new roads under the second section of the road act, with the exception of the word "cross-sections," and clearly imports more than ordinary repairs, as no plans or specifications would be required for such ordinary repairs.

In this connection we refer to the case of *Lambertville* v. *Board of Education,* 93 Atl., 596, where Justice Swayze differentiates the meaning of the word "repair" as used in Sections 74 and 76 of the School Law in accordance with the context of these sections. In Section 74 money authorized to be appropriated for current expenses, the repairing and furnishing of schools, is held by the Justice to mean "Only ordinary current expenses." In Section 76, however, providing for the erection, enlarging, repairing or furnishing a school house and authorizing the issue of bonds therefor, the learned Justice says the word "repairs" means those more important repairs which may properly be likened to the enlarging of a school house.

If the ordinary word "repair" can have such different meanings in the same statute as shown merely by the context, a *fortiori,* the word "extraordinary repairs" from its context may be shown to have a different meaning than the simple word "repairs," and again, a *fortiori,* the word "reconstruction" would have a still further enlarged meaning. But this brings us to our second point.

B. JUDICIAL CONSTRUCTION HAS SETTLED THE MEANING OF THE WORDS "EXTRAORDINARY REPAIRS" OR "RECONSTRUCTION," AS APPLIED TO THE IMPROVEMENT OF HIGHWAYS, TO AUTHORIZE THE IMPROVEMENT CONTEMPLATED IN THIS CASE.

Let us assume even that the work expressly stated by the Board of Freeholders to be "extraordinary repairs" or "reconstruction" actually is the laying of a new and different character of pavement, together with a change in certain parts where necessary of the foundation of the road.

In the 1914 edition of Webster's Dictionary the verb "repair" is defined as "To restore to a sound or good state after decay, injury, dilapidation or partial destruction (as to repair a home, a road, a shoe)."

The word "reconstruct" is likewise therein defined as "To construct again; to rebuild; to remodel."

It is believed that there has been no case in this state where the meaning of the words "extraordinary repairs" and "reconstruction" have been judicially determined. It is clear, however, that the words "reconstruct" and "repave" are very similar in meaning. The word "reconstruct" if anything being a broader and more inclusive term; and that the analogy between the words "construct" and "reconstruct" and "pave" and "repave" are very close. Therefore, the construction by the Courts of this state of the term "repave" will be of benefit in determining the true meaning to be placed upon the word "reconstruct."

In the leading case of *Dean* v. *Paterson,* 67 N. J. L., 199 (affirmed in 68 N. J. L., 664), a

statute permitting repavement was held to authorize the repavement of a macadamized street with red brick.

Likewise in the case of *McGovern* v. *Trenton*, 84 N. J. L., 237, North Montgomery street, Trenton, was repaved with brick (a new character of pavement) under a statute allowing repavement.

Since, therefore, it has been settled that the word "repave" may mean a pavement again with either a new or old character of materials, it would seem by clear analogy that the word "reconstruct" would mean a construction again with either new or old materials. Moreover, we nowhere find in the New Jersey statutes any statement by the Legislature, itself, as to whether either of the words "repavement" or "reconstruction" are to be taken to mean improvement with either a new or an old character of material. It would, therefore, seem that the Legislature had determined to leave to the option of the authorities directly in control of such road, and having the best means of knowledge of its needs and that of the community, to determine whether a new or an old character of material should under all the circumstances be used. Not only would such be the part of wisdom, but unless such construction is allowed all the municipalities in this state will find themselves in the most unfortunate position of not only being without any power to use wisdom and improved methods of pavement, but of having actually spent thousands and millions of dollars in making improvements which were absolutely illegal. As a matter of fact the Supreme Court of this state has held in the recently decided case of *Benson* v. *Mayor and Borough Council of the Borough of Glen Ridge,* a case not yet reported,

that a very similar word, namely, "maintain," as applied to a road meant not merely a maintenance of such road in its original condition, but a maintenance commensurate with the changed use of it made by the public; and, therefore, might require a change in the character of the pavement. See the opinion of Justice Kalisch therein where he says:

> "The statute of 1871 devolves the duty on the borough to maintain the avenue as a public carriage road and that cannot mean, in the face of the natural order of the march of progress, to maintain the avenue only as a carriage road as it was when originally laid out and completed in 1871 and 1876, commensurate then with the volume and character of the public traffic, but reasonably must mean to maintain the avenue as a carriage road, through all time commensurate with the use made of it by public traffic. It is a matter of common knowledge that since the avenue was originally laid out and completed, public traffic has increased and the character of it has changed. The burdens on the highways have been augmented by the use of vehicles propelled by steam, electricity, etc., thereby affecting very much the wear and tear of the pavements of such highways. That being so the duty to maintain a public road suitable for and commensurate with the use made of it may necessarily require that a change in the pavement be made."

It has even been intimated by our Court of Errors and Appeals that the word "repair" may be held to include the improvement of a road by the laying of a new character of pavement, a *fortiori,* would the term "reconstruction" have such meaning?

In the case of *Freeholders* v. *Jersey City &c., St. Ry. Co.,* 85 N. J. L., 179, Justices Garrison, White and Minturn joined in concurring opinions with that of the Chief Justice, who lays down the rule that "repair" does not include "repave," such concurring opinions stating such a holding is unnecessary to the decision of the case, and that the case of *Dean* v. *Paterson* (*supra*) should be confined to its actual facts. The opinion of such concurring Justices is in part as follows:

> "But to hold that it decides that a new pavement is not a repair *where in fact it is necessary in order to repair,* is, as it seems to me, to give it an unwarranted extension. That question was not before the Court and did not receive that 'solemn argument and mature deliberation' which, according to Chancellor Kent, justifies the application of *stare decisis.* In the present case the new pavement is a repair. It is a repair because it is necessary in order adequately to repair. Traffic conditions have changed with the increase of population (doubtless largely induced by the installation of the trolley company's service and certainly to its financial benefit) so that the old dirt road cannot be made to answer the proper requirements of the present traffic. * * * As I view it, therefore, where, as here, a trolley company has acquired its franchise from a municipality on condition that it keep a certain defined portion of the streets occupied by its tracks in proper repair for public traffic, and by reason of natural increase in population and traffic it has become necessary to abandon the old form of surfacing and to put down an improved or better form of pave-

ment *in order to keep the street in such repair,* the trolley company may be compelled to put down such improved pavement. This view has been adopted in Pennsylvania and in New York (citing cases), and so far as I am able to find, is not in conflict with any decision in this state. I think it is controlling where a proper case exists and the proper ground is laid for its application."

That the extraordinary repairs or reconstruction contemplated in the present case are necessary to keep the street in repair is set forth conclusively in the return, by the resolution of May 10th, 1916, of the Board of Freeholders to the effect that "It is impossible to keep the same in good repairs with gravel during all seasons of the year."

To the same effect as the Board of Freeholders case, namely, that a repair may mean a repavement where necessary, see the cases of

State v. *Milwaukee R. R.* (Wis.), 139 N. W., 396;

Mayor v. *the H. B. R. R.,* 186 N. Y., 304 (76 N. E. 1972).

"The idea that, when the pavement of a street has become dilapidated and the city authorities have determined that a new and more enduring pavement should be put down, a street railway company which has agreed to maintain its portion of the street in repair can discharge that duty by patching up the old and perhaps out-of-date pavement year after year seems little short of absurd. * * * The result of such a construction is that the street railway may lawfully stand in the way of the progress of the municipality by insisting on patching

up an inferior kind of pavement within its zone, while the city has adopted a superior and relatively permanent pavement for the balance of the street.

"The question of what shall constitute keeping the pavement in the tracks of a railroad company in good order and repair is to be determined somewhat at least with reference to existing and surrounding conditions, and in our judgment it would be altogether too narrow a view to hold that where a municipality had, for sufficient reason, decided to pave a street with asphalt or other new pavement, a railroad might discharge its obligations to keep its part of the street in good order and repair by merely patching up a direct road or some species of pavement which had become antiquated and out of condition, and which was entirely different from that adopted in the remainder of the street."

Similar to these cases is that of the *City of New Berne* v. *Atlantic Railroad* (North Carolina), 75 S. E., 807. In that case the Court held that an obligation to keep a street in good order meant to pave or repave it with new material where necessary.

"The increase of population and the consequent growth of the city must necessarily have been within the purview of the parties at the time the contract was made. * * * It was never contemplated that the Railway would continue to exist and perform its functions in a cobblestone age. * * * The duties specified in its character were imposed with reference to the changes and improved methods of street pavement which experience might sanction

as superior to and more economical than the old methods."

Moreover, the case of *Ten Eyck* v. *Rector, etc.,* 20 N. Y. Supp., 157, has determined the meaning of the word extraordinary repairs. In that case a street was originally paved with cobbles and was repaved with Belgian blocks. The Court there held:

"The fact that a new pavement was put down after using the old pavement over thirty years, shows that it was an extraordinary repair. * * * The assessment was also for a public purpose of an extraordinary character, because of its amount. A repair costing that amount cannot be deemed ordinary. The assessment, therefore, was for a public purpose of an extraordinary character."

In the case of *American Bonding Co.* v. *Ottumwa,* 137 Fed., 572, it was held that mere resurfacing a road without changing its foundation is a repair, and not a reconstruction.

There are moreover a long line of cases in other states holding that where a road is rebuilt with a new kind of materials, and whether or not the foundation is changed, there is a reconstruction of such road.

In this number are the famous St. Louis Barber Asphalt Company cases, reported as follows:

Verdin v. *St. Louis* (Mo.) 33 S. W., 480;

Paving Company v. *Ullman,* 38 S. W., 458;

Bank v. *Woesten,* 48 S. W., 393;

Barber Asphalt Paving Co. v. *Hezel,* 56 S. W., 449.

In the first of these cases the opinion of the Court covers thirty-three pages. During the

course of such opinion the Court sets forth the character of the work as follows:

> "Ordinance No. 17, 151, provides for the reconstruction of Jefferson avenue, by the taking up and removing of the old pavement of the roadway, repairing a road-bed, removing and readjusting the curbing; laying of a pavement of the best quality of Trinidad Lake Asphalt on a concrete base."

In the case of *City of Covington* v. *Bullock,* 103 S. W., 276 (Ky.), the Court held that the resurfacing of a street with a new character of pavement where the foundation was left intact was a repair and not a reconstruction; inferring that if the foundation were changed the opposite would be true.

In the case of *Perkinson* v. *Schnake,* 83 S. W., 301, it was held reconstruction where a wooden block street was reconstructed with a vitrified brick surface.

In the case of *Fort Wayne R. R.* v. *Detroit,* 34 Mich., 78, it was held that reconstruction is equivalent to repavement under conditions where the old pavement was so worn that the ordinary repairs thereto would not be sufficient to make the same traversable.

There are many cases holding that the relaying of one sidewalk by another of a different character is a reconstruction, and not a repair.

See *Konowalski* v. *Buffalo,* 115, N. Y., Supp., 467;

Walker v. *Detroit,* 106 N. W., 1123.

It is, of course, clear from the above that the Courts of this country are not united in their views as to whether the ordinary word "repair" does, or may not have the same enlarged meaning as the word "reconstruction;" or whether

such word "repair" would, or would not include the laying of a different character of pavement. In fact the above citation from the case of *Freeholders* v. *Jersey City, &c. St. Ry. Co.* (*supra*) would apparently show that the doctrine of this very Court is not settled in that regard; but whatever view may be taken by the Court as to the relative meanings of the words "repair" and "reconstruction" it is obvious that the words "extraordinary repairs" have an entirely different meaning than the word "repairs;" and that in accordance with all of the above case the words "extraordinary repairs" and "reconstruction" would each accurately describe the improvement of White Horse Pike contemplated by the resolutions of the Board of Chosen Freeholders of the County of Atlantic passed on November 8th, 1916, and November 24th, 1916. Such contemplated improvement therefore both by reason of the history of legislation in this State and judicial construction of the terms used in such legislation by the Courts not only of this State, but of the whole country, show that the improvement contemplated in this case is duly and legally authorized by Chapter 122 of the Laws of 1914.

It might simply be added that to adopt the contention of the prosecutors-defendants that the work in question is not authorized by Chapter 122 of the Laws of 1914 would result in the following most disastrous consequences:

1. It is a matter of common knowledge as applied by Justice Kalisch in the case of *Benson* v. *Glen Ridge* (*supra*) and Justices Garrison, Minturn and White in the case of *Freeholders* v. *Jersey City &c. St. Ry Co.* (*supra*) that hundreds of miles of County roads in this State have been resurfaced under the provisions of

the 27th section of the Road Act (or Chapter 122 of the Laws of 1914) with material entirely different from that used in the original surface of the roads in question. All this work, the thousands of dollars expended upon it and the tremendous bond issues therefor, would be absolutely illegal and without authority in law if the contention of the prosecutors-respondents was adopted.

2. County roads telfordized, macadamized or surfaced with gravel or broken shells, must remain telford, macadam, gravel or shell roads, notwithstanding the fact that they are admittedly totally inadequate for the traffic imposed upon them by modern conditions, and the counties would be continually required to expend enormus sums of money in the resurfacing of them as such telford, macadam, gravel or shell roads year after year until further legislative relief might be granted.

II. The resolutions of the Board of Chosen Freeholders of the County of Atlantic, passed November 8th, 1916, and November 24th, 1916, validly authorized the improvement in question, the bond issue to pay therefor, and the award of a contract for such improvement to Liddle & Pfeiffer, the defendants-appellants.

Whether (a) the resolution of November 8th, 1916, be considered as valid, the condition therein contained as to the adoption of Chapter 285 of the Laws of 1916 being considered invalid, and surplusage; or whether (b) such resolution of November 8th, 1916, be considered as invalid by reason of the inclusion of the above invalid condition; or whether (c) the resolution of November 8th, 1916, be considered as valid

despite such condition, but reconsidered, rescinded and repealed by the resolution of November 24th, 1916; or whether (d) such resolution of November 8th, 1916, be considered as neither an award of the contract, nor a rejection of bids, the resolution of November 24th, 1916, being, therefore, a valid authorization of such award and such bond issue.

It is admitted by the defendants-respondents that the condition included in the resolution of the Board of Freeholders, passed November 8th, 1916, as to the dependency of such an award upon the adoption by the voters of Chapter 285 of the Laws of 1916, is ineffective, by reason of the fact that such condition was not stated in the public advertisement for bids for such public improvement.

Armitage v. *The Mayor, &c., of Newark,* 86 N. J. L., 5.

The question then is as to the legal effect of the invalidity of such condition. Such condition is as follows (C., p. 26):

> "Provided, further, that this award shall not be binding upon the Board of Freeholders of the County of Atlantic, nor shall any contract be entered into, nor any bonds offered for sale under resolution heretofore passed, to be issued for the purpose of paying for the contract herein mentioned, if Chapter 285 of the Laws of 1916 is adopted by the voters of this State at the election held November 7th, 1916; that in the event said law is adopted by the voters of this State, this award and all proceedings touching the work herein referred to, and the award of the bid shall be null and void."

The first part of such proviso merely attempts to invalidate the action taken under resolution

heretofore passed, to wit: preceding November 8th, 1916. Therefore, giving the utmost possible effect to so much of such conditions as far as the semi-colon therein, such portion of such condition would in nowise affect a subsequent award and a subsequent authorization for the issuance of bonds under a new resolution. This new award and this further authorization are found in the resolution passed by the Board of Freeholders on November 24th, 1916, and consequently so much of the aforesaid proviso up to and including the semi-colon is ineffective, and may be disregarded in these proceedings.

The portion thereof, which it is contended by the prosecutors-respondents is effective to invalidate the entire proceedings, is that which declares that the proceedings "touching the work herein referred to and the award of the bid shall be null and void."

The proceedings touching the work herein referred to are—

(1) The submission of plans and specifications by the Board of Chosen Freeholders showing the repairs or reconstruction contemplated;

(2) The failure of the Commissioner of Public Roads to set aside any State funds for such work;

(3) The advertisement for bids in two public newspapers etc.;

(4) The submission of such bids.

It is obvious that such are facts and facts indisputable. As such facts they cannot be avoided.

The full legal effect which can, therefore, be given to the use of the words "null" and "void" in such proviso in the resolution of the

Board of Chosen Freeholders is that such Board determined to make emphatic its then intention not to proceed with the work contemplated by such resolution if the Egan Act became effective.

It is clear that there are four, and but four, possible views which can be taken of the legal effect of this express intention of the Board of Chosen Freeholders as contained in the resolution of November 8th, 1916, in view of its subsequent resolution of November 24th, 1916.

(a) It may be contended that the aforesaid invalid condition was surplusage, and did not affect the validity of the remainder of the resolution awarding the contract and authorizing the bond issue; if so such resolution was, and has continued to be a valid award of such contract and authorization of such bond issue.

(b) It may be contended that the invalidity of the aforesaid condition may invalidate the entire resolution of November 8th, 1916; but if this is true the resolution of November 24th, 1916, was the first legally cognizable action taken by the Board in the above regard.

(c) It may be contended that the resolution of November 8th, 1916, with the aforesaid invalid condition, was valid, but became ineffective as an award upon the occurrence of the condition, but if such is the case the resolution of November 24th, 1916, was by its express terms a reconsideration, rescission or repeal of such resolution of November 8th, 1916, within the plenary power of the Board of Freeholders.

(d) It may be contended that such resolution of November 8th, 1916, including such invalid condition, could be neither an award of such contract, by reason of the inclusion of an unauthorized condition, nor a rejection of bids, since it did not in any way purport to be such;

but if so, the resolution of November 24th 1916, was a full authorization of the award of the contract and authorization of the bond issue.

These are the sole possible views that can be taken, and as will be shown below each leads to the same result, namely: that there is a valid award of the contract in question to Liddle & Pfeiffer, the defendants-appellants.

A. IF THE AFORESAID INVALID CONDITION WAS SURPLUSAGE AND DID NOT AFFECT THE VALIDITY OF THE REMAINDER OF THE RESOLUTION OF NOVEMBER 8th, 1916, AWARDING THE CONTRACT AND AUTHORIZING THE BOND ISSUE, SUCH RESOLUTION WAS, AND CONTINUES TO BE, A VALID AWARD OF SUCH CONTRACT.

As has been stated before, by reason of the case of *Armitage* v. *Mayor &c., of Newark* (*supra*), the condition purporting to nullify the proceedings antecedent to its passage in case Chapter 285 of the Laws of 1916 was adopted by the voters is itself a nullity.

It may be contended, however, that it has no direct and essential connection with the remainder of such resolution, since such resolution constituted an award of a contract to the lowest bidder, and an authorization of bond issue to pay the expenses of such contract, that such condition merely showed the intention of the Board of Chosen Freeholders not to proceed with such work in a certain contingency, but that since such Board could not have any such intention in the eye of the law its intention to actually award such work, and authorize such bond issue, would alone be considered and held valid, its illegal in-

tention to make such award and bond issue consequently being considered as surplusage.

If this view is taken, and it is merely suggested as one of the four possible views, it is obvious that the resolution of November 8th, 1916, considered irrespective of the surplus condition, constitutes a valid award of the contract to the defendants-appellants, and a valid authorization of a bond issue to pay therefor.

B. IF THE INVALIDITY OF THE AFORESAID CONDITION INVALIDATES THE ENTIRE RESOLUTION OF NOVEMBER 8TH, 1916, THE RESOLUTION OF NOVEMBER 24TH, 1916, WAS THE FIRST LEGALLY COGNIZABLE ACTION TAKEN BY THE BOARD IN THE ABOVE REGARD.

The aforesaid condition being invalid by reason of its not complying with the advertisement for bids, it may be contended that such invalidity affected the entire resolution. This would appear reasonable because it would apparently effectuate the actual intention of the Board of Chosen Freeholders at the time of the passage of such resolution, and yet would not give legal effect to an invalid condition. Such being the case—in other words the resolution of November 8th, 1916, being an absolute nullity, but the bids as a matter of fact having been actually opened at the time of such meeting—the resolution of November 24th, 1916, constitutes the first legally cognizable action in regard to the award of the contract to the defendants-appellants, and the authorization of a bond issue to pay therefor.

The contention is made by the prosecutors-respondents, and such contention has apparently received attention of the Court below, that the

course which should have been taken by the Board at the time fixed for receiving the bids was either to award the contract, reject the bids, or adjourn for another fixed time for further consideration of the award; and the Court below has cited Section 33 of the Crimes' Act (2 Compiled Statutes, page 1756, and P. L. 1913, page 366) in apparent support of this view.

We submit that this is, however, based upon a misconstruction, for the section of the Crimes Act first quoted is entitled "An act relating to the ensealing and recording of bids for public works or supplies by managers of State institutions or by governing officials of counties or cities of this State, and providing penalties for neglect of the same"; and such act nowhere provides in any way as to the time when awards of contracts shall be made by the governing officials of counties or cities, or the manner in which such awards shall be made, but merely provided for the time when and the manner in which bids for such contracts shall be received.

No question is raised as to the compliance by the Board of Chosen Freeholders with the statutes in regard to the reception of the bids in this case. Furthermore, the second statute above quoted (P. L. 1913, page 366) has no possible bearing upon this question, for the reason that it applies only to the award of contracts, the cost of which are to be *paid with State funds.* Obviously the cost of this contract is not to be paid with State funds. The provision of such act of 1913 merely is to the effect that the award of the contract shall be within three days of the time of the opening of the bids, such act of 1913 being itself an amendment of the original act, which provided that the award of the contract should be made on the same day as the opening of the bids. Thus it

is seen that practical experience has shown what is admittedly the practice among all public bodies that the award of the contract cannot be reasonably made upon the same day as the bids are opened, for the reason that the canvass of the bids, the determination of the lowest bidder, the consideration of his responsibility and various matters connected with the award of the contract required time for consideration. Moreover Chapter 342 of the Laws of 1912, the act providing for the advertisement for bids for contracts or agreements where the sum to be expended exceeds the sum of $500 in no way bears upon the time or manner of awarding the contract for the work, but only as to the method of advertisement for bids and the reception thereof.

Finally Chapter 122 of the Laws of 1914, under which this work was actually intended to be done, has no provision in regard to the time or manner of awarding the contract therefor, but merely provides that the governing body shall have power "To award a contract or contracts for such repairs or reconstruction, on bids duly advertised for in two public newspapers printed and circulating in such county, for two weeks successively at least once in each week before the date fixed therein for the receipt of bids."

It is, therefore, evident that there is no statutory requirement for the making of the award of the contract for the work in question at the time of the opening of the bids, and that there is a well recognized usage, and one recognized even in certain statutes, to the effect that the award should not be made at such time.

The authorities are uniform to this effect. As is well stated in McQuillin on Municipal Corporations, Volume 3, paragraph 1225, the rule is that "The officers need not pass on the bids

immediately on opening them, and before adjournment, but they may take a reasonable time, it seems, to consider them, in order to determine to whom the bid should be awarded."

The rule is similarly stated in Dillon on Municipal Corporations, Volume 2, paragraph 810, as follows: "After the bids have been opened, the officers of a city are entitled to reasonable time for comparison and the calculation necessary to enable them to ascertain who is the lowest or most favorable bidder."

In support of this rule these learned authors cite the cases of

Tingue v. *Port Chester,* 4 N. E., (N. Y.), 625, page 628.

Lilienthal v. *Yonkers,* 39 N. Y. Supp., 1037.

Ross v. *Stackhouse,* 16 N. E., 501. (Ind.)

City of Springfield v. *Weaver,* 37 S. W. (Mo.), 509.

McClain v. *McKisson,* 15 Ohio Circuit Ct., 517.

Manny v. *Cleveland,* 19 Ohio Circuit Ct., 58.

In the first of these cases proceedings by the trustees of the Village in improving a certain street were attacked on the ground, among others, that the trustees did not make the award of the contract at the proper time. The trustees opened the bids on the 22d of September, and did not take them up again until the 24th, at which time the award was made. In regard to such action the Court says:

> "It is evident that some time for comparison and calculation was essential to enable the trustees to ascertain which bid was most favorable."

The award was, therefore, upheld, and that case is even stronger than the present for the reason that the charter of the Village provided that after the bids were received "The trustees shall then determine" which should be accepted; the argument being advanced that the word "then" required an instant determination by them. This view was overruled, however, and the Court, as seen above, held that a reasonable time should be allowed depending upon the circumstances of the case.

To the same effect is the case second above quoted, except that the city charter in that case did not include the word "then." In other words, the charter was on all fours in that respect with Chapter 122 of P. L. 1914, under which the work was done in this case. The Court says, referring to the Port Chester case:

> "If the contention that the trustees of the Village of Port Chester were bound to determine the most favorable proposal immediately upon the opening of the bids, and before adjournment, could not be sustained under the language of the charter of that village, a similar contention based upon the provisions of the defendant's charter must *certainly* be overruled."

In like manner the contention of the prosecutors-respondents in this case must certainly be overruled.

The case of *Ross* v. *Stackhouse* is even stronger. In that case the improvement of a certain street was attacked. The Common Council rejected the bids for the work on December 18th, 1882; almost two months afterwards, on February 5th, 1883, the Council reconsidered its action and let the contract to one Ross, whose bid had originally been rejected.

It was argued that the proceedings of the Common Council were void because "having once exercised the right of decision by rejecting all bids, and then adjourning regularly, it is insisted that its power to let the work was thereby exhausted, and that it could not proceed without ordering a new advertisement." In that regard the Court says:

> "It is settled that where the act or decision of a Common Council or other similar body is done or made in pursuance of notice which the law requires, and is, in its nature, such as to adjudicate upon or determine or affect the substantial personal or property rights of those notified, a decision once rendered cannot ordinarily be rescinded or set aside. This rule has no application, however, to matters of a merely administrative or legislative character. Bodies having cognizance of such subjects may modify, repeal, or reconsider their action in regard to matters of that nature at any time, provided the vested rights of others are not thereby affected. Over such matters they exercise a continuing power. * * * The matter of accepting or rejecting bids, and of letting the contract, is purely administrative in character, depending entirely upon the discretion of the Common Council. * * * The right to reconsider measures, in pursuance of rules adopted for its government, inheres in everybody possessed of legislative power; and unless such right be exercised unreasonably and for a fraudulent purpose, to the injury of the complaining party, courts cannot interfere. It does not appear but that the Council, in reconsidering its previous vote, proceeded in strict conformity it its rules; and, as no rights had attached,

we can perceive no sufficient reason for holding its proceedings void."

To the same effect is the case of *City of Springfield* v. *Weaver,* where the Council first awarded a contract to one Reilly on February 2d; on May 3d annulled such award, and on May 17th reconsidered such annulment and entered into a contract with the said Reilly. In this regard the Court says:

> "The council had the undoubted power to a subsequent meeting to reconsider and rescind the order rejecting the bid of Reilly, and thereafter to accept his bid, and let the contract to him."

In the case of *McClain* v. *McKisson* (*supra*) on January 20th, 1896, the City Council of Cleveland rejected all bids for certain municipal work. On January 27th it reconsidered such action and awarded the contract. After discussing the well-settled rule, as will be shown *infra,* that a municipal body has the right to reconsider its action either at the same or at a subsequent meeting the Court says:

> "The motion to reject all bids, did not dispose of the matter before the council so fully that it could not reconsider. There is no such limitation in the law, and authorities, so far as we have seen any upon the subject, are that the council, after rejecting all bids, may reconsider that vote, and award the contract; or, if the contract is awarded to a bidder, and he refuses or fails to enter into the same, the council may thereafter award the contract to another bidder."

In the case of *Kinsell* v. *The City of Auburn,* 7 N. Y. Supp., 317, the Court held that the Common Council of the city after having awarded a

contract to the lowest bidder, who, however, failed to enter into the same, might at the next meeting reconsider such award, and award the contract to the next lowest bidder.

This is the same in theory as the case at bar. For in the present case the award was made to the defendants-appellants, but it is contended by the prosecutors-respondents that they failed or were unable to enter into the contract in accordance with such award due to a condition contained therein. Thereupon the Council had the right, under the authority of the above cases, to make a new award to a bidder. Inasmuch as the failure to enter into a valid contract was due, in the present case, not to any fault of the defendants-appellants of course the award had to be made to them, instead of to the next lowest bidder; but the theory is the same and the reaward by the resolution of November 24th, 1916, was legal.

Moreover the present case is clearly not one, as will be seen hereafter, where the bids have all been rejected. Therefore, it is quite unnecessary for this Court to go even as far as the Courts of Ohio, Indiana and Missouri have in this regard, but it is apparent from the above decisions that the rule is settled that a reasonable time may, and under ordinary circumstances should elapse between the time of opening the bids and the making of the actual award. This is what has occurred in this case, and the resolution of November 24th, 1916, awarding the contract to the defendants-appellants, Liddle & Pfeiffer, is therefore legal.

It is consequently clear that adopting, for the sake of argument, the second view that the invalidity of the condition in the resolution of November 8th, 1916, made such resolution entirely a nullity, such cannot act in any way to

affect what is otherwise a valid award of the contract and authorization of the bond issue by the resolution of November 24th, 1916.

C. IF THE RESOLUTION OF NOVEMBER 8TH, 1916, INCLUDING ITS CONDITION, IS VALID AND EFFECTIVE, IT WAS RECONSIDERED, RESCINDED AND REPEALED BY THE RESOLUTION OF NOVEMBER 24TH, 1916, WHICH CONSTITUTES A VALID AWARD OF THE CONTRACT AND AUTHORIZATION OF THE BOND ISSUE.

Assuming that the Board of Chosen Freeholders could legally have intended to award the contract to the defendants-appellants only upon the condition that Chapter 285 of the Laws of 1916 was not adopted by the voters, it would appear that in accordance not only with parliamentary law, but the decisions of this State, such intntion might be reconsidered and such resolution rescinded or repealed in the same way as any other intention of such Board. In fact the rules of the Board of Chosen Freeholders themselves show exactly how such reconsideration of measures is to be taken up by it.

In rule 5 thereof (Pamphlet 1912) it is provided that

> "All discussions (questions) shall be considered by parliamentary rules as accepted and in force in the Legislature of New Jersey."

By rule 30 of the House of Assembly of the State of New Jersey, Session of 1916, it is provided that

> "When a motion has been once made and carried in the affirmative or negative it shall be in order for any member who voted with

> the prevailing party to move for the reconsideration thereof on the same day or the next day of actual session of the House thereafter."

The meeting of November 24th was "the next day of actual session" of the Board of Chosen Freeholders. Mr. Shackleford voted originally in favor of the resolution of November 8th, and he it was who moved for the resolution of November 24th reconsidering the action of November 8th.

This rule as to reconsideration is also well settled generally. See

Cushing Law & Practice of Legislative Assemblies, Par. 1266.

> "When there is no special rule on the subject a motion to reconsider may be made at any time by any member precisely like any other motion, and subject to no other rules."

See also *Dillon on Municipal Corporations,* Vol. 2, par. 539:

> "At any time before the rights of third parties have vested the council or other corporate body may, if consistent with its charter and rules of action, rescind previous votes and orders."
>
> Citing *Rock* v. *Rochester,* 5 Lansing, 11;
> *Red* v. *Augusta,* 25 Ga., 386;
> *Mitchell Company* v. *Horton,* 75 Iowa, 271;
> *Adkins* v. *Toledo,* 27 Ohio Cir. Ct., 417;
> *Whitney* v. *Hudson,* 69 Mich, 189;
> *Beach* v. *Kent,* 142 Mich., 347.

See to the same effect the case of *McClain* v. *McKisson* (*supra*) where the Court enters into a lengthy discussion as to the right of a municipal body to reconsider its action, citing with approval the above rule from Dillon.

Applying that rule to this case it is evident that rights have vested in no third parties, with the exception of the possible vesting in Liddle & Pfeiffer, the defendants-appellants herein, to whom the contract was awarded. Of course, if it appears that they have vested rights no further discussion is needed. If, on the other hand, the argument of the prosecutors-respondents is adopted, that the resolution of November 8th, 1916, did not vest any rights in them, such resolution obviously vested no rights in anyone else; and, therefore, in accordance with the above rules of the Board of Chosen Freeholders, the House of Assembly and all the cases upon the subject, the Board had the clear right to reconsider its action, as it did on November 24th, 1916, and validly award the contract to the defendants-appellants.

That the Courts will not technically regard the reconsideration of matters by Legislative bodies in accordance with strict parliamentary usage, see the cases of

Oakley v. *Atlantic City,* 63 N. J. L., 127;
Lake v. *Ocean City* (*supra*).

The resolution of November 24th, even if not strictly speaking a reconsideration, is clearly a rescission of the previous action on the proviso in the resolution of November 8th; and, therefore, culminates in valid proceedings ending in the award of the contract to the defendants-appellants, Liddle & Pfeiffer conditioned merely upon the sale and delivery of the bonds.

Assuming that the resolution of November 8th, or the second part thereof, constitutes a repealer of the proceedings anterior thereto, the resolution of November 24th coming within the rules above set down constitutes a repeal of such repealer which, therefore, in accordance with the well-established law revives such anterior proceedings.

D. IF THE RESOLUTION OF NOVEMBER 8TH, 1916, INCLUDED AN INVALID CONDITION IT COULD NOT BE A VALID AWARD, NOR COULD IT BE A REJECTION OF ALL THE BIDS BY ITS VERY TERMS, THEREFORE THE RESOLUTION OF NOVEMBER 24TH, 1916, CONSTITUTED THE FIRST LEGALLY COGNIZABLE ACTION UPON SUCH CONTRACT AND AUTHORIZATION OF SUCH BOND ISSUE.

As aforesaid the condition as to the validity of the award, depending upon the adoption of Chapter 285 of the Laws of 1916, is invalid. As aforesaid it may be contended that such invalidity affected the entire resolution, or at least affected the validity of the attempted award with which it was directly connected, so that such resolution could not constitute a valid award of the contract.

Armitage v. *Mayor, &c., of Newark* (*supra*).

Likewise such resolution could not constitute a rejection of all of the bids, for the reason that the very terms of such resolution repel any such meaning, such resolution purporting to award a contract to one bidder although conditionally, and to authorize a bond issue to pay for the improvement to be carried out by such bidder, an expression of intention exactly the converse of a rejection of all bids. The Board of Chosen Freeholders took an entirely opposite procedure from one of rejecting the bids on account of informality, irregularity, fraud or other reason appealing to its sound discretion, and proceeded to make a direct award to those who were actually the lowest bidders. Such award was merely made contingent upon the arising of a condition when it would not seem to it wise to

proceed with such improvement, for the reason that such condition (the adoption of the Act of 1916 by the voters) would place the expense of such improvement not upon them, but upon the State as a whole.

And again, if such resolution of November 8th 1916, could be considered as evincing an intention to reject all bids, nevertheless such could be validly reconsidered or rescinded and a valid award made by the resolution of November 24th, 1916.

See the cases of *Ross* v. *Stackhouse* (*supra*).
City of Springfield v. *Weaver* (*supra*).
McClain v. *McKisson* (*supra*).
Manny v. *Cleveland* (*supra*).

On November 24th, 1916, the Board met again, and then took the action which it was its duty to take, and the action which it had the legal power to take, as clearly seen above, by determing to award the contract to the defendants-appellants, and not to reject their bid. Meanwhile no action had been taken by such defendants-appellants to withdraw their bid, which was, of course, a continuing one, and subject to acceptance by the Board.

Such later resolution, therefore, constituted such valid acceptance and valid authorization of the bond issue, the power to enact such resolution at such time being clearly shown above.

Therefore, it would seem that adopting any of the four possible views as to the effect of the resolutions of November 8th, 1916, and November 24th, 1916, that the same result is reached, namely, that there has been a valid award to the defendants-appellants and a valid authorization of a bond issue to pay for such public improvement.

We would call the attention of the Court to the fact that at the end of Section 2 of the respondents' Points they say "So far as the record shows the call for the special meeting of November 24th was not legal

It is submitted in the first place, that this Point was not raised in anyway by the reasons alleged on the part of the prosecutors for setting aside of the resolutions in the lower Court, nor was such in anyway considered by the lower Court, and that such, therefore, cannot be even raised before this Court. Such is fundamental.

Furthermore, if

The prosecutors-respondents have contended, and the Court below has apparently given credence to the argument that (C. p.) "two views are permissible, one that the award never had any legal vitality because of the condition imposed; and the other, that having had vitality it was lost when the fact appeared, that, the Egan Act had been adopted. * * * The award of November 8th was something or nothing. If something, it was final—if nothing, it could not be revived by the action on November 24th."

This appears forceful on first reading, but in view of the above reasoning is shown to be clearly fallacious.

As aforesaid, assuming that the award never had any legal vitality—in other words, that the resolution of November 8th, 1916, was nothing—as shown above the resolution of November 24th, 1916, constituted a proper and the first legally cognizable action awarding the contract and authorizing the bond issue; or assuming that the award had legal vitality, but that the same had been lost when it appeared that the Egan Act had been adopted—in other words, that the resolution of November 8th, 1916, was something—it is equally clear that that something was not final but could be reconsidered or rescinded by the Board in accordance with the well settled rules of parliamentary law, and the decisions of this State. Nor does the view taken by the prosecutors-respondents, or the Court below, take any cognizance at all of the question as to whether since the condition aforesaid is admittedly illegal, it is in itself a nullity and the remainder of the resolution valid and a valid award without any regard whatsoever to the resolution of November 24th, 1916.

It is, therefore, submitted that from every conceivable point of view there has been, and is a valid award of a contract to the defendants-appellants, and a valid authorization of a bond issue to pay for the improvement contemplated thereby.

III. The advertisement preceding the award of such contract and the authorizing of such bond issue was due and legal.

There is no question raised but that the advertisement, as stipulated (C. p. 35) would constitute a valid advertisement preceding the reception of bids had the award been legally made on November 8th, 1916. The only question raised is whether such advertisement is legal in so far as the resolution of November 24th, 1916, is concerned. Therefore, if the Court adopts the view that the resolution of November 8th, 1916, constituted a legal award this point need not further be considered. If, on the other hand, the Court adopts the view that the resolution of November 24th, 1916, constituted a legal award it is obvious, for the reason stated in subdivision II of this Brief, that such advertisement either was never effected in anyway by the resolution of November 8th, 1916, or was legally revived by the repealer of a repealer, or reconsideration as contained in the resolution of November 24th, 1916; and, therefore, constitutes a legal advertisement preceding such later resolution.

IV. The resolutions of November 8th, 1916, and November 24th, 1916, were validly passed before the Board of Chosen Freeholders had in hand the money to pay for the improvements contemplated thereby, because (A) it is expressly provided in such resolutions that "Such contract shall not be entered into between the parties unless the bonds to be issued for the purpose of paying for such extraordinary repairs shall have been sold and delivered, and the moneys received therefor"; and (B) it was unnecessary for the money to be in hand before the award of the contract for the work contemplated thereby.

A. IT IS EXPRESSLY PROVIDED IN THE RESOLUTION OF NOVEMBER 8TH, 1916, (C. p. 21), THAT THE CONTRACT IS AWARDED TO LIDDLE & PFEIFFER "PROVIDED, HOWEVER, THAT SUCH CONTRACT SHALL NOT BE ENTERED INTO BETWEEN THE PARTIES UNLESS THE BONDS TO BE ISSUED FOR THE PURPOSE OF PAYING FOR SUCH EXTRAORDINARY REPAIRS SHALL HAVE BEEN SOLD AND DELIVERED, AND THE MONEYS RECEIVED THEREFOR."

It is further provided in the resolution of November 24th, 1916, (C. p. 30) that the contract is awarded to Liddle & Pfeiffer "subject only to the proviso that said contract be awarded upon the condition that the county shall be able to issue, sell and deliver the bonds heretofore authorized to be delivered, and the receipt of the money therefor."

Similar provisions were inserted in the advertisement (C. p. 35) and there is, therefore, no question but that it was the intention of the Board to make the award of the contract con-

ditioned upon the sale and delivery of the bonds, and the receipt of the purchase price thereof, and that such intention was made in all ways public.

B. IT WAS UNNECESSARY FOR THE MONEY TO BE IN HAND BEFORE THE AWARD OF THE CONTRACT FOR THE WORK CONTEMPLATED THEREBY.

Furthermore assuming, for the sake of argument, that no provision was made for the sale and delivery of the bonds, and the receipt of the money therefrom previous to the award of the contract, such sale, delivery and receipt were not legal conditions precedent to the awarding of such contract.

There are certain cases, specifically those of *Atlantic City Water Works* v. *Reed,* 50 N. J. L., 665, and *Humphreys* v. *Bayonne,* 55 N. J. L., 241, holding that a municipality must have the funds in hand, or the means to provide the same, before a municipal contract can be entered into.

These cases, neither of them, however, concern bond issues in any way, and the municipality in such cases was without power to pay for such municipal contracts, except out of actual cash in hand.

On the other hand the cases of *Niles* v. *Board of Education,* 70 N. J. L., 1, and *Hurley* v. *Trenton,* 66 N. J. L., 568, and *Bew* v. *Ventnor City,* 81 N. J. L., 207, do concern bond issues, but the provisions of the laws relating thereto were in effect that the improvement contracted for should be paid for "Out of the proceeds of the sale of the bonds" thereby compelling the Court to hold that such issue and sale must occur before awarding the contract. On the other hand the provisions of the Pierson Act, P. L. 1916,

page 525, section 13, under which this bond issue is sought to be authorized, specifically sets forth the usual and reasonable means for the financing of large municipal improvements by the issuance of temporary improvement notes or temporary improvement bonds, these notes or bonds to be refunded by the issuance of permanent bonds after the actual cost of such improvement is determined.

It is consequently apparent that the Board of Freeholders could have delayed the issuance of its permanent bonds until after the completion of the improvement itself, in fact the total cost of such improvement could not be determined until after the completion of the work due to the possibilities of default by the contractor, unforeseen construction difficulties, &c.

For the above reasons it would seem, therefore, in the first place that the Board of Freeholders have not actually awarded the contract, except upon the condition that the bonds issued for the payment thereof be first sold and delivered, and the money received therfor; and second, that if such contract has been awarded without such provision that such provision is legally unnecessary as a condition precedent.

V. Chapter 122 of the Laws of 1914, under the provisions of which this work is sought to be authorized, is constitutional and due and legal authority for the carrying out of such work.

(a) It does not contravene the constitutional provision as to necessitating the embodiment in it of any law expressly provided to be applicable thereto.

(b) Its title is constitutional.

A. IT DOES NOT CONTRAVENE THE CONSTITUTIONAL PROVISION AS TO NECESSITATING THE EMBODIMENT IN IT OF ANY LAW EXPRESSLY PROVIDED TO BE APPLICABLE THERETO.

The portion of P. L. 1914, page 203, referred to is as follows:

> "Whenever any county road in this State now is or hereafter may be in need of extraordinary repairs or reconstruction and the board of chosen freeholders of such county shall submit plans and specifications, prepared by the county engineer of such county, showing the repairs or reconstruction contemplated under the provisions of an act entitled 'An act to provide for the permanent improvement and maintenance of public roads in this State (Revision of 1912)' approved April fifteenth, one thousand nine hundred and twelve, and the supplements thereto and amendments thereof, and the said Commissioner of Public Roads shall fail within thirty days after the submission to him of such plans and specifications, to set aside any State funds for such work as in said act provided, it shall thereafter be lawful for such board of chosen freeholders to repair or reconstruct such road or roads to pay the entire cost of such repairs or reconstruction and to award a contract or contracts for such repairs or reconstruction, on bids duly advertised for in two public newspapers printed and circulating in said county, for two weeks successively, at least once in each week, before the date fixed therein for the receipt of bids and such road or roads shall be repaired or reconstructed under the supervision of the county engineer of such county."

The provision of the Constitution of the State of New Jersey referred to is as follows:

> "No law shall be revived or amended by reference to its title only, but the act revived or the sections amended, shall be inserted at length, also that no act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of the act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act."

The 1914 act clearly does not come within the words of such provision of the constitution, for the reason that it does not in any way provide that the 1912 Road Act "shall be made or deemed a part" of the 1914 act, nor does it enact that such 1912 act "shall be applicable" to such 1914 act. The 1914 act merely provides that where certain proceedings have been taken showing that certain repairs or reconstruction of roads, similar to the repairs or reconstruction referred to in the 1912 Road Act, would be advisable, and the Commissioner of Public Roads shall fail to set aside State funds for such work that the Board of Chosen Freeholders shall themselves have the power to repair or reconstruct such roads. Such clearly does not make the 1912 act a part of the 1914, for the reason that the 1914 act covers proceedings entirely different from the 1912 act, and under a set of circumstances where the 1912 act will be of no avail; nor is the 1912 act applicable in any way to the 1914 act for the very same reason that none of its provisions can be availed of in the event that the Commissioner of Public Roads shall fail to set aside funds for the work provided for—in other words, the 1912 act is effective in exactly the opposite situation,

namely, where the 1912 act is not applicable; and that was the very purpose of its passage. The only reason for the insertion of the title of the 1912 is to concisely set forth the facts constituting a condition precedent to the applicability of the 1914 act. The Legislature might as well have said "If you cannot do your work under the 1912 act then you may do it under this, the 1914 act." Such would obviously from the very purpose of its passage show that the sections of the 1912 act should not be inserted in the 1914 act. This view finds ready support in the cases of

Evernham v. *Hulit,* 45 N. J. L., 53;

Campbell v. *Board of Pharmacy of N. J.,* 45 N. J. L., 241;

The Bradley & Currier Co. v. *Loving,* 54 N. J. L., 227;

People v. *Banks,* 67 N. Y., 568;

Swartwort v. *Mich. Cent. R. R. Co.,* 24 Mich., 389;

People v. *Mahoney,* 13 Mich., 481.

The true rule as to the construction of the above constitutional provision is set forth by Depue, *J.,* in the case of *Evernham* v. *Hulit* (*supra*) as follows:

> "A construction of this constitutional provision which would sustain the contention of the plaintiff in certiorari would lead to the most embarrassing results. It would be equivalent to holding that the Legislature can pass no act changing any part of the statute law in force in this State without re-enacting at length every section in the whole body of existing statutes that might be affected by the new legislation. Since the constitutional amendments went into effect in 1875, a considerable number of acts have been passed designed to simplify and

make more efficacious the mode of making and collecting assessments for local improvements in the municipalities of this State. These were subjects specially provided for in sections contained in their several acts of incorporation. General acts have also been passed providing for the assessments, collection and lien of taxes—subjects specially provided for in sections incorporating cities, towns and townships, as well as in several parts of the general tax law of the State. In many instances provisions of this kind are contained in long sections in which it is usual to express and define the general powers of corporations. If this constitutional provision has made it necessary to the validity of a new statute on the subject that every prior statute on the same subject which may be altered or modified should be inserted in it at length, it would be quite impossible to legislate at all on the subjects mentioned, or on kindred subjects, for a statute which would comply with such a requirement would probably be obnoxious to that other provision of the constitution, that every law should embrace but one object, and that object should be expressed in its title."

See also the opinion of the same Justice in the case of *Campbell* v. *Board of Pharmacy of New Jersey* (*supra*) as follows:

"We think the construction of the constitutional provision contended for is unwarranted. The act does not provide expressly that any existing law or part thereof shall be deemed part of the act or be applicable to it. In legal effect, it simply provides that suits for penalties under the act shall be prosecuted as actions *qui tam* are prosecuted under the laws of this State.

> The enacting clause, which defines the offense and prescribes the penalty, is not in any way enlarged or qualified by the superadded words. The latter relate only to the practice and procedure by which suits for penalties incurred under the act are to be governed."

See also the rule as laid down in the Court of Appeals in New York applicable to the constitution of that State similar to the one in New Jersey; such rule being set out in the case of *People* v. *Banks* (*supra*):

> "It is not necessary, in order to avoid a conflict with this article of the constitution, to re-enact general laws whenever it is necessary to resort to them to carry into effect a special statute. Such cases are not within the letter or spirit of the constitution, or the mischief intended to be remedied. By such a reference the general statute is not incorporated into or made a part of the special statute. The right is given, the duty declared or burden imposed by the special statute, but the enforcement of the right or duty and the final imposition of the burdens are directed to be in the form and by the proceedure given by the other and general laws of the State. Reference is made to such laws, not to affect or qualify the substance of the legislation or vary the terms of the act, but merely for the execution of the law."

B. ITS TITLE IS CONSTITUTIONAL.

The only objection which can conceivably be made to the title of said act is that two objects are therein expressed; one to repair or reconstruct county roads, and the second to issue bonds to pay therefor.

The title to such act is as follows: "An act to authorize the Board of Chosen Freeholders of any County, in this State, to repair or reconstruct county roads, and to issue bonds in payment of the cost thereof."

The provision of the section of the constitution of the State of New Jersey in question is as follows: "To avoid improper influence which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object and that shall be expressed in the title."

It would seem too clear for argument that the provisions of the act, and the portion of its title relating to the issue of bonds to pay for the cost of the improvement authorized, were simply necessary part and incident to the authorization of such work; a mere step in the procedure; and, therefore, in accordance with the decisions above cited not unconstitutional.

Furthermore see the cases of

Bumsted v. *Govern,* 47 N. J. L., 368;

The State ex rel. Walter v. *Union,* 33 N. J. L., 350;

Gifford v. *N. J. R. R. Co.,* 2 Stock., 172;

The Easton & Amboy R. R. Co. v. The Central R. R. Co. of N. J., 52 N. J. L., 267;

State, Bergen County Savings Bank, prosecutor, v. *Union,* 44 N. J. L., 599;

Onderdonk v. *Plainfield,* 42 N. J. L., 480.

Justice Dixon in the case of *Bumsted* v. *Govern* (*supra*) says:

> "It is on all hands agreed that its purpose is to require the title of a bill to be such as will inform the public and the members of the Legislature of the object of the enactment, and that this purpose is accomplished when the title fairly indicates the general

object, although it does not indicate the means or method of attaining this object. In considering whether the title of an act meets this requirement, it must be presupposed that the Legislature and the public are cognizant of the public laws touching the subject on which the intended statute is to operate."

Justice Van Syckle, in the case of *The State, ex rel. Walter* v. *Union* (*supra*) says:

"The object of this provision is to prevent surprise upon legislatures by the passage of bills, the object of which is not indicated by their titles, and also to prevent the combination of two or more distinct and unconnected matters in the same bill."

In the case of *The Easton & Amboy R. R. Co.* v. *The Central R. R. Co.* (*supra*) the Court says:

"The general object of the act being ascertained, the Legislature may include provisions of a multiform character, designed to carry into execution the legislative purpose, which are not inconsistent with or foreign to the general object of the act."

VI. The bond issue contemplated by the provisions of the resolutions of November 8th, 1916, and November 24th, 1916, are duly authorized by virtue of the provisions of the so-called Pierson Municipal Bonding Act (P. L. 1916, page 525).

The return (C. p. 22) sets forth in detail the resolution authorizing the bond issue, such resolution showing that in all details such resolution is authorized in accordance with the so-called Pierson Municipal Bonding Act (P. L. 1916, page 525).

The objection raised to such bond issue is that it is not in accordance with either the Road Act of 1912, or Chapter 122 of the Laws of 1914. It was not intended by the Board of Chosen Freeholders that such bond issue should have been in accord with the provisions of either of said acts, for the reason that the so-called Pierson Municipal Bonding Act provides, and is considered by the municipalities of this State, to provide the present sole and general means, absolutely comprehensive in its scope, for the issuance of municipal bonds for all municipal purposes, and supersedes the provisions of preceding acts insofar as they attempt to authorize similar bond issues.

The title of such Pierson Act itself shows the intent of the Legislature. "An act to authorize and regulate the issuance of bonds and other obligations, and the incurring of indebtedness by county, city, borough, village, town, township or any municipality governed by an improvement commission."

The repealer section (section 14 of such act, page 539), leaves no doubt whatsoever as to the effect of the act. Therein it is provided "This act shall take effect immediately, and shall supersede the provisions of all other laws relating to the subject matters hereof, except as otherwise expressly stated herein."

It is to be noted that the Pierson Act is not to supersede the provisions of all other laws relating to the subject matter hereof, but the subject matters hereof, thereby showing conclusively that all other acts governing bond issues for any of the matters covered by the Pierson Act are superseded.

The Pierson Act expressly covers bond issues for road improvement (see page 530, section 4,

sub-section 1, sub-sub-section L., sub-sub-sub-section C of such act). Also sub-sub-section U.

The Courts of this State have well settled the rule in regard to repeals by implication. Perhaps the leading case on this subject is that of *Freeholders of Essex* v. *Park Commission,* 62 N. J. L., 376 (Ct. of Errors & Appeals) where the Court says:

> "Where the later and earlier act have similar or even cognate objects the intention to modify or supersede finds a more ready acceptance. Where, however, the two deal with subjects entirely foreign, the other to the other, so that the later act would, as it were, wrest an incidental feature of the earlier act from its previous setting, some more substantial support is demanded than is derived from the mere fact that such a thing is possible. Some affirmative indication should appear."

See also the case of *Industrial School District* v. *Whitehead,* 13 N. J. Eq., 290, where the Court says:

> "Every statute is by implication a repeal of all prior statutes, so far as it is repugnant thereto. And if the subsequent statute be not repugnant in all its provisions to a prior one, yet if it was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act. But the repeal of the statute by implication is not favored. Unless the latter statute is manifestly inconsistent with and repugnant to the former, both remain in force. Courts are bound to uphold the prior law if the two may subsist together. The matter must be so clearly repugnant that it necessarily implies a negative. (Citing

Beals *vs.* Hale, 4 How., 437; 1 Blackstone Com. 89)."

The cases of *State, Mayor, &c., of New Brunswick* v. *Williamson, Collector of North Brunswick,* 44 N. J. L., 165; and *State, Morris & Essex R. R. Co.* v. *Commissioner of Railroad Taxation,* 37 N. J. L., 228, are also instructive, as is also the case of *Great Central Gas Consumers Co.* v. *Clarke,* 13 C. B. (N. S.) 838 (143 Eng. Rep., 331). The Court says:

> Although that section is not in terms repealed, yet it becomes a clause in a private act of parliament quite inconsistent with a clause in a subsequent public act. That is sufficient to get rid of the clause in the private act. Looking at the 19th section of the general act, we think it is impossible to read it otherwise than as repealing the 24th section of the private act."

It would, therefore, clearly appear that the Pierson Act, under which the bonds in this case actually have been issued, is the sole authority for such issue, and that such bond issue in accordance with the provisions of such act is, therefore, valid.

Conclusion.

We urge upon the consideration of the Court that the objections relied upon by the prosecutors-respondents to prevent the Board of Chosen Freeholders of the County of Atlantic from proceeding with the work initiated in the proceedings under review are of the most technical character. The work itself, the hard surfacing of the White Horse Pike, is of extreme importance to the citizens of Atlantic County as well as to the whole State, as declared by the resolu-

tion of the Board of Freeholders. The White Horse Pike is the main artery of travel between Atlantic City and Camden and Philadelphia, and it is not subject to question that it is in urgent need of repair, so that it may be used at all seasons of the year.

It is manifest that public work of this importance should not be delayed or hindered, except under most weighty considerations. No fraud or misconduct is alleged in this case, and it is apparent from the proceedings that great care has been taken to surround the awarding of the contract with all the safeguards imposed by the statutes and business prudence.

There is no complaint that any person, contractor or taxpayer has been injured, and in view of the fact that it is common knowledge that the prices of labor and material are continually rising, it is manifest that the taxpayers of Atlantic County will undoubtedly be called upon to pay a greater sum for this needed work if new proceedings must be initiated and a new contract awarded.

As to the defendants-appellants, Liddle & Pfeiffer, there is no question but that they submitted their bid in absolute good faith; that their bid was the lowest, and that their bid was actually accepted by the Board of Freeholders whether under mistake of law, or not, and the award of the contract made to them.

Under these circumstances the decision of the Supreme Court in the case of *Atlantic Gas & Water Co.* v. *Atlantic City,* 73 N. J. L., 360, on certiorari, is extremely pertinent. In that case the prosecutor sought, both as a taxpayer and as a bidder, to set aside a resolution of the City Council of Atlantic City awarding a contract for street lighting to the Consumers' Gas and Light Company. Various grounds were set up for the

invalidity of such resolution, including among them the fact that the advertisement for bids was improper. It furthermore appeared that the award had actually been made to the lowest bidder. The Court after showing that the prosecutor as a bidder suffered no injury, then said:

> "As a taxpayer the prosecutor has a different standing, viz., as the representative in theory of the taxpaying interest of the city, but the bid that the prosecutor is attacking was lower than its own bid, hence the interests of the taxpayers would not apparently be advanced by the success of such attack. Certiorari is a discretionary writ, hence a prosecutor who only in theory represents the taxpayers of a city should not be permitted to work an injury to them in point of fact."

Such is this case. No fraud is alleged. Mere technical irregularities are relied upon to defeat the award. The work is clearly necessary for the welfare of Atlantic County, and the award has been made to the lowest bidders therefore.

In view of the fact that the prosecutors-respondents as taxpayers, which they purport to be, are in no way specially injured, and that hardship will result to Atlantic County if the proceedings are set aside, we respectfully submit that the order of the lower Court be reversed, and the proceedings of such Board, including award to the defendants-appellants, be affirmed.

Respectfully submitted,

EMERSON L. RICHARDS,
Attorney for Appellants.

RIKER & RIKER,
Of Counsel.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals

CARLTON GODFREY ET AL.,
Prosecutors-Respondents,
vs.
BOARD OF CHOSEN FREEHOLDERS ET AL.,
Defendants-Appellants.

On Appeal from Supreme Court.

Respondents' Points.

I.

THE WORK REQUIRED TO BE DONE UNDER THE CONTRACT IS NOT REPAIRS, EXTRAORDINARY REPAIRS OR RECONSTRUCTION.

Appellants admit that the only act which authorizes the award under review is the Act of 1914 at page 203. The title provides for repair or reconstruction of county roads, and the body of the act refers to extraordinary repairs or reconstruction. Whether repairs and reconstruction are intended as synonymous terms is, we think of little or no moment. Throughout the resolutions the Freeholders sought to make the work extraordinary repairs, although there are frequent contradictions by reference to permanent improvement.

We submit that the work is the building of a new road or a permanent improvement. The amount to be expended suggests this, if it does not of itself compel such conclusion. The work to be done is continuous for a distance of about twenty-eight miles and it is the laying of a loose stone base with sand, covered by a hard surface pavement known as "Warrenite," and it is to be eighteen feet wide on a road presently 30 feet wide built of gravel. To say that this is either repairs, extraordinary repairs or reconstruction is a misuse of words. Whether reference be had to the dictionary or to adjudicated cases, the position of the appellants is untenable. That the Legislature intended to make a plain distinction between the building of a road permanent in character and the repairing or reconstruction of a road is manifest by reference to the Act of 1912, which is the basis of the Act of 1914. By reference to Words and Phrases, Second Series, under Repairs and Reconstruction, it will be seen that our contention has substantial support. The following quotations and citations will suffice:

> "To repair as is ordinarily understood is to mend, not to make a new thing, but to refit or make good or restore an existing thing." *Walker* v. *City of Detroit,* 106 *N. W.* 1123; 143 *Michigan* 427.
>
> "The word repair as used in connection with a patented article means the restoration of worn out parts." Citing cases.
>
> "Repairing a pavement means restoration of the paved surface while repaving means replacement of old pavement with new." *People Keller* vs. *City of Buffalo,* 137 *New York Supplement* 464.
>
> "Where the wearing surface of a paved street in a metropolitan city has become so decayed as to be unfit for use and it is proposed that the material composing wear and surface shall be

> removed and a new material laid on the same concrete base it constitutes a repaving as distinguished from repairing as used in the provisions of the charter of such a city regulating the manner and method of improving streets." *McCaffery* v. *City of Omaha,* 101 *N. W.* 251.
>
> "To repair is to mean to restore to a sound state whatever has been partially destroyed to make good an existing thing. Restoration after decay, injury or partial destruction, an improvement is a valuable and useful addition, something more than a mere repair or restoration to the original condition." *Dougherty* v. *Taylor,* *S. E.* 928.

The evident spirit of the Act of 1914 is to enable the Freeholders to meet some extraordinary contingency, as where a road has become out of repair in places or has washed out and needs to be repaired or reconstructed. If the contention of the appellant prevails, there is nothing left for the Act of 1912 to operate upon, except the opening of an entirely new road. A reading of the first section of that act will show that the Legislature never so intended. It expressly provides that the Freeholders may, by resolution, "direct that any public road (which of course means an existing road), except" &c., "may be improved by the construction of a macadamized road, or a telford or other stone road, or a road constructed of gravel, oyster shells or other similar materials, with or without plastic binder, in such manner that the same, of whatever materials constructed, shall, with reasonable repairs thereto, at all seasons of the year, be firm, smooth and convenient for travel."

This section all the while speaks of a permanently improved or paved road or street and this is precisely what the contract under review contemplates. It does not matter what language the draftsman of the resolution may have used, the fact remains that what the

couny intends to do is to permanently improve one of its important highways.

If we are right in this contention then the proceedings must be set aside.

The Resolution of November Eighth Was Final and Binding Upon Both the Freeholders and the Contractors.

The law required that the Freeholders advertise for bids and state the time and place when and where the same would be opened and acted upon. While the Freeholders reserved the right to reject all bids, they were required to reject all bids or award a contract. They chose the latter course. They awarded the contract upon condition that the Egan bill had not been adopted by the voters of the State. It happened that the voters had adopted the act. Possibly two views are permissible, one that the award never had legal vitality because of the condition imposed; the other, that having had vitality it was lost when the fact appeared that the Egan act had been adopted. Either view defeats the award.

Counsel for the appellants deals with and argues this phase of the case as though it was a matter of parliamentary law. This we think is plainly erroneous. The situation is likened unto an application for a liquor license or for a street railroad franchise, or the return of a rule to show cause—some action must be taken on the return day, otherwise the proceedings fall. We do not dispute that an adjournment may be taken for consideration at a later day, but if there be action or non-action and no new day is left open for a further consideration, then the transaction is final and concluded. Other bidders may have left with the conviction that the award to the appellants could not become effective because in fact the Egan bill had passed. They may have had legal objections to offer to the award, they

may have been able to show that the appellants were not the lowest bidders. In theory of law neither they nor the public had advice as to the meeting of November twenty-fourth, when the second resolution under review was adopted. They doubtless, on November eighth, dismissed the matter from their minds. The award of November eighth was something or nothing. If something, it was final—if nothing, it could not be revived by the action of November twenty-fourth. As already suggested the test is whether or not the contractors, who are appellants here, acquired certain legal rights on November eighth or could be compelled to perform their contract. The matter was one of mutuality. When the Board of Freeholders said that the award was to be null and void if the Egan bill passed, the fact that it did pass would be a complete defense by the contractors in any action for damages on the part of the Freeholders, or putting it another way, suppose the Freeholders had not passed the resolution of November twenty-fourth and insisted that the contractors got nothing by the award of November eighth, could the contractors have maintained an action against the Freeholders for profits? These are the final tests which when analyzed will show the fallacy of the claim either that the resolution of November eighth was good without the resolution of November twenty-fourth, or that the resolution of November twenty-fourth could make good what was not good on November eighth.

The Legislature has regarded the asking for bids and their submission of considerable importance. See Section 33 and 33A of the Crimes Act. One section requires that the bids shall be opened in public on the day named in the advertisement and a public announcement be made of the contents, and the second section requires that the contract be awarded on the day named. These sections evidently came out of previous jugglery between municipal agents and contractors. The spirit of these sections is that everything touching public con-

tracts must be done in the open, and the public must be kept advised of each step in the proceedings to their finality. So far as the record shows the call for the special meeting of November twenty-fourth was not legal, and it shows that some members were not present. The resolution received only the requisite number of votes, to wit, two-thirds of a membership of twenty-eight, or twenty. Who shall say that had the absent members been present they might not have persuaded one or more members that it was illegal to pass the resolution and thus have defeated its passage?

III.

THE BOARD WAS WITHOUT POWER TO PASS THE RESOLUTION AWARDING THE CONTRACT UNTIL IT HAD IN HAND THE MONEY TO PAY FOR THE SAME.

Bew v. *Ventnor City*, 81 *Law, p.* 207, and cases cited seem dispositive of this point.

IV.

THE ACT OF 1914 IS UNCONSTITUTIONAL.

The title pretends to confer power to repair and reconstruct roads and to issue bonds to pay for the same.

The body of the act refers to repairs and reconstruction contemplated by the act of 1912, and you must look to that act to ascertain what power is given.

This is a plain violation of that part of the Constitution which says, in substance, that no act may become a part of another by mere reference to its title, but that its provisions must be set out in full While the cases submitted on the brief of the appellants do say that where mere proceedure is involved a reference to the act is enough, no case goes so far as to say that it will do to make reference to the title only where substance is involved. That is the situation in the Act of 1914.

You must read the Act of 1912 both to ascertain the power and determine the procedure. In other words, the Act of 1914 is quite incomplete. The real object of the Act is not, therefore, expressed in its title as the Constitution requires. What the Act does is to amend so much of the Act of 1912 which provides that the county may bond for extraordinary repairs or reconstruction, only to the amount which will not exceed the sum to be advanced by the State Road Commissioners. The Act of 1914, by indirection, either repeals this provision or amends it by permitting a bond issue for the total cost of the repairs or reconstruction. This furnishes an additional reason for saying that the title does not express the object. Moreover, if the act is to be given the effect as contended for by appellants, then two objects are provided for, one to repair or reconstruct a road, and the other to amend the Act of 1912 touching the bond issue. By the Act of 1914 the life of the bonds is five years. The bonds in question are made for fifteen years, and appeal is made to the Pierson Act of 1916, which justifies so long a term. A reference to that Act will make it clear that in permitting an issue of bonds for fifteen years it had in mind a permanent improvement and not a mere repairs or reconstruction.

V.

Counsel for appellants lay great stress upon the fact that no fraud is charged against the Board of Freeholders and no attempt made to prove fraud. And from this he argues that there is no fraud and seeks the inference that the public is being damaged by the judgment of the Supreme Court. The fact that the Board in calling for proposals selected only "Warrenite," a patented article, for purposes of laying it upon a loose foundation at a very heavy cost, is at least suspicious. Respondents thought it unnecessary to involve themselves in the costs incident to proving fraud in the

face of what appeared to be plain illegality in the award. The attack here is being made by citizens and tax-payers, who are in no wise interested in controversies between contractors.

The judgment of the Supreme Court should be affirmed.

THEODORE W. SCHIMPF,
C. L. COLE,
Attorneys for Respondents.

INDEX.

Writ of Certiorari.

Filed December 18th, 1916.

New Jersey Supreme Court.

CARLTON GODFREY, *Prosecutor,* *vs.* THE BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ATLANTIC, *Respondents.*	*Writ of Certiorari.*

New Jersey, to wit: The State of (L. S.) New Jersey to the Board of Chosen Freeholders of the County of Atlantic,

GREETING:

We being willing for certain reasons to be certified of a certain resolution passed by the Board of Freeholders of the County of Atlantic, in the State of New Jersey, on the twenty-fourth day of November, nineteen hundred and sixteen, awarding to Liddle & Pfeiffer a contract for making extraordinary repairs to the county road leading from Absecon bridge in the City of Absecon to the county line between the counties of Camden and Atlantic and to that portion of the county road leading from the aforesaid road, in the City of Absecon to the Seaview Golf Club and authorizing the sale and delivery of bonds for the payment of the said work, and attempting to repeal certain portions of a resolution of the Board of Freeholders of the County of

Atlantic adopted November eighth, nineteen hundred and sixteen, together with all resolutions, minutes of the Board of Chosen Freeholders and proceedings of whatever nature touching or concerning the extraordinary repairs to the roads mentioned in said resolution and together with all resolutions, minutes of the Board of Chosen Freeholders and other proceedings of whatever nature touching or concerning the issuing of bonds for the payment of such improvement.

We do command you that the aforesaid resolution, passed by the Board of Chosen Freeholders of the County of Atlantic on the twenty-fourth day of November, nineteen hundred and sixteen, together with all resolutions, records of the meetings or other proceedings of whatever nature of the said Board of Freeholders touching or concerning said work and together with all resolutions, minutes of the Board of Chosen Freeholders and other proceedings of whatever nature together with all things touching and concerning the passing, approving and enacting of the said resolution and all proceedings for the issuing of bonds for the doing of such work as fully and entirely as before you they remain to our Justices of the Supreme Court of judicature at Trenton, on the eighteenth day of December, nineteen hundred and ten, you certify and send, together with this our writ that therein may be done what of right and according to the laws of this State should be done.

Writ of Certiorari.

WITNESS William S. Gummere, Esquire, Chief Justice of our Supreme Court at Trenton, this twenty-eighth day of November, in the year of our Lord one thousand nine hundred and sixteen.

GODFREY & READ,
THEO W. SCHIMPF,
Attorneys for Prosecutor.

This writ is allowed. Let it be sealed.

CHARLES C. BLACK,
S. C. J.

Order.

Order.

NEW JERSEY SUPREME COURT.

CARLTON GODFREY, *Prosecutor.* vs. BOARD OF CHOSEN FREEHOLDERS of ATLANTIC COUNTY, *et als.* *Respondents.*	*On Certiorari.* *Order.*

On reading and filing the affidavit of Henry Weiderhold, a resident freeholder and taxpayer of Atlantic City, Atlantic County, New Jersey,

It is on this first day of December, nineteen hundred and sixteen, on motion of C. L. Cole, attorney for said Weiderhold,

ORDERED that said Weiderhold be and he is hereby made a party prosecutor in the above entitled cause.

Let this rule be entered asd filed.

CHAS. C. BLACK,
J. S. C.

A True Copy,

WM. C. GEBHARDT,
Clerk.

Return.

Return.

Filed December 12th, 1916.

NEW JERSEY SUPREME COURT.

CARLTON GODFREY, *Prosecutor,* vs. BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ATLANTIC, *Respondents.*	*On Writ of Certiorari.* *Return.*

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

I, Robert Prasch, Clerk of the Board of Chosen Freeholders of the County of Atlantic, in obedience to the command of the writ hereto annexed and served upon me, do hereby certify and send to you the said Justices, a resolution passed by the Board of Chosen Freeholders of the County of Atlantic on the twenty-fourth day of November, nineteen hundred sixteen, awarding to Liddle & Pfeiffer a contract, together with all resolutions and records of meetings or other proceedings of whatever nature of the said Board of Chosen Freeholders touching or concerning said work, together with all resolutions, minutes of the Board of Chosen Freeholders or other proceedings of whatever nature, together with all things touching and concerning the passing, approving and enacting said resolution and all proceedings for the issuing of bonds for doing of such work, as are referred to and commanded

Return.

in said writ, as fully and entirely as the same remains in my hands and possession, as by said writ was commanded as appears by the schedule hereto annexed.

In Witness Whereof, I have hereunto set my hand and seal this sixth day of December, nineteen hundred and sixteen.

ROBERT PRASCH,
Clerk of the Board of Chosen Freeholders,
of the County of Atlantic.

SCHEDULE.

Atlantic City, New Jersey,
May 10th, 1916.

A regular meeting of the Board of Chosen Freeholders of Atlantic County was held this day at Memorial Hall, South New York avenue, Atlantic City, N. J., with Director Samuel Winterbottom presiding.

On roll call being had the following members answered present: Messrs. Ashmead, Barrett, Black, Blair, Clements, Collins, Corsiglia, Doughty, Fulmer, Haines, Hanselmann, Johnson, Ritson, Robinson, Smith, A. B., Smith, Ira T. B., Smith, Lewis H., Smith, Lewis, R. Tallman and Willets, Winterbottom and Webb; 22.

Those absent were Messrs. Banning, Bourgeoius, Fitzgerald, Osgood, Ryan, Shackelford; 6.

Mr. Corsiglia offered the following resolution and moved its adoption.

Whereas the county road leading from Absecon to Philadelphia by way of Egg Harbor City sometimes known as the White Horse Pike is used to such extent that it is impossible to keep

the same in good repairs with gravel during all seasons of the year.

And whereas the same is of great importance to the traveling public between Philadelphia and Atlantic City and other places and is in need of extraordinary repairs and reconstruction.

And whereas it is the sense of this board that the said repairs and reconstruction should be of a permanent character and that the said road should be paved with some hard and substantial pavement for a width of sixteen feet in the centre of said road from the bridge over Absecon Creek in the City of Absecon to the county line between Atlantic and Camden counties.

And whereas the county road running from Absecon to Chestnut Neck is traveled to such extent as to make it impossible to keep said road in good repair with gravel at all seasons of the year.

And whereas said road is used to a greater extent between what is known as Seaview Golf Club and Absecon City by reason of said road having the travel from New York and other places in that direction to Atlantic City, as well as the travel from Atlantic City and other points to the Seaview Golf Club.

And whereas said road is in need of extraordinary repairs or reconstruction,

And whereas it is the sense of this board that the said repairs and reconstruction between the Seaview Golf Club and the intersection with the county road leading from Absecon to Philadelphia in Absecon should be of a permanent character and that the said road should be paved with some hard and substantial pavement for a width of 16 feet in the centre of said road from

Return.

said intersection with the Absecon-Philadelphia road to the Seaview Golf Club.

Therefore, Be It Resolved, by the Board of Chosen Freeholders of the County of Atlantic that the County Engineer prepare specifications and such plans and cross sections as are necessary to explain and describe the repairs contemplated by this resolution, namely; the specifications, plans and cross-sections, etc., as are necessary to pave the same with some hard and substantial pavement a width of 16 feet in the centre of said roads, namely, in the centre of the county road leading from the bridge over Absecon Creek in the City of Absecon to Philadelphia as far as the county line between the County of Camden and the County of Atlantic and in the centre of the road leading from Absecon to Chestnut Neck, from the intersection of the county road from Absecon to Philadelphia, to the Seaview Golf Club in the Township of Galloway, and that said plans and specifications be submitted to this board for its approval, as soon as the same have been prepared by the County Engineer as aforesaid, and upon the approval of said specifications, plans and cross-sections by this board, that the same be forwarded to the State Commissioner of Public Roads for his approval.

Mr. Johnson moved that the resolution be amended to read including road from Absecon to the Burlington County line.

On roll call as to amendment the vote was as follows: "Ayes," Messrs. Collins, Johnson 2. Those voting "Nay" were Messrs. Ashmead, Barrett, Black, Blair, Clements, Corsiglia, Doughty, Fulmer, Haines, Hanselmann, Robin-

son, Smith, A. B., Smith, Lewis H., Smith, Lewis R., Tallman, Willetts, Winterbottom, Webb, 18.

Mr. Ira T. B. Smith passed. The amendment was lost 2 "Ayes," 18 "Nayes," 1 pass.

On roll call as to adoption of the resolution as offered by Mr. Corsiglia the following members voted "Aye:" Messrs. Ashmead, Barrett, Black, Blair, Clements, Corsiglia, Doughty, Fulmer, Haines, Hanselmann, Johnson, Robinson, Smith, A. B., Smith, I. T. B., Smith Lewis H., Smith, Lewis R., Tallman, Willetts, Winterbottom, Webb, 20. Mr. Collins passed.

The resolution was adopted 20 "Ayes," no "Nays," 1 pass.

Atlantic City, N. J.,
Aug. 9, 1916.

A regular meeting of the Board of Chosen Freeholders of Atlantic County was held this day at Memorial Hall, South New York avenue, with Director Samuel Winterbottom presiding. On roll call being had the following members answered present: Messrs. Ashmead, Banning, Barrett, Black, Blair, Clements, Collins, Corsiglia, Doughty, Fitzgerald, Fulmer, Haines, Hanselmann, Johnson, Osgood, Ritson, Robinson, Ryan, Shackelford, Smith, Lewis H., Smith, Lewis R., Tallman, Willetts, Winterbottom, Webb, 25.

Members absent—Messrs. Bourgeois, Smith, A. B., Smith, Ira T. B., 3.

Mr. Corsiglia offered the following resolution and moved its adoption:

Be It Resolved, that the width of eighteen (18′) feet be adopted for White Horse Pike and Ocean Highway Paving, except as otherwise provided through towns, and that warrenite surface

to the thickness of two (2″) inches compacted, with two and a half (2½″) inch stone foundation to a loose thickness of (6″) inches be adopted.

On roll call being had the following members voted "Aye:" Messrs. Ashmead, Banning, Barrett, Black, Blair, Clements, Collins, Corsiglia, Doughty, Fulmer, Haines, Hanselmann, Johnson, Osgood, Ritson Robinson, Ryan, Shackelford, Smith, Lewis H., Smith, Lewis R., Tallman, Willetts, Winterbottom, Webb, 24.

The resolution was adopted 24 "ayes," no "nays," no passes.

Mr. Corsiglia offered the following resolution and moved its adoption.

Whereas, There appears to be difficulties in completing the survey from Absecon to the Camden County line because of the provisions of the proposed Egan Law which seem to operate against the Bellevue avenue route and because of difficulties and objections to revisions of the route as now traveled, now therefore,

Be It Resolved, that the survey which is now being made and which commences at Absecon shall terminate at Bellevue avenue.

Be It Resolved Further, that a separate survey with plans and specifications be made from Elvins' corner to the Camden County line and that this paving be the same material as the large section above provided for and bids be received on both sections at the same time.

On roll call being had as to the adoption of resolution the following members voted "aye:" Messrs. Ashmead, Banning, Barrett, Black, Blair, Clements, Collins, Corsiglia, Doughty, Fullmer, Haines, Hanselmann, Johnson, Osgood, Ritson, Robinson, Ryan, Shackelford Smith, Lewis H.,

Return.

Smith, Lewis R., Tallman, Willetts, Winterbottom, Webb, 24.

The resolution was adopted 24 "ayes," no "nays," no passes.

Mays Landing, N. J.,
September 13th, 1916.

A regular meeting of the Board of Chosen Freeholders of Atlantic County was held at this day at Asylum, Smiths Landing, N. J., with Director Samuel Winterbottom presiding.

On roll call being had the following members answered present: Messrs. Ashmead, Banning, Black, Bourgeois, Blair, Clements, Collins, Corsiglia, Doughty, Fulmer, Haines, Hanselmann, Johnson, Osgood, Ritson, Robinson, Ryan, Shackelford, Smith, A. B., Smith, Ira T. B., Smith, Lewis H., Smith, Lewis R., Tallman, Willetts, Winterbottom, Webb, 26.

Members absent were Messrs. Barrett and Fitzgerald, 2.

The members of regular meeting of August 9th and the minutes of adjourned meeting of August 9th and the minutes of adjourned meeting of August 23 were read and approved.

Mr. Shackelford moved that the board allow the hearing of the representatives of the Hotel Men's Association and also representatives of the Chamber of Commerce pertaining to the building and hard surfacing of White Horse Pike. The motion was carried unanimously.

The following communication wherein embodied a resolution passed by the Chamber of Commerce and Hotel Men's Association was offered by said bodies and read by clerk:

Return.

Board of Chosen Freeholders,
Atlantic County.

Dear Sirs:

The Atlantic City Chamber of Commerce and the Hotel Men's Association each appointed a committee of (5) five to make an examination of different classes of road paving. The joint committee inspected over five hundred miles of road paving and as a result of their investigations the following motion was made and unanimously carried:

A committee wait on the Freeholders at their meeting on September 13th and ask them to defer until a later date the adoption of specifications for the paving of White Horse Pike and to appoint a committee to inspect roads with a joint committee of the Chamber of Commerce and the Hotel Men's Association.

The above motion was passed at a meeting at which the following named members were present:

Edward A. Wilson
Henry Wiederhold
John J. White
Henry W. Leeds
Walter J. Buzby
Albert T. Bell
Joseph W. Salus
Samuel P. Leeds
Samuel Ellis
M. B. Markland

Respectfully yours,
M. B. MARKLAND,
Secretary.

September 13, 1916.

Mr. Shackelford moved that the communica-

tion be received and ordered filed. The motion was carried.

Mr. Bourgeois moved that the communication of Chamber of Commerce and Hotel Men's Association be reconsidered.

On roll call the following members voted for reconsidering communication: Messrs. Black, Bourgeois, Collins, Corsiglia, Fulmer, Haines, Johnson, Osgood, Ryan, Smith, A. B., Smith, Lewis H., Tallman, Winterbottom, 13. Those voting "nay" were Messrs. Banning, Blair, Clements, Doughty, Hanselmann, Ritson, Robinson, Shackelford, Smith, I. T. B., Smith, L. R., Webb, 11. Mr. Ashmead passed. The motion was carried, 13 "ayes," 11 "nays," 1 pass.

Mr. Bourgeois moved that the request be granted the Hotel Men's Association, and Chamber of Commerce asking to defer until a later date the adoption of specifications for paving White Horse Pike. On roll call being had the following members voted "aye" to defer: Messrs. Ashmead, Black, Bourgeois, Collins, Fulmer, Johnson, Osgood, Ryan, Smith, A. B., Tallman, Winterbottom, 11. The following members voted "nay" not defer: Messrs. Banning, Blair, Clements, Corsiglia, Doughty, Haines, Hanselmann, Ritson, Robinson, Shackelford, Smith, I. T. B., Smith, L. H., Smith, L. R., Willetts, Webb, 15.

The motion was lost, 11 "ayes," 15 "nays," no passes.

Mr. Corsiglia offered the following resolution and moved its adoption.

Be It Resolved (1st) that the drawings and specifications submitted by the Engineer for this board for the improvement of

Return.

No. 1, White Horse Pike, Absecon to Hammonton.

No. 2, White Horse Pike, Hammonton to Camden county.

No. 3, Ocean Highway, Absecon to Seaview Golf Club, be and the same are hereby approved. (2nd) that the said Engineer be and is hereby directed to present the said drawings and specifiations to the State Commissioner of Public Roads for his approval.

On roll call as to adoption of resolution the following members voted "aye": Messrs. Ashmead, Banning, Black, Bourgeois, Blair, Clements, Collins, Corsiglia, Doughty, Fulmer, Haines, Hanselmann, Osgood, Ritson, Robinson, Ryan, Shackelford, Smith, A. B., Smith, I. T. B., Smith, Lewis H., Smith, Lewis R., Tallman, Willetts, Winterbottom, Webb. Mr. Johnson passed. The resolution was adopted, 25 "ayes," no "nays," 1 pass.

Atlantic City, N. J., October 11, 1916.

A regular meeting of the Board of Chosen Freeholders of Atlantic County was held this day at Memorial Hall, South New York avenue Atlantic City, N. J., Director Winterbottom presiding. On roll call being had the following members answered present: Messrs. Ashmead, Banning, Black, Bourgeois, Blair, Clements, Collins, Corsiglia, Doughty, Haines, Hanselmann, Johnson, Osgood, Ritson, Robinson, Ryan, Shackelford, Smith, A. B., Smith, Ira T. B., Smith, Lewis H., Smith, Lewis R., Tallman, Willetts, Winterbottom, Webb, 25. Those absent were Messrs. Fulmer, Fitzgerald, Barrett, 3. The minutes of meeting of September 13th were read and approved.

Return.

A communication from the Chamber of Commerce and Hotel Men's Association of Atlantic City, wherein they embodied a resolution passed and adopted by them asking the Board of Chosen Freeholders to postpone any action in the building of White Horse Pike, was read by clerk and was ordered received and filed.

Mr. Shackelford moved that when the board adjourn they adjourn to meet again on Monday the 16th day of October, at 11 o'clock a. m., at Memorial Hall, Atlantic City, New Jersey. On roll call the following members voted "aye": Messrs. Banning, Black, Blair, Clements, Doughty, Haines, Hanselmann, Ritson, Robinson, Shackelford, Smith, Lewis R., Willetts, Webb, 13. Voting "nay" were Messrs. Ashmead, Bourgeois, Collins, Johnson, Osgood, Ryan, Smith, A. B., Tallman, 8. Passed were Messrs. Corsiglia, Smith, Lewis H., Winterbottom, 3. The motion was carried, 13 "ayes," 8 "nays," 3 pass.

Atlantic City, N. J., October 16, 1916.

An adjourned meeting of the Board of Chosen Freeholders of Atlantic County was held this day at Memorial Hall, South New York avenue, Atlantic City, N. J., with Samuel Winterbottom, director, presiding.

On roll call being had the following members answered present: Messrs. Ashmead, Banning, Barrett, Black, Bourgeois, Blair, Clements, Corsiglia, Doughty, Fitzgerald, Fulmer, Haines, Hanselmann, Johnson, Osgood, Ritson, Robinson, Ryan, Shackelford, Smith, A. B., Smith, I. T. B., Smith, Lewis H., Smith, Lewis R., Willetts, Winterbottom, Webb, 26.

Absent were Messrs. Collins and Tallman, 2.

A communication from Harry P. Willis, ask-

ing the board to extend the courtesy of the floor to Mr. Charles S. Reed to explain the merits of Willite paving, was read by the clerk.

Mr. Bourgeois moved that the board grant request of Mr. Willis and any other person desiring floor.

The motion was carried.

A communication from the Chamber of Commerce and Hotel Men's Association setting forth the merits of different paving material and asking the board for a postponement of any further action in paving of White Horse Pike and from Absecon to Seaview Golf Club and give committee appointed further time to investigate different materials was read by the clerk. The same was ordered received and filed.

A communication from Mr. J. C. Bentley setting forth the cost of paving materials was read and ordered received and filed.

Mr. Corsiglia offered the following resolution and moved its adoption:

Whereas the Board of Chosen Freeholders of the County of Atlantic has heretofore passed a resolution stating that in the judgment of said board a county road leading from the bridge over Absecon Creek in the City of Absecon to the line between the counties of Camden and Atlantic, said road running through the City of Egg Harbor City and the town of Hammonton, and commonly known as White Horse Pike; and also that portion of the county road leading from Absecon to Chestnut Neck which lies between the first named road and the Seaview Golf Club in the township of Galloway, are in need of extraordinary repairs and that, in the judgment of this board, it is advantageous that said repairs be made of some permanent pavement,

Return.

And whereas by previous resolution of this board plans and specifications were caused to be prepared by the County Engineer for making said extraordinary repairs, which plans and specifications were submitted to this board and by it approved, and were afterward forwarded to the State Commissioner of Public Roads for his approval,

And whereas more than thirty days have elapsed since the same were forwarded to and received by the State Commissioner of Public Roads and he has failed within said thirty days or at any time thereafter to set aside any of the State funds for said work, in accordance with chapter 395 laws 1912,

Now, Therefore, Be It Resolved by the Board of Chosen Freeholders of the County of Atlantic that in the judgment of this board said extraordinary repairs above referred to and mentioned, are necessary and proper to be made and that the Board of Chosen Freeholders of the County of Atlantic do proceed forthwith to have said extraordinary repairs made according to plans and specifications heretofore approved by this board and submitted to the State Commissioner of Public Roads at the sole expense of the County of Atlantic, that is to say, this board cause the same to be made and pay the entire cost thereof.

And Be It Further Resolved, That in the judgment of the Board of Chosen Freeholders aforesaid it would be too burdensome to the tax payers of this county to place the cost of said repairs in the tax levy of any one year,

Therefore Be It Resolved, That we cause to be issued corporate bonds of the county to an amount not exceeding the total cost of said repairs or reconstruction; that said bonds be sold at public sale at the best price obtainable but

Return.

not for less than par and accrued interest; that the term of said bonds, the date of issue, the amount to be issued, the denomination, rate of interest and other necessary matters incident to the issuing of said bonds be determined by a subsequent resolution of this board; that the interest, however, shall not exceed five per cent. per annum and that said bonds shall be for no longer term than fifteen years, and that they shall recite the act under which they are issued.

And Be It Further Resolved, That before said bonds be issued we first determine the actual cost of said repairs by soliciting bids for the performance of said work, and that thereafter said board cause to be passed a resolution stating the amount in which said bonds are to be issued, the amount to be issued, rate of interest, the time when payable and the necessary requisites as required by the laws under which they shall be directed to be issued.

And Be It Further Resolved, That the Road Committee in conjunction with the County Engineer be and they are hereby authorized to advertise for bids for making said repairs, to be opened at an adjourned meeting of this board to be held November 4, 1916, contract, if awarded, to be subject to sale and delivery of bonds.

And Be It Further Resolved, That the authority for making said extraordinary repairs at the sole expense of the county is pursuant to chapter 122, laws 1914, and that said bonds when issued, are to be issued pursuant to chapter 252, laws 1916.

On roll call being had as to adoption of resolution, the following members voted "aye": Messrs. Banning, Barrett, Black, Blair, Clements, Corsiglia, Doughty, Fitzgerald, Fulmer,

Haines, Hanselmann, Ritson, Robinson, Shackelford, Smith, Ira T. B., Smith, Lewis H., Smith, Lewis R., Willetts, Winterbottom, Webb, 20. Those voting "nay" were Messrs. Ashmead, Bourgeois, Johnson, Ryan, Smith, A. B., 5. The resolution was adopted, 20 "ayes," 5 "nays," no passes.

Mr. Shackelford moved that when the board adjourned they adjourn to meet Saturday, the 4th day of November, 1916, at Memorial Hall, South New York avenue, Atlantic City, N. J.

The motion was carried.

Atlantic City, N. J., November 4th, 1916.

An adjourned meeting of the Board of Chosen Freeholders of Atlantic County was held this day at Memorial Hall, Atlantic City, N. J., with Director Samuel Winterbottom presiding. On roll call being had the following members answered present: Messrs. Ashmead, Banning, Black, Blair, Corsiglia, Doughty, Fitzgerald, Fulmer, Haines, Hanselmann, Johnson, Ritson, Robinson, Ryan, Shackelford, Smith, Alfred B., Smith, Ira T. B., Smith, Lewis H., Smith, Lewis R., Tallman, Willetts, Winterbottom, Webb, 23.

The following communication was read by the clerk:

Mr. Samuel Winterbottom, Director Board of Chosen Freeholders.

Dear Sir—I am returning to County Engineer A. H. Nelson the plan, profiles, cross-sections and specifications for the improvement of the White Horse Pike owing to the lack of funds with which to pay the State's proportion of the estimated cost.

Very truly yours,

R. A. MEEKER.

The same was ordered received and filed.

Return.

Time having arrived for the receiving and opening of bids for hard surfacing of the White Horse Pike and county road from Absecon to Seaview Golf Club, the same were opened and read as follows:

	Sec. 1	Sec. 2	Sec. 3	Whole
Liddle & Pfeiffer..	$588,989.33	$44,090.40	$71,189.60	$693,443.48
Charles T. Eastburn.		51,303.20	82,346.40	822,568.80
Powell & Fox.....		45,715.76	71,767.60	
Northern Cons. Co.	506,983.80	44,653.64	72,113.02	711,843.76
Highway Improv. & R. Co.....	602,050.94	44,276.12	71,591.36	709,630.01
John M. Kelly Const. Co.		55,984.82	91,476.66	904,742.27
James Ferry & Sons, Inc.			81,238.20	
Chas. T. Kavanaugh, Inc.			74,352.00	
Edw. L. Bader...	594,659.20	43,147.40	69,416.34	702,356.00

Mr. Shackelford moved that all bids be referred to the Road Committee in conjunction with the County Engineer and Solicitor. The motion was carried.

The Road Committee offered the following report:

The Road Committee beg to report that they have examined the bids for making extraordinary repairs to the county roads and respectfully ask further time in which to consider the same and would recommend that they be given until next Wednesday at the regular meeting to present their full report under the head of new business.

A communication from Mr. C. L. Cole, stating that if contracts for the paving of the Main Highway with Warrenite be awarded, that an application will be made to the Supreme Court for certiorari to review the action of the board was received and ordered filed.

Return.

The board then adjourned to meet at Somers Points for the purpose of viewing the Longport-Somers Point Boulevard as to final acceptance. After viewing road the board proceeded with meeting.

Mr. Shackelford moved that the Longport-Somers Point Boulevard be accepted subject to approval of the State Highway Department of the County Engineer.

On roll call the motion was carried, all members present voting "aye." Mr. Tallman moved that the board adjourn until Wednesday, November 8, 1916. The motion was carried.

Atlantic City, N. J., November 8, 1916.

A regular meeting of the Board of Chosen Freeholders of Atlantic County was held this day at Memorial Hall, South New York avenue, Atlantic City, N. J., Director Samuel Winterbottom presiding.

On roll call being had the following members answered present: Messrs. Ashmead, Barrett, Black, Bourgeois, Blair, Clements, Collins, Corsiglia, Doughty, Fitzgerald, Fulmer, Haines, Hanselmann, Johnson, Osgood, Ritson, Robinson, Ryan, Shackelford, Smith, A. B., Smith Ira T. B., Smith, Lewis H., Smith, Lewis R., Tallman, Willetts, Winterbottom, Webb, 27.

Members absent: Banning, 1.

The minutes of regular meeting of October 11, adjourned meeting of October 16 and adjourned meeting of November 4 were read and approved.

Mr. Corsiglia offered the following resolution and moved its adoption:

WHEREAS the Board of Chosen Freeholders of the County of Atlantic has heretofore passed sundry resolutions touching the making of ex-

Return.

traordinary repairs to the county road leading from the bridge over Absecon Creek in the City of Absecon to the line betwen the counties of Camden and Atlantic; said road running through the City of Egg Harbor City and the town of Hammonton, and commonly known as White Horse Pike and also extraordinary repairs to that portion of the county road leading from Absecon to Chestnut Neck which lies between the first named road and Seaview Golf Club in the township of Galloway, commonly known as Ocean Boulevard, and has instructed the Road Committee in conjunction with the County Engineer to advertise for bids for building the same,

AND WHEREAS, in pursuance of said instructions said Road Committee and County Engineer have advertised for bids for doing said work which bids have been opened and the lowest bid for doing said work is in the sum of $693,443.48,

AND WHEREAS this board has heretofore declared that said improvement be done at the sole expense of the county as set forth in sundry resolutions heretofore passed and that bond issue for the payment of said improvement,

NOW THEREFORE BE IT RESOLVED, That this board do cause corporate bonds of this county to be issued in the sum of $694,000, the proceeds from the sale thereof to be applied to and used for the making of said extraordinary repairs as set forth in plans and specifications heretofore approved by this board, being the amount necessary to be raised therefor. That said bonds bear interest at the rate of four and one-half per cent. per annum, payable semi-annually. That they be issued in pursuance of Chapter 252, Laws of 1916, and in compliance with the

Return.

requirements of said act. This board does hereby determine and declare the following matters:

(a) The probable period of usefulness of the improvement for which the bonds are to be issued is fifteen years.

(b) The average assessed valuation of the taxable real property (including improvements) of the County of Atlantic, computed upon the three preceding valuations in the manner provided for in Section 12 in Chapter 252, Laws of 1916, is $110,032,372.42.

(c) The net debt of the County of Atlantic computed in the manner provided for in Section 12 of the aforesaid act is $1,016,944.57.

(d) The statement required by Section 12 of the aforesaid act has been made and filed as in said act required.

(e) That the character of the road improvement to be made for which said bonds are to be issued, is of bituminous concrete construction.

AND BE IT FURTHER RESOLVED, That said bonds bear date the first day of December, 1916, and be issued in the denomination of five thousand dollars each, excepting No. 139, which shall be four thousand dollars and be numbered consecutively from one to one hundred thirty-nine inclusive, and be payable as follows:

Nos.	1	to	9,	inclusive	in the year	1917
	10	to	18,	"	" " "	1918
	19	to	27,	"	" " "	1919
	28	to	36,	"	" " "	1920
	37	to	45,	"	" " "	1921
	46	to	54,	"	" " "	1922
	55	to	63,	"	" " "	1923
	64	to	72,	"	" " "	1924
	73	to	81,	"	" " "	1925

Return.

82 to 90,	"	"	"	"	1926
91 to 99,	"	"	"	"	1927
100 to 109,	"	"	"	"	1928
110 to 119,	"	"	"	"	1929
120 to 129,	"	"	"	"	1930
130 to 139,	"	"	"	"	1931

That they be signed by the director of this board, he being the Chief Executive officer, and by the clerk of this board, and be countersigned by the county collector, and be under the corporate seal of this board, and the coupon shall be signed by the facsimile signature of the county collector.

That they be coupon bonds with the privilege of registration as to principal only, or, upon surrender of all the coupons, may be fully registered as to both principal and interest. That they be sold at public sale after due advertising for not less than par, advertising to be in accordance with Section 6 of Chapter 252, Laws of 1916.

That no more bonds shall be sold than will produce a sum equal to the amount herein declared to be necessary for the said extraordinary repairs and an additional sum of less than $1,000. That the bonds shall recite that they are issued pursuant to the above named act and that the proceeds are to be used for the purpose of making the extraordinary repairs for which said bonds are issued.

AND BE IT FURTHER RESOLVED, That this resolution shall be advertised by the clerk and published in one issue of each of the two newspapers published in this county which have been designated as the official newspapers of this board, and that with the publication of this resolution,

Return.

the clerk of this board shall publish a statement in substantially the following form: "The foregoing resolution was adopted by the Board of Chosen Freeholders of the County of Atlantic on the 8th day of November, 1916. The bonds authorized thereby will be issued and delivered after the first day of December, 1916, and any suit, action or proceeding to set aside or vacate this resolution must be begun on or before the said last mentioned date."

On roll call as to adoption of resolution the following members voted "ayes": Messrs. Barrett, Black, Blair, Clements, Corsiglia, Doughty, Fitzgerald, Fulmer, Haines, Hanselmann, Osgood, Ritson, Robinson, Shackelford, Smith, Ira T. B., Smith, Lewis H., Smith, Lewis R., Willetts, Winterbottom, Webb, 20. Voting "nays" were Messrs. Ashmead, Bourgeois, Collins, Johnson, Ryan, Smith, Alfred B., Tallman, 7.

The resolution was adopted, 20 "ayes," 7 "nays," no passes.

Mr. Corsiglia offered the following resolution and moved its adoption:

Whereas, the bids for making extraordinary repairs to the county road leading from Absecon bridge in the City of Absecon to the county line between the counties of Camden and Atlantic, being what is known as White Horse Pike, running through the towns of Hammonton and Absecon, and also bids for making extraordinary repairs to that portion of the county road leading from the aforesaid road in the city of Absecon to the Seaview Golf Club in the township of Galloway, being that portion of the road commonly known as the Ocean Boulevard, have been opened and considered.

And whereas, it appears that the low bid for

Return.

making such repairs, in accordance with the plans and specifications, is the bid of Liddle and Pfeiffer for the sum of $693,443.48.

Therefore, be it resolved, by the Board of Chosen Freeholders of the County of Atlantic that the bid for making said repairs be awarded to Liddle & Pfeiffer for the amount of the bid, to wit, the sum of $693,-443.48. Provided, however, that this bid is awarded upon the distinct understanding that the contract shall not be entered into between the parties unless the bonds to be issued for the purpose of paying for said extraordinary repairs, shall have been sold and delivered and the money received therefor.

And be it further resolved, that, upon the issue, sale and delivery of said bonds, and the receipt of the money for the same, the officers of this Board be, and they are hereby directed, to enter into contract with the said Liddle & Pfeiffer in accordance with the plans and specifications, contract to be prepared by our solicitor.

Provided, further that this award shall not be binding upon the Board of Freeholders of the County of Atlantic, nor shall any contract be entered into, nor any bonds offered for sale under Resolution heretofore passed, to be issued for the purpose of paying for the contract herein mentioned if Chapter 285 of the Laws of 1916 was adopted by the voters of this State at the election held November 7, 1916. That in the event said law was adopted by the voters of this State, this award and all proceedings touching the work herein referred to, and the award of the bid shall be null and void.

On roll call as to the adoption of resolution the following members voted "aye": Messrs.

Return.

Barrett, Black, Blair, Clements, Corsiglia, Doughty, Fitzgerald, Fulmer, Haines, Hanselmann, Osgood, Ritson, Robinson, Shackelford, Smith, Ira T. B., Smith, Lewis H., Smith Lewis R., Willetts, Winterbottom, Webb, 20. Voting "nay" were Messrs. Ashmead, Bourgeois, Collins, Johnson, Ryan, Smith, Alfred B., Tallman, 7.

The resolution was adopted 20 "ayes," 7 "nays," no passes.

Atlantic City, N. J., November 24, 1916.

A special meeting of the Board of Chosen Freeholders of Atlantic County was held this day at Memorial Hall, South New York Avenue, Atlantic City, N. J., with Director Samuel Winterbottom presiding.

On roll call being had the following members answered present:

Messrs. Barrett, Banning, Bourgeois, Blair, Clements, Collins, Corsiglia, Doughty, Fitzgerald, Fulmer, Haines, Hanselmann, Johnson, Osgood, Ritson Robinson, Ryan, Shackelford, Smith, A. B., Smith, Ira T. B., Smith, Lewis H., Smith, Lewis R., Willets, Winterbottom, Webb, 25.

Absent were: Messrs. Ashmead, Black, Tallman, 3.

Mr. Shackelford offered the following resolution and moved its adoption:

Whereas, at a regular meeting of the Board of Chosen Freeholders of the County of Atlantic held on the 8th day of November, 1916, there was passed a resolution awarding the contract for making extraordinary repairs to the County Road leading from Absecon Bridge in the city of Absecon to the County Line between the counties of Camden and Atlantic, being what is

Return.

known as White Horse Pike, running through the towns of Hammonton and Absecon and also for making extraordinary repairs to that portion of the County Road leading from this aforesaid road in the city of Absecon to the Seaview Golf Club in the Township of Galloway, being a portion of the road commonly known as Ocean Boulevard, to Liddle & Pfeiffer, for the amount of their bid, to wit, the sum of $693,443.48.

And whereas, said resolution containing a proviso that the contract was awarded upon the distinct understanding that it should not be entered into between the parties unless the bonds to be issued for the purpose of paying for said extraordinary repairs, shall have been sold and delivered, and the money received therefor, and also a proviso in the following language: "Provided further, that this award shall not be binding upon the Board of Freeholders of the County of Atlantic, nor shall any contract be entered into nor any bonds offered for sale under resolution heretofore passed, to be issued for the purpose of paying for the contract herein mentioned if Chapter 285 of the Laws of 1916 was adopted by the voters of this State at the election held November 7th, 1916, that in the event said law was adopted by the voters of this State, this award and all proceedings touching the work herein referred to and the award of the bid shall be null and void."

And whereas, it is the desire of this Board that this latter proviso be repealed, disposed of, set aside, and for nothing holden, so that this Board may proceed with the sale of the bonds and the entering into contract with Liddle & Pfeiffer according to the terms of their bid in the event said bonds to be issued, are sold and delivered and the money received therefor, not-

Return.

withstanding the fact that Chapter 285 of the Laws of 1916 was adopted by the voters of this State at the election held November 7th, 1916.

Therefore, be it resolved, by the Board of Chosen Freeholders of the County of Atlantic that the latter proviso in the resolution of November 8th, 1916, heretofore referred to in the following language: "Provided, further, that this award shall not be binding upon the Board of Freeholders of the County of Atlantic, nor shall any contract be entered into nor any bonds offered for sale under resolution heretofore passed, to be issued for the purpose of paying for the contract herein mentioned if Chapter 285 of the Laws of 1916 was adopted by the voters of this State at the election held November 7th, 1916. That in the event said law was adopted by the voters of this State, this award and all proceedings touching the work herein referred to and the award of the bid, shall be null and void," be repealed, disposed of, set aside and for nothing holden and that this Board do proceed with the issue and sale of said bonds as authorized in the resolution passed on the aforesaid 8th day of November, 1916, directing the issue and sale of said bonds.

And be it further resolved, that the Finance Committee in conjunction with the County Solicitor and County Collector be, and they are hereby authorized, to proceed as rapidly as possible with the sale and delivery of said bonds and the proper officers of this Board be, and they are hereby authorized, to execute said bonds on the behalf of the Board as herebefore directed and in accordance with the Laws of this State.

And be it further resolved, that the Finance Committee of this Board is hereby authorized to

Return.

receive bids for said bonds after due advertisement in accordance with the statute and may either award or reject the bids as their judgment may dictate and the power of this Board for that purpose is hereby delegated.

And be it further resolved, that the contract for making said extraordinary repairs herein mentioned be awarded to Liddle & Pfeiffer for the amount of their bid, to wit, the sum of $693,443.48, they being the lowest bidder, and conforming to all the requirements called for in the bidding blank, subject only to the proviso that said contract be awarded upon the condition that the County shall be able to issue, sell and deliver the bonds heretofore authorized to be delivered and the receipt of the money therefor.

And be it further resolved, in the event of the sale and delivery of said bonds and the receipt of the money therefor, the proper officers of this Board be, and they are hereby authorized to execute the contract with Liddle & Pfeiffer according to the terms of their bid for making the aforesaid extraordinary repairs.

On roll call as to adoption of resolution the following members voted "aye":

Messrs. Banning, Barrett, Blair, Clements, Corsiglia, Doughty, Fitzgerald, Fulmer, Haines, Hanselmann, Johnson, Osgood, Ritson, Robinson, Shackelford, Smith, Ira T. B., Smith, Lewis H., Smith, Lewis R., Willetts, Winterbottom, Webb, 21. Those voting "nay" were Messrs. Bourgeois Collins, Ryan, Smith, A. B., 4.

The resolution was adopted 21 "ayes," 4 "nays," no passes.

Reasons.

(Filed December 15th, 1916.)

NEW JERSEY SUPREME COURT.

CARLTON GODFREY and HENRY WEIDERHOLD, *Prosecutors,* *vs.* BOARD of CHOSEN FREEHOLDERS OF THE COUNTY OF ATLANTIC, *et als.,* *Respondents.*	*On Certiorari.* *Reasons.*

Carlton Godfrey, the prosecutor in the above entitled proceedings, relies upon the following reasons in his application to set aside and for nothing holden the resolution of the Board of Chosen Freeholders of Atlantic County, adopted at a meeting held November 24th, 1916, and all proceedings of said Board touching or concerning the extraordinary repairs to or reconstruction of certain portions of a road between Atlantic City and the Camden County line, and certain portions of the road between Absecon and the Sea View Golf Club, by the terms of which resolution a contract was awarded to Liddle & Pfeiffer:

1. Because by the proviso of a resolution of the Board of Freeholders of November 8th, 1916, all the proceedings of said Board touching or concerning the subject matter of the resolution of November 24th, 1916, were declared null and void.

Reasons.

2. Because the resolution of November 24th, 1916, is in violation of the Act of 1912, page 593, which provides that the act of any public body entering into any agreement for the doing of any work, or furnishing of any materials or labor, in excess of the sum of $500 shall be invalid, and such public body shall first publicly advertise for bids therefor.

3. The resolution of November 24th, 1916, attempts to revive proceedings of the Board theretofore annulled as the resolution of November 8th, 1916.

4. Because the resolution of November 24th, 1916, and all proceedings touching or concerning the subject matter of said resolution rests upon the authority of an Act P. L. 1914, page 203, which act contravenes Paragraph 4, Section 7 of Article IV of the Constitution of New Jersey, by making one act of the Legislature part of the act of 1912 without incorporating the act referred to in full therein.

5. Because the act of 1914, page 203, by authority of which the resolution of November 24th, 1916, was adopted contravenes Paragraph 4 of Section 7 of Article IV of the Constitution of New Jersey, in that it embraces more than one object, and one of the objects embraced is not expressed in its title.

6. Because the resolution of November 24th, 1916, attempts to provide for the making of permanent improvements to roads, by virtue of the authority of the Act, Pamphlet Laws 1914, page 203, which provides only for the making of extraordinary repairs or reconstruction.

7. Because the resolution of November 24th, 1916, is based upon proceedings of the issue of bonds in violation of the statute which authorizes such bond issue P. L. 1912, page 809, P. L.

Reasons.

1914, page 203, in that the bonds are issued for varying periods from five to fifteen years, whereas the Act under which they are authorized, if authorized at all, limits the issue to a period of five years.

8. Because the Board of Freeholders were without authority to award a contract by the resolution of November 24th, 1916, for the reason that there was no previous advertisement as required by Pamphlet Laws of 1912, page 595.

9. Because the Board of Freeholders were without authority to award any contract until the bond issue for the payment of the same had been sold, and the money actually in hand.

THEODORE W. SCHIMPF,
C. L. COLE,
GODFREY & READ,
Attys. for Carlton Godfrey.

Order.

Order.

(Filed December 9th, 1916.)

NEW JERSEY SUPREME COURT.

CARLTON GODFREY, *Prosecutor,* *vs.* BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY, *Respondents.*	*On Certiorari.* *Order.*

It appearing to the Court that Clarence M. Liddle and William H. Pfeiffer, trading as Liddle & Pfeiffer, are the contractors named in the resolution of award of the Board of Chosen Freeholders of Atlantic County, which resolution was, by writ of certiorari granted to the above named prosecutor on the twenty-eighth day of November, nineteen hundred and sixteen, removed to this Court for review, and that the said Clarence M. Liddle and William H. Pfeiffer, trading as Liddle & Pfeiffer, have some interest in the subject matter of the said resolution.

IT IS on this fifth day of November, nineteen hundred and sixteen, on motion of Godfrey & Read, and Theodore W. Schimpf, Esquires, attorneys for the prosecutor, ORDERED that Clarence M. Liddle and William H. Pfeiffer, trading as Liddle & Pfeiffer, be, and they are, hereby made parties defendant in the above proceeding; and it is further ordered that a copy of this order, to which shall be attached uncertified copies of the writ of certiorari aforesaid,

shall be served upon the said Clarence M. Liddle and William H. Pfeiffer, trading as Liddle & Pfeiffer, within ten days from the making of this order.

CHAS. C. BLACK,
Justice of Supreme Court.

Entered December 9, 1916.
On motion of
GODFREY & READ and
THEO. W. SCHIMPF,
Attorneys.

A true copy,

WM. C. GEBHARDT,
Clerk.
(Filed Jan. 3d, 1917.)

LEGAL
ADVERTISEMENT.

The Board of Chosen Freeholders of Atlantic County, N. J., will receive bids at Eleven o'clock A. M. during a meeting to be held in Memorial Hall, New York Avenue, Atlantic City, N. J., November 4th, 1916, for extraordinary repairs to any number or all of the following roads, or to the three as a whole.

1. White Horse Pike from Absecon to Hammonton.

2. White Horse Pike from Hammonton to the Camden County Line.

3. Ocean Highway from Absecon to Sea View Golf Club.

Plans and specifications may be seen at the office of the Engineer for Atlantic County, N. J., Guarantee Trust Build-

ing, Atlantic City, N. J., where they may be obtained in return for a deposit of $10.00 for each set. Such deposit will be refunded if plans and specifications are returned by noon of November 6th, 1916. Bids must be made out on bidding blanks incorporated in the specifications.

The total work involved in the three roads is approximately as follows: Embankment 8736 cubic yards; Warrenite Pavement and Base Course, 287,475 square yards; Gravelled shoulders, 22,572 cubic yards; Gravel "C" for foundations, 14,853 cubic yards; Concrete Gutters, 5,366 square yards; Wooden Guard Rail, 20,500 lineal feet; together with quantity of Concrete Headers, Drainage Provisions, Catch Basins and other incidental items.

A certified check to the amount of $1,000 will be required with each bid and a contractor will be required to furnish a bond in the full amount of the contract price, which must guarantee maintenance for a period of five (5) years.

If a contract is awarded it will be conditioned upon the sale and delivery of bonds by Atlantic County for payment of the work under the contract and a contract will not be executed and delivered to a Contractor until said bonds have been issued, sold and delivered.

Advertisement for Bids.

The right is reserved to reject any or all bids.

A. H. NELSON,
Engineer for Atlantic County.

DOMINIC CORSIGLIA,
Chairman of Road Committee.

Pr's fee, $14.30. No. 23954.

Stipulation.

Stipulation.

NEW JERSEY SUPREME COURT.

CATLTON GODFREY, *et al.*, *Prosecutors.* *vs.* THE BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC CO., *et als.* *Respondents.*	*On Certiorari.* *Stipulation.*

It is stipulated and agreed between all the parties to this action by their respective Counsel that the attached notice was published in the Atlantic City Daily Press and Atlantic City Review, two new papers printed and published in Atlantic City, Atlantic County, N. J., in their issues of October 17, 24, 31, of 1916, and the Engineering new , a new papers printed and published in New York City in the issue of October 19, 26, 1916.

E. A. HIGBEE,
Atty. Board of Chosen Freeholders of Atalntic County.
RIKER & RIKER,
Attys. of Liddle & Pffeifer.
C. L. COLE,
Atty. for Henry Wiederheld.
THEO. W. SCHIMPF,
Atty. for Carlton Godfrey.

A true copy.
WM. C. GERHARDT,
Clerk.

RULES OF THE BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY.

Rule. 5. All voting shall be *viva voce* unless otherwise ordered, and all discussions shall be governed by parliamentary rules as accepted and in force in the Legislature of New Jersey.

RULES OF HOUSE OF ASSEMBLY OF NEW JERSEY, ADOPTED AT SESSION OF 1916.

Rule 30. When a motion has been once made and carried in the affirmative or negative, it shall be in order for any member who voted with the prevailing party to move for the reconsideration thereof on the same day, or on the next day of actual session of the House thereafter; all motions may be reconsidered by a majority of the members present; but bills to be reconsidered must have the same majority that would be necessary to pass them, and such vote on motion to reconsider shall be by taken the ayes and nays.

Opinion.

(Filed.)

NEW JERSEY SUPREME COURT.

CARLTON GODFREY and HENRY WEIDERHOLD, *Prosecutors,* *vs.* BOARD of CHOSEN FREEHOLDERS OF THE COUNTY OF ATLANTIC AND LIDDLE & PFEIFFER, *Respondents.*		*On Certiorari.*

Argued December 29, 1916.

Decided January 24, 1917.

Before Justice Black.

Messrs. Godfrey & Read, C. L. Cole, Esq., and Theo. W. Schimpf, Esq., for Prosecutors.

Adrian Riker, Esq., and Emerson L. Richards, Esq., for Liddle & Pfeiffer; E. A. Higbee, Esq., for Board of Chosen Freeholders of the County of Atlantic.

A resolution passed by a Board of Chosen Freeholders, providing, that an award of a contract, for the improvement of a county road be not binding, if Chapter 285 of the laws of 1916 was adopted by the voters of the state; that, in the event said law was adopted by the voters of the state, the award and all the proceedings shall be null and void. The resolution was passed November 8, 1916. The above act was adopted by the voters of the state at the election, November 7, 1916. On November 24th, 1916 at a special

meeting of the Board, the above resolution was repealed, disposed of, set aside and for nothing holden. A contract was awarded under the original advertisement for bids. Held, the award of the contract was void and illegal.

The opinion of the Court was delivered by BLACK, *J.*

On the eighth of November, 1916, the Board of Chosen Freeholders of the County of Atlantic, by a resolution, awarded a contract to Messrs. Liddle & Pfeiffer for extraordinary repairs or reconstruction of a permanent character, improving a county road. The proceedings were based upon P. L. 1914, p. 203, and sec. 27, P. L. 1912, p. 826. The bond issue is based upon P. L. 1916, p. 525. The road leads from Absecon Bridge, in the City of Absecon, to the county line, between the counties of Camden and Atlantic, being what is known as the White Horse Pike, running through the towns of Hammonton and Absecon, and to that portion of the county road leading from the aforesaid road, in the City of Absecon, to the Seaview Golf Club, in the Township of Galloway, being that portion of the road commonly known as Ocean Boulevard, for the width of sixteen feet in the centre of the road, for the sum of six hundred, ninety-three thousand, four hundred and forty-three dollars and forty-eight cents ($693,443.48), subject to the following proviso: "Provided, further, that this award shall not be binding upon the Board of Freeholders of the County of Atlantic, nor shall any contract be entered into, nor any bonds offered for sale under resolution heretofore passed, to be issued for the purpose of paying for the contract herein mentioned, if Chapter 285 of the

laws of 1916 was adopted by the voters of this state at the election held November 7th, 1916. That in the event said law was adopted by the voters of this state, this award and all proceedings touching the work herein referred to, and the award of the bid shall be null and void."

While the record does not show, that Chapter 285 of the laws of 1916 was adopted by the voters of the state, at the election held November 7, 1916, yet on the argument this fact was admitted.

On November 24th, 1916, at a special meeting of the Board of Chosen Freeholders of Atlantic County, another resolution was passed, viz: that, the above proviso be repealed, disposed of, set aside and for nothing holden, so that, the Board may proceed with the entering into a contract with Messrs. Liddle & Pfeiffer according to the terms of their bid, and be it resolved, that the above proviso "be repealed, disposed of, set aside and for nothing holden and that the contract for making said extraordinary repairs herein mentioned, be awarded to Liddle & Pfeiffer for the amount of their bid, they being the lowest bidders."

The problem for solution, provided by these resolutions is, whether the latter award was legal and binding, so, that, a contract and sale of bonds, thereunder will be legal. The argument advanced on behalf of the Board of Freeholders is to that effect; the proviso in the resolution of November 8, 1916, attempts to make void the award and all proceedings touching the work therein referred to. The intention of the Board could be reconsidered in the same way, as any other intention of such Board, according to parliamentary law and usage. The resolution of November 24th, even if not, strictly speaking,

a reconsideration, is clearly a rescission of the previous action on the proviso, in the resolution of November 8th; the proviso, in the resolution of November 8th, constitutes a repealer of the proceedings anterior thereto; the resolution of November 24th, constitutes a repeal of such repealer, which, therefore, in accordance with well established law, revives such anterior proceedings. The fact is the Board of Chosen Freeholders passed upon, the question of the lowest bidder and of the formality of the bid and awarded the contract to Messrs. Liddle & Pfeiffer, subjecting it, however, to a condition, not contemplated by the bidder and not embodied in the advertisement for bids and which the Board of Chosen Freeholders could not enforce against the bidder without his consent. The award must follow the terms of the advertisement. *Armitage* v. *Mayor etc. of Newark,* 86 N. J. L. 5. The action of the Board on November 8th, was neither an award of the contract, in accordance with the terms of the advertisement nor was it a rejection of all bids by the Board. On the 24th of November, the Board again met in special session and then took the action which was their duty to take, by determining to award the contract to Messrs. Liddle & Pfeiffer and not to reject their bid. Meanwhile, the bid of Messrs. Liddle & Pfeiffer had not been withdrawn, but was a continuing one and subject to acceptance by the Board; as, the action of the Board of Freeholders on November 8th is susceptible of the view, that a valid award was then made under the resolution, for the reason that the Board was without power to impose a condition not contained in the notice to bidders or the plans and specifications, and inasmuch, as, it undertook to make an award,

that part of the resolution containing the unauthorized proviso, was void and of no effect. In either event a valid award was made to Messrs. Liddle & Pfeiffer on the 8th or 24th of November, 1916.

This argument is more ingenious than sound. The prosecutors in reply thereto, argue that it shall be lawful for the Board of Chosen Freeholders to award a contract or contracts, for such repairs or reconstruction on bids duly advertised for in two public newspapers, printed and circulating in such county, for two weeks successively, at least, once in each week, before the date fixed therein for the receipt of the bids. P. L. 1914, p. 204, sec. 1, So, in the act of 1912, p. 837, sec. 22. The state commissioner shall advertise for bids which shall state the hour, date and place where the sealed proposals will be received and publicly opened and read. The commissioner may then reject any or all bids, but the award of the contract, if made, must be to the lowest responsible bidder.

The Board reserved the right in this case in the advertisement, to reject all bids. The universal practice is to reject all bids, adjourn to a fixed day for further consideration, or award a contract. They chose the latter course. They awarded the contract upon condition, that the Egan bill had not been adopted by the voters of the state. But the voters of the state had adopted the act. Possibly two views are permissible, one, that the award never had any legal vitality, because of the condition imposed; the other, that having had vitality, it was lost, when the fact appeared, that, the Egan act had been adopted. Either view defeats the award.

It is not controverted that, an adjournment may be taken for consideration at a later day,

but if there be action or non-action and no new day is left open for a further consideration, then, the transaction is final and concluded. To use the words of the brief, "The award of November 8 was something or nothing. If something, it was final—if nothing, it could not be revived by the action on November 24th."

While I am not aware of any statute or decision that either permits or forbids these public contracts to be awarded upon conditions, *i. e.*, depending upon the happening or not happening of events not connected with the subject matter of the contract, on grounds of sound public policy, contracts so awarded should be declared void. If the award can be made to depend upon one condition, why not on two or many? If this condition in the award can be nullified after sixteen days at a special meeting, not an adjourned meeting, why not after thirty, forty or sixty days, and so on, until the award of the contract will be left in confusion and uncertainty, the legality of the bonds issued to pay for the cost impaired? This litigation is an apt illustration of the uncertainty that does arise out of awarding a public contract upon a condition.

The course demanded by all interests, affected in the awarding of these public contracts at the time fixed in the advertisement, for receiving and reading the bids is either to award a contract, reject all the bids or adjourn to some fixed time publicly announced for further consideration. Any other course is open to suspicion and uncertainty. If conditions are to be attached to the making of an award, such conditions should be stated in the advertisements calling for bids, so, that, the award of a contract, under such an advertisement would follow its terms.

Armitage *v.* Mayor, etc., of Newark, 86 N. J. L. 5. Section 33 of the Crimes act, 2 Comp. Stats. p. 1756 requires, that bids shall be opened in public, at the time and place on the day named in the advertisement, and public announcement made of the contents, in the presence of the parties bidding on their agents. By statute, P. L. 1913, p. 366, in contracts to be paid by state funds exceeding the sum of $1,000 the contract therefor shall be awarded within three days, after the day prescribed for publicly opening the bids.

I am therefore constrained to hold, that, the award of the contract in this case is void. This makes it unnecessary to consider or decide the other important and interesting points raised by the prosecutors, which were argued orally and at length in the briefs of the respective counsel, representing all parties to this litigation.

The resolution awarding, the contract to Messrs. Liddle & Pfeiffer is set aside with costs

Order for Judgment.

(Filed January 31st, 1917.)

NEW JERSEY SUPREME COURT.

CARLTON GODFREY, *et al.*, *Prosecutors,* *vs.* BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF ATLANTIC, *et al.*, *Respondents.*	*On Certiorari.* *Order for Judgment.*

The Court having inspected the transcript and proceedings of the Board of Chosen Freeholders of the County of Atlantic, returned with the certiorari in this cause, and the reasons for setting aside the resolutions of said Board, and heard the argument of counsel therein, and having duly considered same;

It is, on this twenty-fourth day of January, nineteen hundred and seventeen, Ordered that the resolutions of the Board of Chosen Freeholders of the County of Atlantic of the eighth day of November, 1916, and the 24th day of November, 1916, by which the said Board awarded a contract to Messrs. Liddle & Pfeiffer for the improvement of certain roads in the County of Atlantic, as well as the award of said contract, be reversed, set aside, made void and for nothing holden; and that the said plaintiff in certiorari be restored in all things wherein they

Order for Judgment.

have lost, by reason of the said resolutions and award, with costs.

On motion of

GODFREY & READ,
THEO. W. SCHIMPF,
C. L. COLE,
Attorneys of Prosecutors.

A true copy,

WM. C. GEBHARDT,
Clerk.

Notice of Appeal.

(Filed.)

NEW JERSEY SUPREME COURT.

CARLTON GODFREY and HENRY WEIDERHOLD, *Prosecutors,* *vs.* BOARD OF CHOSEN FREEHOLDERS of the County of Atlantic, and CLARENCE M. PFEIFFER, trading as LIDDLE & PFEIFER, *Respondents.*	*On Certiorari.* *Notice of Appeal.*

To Messrs. Godfrey & Read, C. L. Cole, Esq., and Theodore W. Schimpf, Esq.,
Attorneys for Prosecutors.

Gentlemen:

TAKE NOTICE that the respondents, Clarence M. Liddle and William H. Pfeiffer, trading as Liddle & Pfeiffer, appeal to the Court of Errors and Appeals from the whole of the judgment entered in this cause declaring the resolutions of said Board of Chosen Freeholders, passed November 8th, 1916, and November 24th, 1916, authorizing the bond issue and awarding of a contract to the said Liddle & Pfeiffer, and such award of such contract to such respondents, invalid, on the following grounds:

1. The resolutions of the Board of Chosen Freeholders of the County of Atlantic, passed November 8th, 1916, and November 24th, 1916, and the authorization of the bond issue, and the award of the contract to the respondents, Lid-

dle & Pfeiffer, thereunder, are in all respects lawful, regular and valid.

2. The work contemplated by such resolutions, the award of such work and the bond issue to pay therefor, are duly and legally authorized by such resolutions, and by the statutes in accordance with the provisions of which such action by the Board of Chosen Freeholders of the County of Atlantic was taken.

3. Such resolution of November 6th, 1916, was valid, the condition contained in such resolution as to the adoption of Chapter 285 of the Laws of 1916 by the people of the State of New Jersey being invalid and without effect.

4. Such resolution of November 8th, 1916, was invalid by reason of the condition contained therein as to the adoption by the people of the State of New Jersey of Chapter 285 of the Laws of 1916, and the award of such contract by such resolution of November 24th, 1916, and the authorization of the bond issue are, therefore, valid.

5. Such resolution of November 8th, 1916, with such condition as to the adoption by the people of the State of New Jersey of Chapter 285 of the Laws of 1916 was valid, but was validly reconsidered, rescinded and repealed by said resolution of November 24th, 1916, which resolution constituted a valid award of such contract and authorization of such bond issue.

6. Such resolution of November 8th, 1916, was neither an award of such contract nor a rejection of bids for the work contemplated thereby, and such rejection of November 24th, 1916, was, therefore, valid as a full authorization of the award of such contract and the authorization of such bond issue.

7. The advertisement preceding the award of such contract, and the authorization of such bond issue, was due and legal.

8. Such resolutions of November 8th, 1916, and November 24th, 1916, were valid, in that they expressly provided that "Such contract shall not be entered into between the parties unless the bonds to be issued for the purpose of paying for said extraordinary repairs shall have been sold and delivered, and the money received therefor."

9. Such resolutions of November 8th, 1916, and November 24th, 1916, are valid, in that it was unnecessary for the money to be in hand before the award of the contract for the work contemplated therein.

10. P. L. 1914, page 203, referred to in the provisions of such resolutions of November 8th, 1916, and November 24th, 1916, is constitutional, and due and legal authority for the carrying out of the work and issuance of the bonds contemplated by such resolutions of November 8th, 1916, and November 24th, 1916.

11. The issuance of the bonds contemplated by the provisions of such resolutions of November 8th, 1916, and November 24th, 1916, is duly authorized by virtue of the provisions of the so-called Pierson Municipal Bonding Act (P. L. 1916, page 525).

EMERSON L. RICHARDS,
Attorney for Liddle & Pfeiffer,
Appellants.

RIKER & RIKER,
of Counsel.