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TESTIMONY.

For Plaintiff.

For Defendant.

EXHIBITS.

NOTICE AND GROUNDS OF APPEAL.

Filed July 6, 1927.

New Jersey Supreme Court

ESSEX COUNTY.

HENRY V. WALKER, *Plaintiff,*	*Action at Law.*
vs.	*Notice and Grounds of Appeal.*
MAAS & WALDSTEIN COMPANY, *Defendant.*	

To Messrs. Pitney, Hardin & Skinner, attorneys of defendant, Prudential Building, Newark, New Jersey.

SIRS:

TAKE NOTICE that the plaintiff appeals from the judgment entered in this cause to the Court of Errors and Appeals in the last resort in all causes and for grounds of appeal states the following:

1. The trial judge erroneously withdrew the case from the consideration of the jury.

2. The trial judge erroneously refused to direct a verdict for the plaintiff for the sum of $22,000.00 with interest from February 2, 1925.

3. The trial judge erroneously directed a verdict for the plaintiff for the sum of $2,000.00 with interest, to the amount of $290.00, total $2,290.00.

4. The trial judge erroneously permitted the defendant's counsel to ask the witness, William P. Allen, the following question:

"Have there been any differences between Dr. Walker and his directors in the Carbonol Products Company as to his policy in that company, other than with relation to this establishment of an independent clan?"

McCARTER & ENGLISH,
Attorneys of Plaintiff-Appellant.

COMPLAINT.

Filed March , 1925.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

HENRY V. WALKER, *Plaintiff,* *vs.* MAAS & WALDSTEIN COMPANY, a corporation, *Defendant.*	*Complaint.*

The plaintiff, Henry V. Walker, residing in the City of Newark, Essex County, says that:

1. On December 2, 1924, the defendant through its Board of Directors elected and employed the plaintiff as its President and General Manager for ~~the period of one~~ ensuing year ~~from~~ said date, at an annual salary of $24,000, to be paid from the 2nd of December, 1924.

2. Plaintiff had been for a long time prior thereto, and ever since December 7, 1915, annually elected and employed by defendant through its Board of Directors, as President and General Manager of the defendant, and his election and employment on December 2, 1924, was a continuation of his previous employment.

3. Immediately upon his election and employment on December 2, 1924, plaintiff entered upon the continuation and performance of the duties which he had previously performed as President and General Manager of the defendant, and

fully performed the contract on his part to be performed and did perform all the duties of President and General Manager of the said defendant.

4. On February 2, 1925, while plaintiff was confined to his home by reason of illness and was unable to go about, the defendant, acting through its Board of Directors, removed him as President of the defendant company, such removal to take effect immediately, and discharged him as General Manager. Plaintiff, nevertheless, proceeded to his usual place of business at the factory plant of the defendant in Newark as soon thereafter as his health would permit, and ever since that time has tendered himself ready and willing to, and has endeavored to perform his duties as President and General Manager, but has been prevented from so doing by the defendant.

5. Plaintiff's removal from the office of President of the defendant and his discharge as General Manager, was unjustifiable and without cause.

6. Defendant has paid plaintiff on account of his annual salary the sum of $2,000. The sum of $22,000 for the balance of the year from December 2, 1924, is still due and owing the plaintiff.

Plaintiff demands as damages in the sum of $22,000 besides lawful interest and costs of suit.

McCARTER & ENGLISH,
Attorneys for Plaintiff.

ORDER AMENDING COMPLAINT.

Filed June 24, 1927.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

HENRY V. WALKER, *Plaintiff,* *vs.* MAAS & WALDSTEIN COMPANY, a corporation, *Defendant.*	*Action at Law.* *Order.*

The plaintiff having made application at the trial to amend his complaint, and no one objecting;

It is ORDERED on this 13th day of June, 1927, that the first paragraph of the complaint be amended as follows:

In the third and fourth lines of said paragraph, strike out the words "period of one year from said date," and insert in lieu thereof the words "ensuing year"; and in the fourth and fifth lines of said paragraph, strike out the words "to be paid from the second day of December, 1924," so that said paragraph 1 of the complaint shall read as follows:

"1. On December 2nd, 1924, the defendant through its Board of Directors elected and employed the plaintiff as its President and General Manager for the ensuing year at an annual salary of $24,000."

WORRALL F. MOUNTAIN,
Circuit Court Judge.

ANSWER.

Filed March 21, 1925.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

HENRY V. WALKER, *Plaintiff,* vs. MAAS & WALDSTEIN COMPANY, a corporation, *Defendant.*	*Action at Law.* *Answer.*

The defendant, Maas & Waldstein, a corporation organized and existing under the laws of New Jersey, answering the complaint in the above-entitled action says that:

1. It admits that on December 2, 1924, the plaintiff was elected as President of the defendant company for one year and that his salary as such President was fixed at $24,000 for the year. Defendant denies the remaining allegations in paragraph 1 of the complaint contained.

2. It admits that on December 7, 1915, the plaintiff was, and annually until December 2, 1924, had been, elected by the defendant as President of the defendant company. Defendant denies the remaining allegations in paragraph 2 of the complaint contained.

3. It admits that upon his election on December 2, 1924, the plaintiff entered upon the performance of his duties as President of the defendant company. Defendant denies the remaining allegations in paragraph 3 contained.

4. It has no knowledge of the allegations contained in paragraph 4 of the complaint regarding the alleged illness of the plaintiff and his alleged inability to go about and leaves the plaintiff to make such proof thereof as he may be advised. Defendant admits that on February 2, 1925, it removed the plaintiff as President of the defendant company, and that such removal was made to take effect immediately. Defendant denies the remaining allegations of paragraph 4 of the complaint contained.

The answer should

5. It denies paragraph 5 of the complaint, and says that the plaintiff was subject to removal and was duly removed from his office as President of the defendant, by action of its Board of Directors duly taken under and by virtue of its by-laws.

6. It denies paragraph 6 of the complaint and says that it paid to the plaintiff the sum of $2,000 for the month of December, 1924, and the sum of $2,000 for the month of January, 1925.

FIRST SEPARATE DEFENSE.

As a first separate defense to the complaint, the defendant says that on February 2, 1925, by action of its Board of Directors, the defendant lawfully removed the plaintiff from his office as President of the defendant for good and just cause.

PITNEY, HARDIN & SKINNER,
Attorneys of the Defendant.

Rule for Judgment.

RULE FOR JUDGMENT.

Filed June 23, 1927.

NEW JERSEY SUPREME COURT.

HENRY V. WALKER, *Plaintiff,* *vs.* MAAS & WALDSTEIN COMPANY, a corporation, *Defendant.*	*Action at Law.* *On Postea.*

IT IS ORDERED that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of two thousand two hundred and ninety dollars, besides costs to be taxed *nisi.*

Entered June 23, 1927.

On motion of

McCARTER & ENGLISH,
Attorneys.

Damages $2,290.00
Costs .....

$

Opening.

NEW JERSEY SUPREME COURT.

ESSEX CIRCUIT.

June 13, 1927.

HENRY V. WALKER, *Plaintiff,* *vs.* MAAS & WALDSTEIN COMPANY, a corporation, *Defendant.*	*Action at Law.*

Before Hon. Worrall F. Mountain, *J.*, and a jury.

For the plaintiff appear McCarter & English (by Conover English).

For the defendant appear Pitney, Hardin & Skinner (by Alfred S. Skinner).

(A jury is called and sworn.)

By the Court.

I understand it is agreed between counsel that a copy of the complaint handed to me, together with a copy of the answer handed to me, are true copies of the originals on file in the office of the Supreme Court clerk in Trenton, and that you both agree to go to trial with these true copies without any objection.

Mr. English: Yes, your Honor.

Mr. Skinner: Yes, your Honor.

The Court: This is not a transcript, and if I had not set this case down for a day with preference I would not try it, but if you will

agree that this is equivalent to a transcript, on that it will not be raised on an appeal, I will go ahead and try the case.

Mr. Skinner: I have Mr. English's assurance that that is a correct copy, and that is enough for me, and therefore I consent.

Mr. English: I consent, your Honor.

Mr. English opens for the plaintiff.

Mr. Skinner opens for the defendant.

SANFORD FERRIS, sworn in behalf of the plaintiff.

Direct examination by Mr. English.

Q Are you a practicing physician in the City of Newark? A I am.

Q And have been how long? A Since 1901.

Q Do you know Dr. Walker, the plaintiff here? A I do.

Q Is he a patient of yours? A He is.

Q Was he under your professional care in January, 1925? A He was.

Q Was he at a hospital? A Yes, sir.

Q What hospital? A St. Mary's.

Q For an operation? A Yes, sir.

Q When did he leave the hospital and return to his home? A January 27th.

Q You have refreshed your memory from your record book? A From my records.

Q January 27, 1925, he got back home? A Yes, sir.

Q When next did you see him at his house? A February 1st.

Q Yes, when next? A February 3rd.

Q When next? A February 6th.

Q When was he first able to go out of his house and return to his office? A After the 6th I told him that he may go downstairs and go out around on the porch.

Q On the 6th? A Yes, sir.

Q After you let up on him was he able to go downstairs and go out on the porch? A Yes, then he felt able to go to the office.

Q Up to that time had you let him go downstairs? A No.

Q On February 2nd, was he physically able to go to New York and attend a meeting? A I did not want him to.

Q I mean it was against your judgment or advice? A Yes.

Cross examination by Mr. Skinner.

Q Did he consult you about it? A No, I said I wouldn't want him to. He did not consult me about it.

Q He did not tell you he had any notice of a meeting? A No.

Q He did not ask your judgment as to whether it was right for him to go? A No.

Q He had been operated upon for the removal of piles? A No; he had a large rectal vein.

Q Did it affect his comfort in walking? A No, it was high up. The reason I did not want him to walk was I did not want that bowel to be disturbed. It was rather a large vein in the membrane of the bowel and I did not want anything to happen to it.

Q Do you remember when he was operated upon? A He was operated on on the 9th, but we had him under an anesthetic on the 6th.

Q The 9th of what? A The 9th of January.

Q Before that he was under an anesthetic on the 6th? A Yes, sir.

Q Just for observation? A Yes, sir, to determine the nature of it.

Q That is for observation? A Yes, sir.

Re-direct examination by Mr. English.

Q Was that rather a serious operation? A Oh, yes.

Q He was a pretty sick man, wasn't he? A Oh, yes. It is serious to the extent that you are getting down to the cutting of the bowels.

Q So, it was important that he stay quiet for some days? A I wanted him to for the result of the operation.

HENRY V. WALKER, plaintiff, sworn in his own behalf.

Direct examination by Mr. English.

Q You are the plaintiff in this case; did you bring this suit? A I am.

Q Where is your home? A 191 Ballantine Parkway, Newark, New Jersey.

Q You have been a resident of Newark for a number of years? A Since 1910.

Q Prior to February, 1925, had you had any connection with the defendant, Maas & Waldstein Company? A Yes, sir, I had been president of that company.

Q For how long prior to February, 1925, had you been president? A From December, 1915; ten years.

Q Did you have any other office or position in that company beside that of president? A I was a director.

Q Had you ever been any other officer beside president? A Previous to being president I was secretary of the company.

Q For how many years were you a director? A Sixteen years.

Q From 1910? A 1910, fifteen years.

Q In addition to being a director and in 1925 president, were you employed by the company in any other capacity? Did you exercise any other function?

Mr. Skinner: I object as leading.

The Court: I will admit it.

A I was in charge of the factory and I was general manager of the corporation.

Q I have here a minute book produced by defendant's counsel which I may use?

Mr. Skinner: Yes.

Mr. English: I would like, your Honor, to offer in evidence the minute book of the company produced by defendant's counsel and I will call attention in the record to the resolutions in it which are pertinent.

Mr. Skinner: No objection.

(Minute book is marked Exhibit P. 1.)

Q Referring to Exhibit P. 1, I call your attention specifically to pages 74 and 75, which are the minutes of the annual meeting of the stockholders held on January 18, 1910. I show you that minute and I ask you if from it it appears

you were elected a director of the company on that day? A Yes, sir, I was.

Q Was that your first election as a director? A It was.

Q Were you subsequently elected a director every year thereafter? A I was.

Q Until when? A December 2, 1924.

Q I show you the minutes of the stockholders' meeting held on December 2, 1924, on pages 225 and 226 of the minute book, and I ask you if it appears there that you were elected a director at that meeting?

Mr. Skinner: I object. These minutes speak for themselves.

A It appears on the minutes as follows: "The meeting then proceeded to the election of directors for the ensuing year. Dr. Henry V. Walker, Milton A. Maas and Frederick Magnus were nominated as directors of the company for the ensuing year. The balloting having taken place, the reports show that each nominee had received the required number of votes and were there declared unanimously elected. There being no other business before the meeting the same was on motion adjourned. Harry N. Selvage, Secretary."

Q You have been elected a director successively from 1910 to and including that meeting in 1924? A Yes, sir.

Q You said at one time you had been elected secretary of the company? A Yes, sir.

Q I show you the minutes of the meeting of January 18, 1910, on page 76. Does it appear there that you were elected secretary of the company? A The minutes read in part as follows: "The meeting then proceeded to the election of officers for the ensuing year and the following nominations were made: Martin Waldstein was nominated as president, Milton Maas, vice president, Frederick Magnus as treasurer and Henry V. Walker as secretary. A ballot having been taken and each of the nominees received four votes were thereupon unanimously elected. There being no further business before the meeting the same, on motion, adjourned."

Q You were successively elected secretary until when? A Until December 7, 1915.

Q I show you the minutes found on page 157 of the minute book, which is the meeting of the directors held on December 7, 1915, and I ask you if it appears from that minute that you were elected president and who the other officers then elected were? A The minute reads in part as follows: "The meeting then proceeded to the election of officers for the ensuing year, and the following nominations were made: Dr. Henry V. Walker was nominated as president, Frederick S. Magnus, treasurer, Milton A. Maas as vice president and secretary. A ballot having been taken said nominees were duly elected and so declared. There being no other business before the meeting the same on motion adjourned."

Q Were you successively elected president up to and including the meeting of December, 1924? A I was.

Q At the time of your election as president in 1924 what was the salary which you were paid? A $24,000 per year.

Q I call your attention to the minute book, page 217, which is a minute of the special meeting of the Board of Directors held on July 6,

1922, and I ask you to state what the salaries of the officers were provided for as stated in that minute? A The minute reads as follows: "Upon motion of Mr. Frederick S. Magnus, unanimously carried, the by-laws were amended as follows: The president of the company shall receive an annual salary of $24,000.00."

Q Give the rest of it. A "The vice president shall receive an annual salary of $24,000. The treasurer of the company shall receive an annual salary of $24,000. The vice-president shall perform the duties of secretary without further compensation. The additional $12,000 for the year 1922 to be payable on or before December 15th, 1922, and thereafter payable monthly in advance. There being no further business the meeting on motion adjourned."

Q Did you and did your other associates in the company mentioned in the minutes receive an additional $12,000 that year? A We did.

Q Thereafter, did you receive a salary at the rate of $24,000 a year, payable in advance at the rate of $2,000 a month? A We did.

Q I call your attention to the minutes of the meeting of the directors held on December 2, 1924, found on page 227 of the minutes, and I ask you if that shows that you were elected president and if that was the last meeting that you were elected president preceding your removal? A It does so show. I have already read this extract.

Q I do not think you have read that. Read it again. A This is a meeting of the directors held on the 2nd day of December, 1924. "The meeting then proceeded to the election of the officers for the ensuing year and the following nominations were made: Dr. Henry V. Walker

was nominated as president. Frederick S. Magnus as treasurer, Milton A. Maas as vice president and secretary. A ballot having been taken said nominees were duly elected and was so declared. There being no other business before the meeting, the same on motion adjourned. Signed (Milton A. Maas, secretary.)"

Q Did you receive your salary for the year, any part of your salary for the year 1925 in advance? A Yes, sir, I received my salary for the month of January.

Q How early in the month was that paid? A The 2nd day of the month.

Q The first day being a holiday? A Yes, sir.

Q Was that pursuant to a previous resolution you read, an amendment to the by-laws from the practice of the company? A Yes, sir.

Q Following your election in December, 1924, did you perform the duties you had previously performed as president and manager of the company? A I did.

Q Generally, what were those duties? A Primarily the management of the factory and secondarily all other matters connected with the business of the corporation.

Q The factory was located here in Newark? A Yes, sir.

Q Did the company have a New York office? A It did.

Q Your chief headquarters were at the factory in Newark? A They were.

Q Did you ever have occasion to go to the New York office? A I did, frequently.

Q Approximately how often? A It varied, sometimes several times a week; sometimes once a week. I should say on an average of every week or ten days.

Q When you were at the New York office what was the character of the business which you would transact there with your associates in the company? A General matters of company policy. In recent years particularly questions of sales policies.

Q Who had charge, general charge of the manufacturing end of the company? A I did.

Q In addition to being president of the company? A In a business sense.

Q Are you professionally trained in any line? A I am, I am a chemist, graduate of Columbia University.

Q You have practiced professional chemistry a good many years? A Yes, sir.

Q Besides taking charge of the manufacturing end at the factory, who was the manager of the whole factory plant? A The superintendent was a man named Otto P. Seher.

Q Who was his superior? A I was.

Q When it came to questions of general policy of the company in addition to those connected with the operation of the plant, who was consulted in that respect? A Mr. Magnus and Mr. Maas; also Mr. Flannagan, the sales manager.

Q Subject to the direction of the Board of Directors, who was the responsible officer in the general policy of the management of the company? A Well, there was a subdivision of duties. My primary duties were connected with the manufacturing, but I also discussed in conjunction with my associates and decided other questions.

Q You spoke of the question of sales? A Yes, Mr. Magnus was the financial man of the company. He was the treasurer and attended to the office management of the New York office.

Q What did Mr. Maas do? A He did not have any specific business; he was the secretary of the company.

Q Now, I show you a letter, or a notice, rather, dated January 29, 1925, signed, "Milton A. Maas, secretary and treasurer," written on the letterhead of Maas & Waldstein Company. Did you receive that? A I did.

Q When did you receive it? A January 30, 1925.

Q The day after it is dated? A Yes, sir.

Mr. English: I offer this letter in evidence.

Mr. Skinner: No objection.

(Letter is marked Exhibit P. 2.)

(Exhibit P. 2 read to jury.)

Mr. English: This is the New York corporation. There were notices sent out, one for the New York corporation and one for the New Jersey corporation with the identical language, except they used New York in one and New Jersey in the other.

Q What was your physical condition on the date of receipt of that notice? A I had returned from St. Mary's Hospital two days previous, having been at the hospital most of the month of January.

Q Had you undergone an operation on January 7th as Dr. Ferris testified? A I did.

Q Were you physically able on January 30th to go out? A No, I was not.

Q When did the doctor permit you to go out of the house first? A The 6th day of February, 1925.

Q Prior to that, had you been out of the house at all? A No.

Q What was the condition of the weather then, do you remember? A Extremely inclement; a great deal of snow and ice.

Q Did you have any information other than that stated in this notice as to what the meeting was called for? A I had no other notice.

Q Did anybody call you on the telephone and tell you what the meeting was for, or give you any information at all? A No.

Q When next did you hear the results of that meeting? A On the 3rd day of February, 1925.

Q Did you receive a communication through the mail purporting to be a copy of the resolution of the directors held or adopted on February 2, 1925? A I did receive it.

Q Is that the paper which I show you (indicating)? A This is it.

Mr. English: I offer that paper in evidence as a paper received by Dr. Walker.

Mr. Skinner: No objection.

(Same is marked Exhibit P. 3.)

Q I now refer to the minute book, Exhibit P. 1 and I call your attention to the minutes of a special meeting held by the directors February 2, 1925, found on page 231 of the book and I ask you to look at the minutes, and also look at Exhibit P. 3 and tell me whether the notice you received sets up the full minutes of the meeting or only part? A The notice I received sets up only part of the minutes of February 2, 1925.

Q Read the minutes of that meeting to the jury. First, let me ask you to read what it says on the notice, and then to continue on after that

from the book. A I read from the notice, "A special meeting of the Board of Directors of Maas & Waldstein Company of New Jersey, was held at the office of the company, No. 45 John street, Borough of Manhattan, City of New York, New York, on the 2nd day of February, 1925, at three o'clock in the afternoon. There were present Frederick S. Magnus, Milton A. Maas; being a majority of the directors. The meeting was postponed until 3:30 P. M., to await the arrival of Dr. Henry V. Walker, but he not having arrived at that time the meeting was proceeded with. Proof of due mailing on January 29th, of notice of the meeting was presented. The meeting organized by electing Mr. Frederick S. Magnus as chairman, Mr. Milton A. Maas, secretary of the company acted as secretary of the meeting. The reading of the minutes of the previous meeting was, on motion, duly made and seconded, dispensed with. On motion duly made, seconded and unanimously carried, the following resolutions were adopted. Resolved: that in view of Dr. Henry V. Walker having connected himself actively with the Butyl Corporation without consulting his co-directors of this company, he is and hereby is removed as president of this company, such removal to take effect immediately. Further Resolved: That the secretary of this company be and hereby is authorized to notify Dr. Walker of his removal as such president."

Q You have read all that from the notice? A Yes, sir.

Q Go on and read the minutes. A Yes. The minutes continue and follow. "It is further resolved that the secretary of this company be and he is hereby authorized to notify

the various banks in which this company maintains accounts, of the removal of Dr. Henry V. Walker as such president.

Further Resolved that special Account "A" maintained by this company in the National Newark and Essex Banking Co., by henceforth subject to checks signed by William Reuschle, or by any officer of this company.

Mr. Milton A. Maas thereupon tendered his resignation as vice-president and upon motion duly made, seconded and carried, which was accepted, the meeting then proceeded to the election of a president and vice-president to hold office until the next annual meeting, and the following nominations were made: Mr. Milton A. Maas as president and Mr. Frederick S. Magnus as vice-president. A ballot having been taken the said nominees were unanimously elected and were so declared.

Upon motion duly made, seconded and unanimously carried, the following resolution was adopted: Resolved, that the treasurer of this corporation is hereby authorized and directed on behalf of this corporation to deliver in negotiable form, 1012 shares of preferred stock of the Commercial Solvents Corporation to Tucker, Anthony & Co., against payment of $102,054.57, carrying out agreement of December 17, 1924."

"There being no further business before the meeting, the same, upon motion, adjourned.

Milton A. Maas, Secretary."

Q I now call your attention to a meeting of the directors found on page 238 of the minute book, held on December 8, 1925, and particularly that part found on page 239, relating to the

salaries of the then officers and I ask you to read that.

Mr. Skinner: I object to the introduction of the minutes as of December 8, 1925, as being subsequent to this discharge, subsequent to the date as to when this issue was raised and could have nothing to do with this plaintiff's right to a salary. What the company did after that, in fixing the right—

Mr. English: The minute book is all in evidence and this I think is substantially in answer to some of Judge Skinner's claims in his opening about the motives of the directors of Maas & Waldstein Company in discharging Dr. Walker.

(Argument.)

The Court: Sustain the objection. I think at this time you had better just keep to the issue.

Mr. English: The part I refer to is page 239 in the minute book. I will reserve that right.

Q Now, doctor, having received the notice which you read from Exhibit P. 3, what did you do then? A I communicated with yourself.

Q As counsel for you? A Yes, sir.

Q How soon after you got that notice did you communicate with counsel? A Immediately.

Q Up to the time you received Exhibit P. 3, the notice, did you have any inkling or idea that your fellow directors were planning to

remove you from your company? A No, I had no information whatever.

Q Where did counsel confer with you, at their own office, or where? A At my home.

Q Why was that? A I was unable to leave.

Q Counsel came to your house? A Yes, sir.

Q Following that or at that conference did you instruct counsel to write a letter on your behalf? A I did.

Mr. English: I ask for the original of the letter from McCarter & English to Milton A. Maas, dated February 8, 1925.

Mr. Skinner: No objection to the copy.

Q You are familiar with the letter which this is a copy of (indicating)? A Yes, sir.

Mr. English: I offer in evidence the letter from McCarter & English to Milton A. Maas, dated February 8, 1925, the copy.

(Same is marked Exhibit P. 4.)

Q Following that letter this suit was brought by summons dated February 28, 1925? A Yes, sir.

Q You also, I think, took proceedings by an application for a writ of quo warranto on a rule to show cause allowed by the Chief Justice? A I did.

Q That rule was allowed March 7, 1925?

Mr. English: We will agree, Judge Skinner.

Mr. Skinner: Yes, that is the rule to show cause.

Mr. English: Yes, dated and allowed March 7, 1925, and it was subsequently discharged after it was argued before the Supreme Court. May 3, 1926, rule entered discharging rule to show cause, denying the application for the writ.

Q Now, I will refer to the minute book to certain of the by-laws found on page 19, particularly article 4, sections 1, 2, 3 and 4.

Mr. English: Shall I read them or ask the witness to?

The Court: You read them.

Mr. English: "Article 4, Section 1.

Executive Officers: The executive officers shall be a president, a vice-president, a treasurer and a secretary, all of whom shall be elected annually by the Board of Directors. The president, vice-president and treasurer shall be chosen from among the directors; the secretary need not be a director. The powers and duties of the treasurer and secretary may be exercised and performed by the said person.

Section 2. Subordinate Officers. The Board may appoint such other officers as it shall deem necessary, but who shall have such authority and shall perform such duties as from time to time may be prescribed by the Board.

Section 3. Tenure of Officers. All officers and agents shall be subject to removal at any time by the affirmative vote of a majority of the whole Board of Directors.

Section 4. The President. The president shall preside at all meetings of the stock-

holders and by virtue of his office he shall be a member of the Executive Committee. Subject to the Board of Directors and the Executive Committee he shall have general charge of the business of the company. He shall sign all certificates of stock and shall do and perform such other duties as shall from time to time be assigned to him by the Board of Directors.''

Q Following your receipt of this notice Exhibit P. 3 and your consultation with counsel at your house, when were you first able to go abroad? A On the 6th of February, 1925.

Q Then, where did you go? A I went out and walked around the house.

Q I mean as relating to this business affair? A I went down to the office of the company in Newark.

Q How long were you able to stay? A About fifteen minutes.

Q At that time when you went you had received this notice of removal? A I had.

Q Did you continue to tender yourself ready to perform your duties as manager and president of the company? A Yes, sir; I did. The following week I went down on Monday and continued to go there every day.

Q For about how long? A Until late August, 1925.

Q At the present time are you in business? A I am.

Q What is your present connection? A President of the Henry V. Walker Company.

Q Have you ever received the balance of salary which was voted to you on December 2, 1924? A No, I have not.

Q Other than the $2,000 you spoke of? A That is all I received.

Q Which leaves a balance of salary due that year of $22,000? A Yes, sir.

Cross examination by Mr. Skinner.

Q You claim to be entitled to $22,000? A Yes, sir.

Q That is for the balance of the year 1925? A Yes, sir.

Q Crediting the company with about a month's salary? A Yes, sir.

Q Do you rest that claim upon the fact that you went down there and continued at the factory, or do you rest it upon the fact that your salary was fixed for the year and you think you are entitled to it for the whole year?

Mr. English: I object. I think that asks the doctor to give an answer on a question of law, which I think maybe your Honor will have to decide on a motion.

The Court: I think it does.

Q Your counsel asks you if you tendered yourself ready to go on and continue your office and I noticed that your reply was not that you did tender yourself, but that you went down there. Did you at any time make any tender to the officers of the company or your co-directors of a willingness to go on? A I presented myself at the office of the factory every day, as was my custom for many years.

Q I am making that distinction of just going down to the factory or office and tendering yourself as ready to perform. You knew at the

time that your co-directors were over in New York and at the New York office of the company, didn't you? A Yes.

Q You knew that that was the place where you went to confer and had meetings with them, did you not? A Yes.

Q The factory office you speak of was the office you occupied because you were in charge of the production, were you not? A Whatever the reason was it was the office I principally occupied.

Q When you went down to that office after receiving the notice of removal, if you tendered your readiness to any body it was to yourself, there was no one else to tender it to? A There was no one there. To myself; I was still a director of this corporation during this whole time.

Q Then, you do not mean that you made a formal tender? A I had treated the attempts of removal as a nullity. We had contested the removal and my conduct was to treat it as a nullity.

Q That was your own attitude? A Attitude and action.

Q Action expressive of your action towards the attempt of removal? A Yes.

Q You received the notice of removal on what day? A February 3, 1925.

Q On that day it seems your counsel addressed a protest to Mr. Maas, secretary of the company? A Yes, sir.

Q You conferred with him, did you? A I did.

Q Where? A At my home.

Q Not by telephone? A No, he came to my home in person.

Q Then you instructed him to take steps to protect your rights, did you? A Yes.

Q Did you, after you received the notice of your removal, communicate with Mr. Magnus or Mr. Maas? A Through my counsel.

Q Not otherwise? A Not otherwise.

Q Through your counsel means with this notice of protest? A Yes.

Q Did you make any attempt to find out why they had done it? A The notice stated the reason.

Q Didn't you know anything at all about why they did it except what was in the notice? A No.

Q You say your relations with them were friendly?

Mr. English: I object. He did not say that.

The Court: Sustain the objection. I do not remember that he did.

Q At any rate, you made no inquiry except this notice to your company? A That is all.

Q When you got the notice of this special meeting, did you make any inquiry by telephone or otherwise as to what it was about? A No.

Q Why not? A I had just returned from the hospital.

Q You had returned from the hospital some time before, hadn't you? A Two days before.

Q Don't you remember Mr. Otto Seher calling at your house? A Yes, I remember him calling at my house.

Q Do you remember what day it was? A He called frequently; he called at the hospital and at the house.

Q What day did you say you received the notice of the meeting? A January 30, 1925.

Q Didn't you have a call from Mr. Seher on January 28th? A A personal call, you mean?

Q Yes. A He visited me at my house frequently, nearly every day.

Q Don't you remember that particular call? A On January 30th?

Q The 28th? A No, I do not. He may have called that day; he called nearly every day.

Q Did you not tell him on that day that you thought you would be back the next day at his office for a few hours? A I do not remember having seen him on that day, necessarily cannot say what I told him on that day.

Q Necessarily, do you say you did not tell him? A I did not tell him I expected to be back.

Q At no time? A Not when I would be back. I stated, of course, as soon as I see fit I would go down to the office.

Q Without any quibbling as to whether it was January 28th, 29th or some other day, you at no time in the month of January, or prior to the meeting in February at which you were removed, told Mr. Seher that you expected to be back? A I may have stated my expectations, but I did not stipulate to him when I would return.

Q I did not ask you that. I only asked you if you did not tell him as one man to another friend, that you expected to be back the next day? A I do not remember having done that.

Q You say you may have? A I now say I do not remember. I made no stipulation with Mr. Seher and no one else when I would be back.

Q Didn't you tell him of your expected motives that you were going to be back? A It is highly improbable I made any such statement. My doctor had refused to let me go downstairs.

Q It is highly improbable that Mr. Seher would lie about it.

Mr. English: I object.

The Court: Sustain the objection. That is an improper method. The method is to have Mr. Seher take the witness stand and contradict this gentleman later in the case.

Q You spoke of a subdivision of duties. Mr. Magnus was financial manager? A Yes, sir.

Q You were the production manager, weren't you? A Among other things.

Q Well, in the subdivision of duties what was your duty? A Primarily I was in charge of the factory. Any question that was of importance I had a voice in the decision, whether it related to the factory or general business.

Q Just another question about this time, the latter part of January. Weren't you feeling pretty well in the latter part of January, 1925? A That is a relative time. For a man who has been through an operation I was feeling pretty well.

Q Weren't you yourself expecting to go back? A As soon as I was released by my doctor I was expecting to go back.

Q Except for such release you felt personally able to attend at the meeting? A I did not pass on that. I was under orders from my physician.

Q I am asking you how you felt. Except for waiting for an order from the physician you

personally felt able to attend, didn't you? A No, I did not.

Q Weren't you in pretty good physical condition? A I am not a judge of my physical condition.

Q I call attention to your testimony at a former hearing, page 24, to this, "Question: Haven't you any recollection as to whether you were expecting to be back on that date (referring to the next day, the 29th)? Answered: I was awaiting instructions from my physician. As soon as he released me I expected to be back. Question: Except for such release you personally felt able to attend? Answer: I was in pretty good physical condition"? A Which was my answer. That means, for a man who has been through an operation and has just returned from the hospital.

Q By the way, the typewritten paper which was sent you, following the meeting, which was spoken of by counsel as part of the minutes, did you complain because only part of the minutes were sent you? A Yes. I was a director of the corporation and entitled to know what transpired at that meeting.

Q It is not as a president who was removed you make the complaint? A I do not know that I made any complaint. You asked me if I objected and I said I think I should have received a full copy of the proceedings.

Q Did you ask for it? A No.

Q Why didn't you, if you thought you should have it, why do you make a point of it now? A I do not make it, you make it.

Q You make no point then of that fact? A No.

Q The letter that came with that typewritten copy stated, or it did not say that it was a full copy? A I do not remember what it stated.

Q Reading from the record in the other proceeding, page 13, "To Dr. Walker: Dear Sir: In accordance with direction of the Board of Directors of the Maas & Waldstein Company of New York, and also of Newark, New Jersey:

I herewith enclose copies of resolutions adopted by the Board of Directors of said companies at special meeting held today, pursuant to due notice.

Very truly yours,
(Milton A. Maas)."

Q You read the resolutions and the copies of that that came to you, didn't you? A Yes.

Q The letter I read from this record is as you received it, isn't it? A Yes.

Q You had employment, did you not, in 1925; I mean after this February meeting? A Yes.

Q Where? A In the month of December I became the president of Minor-Edgar Company.

Q Was that your first employment? A It was.

Q You received a salary there? A Yes.

Q Where had you been in the meantime? A I had been attending at the office of Maas & Waldstein Company.

Q That is all you have done? A That is all.

Q You have made no effort or attempt to get with the Minor-Edgar Company? A No, I made no effort at any time; I was approached by Minor-Edgar Company.

Q That was when? A In 1925.

Q You rejected it, did you? A No, it wasn't put in a concrete form to either accept or reject; it was an approach.

Q At any rate your selection finally as president of the Minor-Edgar Company was not the result of your efforts? A It was not the result of my efforts, no.

Q As a matter of fact, wasn't it October you were made president of the Minor-Edgar Company? A I said September.

Q If you said December you wish to correct that? A Yes.

Q What did you receive then? A A salary at the rate of $12,000 per annum.

Q Did you get stock, too?

Mr. English: I object.

Q Did you not receive in addition to cash salary, stock of the company?

Mr. English: I object as immaterial.

The Court: Sustain the objection.

Q Was $12,000 a year all you received for your services as president of the Minor-Edgar Company? A That is all.

Q Did you not receive stock, without paying full value for it?

Mr. English: I object.

The Court: As part of the salary?

Mr. Skinner: I do not know whether I can get him to admit it was part of the salary.

Mr. English: I object to the question as immaterial and incompetent.

The Court: I do not think you can get it in either way. It seems to me that a man might obtain stock after he joined a corporation and answered truthfully that he did, but deny it was any part of his salary. I think you should limit it to whether any stock given to him was in lieu of services or as part of his salary; whether he got any outside of that is not our concern.

Q I am not asking you whether he purchased stock of the company, but I am asking you whether you did not receive some stock of the Minor-Edgar Company as part of the terms the company was making for your services you had given as president? A I answered that I received no stock in compensation for my services.

Q Did you receive it in any other way than by purchase?

Mr. English: I object.

A If I can state what happened I will say so.

The Court: The doctor may explain it.

A I received one qualifying share as a director. At the time I accepted the presidency of the company I entered into a financial arrangement with the company by which I was to do certain things, the company arranged, which involved the purchase of stock. I made the initial payment under that agreement, and on account of the inability of the Minor-Edgar Company to carry out their part of the agreement that payment was subsequently refunded, so I have never been the owner of any shares of stock in the

Minor-Edgar Company, outside of the one qualifying share.

Q You do not mean that you were never the owner of any shares? You were at a time? A No.

Q You made an arrangement with them by which you were to do certain things, and they were to do certain things. Among the things you were to do was to serve as president of the company? A Yes, sir.

Q It was part of their interest and policy? A Yes, sir.

Q Their side was to pay you a salary of $12,000 and let you have some shares of stock at a certain price? A That had nothing to do with the agreement to serve as president.

Q So, that is the arrangement you spoke of by which you were to have some stock of the company at a certain price? A Yes, sir.

Q Now, you were removed in February, 1925, and this suit was begun on the 27th day of February, 1925?

Mr. Skinner: Is that agreed?

Mr. English: Yes, that is correct. The summons was dated February 27, 1925.

Mr. Skinner: Will it be stipulated that the answer was filed March 21, 1925?

Mr. English: Correct.

Mr. Skinner: And there was no revocation of the cause then at issue?

Mr. English: No.

Q Did you not delay the bringing on of this suit because of the proceedings in the Supreme Court in which you asked for a writ of quo warranto?

Mr. English: I object as not cross examination and immaterial.

The Court: Sustain the objection.

Q Now, whatever you claim here is for salary as president of the company, claiming that you were unlawfully removed, is that right? A As president and any other position and title which may properly belong to me.

Q You have offered in evidence here the minutes showing your relation as president? A My counsel has offered that.

Q And your salary was fixed as president, wasn't it? A The minutes speak for themselves.

Q You know that, too? A That is my recollection.

Q It was as president you had some duties of management, was it not? A I do not know what you mean by that question.

Q Isn't that plain, that as president you had some duties of management? Haven't you been mentioning them yourself? A I had the same duties of management when I was secretary of the company.

Q Then, it did not make any change in your position? A Yes, it added other duties.

Q Your counsel has offered the whole minute book in evidence. I ask you if you have in mind anything in the minute book which employed you as general manager as distinct from your selection as president?

Mr. English: I object. He cannot ask him what he had in mind.

The Court: Sustain the objection.

Mr. English: The by-laws which were put in evidence, stated the officers shall perform all the duties as the directors direct them to do, on page 20, article 4, which begins on page 19. Section 4 of that article is found on page 20 and then further provides, "He shall sign all certificates of stock, and so forth."

Q Was there ever an agreement between you and Maas & Waldstein Company for the payment of any money in compensation for your services other than the fixing of the salary as president which is in the book? A Yes, from time to time we voted ourselves bonuses.

Q You do not claim anything in this suit by reason of such vote? A I claim whatever my counsel sets up.

Q You claim whatever your counsel sets up, and you have heard what your counsel set up just now?

Mr. English: The complaint says that he was employed as president and general manager for a period of one year from the December—whatever date it was—at an annual salary of $24,000 a year.

Mr. Skinner: It is because the complaint says that that I am now trying to smoke out whatever there might be in the mind of counsel for the plaintiff that justifies that statement that he was employed as general manager. So far I have heard nothing that refers to the by-laws and I ask if counsel has anything else in the minutes of what he has said.

Mr. English: Nothing else in the minutes, but by practice of the company; general manager in a large sense of the other affairs of the company.

Q Did you ever have any such compensation fixed for any such services? A Not separately, except in the way of bonuses.

Q Those are in the past? A It is all in the past.

Q You were secretary of the company about five years, weren't you? A Yes.

Q You had possession and custody of the minute book with the by-laws in it? A Yes.

Q You had occasion to refer to those minutes and by-laws and study them, didn't you? A Yes.

Q You are fairly familiar with them? A Moderately so. Not as familiar as I should have been.

Q Not as familiar as you should have been in what respect? A I should have known some of these provisions which I only learned after this meeting was held.

Q What one? A That it was not required to state the business of the meeting in the call for a special meeting. I was under the distinct impression that it was. Not having the minute book to consult I was unable to correct an erroneous impression.

Q You must have seen that before, but forgotten it? A Probably so. It made no impression on me.

Q As secretary you had to give notice of meetings, didn't you? A Yes.

Q You had given notices of special meetings, too, hadn't you? A I don't recall.

Q Don't you think you had? A I will look at the minute book and see.

Q Don't you remember any special meetings during the five years in which you were secretary? A Upon notice, no.

Q There were special meetings without any notice at all? A Yes, waived.

Q There was no written waiver signed, you just did not have any? A It was incorporated in the minutes.

Q You said that you should have known about this provision in the by-laws and I think you then said you could have corrected it? A No, you are mistaken as to the last part. I said I should have known of it, not what I did, so not having access to the minute book I was unable to correct my erroneous recollection of the minute book.

Q You mean you did not go to the minute book to find out? A I was home confined to my house at the time, and the minute book was at the New York office.

Q Did it occur to you to inquire at all? A It occurred to me to put the whole thing in the hands of my counsel and to do what he advised.

Q That was after you received notice of your removal? A Yes.

Q Before that, when you got the notice of the meeting, did it occur to you to inquire what it was about? A No. I thought it was some routine matter. I could not conceive of them taking action affecting me without letting me know what it was.

Q You expected to be down, didn't you? A No.

Q Didn't you tell Mr. Maas so? A No, I did not.

Q Now, you had been aware of this clause in the by-laws that says that the directors may remove at any time, hadn't you? A There is no question of my being charged with notice of it, but I had no knowledge of it.

Q At the former hearing I asked you this question, page 25, "Last year you had a particular occasion to refer to the by-laws? Answer: Yes. Question: You had referred to them and studied them? Answer: Yes. Question: Is it not then fairly to be presumed that you had seen that clause in the by-laws and forgotten it perhaps? Answer: Yes, that may be presumed, my recollection is the provision is exactly to the contrary." Isn't that true? A Yes.

Q And that the business was required to be stated? A It may be presumed, but it was not a fact. That was my answer. I said my opinion was to that effect.

Q When I asked you on that occasion was it not fairly to be presumed? A If we agree as to the meaning of the word presume, that does not controvert it, if it is presumed.

Q Just listen to my question. When I asked you at that time, "Was it necessary to be presumed that you had seen the by-laws in question, having already asked you if you had not studied the minutes and studied the by-laws, and had frequent occasions to refer to them, did you think I was not asking whether there was not some presumption of liability? A No, not of liability. That is exactly what I thought. You asked me might it reasonably be presumed and I said it might be, but it was not true.

Q It might be reasonably presumed? A But it was not so.

Q As a matter of fact that you had not seen it? A Perhaps I did not understand what the word presumed means. My answer was directed to your question with my understanding of what the word "presumes" means. You may presume a thing but nevertheless say it is not so.

Q You understand I was asking you about your knowledge of the by-laws that gave you the power of removal? A Yes.

Q I think this question I referred to at the former hearing related to the other by-law about the notice? A I think not, I think it related to the by-law.

Q I think you were asked as to both, but the portion I read from related to that by-law as to the notice.

Mr. Skinner: There is a lot of cross examination that I think would be important, but I doubt whether I would be justified in presenting it. I would like to question the doctor about the circumstances surrounding his removal from office, but my feeling is that I would be going outside the direct examination and it would not be allowed.

The Court: I think you would be going outside the direct examination.

Mr. Skinner: I do not want to be confronted with the fact that I failed to ask such questions now, when there is an objection at some later time.

Re-direct examination by Mr. English.

Q Referring to section three of article 4 of the by-laws found on page 20 of the minutes,

which says that, "All officers and agents shall be subject to removal at any time by the affirmative vote of the majority of the whole Board of Directors." Did you, as a matter of fact, prior to February 2, 1925, know the existence of that by-law? A No, I did not.

Q Also referring to page 16 of the minute book, to section 7, or that part of section 7 of article 2 which deals with the Board of Directors and that part of section 7 which says, "Unless otherwise indicated in the notice thereof, any and all business may be transacted at a special meeting," and I ask you whether prior to February 2, 1925, you knew, as a matter of fact, of the existence of that provision in the by-laws? A No, I did not, I thought the nature of the business must be stated.

Mr. English: I will ask Mr. Skinner to admit that the annual meeting of the directors was to be held on the first Tuesday after the first Monday in December of each year.

Mr. Skinner: Yes.

Mr. English: And that also after the annual election the newly elected directors met and elected officers for the ensuing year.

Mr. Skinner: That is a provision of section 5 on page 15.

Mr. English: Yes, section 5, article 2.

Mr. Skinner: We admit that was in the by-laws.

Mr. English: I would like to introduce in evidence out of the minute book the minutes of the annual meeting of the directors held annually in December and each year beginning with the year 1915 and end-

ing with the year 1924. In each year the words, or the language of the minutes is that the meeting then proceeded to the election of the officers for the ensuing year and in each case follows with the list of names of the officers elected. That is true for the minutes of the years I mentioned, beginning on page 156, 1915; page 162 for 1916, page 181 for 1917; page 189 for 1918; page 199 for 1919; page 206 for 1920; page 212 for 1921; page 220 for 1922; page 224 for 1923; page 227 for 1924.

Mr. Skinner: Counsel needs no admission from me; that is set forth in the minute book.

(At one o'clock the Court takes a recess for one hour.)

After Recess.

Q Referring to section 4, article 4 of the by-laws found on page 20, it is provided that the president, subject to the Board of Directors, shall have general charge of the business of the company. Did you, as a matter of fact, or to what extent did you have as president general charge of this company?

Mr. Skinner: I object. It seems to me that we have gone into those questions at length.

Mr. English: Withdraw the question.

Q The same section 4, of article 4 found on page 20, says that the president shall do and

perform such other duties as from time to time may be assigned to him by the Board of Directors. State what duties in addition to the work, duties of president you performed, if not by direct assignment, at least by acquiesence and knowledge of the directors?

Mr. Skinner: I object to the question as irrelevant.

The Court: I will admit it.

Q (Question read.)

The Court: That is other duties which were imposed by the directors?

Mr. English: Either directly imposed or he performed with their knowledge or acquiescence.

Mr. Skinner: I object to anything of that kind, "if not by direct assignment at least by acquiescence and knowledge of the directors," and I object to what was imposed by the directors as same must be shown by the minutes of the directors.

The Court: You may ask him what he did or what he did as president of the company during all the time he was employed.

Q During the period you were acting for this company holding the title of president from the year 1915 to February, 1925, what did you do in connection with the business of the company?

Mr. Skinner: I object.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A Immediately following my election as president, or about the same time, I supervised the design and erection of a new plant for the corporation to be used in the manufacture of gunpowder. I supervised the operation of that plant, as well as the operation of the old plant, during the years 1915, 1916 and 1917 and 1918. I had charge of the dismantling of the plant and the sale of the property in the years 1918 and 1919. I conducted many negotiations with the French Government relating to contracts with that government. During the year 1923 by direction and acquiescence of the directors I found a considerable period of time at the plant of the Commercial Solvents Corporation in an effort to find out the cause of their manufacturing difficulties. I supervised the design of the new plant for the Commercial Solvents Corporation, which consistsd in the selection of the site. These were in addition to the ordinary duties connected with the operation of the company.

Q In addition to that did you perform the strict duties of president such as presiding at meetings and signing certificates of stock? A Yes, sir.

Q In addition to all that you were at the factory every day, when not off on other business attending to the general business? A Yes.

Q It appears from the minute book, particularly that part referred to before referring to the minutes of the directors at the annual meeting of the election of officers, that in every case officers were elected for the ensuing year? As

a matter of practice in the company what was the ensuing year for the term of an officer, the meeting being held in every case in December? A The succeeding current year.

Q The payment of salary in the ensuing year began after what date? A The current year.

Q Payable always in advance? A Yes, sir.

Re-cross examination by Mr. Skinner.

Mr. Skinner: May I have counsel's admission that the by-laws referred to were adopted at the organization of the company?

Mr. English: Yes, subject to one or two amendments.

Mr. Skinner: Then counsel will admit that every by-law referred to here by counsel and offered in evidence in his case was part of the by-laws of the company from the time Dr. Walker became president of the company up to the time he was removed?

Mr. English: I do; that is true.

The Court: They speak for themselves.

Q These services you have spoken of—counsel asked you to detail—was services performed by you as president of the company, were they not?

Mr. English: I object. He should not be asked a tripulicate question.

Mr. Skinner: Withdraw the question.

Q To put it in the terms the doctor will understand, for any of these services you have described, was there ever any arrangement with

the company for compensation other than you should be paid a salary of so many thousand dollars a year? A There were certain payments in the way of bonuses and additional compensation, but none relating specifically to the work.

Q What I asked you was there ever any contract or arrangement to pay anything other than the salary? A For the specific services I enumerated?

Q Yes. A There is a resolution in the minute book relating to services in the establishment of the new plant; I do not recall it.

Q There were bonuses allowed, too, weren't there? A Yes.

Q Those bonuses were allowed after the end of a given period of services because the Board of Directors felt that the services that had been rendered were entitled to extra pay, is that right? A Except as to the one particular case which I have in mind, and which I think is contained in the minutes and which I think is enumerated that the extra compensation relates to services.

Q Aren't you talking of bonuses or allowances for extra compensation that were determined and fixed by the Board of Directors after the services had been rendered? A Oh, yes.

Q And not in any way a bargain or arrangement that obligated them to pay? A Yes, that is right.

Q So, in recognition of what they felt your services were worth they voluntarily gave you? A Yes.

Q You cannot point to anything or do not recall anything of any arrangement of the company by which they undertook to obligate anything to you, anything to your salary? A In advance?

Q In advance of your services? A No.

PLAINTIFF RESTS.

Mr. Skinner: I respectfully move for a judgment of non-suit on the ground that the case that is made out by the plaintiff is a case of the right to compensation in the form of fixing of the salary for accompanying the office of the president of the company from which he was removed, and that the removal was within the power of the directors of the company under the section of the by-laws referred to and as was held by the Supreme Court was an implied part of every contract of employment or fixing of the salary, so I do not need to go into the reason by which the Court reaches the decision that that power was absolute; that he had taken the office of president subsequent to it and at the peril that it should be exercised at any time, and it was entirely within the rights of these directors to remove him as they did.

(Argument.)

Mr. English: Before replying to Judge Skinner I intended to make a motion to amend. It is in paragraph 1 of the complaint, using the words there, "That on December 2nd, the plaintiff had been employed for a period of one year from said date, at a salary of $24,000 to be paid from the 2nd of December." I would like to scratch out "period of one year from said date," and say "ensuing year," and also scratch out

the "2nd of December," so the paragraph will read, "That on December 2nd, 1924, the defendent through its Board of Directors elected and employed the plaintiff as its president and general manager for the ensuing year at an annual salary of $24,000." That is in accordance with the exact proof in the case.

Mr. Skinner: Doesn't Mr. English want to make that for the "ensuing current year"?

The Court: Defendant's counsel takes the stand that the by-law here is that the majority of the directors may remove the president at the will of the majority.

Mr. Skinner: Yes.

(Argument.)

The Court: You are reasoning all right if you were trying the action on a quo warranto proceeding, but not a contract case. I will decide this case without further argument.

Mr. Skinner: May I refer your Honor to one more case?

The Court: I am more interested in what your reasons are than your cases. I do not see any reason in this case why I should grant your motion. I would like to hear your reasons; I do not care about a recitation of cases.

Mr. Skinner: My reason is this: That the cases that say there might be a right of recovery, that there may be a right under a contract as distinguished from a right to a salary attached to an office, are cases that have distinctly said it with reference to a

separate independent contract apart from his election office, and these cases referred to have held that the fact that the man is elected annually at an annual salary and the by-laws so provided, did not give him a fixed term and did not change the facts that part of that election and part of the contract that goes with it is the by-law that says it may be terminated at any time.

The Court: I understand that the minutes show that the directors employed this gentleman for one year.

Mr. Skinner: Subject to the right to remove him at any time.

The Court: There is no question about that as far as the right to question the office was concerned.

Here is a case where the by-laws of the defendant corporation contained these words, "All officers and agents shall be subject to removal at any time by the affirmative vote of a majority of the whole board of directors." We were told that there were three directors and that the vote of two directors in this case dismissed the president from office. At the time of the dismissal he had been, by vote of the board of directors, engaged as president at a salary of $24,000 a year, and I understand that that engagement appears on the minutes of December 2, 1924. I think he testified that he obtained one month's salary and that that was all, and that then there was a meeting, as I say, and he was discharged.

An interesting feature of the case is, first, we have the by-law to which I have referred,

and, secondly, the fact that the plaintiff in this case, in my opinion, was conclusively presumed to have known of that by-law whether he did or not; that would not make any difference in the final opinion that I have. Third, that with this by-law on the books, this contract for one year was made, and it was an entire contract for one year and not a separate contract.

Lastly, we find that he was discharged and that after his discharge he questioned the right of the defendant to discharge him by what we know in this State as quo warranto proceedings, that is, he went to the Supreme Court of the State of New Jersey and issued a writ which is a common law writ and which was once in years past directed to the King to inquire why an individual held a certain office; it was known then as a Writ of Right.

The Supreme Court decided against the president; the Supreme Court was not trying a case to determine whether he was rightfully or wrongfully discharged, its inquiry was as to whether the corporation had a right to discharge him. There isn't any question when you read the by-laws which I have quoted, that, "all officers and agents shall be subject to removal at any time by the affirmative vote of a majority of the whole board of directors." A majority vote of the board of directors is all that is sufficient to put an officer out of the concern, that is, under the law this corporation could rid itself of a president, rightfully or wrongfully; he could not get back again, but if they did do it wrongfully under the circumstances narrated in this case, in my opinion they could not avoid liability. The Board of Directors were given the power to remove at any time any officer or agent in its employ and if an officer or agent was removed because of this by-law he hadn't any legal right to get back the office which he had lost, and that is what the Supreme Court had decided; he was deprived of that office; it was gone.

This action is a different action. This case admits they had the right to put him out, but the plaintiff claims that while they had the right to put him out they wrongfully put him out because they broke their contract with him. He does not question their right to put him out; that has been decided; he does not question their right to completely sever the relations, but he says, "I have a contract and I had an entire contract and while, if you can put me out, and I cannot return, still, if you did it wrongfully without cause or justification, if you breached that contract, I have a right in law to recover damages," and that is what he is here to recover. I will hear the defense.

(Argument.)

The Court: He has proved the breach of the contract, and that is all he has to prove.

(Argument.)

The Court: I have not changed my mind. I will hear the defense.

WILLIAM P. ALLEN, sworn in behalf of the defendant.

Direct examination by Mr. Skinner.

Q Where do you live? A I live in Wilmington, Delaware.

Q Are you connected with Dupont de Nemours? A Yes, sir.

Q In what capacity? A General manager of the paint, lacquer and chemicals department in that company.

Q Were you in that position back in 1924 and 1925? A Substantially the same position, yes.

Q Were you and other companies associated with Maas & Waldstein Company in a corporation called the Carbonall Products Company? A Yes, sir.

Q You were competitors, were you not, with some of these other associates? A Yes, sir.

Q Your company made lacquers? A Yes, sir.

Q And so did some of your associates? A Yes, sir.

Q Eastman Kodak, did they make lacquer? A To some extent. Their principal product was photographic films.

Q In the course of business of these companies, did they have occasion to use butyl alcohol? A Yes, we were all sustantial consumers of that material.

Q In what quantities? A I presume the group of five manufacturers whom you have enumerated consumed at that time more than half of the total consumption of this material.

Q For the country? A For the country.

Q In gallons or thousand of gallons, what do you suppose it would be, roughly? A I do not

know that I could answer that, because this goes back to a time when this particular industry was in a period of growth.

Q Was it in the hundreds of thousand or millions? A Probably in the neighborhood of four or five million gallons a year.

Q Was the Carbonall Products Company in any way an association of these five companies? A The Carbonall Products Company was an outgrowth of the informal association of representatives of these five companies. The occasion for the five companies getting together was the fact that in the latter part of 1922 and 1923 the sole manufacturer of this material found great difficulty in supplying the demand for it.

Q That is, butyl alcohol? A Butyl alcohol, yes. It was manufactured by the Commercial Solvents Corporation, and during that period, either through lack of sufficient technical knowledge and skill, or because of poor management and perhaps because of both, they failed to supply the necessary quantity of material and it was necessary for the large consumers to pool their interests with the idea of forming a company for the manufacturing of material for their own use.

Q It was in that way that the Carbonall Products Company was organized? A Yes, sir, but this association existed in an informal way for some time before the company was actually incorporated.

Q What was the structure of the Carbonall Company? You had five directors? A The structure of the company consisted of five directors, one director represented each of the five stockholders, those stockholders being constituent companies which you originally enumerated a few minutes ago.

Q Was Dr. Walker made president of the company? A Yes, Dr. Walker represented Maas & Waldstein Company on that board and Dr. Walker was made president of the company.

Q Now, then, later did that company acquire any patents? A Yes, I don't remember the date, but there existed, in addition to the patents under which the Commercial Solvents Corporation operated, an English patent known as the Firmbock-Strange patent, and this company figured it would be wisdom to acquire the American rights under that patent.

Q And they did acquire them? A They did acquire them.

Q Was there any consideration by the Carbonall Products Company or the group that composed it of the arrangement of an independent plan for the manufacturing of butyl alcohol? A Yes, there was. During this period, in addition to the failure of the Commercial Solvents Corporation to produce a sufficient quantity of material, they were at loggerheads with their customers because they did not give evidence of a desire to deal fairly with their customers and we felt that unless we joined together for the protection of our interests we would be subject to a monopoly and the surest means of avoiding that was combining our interests and acting as either evidential or actual competitors of the Commercial Solvents Corporation.

Q Was there any proposition submitted to the Carbonall Products Company to license the same group out west? A Yes, Dr. Walker presented, in fact, Dr. Walker wrote the members of the group representing that the American Milling Company desired to go into the Butyl alcohol business and desired to obtain a license under the Firmbock-Strange patent from us and

later a meeting was called by the directors at which this proposition was discussed.

Q Was the application received or rejected? A The application was rejected.

Q Do you remember hearing about Mr. Atwood in that connection? A Yes, Mr. Atwood was president of that company.

Q The American Milling Company? A Yes, sir.

Q Was that followed by some consideration of establishing an independent plant of the Carbonall Products Company itself? A No, the consideration of construction and operation of an independent plant occurred considerably prior to this time. During the time we gave consideration to going into the manufacture of this material for ourselves the Commercial Solvents Corporation did two things. They found the cause of the difficulties which had resulted in low yields and low outputs and they had also made provisions for the construction of an additional plant and another site. During the same period they also negotiated with this group a new contract and the appearance of this contract made it seem unwise to the directors of the Carbonall Products Company to engage in the manufacture of this product.

Q Did the Carbonall Products Company at some time consider engaging in the business itself? A Yes, sir, they had, during the period when we were uncertain as to whether the Commercial Solvents Corporation would be able to do its duty towards the proposition and also through its skill in the business be able to go forward with the proposition.

Q Where was the independent plant talked of to be established? A The plant was to be estab-

lished in the middle west, somewhere near the Corn belt—I think Dr. Walker secured an option on a plant site in East St. Louis. The reason I answered your question as I did was because I wanted to establish the chronological order of these events. In the first place we had the difficulties with the Commercial Solvents Corporation and during this period they ironed out these difficulties and constructed a new plant, and then we made a new contract with them which contract gave us full assurance that we would secure an adequate supply of material and at a fair cost to us, and at that time the question you asked me as to the presentation of this article by the American Milling Company was after all this had happened.

Q The construction and licensing of the American Milling Company and the building of an independent plant all came after you had—A Made our contract with the Commercial Solvents Corporation and after we were operating under the contract. That is my recollection.

Q Well, will you tell me why the Carbonall Products Company considered the building of an independent plant after it had solved all these difficulties with the Commercial Solvents Corporation? A It did not consider building a plant after it solved all these difficulties.

Q I thought you just said so? A No.

Q You said the difficulties with the Commercial Solvents Company were all ironed out. A Then came the proposition with the American Milling Company.

Q And the proposition of the Carbonall Company to build its own plant? A That was in the very beginning. These companies came together with the idea that if it was necessary they would put up the capital and build a plant of

their own. After having decided to abandon that project and made a contract with the Commercial Solvents Corporation and had worked under that contract for some time, Dr. Walker presented a request for a license under this patent with the American Milling Company group of associates. My recollection is that when that proposition was presented it was shortly before Dr. Walker resigned as president of the Carbonall Products Company.

Q He did resign as president of the Carbonall Products Company? A Yes.

Q Did you succeed him as president of the company? A Yes.

Q I show you a letter dated December 19, 1924, from Dr. Walker to you, and I ask you if you received that letter? A Yes, sir.

Mr. Skinner: I offer the letter in evidence.

Mr. English: No objection.

(Same is marked Ex. D. 1.)

(Exhibit D. 1 read to jury.)

Q Has there been any differences between Dr. Walker and his directors in the Carbonall Products Company as to his policy in that company other than with relation to the establishment of an independent plant?

Mr. English: I object.

(Argument.)

The Court: If you will assure me that the various policies or lines of action followed by Dr. Walker in connection with the Carbonall Products Company is the beginning of your

defense, or a part of your defense, I will admit the question.

Mr. Skinner: I will go further and give your Honor just how it is.

Mr. English: I do not think he should state his case.

The Court: No, I do not think you should do that, because you will get before the jury your testimony and you are not on the witness stand. I am a little bit handicapped in knowing where the defense starts; I assume the defense is justification.

Mr. Skinner: Yes, and I ask this question of the witness for the purpose of showing there was a difference and that that difference was expressed to Dr. Walker so that he was aware of it, and that is to prove the background later that there was an inconsistency.

Mr. English: Will your Honor hear me?

The Court: No.

Mr. English: He has stated facts that are not true.

The Court: That is the trouble with a case that we try where there is this continual argument.

(Argument.)

Mr. English: The inference of Judge Skinner's statements I would draw is that Maas & Waldstein's money was going into some other enterprise. Wouldn't your Honor get that impression?

The Court: I may have thought that. Let me ask Mr. Allen a few questions.

By the Court.

Q I understand this Carbonall Company was a company of pooled interests for the protection of the men who were interested in it. A That's right. That is, for the protection of their company.

Q When you started I suppose you had a common object to protect the companies you represented? A Exactly.

Q Was there a departure from that? A There was never any departure.

The Court: Then, how is that question you asked, Judge Skinner, relevant?

Mr. Skinner: I asked whether there was a policy.

The Court: I am fearful that a lot will get into this case which we will find out later we do not want.

Q (By the Court.) In what manner did Dr. Walker's policy differ from the policy of the other members, of the other men whose interests were pooled in this company? A Dr. Walker's position; in fact, Dr. Walker had no policy because the policy was determined by a majority of the Board of Directors of this company, but Dr. Walker's attitude and his position was that the Carbonall Company should go ahead with the matter of butyl alcohol regardless of whether or not we secured a favorable contract from the Commercial Solvents Corporation. Now, as a matter of mere business judgment the Board of Directors of the company decided, after we succeeded in negotiating a very favorable contract, that we would abandon the plan of going ahead with our own plant but we would at the

same time retain our rights in the patents which would enable us to protect ourselves in case of future necessity with the Commercial Solvents Corporation.

Q Were these contracts to be made between the separate companies; that is, the pooled interests and the Commercial Solvents Corporation? A Yes, sir.

Q With the thought that it would be better for the Carbonall Products Company to go ahead and make its own plant regardless of the contract? A Yes, sir.

The Court: What was the question that was objected to?

(Question read as follows:) "Have there been any differences between Dr. Walker and his directors in the Carbonall Products Company as to his policy in that company other than with relation to this establishment of an independent plant?"

Mr. English: Objected to.

The Court: I will admit it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A Yes, the other difference between the majority of the Board of Directors and Dr. Walker was in licensing other outside interests under this patent. The majority of the board felt that the interests of these companies would be much better safeguarded by our retaining the full rights under these patents than by licensing others.

Q That was merely his view as a member of the Board of Directors? A That was his view as a member of the Board of Directors; yes, sir.

Q He wanted to license others? A He wanted to license others under these patents he had applied.

Q (By Mr. Skinner.) Was the differences between—these different views you say the Board of Directors took, expressed to Dr. Walker? A Oh, yes, it was discussed at great length at the meetings of the company.

Q Was the difference of opinion as to the building of an independent plant expressed to Dr. Walker? A Oh, quite thoroughly.

Q Now, you spoke of favorable contracts being worked out by the Commercial Solvents Corporation. A Yes, a favorable type of contract.

Q Now, was Mr. Maas or Mr. Magnus present at either of the meetings when any disapproval or decision was reached as to the building of an independent plant?

Mr. English: Objected to.

The Court: Sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q After the ironing out, as you speak of, of the difficulties with the Commercial Products Company Corporation, were there any other later proceedings looking to the establishment of an independent plant? A No, sir, there were not. After the contract was agreed upon and signed all the constituent companies agreed among themselves that it was to their interest to encourage the Commercial Solvents Corporation to get on its feet so that it could extend its property and could protect its customers in the future.

Q Was Dr. Walker informed of that duty? A He was a member of the board at that time.

Q Was he present when that was discussed? A Yes, sir, when we had our final meeting on the contract with the representative of the Commercial Solvents Corporation.

Q Was it at that meeting that position was reached in fairness to the Commercial Solvents Corporation? A Yes, sir; it was very expressly stated.

Mr. English: I object. I do not think this witness should go into board room conversations, which it seems to me is trying to bind these parties. I object to it as entirely irrelevant.

The Court: I will admit the conversation that took place in the presence of the plaintiff at board meetings of the Carbonall Company.

Q (By Mr. English.) Was Dr. Walker present at the time you are speaking of? A Yes, sir.

Q (By Mr. Skinner.) You may answer the previous question. (Question read as follows:) "Was it at that meeting that position was reached in fairness to the Commercial Solvents Corporation? *Answer*: Yes, it was very expressly stated." A It was very expressly stated to representatives of the Commercial Solvents Corporation that in the future our interests were mutual with theirs and it was to our interest to operate under a contract which allowed them a fair profit, and which would also permit them to expand their business to meet the very rapidly increasing demand of the lacquer industry.

Q You say it was to your interest to permit them to operate? A To let them operate at a fair profit and on the basis of that arrangement the contract provided that we would purchase, each of us, our full requirements over a term of years from them.

Q Do not answer this question until it has been ruled upon. Was anything said at that meeting about any competing with them?

Mr. English: I renew my objection to any conversation.

(Argument.)

Mr. Skinner: I am trying to prove a meeting at which certain arrangements were made in good faith, arrangements that constituted a moral obligation if it did not constitute a legal obligation. I want to show that the statements were given by these five members of the group of a certain character.

The Court: I will let you ask any questions as to a conversation that took place in the plaintiff's presence with the directors of the firms interested in the Carbonall Company who were foregathered.

Mr. Skinner: That is just what I want.

Q This was such a meeting, wasn't it? A It was.

Q Dr. Walker was present? A Yes, sir.

Q Tell us what, if any, assurances were given—

Mr. English: No, what was said.

Q What was said to the Commercial Solvents Corporation about the future policy of your Carbonall Company, or by your group?

Q (By Mr. English.) Were the representatives of the Commercial Solvents Corporation present? A They were. This meeting to which I refer was one attended by members of the board of the Carbonall Company, together with the representatives, being the principal officers of the Commercial Solvents Corporation, and at that meeting the final terms of the contract were agreed upon, and after having reached an agreement it was expressly stated by both sides that the future development of this business would be promoted by the most friendly attitude on the part of the members of the Carbonall group on the one hand and on the part of the Commercial Solvents Corporation on the other. There were no promises made about competition, but there was certainly an implied obligation—

Mr. English: I object to that and move that it be stricken out.

The Court: Strike it out.

Q (By the Court.) Tell us what was said, not your conclusions.

Q (By Mr. Skinner.) Something was said that perhaps justified the statement of an implied obligation. I think you can tell that.

Mr. English: Objected to as leading.

The Court: Sustain the objection.

Q Did you tell the entire conversation? A Insofar as I remember it.

Q Did you, after that, hear anything at all of the organization of a company for the running or building of an independent plant out West? Yes or no. A Yes, sir.

Q When and how did you hear it? A I heard of it through a letter I received from Dr. Walker. I had written Dr. Walker on receipt of his resignation expressing my regret that he had decided to sever his connection with the company, and in reply to that letter he wrote me—

Mr. English: I object.

Q In reply to that letter he wrote another? A Yes.

Q I show you a letter dated January 2, 1925, and I ask you if you received that? A Yes, sir.

Mr. Skinner: I offer the letter in evidence.

(Same is marked Exhibit D. 2.)

(Exhibit D. 2 read to jury.)

Q Following the receipt of that letter what did you do? A I called up Mr. Magnus on the phone immediately to find out what he meant.

Mr. English: I object to what he said.

Q Was it with reference to the delivery of this letter?

Mr. English: I object. I do not think counsel by direct or indirect can go into the conversation over the telephone in the absence of Dr. Walker.

Q I ask you now to tell the conversation that you had with Mr. Magnus. Do not answer until it is passed upon by the Court, to tell the conversation you had with Mr. Magnus so far as it relates to this letter you have received from Dr. Walker.

Mr. English: Objected to.

The Court: Sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Do not answer this question. What, if anything, did you say to Mr. Magnus with reference to this letter?

Mr. English: I object.

The Court: That has been already ruled upon.

Q Did you later see Mr. Magnus? A Yes.

Q With reference to this letter? A Yes, sir.

Q Did you have a conversation with him about it?

Mr. English: I object.

The Court: Sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. English: I think that was answered and I move to strike out the answer.

The Court: If it has been answered the answer will be stricken out.

Q Why did you call Mr. Magnus on the telephone with reference to a letter that had been received from Dr. Walker?

Mr. English: I object as irrelevant and incompetent.

The Court: Sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Why did you go to Mr. Magnus with reference to a letter received from Dr. Walker?

Mr. English: I object.

The Court: Sustain the objection.

Q Did you regard the action of—do not answer this question—did you regard the action of Dr. Walker that is described in his letter as being taken by him on behalf of the Maas & Waldstein Company?

Mr. English: I object as to what his mental process was as immaterial and irrelevant.

The Court: Sustain the objection.

Mr. Skinner: May I have my objection noted to your Honor's ruling on this line?

The Court: Yes.

Q Did you have any talk with Dr. Walker about this letter? A No, sir.

Q Did you have any talk with the Commercial Solvents Corporation's representatives? A Yes, sir.

Q Did you have any talk with other members of the group that made up the Carbonall Company? A Yes, sir.

Q Did you have any feeling at the time about this action of Dr. Walker's with reference to the understanding or agreement that you described as having been reached with the Carbonall Company?

Mr. English: I object as leading and incompetent.

The Court: Sustain the objection.

Q Did this action of Dr. Walker's have any effect upon the relations between Maas & Waldstein Co. and the other members of the group?

Mr. English: I object as requiring him to give a conclusion.

The Court: I do not see how he can answer that. That is an absolute conclusion. Sustain the objection.

Mr. Skinner: Your Honor refuses to let me—

The Court: Do not tell me something the jury did not hear. I know.

Mr. Skinner: May I make an offer of what I wish to prove by this witness outside of the presence of this jury?

The Court: Yes. I will excuse the jury.

(The jury retires.)

Mr. Skinner: I offer to prove by this witness that there was an effect on the relations of the Maas & Waldstein Company with the other members of the group to the disadvantage of the

Maas & Waldstein Company, and that effect was that this action of Dr. Walker's was imputed to the Maas & Waldstein Company and was regarded as a breach of faith on the part of Maas & Waldstein Company that was not only dishonorable, but that would result to the injury, disadvantage from all the members of the group in its effect upon the mind of the Commercial Solvents Corporation; that the other members of the group, including this gentleman, Mr. Allen, felt that if Maas & Waldstein had any connection with this action of Dr. Walker's it was bad faith on their part and in violation of a covenant that had been made with the Commercial Solvents Corporation, that they would get their supplies from them and give up the idea of an independent source of supply.

The Court: So far, all you have proved is that there were a number of companies which I assume at a certain time could not get butyl alcohol, that the Commercial Solvents Corporation could not or would not manufacture enough of it, and that then they formed a protecting company and in that protecting company they considered forming an independent plant and considered the purchase of certain patents, and at that time or thereafter there was a difference of opinion between the directors or between these men. Now, I never knew a board of directors to amount to anything yet that did not have sharp differences of opinion quite frequently, but that does not mean bad faith. All you have shown so far is that the doctor disagreed sharply with the policies of some other people on the board and he thought he could not go along with them, because as I understand later he thought

an independent plant should be started, that he was interested in that enterprise.

(Argument.)

The Court: Definitely, what do you want to show?

Mr. Skinner: I offer to show by this witness that the action of Dr. Walker was imputed to Maas & Waldstein, or at least there was a suspicion that what he was doing was being done for that company; that that suspicion was disadvantageous to the relations with the members of the group, working to the disadvantage of all the members and the Commercial Solvents Corporation with whom an understanding had been reached to give them business, and that that disadvantage which was felt by them also took the form of distrust of Maas & Waldstein as not playing fair with the other members of the group, disturbing the possible continuation of this friendly arrangement that had worked to their advantage so far.

I offer to prove by this witness that he communicated that feeling to Maas & Waldstein or to Mr. Magnus and Mr. Maas, two members of the board other than Dr. Walker, and that he received from them the assurance that they were not in any way identified with Walker's action.

I offer to prove by this witness that he said, "Well, I know you boys, or I know you men, and I must believe what you say, but if I did not know you as well as I did I would think you were liars." I want to show that as being evidence of the reaction upon one of the representatives of one of these companies by what Dr. Walker had done.

I want to show something by one of these other witnesses—

Mr. English: You are repeating your opening.

Mr. Skinner: I want to prove and I want to show the same thing I mentioned in my opening, that the mass of proof admitted by the Court tends to establish a state of things which is a legitimate factor in determining their judgment as directors as to what to do with Dr. Walker, but that if their associates had that feeling in their mind, how they got it and why is a condition that confronted them, and the only way to remove such feeling was to disassociate themselves from Dr. Walker.

I offer to show by this witness that Mr. Allen advised and told them that if he had a partner—

Mr. English: This all has to be proved by competent evidence and it will not prevent me from objecting.

The Court: Well, I will take this matter up the first thing in the morning.

Adjourned to Tuesday, June 14, 1927, at 10:00 o'clock A. M.

SECOND DAY.

June 14, 1927.

Continued pursuant to adjournment.

Present, counsel as before stated.

The Court: Mr. English, I have been thinking about this case overnight and I would like to criticise this reasoning on the case which has occurred to me in view of the Corporation Act. That act provides that officers and agents may be chosen and paid. It provides that, "every corporation organized under the act shall have a president, secretary and treasurer who shall be chosen either by the directors or stockholders as the by-laws may direct and shall hold their office until others are chosen and qualified in their stead."

"The president shall be chosen from among the directors." Now, it appears that on July 6th, 1922, the directors of this corporation met and they passed a motion that the president of the company should receive an annual salary of $24,000. On December 2, 1924, following that meeting, there was a meeting of the directors and it is recited in the minutes that Dr. Henry V. Walker was nominated as president, Dr. Frederick S. Magnus as treasurer, and Milton A. Maas as vice-president and secretary. A ballot having been taken the said nominees were so elected and so declared. At that time the plaintiff was elected to an office and that office carried with it the salary I have indicated. At that time there was a by-law of the company with which he was charged with in which all officers and agents were subject to removal by the affirmative vote of a majority of all of the Board of Directors. Subsequent to that time he was removed by the vote of a majority and the matter was taken before the Supreme Court on a quo warranto proceeding and that court decided that the rule which had been allowed by the Chief Justice should be discharged. When the Supreme Court decided that, as far as he was concerned, he did not then fill the position of president. They decided that the Board of Directors had the power to remove him and it is provided in the Corporation Act that after removal or the vacation of an office another person should be chosen who is qualified.

The plaintiff is bringing an action for his salary and I, yesterday, regarded it as a straight contract action, but I do not know that I regard it that way this morning. I am merely talking out loud because I want you to come back at me. He was elected to an office which carried a certain salary, under the Corporation Act. He was discharged, rightfully or wrongfully, it makes no difference in the purpose of this argument, but he was removed from his office by the Board of Directors and the Supreme Court said they had the power to remove him. Now, having been removed, the office then became vacant, or if someone else was appointed they presumably got this salary, but he is suing for the salary that goes with his office from the time of his removal until the end of his contract at the end of the ensuing year, the minutes state.

The directors are bound by the stockholders. The stockholders are placed, in the event of the success of the plaintiff, where they are responsible pecuniarly for the salary of the plain-

tiff for the unexpired term and they are responsible for the salary of somebody else.

Somehow, as I think of this it does not appeal to me as being exactly the sort of a case or the kind of a case that I thought it was yesterday. It is not a question of having made a contract with this gentleman, having, for instance, gone to a certain place and said, "Now, you come with us and we will make a signed contract with you and hire you for one year at so much money," but they did not do that; they said to him, "Now, the office of president is vacant and carries with it a salary of $24,000 a year, and we will elect you to that office," and he is elected to it by vote and is deprived of the office regularly under the by-laws so far as the right to deprive him of the office is concerned.

What do you think of that?

Mr. English: Your Honor has asked me to criticise your line of thought.

The Court: I want you to do that. I have invited you.

(Argument.)

The Court: The distinction I make is that this man was elected to this office and if he was elected to this office, an office which carried a certain salary, and he was removed and the Supreme Court said that was proper, then that office is vacant. The minute they said that the removal was proper then the office is vacant. Now, if they had said the removal was not proper, the directors had exceeded their authority and then the plaintiff goes back and endeavors to perform his function as president and they refuse to let him and he sues, he can recover.

(Argument.)

The Court: I have not changed my mind and I have tried to look up cases that favor your contention. I cannot enlarge on what I have said, but I think I am inclined to grant a motion for a non-suit at this time on the grounds I brought up this morning.

Mr. Skinner: I will renew my motion for a non-suit.

The Court: I would like very much to try the case, but I am not supposed to be sitting here as an equity judge.

Mr. English: Has your Honor taken into consideration that month of February as a situation to be presented to the jury? His salary was payable in advance and he was dicharged on February 2nd. The contract required payments to be made monthly in advance and he was entitled to his payment on the first of the month and the directors met on the 2nd day of the month and passed this resolution of discharge.

The Court: What you call a contract is to be found where in this minute book?

Mr. English: Page 217 and page 227. Page 227 is the resolution appointing Dr. Walker to the office as president for the ensuing year, and on page 217 it fixes the salary which the president receives which it says shall be payable monthly in advance.

The Court: And he was elected to the office on the second day of December, 1924?

Mr. Skinner: May I call your Honor's attention to the fact that the by-laws, just as Mr. English says—that the president shall receive an annual salary of $24,000, and after a few more paragraphs it says, "An additional $12,000 for

the year 1922 to be payable on or before December 15th, 1922, and thereafter payable monthly in advance." Therefore, whatever there was, if there was anything that fell due for the month of February it was payable, if at all, in advance on the first day of the month. The first day of the month, according to the calendar, fell on a Sunday, and on Monday, the first business day of the month was the first day he could have claimed that payment and it was on that day he was removed. You will say that he was removed before any salary had become due, as a matter of fact.

The Court: I do not think I agree with you as to that, the fact that the first day of the month falls on a Sunday. It seem to me—

Mr. Skinner: We will submit to the direction of a verdict for $2,000, the amount of one month's salary.

The Court: I think that would be proper. I do not agree with you as to the—

Mr. Skinner: I realize that your Honor does not agree with me.

The Court: I am in a position to grant a nonsuit, but I do not know whether I am in a position to direct a verdict.

Mr. English: I object to that, carrying out that suggestion. I do not want it to appear that that suggestion of Judge Skinner's is acquiesced in by me, because it is not.

Mr. Skinner: Then, I rest.

The Court: Then, you ask for the direction of a verdict?

Mr. Skinner: Yes.

Mr. English: I move for the direction of a verdict in favor of the plaintiff in the sum of

$22,000 with interest from the date of his discharge which was February 2nd, 1925.

The Court: That motion is denied.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

The Court: There is an interesting case which is not exactly in point as to municipal officials reported in 99 New Jersey Law, which I thought might help you, Mr. English.

(The jury returns into court.)

The Court: Gentlemen of the jury, I direct that you bring in a verdict in favor of the plaintiff and against the defendant in the amount of $2,000 with interest.

Mr. Skinner: We will agree on the interest, your Honor.

Mr. English: Yes, $290 interest.

The Court: Then, gentlemen of the jury, I direct that you bring in a verdict in favor of the plaintiff and against the defendant in the amount of $2,290, which includes interest.

Mr. English: I respectfully pray an exception to your Honor directing a verdict.

Exception noted as ground of appeal.

Exhibit P. 1.

EXHIBIT P. 1.

From Minute Book Ex. P. 1 at page 217.

New York, July 6th, 1922

Minutes of a Special Meeting of the Board of Directors of the Maas & Waldstein Company, held at the office of the Company, #45 John Street, New York City, at three o'clock P. M., pursuant to notice.

PRESENT: Henry V. Walker, presiding
F. S. Magnus
M. A. Maas

Upon motion the reading of the minutes of the previous meeting was dispensed with.

Upon motion of Mr. F. S. Magnus, unanimously carried, the By-Laws were amended as follows:

The President of the company shall receive an annual salary of $24,000.

The Vice-President of the company shall receive an annual salary of $24,000.

The Treasurer of the company shall receive an annual salary of $24,000.

The Vice-President shall perform the duties of secretary without further compensation.

The additional $12,000 for the year 1922 to be payable on or before December 15th, 1922, and thereafter payable monthly in advance.

There being no further business the meeting, on motion, adjourned.

(Signed) Milton A. Maas
Secretary.

Milton A. Maas

Exhibits P. 2—P. 3.

EXHIBIT P. 2.

MAAS & WALDSTEIN CO.
45 John Street
New York

Please take notice that a Special Meeting of the Board of Directors of Maas & Waldstein Co., a New Jersey corporation, will be held at the office of the company, No. 45 John Street, Borough of Manhattan, New York City, N. Y. on the 2nd day of February, 1925, at three o'clock in the afternoon to transact such business as may properly come before the meeting.

Dated January 29th, 1925

Milton A. Maas,
Secretary and Director.

EXHIBIT P. 3.

A SPECIAL MEETING OF THE BOARD OF DIRECTORS of the MAAS & WALDSTEIN COMPANY OF NEW JERSEY was held at the office of the Company, #45 John Street, Borough of Manhattan, City of New York, N. Y. on the 2nd day of February, 1925, at three o'clock in the afternoon.

There were present—
Frederick S. Magnus
Milton A. Maas
being a majority of the directors.

The meeting was postponed until three thirty (3:30) P. M. to await the arrival of Dr. Henry V. Walker, but he not having arrived at that time the meeting was proceeded with.

Exhibit P. 3.

Proof of due mailing on January 29th of notices of the meeting was presented.

The meeting organized by electing Mr. F. S. Magnus as chairman, and Mr. M. A. Maas, the secretary of the company, acted as secretary of the meeting.

The reading of the minutes of the previous meeting was, on motion duly made and seconded, dispensed with.

On motion, duly made, seconded and unanimously carried the following resolutions were adopted:—

RESOLVED—that in view of Dr. Henry V. Walker having connected himself actively with the Butyl Corporation without consulting his co-directors in this company, he be and hereby is removed as president of this company, such removal to take effect immediately.

FURTHER RESOLVED—that the secretary of this company be and hereby is authorized to notify Dr. Henry V. Walker of his removal as such president.

Exhibit P. 4.

EXHIBIT P. 4.

February 3, 1925.

Mr. Milton A. Maas,
Secretary,
Maas & Waldstein Co.,
45 John Street,
New York City.

Dear Sir:

We write you as Secretary of Maas & Waldstein Co., a New Jersey Corporation. We represent Dr. Henry V. Walker. He protests against the attempted action of the board of directors of the Maas & Waldstein Co. of New Jersey to remove him as president of the said company, and hereby gives notice that he will take such steps as he is advised to protect his rights in the premises.

Yours very truly,

McCARTER & ENGLISH.

Exhibit D. 1.

EXHIBIT D. 1.

MAAS & WALDSTEIN CO.
Newark, N. J.

December 19, 1924.

(Stamp)
Noted W. P. A.

Mr. William P. Allen,
General Manager,
Cellulose Products Department,
E. I. du Pont de Nemours & Company, Inc.,
Woolworth Building,
New York, N. Y.

My dear Mr. Allen:—

I have today forwarded to the Secretary of Carbinol Products Company my resignation as President and Director. I am taking this step for the reason that not being in accord with the policy of the company I consider it proper to sever my connection.

Sincerely yours,

HENRY V. WALKER.

Also to Mr. Ruckgaber,
Mr. Haste,
Mr. Richards.

(Stamps)
Received Dec. 20, 1924
Cellulose Products Dept.
Received Dec. 22, 1924
Cellulose Products Dept.

Exhibit D. 2.

EXHIBIT D. 2.

MAAS & WALDSTEIN CO.
Newark, N. J.

January 2, 1925.

(Stamp)
Noted W. P. A.

(Stamp)
Received Jan. 3, 1925
Cellulose Products Dept.

Mr. William P. Allen,
E. I. du Pont de Nemours & Company,
233 Broadway,
New York, N. Y.

My dear Mr. Allen:—

Your letter of December 22nd reached me just as I was leaving for the West and I have had no opportunity to reply until now.

Of course I desire you to understand that my action in resigning from Carbinol Products was not in any way due to a disgruntled feeling. I of course recognize the force of what you say about differences of opinion among directors. As a general proposition a director or officer of a corporation who is overruled by the superior wisdom of his colleagues need not have any difficulty in wholeheartedly carrying out the policy decided upon by his board. In the case of Carbinol, however, the policy adopted amounts to an abandonment of the whole plan, and the situation thus created is quite different from that which may arise through differences of opinion in a going concern. I feel so strongly that action is necessary that I must leave myself personally free to follow another course. My action is en-

Exhibit D. 2.

tirely a personal one, but I think it is evident that in all our disagreements with Commercial Solvents the onus has been largely on our company, and from our knowledge of the other side this situation is likely to react unfavorably on us. Mr. William P. Allen—page 2—1/2/25.

When I was West I met Mr. Atwood and the representatives of other financial interests in Peoria, and the decision was arrived at to convert the Corning distillery into a butyl alcohol plant. A company is being organized, and while my preference would be to have others shoulder the burden, I have found it necessary to assume the direction of the new enterprise. I think you will agree that under the circumstances a reconsideration of my resignation is impossible, notwithstanding the fact that the new enterprise is in furtherance of the object for which Carbinol Products was organized.

I should like, of course, if possible to know that you might have a friendly feeling towards the new company, and that at some time they might look forward to securing part of your business.

With best regards and the Compliments of the Season I am,

Sincerely yours,

HENRY V. WALKER.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

New Jersey Court of Errors and Appeals.

HENRY V. WALKER,
Plaintiff-Appellant,

vs.

MAAS & WALDSTEIN COMPANY,
Defendant-Respondent.

Action at Law.

On Appeal from Supreme Court (Essex County).

BRIEF FOR PLAINTIFF-APPELLANT.

The case was tried at the Essex Circuit before Judge Mountain and a jury. Plaintiff sued for the unpaid balance of salary due him as President and General Manager of the defendant company for the year 1925, amounting to $22,000 (pp. 3-4). His salary was $24,000 per year (p. 15, line 35). Plaintiff was removed as President in February 1925 by action of the Board of Directors after having been paid $2,000 for the month of January on account of his annual salary.

The plaintiff, Dr. Walker, had for many years prior to February, 1925, been an officer, director and stockholder of the defendant company.

Plaintiff was a one-third owner of the defendant, the stock being held equally by him and Maas and Magnus to the extent of 99.6%. Seher owned 20 shares or 0.4% (see Minute Book, Ex. P-1, p. 13, line 30). The same three constituted the Board of Directors and they also filled all the offices (see Minute Book).

The plaintiff had been President for ten years, having been first elected to that office on December

7th, 1915 (p. 15, line 17). At a special meeting of the Directors held on July 6th, 1922, the by-laws were amended to fix the salary of the President at $24,000 per year (p. 15, line 37 to p. 16, line 10). Like salaries were provided for the Vice-President (Maas) and the Treasurer (Magnus) (p. 16, lines 12-20). All three salaries were payable monthly in advance (p. 16, line 18).

At every annual election from December 1915 through December 1924 the plaintiff was elected president "for the ensuing year" (p. 16, line 39; p. 43, line 36; p. 44, line 16).

Under the by-law (p. 16, line 10) "the president of the company shall receive an annual salary of $24,000."

Under the well established practice in the company the "ensuing year" meant "the succeeding current (calendar) year" (p. 47, line 5). When, therefore, the plaintiff was elected president on December 2nd, 1924 for the "ensuing year" (p. 16, line 39), he was selected for the calendar year of 1925 and at a salary of $24,000 for the year, payable monthly in advance. And he did in fact receive a payment on account of his salary for the month of January of $2,000 (p. 4, line 30).

During the month of January, 1925, the plaintiff underwent a serious operation which laid him up for a month (p. 11, line 36; p. 12, line 15). He was brought home from the Hospital on January 27, 1925 (p. 10, line 32), but was not allowed to go downstairs until February 6th, 1925 (p. 11, lines 1-15). He was not able to go out on February 2nd, 1925.

On February 2, 1925 his co-directors in the company held a special meeting. The notice which was sent the plaintiff innocuously stated "to transact such business as may come before the meeting." He received it January 30th, 1925 while sick at his house (p. 19, lines 10-33; Ex. P-2, p. 81).

There was nothing in the notice to suggest anything unusual and he thought it was a routine matter (p. 40, line 35).

On February 3, 1925, the plaintiff, to his surprise, received through the mail a notice to the effect that he had been removed as president of the defendant company (p. 20, line 20; Ex. P-3, p. 81).

The ground of removal as signed in the resolution was (p. 21, line 25):

> "*Resolved*: that in view of Dr. Henry V. Walker, having connected himself actively with the Butyl Corporation without consulting his co-directors of this company, he is and hereby is removed as president of this company, such removal to take effect immediately."

Immediately following the receipt of this notice plaintiff consulted counsel and shortly thereafter instituted two actions in the Supreme Court: (1) this action for the balance of his unpaid salary for the year 1925 (p. 36, lines 24-35), and (2) a *quo warranto* proceeding designed to restore him to the office of president. The rule to show cause was allowed March 7th, 1925 (p. 24, lines 35-40).

See *Walker* v. *Maas & Waldstein,* 132 Atl. 322; 4 N. J. Misc. Rep. 230.

The by- laws of the defendant company provided by Article IV, section 1, that the executive officers should be a president, vice-president, treasurer and secretary, all of whom should be elected annually (p. 25, line 20); by article IV, section 2, it was provided that the Board may appoint such other officers as it shall deem necessary, who should have such authority and perform such duties as might be prescribed by the Board (p. 25, line 30), and by section 3 (p. 25, line 35):

> "*Section 3. Tenure of Officers.* All officers and agents shall be subject to removal at any time by the affirmative vote of a majority of the whole Board of Directors."

The Supreme Court in the *quo warranto* proceeding held that this last quoted by-law was controlling and that a majority of the board had the right to remove any officer without cause and without notice.

At the trial of the case at bar the plaintiff proved his employment as president for the year 1925 at a salary of $24,000; that he had functioned as president up to the time of his removal on February 2, 1925; that under Article IV section 4 of the By-Laws he, as president, had general charge of the business of the company (p. 26, line 8) and that he had exercised the functions of president and general manager until the time of his removal (p. 17, lines 20-30); that he had been paid $2,000 on account of his salary for the month of January, and that following his removal and as soon as his health would permit, he continued to return to his office at the defendant's factory until late August, 1925 (p. 26, lines 25-35).

When the plaintiff rested his case, defendant moved for a non-suit which the trial judge denied. The defendant then proceeded with its defense and called a witness, Mr. Allen, evidently with the intention of establishing, if it could, the first separate defense in its answer that the plaintiff had been removed "for good and just cause" (p. 7, line 30).

The testimony of Mr. Allen did not anywhere approach establishing that defense by the time of the adjournment for the day (pp. 54-73).

The next morning the trial judge reversed his ruling of the day before upon the motion of nonsuit, whereupon the defendant rested its case (pp. 74 to 79; p. 78, line 35), counsel for the defendant stating his willingness to submit to the direction of a verdict for $2,000 the amount payable in advance on account of the plaintiff's salary for the month of February (p. 77, line 20). This suggested direction of a verdict for $2,000 was objected to by plaintiff's counsel (p. 78, line 30). Counsel moved

for a direction of a verdict for $22,000 in the plaintiff's favor which was denied (p. 79, lines 1-10) and the court thereupon directed a verdict for the plaintiff for $2,000 with interest (p. 79, lines 15-30).

The defendant failed to establish its first separate defense that it had removed the plaintiff from his office of president "for good and just cause" (p. 7, line 35). It submitted no material evidence on that subject whatever. An offer of proof was made but was not followed up. The trial judge took it under advisement until the next morning (p. 70, line 35; p. 73, line 25). But the next morning, the trial judge reversed himself and thereupon the defendant rested (p. 78, line 35).

The alleged proof of good cause was the same set of facts which were submitted to the Supreme Court in the *quo warranto* proceeding; and as to that the Supreme Court said (132 Atl. 322, p. 323):

> "If we were to look at the alleged causes we should be obliged to hold that they were wholly inadequate. Dr. Walker, so far as the evidence indicates, actuated by high motives, engaged in a move which had for its object the protection of the interest of the company of which he was the executive head. It was apparently an effort to avoid a recurrence of the same precarious situation in which the company had found itself when the Carbinol Company was formed."

Since the defendant rested without proving "good cause" there was no defense left in the case, unless the provision of Article 4, Section 3 of the By-Laws constituted a defense. That section provided that all officers and agents shall be subject to removal at any time by the affirmative vote of a majority of the whole Board (p. 25, line 35).

The question therefore is: what is the effect of this By-Law on the plaintiff's right to recover his salary for the balance of the year 1925 for which he had been elected president at the "annual salary of $24,000" (p. 16, line 10).

I.

The plaintiff's contract was an entire contract for the definite term of one year.

The by-laws in the case at bar specifically fix the term of office.

Article 4, Section 1, provides that the president "shall be elected annually by the Board of Directors" (p. 25, line 20).

The amendment to the by-laws fixing the salary of the president provided: "The president of the company shall receive an annual salary of $24,000.00" (p. 16, line 10).

The use of the word "annual" and "annually" in these by-laws clearly indicates the fixed period of one year.

The word "annually" both by derivation and through common use necessarily implies a fixed term of a year. The cases so hold.

In *Chelmsford Company* v. *Demarest,* 7 Gray (Mass.) 1, the action was on a bond given to the company by its treasurer conditioned for the faithful performance of his duties as such.

The statute under which the corporation was organized provided that the treasurer should be "chosen annually." The statute also provided that he should hold his office until another was chosen and qualified in his stead. The defense was that the breach had occurred after the expiration of one year from date of his election. One of the questions involved was as to the meaning of the words "chosen annually". Chief Justice Shaw said (p. 3):

> "The court are of opinion that under the direction of this law, Phelps was elected as treasurer to an annual office; that the bond

> was a collateral security for the faithful performance of the duties of that office; and that such office being annual, such duties are limited to the term of a year."

The Court further said (p. 3):

> "Nor do we think that the further provision above cited—'shall hold their offices until others are chosen and qualified'—substantially changes the character of the office from an annual one to one for an indefinite time."

In this connection it may be noted that the by-laws of Maas & Waldstein Company do not provide that the officers shall continue until their successors are elected. Such a provision is unnecessary, in any event, as section 13 of the Corporation Act provides specifically that the officers "shall hold their offices until others are chosen and qualified in their stead."

In *City of Buffalo* v. *MacKay,* 15 Hun (N. Y.) 204, the ordinances of the City of Buffalo provided that the Board of Health should "annually appoint" a physician as health inspector. Dr. MacKay was chosen "for the ensuing year" and accepted the office. Later an effort was made to rescind the resolution appointing him.

The court were "unanimously of the opinion" that Dr. MacKay, by virtue of such appointment and acceptance "was entitled to the office for the term of one year thereafter."

This Court in *Willis* v. *Willys Corporation,* 98 N. J. Law 180, reviewed every authority in the State. The contract there was (p. 180),

> "we engage your services as Assistant Comptroller in Charge of Factory Accounting with a salary at the rate of $7,500.00 per year, with the understanding that if the connection proves satisfactory the salary, beginning with January 1, 1921, will be at the rate of $9,000.00 per year."

This Court said (p. 181):

"Our consideration of the case leads us to the conclusion that the letter alone, viewed as the entire contract is properly to be construed as a hiring by the year."

"There is a great diversity of view in the different jurisdictions respecting this class of cases. The 'English view', so called, tends to a construction establishing a contract for a definite term if this can be spelled out of the language used. The 'American view', favored by most of the states, tends toward a holding that the hiring is at will unless the contrary be fairly plain. 26 Cyc. 973 *et seq.;* Willis, Con., § 39. Our own cases seem to favor the English view."

"In Beach *v.* Mullin, 34 N. J. L. 343, a stipulation for payment of wages monthly, without more, was held to indicate a monthly term, the court relying on English cases almost entirely."

"In Stanford *v.* Fisher Varnish Co., 43 N. J. L. 151, plaintiff was hired at $12 per week, and the court said the employment was by the week; the fact that later a resolution of the board of directors was passed providing that his salary be increased $104 per annum, thus making his salary $14 instead of $12 per week," was held to indicate only a method of computation and not a change in the original contract of hiring except as to amount of pay."

"In Jones *v.* Manhattan Horse Manure Co., 91 N. J. L. 406, the contract was construed by the Supreme Court as an annual hiring."

"In Lyons *v.* Pease Piano Co., in this court, 92 N. J. L. 592, a contract for '$50 per week salary and one per cent. commission on net sales over $60,000, salary to start with new year, all reports run from January 1st to December 31st,' was construed as evidencing a hiring by the year."

"In Pfeil *v.* Christian Feigenspan, Inc., 97 N. J. L. 3, the Supreme Court, speaking

through the Chief Justice, remarked: 'So that if nothing else appeared in the findings of fact except the agreement to pay an annual salary, the law would justify the inference that the employment was by the year.'

"The trial court would have been justified in instructing the jury that the letter and plaintiff's acceptance of its terms established a hiring by the year."

In *Henry M. Beach* v. *Margaret Mullin,* 34 N. J. Law 343, the Court said (p. 343):

"The entirety of a contract does not depend upon its subject matter. An entire contract is a contract the consideration of which is entire on both sides. Whenever there is a contract to pay a gross sum for a certain definite consideration the contract is entire, and not apportionable either in law or in equity. Story on Contracts, § 22. A contract to pay $16 for a month's service is as entire in its consideration as is a contract to pay a certain sum for a single chattel, or for a specified number of chattels."

In *John Jones, Respondent* v. *Manhattan Horse Manure Company, Appellant,* 91 N. J. Law 406, the Court said (p. 408):

"As will be observed there is no express limitation of the term of service, though the plaintiff was to be paid $1,500 per year, payable semi-monthly. But a stipulation in a written contract for a specified amount of salary per year, payable semi-monthly, is not inconsistent with a yearly hiring, and the contract will be deemed to be a hiring for a year when, from a consideration of all its terms, such appears to have been the intention of the parties. Beach *v.* Mullin, 34 N. J. L. 343; Stanford *v.* Fisher Varnish Co., 43 *Id.* 151; Larkin *v.* Hecksher, 51 *Id.* 133; Passino *v.* Brady Brass Co., 83 *Id.* 419."

In *Simpson B. Lyons,* v. *Pease Piano Company,* 92 N. J. Law 592, the plaintiff wrote (p. 593):

> "I will accept your proposition on salary for the writer, *i. e.*, $50 per week and one per cent. commission, on net sales over $60,000 made through our Newark store, this to include any and all sales, with the understanding my salary starts with the new year, January 1st, 1917, all our reports run from January 1st to December 31st."

This Court said (p. 593):

> "Where the term of employment involved is left by the writing in the sphere of doubt, and a practical method of determining it is the circumstance of weekly or monthly payments made during its continuance, as evidencing the mutual intent by the construction of the parties themselves, the settled rule is to resort to that circumstance as an aid in the proper construction of the contract. Steffens *v.* Earl, 40 N. J. L. 128; Passino *v.* Brady Co., 83 *Id.* 419; Jones *v.* Manhattan Co., 91 *Id.* 406."

> "In the latter case the payments were made semi-annually, but it was held that that fact was not inconsistent with a yearly hiring 'when from a consideration of all of its terms such appears to have been the intention of the parties.'"

The Court then reviewed the evidence and said (p. 594):

> "These facts and circumstances, combined with the language of the acceptance, evince that the period contemplated was neither a hiring at will nor by the week, and that the trial court properly construed the contract as a yearly hiring."

In *Frank P. Pfeil,* v. *Christian Feigenspan, Inc.,* 97 N. J. Law 3, the facts were found to be (p. 4):

> "That the plaintiff went into the employ until the 8th of July, 1920, when he was discharged from his service without just cause; that on or about December 31st, in each year, it was the custom of the defendant to call the plaintiff into its office and inform him what his annual salary would be for the succeeding year; that in this manner the plaintiff was informed his salary for the year 1919 would be $4,400; and that he was further informed on January 31st, 1920, that his salary would remain at that sum for the year ending January 1st, 1921. On these facts the court found, as a matter of law, that the plaintiff was employed by the year, and that having been illegally discharged, without cause, was entitled to so much of his salary as would have accrued between July 8th, 1920, and January 1st, 1921."

The Supreme Court, by the Chief Justice, said (p. 4):

> "The only ground upon which we are asked to reverse this judgment is that on the facts found no agreement as to the term of the employment is shown, the argument being that an agreement to pay salary at an annual rate does not constitute a contract of employment for a year."

The Court then cited *Beach* v. *Mullin,* 34 N. J. Law, 343, and said further (p. 4):

> "The cited case has frequently been referred to with approval in our later decisions and is accepted as accurately stating the rule of law in a case like that now before us. So that if nothing else appeared in the findings of fact except the agreement to pay an annual salary, the law would justify the inference that the employment was by the year."

In *Passino* v. *Brady Brass Co.,* 83 N. J. Law, 419, the conflicting claims were (p. 419):

> "* * * that he was employed by the defendant as manager and superintendent of its business in Jersey City for one year from September, 1909, and without sufficient legal

cause was discharged therefrom on October 13th, 1909; that his salary was fixed at the sum of $2,500 per year, payable in equal semi-monthly payments. It appears that during his employment he was constituted the secretary of the company by the directors, and the inference is that the salary comprehended the compensation for the performance of the duties of both manager and secretary.

The defendant insisted that the plaintiff was not employed for a year; that his discharge was warranted, and that the plaintiff had acquiesced in it."

The jury settled the facts as claimed by the plaintiff (p. 421):

In the course of its opinion the Supreme Court by Justice Minturn said (p. 421):

"The trial court refused the nonsuit, and we think properly, for the reason that, if the plaintiff's statement of the facts be accepted, a jury might find that there existed a continuing contract between these parties which contemplated the employment of the plaintiff in the dual capacity of manager and secretary, and that his unwarranted discharge from that employment created a liability upon the part of the defendant for the breach. 1 *Thomp. Corp.* 804; *Bank* v. *Paterson,* 7 Cranch 299; *Danforth* v. *President, &c.,* 12 Johns (N. Y.) 227.

The existence of a continuing contract of service from year to year, or from one definite period to another, may be implied from proved facts and circumstances, and the course of business between the parties, and is always a question of the intent of the parties. *Houghwout* v. *Boisanbin,* 3 C. E. Gr. 315; *Clark Con.* 24; *Tatterson* v. *Suffolk Co.,* 106 Mass: 56; 9 Cyc. 242; *Beach* v. *Mullin,* 5 Vroom 343."

The plaintiff in the case at bar was elected president successively for ten years always at an annual salary. Each new election constituted a new

and entire contract for a year; or it may conceivably be said that the parties by their conduct intended that the original contract of hiring in its entirety should run from year to year, as in *Kislak* v. *Muller,* 5 N. J. Adv. Rep. 64, where the Court said (p. 66):

"The first point made by the defendant is that even though the defendant continued in the employ of the complainant, the contract was not continued after June 15th, 1925, because there is no provision in the contract for giving notice of its discontinuance after April 15th, 1924. I do not agree with the defendant in this. The parties, by their conduct, acquiesced in a renewal of the contract from year to year, and all its provisions, so far as applicable, remained in force. It is plain, from the conduct of the parties, that they intended that the contract in its entirety should run from year to year. *Passino* v. *Brady Brass Co.,* 83 N. J. Law 419; *Jones* v. *Manhattan Horse Manure Co.,* 91 N. J. Law 406; *Lyons* v. *Pease Piano Co.,* 92 N. J. Law 592; *Pfeil* v. *Christian Feigenspan, Inc.,* 97 N. J. Law 3; *Styles* v. *Lyons* (Conn.) 86 Atl. Rep. 564, 565; *Tatterson* v. *Suffolk Manufacturing Co.,* 106 Mass. 56."

Under the facts and the law it must result that the employment of the plaintiff was for the fixed and definite term of one year.

This fundamental fact in the case leads on to the next point.

II.

The By-Law, Sec. 3 of Article 4 (p. 25, line 35) providing that all officers and agents shall be subject to removal does not militate against the plaintiff's right to recover his unpaid salary.

Please remember that in addition to the fixed term of employment, the removal was without cause and utterly unjustified under the evidence in the case and that all the defendant has to stand on is the by-law.

Conceding, but only for the sake of the argument, that the directors had full power of removal, as the Supreme Court found in the quo warranto case (132 Atl. Rep. 322), yet the exercise of that power was at the peril of the defendant company with respect to the right of the plaintiff to hold it in damages for the breach of his contract: particularly where, as in the case at bar, no good cause or justification is proved.

Our case is squarely within the pronouncement of this court adopting the opinion of the Supreme Court in *In re Griffing Iron Co.,* 63 N. J. Law, 168, affirmed on opinion at page 357. One of the questions there was the validity of a corporate election. Its validity could only be questioned if there was invalidity in the removal of the former incumbents. The court, by Justice Collins, said (p. 175):

> "The statute recognizes a power of removal (section 15), and such power is indeed inherent. If there be a fixed term of office removal must be for cause, but otherwise, unless limited by statute or by-law, the power to remove ministerial officers is absolute, in the body that elects, subject only to a right of action if there be a breach of contract or employment. Thomp. on Corp., sections 804, 805, 820."

In *Thompson on Corporations,* section 804, cited in *Griffing* Case, the author, after pointing out that the directors who appoint a ministerial officer may undoubtedly remove him at pleasure, says:

> "And he has no remedy other than an action for damages against the corporation for a breach of contract."

So in section 805, cited in the *Griffing* Case, the author, in speaking of corporate officers, says:

> "They are dischargeable like any other employee subject only to their right of action against the corporation for damages for a breach of the contract of employment."

And again in section 820, cited in the *Griffing* Case, the author makes a distinction between an officer who has a franchise in the office and one who has not, and says, with respect to the officer who has no franchise:

> "But the corporation may discharge him as any other employer may discharge his employee without assigning any cause but subject to the liability of an action for damages for breach of contract if by discharging him its contract with him is broken."

The court in the *Griffing* Case clearly recognized a right of action on the part of the officer removed for the breach of his contract of employment, and clearly recognized that while a right of removal may exist, it is subject to a right of action for damages.

In the *Griffing* Case the by-laws of the company directed that the directors should choose the officers but fixed no term of office (p. 175).

In the case at bar the term of office is fixed to that of one year.

Cuppy v. *Stollwerck Bros. Inc.* in the New York Court of Appepals (111 N. E. 249) seems squarely in point. That was an action to recover salary

which the plaintiff claimed to be due him under a contract of employment for one year. He was discharged at the end of four months. The court found that he was employed for a definite period of one year (p. 251). In connection with his employment he was elected a managing director of the defendant corporation.

In this case the New York court sharply distinguished between the power of the Board of Directors to remove an officer, as contrasted with their lack of power to terminate a contract for a definite term, and they held that the power to remove him from the office to which he had been elected did not carry with it the right to discharge him from his employment in view of his contract for a fixed term.

The Court said (p. 251):

> "It is claimed by the respondent that it had the right to terminate the plaintiff's employment, even if he had been employed for a period of one year. This claim rests upon the fact that the by-laws of the defendant corporation, which were known to the plaintiff, provided that 'The Board of Directors by a majority vote may at any regular or special meeting remove a director or officer and by like vote fill the vacancy so created.' Pursuant to this by-law, the defendant on April 28, 1910, adopted the following resolution: 'Resolved, that Mr. H. A. Cuppy is removed from his position as managing director, and Mr. Ludwig Stollwerck is hereby appointed and elected as managing director in his place.' We can find in the record no evidence that the plaintiff acquiesced in this action as has been suggested, and we are of the opinion that this by-law did not authorize the defendant to terminate the plaintiff's employment as general manager. While the by-law empowered the board of directors to remove a director or officer, it did not authorize them to terminate a contract with one whom they had employed for a definite term. The fact that the plaintiff had been elected a director in no way alters the situation. His

> election as director was in pursuance of his contract of employment. It did not supersede the contract and render his contract which was for a definite term terminable at will. Douglass *v.* Merchants Ins. Co., 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822, upon which the respondent relies, is plainly distinguishable from this case. In that case one who acted as the secretary of the corporation at an annual salary was not employed for a definite term, and the decision in that case turned upon that fact. Indeed, in Judge Bradley's opinion in that case, it is pointed out that in cases where the employe had been employed under a special contract it has been held that the corporation loses its general power of removal. Trustees of Soldiers' & Orphans' Home *v.* Shaffer, 63 Ill. 243; Martino *v.* Commerce Fire Ins. Co., 47 N. Y. Super. Ct. 520.
>
> The plaintiff held his place, like any other agent or servant subject to the terms of the contract under which he was employed. If no stated term was fixed, he was subject to removal by the board of directors, even in the absence of a by-law giving the directors this power. When he was elected as a director of the corporation he held that office under the provisions of the by-law, subject to removal by the board of directors. The power to remove him from the office to which he had been elected did not carry with it the right to discharge him from the employment of the defendant in view of the special contract for a fixed term under which he was employed."

Douglass v. Merchants Ins. Co., 118 N. Y. 484; 23 N. E. 806, is cited and distinguished in the opinion in the *Cuppy* case because there was no contract for a definite term.

In *Hand* v. *Clearfield Consolidated Coal Co.* (Pa.), 22 Atl. 709, there was a hiring for one year. The Court said (p. 710):

> "In the presence of plenary proof of a contract of hiring for a year, there is no room

for the contention that the appellant was at liberty to terminate the employment at its pleasure, and without liability to its employe. It was clearly within the power of the corporation to make the contract in question, and it is bound to compliance with its terms."

The court cited and quoted from *Trustees of Soldiers', &c. Home* v. *Shaffer,* 63 Ill. 243 (cited in the opinion in the *Cuppy* case), and said (p. 710):

"In *Soldiers' Orphans' Home* v. *Shaffer,* 63 Ill. 243, the trustees of the corporation were authorized by its charter to remove any officer or employe if the interests of the institution required it, and it was held that this conferred on the trustees a power of removal at their discretion, if there was no special contract for the service of the employe for a definite time; but that it did not give the right to discharge him without any dereliction on his part when he had been engaged for a fixed period. It was said by the court in the case cited that, 'if a corporation desires to retain the right of removal at its discretion, it must not bind itself by a special contract. The law will not permit it to disregard the terms of its contract, but it must be governed by the same rule as is a natural person.' This rule is so consonant to reason and justice that its existence should not be questioned, nor its enforcement resisted. The evidence of any dereliction of duty on the part of the appellee is very slight and unsatisfactory."

In the case at bar there is no evidence whatever of any dereliction of duty or justification for a discharge. On the contrary, there is the finding of the Supreme Court in the *quo warranto* case (132 Atl. 322, p. 323) that the alleged causes of discharge were totally inadequate.

The cases cited fully demonstrate that, assuming the power of removal to exist, it can be exercised only at the peril of a breach of contract in those

cases where, as here, there was a fixed term of employment, and no good cause of removal is shown.

The trial judge, when disposing of the motion to nonsuit, properly grasped the distinction between the abstract right to remove an officer from his office and the liability of the defendant company for breach of his contract of employment (p. 53).

When, however, he came to reverse himself the next morning his mind seemed to have become confused upon the legal questions involved. The trial judge completely lost sight of the fact that the defendant company had made a contract with the plaintiff for the definite period of one year. He said, in addressing counsel (p. 76, line 10):

"It is not a question of having made a contract with this gentleman, having, for instance, gone to a certain place and said, 'Now, you come with us and we will make a signed contract with you and hire you for one year at so much money,' but they did not do that; they said to him, 'Now, the office of president is vacant and carries with it a salary of $24,000 a year, and we will elect you to that office,' and he is elected to it by vote and is deprived of the office regularly under the by-laws so far as the right to deprive him of the office is concerned."

That is an entirely wrong conception of the evidence. The trial judge's argument was that the directors, having removed the plaintiff from the office of president by reason of which the office became vacant, and that vacancy having been filled, the plaintiff could not sue for the salary which went with the office because it had been appropriated to pay the new incumbent who succeeded the plaintiff (p. 75, line 17 to p. 76, line 20).

The trial judge reasoned as though the exact sum of $24,000 had been appropriated to the salary of president in the same manner as a municipal body might appropriate a given sum of money to meet a

building contract. The two cases, however, are not at all parallel. In the case of the municipal body, under the municipal lien law the fund may be liened up to, but not in excess of, the amount appropriated.

But in the case at bar there was no distinct appropriation of a fixed fund for the salary of the president in the sense that the defendant company could not, under any circumstances, be called on to pay more than $24,000 for the salary of a president during a given year, because the company, by wrongfully discharging its president, laid itself open to a general liability for which it could be held in damages and required to answer any judgment out of any fund or property which it might have.

The plaintiff had been employed for a fixed term and was discharged without cause and this created a liability as against the defendant for the breach of his contract which entitled him to damages for the unpaid amount of his salary.

The trial judge cited a case in 99 N. J. Law (p. 79, line 13) :—*Keegle* v. *Hudson County,* 99 N. J. Law, 26. That case and the cases which it cites are not at all in point as all of them dealt with a public employment. The plaintiff in the *Keegle* case had been discharged contrary, as he claimed, to the Civil Service Act, and sought in a salary suit to try his right to the office.

III.

The plaintiff had the right to recover the full amount of his unpaid salary because the contract of employment with the plaintiff for the fixed term of one year operated to nullify the power to discharge as reserved in the by-laws.

The defendant corporation was practically owned by three men, the plaintiff, and Messrs. Maas and Magnus. Those three constituted 99.6% of the stockholders.

The same three stockholders constituted the entire Board of Directors.

Seher, who had 0.4% of the stock (20 shares), knew and acquiesced in the election of the plaintiff as president for ten years.

The Board of Directors, at its meeting held on December 2, 1924, elected the plaintiff president for the ensuing year which, under the by-laws, carried with it a salary of $24,000 per annum (p. 15, line 15; p. 16, line 10).

This action of the Board of Directors operated to repeal Section 3 of Article 4 of the by-laws so far as the power to remove the president and cut off his salary was concerned.

In 1 *Thomp. on Corp.,* 2nd edition, Sec. 1023, the author says:

> "There are cases which seem to hold that a corporation may work a repeal of a by-law by contract. This principle has been applied in the employment of officers and agents by special contract. Where the power to discharge was reserved by the by-laws, but the corporation through its managers or directors entered into a special contract of employment for a

fixed term, it operated as a nullification of the power to discharge as reserved in the by-laws.

(Citing in the footnote *Soldiers' Orphans' Home* vs. *Shaffer,* 63 Ill. 243.)

And in a New York case it was said that a by-law of the company providing that officers, clerks, etc., should be elected during the pleasure of the board, did not deny to the defendant the power, by special contract, to overcome it or set it aside.

(Citing in the footnote *Martino* v. *Commerce Fire Ins. Co.,* 6 Jones & S. (N. Y.) 520.)

In a later case in the same state the court of appeals say: 'It may be assumed, for the purposes of the question, that this is within the power of the board, which creates the by-laws, and that when it appears that a special contract is made by such board, in terms which indicate an intent of the members to exclude from it the operation of the by-laws having relation to the right of terminating service, such contract of employment may not be subject to it. (Citing Douglass *v.* Merchants Ins. Co., 118 N. Y. 484, 23 N. E. 806.)"

Section 11 of our Corporation Act provides as follows:

"11. *By-laws.*

The power to make and alter by-laws shall be in the stockholders, but any corporation may, in the certificate of incorporation, confer that power upon the directors; by-laws made by the directors under power so conferred may be altered or repealed by the stockholders."

In addition, the certificate of incorporation provides that the directors may alter or repeal the by-laws (see Minute Book).

The 11th paragraph of Certificate of Incorporation states:

"The Board of Directors shall have the power without consent or vote of stockholders to make, alter, amend or rescind the by-laws of the corporation."

An example of this is found in the action of the directors in amending the by-laws to change and increase the salaries of the president, vice-president and treasurer (p. 15, line 37, to p. 16, line 20).

If the stockholders or directors can make, alter or repeal by-laws it follows that they can waive them.

In *Breslin* v. *Fries-Breslin Co.,* 70 N. J. Law, 274, this court, in an opinion by Justice Pitney, said (p. 282):

"Saving so far as public policy and the interests of creditors and other third parties are concerned (none of which is involved in the present case), the stockholders may bind themselves *inter sese* and in favor of the corporation by their own acts and agreements, and what will bind *all* the stockholders, with respect to an obligation from the company to one of its members, will bind the company as such."

And again, after citing *Thomp. on Corp.,* Sec. 5314, to the effect that the stockholders are in a substantial sense the corporation, he said (p.283):

"It follows that many acts which the directors may do outside the scope of their powers become ratified and validated by the *acquiescence of the body of shareholders,* and in general, the body of shareholders can ratify and confirm any act done by the directors or other officers of the corporation without a precedent authorization which the shareholders could have authorized originally.' See, also, 4 *Thomp. Corp.,* sections 4496, 4497."

And see *In re Griffing Iron Company,* 63 N. J. Law, 168, affirmed page 357, at page 171.

In the case at bar the meeting of the directors which elected the plaintiff president at an annual salary of $24,000 not only was a meeting of the full Board, all of the Directors being present, but those same gentlemen constituted all of the stockholders of the corporation.

In 14 C. J., Sec. 437, note 55, cites a long list of jurisdictions for this proposition:

> "as a corporation may at any time amend its by-laws by proper corporate action, it may expressly or impliedly waive the provision of a by-law even in favor of or as against stockholders or members by action which is binding on the corporation."

The decision of the New York Court of Appeals in *Douglass* v. *Merchants Ins. Co.,* 118 N. Y. 484; 23 N. E. 806, illustrates this point. The Court there said (p. 487):

> "* * * and in *Martino* v. *Commerce Fire Ins. Co.,* 15 J. & S. 520), it was held that the by-laws of the defendant providing that officers, clerks, etc., should be elected during the pleasure of the board, did not deny to the defendant the power by special contract to overcome it or set it aside.
>
> It may be assumed, for the purposes of the question, that this is within the power of the board which creates the by-laws, and that when it appears that a special contract is made by such board in terms which indicate an intent of the parties to exclude from it the operation of the by-laws having relation to the right of terminating service, such contract of employment may not be subject to it."

The election of the plaintiff as president was the unanimous act of the full Board of Directors, who also constituted all of the stockholders of the defendant company.

They had power to repeal or rescind the by-laws. They also had power to waive them. Their action in electing the plaintiff president for a full term for the year 1925, in the face of Section 3, Article 4 of the by-laws (p. 25, line 35), providing for the Tenure of Officers, must, of necessity, be construed to indicate an intent of the parties to exclude the

contract of hiring from the operation of the by-laws (Sec. 3, Article 4) having relation to the right of the removal of an officer.

We have thus far argued on the assumption that the Directors had the right to remove the plaintiff from the office of president, as the Supreme Court in the *quo warranto* proceeding found.

The question of the power to remove at all, under the facts, remains to be discussed.

IV.

Since the plaintiff was elected president for a fixed term he could not be removed except for cause and upon notice and hearing and the removal was ineffective to bar his recovery for the breach of his contract of employment.

We postulate this proposition on (1) the fact that the plaintiff was elected for the fixed term of one year; (2) the fact that no cause or justification is shown for his discharge; and (3) the fact that he had no notice that the meeting of the Board was to consider the removal and had no opportunity of being heard.

We are also conscious in arguing this point that it is directly contrary to the determination of the Supreme Court on the *quo warranto* proceeding (see *Walker* v. *Maas,* 132 Atl. 332); but we are now in the court of last resort and with great deference to the Judges who determined the *quo warranto* case, desire to question the correctness of their determination.

The by-laws provided that all officers and agents should be subject to removal at any time by the vote of a majority of the board of directors. This provision of the by-laws, however, could not overrule the fundamental right of a person to be affected by the official action of the board to be heard. The by-law is silent as to whether the removal may be with or without cause, but it is necessarily implied that the removal could only be for cause, particularly where the tenure of office was for a definite term.

Reference to the cases will demonstrate this.

In *Stanley* v. *Passaic,* 60 N. J. Law 392, the Supreme Court said by Chief Justice (then Justice) Gummere (p. 394):

> "That a party whose rights are to be directly affected by official action is entitled to have an opportunity afforded him of being heard in relation thereto before action is taken, whenever such action is judicial in its character, is entirely settled in this court. Vanatta *v.* Morristown, 5 Vroom 445; Traction Company *v.* Board of Works, 27 *Id.* 431; Connolly *v.* Freeholders, 28 *Id.* 286."

In *In re Griffing Iron Co.,* 63 N. J. Law 168, affirmed on opinion, page 357, the Court said (p. 175):

> "The statute recognizes a power of removal (section 15), and such power is indeed inherent. *If there be a fixed term of office removal must be for cause,* but otherwise, unless limited by statute or by-law, the power to remove ministerial officers is absolute, in the body that elects, subject only to a right of action if there be a breach of contract of employment. Thomp. on Corp., Secs. 804, 805, 820."

Observe that the language is

> "If there be a fixed term of office"—

which was the situation here,

> "removal must be for cause."

In *Costello* v. *Cusack Co.,* 124 Atl. 615, the question was as to the legality of certain proposed amendments to the certificate of incorporation. Vice-Chancellor Griffin said (p. 618):

> "As to the third amendment, I think it is void, because it provides for the immediate removal of the director, which means summary, and without a hearing; for the word 'immediate' negatives the idea of a hearing, giving the person charged time to prepare. *In re* Griffing Iron Co., *supra,* the court said:
>
> > 'The statute recognizes a power of removal (section 15), and such power is * * * inherent. If there be a fixed term of office removal must be for cause.' Page 175 (41 Atl. 934).
>
> In proceedings to remove a director the board acts judicially, and is without power to remove him for cause without giving him a hearing with reasonable opportunity to prepare. Thompson on Corp., Sec. 820.
>
> In Stanley *v.* Freeholders of Passaic, 60 N. J. Law 392, 38 Atl. 181, it was said that a party whose rights are to be directly affected by official action is entitled to have an opportunity afforded him of being heard in relation thereto before action is taken, whenever such action is judicial in its character."

Observe, as the Vice-Chancellor points out, following the principle of the *Stanley* case, *supra,* that the board acts judicially, which implies notice and the opportunity to be heard.

The *Cusack* case was affirmed by this court as to the result, this court saying:

> "We prefer to put our decision upon another ground."

Not only does the board act judicially, but an officer elected for a fixed term cannot be removed, except for adequate cause. See *Smock* v. *Buchanon*

& Smock Lumber Co., 125 Atl. 115, where Justice Trenchard, speaking for this Court, said (p. 116):

> "The president of a private corporation organized under our General Corporation Act, although elected for a fixed term, may be removed by the board of directors, for adequate cause. See *in re* Griffing Iron Co., 63 N. J. Law 168, 175, 41 Atl. 931. The statute recognizes a power of removal (section 15) and such power is indeed inherent."

"Adequate cause", implies a hearing.

In 2 *Thomp. on Corporations,* 2nd ed., Section 1814, the author says:

> "Where the term is fixed by statute or by-laws adopted before his election or appointment, an officer cannot be removed except for cause."

Once the fact that the election was for a fixed term of one year is established, the ruling of this Court in *In re Griffing Iron Co., supra,* that

> "if there be a fixed term of office removal must be for cause"

applies. The record is entirely devoid of any evidence showing good cause or justification for the removal, as, indeed, the Supreme Court found was the situation in the *quo warranto* proceeding (132 Atl. 322).

Furthermore, the record is equally devoid of any evidence showing that the plaintiff had notice of the business to be transacted or any opportunity to be heard. All that the notice told him was that there was to be a meeting (Ex. P-2, p. 81). His associates took advantage of his physical inability to attend to remove him without a hearing.

There can be no doubt that the plaintiff's rights were directly affected by the official action of the Board of Directors at the meeting of the Directors

of February 2nd, 1925 (pp. 81 and 82). The action which they then took was judicial in its character. Since the plaintiff had been employed for a fixed term of office his removal had to be for cause and he was, therefore, entitled to a hearing before the Board.

The Supreme Court, in the *quo warranto* proceeding (132 Atl. 322), held that the by-law (Section 3, Article 4; p. 25, line 35) relating to the Tenure of Officers contemplated removal without cause and, therefore, without notice (p. 323). It seems to us that in so holding the Supreme Court ran directly counter to the decision of this court in *In re Griffing Iron Co.,* 63 N. J. Law, 168, at page 175, in overlooking the importance in the case of the facts: (1) that the plaintiff was elected and employed as president and general manager for a fixed term, and (2) that no good cause was shown for his removal. The presence of those settled facts in the case brings it squarely within the decisions above cited.

Finally, a proper construction of the by-laws is against the right of removal.

The by-laws, article IV, section 1 (p. 57, line 19), section 2 and section 3 (p. 87, line 4), read as follows:

> "Section 1. Executive Officers.
>
> "The executive officers shall be a president, a vice-president, a treasurer and a secretary, all of whom shall be elected annually by the board of directors.
>
> "The president, vice-president and treasurer shall be chosen from among the directors; the secretary need not be a director.
>
> "The powers and duties of the treasurer and secretary may be exercised and performed by the same person.
>
> "Section 2. Subordinate Officers.
>
> "The board may appoint such other officers as it shall deem necessary, who shall have such

authority and shall perform such duties as from time to time may be prescribed by the board.

"Section 3. Tenure of Officers.

"All officers and agents shall be subject to removal at any time by the affirmative vote of a majority of the whole board of directors."

Very plainly the context shows that the "Tenure of office" (Sec. 3), provision relates to the "Subordinate officers" mentioned in section 2, and not to the "officers" mentioned in section 1.

The language of section 3 is "all officers and agents." Its true construction is "all such officers", indicating that the "other officers" mentioned in section 2 are those referred to as a lower order of agents and employees than the "Executive officers."

It is submitted that the trial judge erred in his final ruling in the case; that his direction of a verdict for $2,000 only was improper, and that the plaintiff was entitled to the full amount of the balance of his salary for the year 1925.

Respectfully submitted,

McCarter & English,
Attorneys of Plaintiff-Appellant.

Conover English,
of Counsel.

T6383

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Henry V. Walker, *Plaintiff-Appellant,* *vs.* Maas & Waldstein Company, *Defendant-Respondent.*	*Action at Law.* *On Appeal from Supreme Court (Essex County).*

BRIEF FOR DEFENDANT-RESPONDENT.

Facts.

Plaintiff claimed $22,000 as the balance of an annual salary fixed for the calendar year 1925 (Case, p. 3, l. 25 and p. 5).

Plaintiff's complaint alleged that the defendant "elected and employed the plaintiff as its President and General Manager for the ensuing year at an annual salary of $24,000" (Case, p. 5); *that this election and employment took place on December 2, 1924;* that he had before that annually been "elected and employed * * * as President and General Manager of the defendant, and his election and employment on December 2, 1924, was a continuation of his previous employment" (Case, p. 6).

To support this contention, plaintiff offered the by-laws and proceedings of the directors as shown by the minute book of the company as follows:

That in 1915, and each year thereafter until and including the meeting of December 2, 1924, Dr. Walker was elected president of the company; that in 1924 his salary was $24,000 per

year, having been so fixed at the annual meeting of December, 1922; that this was payable in advance at the rate of $2,000 a month; that he received his salary for the month of January, 1925 (Case, pp. 15 to 17, l. 15);

That he was removed from office on February 2, 1925 (Case, p. 20, l. 20 to p. 21, l. 35 and Exhibit P. 3, pp. 81 and 82);

That Article 4 provided as follows:

"Article 4, Section 1:

"*Executive Officers:* The Executive Officers shall be a president, a vice-president, a treasurer and a secretary, all of whom shall be elected annually by the Board of Directors" (Case, p. 25).

"Section 2: *Subordinate Officers:* The Board may appoint such other officers as it shall deem necessary, but who shall have such authority and perform such duties as from time to time may be prescribed by the Board.

"Section 3: *Tenure of Officers:* All officers and agents shall be subject to removal at any time by the affirmative vote of a majority of the whole Board of Directors.

"Section 4: *The President:* The president shall preside at all meetings of the stockholders and by virtue of his office he shall be a member of the Executive Committee. Subject to the Board of Directors and the Executive Committee he shall have *general charge of the business of the company.* He shall sign all certificates of stock *and shall do all other duties as shall from time to time be assigned to him by the Board of Directors*" (Case, p. 25).

That Article 2, Section 5, provided that after the annual meeting the newly elected directors should meet and elect officers for the ensuing year, and the minutes of their meetings in each

year showed that the officers were elected "for the ensuing year" (Case, pp. 43 and 44);

That all of these by-laws were in effect from the time Dr. Walker became president of the company (in 1915) and up to the time he was removed.

It is important to notice that nothing in the minutes was referred to as showing any election or employment of the plaintiff, either as president or general manager, whether on December 2, 1924, or any other time, except such as arose from his election as president and the fact that the by-laws above referred to provided that he should be the general manager (Case, p. 26, l. 10).

Plaintiff's counsel tried to elicit from plaintiff testimony as to a separate contract of employment as general manager, asking,

"In addition to being a director, and in 1925, President, were you employed by the company in any other capacity? Did you exercise any other function?"

Plaintiff's answer was,

"I was in charge of the factory and I was general manager of the corporation" (Case, pp. 10 to 25).

Of course he was general manager. That is the usual function of a president. The by-laws of this company expressly provided

"he shall have general charge of the business of the company." Article 4, Section 4. (Case, p. 26, l. 10.)

Counsel later asked,

"Following your election in December, 1924, did you perform the duties you had previously performed as president and manager of the company? A Yes, sir, I did.

Q Generally, what were those duties? A Primarily the management of the factory

and secondarily all other matters connected with the business of the corporation'' (Case, p. 17, ll. 26 to 30).

Again

''Subject to the direction of the Board of Directors, who was the responsible officer in the general policy of the management of the company? A Well, there was a subdivision of duties. My primary duties were connected with the manufacturing, but I also discussed in conjunction with my associates and decided other questions'' (Case, p. 18, ll. 30 to 40. See also Case, p. 31, l. 20).

On cross examination plaintiff was asked,

''Now, whatever you claim here is for salary as president of the company? A As president and any other position and title which may properly belong to me.''

a very indefinite though perfectly safe answer (Case, p. 37).

Asked if there was ever an agreement between him and defendant company for the payment of any money in compensation for his services other than the fixing of his salary as president, he could only refer to bonuses (Case, p. 38, ll. 10 to 20), which he admitted were, as bonuses usually are, an extra compensation voted after the services had been rendered, and not in any way because of an arrangement that obligated the company to pay (Case, p. 47, l. 40 to p. 49, l. 3).

He was asked if he had in mind anything in the minute book which employed him as general manager as distinct from selection as president. His counsel objected on the ground that he could not be asked what he had in mind, and the Court sustained the objection (Case, p. 37, ll. 30 to 40).

Asked if he claimed anything in this suit by reason of the bonuses that had been voted, he could only reply,

''I claim whatever my counsel sets up.''

whereupon counsel referred to the language of his complaint, then followed this colloquy,

''Mr. English: The complaint says that he was employed as president and general manager for a period of one year from the December—whatever date it was—at an annual salary of $24,000 a year.''

''Mr. Skinner: It is because the complaint says that that I am now trying to smoke out whatever there might be in the mind of counsel for the plaintiff that justifies that statement that he was employed as general manager. So far I have heard nothing except by reference that refers to the by-laws*

*evidently an error, either of counsel or of the reporter

and I ask if counsel has anything else in the minutes of what he has said.''

''Mr. English: Nothing else in the minutes, but by practice of the company; general manager in a large sense of the other affairs of the company'' (Case, pp. 38 to 39 to l. 10).

That is just what a president ordinarily is, general manager in a large sense, and that is just what the by-law of the company in this case said he should be.

The company had two offices, one at the factory in Newark, and one in New York. Plaintiff as president had charge of production at the factory. The treasurer and secretary had charge of the New York office, with all that passed through it (Case, p. 18, ll. 20 to 40 and p. 31, ll. 15 to 25) with the president, however, in general supervision, subject to the Board of Directors.

When it is realized that by the uncontradicted proofs the authority that the plaintiff had as general manager was conferred upon him as president; that even the duties imposed upon him

> "if not by direct assignment, at least by acquiescence and knowledge of the directors"

referred to by Mr. English at page 45, were all within the language of Article 4, Section 4, above referred to describing the duties that went with the office of president (Case, bottom of pp. 25 and 26, ll. 1 to 10); that the only contract for compensation that was shown is found in the voting of a salary of $24,000 to him as president, it is clear that plaintiff's apparent attempt to establish some contract other than arose from plaintiff's election to the office of president completely failed.

In a *quo warranto* proceeding instituted by the plaintiff for his restoration to office, the Supreme Court held that Article 4, Section 3 of the by-laws of the company, conferred a sweeping power of removal without cause, and therefore without notice.

> *Walker* v. *Maas & Waldstein,* 132 Atl. Rep. 322 at 323; 4 N. J. Misc. Rep. 230.

Notwithstanding this decision, plaintiff brought on for trial the present action, a suit for salary, which had not been pressed for trial during the pendency of the *quo warranto* proceeding.

The learned trial judge denied defendant's motion for non-suit (Case, pp. 49 to 53), holding that the power of removal above referred to did not apply to "a contract case" (Case, p. 50, l. 25); that the judgment of the Supreme Court had deprived the plaintiff of his office, but that

if his contract of employment had been breached, the plaintiff had a right in law to recover damages (Case, pp. 51 to 53), and that there was a breach of contract if the discharge was without cause or justification. The defense then proceeded with its testimony, the first witness being Mr. William P. Allen, general manager of the paint, lacquer and chemical department of the DuPont de Nemours Co. His testimony was not completed when the adjournment was taken for the day. When the Court convened the next morning, the trial judge stated that, after fuller consideration, he had changed his view; that the proof showed that the plaintiff had been elected to an office; that at the time he was elected the by-law above referred to was in force; that he was chargeable with notice of it; that his right to the salary was lost with his loss of his right to the office, and that he would grant a motion for non-suit if renewed (Case, pp. 74 to 77, l. 10). The motion for non-suit being renewed, plaintiff's counsel argued that even from that point of view, plaintiff was entitled to $2,000, the salary for the month of February; that as that was payable in advance it was due on February 1st, and plaintiff was not discharged until February 2nd (Case, p. 77, l. 20). Thereupon defendant rested its case, offering to submit to a direction of a verdict for $2,000, the amount of one month's salary. Such direction was given.

The question then that is before this Court is the effect of the by-law giving the power of removal, upon the plaintiff's right to recover the salary which went with that office and that is just the way plaintiff's counsel states the question in the brief now before the Court, closing

his review of the facts in the case with the following:

> "The question therefore is: what is the effect of this by-law on the plaintiff's right to recover his salary for the balance of the year, 1925, for which he had been elected president 'at the annual salary of $24,000' " (p. 16, l. 10).

Replying now to the formal points made by plaintiff we submit the following:

I.

The plaintiff's contract was not for a fixed term.

While it is true that one of the by-laws provides that the president shall be elected annually by the Board of Directors, and another that he shall receive an annual salary of $24,000, cases that say that those words imply a fixed term, are cases where the Court had no other guide by which to determine whether the term is fixed. That is not the case here. Here we have no by-law, such as is quite common, to the effect that the officers shall be elected for the term of one year, or that says that they are to hold office until their successors are chosen, and we have the by-law that makes all officers and agents subject to removal at any time. Notice that officers are coupled with agents, the power of removal applies to one as much as to the other; that the by-law does not appear under the heading "Removal of Officers," but under the caption "Tenure of Officers."

We respectfully submit that in the absence of a provision stating how long the term shall be, the provision that the president and other officers shall be elected annually (Case, p. 25, l. 20)

is to be read in connection with the above quoted by-law making officers and agents subject to removal at any time; and that so read, the term for which the president is elected is subject to be terminated at any time, and is therefore not fixed.

There was no contract except such as arose from the election to the office. The plaintiff accepted office charged with knowledge of the by-law giving the power of removal. His contract, therefore, was subject to termination at any time, and to terminate it in the exercise of that power was not a breach of the contract. This view of the case, we submit, completely disposes of Points I and II, and the cases cited under them either do not support the points, or are not applicable to the present case.

Where the by-laws under which a man is elected to office, or the contract under which he is hired, are silent as to the length of time for which he is elected or hired, the Court may well infer from the fact that he is to be elected annually or that the salary accompanying the office or fixed by the contract of employment is an annual salary, that it was intended that his term of office or of employment should be one year; but if there is no contract except such as may be implied from election, and there is a by-law that reserves the right to terminate the office at any time, this negatives and overcomes any implication of an annual term.

The English view referred to in *Willis* v. *Wyllys Corporation,* 98 N. J. Law 180, does not go so far as to construe a contract as being for a definite term if there is an express reservation of the power of termination. The rule of law set forth in the leading case of *Beach* v. *Mullin,*

34 N. J. Law 343, is that if the payment of wages monthly

> "*is the only circumstance from which the duration of a contract is to be inferred,* it will be taken to be a hiring for a month."

In *Pfeil* v. *Feigenspan,* 97 N. J. Law 3, the Supreme Court found that even if the original contract of hiring had been indefinite so far as the term was concerned, there was an employment by the year and not for an indeterminable period. So the converse of this must be true, that even if the original contract of hiring is definite, anything, then or later, agreed upon making it subject to termination at any time must reduce it from definiteness to indefiniteness.

In *Jones* v. *Manhattan Horse Manure Co.,* 91 N. J. Law 406, the rule adopted was predicated upon the fact that there was no limitation of the term of service. In the case at bar there is such a limitation in the by-law giving the power of removal at will.

In *Lyons* v. *Pease Piano Co.,* 92 N. J. Law 592, it was made clear that the resort to the circumstance of weekly or monthly payments is controlling only in the absence of anything else evidencing the intent of the parties.

In *Passino* v. *Brady Brass Co.,* 83 N. J. Law 419, plaintiff was first employed as manager, later elected secretary, and thereafter he performed the duties of manager and secretary for a salary fixed for him as secretary. The Court said that the inference was that the salary comprehended the compensation for the performance of his duties in both capacities. The same thing can be said in the present case with this added distinguishing fact, that there was no employment as manager distinct from election

as president, and that whatever duties were performed by the plaintiff as manager were assigned to him under the by-laws as incident to his office of president. In the Passino case, there was no reserved power of removal, either from the office of secretary or in the separate contract of employment as manager.

II.

Removal under the By-law Section 3 of Article 4 (p. 25, l. 3) ended plaintiff's right to salary except so far as it had become due prior to removal.

Plaintiff's brief, Point II, argues that the by-law

> "does not militate against plaintiff's right to recover his unpaid salary."

In Re Griffing Iron Co., 63 N. J. Law 168, affirmed in this Court on opinion of court below, 63 N. J. Law, page 357, is cited as squarely in point. It is true that that case involved a by-law similar in its terms to the one in question and the Court did say as quoted, but what does that amount to? It says that

> "*if* there be a fixed term of office removal must be for cause."

In the case at bar, we have seen that there was no fixed term. It speaks of the power of removal of ministerial officers as an absolute power (if term of office be not "fixed"), adding,

> "subject only to a right of action *if* there be a breach of contract of employment."

Cuppy v. *Stollwerck,* 111 N. E. 249 (also found in 216 N. Y. 591), is also cited as "squarely in point." We do not so read it. A contract was made with Mr. Cuppy. This was in writing and

was for the named term of twelve months, quite justifying the Court's finding that

> "It is clear that the plaintiff was employed for a definite period of one year."

The plaintiff was then elected as managing director. There was no such office as managing director provided by the by-laws, and the opinion says that this election was in pursuance of his contract. The power of removal was similar to the one in the case at bar, that is, it was a power to remove a director or officer. But before Cuppy became a director, the contract had been made. It could not be superseded by a by-law later made applicable to him. This decision then is only one of several where the power of removal has been held inapplicable to one who has a special contract for a fixed term.

Douglass v. *Merchants' Insurance Co.,* 118 N. Y. 484; 23 N. E. 806; 7 L. R. A. 822, is in point, where Cuppy *v.* Stollwerck is not. The main facts of the case are on all fours with the one at bar. Plaintiff was elected to the office of secretary. The by-laws did not say that his term of office was for a year (nor do they in the case at bar), but his compensation was fixed at the yearly salary of $1,500 as in the instant case. This fact was relied upon as making his term of office a fixed term, but there was a by-law which said

> "The secretary and other officers named shall respectively hold their offices during the pleasure of the Board of Directors," etc.

and the Court held that the plaintiff was chargeable with knowledge of this by-law; that it impliedly gave the power of removal at any time

> "and that the power of removal at any time must be deemed to have been reserved in the contract of employment" (118 N. Y. 487).

The quotation from the case of *Trustees of Soldiers' & Orphans' Home* v. *Shaffer,* 63 Ill. 243, appearing at page 18 of plaintiff's brief only shows that the Court there held that a power of removal conferred by the charter might be exercised at the discretion of the trustees

> "*if* there was no special contract for a definite time."

It was just this distinction between cases where there was a special contract of employment and the present case that the learned trial judge had in mind in his remarks quoted in plaintiff's brief at page 19. All he could see was an election to office and such contract of employment as was implied from the fact of election. He could see no separate contract of employment, either as president or as general manager. He saw that the by-laws did not say that the president was elected for one year. Whatever there was of inference from the fact that he was elected annually or awarded an annual salary was more than offset by the fact that he could be removed at any time without cause. He saw then a term of office that was not fixed but indefinite and subject to termination at any time. Looking at the election as containing a contract, he saw the by-law as a part of the contract. Putting the plaintiff in the position of having accepted employment subject to termination at will, he applied to the case the law that had been laid down by the Supreme Court. He could not be persuaded to disregard that law by any citation of cases that were so clearly distinguishable from the instant case in the facts involved and the principles applied to their decisions. Plaintiff's brief criticizes the citation by the trial judge of *Keegle* v. *Hudson County,* 99 N. J. Law 26, and remarks that the case which he cites is not at all in point. This was cited by the trial judge as

interesting, "though not exactly in point" (Case, p. 79, l. 10). We submit that while it differs from the instant case in that it involved a discharge from a municipal office, the principle on which the decision is rested is applicable to the instant case. It rested upon the rule that in this State

> "in the absence of any judicial ascertainment of illegality of the discharge no suit for salary would lie."

One of the points earnestly made by us in the *quo warranto* proceeding was that the Supreme Court had no jurisdiction by the writ of *quo warranto* to inquire into the discharge of an officer of a stock corporation organized for private gain. The Supreme Court held that this court had definitely established the law to the contrary in the case of *Schilstra* v. *Van Den Heuvel,* 82 N. J. Eq. 612. We submit that if the Supreme Court has jurisdiction over discharges from office whether in a municipal corporation or a private stock corporation, the rule of the Keegle case should be applied to the case of discharge from a private corporation, unless there be some reason for not doing so; that there is no such reason and that therefore plaintiff's suit for salary will not lie for there has been no judicial ascertainment of the illegality of the discharge. In the instant case, on the contrary, the judicial ascertainment has been that the discharge was legal.

That the power of removal may be reserved by a by-law similar to the one in question, and that it then is a limitation upon any contract of employment implied from mere election to office is stated by Professor Thompson as the settled law. He says:

> "Whether the right to remove directors or officers is given by statute or by-laws or

> not, it is clear that the corporation may reserve the right by contract to remove an officer. Such right may not exist in relation to directors, for the reason that they are chosen by election and not by contract; and while officers may technically be said to be chosen by election, yet it is so far in the nature of an employment that a condition for removal may be made a part of the agreement. A corporation may enter into a special contract with an officer or an agent by which the corporation may reserve the power to remove such officer or agent at pleasure, notwithstanding any by-law to the contrary. * * * There is no doubt that the corporation may by by-laws provide for removals from office; and to avoid uncertainty, and for the proper regulation of the corporation, such provisions in the by-laws would certainly be prudent. Persons who enter the service of corporations as officers are chargeable with knowledge of the provisions of the by-laws relating to removals from office. Without some reserved right of termination, it may be assumed that the term of office of a director or officer is not terminable without cause until the end of the term." 2 Thompson on Corporations, Second Edition, Section 1085.

Among the cases cited in the note are *Douglass* v. *Merchants' Insurance Co.* and *In Re Griffing Iron Co.,* cited in this brief.

At another point, Professor Thompson says,

> "Where the term of office is fixed by the statute, or by-laws adopted before his election or appointment, an officer cannot be removed except for cause; but in the absence of a special contract, or of a charter regulation or by-law, fixing the term of an officer, he may be removed at any time with or without cause, either by the stockholders or by the officer or officers by whom he was appointed, without liability on the part of the corporation. It is evident that where the statute, charter or by-laws confer upon the

corporation the power of removal, then every officer holds his office subject to such provisions." 2 Thompson on Corporations, Second Edition, Section 1814.

It is the settled law that officers of a corporation elected by the directors are ministerial officers, and may be removed at the pleasure of the directors without any by-law giving that power, unless restrained by contract with the particular officer. Professor Thompson says,

> "Below the grade of director and such other officers as are elected by the corporation at large, the general rule is that the officers of private corporations hold their offices during the will of the directors, and are hence removable by the directors without assigning any cause for the removal, except so far as their power may be restrained by contract with the particular officer—just as any other employer may discharge his employee."
>
> 2 Thompson on Corporations, Second Edition, Section 1816. See also Vol. 14 A—Corpus Juris, pages 74 and 75. Brindley *v.* Walker, 221 Pa. State Rep. 287 at pages 292-293; Town of Davis *v.* Filler, 47 W. Va. 413 (35 S. E. 6).

The opinion of the Supreme Court *In re Griffing Iron Co.,* says:

> "The president of a corporation has no securer tenure than any other ministerial officer." (63 N. J. Law at pages 175-176.)

Conceding, for the sake of argument, that the directors may deprive themselves of the right to exercise this power in a case of an officer with whom they have made a special contract of employment that negatives the power, the instant case is one where there was a by-law which made the term of office terminable at the pleasure of the Board. There was no special contract of employment negativing the exercising of this power.

There was no contract of employment except such as may be implied from election to office, and that was an election subject to the by-laws, with knowledge of which the plaintiff is chargeable. Many other cases might be cited. We will only mention

Darrah v. *Ice & Storage Co.,* 50 W. Va. Rep. 417, at pages 419 and 421;

Burr v. *McDonald,* 3 Grat. 215, syl. pt. 1;

Hunter v. *Insurance Company,* 26 La. Ann. 13;

Selley v. *American Lubricator Co.,* 119 Iowa Rep. 591;

Stobo v. *Davis Provision Co.,* 54 Ill. Appellate Court Reports 440.

Darrah v. *Ice & Storage Co.,* above referred to, was approved and followed in *Wright* v. *Warren Bros. Co.,* 204 Fed. Rep. 231 (C. C. A., 4th C.) and was also followed in *Long* v. *Savings & Annuity Co.,* 76 W. Va. 31.

III.

Plaintiff was without any right to recover any of the monthly instalments of salary accruing after his discharge in February. The directed verdict of $2,000 for the February salary payable in advance, the day before he was removed, gave him all that he was entitled to.

This is in reply to plaintiff's Point III, where plaintiff argues that the contract of employment for a fixed term of one year operated to nullify the power to discharge reserved in the by-laws. We think that that is putting the cart before the horse. We say that the power of discharge at any time reserved in the by-law makes it impossible to find that the plaintiff was employed for the fixed term of one year. Much of our

argument in support of the preceding points applies also to this point.

Many authorities say that a contract made by directors for a fixed term of employment in the face of a statute or by-law saying that the officers shall hold at the pleasure of the Board will be ineffective. An illustration of such case is *Fowler* v. *Great Southern Tel. & Tel. Co.,* 104 La. 751. There the by-laws provided that all officers should hold office "during the pleasure of the board." The Court held,

> 1. "The fact that he was chosen general manager at the recurring annual election of officers, and that the salary of the position was designated as so much per year, does not of itself sustain his contention that his was a yearly employment at a yearly salary.
>
> "It was not convenient to elect officers less often than once each year, and while the salary was specified at so much per year, in point of fact it was payable and drawn monthly, as usual in such cases.
>
> 2. "We do not find that plaintiff was ever employed specifically by the year, but if he were, there was no power in the board of directors to so employ him, and he knew it, for as secretary he was custodian of the archives, to wit: the charter, by-laws, minutes, etc."

Plaintiff's brief argues (pages 29 and 30) that by a proper construction of Art. IV of the by-laws the right of removal relates only to subordinate officers; it does not include the president. One subdivision deals with the higher executive officers, the next gives the power to appoint subordinate officers, and then the next section says all officers and agents shall be subject to removal, etc. It seems to us a very forced construction that would limit the application of the words "all officers" to the subordinates mentioned in Section 2, and give it no application to the executive officers mentioned in Section 1.

Plaintiff's brief argues that by-laws may be altered or repealed by stockholders, and points out that the directors who elected the plaintiff president were all of the stockholders of the corporation. This reasoning, we submit, starts with the assumption that there was a special contract of employment for a fixed term, which we have fully covered. The quotation from *Douglass* v. *Merchants' Insurance Co.,* (Plaintiff's brief, page 24) says:

> "that when it appears that a special contract is made by such board in terms which indicate an intent of the parties to exclude from it the operation of the by-laws having relation to the right of terminating service, such contract of employment may not be subject to it."

There is nothing in the instant case which shows any intent on the part of defendant corporation, its directors or stockholders, to exclude the plaintiff from the operation of the by-law which made his term of office subject to the will of the directors.

It may be said that the status of the plaintiff after election to the office of president was that he had a fixed term subject to be terminated, just as there may be a vesting of an estate subject to be divested. We think it makes no difference in his right to recover salary, after his discharge, whether he had a fixed term subject to be terminated, or had no fixed term. The essential element that the two views have in common is that he cannot complain if the power of removal is exercised, and in the doing of it there is no breach of the contract of employment implied from his election. Our own view is, however, as above

stated, that the proper interpretation of the situation surrounding the plaintiff at the time of his election was that there was no special employment for a fixed term.

IV.

The By-law (Article 4, Section 3) gave the right to remove without cause and without notice or hearing.

The proposition here set forth was decided by the Supreme Court. That decision was made in the exercise of its exclusive jurisdiction to try out the right to an office. From it there was no right of appeal except by the permission of that Court. Such pe rmission was sought and denied. We respectfully submit that plaintiff cannot confer upon himself the right to an appeal by merely taking it; that the Supreme Court decision is the law of the case in this Court, so far as the plaintiff's right to office is involved. If the question can be raised here at all (which we do not concede) it can only be on the ground that plaintiff's right to his salary depends upon something other than his right to the office of president. All the argument in plaintiff's brief by which he seeks to set up a special contract for a fixed term that supersedes the by-law giving the power of removal, recognizes this. We have replied that plaintiff showed no such contract; that the term of office was not fixed; that there was no contract of employment other than such as may be implied from the election to the office of president; that there was no special contract of employment as general manager; that such general management is inherent in the office of president and is expressly described as part of plaintiff's duties as president; that the attempt

to show some employment for other duties entirely failed, and even if there were such, they were also part of and attached to the office of president under the language of the by-law, Article 4, Section 4. We have shown that the very common by-law fixing the term of office at one year was absent in this case; that the fact that the president was to be elected annually was not sufficient upon which to ground a fixed term, in the face of the by-law making all officers subject to removal at any time, which was in effect at the time of his election, and with knowledge of which plaintiff was charged; that the fact that a salary was fixed as an annual salary is a natural consequence of electing annually, and for the same reasons as above stated does not operate to make his term "fixed." What we have already said, we think sufficiently replies then to the first ground on which plaintiff postulates the proposition contained in his fourth point.

The second ground is that no justification is shown for the discharge. That, we contend, does not have to be shown, as the by-law gives the right to remove without cause. Plaintiff argues that, while the by-law is silent as to whether the removal may be with or without cause,

> "It is necessarily implied that the removal could only be for cause, particularly where the tenure of office was for a definite time."

Plaintiff cites a number of cases, none of which is applicable. The rule of law laid down in *Stanley* v. *Passaic* has no application to official action by the board of directors under a by-law which entitled them to remove an officer at any time. Their action in so doing is not judicial in its character. *In Re Griffing Iron Co.* only holds that removal must be for cause if there be a fixed term. Here there was none.

In *Costello* v. *Cusack Co.,* Vice-Chancellor Griffiin rested his conclusions upon *In Re Griffing Iron Co.* and *Thompson on Corporations,* and the latter writer states as the settled law that the corporation may reserve the right by contract or by-law to remove without cause (see citations under our Points II and III). The learned Vice-Chancellor seems to have assumed that there was a fixed term of office, but there is nothing in the statement of the facts of the case to justify that assumption. Moreover, in the Costello case, the power of removal was sought to be exercised with reference to directors, and in that respect the authorities make a distinction between directors (who are elected by the stockholders) and mere ministerial agents, including those who hold the office of president. In any case, the Court of Errors unanimously differed with the Court of Chancery, concurring in the result by resting their decision upon another ground, namely, that the director could not be removed for the particular cause named in the by-law, as that involved an attempt to set up qualifications for the office of director on which the legislature had finally acted. In *Smock* v. *Buchanan & Smock Lumber Co.,* the Court did no more than recognize an inherent power of removal for adequate cause of a president of a private corporation though elected for a fixed term.

Plaintiff's argument that it is implied that the power of removal given by Article 4, Section 3, can only be exercised for cause was not accepted by the Supreme Court. The Court said:

> "Obviously it contemplates removal without cause, and therefore without notice. It is a protective instrument placed in the hands of the corporate directors to be wielded at discretion, and of its existence of course the relator had knowledge when he took office. The president, as in most corporations, was elected by the board, and for adequate cause could be removed by that body at any time without the aid of special authority. This being true, the by-law in question would be futile in its purpose if the existence of cause of removal and notice of hearing be essential to the exercise of the powers it confers."

Thompson on Corporations says:

> "Where an officer holds his office at the will or pleasure of the board of directors or the corporation, he is not entitled to notice of proceedings to remove him such as are required in proceedings in *quo warranto.*" 1 Thompson on Corporations, 2nd Edition, Section 954, citing cases where officers who held office during pleasure had been deposed without notice or trial.

We submit that the judgment of the court below should be affirmed. Plaintiff's brief refers more than once to the fact that the Supreme Court found that Dr. Walker had been actuated by high motives and that what he did had for its object the protection of the interest of the company of which he was the head. This and references to the manner of his discharge are no doubt made in recognition of the fact that judges are human and may be moved by sympathy. This is not the time or place to attempt any reply, and reply is unnecessary, for the determination by this Court of the question of law that is before it is not to be influenced by sympathy.

Respectfully submitted,

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