

New Jersey Supreme Court.

DELAWARE RIVER TRANSPORTA-
TION COMPANY,)
 Prosecutor,
 vs.
INHABITANTS OF THE CITY OF)
TRENTON, Respondent.

Writ of Certiorari.

[Filed March 27, 1913.]

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State of New Jersey, to wit—To Hon. Thomas W. Trenchard, the Inhabitants of the City of
[L. s.] Trenton, the Board of Harbor Commissioners of the City of Trenton and George R. Robbins, Clerk of the County of Mercer.

We being willing for certain reasons to be certified of an order made on this sixth day of March, nineteen hundred and thirteen, by Hon Thomas W. Trenchard, Justice of the Supreme Court, naming and appointing Harry A. Ashmore, Charles A. May and Gardner H. Cain, three 20 disinterested freeholders, resident of the county of Mercer, to examine, appraise and fix the compensation to the Delaware River Transportation Company, the Fidelity

Trust Company, the New Jersey Trust Company and the Wilson & Stokes Lumber Company for the taking of the wharf, lands and property belonging to the said Delaware River Transportation Company by the inhabitants of the city of Trenton to be used for the purpose of the improvement of the harbor and water front of the city of Trenton, and to assess the damages by reason of the taking of the same:

10 We do command you that the said order and all petitions, resolutions, ordinances and other proceedings upon which said order is based, together with all things touching and concerning the making of said order by said Justice of the Supreme Court as fully and entirely as before you they remain to our Justice of the Supreme Court of Judicature, at Trenton, on the twenty-seventh day of March, nineteen hundred and thirteen, you certify, and send, together with this writ that therein may be done what of right and according to the laws of this State should be done.

20 Witness William S. Gummere, Esquire, Chief Justice of our Supreme Court, at Trenton, this seventh day of March, nineteen hundred and thirteen.

WM. C. GEBHARDT,
Clerk.

PETER BACKES,
Attorney.

I allow this writ; let it be sealed, and I hereby order that all the proceedings on the part of the Commissioners to condemn the lands of the prosecutor to be stayed until the 15th day of September, 1913.

30 THOMAS W. TRENCHARD,
J. S. C.

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

In obedience to the command of this writ, directed to George R. Robbins, Clerk of the County of Mercer, and

to me, Thomas W. Trenchard, one of the Justices of the Supreme Court, do hereby certify and send under my seal to you, the Honorable Justices of the Supreme Court of New Jersey, as well the order appointing commissioners to fix the compensation, &c., for the lands and property belonging to the said Delaware River Transportation Company, and to be taken by the Inhabitants of the City of Trenton to be used for the purpose of the improvement of the harbor and water front of the City of Trenton, and to assess the damages by reason of the taking of 10 the same, as the petition whereon the same was made, with the affidavits appertaining thereto, the notice assigning time and place for the appointment of commissioners, order amending the order assigning time and place for the appointment of commissioners, the notice of the application for the appointment of commissioners, as well as the order made on the sixth day of March, nineteen hundred and thirteen, naming and appointing Harry A. Ashmore, Charles A. May and Gardner H. Cain, three disinterested freeholders, residents of the 20 County of Mercer, to examine, appraise and fix the compensation to the Delaware River Transportation Company for the taking of its lands and property, and all things touching and concerning the same, as fully and entirely as they remain before me as appears in the schedule hereto annexed, as I am commanded.

Witness my hand and seal this twenty-second day of March, nineteen hundred and thirteen.

THOMAS W. TRENCHARD,
Justice of Supreme Court. 30

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

In obedience to the command of this writ, directed to me, George R. Robbins, Clerk of the County of Mercer, and Thomas W. Trenchard, one of the Justices of the

- Supreme Court, do hereby certify and send under my seal, to you, the Honorable Justices of the Supreme Court of New Jersey, as well the order appointing commissioners to fix the compensation, &c., for the lands and property belonging to the said Delaware River Transportation Company, and to be taken by the Inhabitants of the City of Trenton to be used for the purposes of the improvement of the harbor and water front of the City of Trenton, and to assess the damages by reason of
- 10 the taking of the same, as the petition whereon the same was made, with the affidavits appertaining thereto, the order assigning time and place for the appointment of commissioners, order amending the order assigning time and place for appointment of commissioners, the notice of the application for the appointment of commissioners, as well as the order made on the sixth day of March, nineteen hundred and thirteen, naming and appointing Harry A. Ashmore, Charles A. May and Gardner H. Cain, three disinterested freeholders residing in the
- 20 County of Mercer, to examine, appraise and fix the compensation to the Delaware River Transportation Company for the taking of its lands and property, and all things touching and concerning the same, as fully and entirely as they remain before me as appears in the schedule hereto annexed, as I am commanded.

Witness my hand and seal this twenty-second day of March, nineteen hundred and thirteen.

[L. s.]

GEO. R. ROBBINS,
Clerk.

- 30 *To the Honorable the Justices of the Supreme Court of the State of New Jersey:*

In obedience to the command of this writ to it directed, "The Inhabitants of the City of Trenton" within named does hereby certify and send the within mentioned, as well the order of appointing the commissioners to fix compensation, &c., for lands and property belong-

ing to the Delaware River Transportation Company, as well as the petition, resolutions and other proceedings and all things touching and concerning the matter whereof mention is made in the said writ, as fully as before it they remain.

In witness whereof "The Inhabitants of the City of Trenton" has caused this return to be signed by his Honor the Mayor, its corporate seal to be hereunto affixed, attested by the City Clerk, this twenty-second day of March, nineteen hundred and thirteen.

[L. s.]

FREDK. W. DONNELLY,

Mayor.

FRANK THOMPSON,

City Clerk.

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Notice of Application for Appointment of Commissioners.

To the Delaware River Transportation Company, the Fidelity Trust Company, the West Jersey Trust Company and the Wilson & Stokes Lumber Company:

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Take notice, that "The Inhabitants of the City of Trenton," a body politic and corporate of the State of New Jersey, has presented to the Honorable Thomas W. Trenchard, one of the Justices of the Supreme Court of New Jersey, its petition for the appointment of three disinterested freeholders, residents of the County of Mercer, as commissioners to examine and appraise and to fix the compensation to be paid by the petitioner for the taking of certain lands and premises hereinafter described, to be used for the purpose of the improvement 30 of the harbors and water front of the City of Trenton, pursuant to the statute in such cases made and provided, and to assess the damages by reason of the taking of

the same, if any; and that said justice has, by his order dated the seventh day of January, one thousand nine hundred and thirteen, as amended by an order dated the eleventh day of January, one thousand nine hundred and thirteen, assigned Thursday, the thirtieth day of January, one thousand nine hundred and thirteen, at the hour of ten o'clock in the forenoon, at the Supreme Court room, at the State House, in the City of Trenton, in the State of New Jersey, as the time and place for
10 the hearing on said petition before him, and has directed this notice to be given.

The said land and premises are necessary to be taken by the petitioner for said improvement, and is particularly described as follows: All that certain tract or parcel of land in the City of Trenton aforesaid, beginning at a point in the westerly line of Fair street, said point being distant southerly sixty-eight (68) feet from the northeast corner of a brick building owned by Timothy Furlong, said building being on the southerly line
20 of McLea alley, and running thence westerly and at right angles to Fair street ninety-four (94) feet to a point in the southwest corner of a lot owned by Timothy Furlong; thence (2) northerly at right angles to the first course sixty-eight (68) feet to the southerly line of McLea alley; thence (3) westerly along the southerly line of McLea alley one hundred sixty-five (165) feet, more or less, to the Delaware river; thence (4) southerly along the shore of the Delaware river four hundred (400) feet, more or less, to a point in the northerly boundary line of a lot
30 owned by the Camden and Amboy Railroad Company; thence (5) easterly and parallel to Federal street two hundred sixty (260) feet, more or less, to a point in the westerly line of Fair street, said point being also one hundred fifty (150) feet northerly from the northerly line of Federal street; thence (6) northerly along the westerly line of Fair street two hundred (200) feet, more or less, to a point corner to a lot owned by John Malloy; thence (7) westerly and at right angles to Fair street one hundred (100) feet to a point, said point

being the southwest corner of said John Malloy's lot; thence (8) northerly on a line parallel to Fair street thirty (30) feet to a point, said point being the northwest corner of said John Malloy's lot; thence (9) easterly along the northerly line of John Malloy's lot one hundred (100) feet to the westerly line of Fair street; thence (10) northerly along the westerly line of Fair street one hundred two (102) feet, more or less, to the point of beginning, together with all and singular the buildings, improvements, ways, alleys, waters, water courses, rights, liberties, privileges, hereditaments and appurtenances to the same belonging or in anywise appertaining, and the reversion or reversions, remainder and remainders, rents, issues and profits thereof, and every part and parcel thereof, and also all the estate, right, title, interest, possession, property, claim and demand whatsoever, both in law and equity, of the said owners and occupants in and to the said land and premises with the appurtenances.

You, the said Delaware River Transportation Company, a corporation of the State of New Jersey, are made a party hereto because you appear on the records in the clerk's office of the county of Mercer as the owner of said land and premises, and you, the said Fidelity Trust Company, a corporation of the State of Pennsylvania, as trustee, and the West Jersey Trust Company, a corporation of the State of New Jersey, as trustee, are made parties hereto because you have or claim to have an interest in the said land and premises by reason of certain mortgages made to you, as trustees, covering said premises, and you, the Wilson & Stokes Lumber Company, a corporation of the State of New Jersey, are made a party defendant because you have or claim to have some interest in the said lands and premises by reason of a judgment lien on said premises.

"THE INHABITANTS OF THE CITY OF TRENTON."

(Signed) CHARLES H. ENGLISH,
Attorney for Petitioner.

Dated Trenton, N. J., January 14, A. D. 1913.

Order Assigning Time and Place for the Appointment of Commissioners.

“The Inhabitants of the City of Trenton” having presented to me, the Honorable Thomas W. Trenchard, Esq., one of the Justices of the Supreme Court, its petition for the appointment of three disinterested freeholders, residents of the county of Mercer, as commissioners to examine and appraise certain lots and property hereinafter more particularly described, and to assess the damages, if any, and fix the compensation to be paid for the taking of the same by the said “The Inhabitants of the City of Trenton,” pursuant to the statute in such cases made and provided, which said lands are bounded and described as follows: Being all that certain tract of land and premises lying in the city of Trenton, in the county of Mercer and State of New Jersey, beginning at a point in the westerly line of Fair street, said point being distant southerly sixty-eight (68) feet from the northeast corner of a brick dwelling owned by Timothy Furlong, said building being on the southerly line of McLea alley, and running thence westerly and at right angles to Fair street ninety-four (94) feet to a point in the southwest corner of a lot owned by Timothy Furlong; thence (2) northerly at right angles to the first course sixty-eight (68) feet to the southerly line of McLea alley; thence (3) westerly along the southerly line of McLea alley one hundred sixty-five (165) feet, more or less, to the Delaware river; thence (4) southerly along the shore of the Delaware river four hundred (400) feet, more or less, to a point in the northerly boundary line of a lot owned by the Camden and Amboy Railroad Company; thence (5) easterly and parallel to Federal street two hundred and sixty (260) feet, more or less, to a point in the westerly line of Fair street, said point being also one hundred and fifty (150) feet northerly from the northerly line of Federal street; thence (6) northerly along the westerly

line of Fair street two hundred (200) feet, more or less, to a point corner to a lot owned by John Malloy; thence (7) westerly and at right angles to Fair street one hundred (100) feet to a point, said point being the southwest corner of said John Malloy's lot; thence (8) northerly on a line parallel to Fair street thirty (30) feet to a point, said point being the northwest corner of said John Malloy's lot; thence (9) easterly along the northerly line of John Malloy's lot one hundred (100) feet to the westerly line of Fair street; thence (10) northerly along the 10
westerly line of Fair street one hundred and two (102) feet, more or less, to the point of beginning; and it further appearing by said petition that the owner of record of said lands is the Delaware River Transportation Company, a corporation of the State of New Jersey, and that the West Jersey Trust Company, a corporation of the State of New Jersey, as trustee, and the Fidelity Trust Company, a corporation of the State of Pennsylvania, as trustee, have or claim to have some interest in the said premises by reason of certain mortgages having 20
been made to the said the West Jersey Trust Company, a corporation of the State of New Jersey, as trustee, and to the said Fidelity Trust Company, a corporation of the State of Pennsylvania, as trustee, respectfully, by the said owner, the Delaware River Transportation Company, a corporation of the State of New Jersey; and it further appearing that the Wilson & Stokes Lumber Company, a corporation of the State of New Jersey, has or claims to have some interest in said premises by reason of a mechanics' lien claim and judgment secured against a 30
previous owner of said premises; and it appearing that said petition is duly verified by the oath of Frederick W. Donnelly, Mayor and agent of the city of Trenton:

Therefore, I, Thomas W. Trenchard, one of the Justices of the Supreme Court of the State of New Jersey, being disinterested in the premises, and having read the above-mentioned, duly-verified petition of "The Inhabitants of the City of Trenton" do hereby assign Thursday,

the thirtieth day of January, nineteen hundred and thirteen, at the hour of ten o'clock in the forenoon, in the Supreme Court room at the State House, in the city of Trenton, State aforesaid, as the time and place, when and where the said application as set forth in the said petition will be heard before me for the appointment of three disinterested freeholders, residents of the county of Mercer, as commissioners to assess the damages, if any, and fix the compensation to be paid for the taking of said
 10 lands and premises by the said "The Inhabitants of the City of Trenton," and for such further proceedings thereon as the law may require.

And I do direct that the petitioner give to all parties in interest six days' notice, in writing, of the said application, and of the time and place so fixed for the hearing thereof, which said notice shall be served personally upon said corporation defendants by leaving copies thereof at the principal offices of the said corporation defendants resident within the State of New Jersey, and upon the
 20 corporation defendant residing out of the State of New Jersey notice shall be given by publication for not less than one week in the "Trenton Evening Times," a newspaper printed and published in the city of Trenton, where said lands are located, and by mailing a copy thereof to the business address of said non-resident defendant.

(Signed) THOMAS W. TRENCHARD,
Justice of Supreme Court.

Dated Trenton, N. J., January 7th, 1913.

30 **Order Amending Order Assigning Time and Place for the Appointment of Commissioners.**

WHEREAS, by an order made by me dated the seventh day of January, one thousand nine hundred and thirteen, in the above stated matter, duly filed in the Clerk's

office of Mercer county, the petitioner in the above stated cause was directed to give notice to the corporation defendant residing out of the State of New Jersey by publication for not less than one week in the "Trenton Evening Times," a newspaper printed and published in the City of Trenton where said lands are located, and by mailing a copy thereof to the business address of the said non-resident corporation defendant:

Therefore, I, upon motion of Charles H. English, attorney for the said "The Inhabitants of the City of Trenton," do, on this eleventh day of January, one thousand nine hundred and thirteen, order that the said order be amended so as to read that notice (signed by the attorney for the petitioner) to the corporation defendant residing out of the State of New Jersey be published in the "Trenton Evening Times," a newspaper printed and published in the City of Trenton, where said lands are located, on January fifteenth, sixteenth, seventeenth and eighteenth, one thousand nine hundred and thirteen, in the "Sunday Times-Advertiser," a newspaper printed and published in the City of Trenton aforesaid, on January nineteenth, one thousand nine hundred and thirteen, and in the said the "Trenton Evening Times" on January twentieth and twenty-first, one thousand nine hundred and thirteen, which notice shall contain a description of the lands to be acquired, and that copies of such notice be mailed to said corporation defendant residing out of the State of New Jersey at its last known place of business or address within three days from the date of the first publication thereof.

(Signed) THOMAS W. TRENCHARD,
Justice Supreme Court.

Order Appointing Commissioners.

"The Inhabitants of the City of Trenton," a body politic and corporate of the State of New Jersey, having heretofore presented to me, the Honorable Thomas W. Trenchard, one of the Justices of the Supreme Court of said State, its petition duly verified, as required by chapter 53 of the Laws of 1900, for the appointment of three commissioners, in conformity with said chapter 53 of the Laws of 1900, to fix the compensation to be paid

10 by reason of the taking by said corporation of certain lands of the said Delaware River Transportation Company, particularly described as follows, to wit: Being all that certain tract of land or premises, known as lots 3, 5 and 6, on page 66 of the City Atlas, lying in the city of Trenton, county of Mercer and State of New Jersey, beginning at a point in the westerly line of Fair street, said point being distant southerly sixty-eight feet (68) from the northeast corner of a brick building owned by Timothy Furlong, said building being on the south-

20 erly line of McLea alley, and running thence westerly and right angles to Fair street ninety-four (94) feet to a point in the southwest corner of a lot owned by Timothy Furlong; thence (2) northerly at right angles to the first course sixty-eight (68) feet to the southerly line of McLea alley; thence (3) westerly along the southerly line of McLea alley one hundred and sixty-five feet, more or less, to the Delaware river; thence (4) southerly along the shore of the Delaware river four hundred (400) feet, more or less, to a point in the northerly

30 boundary line of a lot owned by the Camden and Amboy Railroad Co.; thence (5) easterly and parallel to Federal street two hundred and sixty (260) feet, more or less, to a point in the westerly line of Fair street, said point being also one hundred and fifty (150) feet northerly from the northerly line of Federal street, thence (6) northerly along the westerly line of Fair street two hundred (200)

feet, more or less, to a point corner to a lot owned by John Malloy; thence (7) westerly and at right angles to Fair street one hundred feet to a point, said point being the southwest corner of said John Malloy's lot; thence (8) northerly on a line parallel to Fair street thirty (30) feet to a point, said point being the northwest corner of John Malloy's lot; thence (9) easterly along the northerly line of John Malloy's lot one hundred (100) feet to the westerly line of Fair street; thence (10) northerly along the westerly line of Fair street one hundred and two (102) feet, more or less, to the point of beginning; for the purpose of providing for the improvement of harbors and water fronts, &c., of the city of Trenton, as authorized by chapter 161 of the Laws of 1911; and said petition having set forth the name of the owner and occupant and the names of all persons appearing of record to have an interest in said property, and the residence of the said owner, occupant, and persons (and which said petition was duly verified by the oath of Frederick W. Donnelly, Mayor of the city of Trenton): whereupon I, the said justice, did, by an order dated January 7th, 1913, as amended by an order dated January 11th, 1913, assign and appoint Thursday, the thirtieth day of January, nineteen hundred and thirteen, at the hour of ten o'clock in the forenoon, in the Supreme Court room of the State House, in the city of Trenton, State aforesaid, as the time and place for the hearing of said petition before me, and did, by said order, amended as aforesaid, direct, that the petitioner give to all parties in interest six days notice, in writing of the said application, and of the time and place so fixed for the hearing thereof, said notice to be served personally upon said corporation defendants by leaving copies thereof at the principal office of the said corporation defendants residing within the State of New Jersey, and that notice (signed by the attorney for the petitioner) to the corporation defendant residing out of the State of New Jersey be published in the "Trenton Evening Times," a

newspaper published and printed in the city of Trenton, where said lands are located, on January fifteenth, sixteenth, seventeenth and eighteenth, one thousand nine hundred and thirteen, in the "Sunday Times-Advertiser" a newspaper printed and published in the city of Trenton aforesaid, on January nineteenth, one thousand nine hundred and thirteen, and in the said the "Trenton Evening Times" on January the twentieth and twenty-first, one thousand nine hundred and thirteen, such notice to contain a description of the lands to be acquired, and that

10 copies of such notice be mailed to said corporation defendant residing out of the State of New Jersey at its last known place of business or addressed within three days from the date of the first publication thereof; and it appearing by affidavit filed in the office of the clerk of the county of Mercer, which are satisfactory evidence to me, that notice has been served, as required by said order, amended as aforesaid, and the statute in such case made and required, upon the Delaware River Transportation

20 Company, a corporation of the State of New Jersey, the Fidelity Trust Company, a corporation of the State of Pennsylvania, the West Jersey Trust Company, a corporation of the State of New Jersey, and upon Wilson & Stokes Lumber Company, a corporation of the State of New Jersey, respectively; and it further appearing that the said hearing on the said application, as set forth in the said petition, which said hearing was fixed for Thursday, the thirtieth day of January, nineteen hundred and thirteen, was, by an order dated January 30th, 1913,

30 continued until Thursday, the sixth day of February, nineteen hundred and thirteen, which said order was filed in the office of the said Clerk of the county of Mercer on the thirtieth day of January, nineteen hundred and thirteen; and it further appearing by an order dated Thursday, the sixth day of February, nineteen hundred and thirteen, filed in the office of the said clerk of the county of Mercer on the thirteenth day of February, nineteen hundred and thirteen, said hearing was again

continued from the said sixth day of February, nineteen hundred and thirteen, until Thursday the thirteenth day of February, nineteen hundred and thirteen; and it further appearing that by an order dated the said thirteenth day of February, nineteen hundred and thirteen, filed in the office of the said clerk of the county of Mercer, on the twenty-first day of February, nineteen hundred and thirteen, said hearing was again continued from the said thirteenth day of February, nineteen hundred and thirteen, until Thursday, the twentieth day of February, nineteen hundred and thirteen; and it further appearing that by an order dated the said twentieth day of February, nineteen hundred and thirteen, filed in the office of the said clerk in the county of Mercer on the third day of March, nineteen hundred and thirteen, said hearing was again continued from the twentieth day of February, nineteen hundred and thirteen, until Thursday, the sixth day of March, nineteen hundred and thirteen, at the hour of nine thirty o'clock in the forenoon of said day, in the Supreme Court room at the State House, 20 in the city of Trenton, State aforesaid; and now at the time and place assigned as aforesaid by said order for the hearing of said petition:

I do, therefore, pursuant to chapter 53 of the laws of 1900, hereby appoint Gardner H. Cain, Harry A. Ashmore, and Charles A. May, three disinterested freeholders, residing in the county of Mercer and State of New Jersey, commissioners to examine and appraise the said lands, that is to say, three lots or pieces of land standing in the name of The Delaware River Transportation Company, which lots are numbered 3, 5 and 6, on the City Atlas of said city of Trenton, page 66, hereinbefore more particularly described, together with all and singular the buildings, improvements, ways, alleys, waters, watercourses, rights, liberties, privileges, hereditaments and appurtenances to the same belonging or in anywise appertaining; and I do further order that said commissioners shall assess the damages suffered by rea- 30

son of taking of the property herein before described, on at least six days' notice, signed by said commissioners or a majority of them, such notice to be given to all persons appearing of record to have an interest in the said property; and I do further order that said commissioners shall file their report in this matter on or before the fifteenth day of September, in the year of our Lord one thousand nine hundred and thirteen.

THOMAS W. TRENCHARD,
Justice Supreme Court.

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Dated the 6th day of March, one thousand nine hundred and thirteen.
Filed March 6, 1913.

Petition.

[Filed January 8, 1913.]

To the Honorable Thomas W. Trenchard, Justice of the Supreme Court of New Jersey:

The petition of The Inhabitants of the City of Trenton, a body politic and corporate of the State of New Jersey, respectfully shows as follows:

20 1. That pursuant to an act of the Legislature of the State of New Jersey, entitled "An act authorizing the appointment of boards of harbor commissioners in cities of this State fronting on, or containing within their borders, navigable or tidal waters and prescribing their powers and duties; and providing for the improvement of harbors and water fronts and the regulation and use thereof, and the extension of shipping facilities; the acquisition of lands and property by purchase or condemnation; the acquisition of lands under water or riparian lands from the State; and the raising of funds for the aforesaid purposes by the levy of taxes or the issuance of

bonds," approved April 15th, 1911, Frederick W. Donnelly, Clayton L. Traver, R. K. Bowman and Henry C. Moore were duly appointed as the Board of Harbor Commissioners of Trenton by his Honor, Walter Madden, Mayor of the City of Trenton, on the seventeenth day of April, nineteen hundred and eleven, and were on the same day duly sworn to properly perform the duties of said office, and to the end of acquiring suitable lands for the improvement of harbors and the water front of said city, and the extension of shipping facilities, as provided by said act, the said Board of Harbor Commissioners of Trenton addressed and presented, on the second day of May, nineteen hundred and eleven, to the Common Council of the City of Trenton, a petition recommending that the tract of land herein sought to be condemned be acquired by the city for the purpose of improvement as authorized by said act, a copy of which is hereunto annexed and marked "A-1;" that following the presentation of said petition, the Common Council of the City of Trenton, on the second day of May, nineteen hundred and eleven, passed a resolution, a copy of which is hereunto annexed and marked "A-2," authorizing the said Board of Harbor Commissioners of the City of Trenton to acquire certain property along the Delaware river, including the lands sought by these proceedings to be condemned, as by reference thereto will more fully appear; that said Common Council of the City of Trenton, pursuant to the recommendation made in the said petition of the Board of Harbor Commissioners of Trenton, by a resolution passed on the second day of May, nineteen hundred and eleven, and approved by his Honor, Walter Madden, Mayor, on May tenth, nineteen hundred and eleven, a copy of which is hereunto annexed and marked "A-3," authorizing the issue of bonds to an amount not exceeding fifty thousand dollars, which said bonds have been issued and sold, and the amount aforesaid is now available for the purposes as authorized by said act of the Legislature; that by "An act relating to, regulating

and providing for the government of cities, towns, boroughs and other municipalities within this State," approved April 25th, 1911, it was provided, among other things, "For the election of a board of five commissioners" in cities adopting the provisions of said act, and it was also provided that "the board of commissioners shall have and possess all administrative, judicial and legislative powers and duties now had and possessed and exercised by the mayor, the city council and all other
10 executive or legislative bodies in said city, and have complete control over the affairs of the city adopting the provisions of this act;" that said act was adopted by the City of Trenton on the twentieth day of June, nineteen hundred and eleven; that the commissioners provided for in said act were duly elected and qualified, and assumed their duties on the twenty-second day of August, nineteen hundred and eleven; that on the twenty-second day of May, nineteen hundred and twelve, the Board of
20 Commissioners of the City of Trenton passed a resolution that, in the judgment of the said Board, it is advisable that the lands hereinafter described should be acquired for the purpose of making the improvement as authorized by the act hereinbefore referred to, and appointed Frederick W. Donnelly, the Director of Public Affairs for said City of Trenton, and William F. Burk, the Director of the Department of Parks and Public Property for said city, to treat with the owners of said lands, for the purchase of the same, a copy of which resolution is hereunto annexed and marked "A-4;" that on the twenty-
30 sixth day of September, nineteen hundred and twelve, the said Frederick W. Donnelly and the said William F. Burk, appointed for the purpose aforesaid, reported to the Board of Commissioners of the City of Trenton that the owners of the said tracts of land hereinafter described refused to treat with the said The Inhabitants of the City of Trenton for the sale of the property desired on such terms as would be acceptable to the said The Inhabitants of the City of Trenton, a copy of which report is

hereunto annexed and made part hereof, and marked "A-5;" that on the fourteenth day of October, nineteen hundred and twelve, by resolution of the Board of Commissioners, Frederick W. Donnelly, Mayor of the city, was appointed the agent of the said The Inhabitants of the City of Trenton and authorized to offer the said Delaware River Transportation Company the sum of forty-five hundred dollars as the purchase price for lots Nos. 3, 5 and 6, on page 66 of the City Atlas, hereinafter more particularly described, the same to be conveyed free and clear of all incumbrances, a copy of which resolution is hereunto annexed and marked "A-6;" that said offer was made by the said Frederick W. Donnelly, acting as the agent of the said The Inhabitants of the City of Trenton, which offer was declined by the said the Delaware River Transportation Company; that thereupon, by resolution of the Board of Commissioners of the City of Trenton, adopted December 27th, 1912, a copy of which resolution is hereunto annexed and marked "A-7," proceedings on behalf of the said The Inhabitants of the City of Trenton were directed to be commenced.

2. That your petitioner has been unable to purchase the said land with the buildings thereon erected for the use of the said the Board of Harbor Commissioners of the City of Trenton, or of the said The Inhabitants of the City of Trenton, although they have attempted so to do in good faith, by reason of its inability to agree with the owner of said property as to the price to be paid therefor.

3. That a part of the said land, and the estates, titles and interests connected therewith, so adopted to be suitable and needed as aforesaid, is all that certain lot, parcel, or tract of land, within the corporate limits of the said city of Trenton standing on the records of the clerk of the county of Mercer in the name of the Delaware River Transportation Company, a corporation of the State of New Jersey, which said tract or parcel of land is known as lots Nos. 3, 5 and 6, on the annexed tracing or map, and being more particularly bounded and de-

scribed as follows, to wit: Beginning at a point in the westerly line of Fair street, said point being distant southerly sixty-eight (68) feet from the northeast corner of a brick building owned by Timothy Furlong, said building being on the southerly line of McLea alley, and running thence westerly and at right angles to Fair street ninety-four (94) feet to a point in the southwest corner of a lot owned by Timothy Furlong; thence (2) northerly at right angles to the first course sixty-eight (68) feet
10 to the southerly line of McLea alley; thence (3) westerly along the southerly line of McLea alley, one hundred sixty-five (165) feet, more or less, to the Delaware river; thence (4) southerly along the shore of the Delaware river four hundred (400) feet, more or less, to a point in the northerly boundary line of a lot owned by the Camden and Amboy Railroad Company; thence (5) easterly and parallel to Federal street two hundred sixty (260) feet, more or less, to a point in the westerly
20 line of Fair street, said point being also one hundred fifty (150) feet, northerly from the northerly line of Federal street; thence (6) northerly along the westerly line of Fair street two hundred (200) feet, more or less, to a point corner to a lot owned by John Malloy; thence (7) westerly and at right angles to Fair street one hundred (100) feet to a point, said point being the southwest corner of said John Malloy's lot; thence (8) northerly on a line parallel to Fair street thirty (30) feet to a point, said point being the northwest corner of said John
30 Malloy's lot; thence (9) easterly along the northerly line of John Malloy's lot one hundred (100) feet to the westerly line of Fair street; thence (10) northerly along the westerly line of Fair street one hundred two (102) feet, more or less, to the point of beginning; being the same premises which were conveyed (*inter alia*) to the said the Delaware River Transportation Company, a corporation, by the Delaware River Navigation Company, a corporation, by deed dated April 2, 1906, recorded in the clerk's office of the county of Mercer in book 288 of Deeds, page 87, &c.

4. Your petitioner further shows that the owner of said lands and premises is the Delaware River Transportation Company, a corporation of the State of New Jersey; that the principal office of the said Delaware River Transportation Company in the State of New Jersey is at No. 127 Market street, in the city of Camden, in the State of New Jersey, and the agent in charge thereof is the corporation's company, and that the principal business office of the said Delaware River Transportation Company is at Pier No. 5, foot of Chestnut street, in the city of Philadelphia, in the State of Pennsylvania; that erected upon said lands is a small building or wooden shed. 10

5. Your petitioner further shows that on the second day of April, nineteen hundred and six, the Delaware River Transportation Company, a corporation of the State of New Jersey, executed and delivered, under its hand and seal, an indenture of mortgage to the Fidelity Trust Company, a corporation of the State of Pennsylvania, as trustee, to secure a total issue of \$225,000 of first mortgage, five per centum, bonds, which said mortgage was recorded in the Mercer County Clerk's office in book 154 of Mortgages, on pages 498, &c.; that said trust was accepted by said trustee as also appears of record as aforesaid; that said mortgage covers (among others) the tract of land herein described, whereby the said Fidelity Trust Company, a corporation of the State of Pennsylvania, as trustee, has or claims to have, some interest in the said premises; that your petitioner is informed and believes that the address and principal office of the said Fidelity Trust Company is at No. 325 Chestnut street, in the city of Philadelphia, in the State of Pennsylvania. 20 30

6. Your petitioner further shows that on the first day of August, nineteen hundred and eight, the said Delaware River Transportation Company executed, under its hand and seal, a mortgage, which (among others) covers the above described tract of land, to the West Jersey Trust Company, a corporation of the State of New Jersey, as trustee, to secure an authorized issue of first and refund-

ing mortgage, five per centum, bonds, amounting to \$350,000, which said mortgage is recorded in the Mercer county clerk's office in book 175 of Mortgages, pages 383, &c.; that said trust was accepted by the said West Jersey Trust Company, as also appears of record as aforesaid, whereby the said West Jersey Trust Company, as trustee, has or claims to have some interest in the said premises; that the principal office of the said West Jersey Trust Company is at the southeast corner of Third and
10 Market streets, in the city of Camden, in the State of New Jersey.

7. And your petitioner further shows that on September eighth, nineteen hundred and four, a lien claim was filed in the Mercer county clerk's office, and is recorded in Liber B, Mechanics' Liens, on pages 246, &c., at the instance of Wilson & Stokes Lumber Company, a corporation of the State of New Jersey, claimants, against Alfred B. Nelson and Irwin Cubberly, partners, trading as Alfred Nelson & Company, builders, and the Delaware
20 River Navigation Company, owner, which said mechanics' lien (among others) covers the above-described tract of land and premises, whereby the said Wilson & Stokes Lumber Company has or claims to have some interest in said premises; that the principal office and address of the said Wilson & Stokes Lumber Company is at No. 655 South Broad street, in the city of Trenton, in the State of New Jersey, and that the agent in charge thereof is James J. Wilson.

8. And your petitioner further shows that on the
30 twenty-sixth day of September, nineteen hundred and five, a judgment was entered against Alfred B. Nelson and Irwin Cubberly, partners, et al., builders, and the Delaware River Navigation Company, owner, at the suit of the Wilson & Stokes Lumber Company, in an action on contract (mechanics' lien), for the whole amount of damages and costs, for four hundred and thirty dollars and forty-three cents, which said judgment is recorded in the office of the clerk of the county of Mercer in book

Statement of Judgments No. 2, page 150, whereby the said Wilson & Stokes Lumber Company has or claims to have some interest in said premises.

Your petitioner therefore prays that your Honor, after hearing the parties, will appoint three disinterested freeholders, residents of the said county of Mercer, commissioners to examine and appraise the said lots and property last above described, and to assess the damages and to fix the compensation to be paid for such taking, and the damages, if any, by reason of the taking of the same, and to make a report thereon, in writing, and an award thereof, pursuant to the statute in such cases made and provided, to the end that, upon payment or tender of payment of the amount of such award, your petitioner may enter upon or take possession of said lots and tract of land and premises and use the same for the purpose for which the same are by law authorized to be taken.

And your petitioner will ever pray, &c.

"THE INHABITANTS OF THE CITY OF TRENTON,"

By the Board of Commissioners.

(Signed) CHARLES H. ENGLISH,

City Attorney.

(Signed) CHAS. E. BIRD,

City Counsel.

Dated Trenton, N. J., December 31, 1912.

State of New Jersey, County of Mercer, ss.—Frederick W. Donnelly, being duly sworn according to law, upon his oath deposes and says, that he was formerly a member of the Board of Harbor Commissioners of the City of Trenton, duly appointed and qualified, and is at present a member of the Board of Commissioners of the City of Trenton, and the Mayor of said city, and that he is the duly appointed agent of the inhabitants of the city of Trenton, the petitioner named in the foregoing petition, for the purpose of acquiring the lands described

therein; that he has personal knowledge of the facts and statements contained in the foregoing petition, and that the same are true; that this deponent, as the agent of the inhabitants of the city of Trenton, has been authorized by the Board of Commissioners of the said city to offer to the owners of the lands described in said petition the sum of forty-five hundred dollars, as the price for said lands and premises; that on the twenty-first day of October, nineteen hundred and twelve, deponent, as said
 10 agent, offered the said sum of forty-five hundred dollars to the said Delaware River Transportation Company, the owners of said lands and premises, as the price of said lands and premises, and that said owners refused to accept the said sum as the price for said lands and premises; that this deponent, as the agent of the inhabitants of the city of Trenton, has been unable to agree with the owners of lands and premises as to the price to be paid therefor.

(Signed) FREDERICK W. DONNELLY,
 20 Mayor.

Sworn to and subscribed before me, this second day of January, A. D. 1913.

(Signed) FRANK THOMPSON,
 Notary Public of New Jersey.

[NOTARY SEAL.]

To the Honorable the Common Council of the city of Trenton:

GENTLEMEN—In accordance with the provisions of
 “An act authorizing the appointment of boards of harbor
 30 commissioners in cities of this State fronting on, or containing within their borders, navigable or tidal waters and prescribing their powers and duties; and providing for the improvement of harbors and water fronts and the regulation and use thereof, and the extension of shipping facilities; the acquisition of lands and property by purchase or condemnation; the acquisition of lands under

water or riparian lands from the State; and the raising of funds for the aforesaid purposes by the levy of taxes or the issuance of bonds," approved April 15, 1911, we, the undersigned, all members of the Board of Harbor Commissioners of the city of Trenton, duly appointed and qualified, under and by virtue of the provisions of said act, do hereby recommend that it is advisable, in the opinion of said board, to acquire the lands fronting along the Delaware river in said city, from the new Pennsylvania railroad bridge, southerly along said river to the city line, together with all the estate, rights, title and interest therein for use and improvement as authorized by said act. The particular and separate tracts hereby recommended to be acquired referring to the owners' names, the lot and page numbers in the city atlas of the city of Trenton, is attached hereto and made a part hereof. 10

We recommend that the said tracts of land and the improvements thereon, together with any or all the estate, rights, title and interest therein be acquired, and we estimate that it will cost the sum of seventy-three thousand and four hundred and ninety dollars to acquire the same. 20

We respectfully request your Honorable body to appropriate the amount above stated estimated by us as necessary to acquire said lands, or such part thereof, as your Honorable body is willing to appropriate at this time for said purpose.

Respectfully submitted,

FREDERICK W. DONNELLY, 30

CLAYTON L. TRAVER,

R. K. BOWMAN,

HENRY C. MOORE.

Attest:

A. ARTHUR METZGER, *Secretary.*

"A-1."

FAIR STREET, WEST SIDE. M'LEAR'S ALLEY TO
FEDERAL STREET.

Owner.	City Atlas Record.	
	Page.	Lot.
Timothy Furlong.....	66	2
Delaware River Trans. Co.....	66	5
“ “ “ “	66	3
“ “ “ “	66	6
John Malloy.....	66	4
10 Camden & Amboy Railroad.....	66	7
“ “ “ “	66	10

LAMBERTON STREET, FROM LANDING STREET TO
RIVERVIEW CEMETERY.

Charles C. Hill.....	66	36
William Dolton Est.....	69	9
“ “ “	73	113
“ “ “	73	119
John Exton Est.....	73	112
William J. Lee.....	73	14
20 Christopher McAllister	73	147
Charles C. Hill.....	73	143
Nathaniel J. Clegg.....	73	144
Andrew Cochran.....	73	145
“ “	74	91
“ “	74	96
Josiah K. Bougher.....	74	19
Edward F. Hill.....	74	95
Benj. M. Phillips.....	74	94
Peoples Brewing Co.....	74	9
30 Charles C. Hill.....	74	14
Delaware River Trans. Co.....	77	48
“ “ “ “		2
		68
		66
		58
		71r
		72r
		73r
		74r

Joseph Hannum	77	39
Charles Brearly.....	77	40
John Caren.....	77	69
Ameilia Deutz.....	77	70
Laura English	77	49
Trenton Yacht Club.....	77	50
Riverview Cemetery.		

"A-I"

State of New Jersey, County of Mercer, ss.—Frank Thompson, being duly sworn according to law, on his oath saith that he is city clerk of the city of Trenton; that the above is a true copy of the petition filed with the common council of the city of Trenton on the second day of May, 1911, and recorded in the minutes of said common council on page 88.

(Signed) FRANK THOMPSON.

Sworn and subscribed to before me this 31st day of December, A. D. 1912.

(Signed) ALBERT G. HOWELL,
Notary Public of New Jersey. 20

WHEREAS, The Board of Harbor Commissioners of the City of Trenton have recommended, to this common council, being the body having control of the finances of said city, that it is advisable to acquire the tracts and parcels of land included in the schedule annexed to this resolution, together with the improvements thereon, and all the estate, rights, title and interest therein, for the use and improvement as authorized by an act entitled "An act authorizing the appointment of boards of harbor commissioners in cities of this State fronting on, or containing 30 within their borders, navigable or tidal waters and prescribing their powers and duties; and providing for the improvement of harbors and water fronts and the regulation and use thereof, and the extension of shipping facilities; the acquisition of lands and property by purchase

or condemnation; the acquisition of lands under water or riparian lands from the State; and the raising of funds for the aforesaid purpose by the levy of taxes or the issuance of bonds," approved April 15th, 1911; therefore, be it

Resolved, That it is the sense of this body that the same should be acquired, and, be it further

Resolved, That the said Board of Harbor Commissioners of the City of Trenton be and they are hereby
 10 authorized to purchase, or otherwise acquire in the name, and on behalf of the inhabitants of the city of Trenton, the lands in the annexed schedule referred to, or such parts thereof as they may be able to acquire at a cost not to exceed the amount which may be appropriated by this body for such purpose; and be it further

Resolved, That in case the said Board of Harbor Commissioners of the City of Trenton shall be unable to agree with the owners, of the said properties, or any of them, as to the price of the properties respectively
 20 owned by them, or if, by reason of legal incapacity, or the absence of any such owner or owners to convey valid title, or if, for any other cause the purchase thereof, in the opinion of the said Board of Harbor Commissioners of the City of Trenton, cannot advantageously be made, then and in either of said cases, the Board of Harbor Commissioners of the City of Trenton be and they are hereby authorized and empowered to condemn and take in the name and on behalf of the inhabitants of the city of Trenton such of the lands aforesaid as they
 30 may deem advisable, and to make compensation therefor pursuant to the provisions of the act of the legislature of the State of New Jersey entitled "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use (Revision of 1900)," approved March twentieth, one thousand nine hundred, and the supplements and amendments thereto, for use or improvement as authorized by the act creating said board above mentioned; and for so doing the passage of this resolution shall be their sufficient warrant.

FAIR STREET, WEST SIDE. M' CLEAR'S ALLEY TO
FEDERAL STREET.

Owner.	City Atlas Record.	
	Page.	Lot.
Timothy Furlong.....	66	2
Delaware River Trans. Co.....	66	5
“ “ “ “	66	3
“ “ “ “	66	6
John Malloy.....	66	4
Camden & Amboy Railroad.....	66	7 10
“ “ “ “	66	10

LAMBERTON STREET, FROM LANDING STREET TO
RIVERVIEW CEMETERY.

Charles C. Hill.....	66	36
William Dolton Est.....	69	9
“ “ “	73	113
“ “ “	73	119
John Exton Est.....	73	112
William J. Lee.....	73	14
Christopher McAllister	73	147 20
Charles C. Hill.....	73	143
Nathaniel J. Clegg.....	73	144
Andrew Cochran.....	73	145
“ “	74	91
“ “	74	96
Josiah K. Bougher.....	74	19
Edward F. Hill.....	74	95
Benj. M. Phillips.....	74	94
Peoples Brewing Co.....	74	9
Charles C. Hill.....	74	14 30
Delaware River Trans. Co.....	77	48
“ “ “ “		2
		68
		66
		58
		71r
		72r
		73r
		74r

Joseph Hannum	77	39
Charles Brearly.....	77	40
John Caren.....	77	69
Ameilia Deutz.....	77	70
Laura English	77	49
Trenton Yacht Club.....	77	50
Riverview Cemetery.		

“A-2”

State of New Jersey, County of Mercer, ss.—Frank
 10 Thompson, being duly sworn according to law, on his
 oath saith that he is city clerk of the city of Trenton;
 that the above is a true copy of a resolution passed by the
 Common Council of the city of Trenton on May 2d,
 1911, and recorded in the minutes of said Common
 Council at page 89.

(Signed) FRANK THOMPSON.

Sworn to and subscribed before me this 31st day of
 December, A. D. 1912.

(Signed) ALBERT G. HOWELL,
Notary Public of New Jersey.

20.

Resolved, That the city treasurer be and he is hereby
 authorized and directed to issue bonds under the cor-
 porate name of the city of Trenton to an amount not
 exceeding fifty thousand dollars (\$50,000) payable in
 thirty years from the date thereof, with interest at the
 rate of four and one-half per centum per annum, payable
 semi-annually; and be it further

Resolved, That said bonds shall be sealed with the city
 seal, signed by the mayor, comptroller and treasurer and
 30 attested by the city clerk. The bonds hereby authorized
 may be registered or coupon bonds, and shall be num-
 bered and a register of such numbers and the date of

such bonds and the date of issuing and time of payment of the same shall be made by or under the direction of the city treasurer in a book provided for that purpose; if registered bonds they shall appear on said books, and an entry of such transfer shall be made on such books; if coupon bonds they shall have interest coupons attached, the delivery of which to the city treasurer shall be a sufficient voucher to him for the payment of the interest thereon specified, and shall be signed with a fac-simile signature of the city treasurer; provided, however, that if said bonds or any of them are issued in coupon form they may be surrendered at any time to the city treasurer by the owner or owners thereof, with a written request to have the remaining coupons cut off and destroyed, and said bonds converted into registered bonds, both as to principal and interest, and an entry of such conversion shall be made by the city treasurer on said bonds and in the books of his office; and be it further

Resolved, That said bonds shall not be sold for less than their par value and the proceeds of the sale thereof shall be credited to the account of the Board of Harbor Commissioners of Trenton, to be expended by said board in carrying out the objects specified in an act of the Legislature of this State, entitled "An act authorizing the appointment of boards of harbor commissioners in cities of this State fronting on, or containing within their borders, navigable or tidal waters and prescribing their powers and duties; and providing for the improvement of harbors and water fronts and the regulation and use thereof, and the extension of shipping facilities; the acquisition of lands and property by purchase or condemnation; the acquisition of lands under water or riparian lands from the State; and the raising of funds for the aforesaid purposes by the levy of taxes or the issuance of bonds," approved April 5th, 1911, and for no other purpose or purposes whatsoever; and be it further

Resolved, That said bonds shall designate on their face "Harbor Improvement Bonds" and shall recite that they

are issued pursuant to the authority of an act entitled "An act authorizing the appointment of boards of harbor commissioners in cities of this State fronting on, or containing within their borders, navigable or tidal waters and prescribing their powers and duties; and providing for the improvement of harbors and water fronts and the regulation and use thereof, and the extension of shipping facilities; the acquisition of lands and property by purchase or condemnation; the acquisition of lands under water or riparian lands from the State; and the raising of funds for the aforesaid purposes by the levy of taxes or the issuance of bonds," approved April 15th, 1911, and of this resolution; and be it further

Resolved, That the interest and principal of said bonds shall be raised and paid in the following manner, to wit: a sum equal to the interest and one-thirtieth of the principal shall be added yearly and every year to the amount to be raised by taxes in said city, for the period of thirty years from the date of issuing of the said bonds, and said portion of the principal so raised each year shall be paid yearly to the commissioners of the sinking fund, to be used exclusively for the liquidation of said bonds at maturity; provided, however, that when said fund shall be sufficient for the redemption of said bonds, no further sum shall be raised by taxation for that purpose.

"A-3."

State of New Jersey, County of Mercer, ss.—Frank Thompson, being duly sworn according to law, on his oath saith that he is city clerk of the city of Trenton; that the above is a true copy of the resolution passed by the common council of said city of Trenton on the second day of May, nineteen hundred and eleven, and recorded in the minutes of said common council at page 88.

(Signed) FRANK THOMPSON.

Sworn to and subscribed before me this 31st day of December, A. D. 1912.

(Signed) ALBERT G. HOWELL,
Notary Public of New Jersey.

WHEREAS, By resolution heretofore passed by the common council of the city of Trenton, it was resolved that it is advisable to acquire certain lands and property by the city of Trenton, bordering on the Delaware river in said city, for the use and improvement by the said city, as authorized by an act entitled "An act authorizing the 10 appointment of boards of harbor commissioners in cities of this State fronting on, or containing within their borders, navigable or tidal waters and prescribing their powers and duties; and providing for the improvement of harbors and water fronts and the regulation and use thereof, and the extension of shipping facilities; the acquisition of lands and property by purchase or condemnation; the acquisition of lands under water or riparian lands from the State; and the raising of funds for the aforesaid purposes by the levy of taxes or the 20 issuance of bonds," approved April 15, 1911; and

WHEREAS, The city treasurer was, by resolution of the common council of the city of Trenton, directed to issue bonds under the corporate name of the said city of Trenton to an amount not exceeding fifty thousand dollars (\$50,000.00), designated as "Harbor Improvement Bonds," pursuant to the authority of said act; and

WHEREAS, There is now available in the treasury of the city of Trenton the sum raised under the authority aforesaid for the purpose of acquiring the said lands 30 and property on the Delaware river within the city of Trenton, or any of said lands; and

WHEREAS, In the judgment of this board it is advisable that said lands should be acquired with all reason-

able haste, for the purpose of making the improvement as authorized by said act and the resolution above referred to; therefore be it

Resolved, That his Honor, Frederick W. Donnelly, the director of public affairs, and William F. Burk, the director of the department of parks and public property, are hereby requested to ascertain from the respective owners of lots Nos. 5, 3, 6, 4, 7, 10, on page 66 of the city atlas, lands necessary to be taken and appropriated for the purpose of improving the harbor or river front in said city, in conformity with the act of the legislature of this State aforesaid, the prices at which they will convey to the city their respective lands necessary to be taken and appropriated as aforesaid, and that said director of public affairs and director of the department of parks and public property do report to this board of commissioners with all convenient speed.

(Signed) FREDERICK W. DONNELLY.
WILLIAM F. BURK.

20 Adopted May 22, 1912.

State of New Jersey, County of Mercer, ss.—Frank Thompson, being duly sworn according to law upon his oath saith that he is the city clerk of the city of Trenton; that the foregoing copy of a resolution passed by the board of commissioners on May 22, 1912, is a true and correct copy thereof.

(Signed) FRANK THOMPSON.

Sworn to and subscribed before me this 31st day of December, A. D. 1912.

30 (Signed) ALBERT G. HOWELL,
Notary Public of New Jersey.

"A-4"

TRENTON, N. J., September 26th, 1912.

To the Honorable The Board of Commissioners of the City of Trenton:

GENTLEMEN—Pursuant to the direction and authority given us by a resolution of your board, adopted on the twenty-second day of May, nineteen hundred and twelve, we respectfully beg to submit that we have taken up with the Delaware River Transportation Company the question of purchasing from said company, on behalf of the city, lots Nos. 3, 5, 6, on page 66 of the city atlas, for 10 the use and improvement by said city as authorized by an act entitled “An act authorizing the appointment of boards of harbor commissioners in cities of this State,” &c., approved April 15th, 1911.

We first had an interview with former Senator Mitchell B. Perkins and Barclay Johnson, treasurer and president, respectively, of the Delaware River Transportation Company, in which we stated to them that the city desired to purchase the property owned by the company, and hereinbefore designated, for the purposes here- 20 inbefore set forth, and asked them to set a price at which they would sell the same to the city. After a long interview and much discussion of the situation, the representatives of the Delaware River Transportation Company stated that they were not then in a position to make any definite offer to sell, or to bind their company with a price on the same, and we adjourned to meet at a future time.

After much correspondence passing between the parties, another interview was arranged for Thursday, 30 September 12th, 1912, at 2:30 o'clock in the afternoon at the City Hall. Mr. Perkins attended said meeting and said that he was not yet in a position to state the terms upon which his company would sell to the city the property desired, not yet having had an opportunity to place the matter before the board of directors of said company, so further consideration of the matter was postponed until Tuesday, the seventeenth day of September,

1912, when Mr. Perkins and Mr. Johnson met with your committee at the City Hall and made a proposition for the sale of the property, to the effect that they would convey to the city the property desired, provided the city would agree that they should not be disturbed in the holding and use of other properties belonging to the Delaware River Transportation Company and situate at or near the foot of Lalor street, and bordering on the Delaware river, and with the further understanding that the
10 city would make a lease, for the property desired at this time for the improvement for a term of years. No price was fixed at which the Delaware River Transportation Company would sell the property desired by the city, but it was intimated that the price would be a nominal one, provided the city would agree to the terms of the Delaware River Transportation Company, as aforesaid.

The gentlemen representing the Delaware River Transportation Company stated, at the interview last above mentioned, that under no consideration would they
20 treat with the city for the absolute sale of the property desired, but only on such terms as would secure to the Delaware River Transportation Company the unmolested holding of the Lalor street property owned by the company, and the other details of the terms hereinabove mentioned, and with the further condition that the city would permit the Trenton Street Railway to run its tracks down Lalor street to the wharf of the Transportation company. The representatives of the Delaware River Transportation Company also informed your committee
30 that they would fight every effort of the city to secure the properties known as lots Nos. 3, 5 and 6, page 66 of the city atlas, unless such an agreement should be reached by the parties as hereinabove set forth.

Your committee, appointed for the purpose of agreeing with the owners for the acquisition of said lands, therefore respectfully report that they cannot agree with the

Delaware River Transportation Company as to the price which the city can acquire said lands for the reasons aforesaid.

Respectfully submitted,
 FREDERICK W. DONNELLY, *Mayor.*
 WILLIAM F. BURK.

"A-5."

State of New Jersey, County of Mercer, ss.—Frank Thompson, being duly sworn according to law, upon his oath saith, that he is the city clerk of the city of Trenton; that the foregoing copy of the report filed by Frederick W. Donnelly and William F. Burk with the board of commissioners of the city of Trenton is a true and correct copy thereof. 10

(Signed) FRANK THOMPSON.

Sworn to and subscribed before me this 31st day of December, A. D. 1912.

(Signed) ALBERT G. HOWELL,
Notary Public of New Jersey.

WHEREAS, Frederick W. Donnelly and William F. Burk, members of this board of commissioners, appointed for the purpose of treating with the Delaware River Transportation Company, a corporation, for the purchase of lots Nos. 3, 5 and 6, on page 66 of the city atlas, have reported to this board that they cannot agree with the Delaware River Transportation Company, a corporation, as to the price at which the city can acquire said lots, for reasons more fully set forth in said report; therefore

Resolved, That said Frederick W. Donnelly be and he is hereby appointed the agent of this board, and he is hereby authorized to offer the said Delaware River Transportation Company, a corporation, the sum of forty-five hundred dollars (\$4,500) as the purchase price for said 20 30

lots No. 3, 5 and 6, on said page 66 of the city atlas, free and clear of all incumbrances, said lots being required by the city for the purpose of improvement as authorized by an act of the legislature of the State of New Jersey, entitled "An act authorizing the appointment of boards of harbor commissioners in cities of this State," &c., approved April 15, 1911; and be it further

Resolved, That the said Frederick W. Donnelly report the result of his offer hereby authorized to this
10 Board.

"A-6"

State of New Jersey, County of Mercer, ss.—Frank Thompson, being duly sworn according to law, upon his oath saith, that he is the city clerk of the city of Trenton; that the foregoing copy of a resolution passed by the board of commissioners on the fourteenth day of October, nineteen hundred and twelve, is a true and correct copy thereof.

(Signed) FRANK THOMPSON.

20 Sworn to and subscribed before me this 31st day of December, A. D. 1912.

(Signed) ALBERT G. HOWELL,
Notary Public of New Jersey.

30 WHEREAS, The sum of forty-five hundred dollars (\$4,500), offered on behalf of The Inhabitants of the City of Trenton to the Delaware River Transportation Company, a corporation, for the purchase of lots Nos. 3, 5 and 6, on page 66 of the city atlas, required for improvement as authorized by an act of the Legislature of the State of New Jersey, entitled "An act authorizing the appointment of boards of harbor commissioners in cities of this State," &c., approved April 15th, 1911, has

been rejected by the said Delaware River Transportation Company, a corporation, and said lands and property cannot be acquired by The Inhabitants of the City of Trenton by agreement with the said Delaware River Transportation Company, a corporation; therefore,

Resolved, That the legal department be and it is hereby authorized and directed to commence condemnation proceedings to acquire said lands, for the purposes aforesaid, according to the statute in such case made and provided. 10

Adopted December 27th, 1912.

"A-7."

State of New Jersey, County of Mercer, ss.—Frank Thompson, being duly sworn according to law, upon his oath saith that he is the city clerk of the city of Trenton; that the foregoing copy of a resolution passed by the Board of Commissioners of said city on the twenty-seventh day of December, nineteen hundred and twelve, is a true and correct copy thereof.

(Signed) FRANK THOMPSON. 20

Sworn to and subscribed before me this 31st day of December, A. D. 1912.

(Signed) ALBERT G. HOWELL,
Notary Public of New Jersey.

Reasons.

The said prosecutor, by Peter Backes, its attorney, comes and prays that the order made on the seventh day of March, nineteen hundred and thirteen, by the Honorable Thomas W. Trenchard, Justice of the Supreme Court, naming and appointing Charles A. May, Harry A. Ashmore and Gardner H. Cain, three disinterested freeholders, residents of the County of Mercer, to examine, appraise and fix the compensation to the Delaware River Transportation Company, the Fidelity Trust Company, the New Jersey Trust Company and the Wilson & Stokes Lumber Company for the taking of the wharf, lands and property belonging to the said Delaware River Transportation Company, by the Inhabitants of the City of Trenton, to be used for the purpose of the improvement of the harbor and water front of the City of Trenton, and to assess the damages by reason of the taking of the same, may be set aside, reserved and for nothing holden, for the following reasons:

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(1) The Common Council did not determine to acquire prosecutor's land (Resolution A2), but only resolved, that it was the sense of said body that the same should be acquired. The resolution of said Common Council attempted to delegate to said Board of Harbor Commissioners the power to purchase or otherwise acquire the lands in the annexed schedule referred to, or such parts thereof that they might be able to acquire. The resolution placed the determination as to the parcels to be acquired upon the Harbor Board instead of Common Council which was the only body that could make such determination.

(2) The resolution of the Common Council authorizing the issue of \$50,000 of harbor improvement bonds is only an authority to the treasurer to issue and make sale of said bonds pursuant to the authority of the Harbor Board act, and the placing of the avails of such is-

sue to the credit of the Harbor Board was not such appropriation as required by the statute.

(3) No fund was appropriated by the Common Council of the City of Trenton to the Board of Harbor Commissioners for the purpose of purchasing or condemning the prosecutor's land.

(4) The direction of Common Council to the treasurer to issue bonds by the treasurer, and the direction of the Common Council of the City of Trenton to the treasurer and to place the avails of said bond issue to the credit of said Harbor Board Commissioners, was not an appropriation. 10

(5) The recommendation, signed by the individual members of the Board of Harbor Commissioners, is that the council acquire the whole of the water frontage on the Delaware river, from the railroad bridge to the city line. The estimate cost is \$73,000. This is the recommendation of the individual members of the board. No corporate or board action is shown.

(6) No estimate of the cost of acquiring prosecutor's 20 property, affected by these proceedings, was made by the Board of Harbor Commissioners in the recommendations submitted by the said board to the Common Council of the City of Trenton, which was the body having charge and control of the funds of said city.

(7) The prosecutor is a common carrier engaged in interstate commerce in the transportation of goods and persons between points in the States of Pennsylvania and New Jersey, and the property of the prosecutor which is sought to be taken under these condemnation proceedings, is a wharf and warehouse property and is an instrument used by the prosecutor in, and necessary to the performance of its duties as such common carrier 30 engaged in interstate commerce, and the taking of such property from the prosecutor by the Inhabitants of the City of Trenton would be an interference with interstate commerce.

(8) The Common Council of the City of Trenton,

which was the body having charge and control of the finances of said city, made no determination as to what part of the property recommended to be acquired by the Board of Harbor Commissioners of said City of Trenton, at a total cost of \$73,490, should be acquired by said Board of Harbor Commissioners although said Common Council did not appropriate the whole amount of said cost of acquiring the property recommended by the said Board of Harbor Commissioners to be acquired for

10 the use of said city.

(9) The property of the prosecutor which is sought to be taken by condemnation under these proceedings is a wharf or dock and warehouse of the prosecutor, constructed for and used as an instrument in interstate commerce by the prosecutor which is a common carrier engaged in the transportation of persons and goods to and from points in the States of Pennsylvania and New Jersey, and said property is impressed with the nature, character and functions of a public utility and as such

20 is not within the provisions of the act under which the condemnation proceedings are taken, since the authority conferred by statute is to acquire uplands and riparian rights and lands under water.

(10) The Harbor Board Commissioners recommended that the entire river front property within the City of Trenton lying below the bridge of the Pennsylvania Railroad Company should be acquired for harbor purposes.

(11) The act authorizing the appointment of the

30 Board of Harbor Commissioners, &c., approved April 15, 1911 (P. L. 1911, page 233) is unconstitutional, in that it embraces more than one object; and for other reasons.

(12) Said act does not authorize the acquisition of either upland or riparian land or rights or lands under water or any estate, rights, title or interest therein, except for use or improvement in connection with water front property already belonging to a city and contiguous thereto.

(13) The property of the prosecutor is already devoted to public use, and there is no express authority in said act to condemn property so devoted.

(14) The order brought up for review is in divers other respects erroneous and contrary to law.

PETER BACKES,
Attorney.

GILBERT COLLINS,
Of Counsel.

Filed April 14, 1913.

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Depositions.

Depositions taken in the above-entitled cause, before me, Harry Heher, a Supreme Court Examiner of the State of New Jersey, on Saturday, the third day of May, nineteen hundred and thirteen, at the hour of ten o'clock in the forenoon, at the office of the city counsel of the city of Trenton, in the City Hall, in the said city of Trenton, in the county of Mercer and State of New Jersey, pursuant to notice.

HARRY HEHER, 20
Supreme Court Examiner.

Appearances—

Peter Backes and *Linton Satterthwait*, for the prosecutor.

Charles E. Bird, City Counsel, and *Henry M. Hartman*, City Attorney, for the respondent.

It was agreed between the respective counsel that the depositions be taken stenographically, and that the signatures of the witnesses be waived.

G. Morris Dorrance, being duly sworn according to law, on behalf of the prosecutor, on his oath, deposes and says:

Direct examination by Mr. Backes.

Q. Mr. Dorrance, you reside where?

A. Bristol, Pennsylvania.

Q. How long have you resided there?

A. Seventy-seven years.

Q. Your present age?

10 A. Yes. I will correct that—76½ years; in other words, I will be 77 in September.

Q. You are the son of John Dorrance?

A. Yes, sir.

Q. Are you familiar with certain property owned by John Dorrance, which is now described as the Edwin Forrest wharf property on Fair street, in Trenton?

A. Yes.

Q. How long have you known that property?

A. I have surely known it over 50 years.

20 Q. Can you describe the general characteristics of that property—the nature of the construction on the land adjoining the river, or in the river?

A. I can only recall the pier, because I was frequently called upon to repair it during the time that I had an interest in the steamer "Forrest."

Q. Can you from memory give a description of that pier, of its dimensions?

A. Oh, no, not for a moment.

Q. Well, can you describe the nature of the pier?

30 A. I only know that it was a pier running out, extending such a distance out into the river—how far, I cannot tell. I was called upon on behalf of the owners frequently to repair it in the spring in consequence of the damage by freshets.

Q. What was that pier used for?

A. Exclusively, I think, during my time, or during the time that I had an interest in the "Forrest," for a landing for that boat.

Q. For a landing for the steamer "Edwin Forrest?"

A. Yes.

Q. Who were the owners of the steamboat "Edwin Forrest?"

A. My father had an interest in the "Forrest," just what proportion I don't know, but after his death I succeeded to that ownership along with my two brothers.

Mr. Bird—I move to strike all that out, as being immaterial.

Q. The "Edwin Forrest" was a steamboat of what dimensions?

A. I can't tell you.

Q. Was it a large boat or small boat?

A. The regular passenger boat on the Delaware river, running by the tide, and stopping at all points between Trenton and Philadelphia.

Q. Was this pier of sufficient dimensions in width to accommodate the traffic from that boat?

A. It was.

Q. Can you in a general way give me the size of that pier?

A. I wouldn't undertake to do that.

Q. What was it constructed of?

A. Timber.

Q. Solid filling?

A. Solid filling; I filled it repeatedly.

Q. Was it a standard steamboat wharf?

A. It was so considered in its day.

Q. You did say you had known that wharf for how long?

A. Personally, for certainly 55 years.

Q. And from information derived by you, either from persons who held title prior to you, how long do you know from that source of information that wharf existed there?

Mr. Bird—Objected to as being leading.

A. I can't tell you as a matter of course when it was constructed. I know it was a pier for the use and occupation of the steamer "Forrest," in my father's time, and also after his death in 1869.

Q. When did your father acquire title?

A. I can't tell you.

Q. You are speaking of the title to the property or his ownership in the "Forrest?"

A. Of the property; I will have to refer to dates.

Q. I show you a certified copy of a deed from Benjamin Fish——

Mr. Bird—Doesn't it speak for itself?

Q. I want to identify it—dated August 7th, 1868——

10 A. You ask me to identify this deed?

Mr. Bird—Do you know the deed?

A. I can't recall this deed, sir.

Mr. Bird—Do you know of the execution of it?

A. Fish to my father, yes.

Mr. Bird—Do you know anything yourself of the execution of it?

A. Of this specific deed?

Mr. Bird—Yes.

A. No.

20 Mr. Bird—I object to it.

Q. Do you know when your father obtained title to the wharf property that we now speak of?

A. By my memory?

Q. Yes.

A. I can't.

Mr. Bird—I might say I don't think there is any question in regard to the title of this property—as to this title. We will raise no question about that.

Q. When were you last on the wharf property, Mr.
30 Dorrance?

A. I can't tell you that, sir.

Q. You haven't made any recent inspection of it?

A. No.

Q. You don't know the condition of it at the present time?

A. No.

Q. Do you know whether it is used as a steamboat landing at the present time?

A. Oh, no; I don't know. I have no knowledge since parting with the interest in the "Forrest."

Q. When was that?

A. I can't tell you that.

Q. About how long?

A. Twelve or fifteen years ago, I should judge. It was assigned, I think, to Joel De Victor.

Q. Look at the date of the deed, and tell me whether you have known the property since the date of that deed?

A. The first day of August, 1900. I have known 10 nothing of the property since that date.

Q. That is the deed from you to Joel H. De Victor?

A. Yes, that is my signature—never had any occasion to look at the property.

Cross-examination by Mr. Bird.

Q. You speak of a pier being erected there. What do you mean by a pier?

A. Steamboat landing.

Q. Can you describe that as to its width and length?

A. No, I can't, sir.

20

Q. Do you recall when that was abandoned for landing purposes?

A. I don't know that it ever was abandoned, that is to say, when the "Forrest" was sold to De Victor she was—I don't know whether the boat ran any time after that or not, but she was broken up very shortly after the date of that deed. Whether it was used for any purpose after that date I can't answer.

Q. What period do you mean?

A. The date of that deed; I have had no knowledge 30 of the property since that time.

That is all.

Joseph H. McIntyre, being duly sworn according to law, on behalf of the prosecutor, on his oath, deposes and says:

Direct examination by Mr. Backes.

Q. What is your business, Mr. McIntyre ?

A. I am a steamboat captain.

Q. Where do you live ?

A. I live on Cliff street, Trenton, N. J.

Q. Were you ever the captain of the steamboat "Edwin Forrest?"

A. Yes, sir.

10 Q. When did you assume a position on the "Edwin Forrest?"

A. On the 11th day of September, 1880, as a deckhand.

Q. Where was the "Forrest" navigating at that time—on what river ?

A. On the Delaware river, between Arch street wharf and Fair street wharf—I think it is Ferry street.

Q. What was the name by which the wharf in Trenton was known ?

A. South Trenton wharf.

20 Q. And the "Edwin Forrest" wharf too, wasn't it?

A. Fourth Ward wharf we used to call it.

Q. In order to identify the property describe where it was located, if you can ?

A. As near as I can tell you, it was on Ferry street—below the bridge of the Pennsylvania Railroad Company.

Q. How long after 1880 did you land at the wharf on board of the steamer "Edwin Forrest?"

A. Fifteen years and eight months.

Q. That would bring you down to what year ?

30 A. I can't remember that—that is the time that I served on the boat.

Q. What was your position on that boat ?

A. I was deckhand, mate, pilot, and the last seven years and eight months I was captain of it.

Q. During all that time did you land at this Ferry street wharf ?

A. Yes, sir.

Q. Describe that wharf, if you can—what style of

wharf it was and its general characteristics, and its width; if you know?

A. The river or the length on the street?

Q. Length on the river.

A. I suppose about 150 feet in length.

Q. What depth of water?

A. At low water you could walk along the front of it.

Q. What was it at high water?

A. Five feet of water there on the tide—we ran tide 10 work altogether. We had four hours from the time we left Philadelphia to run with the tide. That would give us time to get up and get away without running to shore.

Q. What was this pier or wharf built of?

A. Front of it was wood, filled in with stone and gravel.

Q. Solid filling?

A. Yes, sir; solid wharf.

Q. Have you known the wharf since you left it?

A. I haven't been up on that wharf in two years; 20 I have, too; they rebuilt it and put belgian block on it.

Q. When?

A. I can't tell you.

Q. About what time?

A. I don't know, because I wasn't here at that time.

Q. You said that you saw them rebuild it?

A. No, sir.

Q. Well, when were you on the wharf last?

A. I haven't been on that wharf in two years.

Q. Two years ago what condition was the wharf in? 30

A. Good condition, any more than a high river would run over top of it. The belgian blocks were there.

Q. Solid?

A. Yes, sir.

Q. Piled all up?

A. Yes, sir.

Q. Filled in?

A. Yes, sir.

Q. Did you have any occasion to look for the tide at that time?

A. No, sir; I had no business upon the wharf; I was just walking around.

Q. Any building on the wharf at that time?

A. There was a storehouse there.

Q. Was it in use?

A. No, it wasn't in use, that I know of.

Q. How long, to your knowledge, since that wharf
10 was used as a steamboat landing?

A. Well, after the "Edwin Forrest" went away from there we ran the "Twilight" there.

Q. How long did you run on the "Twilight" there?

A. One season, or a part of a season, then the little "Trenton" ran there.

Q. Did you run on the "Trenton"?

A. Yes, sir.

Q. How long did you run on the "Trenton"?

A. The way we used that wharf, we had a wharf at
20 the brewery, and when the tide swelled we ran up to the other wharf. We ran the "Twilight" on the tide the same as we did the "Edwin Forrest."

Q. And the "Trenton"?

A. Yes, sir.

Q. Up to what time did you run the "Trenton," for
how many years?

A. Two years, little "Trenton."

Q. When did you quit steamboating?

A. I haven't quit yet.

30 Q. Have you been up on that wharf with a steamboat lately?

A. I am working at the lower wharf now.

Q. Has the upper wharf been used by the steamboats of the Delaware River Transportation Company?

A. Not since I was up there, I don't think.

Q. When were you up there last with the boat?

A. I haven't been there since I was there with the little "Trenton."

Q. How long?

A. I can't remember that.

Q. When; two or three years ago, four or five years ago. Is it more than four or five years ago?

A. I don't think so. I can't remember some things and some things I can remember.

Q. Why didn't you continue using that wharf, if you know? Why did they abandon it?

A. They built a wharf down in the Sixth Ward, and there wasn't water enough to get up there unless you went on tide, and they used the lower wharf altogether.

Q. You are on the lower wharf now?

A. Yes, sir.

Q. How long have they used the lower wharf?

A. That was built by the Wilmington Steamboat Company in 1901, I think.

Q. How long has the present company used the lower wharf?

A. 1903, they took charge of it.

Q. You say that you always used that upper wharf on 20 the tide?

A. Yes, sir.

Q. Could you take a boat up there now on the tide?

A. I wouldn't try to.

Q. Why wouldn't you try?

A. There isn't water enough.

Q. Do you know whether the government at this time is dredging that section of the river?

A. They are not.

Q. You say that you have gone up that river on the 30 tide?

A. Yes, sir.

Q. Frequently?

A. Yes, sir.

Q. Why do you say you couldn't get up that river to-day on the tide on this wharf?

A. Because I haven't tried it, I suppose.

Q. Well, if you tried?

A. I wouldn't try it.

Q. Is there less water in the river to-day than when you used that wharf?

Mr. Bird—If you know.

A. I don't know because I haven't sounded up there.

Q. Have you seen any boats land up there at that wharf at all?

A. I have seen small boats, naphtha boats, motor boats.

Q. Could a boat, as an expert I am going to ask you
10 now, could a boat that would draw the same water as the
"Forrest" drew in the past, could that run at that wharf
at high water, if you know?

A. I think it could, at high water, but she wouldn't
do it on all tides; there is two or three kinds of tides
down there.

Cross-examination by Mr. Bird.

Q. You are a practical steamboat man?

A. I am supposed to be, yes.

Q. You know that river thoroughly?

20 A. I think I do; yes, sir.

Q. And as a result of that, do you think it would be
practical to operate a steamboat line to the old wharf?
I mean ordinarily, as a matter of navigation?

A. The way they say they are going to do it, it would
be all right.

Q. In its present condition?

A. No, only on tide.

Q. Would you run on tide?

A. I wouldn't try it.

30 Q. (By Mr. Backes.) When you say "run on tide,"
you mean sufficient water to carry your boat in?

A. Yes, sir.

Q. (By Mr. Bird.) Would there be any more danger
on running on tide at this time than when you run on
flow up there?

A. Yes, the pier has worked down, so that you can't
get over to it.

Q. (By Mr. Satterthwait.) As a matter of fact, Mr. McIntyre, how far up the river does the tide ebb and flow, with reference to this wharf? Does it go up as far as this wharf, or above?

A. It raises there, but there is no flood tide. The tide is always running one way down, and at the same time the tide backs up.

Henry V. Massey, being duly sworn according to law, on behalf of the prosecutor, on his oath, deposes and says: 10

Direct examination by Mr. Satterthwait.

Q. Mr. Massey, where do you live?

A. At Merrion, Pennsylvania, which is a suburb of Philadelphia.

Q. Are you connected with the Delaware River Transportation Company?

A. I am, and have been connected with the successor companies since about 1890.

Q. Well, the Delaware River Transportation Company is the present company? 20

A. Yes, sir.

Q. To what other companies do you refer?

A. Its immediate predecessor was the Delaware River Navigation Company. And its immediate predecessor was the Upper Delaware River Transportation Company, and I was vice president of the Upper Delaware River Transportation Company from the first of January, 1891, until it went out of business in about 1900, I think. And then was vice president of the Navigation Company until about 1906, and then became an officer 30 in the present Delaware River Transportation Company.

Q. What position?

A. I was vice president of the company until October, 1911, and now am secretary, and have been since about that time.

Q. The Upper River Navigation Company, I think you said?

A. Yes, the Upper Delaware River.

Q. What did that succeed to? What was it the successor of?

Mr. Bird—I want to enter an objection here, as being irrelevant and immaterial—I mean so far as his testimony has gone.

Q. Did the Upper Delaware River Navigation Company own the “Edwin Forrest?”

A. Yes, it purchased from the owners the steamer
10 “Edwin Forrest,” and its wharf properties in Trenton.

Q. Then you have been actively engaged—

Mr. Bird—I want to enter another objection. All of this is leading.

A. May I qualify an answer?

Mr. Bird—Yes.

Witness—I mean that the property of the “Forrest” and the real estate was acquired in the interest of the Upper Delaware River Transportation Company, but I think the title was conveyed to persons in interest who
20 were holding it in trust for the company.

Mr. Bird—So far as that is concerned, Mr. Satterthwait, there is a continuity of title there.

Mr. Satterthwait—I want to show a continuity of use.

Q. Since your connection with the navigation business, as you have stated, was the “Edwin Forrest” wharf in Trenton used for a steamboat landing.

A. I knew she was running on the river, and from general information, being interested in the business, she was stopping here, running to Trenton on the tide.

30 Mr. Bird—Objection on the ground that it is from general information he assumed that.

(Witness continues.) On several occasions before the “Forrest” was taken over, I had come to Trenton and had looked over her property—her real estate and wharf. I had also made several trips on the “Edwin Forrest.”

Q. Did she stop at this wharf on Ferry street?

A. Yes, sir. That was her landing place on the number of times I went up the river on her.

Q. After the "Forrest" was taken over, was the "Edwin Forrest" wharf used then as a steamboat landing?

A. Yes.

Q. For how long?

A. For, I think, about two years—at intermittent periods when the water was high in the river. And that was used by the little steamer "Trenton" or the steamer "Twilight." This company, the operating company, at that time, owned or leased, rather, a wharf on the Kuser brewery property near Lalor street. 10

Q. Did the company acquire other boats or own other boats than the "Forest?"

A. Yes.

Q. And how did their draft compare with that of the "Forrest?"

A. The company owned the steamer "Columbia," "John A. Warner," "Twilight" and the "Trenton." The "Trenton" and the "Twilight" were about the same draft as the "Forrest." The "Columbia" and the "Warner" were much deeper. 20

Q. And were they all operating between Philadelphia and Trenton?

A. No. The "Twilight" and the "Trenton."

Q. Didn't the "Columbia" and the "Warner" operate between Philadelphia and Trenton?

A. Afterwards.

Q. When was this wharf leased near Lalor street? About?

A. I should say about 1896.

Q. From that time on which wharf was most used— 30 the Ferry street wharf or the one at Lalor street?

A. The one at Lalor street.

Q. When was the last time that you know that the Ferry street wharf was used?

A. Oh, I should say eight years, probably ten years. It is not ten years ago.

Q. Why has it not been used in that time?

A. I think it was about 1903 or 1904—the company

thought it would be a proper move to procure a good and sufficient channel from Lalor street to Ferry street, so that their boats could run on all stages of the tide, and a time schedule maintained. In pursuance of that project surveys and soundings were made of the Delaware river from Ferry street to Lalor street. A contract was awarded to blast out or dredge out a channel sufficient to take care of our boats at any stage of the tide. That was done and at that time we also built and reconstructed or
10 rebuilt the bulkheads and the dock and put the buildings and pier as they now exist at that place.

Q. Where do you mean?

A. At Ferry street.

Q. What outlay did the Delaware River Transportation Company make in doing this work that you have spoken of?

A. My recollection is that over \$5,000 was spent on the channel alone, and something like that amount, if not more, in the reconstruction of the pier and the build-
20 ing of the freight house and paving the wharf, and other things we put there at that time.

Q. This was done in contemplation of what action with reference to the wharf at Lalor street?

Mr. Bird—Objected to, as leading.

[Question withdrawn.]

Q. At this time your company was using the wharf at Lalor street?

A. Yes.

Q. How much further away from the centre of Tren-
30 ton is the Lalor street wharf than the Ferry street wharf?

A. I should say three-quarters of a mile. It wasn't so much a question of distance, as of being able to land at Ferry street; we were able to unload our freight and deliver it to the teamsters in a cheaper zone for delivery.

Q. When you say "not so much a question of distance," you mean what? Distance of what?

A. The main object of the company was to get to a cheaper and more central point in Trenton for the delivery of freight.

Q. Speaking of distance, you are referring to the distance on the river for the boat?

A. Yes, it would have been the main freight station of the company.

Q. The places of your freight patrons, are they located near which of these two wharfs?

A. Nearer Ferry street; and the hauling charge of teamsters was one-half to our customers of what it was at Lalor street.

Q. Why didn't you make use of this wharf? 10

A. After spending a considerable amount of money with it, we discovered that there was a large ledge of rock running across the river there, which made, as it were, a bump in the bed of the river.

Q. What did you do with regard to your project of opening the channel?

A. After spending this considerable sum of money we stopped and had some interviews with the United States engineers on the channel in Philadelphia; told them what we had done, and showed them what we had done, 20 and showed them it wasn't safe to go up at every stage of the tide with a boat, and asked their co-operation. They stated that an application was going to be made to Congress the first thing for an appropriation to make a survey.

Q. Has that been done?

A. An appropriation was made, and I understand that a survey has been made.

Q. By the United States Government?

A. By the United States engineers. 30

Q. For the improvement of this particular part of the channel?

A. Between Lalor street and Ferry street.

Q. Do you know how recently that has been done?

A. About that time; I think within a comparative recent time.

Q. Can you be any more definite?

A. Within two years.

Q. Without that ledge of rock, would there then be any obstruction about getting up with your deeper draft boats to this wharf?

A. No.

Mr. Bird—Objected to as being immaterial.

Q. Has your company abandoned this wharf on Ferry street?

A. No; never abandoned it.

10 Q. What, if anything, has been done towards the maintenance of that wharf within the last five years up to the present time?

A. I would rather not answer that; that hasn't been under my supervision; I couldn't tell; except that I knew it was looked after.

Q. Do you know whether that wharf is in any use at the present time?

A. Not by any steamboats.

Q. Is it by anything else?

Mr. Bird—Objected to as being immaterial.

20 A. I can't answer that.

No cross-examination.

Lorenzo H. Cone, being duly sworn according to law, on behalf of the prosecutor, on his oath, deposes and says:

Direct examination by Mr. Backes.

Q. You are familiar with the "Edwin Forrest" steamboat wharf, in Trenton, known as the Ferry street wharf?

A. Yes, sir.

Q. How long have you known it?

30 A. I have known it—we had a wharf used by the "Forrest" from 1868 until about 1892, or 1893, when it was sold to De Victor.

Q. Do you know what it was used for before 1868?

A. I suppose she was used for the boats.

Q. When you first knew it, what was the general character of the wharf?

A. General wharf for passengers and freight—steamboat wharf.

Q. Permanently constructed?

A. Yes, sir.

Q. Not a temporary affair?

A. No, sir.

Q. What later period did you know that wharf?

A. Up until 1893 or 1894.

Q. Was it always used as a steamboat wharf by the "Forrest?"

A. Yes, sir.

Q. Did they have any other wharf in the city of Trenton?

A. No, sir.

Q. Could that wharf be reached at any stage of the tide?

A. No, sir; we went in there at high water.

Q. How deep water was there at high water?

A. I suppose in front of that wharf it was probably seven to eight feet of water; the rise and fall is very slight up here.

Q. Did the front of the wharf ever run dry at low water?

A. It would run dry more or less across the river, but there was a channel. There was water enough in front of the wharf for the boat to lay there, but there wasn't water enough for her to get up there.

Q. You were a steamship master?

A. Yes, sir.

Q. And navigated boats yourself?

A. Yes, sir.

Q. What boats?

A. "Columbia," "John A. Warner."

Q. Did you ever get to that wharf with the "Columbia?"

A. The "Columbia" never was up to Trenton until after I went out of the business in 1892.

Q. What other boat besides the "Forrest" did you land at that wharf?

A. I never landed the "Forrest;" never was on the

“Forrest.” The “Forrest” was controlled by the same people, and we had the management of it. I had personal knowledge of everything.

Q. Then you do know that the “Forrest” did land at that wharf?

A. I know personally as far back as 1868, and every year down to probably 1893, when she was sold, that she landed at that wharf.

Cross-examination by Mr. Bird.

10 Q. Have you ever landed any other boat except the “Forrest” there?

A. I never landed the “Forrest” there.

Q. You never navigated the “Forrest?”

A. Never been aboard of it.

Mitchel B. Perkins, a witness produced on behalf of the prosecutor, being conscientiously scrupulous of taking an oath, and being duly affirmed, deposed and said:

Direct examination by Mr. Backes.

20 Q. Senator, what connection, if any, have you with the Delaware River Transportation Company?

A. I am treasurer and general manager at this time.

Q. How long have you been an officer of the company?

A. Since the incorporation of the present company—not first holding that office.

Q. But as an officer?

A. I have been a director of that since the incorporation of the Delaware River Transportation Company.

Q. Can you fix the time of that?

30 A. 1906.

Q. Prior to that time did you have any connection?

A. Prior to that I was a director and treasurer of the Delaware River Navigation Company.

Q. And when did you form your connection with that company?

A. In 1900.

Q. And prior to that did you have any connection with navigation on the Delaware?

A. I was a director and general agent of the Upper Delaware River Transportation Company.

Q. For how long?

A. Since, I think, 1891 or 1892—1891, I think.

Q. What connection did you have on the river prior to that?

A. I had none.

10

Q. From 1891 on down, did you have the management or control over boats landing at the Ferry street wharf, belonging to your various companies?

A. I was director of the three companies. I have always been director in the three companies that existed, and always took an active management in the affairs of the company from the time I became connected with them up until the present time.

Q. The companies you have mentioned, were they the owners of the Ferry street wharf?

20

A. Yes, sir.

Q. Land any boats there?

A. Yes, sir.

Q. What boats?

A. The Upper Delaware River Transportation Company landed the "Forrest," the little "Trenton," and the "Twilight" at the upper pier—the upper Ferry street wharf.

Q. The next company?

A. The Delaware River Navigation Company. They 30 landed for a while at the upper pier, until it was decided to try to improve the channel by dredging it, when they thought that by doing this we could land at all stages of the tide at the upper pier.

Q. Find that plan to be feasible?

A. We made a contract with a river and harbor improvement company of Philadelphia, and they drove pipes right down through the center of the river and

dredged there for, I think, several months, and finally struck a ledge of rock, and they had to discontinue the work. We then, for a while, ran on the tide to this upper pier. At one time, I think at times, we ran the "Columbia." I remember having the "Columbia" go up there on high water, but we found it wasn't safe to make this a permanent terminal until there was more clearing up of the river. We then got in touch with the government, and they made a survey of the channel from Lalor street to Ferry street, and appropriated sufficient money to make this survey, and after that there was a bill introduced and passed, and appropriated, I think, \$130,000, to complete this dredging that we had started. I am informed that the bill has been approved, and the money has been appropriated.

Q. Any work been done on it?

A. I am not sure that any work has been done. I am reliably informed—

Mr. Bird—Objected to. I wish to enter an objection here to Senator Perkins' testimony, because it is largely based upon information.

Q. Your company ever spend any money on this dredging?

A. Yes, sir; I think upwards of \$5,000 in dredging there.

Q. What company did that?

A. The Delaware River Navigation Company. Then we went on and rebuilt the wharf. We faced it with Belgian blocks; put up a large warehouse; that cost us five or six thousand dollars.

Q. When did you do that work?

A. That work was done in 1902 or 1903.

Q. What company did that?

A. The Delaware River Navigation Company.

Q. What have you done since with that?

A. We have kept it in order; we have a watchman there keeping it in order; we have boats land there.

Q. Could it be used as a steamboat wharf and landing?

A. Yes, sir.

Q. Why isn't it used?

A. Because of the uncertainty of the water—of the tide; it is such that we can't make a positive schedule to go there; we can't get there at all stages of the tide.

Q. Is that because you have deeper draft boats?

A. Yes, sir; our boats that run to Trenton now draw about one and one-half feet more water than the "Forrest."

Q. When did you last make any repairs on the wharf?

A. We made some last year; we are making them 10 right along; we are keeping the wharf in condition; we have a large building there, and we have to keep that in order.

Q. Did your company ever abandon that wharf?

A. No, sir; we are using it to-day.

Q. It is simply not used for steamboat landing by your company?

A. Yes, sir; but it is used by the small boats that come there; yachts.

Q. Does your company use it for any steamboat landing? 20

A. Not just at the present time.

Q. How long since you have used it?

A. I think some five or six years, possible, we haven't made any landing there; I mean used for the unloading of freight and things like that. We have run our boats up at high water there on the tide.

Q. How recently?

A. I am not just sure whether we ran in the last year or not. 30

Q. Did you do it the year previous?

A. I think within the last two or three years we occasionally ran up there on the high water only.

Q. Do you know what depth of water there is?

A. Right inside of our pier there is a depth there, I think, of about 10, I think somewheres about 10 feet.

Q. At high water?

A. Yes, sir.

Q. At low water is it ever bare?

A. It may be at one end of the pier, but at the upper end it is never bare; I think there is some four or five feet of water there at all stages of the tide.

Q. Can you give the frontage of that pier on the river?

A. I think about 160 feet.

Q. Long?

A. The warehouse we have on there, I think, is 125 feet long. I think it would be about 175 feet.

10 Q. Since the time that you have had any knowledge of that pier, has it been enlarged from what it formerly existed—the face of it?

A. No, I think not; one time we put in a raising slip there, but I think possible the ice of last winter a year knocked that down, and took off some of the blocks along the front of the pier, but we can restore that in a week's time.

No cross-examination.

The further taking of depositions was then adjourned
20 to Friday, the ninth day of May, A. D. 1913, at ten o'clock in the forenoon, at the same place.

Supreme Court Examiner.

Continuation of the taking of depositions in the above-entitled cause, before me, Harry Heher, a Supreme Court Examiner of the State of New Jersey, on Friday, the ninth day of May, nineteen hundred and thirteen, at the hour of ten o'clock in the forenoon, in the court room of the District Court of Trenton, in the City Hall, in the said city of Trenton, in this
30 State, pursuant to adjournment.

Supreme Court Examiner.

Same appearances.

Prosecutor rested.

Herbert F. Stetser, being duly sworn according to law, on behalf of the respondent, on his oath, deposes and says:

Direct examination by Mr. Bird.

Q. Mr. Stetser, where do you reside?

A. Pleasantville, N. J.

Q. What is your occupation?

A. General manager of amusement park. 10

Q. Prior to that what was your occupation?

A. General Manager Delaware River Transportation Company.

Q. When were you in the employ of the Delaware River Transportation Company?

A. From 1907 to 1911—in both years—inclusive.

Q. Do you recall the operation of deepening the river between Lalor street and Ferry street, in the year 1904?

A. No, sir.

Q. You have no knowledge of anything prior to 1907? 20

A. Not actual work.

Q. Are you familiar with the structure known as the Ferry street wharf?

A. I am.

Q. During the year 1907 and 1911, were any boats operated by that company to that wharf?

A. None at all.

Q. Do you know why?

A. On account of the depth of the channel.

Q. Do you know when the Ferry street wharf was last 30 used as a landing for steamboats plying between Philadelphia and Trenton?

Mr. Backes—Objected to. He has already testified it wasn't during his period, and he has no knowledge in connection with the company prior to 1907.

A. To my knowledge when the "Edwin Forrest" ran there.

- Q. When was that ?
A. About 1894 or 1895.
Q. And you have actual knowledge of that ?
A. I was on the river and doing business at that time.
Q. Do you know the draft of the different boats plying between Philadelphia and Trenton ?
A. The present boats ?
Q. Yes.
A. What are they ?
- 10 Mr. Backes—Objected to, if you are going to use him as an expert.
Q. How long have you been engaged in the steamboat business ?
A. Twenty years.
Q. In what different capacities ?
A. On the Delaware river, in charge of all classes of steamboats.
Q. In what different capacities ?
A. From office boy to general manager.
- 20 Q. Now, I ask you, do you know the draft of the different boats plying between Trenton and Philadelphia ?
Mr. Backes—Objected to. It does not appear that he has any occasion to make an investigation as to the depth of the draft of the various boats.
A. What are the boats plying there now ?
Mr. Backes—Unless you know I don't want you to speak of it.
A. I can tell you about the boats that are owned by that line, but I don't know what boats are running on the
- 30 lines to-day.
Q. Take the draft of the boats that are owned by that line ?
A. Steamer "Columbia" is one boat owned by that line.
Q. What is the draft of that ?
A. Six and one-half feet.
Q. What other boats ?
A. Steamer "Twilight."

Q. What is the draft of that?

A. Six feet.

Q. What other boats?

A. Steamer "Bristol."

Q. What is the draft of that?

A. Six feet.

Q. What is the draft of the "Twilight?"

A. I think I gave you that.

Q. Do you know the draft of the "Trenton?"

A. I don't.

Q. Are there two "Trentons," the little "Trenton" and
the large "Trenton?"

A. There were two different "Trentons" on the river.

Q. Do you know the draft of each of those boats?

A. No, sir.

Q. Do you know the draft of the "Edwin Forrest?"

A. Yes, sir.

Q. What was the draft of the "Edwin Forrest?"

A. Four feet.

Q. Since the "Edwin Forrest" ceased running, would 20
it be practical to operate any of these boats to the Ferry
street wharf?

A. None that I have given the draft of.

Cross-examination by Mr. Backes.

Q. You say during the period in which you were gen-
eral manager of this line, there were no boats operated to
the Ferry street wharf?

A. Yes, sir.

Q. Why was that?

A. Because there wasn't enough water.

Q. Wasn't it due to the fact that the line had secured
deeper draft boats?

A. They had the same boats then that they had all the
time I was with them.

Q. But were those boats not of a deeper draft than
the "Forrest," which did run up there?

A. Yes, sir.

Q. You say that at high water it was impossible for any of these boats to get up there?

A. Yes, sir.

Q. Did you ever make any effort to get them up there?

A. No, sir.

Q. Did you, as manager of this company, ever direct any of these boats to go up to the Ferry street wharf?

A. I didn't.

10 Q. Did you make any personal inspection of the river between Lalor street and Ferry street, for the purpose of learning the depth of the water?

A. I didn't.

Q. You don't know?

A. From the government survey.

Q. Do you know the depth of the water between the points that I have mentioned, of your own personal knowledge?

A. I refuse to answer.

20 Q. Of your own personal knowledge?

[Previous question repeated by examiner.]

A. I don't.

Q. When you were manager of this line the "Forrest" had gone out of commission?

A. Yes, sir.

Q. And your knowledge of the "Forrest" was derived from what source?

A. From working alongside of the boat at the Arch street wharf.

30 Q. Did you ever work on the "Forrest"?

A. Yes, sir.

Q. In that way you obtained the depth of the draft?

A. I did.

Q. Could other boats of the same depth or draft of the "Forrest" now make the Ferry street landing at high water.

A. I can't say.

Q. Then you don't know the condition of the river between Lalor street and Ferry street?

A. Only from government survey.

Q. Take the government survey as your authority, would you say it would be impossible for a boat of the draft of the "Forrest" to reach the Ferry street wharf?

A. No, sir.

Q. You say it could be reached?

A. Yes, sir.

Q. So that the Ferry street wharf could be used as a point of navigation to-day on high water?

A. Not in its present condition. 10

Q. You could get up the river that far?

A. Yes.

Q. When were you last at the Ferry street wharf?

A. To-day.

Q. When before that?

A. I should judge inside of a year.

Q. You made the inspection to-day for the purpose of qualifying as a witness here?

A. Yes, sir.

Q. Tell us the general condition of that wharf? 20

A. Dilapidated condition; building moved from where it was built for and set back on uprights temporary; belgian blocks partly removed from the face of the wharf.

Q. The face of the wharf is there?

A. Yes, partly.

Q. Piling there?

A. Yes, some few.

Q. Wharf could be put in proper condition?

A. Oh, yes—at quite some expense. 30

Q. But aside from the expense only, the wharf could be made a landing place as it has been used heretofore?

A. Oh, yes; as long as you got the money.

Q. Did you try the depth of the water in front of the wharf?

A. I could see the bottom.

Q. But there was water all round?

A. About two feet.

Q. At the time you made the inspection, was it high or low water?

A. One-half tide.

Q. What time did you make the inspection?

A. About five minutes after ten; just after the train came in.

Q. You found the storehouse there?

A. Yes, sir.

Q. The storehouse was on the wharf when you were
10 manager of this wharf?

A. Except that it was on uprights; same condition.

Re-direct examination by Mr. Bird.

Q. Upon what surveys do steamboats operate?

A. Generally on government survey.

Q. Is that the ordinary practice?

A. A great many times with a lead line.

Q. As a practical steamboat man, a commercial proposition, is it practical to operate steamboats to a wharf on tide, running a draft of four feet?

20 A. Not from a commercial standpoint.

Q. Why?

A. Not where you have got to work tide work.

Q. Would the tonnage have anything to do with that?

A. No, sir.

Recross-examination by Mr. Backes.

Q. Do you know that the "Forrest" was operated as a commercial enterprise?

A. Yes, sir.

Q. You know that other boats were operated to this
30 point as a commercial enterprise?

A. I don't.

Q. Do you know whether the little "Trenton" was ever operated to the Ferry street wharf, as a commercial enterprise?

A. I don't.

Q. How much time between tides do you have at the Ferry street wharf?

A. From two to three hours.

Q. A steamer of the capacity of a draft of only four feet of water could get up to this Ferry street point, and discharge its freight, and take on its freight, very readily in three hours?

A. That would depend on the amount of freight and kind of freight.

Q. I am speaking of the capacity of the boat?

A. No, sir, you can't handle the capacity of that boat in that time. 10

Q. What was the capacity of the "Forrest"?

A. That would be according to the sort of freight—whether it was heavy or light freight.

Q. The "Forrest" in your time did handle all manner of freight?

A. Yes, sir.

John W. Thompson, being duly sworn according to law, on behalf of the respondent, on his oath, deposed and said:

Direct examination by Mr. Bird. 20

Q. Mr. Thompson, where do you reside?

A. Trenton, N. J.

Q. And what is your profession?

A. Civil engineer.

Q. By whom are you employed?

A. United States Government.

Q. How long have you been in the employ of the government?

A. Fifteen years.

Q. During that time have you been assigned to duty on the Delaware river, between Trenton and Philadelphia?

A. Entirely so since early in 1909, and partially so prior to that time.

Q. Have you made observations and surveys of the river between Lalor street and Ferry street?

A. I have.

Q. Will you state the result of those surveys and observations?

Mr. Backes—The witness hasn't stated for whom the surveys were made.

Q. For whom were these surveys and observations made?

A. United States Government.

Q. Will you state the result of the observations and surveys made by you?

10 A. The surveys showed that a draft of three and one-half feet at low water was the greatest that could possibly be taken or carried from Lalor street to Ferry street; I suppose that that is what the question calls for.

Q. Has any action been taken, to your knowledge, to widen and deepen the channel, or create a channel between Lalor street and Ferry street?

A. The project for such an improvement has been approved by the War Department.

Q. When was that approved, if you know?

20 A. That project was approved in 1910, subject to certain conditions.

Q. Do you know what those conditions are?

A. Yes; those conditions were that the city of Trenton provide suitable terminals, wharves, &c., and that a place for the deposit of the dredge material be furnished the government without cost.

Q. Have any of those conditions been fulfilled by the city?

30 A. A place for the disposal of the dredge material has been provided by the city of Trenton, and assurances given that wharves and terminals that would be suitable would be constructed. The government has accepted their statement as made in good faith, and has arranged to carry out the project.

Q. Do you know whether any survey was made and approved by the government for such project as this prior to 1909?

A. Not to my knowledge.

Q. Would you have known of it if it had been made

and approved by the United States Government during the time that you have been with them?

A. Yes; there has been some dredging done of a private nature prior to this, between Lalor street and Ferry street, not, however, by the United States Government.

Q. Are you familiar with the work?

A. To some extent.

Q. Will you state what was done, so far as you know?

A. My knowledge of that is limited, because it was a private business or work; but I do know that the steam-boat company contracted for some dredging between those two places, which was never carried out entirely. 10

Q. Do you know why that undertaking was abandoned?

A. Probably——

Mr. Backes—Do you know?

A. I don't.

Q. How far has the work of improving the river between Lalor street and Ferry street progressed at this time? 20

A. No actual improvement work has been done so far. The advertisement will be made very shortly for bids on that work, however.

Q. Surveys have been completed?

A. Surveys are completed; everything is approved.

Q. I think you have already testified that the United States Government has made an appropriation for this work?

A. An appropriation has been made.

Q. When was that appropriation made, if you know? 30

A. \$50,000 was appropriated in 1912, and \$114,000 was appropriated in the recent River and Harbor bill of March 3, 1913.

Mr. Backes—I understand there is \$164,000 available for this work at this time?

Witness—Yes, sir.

Q. How much was appropriated for annual maintenance?

A. A maintenance cost of \$5,000 annually is provided for.

Q. Was any other appropriation made by the United States Government prior to 1912, as far as you know?

A. A small appropriation to cover the cost of making the survey on which the project will be based.

Q. During the time that you have been employed on the river, have you observed the movement of boats?

A. Yes.

Q. Have you ever observed any steamboat landing at what is known as the Ferry street wharf.

10 A. No.

Q. In your opinion as an engineer, and from your practical experience in the work of improving this river, can you say whether it would be practical or not to operate steamboats between Ferry street and Lalor street?

A. I should say not.

Q. Do you know the draft of the boats now operating on the Delaware river?

A. Yes.

Q. Will you state them?

20 A. The "Columbia," 6 feet; the "Twilight," 6½ feet; the "Bristol," 6 feet; the "Springfield," 9½ feet.

Cross-examination by Mr. Backes.

Q. You say that it will not be practical to operate steamboats between Ferry street and Lalor street?

A. Was that question limited to Lalor street and Ferry street, or to Ferry street and Philadelphia?

Mr. Bird—Between Ferry street and Lalor street.

Q. Do you mean to say it is impractical to operate steamboats between those two points?

30 A. Not impossible, but commercially impractical.

Q. Will it become practical when you expend this \$164,000 appropriation?

A. Certainly.

Q. You did say that from your observation that 3½ feet of water was to be found within those two points, at the present time, at low water?

A. Yes.

Q. What would it be at high water?

A. Seven and one-half to 8 feet.

Q. Would it be impractical to run with the tide and operate steamboats at Ferry street?

A. Yes.

Q. Why?

A. Commercially impractical, because it would limit the business that could be done, so that it wouldn't be able to compete with business from Lalor street.

Q. Assuming, now, that one company owned both 10 wharves, and it had a lighter draft boat that ran to Ferry street, do you still say it would be impractical to use the Ferry street wharf as a landing point?

A. For passenger service it would.

Q. What would it be for freight?

A. Under those conditions, it would be practical for freight.

Q. And why wouldn't it be practical for passenger service—because of the want of trolley connections?

A. Because no schedule could be maintained. 20

Q. The passenger service, however, with the tide could be maintained—schedule by tide?

A. Not over the entire year, or an entire season, because of the fact that there are times during the year when there wouldn't be sufficient tide to enable a boat to run up there. During the greater part of the season there would be, however.

Q. What have you in your possession, or what has come under your observation, to show the conditions that the War Department put upon the City of Trenton, as 30 a condition for the doing of this work?

A. I have seen the correspondence that necessarily passed through the United States Engineers' office in Philadelphia, relative to that.

Q. Have you had direct communication with the officials in charge of the government work, so as to acquaint you with these conditions?

A. I have.

Q. Can you, of your own knowledge, speak of what these conditions were, further than what you already testified to?

A. I think I stated those conditions fully as they were stated in writing to me and verbally by the engineering officer in charge of the Philadelphia office.

Q. And that condition was that the city should provide a disposal point for the material that was dredged, and a landing place and wharves?

10 A. The conditions were that the city of Trenton should provide suitable and satisfactory wharves and terminals, and that a place for the disposal of the dredge material should be provided free to the government.

Q. Was there a condition which required the taking by the city of the entire water front?

A. No, there wasn't such a condition.

Q. Did the condition require the providing for more than one wharf or landing place?

A. The condition was based on the harbor plans, which
20 the city of Trenton made and submitted to the government.

Q. Have you a copy of those plans?

A. There is a copy in the United States Engineers' office in Philadelphia.

Q. You are familiar with the surrounding river front about Ferry street, are you not?

A. Yes.

Q. And both below and above the point that we now contend for—the property of the Delaware River Transportation Company, and known as the old “Edwin Forrest” wharf?
30

A. Yes.

Q. Above that “Forrest” wharf, is there any suitable landing place for steamboats that could be utilized for your project?

A. There is not.

Q. Is there any below?

A. Yes, there are places below that are suitable.

Q. And you say there are none above, because there is no wharf existing there?

A. The bed of the stream contains a great deal of rock above that point—not possibly coming down precisely to the upper property line.

Q. Take the property immediately adjacent to and north of the property line of the Delaware River Transportation Company, could that property be used for landing purposes?

A. No. 10

Q. Have you any knowledge whether or not the city of Trenton has acquired that land?

A. I have not.

Q. Do you know who the owner of that land is at the present time?

A. Only from hearsay. I have no personal knowledge.

Q. Have you made any sounding above, to the north of the land of the Delaware River Transportation Company, and immediately in front of the land on the river front, for the purpose of ascertaining the depth of the 20 water?

A. Yes.

Q. What did you find?

A. Very little water.

Q. Find as much there as you did in front of the frontage of the wharf property of the Delaware River Transportation Company?

A. Practically the same.

Q. The same depth of the river bed?

A. What do you mean by that question? 30

Q. I want to know whether the water in front of this land is of the same and equal depth as in front of the Delaware River Transportation Company—land immediately north of it?

A. The depth of the water is practically the same—as to the character of the bottom I don't know.

Q. You have made no test?

A. I have made no borings above the property of the Delaware River Transportation Company.

Q. Now, taking the property to the south of the present wharf property of the Delaware River Transportation Company, at Ferry street. Have you made any sounding or boring in the river there?

A. Yes.

Q. What is the general condition you find there—first, as to the depth of the water, and then as to the nature of the soil?

A. There is very little difference, if any.

10 Q. And you did say that that land could be used for wharf purposes?

A. Yes; there is quite a deep and wide basin there in the river at that point, and immediately in front of the point of the Delaware River Transportation Company land, in which you could turn and maneuver your boats. There is no better water conditions there than which is general in that section of the river.

Q. All of it is favorable to the carrying out of the project or scheme now undertaken by the Government to
20 give deeper water-way up to Ferry street wharf, is it not?

A. It was sufficiently favorable for them to adopt the project.

Q. Do you know whether the city of Trenton has acquired what was formerly the property of the Pennsylvania Railroad Company, which is immediately south of the Delaware River Transportation Company land?

A. I am told that they have.

Q. That property could be used for wharf purposes, could it not?

30 A. It would be possible to use it—it would be much more advantageously used if it were used in conjunction with other property.

Q. Because of its frontage on the river?

A. Yes.

Q. Do you know how much frontage they have there?

A. I can't tell you without referring to papers I have
at home.

Q. There is no wharf constructed on that land?

A. No.

Q. Immediately south of the land acquired from the Pennsylvania Railroad Company, is there a street leading to the river belonging to the city of Trenton, between that point and the Delaware River Transportation Company land?

A. I am not certain as to that.

Re-direct examination by Mr. Bird.

Q. Is the land now owned by the city of Trenton as desirable for this purpose as the land owned by the Delaware River Transportation Company? 10

A. I believe it is—in proportion to the frontage.

Q. Do you know the condition of the so-called Ferry street wharf?

A. Yes.

Q. Present condition?

A. Yes.

Q. Will you describe it?

A. It is in a decayed condition—run-down condition.

Q. Is it in use?

A. No. 20

Q. Do you know the condition of the so-called warehouse or frame structure that is there?

A. Yes.

Q. What is the condition of that?

A. That is in a dilapidated condition.

Q. What kind of a structure is that?

A. Timber structure.

Q. Can you describe it more fully as to its strength, and material of which it is constructed?

Mr. Satterthwait—Is that material? 30

A. It is rather light frame construction in a dilapidated condition, about 100 by 30 to 35 feet.

Recross-examination by Mr. Backes.

Q. Answers for warehouse purposes, does it not?

A. What is that?

Q. Would answer for warehouse purposes, would it not?

A. I haven't been inside to see whether the roof leaked.

Q. Oh, aside from the roof leaking?

A. If it were put in repair it would answer for warehouse purposes.

Q. It is of the same character as is used for landing purposes?

A. Yes.

Q. You say this wharf and warehouse is in a run down
10 condition?

A. Yes.

Q. Is that due to the fact of its non-user?

A. That is due to the fact that it hasn't had any repairs made.

That is all.

Edward E. Cherry, being duly sworn according to law, on behalf of the respondent, on his oath, deposed and said:

Direct examination by Mr. Bird.

20 Q. Mr. Cherry, where do you reside?

A. 1062 Franklin street, Trenton.

Q. What is your occupation?

A. I am superintendent of the Trenton Sand Company's business.

Q. Prior to that?

A. I have been superintendent of erecting, dredging and general contractors' work.

Q. Do you recall the years 1903 and 1904?

A. Yes.

30 Q. Were you employed, then, in dredging the Delaware river, or part of it?

A. I was employed by Alfred Nelson, that had the work.

Q. Where?

A. On the Delaware, between Ferry and Lalor street, the dredging was done, and the reconstructing of the wharf and building of the warehouse.

Q. Do you know for whom that work was being done?

A. Delaware River Navigation Company.

Q. Was the dredging and the building of the warehouse carried on at the same time, as one scheme or operation?

A. Yes, one operation.

Q. Tell us what was done there at that time?

Mr. Backes—Unless he has had charge while employed I object.

Witness—I had personal charge of the work. 10

Mr. Backes—I object because the best evidence of what was done is the production of Mr. Nelson and his contract.

Q. You know what was done?

A. I did it.

Q. Tell us what was done?

A. We built the wharf and extended it in length—built the warehouse and did considerable dredging between Ferry street and Lalor street.

Q. What kind of a building is that warehouse? 20

A. Frame building.

Q. Can you describe it?

A. I can't give you just the dimensions—I suppose it is 100 by 35.

Q. What is it constructed of?

A. Frame building.

Q. Solid, substantial building?

A. It was all right at the time—on good foundation.

Q. Light or heavy?

A. Ordinary structure. 30

Q. Tell us what was done in respect to the dredging of the channel?

A. I can't tell you just exactly what work was done; the idea was to get a six-foot channel between Lalor street and Ferry.

Q. Was that accomplished?

A. To a certain extent.

Q. What extent?

A. The low water mark that we worked from, there was six feet at that time.

Q. It wasn't carried to completion?

A. Very near it.

Q. Was it?

A. Not to completion, no.

Q. Do you know why it wasn't carried to completion?

A. I don't know.

Q. The work was abandoned, was it not, before completion?

A. It was supposed to be complete; I don't think anybody knew anything about its not being completed.

Q. Do you know whether any boats were ever operated between Lalor street and Ferry street after this work was completed?

A. The "Twilight" made a trip to the Ferry street wharf.

Q. One trip?

A. One trip.

Q. Has any other boat or boats, at any other time or times, operated to that wharf?

A. Well, not that I know of since; before that I saw the little "Trenton" there.

Q. When was that about?

A. I think that was in 1900, that the "Trenton" ran up there. I moved there in the winter of 1899, and I remember the next season, when the river opened, the "Trenton" landed there, but I can't remember just how often. I used to see it.

Q. You don't know when the company transferred its landing from Ferry street to Lalor street, do you?

A. No, I don't know just the date.

Q. When was the last boat landed at Ferry street?

A. The last that I know of was the "Twilight," and it was in September, 1903.

Q. And you have been about that river?

A. Up until about three years ago; I was living close to it and spent a lot of time there.

Cross-examination by Mr. Backes.

Q. How long were you employed in this work that you have described?

A. Well, the work ran along part of 1903 and part of 1904.

Q. And the work was being done for whom?

A. Delaware River Navigation Company.

Q. And you accomplished the dredging of the river to the extent of the six feet channel?

A. At the stage of the tide that the measurements 10 were taken.

Q. When were they taken?

A. Taken in the spring of 1903.

Q. And then you say they were taken at low water?

A. Not at low water—there was a mistake made in the low water mark.

Q. What depth did they have?

A. I suppose at low water mark they had about four feet.

Q. The work to be accomplished, and which you set 20 out to accomplish, was to get the Delaware River Transportation Company a six feet channel, is that right?

A. That is right.

Q. And that work was completed?

A. Completed—the “Twilight” went up there on the stage of the tide it was supposed to go.

Q. At that time did you extend this wharf out into the river?

A. Not out in the river, but extended it in length.

Q. Was there any water in front of that wharf? 30

A. At that time six feet of water.

Re-direct examination by Mr. Bird.

Q. At what tide?

A. The low water mark that we did the dredging—we took as a basis for dredging.

Q. That is all.

Timothy Furlong, being duly sworn according to law, on behalf of the respondent, on his oath, deposed and said:

Direct examination by Mr. Bird.

Q. Mr. Furlong, where do you reside?

A. City of Trenton.

Q. How long have you resided in the City of Trenton?

A. Thirty-three years last February.

Q. Are you familiar with the structure known as the

10 Ferry street wharf?

A. Yes, sir.

Q. Do you live in the vicinity of that wharf?

A. For nearly thirty years.

Q. Is that wharf in use at present?

A. No, sir.

Q. When was its use discontinued? One minute.

When was that wharf discontinued for river traffic between Philadelphia and Trenton, if you know?

A. Well, as near as I can recall, at sixteen years ago.

20 Q. Was it abandoned or did the——

Mr. Backes—I object to characterizing it.

Q. At the time the use of the wharf was discontinued was the line operated to another point in the said steamboat line?

A. Yes.

Q. To what point?

A. Lalor street.

Q. Then the operation of the line was transferred from the Ferry street wharf to the Lalor street wharf?

30 A. Yes, sir.

Q. And that, you think, was about sixteen years ago?

A. As near as I can recall; I am not positive exactly.

Q. Has any steamboat been operated to the Ferry street wharf since that time, so far as you know?

A. There was—at intervals boats came up there. A boat came up there once or twice—the “Lily White,” I think that is the name, and I think the “Trenton” was up there a couple of times.

Q. Can you tell us when that was, about?

A. Well, 1898, along there—1898; I am not positive. The last boat that I recall coming there was the "Twilight." She brought up some lumber. I remember distinctly when the October flood came, it washed all that lumber away.

Mr. Satterthwait—You mean the October flood of 1903?

Witness—Yes. I never knew of any boat coming there since. 10

Q. You are about there a considerable portion of your time?

A. I lived right adjoining the wharf there for twenty-eight or twenty-nine years.

Q. Your properties are contiguous, are they not, adjoining?

A. Yes, sir.

Q. What is the present condition of the so-called wharf?

A. It is not in very good condition—it's being neglected like it is; the bricks are torn out. 20

Q. What is the condition of the so-called warehouse?

A. Well, it is a frame structure; there is a great deal of flooring gone out of it, and it is in a dilapidated condition.

Q. Is it in use?

A. No.

Q. Has it ever been in use?

A. No.

Q. Not since the time it was constructed? 30

A. No.

Cross-examination by Mr. Backes.

Q. Mr. Furlong, you are the proprietor of the Bloomsbury House, immediately adjoining this wharf?

A. Yes, sir.

Q. You have no river frontage on your property?

A. No.

Q. You conducted the Bloomsbury House during the time the "Edwin Forrest" ran there?

A. Yes, sir.

Q. For how many years did you observe the landing of freight and passengers by the "Forrest" at that point?

A. Well, from I went there into that place in 1882, and I think she quit running somewheres about 1895 or 1896.

Q. During that period there was a regular schedule
10 landing of the "Forrest" by the tide?

A. Yes, she run by the tide.

Q. Made trips during the season?

A. Yes.

Q. Carried freight and passengers?

A. Yes.

Q. Never had any difficulty either in landing or getting away?

A. Well, at times when the water was low I have seen her held back.

20 Q. Ever see her held back more than a few hours?

A. Well, no, not until the tide came in.

Q. You observed the condition of the wharf at that time?

A. Yes, sir.

Q. And have you recently inspected the wharf?

A. Well, not particularly. I have been down there a few weeks ago.

Q. Tell us what difference, if any, you observed in the condition of the wharf?

30 A. Well, in what way?

Q. As to the general structure of it. The wharf is still there?

A. Yes.

Q. Same wharf?

A. Yes.

Q. And this dilapidated condition that you refer to is only due to neglect of the surface of the wharf, where the brick and stone had been washed away?

A. Well, I don't know. Of course, there is a great many of the bricks taken away.

Q. But the face of the wharf is still there?

A. As to that I cannot say.

Q. Is there or is there not a well-defined wharf there at the present time?

A. I don't know exactly what you mean by a well-defined wharf.

Q. You could observe that a wharf existed at this point?

10

A. Yes, sir.

Q. And it is the same wharf that you knew when the "Forrest" landed there?

A. Same place.

Q. Same place exactly, had not been changed?

A. No, sir.

Q. And substantially in the same condition?

A. When the "Forrest" came there they had a plank wharf there, and after that they laid a lot of these—I don't know what kind of bricks or block—

20

Q. Belgian block?

A. No, not Belgian block—asphalt block.

Q. And the only difference that you find now is that this block, or some of them, had been washed away?

A. Well, the posts or uprights had rotted away.

Q. Small boats have landed, have they not?

A. Can't land there now, except at high water.

Q. Small yachts and boats land there?

A. No, not at that wharf—have landed below. A boat can't go in there except at high water.

30

Q. What kind of a boat can't go in there?

A. Can't any kind. You can see the bottom of the river there for a foot or two out in the water.

Q. Were you living there at the time the Delaware River Navigation Company made the improvements in the wharf, six or seven years ago?

A. Yes, sir.

Q. You observed the work there?

A. Well, casually.

Q. You didn't know that the "Twilight" came up to that wharf?

A. I have seen her there.

Q. After this work was done?

A. I never remember seeing the "Twilight" there but once.

Q. Did you see any other boat there after this work was done?

10 A. No.

Q. That is all.

Alfred Wilson, being duly sworn according to law, on behalf of the respondent, on his oath, deposed and said:

Direct examination by Mr. Bird.

Q. Mr. Wilson, what is your business?

A. Salesman.

Q. Where do you reside?

A. Trenton.

Q. How long have you resided in Trenton?

20 A. Fifty years or fifty-two years.

Q. In what part of Trenton did you reside?

A. Well, up until the last three or four years, I resided at 697 Center street.

Q. Are you familiar with the structure known as the Ferry street wharf?

A. Yes, that wharf on January 22d of this year—

Q. You knew it?

A. Yes, sir.

Q. How long have you known that structure?

30 A. Well, quite a few years.

Q. Is it used or not for transportation purposes?

A. Not that I know of; no, sir.

Q. Do you know when it was last used as a wharf for the landing of steamboats plying between Philadelphia and Trenton?

A. Well, to my knowledge it has been fifteen or sixteen years.

Q. Do you know whether any boat, steamboat, has landed there last year or not?

A. Not to my knowledge. I wasn't up there when a boat landed. I knew the "Twilight" did go up there.

Q. How many times?

A. Only the once.

Q. When?

A. After the improvement of this channel.

Q. In 1904?

A. Somewhere around there, yes. 10

Q. What is the condition of that wharf?

A. The condition that I found this year when I landed there in a launch—very bad shape. There is no spring piling there, and the front of the wharf is very much dilapidated—wharf logs partially demolished by ice.

Q. Any part of it due to the elements other than ice?

A. I suppose the freshets—the wash of the water in front of it, and back of it, too.

Q. Due to wind and rain?

A. Yes, sir; conditions of water. 20

Q. What is the condition of the structure referred to here as the warehouse?

A. Well, I saw it there when I was there in January, but I didn't go through it—I walked by it.

Q. What was its general condition?

A. The outside appearance looked all right.

Q. Would it be practical to operate a boat—

Mr. Backes—Objected to.

Q. Have you had to do with the operation of boats?

A. Yes, sir; been on the river nearly all my life. 30

Mr. Backes—Sailboat or launch?

Witness—Sailing launch.

Q. Would it be practical to operate a steam yacht or naphtha launch, drawing four feet of water, to that wharf?

A. Only at high water.

Cross-examination by Mr. Backes.

Q. You say you landed your own boat there in January?

A. Small launch.

Q. How much water did it draw?

A. About two feet, I suppose.

Q. Have any difficulty? Landed in front of the wharf?

A. Yes, the river was very high—there was a freshet in the river.

Q. Have you been there since January?

A. No, sir.

10 Q. When were you on this wharf before January last?

A. You mean land at the wharf or around the wharf?

Q. Out in the river?

A. About five years ago.

Q. So all that you have testified to was from your observations made in January of this present year—observations of the place?

A. No, I have been up there in a yacht, and been around that neighborhood.

20 Q. But the facts that you have testified to now, as to the condition of the wharf, and the condition of the warehouse, are all from observations you made in January last?

A. Yes.

Q. When prior to January last, did you try to get to that wharf with a naphtha or steam launch?

A. I never owned those naphtha launches; I have sailed up there.

Q. We are confining you to a sailing launch. Did you ever make any effort to get there? To the wharf?

30 A. Yes—no.

Q. This wharf and the warehouse that you have referred to could be put in repair, ordinary repair?

A. Yes, sir; it could be put in repair; it would cost a lot of money.

Q. That is all.

C. Arthur Metzger, being duly sworn according to law, on behalf of the respondent, on his oath, deposed and said:

Direct examination by Mr. Bird.

Q. Mr. Metzger, you are a resident of the city of Trenton?

A. I am.

Q. And have been for how long?

A. Three and one-half years.

Q. Were you secretary to the Harbor Board of the city of Trenton?

A. Yes.

Q. I show you what purports to be a recommendation, 10 addressed to the Honorable Common Council of the City of Trenton, and purports to be signed by Frederick W. Donnelly, Clayton L. Traver, R. K. Bowman and Henry C. Moore, and attested by C. Arthur Metzger, as secretary. I ask you to identify that paper?

A. Yes, sir; that is the original.

Q. By reference to your minutes, can you tell me whether or not this paper was adopted by the Harbor Board?

A. I can. 20

Q. On what date?

Mr. Backes—I object to the offer or reference to the book handed to the witness.

Mr. Bird—Do you want me to prove the book?

Mr. Backes—Yes.

Q. I show you a book and ask you what that book is?

A. That is the minutes of the Harbor Board.

Q. And prepared by whom?

A. By myself.

Q. (By Mr. Backes.) Kept by you? 30

A. Yes, sir.

Q. Book in your custody now?

A. No, sir.

Q. When was it last in your custody?

A. At the time my office of secretary expired.

Q. When was that?

A. At the time commission government was adopted.

Q. Have you examined this book now presented to

you, to see whether it was the authentic record of the Harbor Board?

A. I can swear to that.

Q. That book is a loose-leaf book?

A. It is.

Q. The pages are not numbered, are they?

A. They are not.

Q. So that you can either take from or add to any sheets that may be required, or that you may deem necessary?

A. If you so desire.

Q. I ask you to examine that book and make sure that that is the book that left your possession, as secretary of the Harbor Board, and whether it is in the same condition as when you turned it over?

Mr. Bird—Are you content?

Mr. Backes—I am content, if he is satisfied that that book is in the same condition it was in when he turned it over to the Harbor Board.

20 Q. (By Mr. Bird.) Is that the authentic record of the doings of the Board of Harbor Commissioners?

A. It is.

Q. Is it in the same condition as it was when it left your hands?

A. So far as I can see; I haven't gone over it carefully.

[Witness examines minutes.]

Q. Referring to what purports to be the minutes of the meeting of April 28, 1911, I ask you to examine that
30 and state whether that is in the same condition it was when you prepared it?

A. (Witness produces what purports to be a typewritten copy of the minutes of the meeting of the Harbor Board of April 28, 1911, and says)—These records were dictated by me to the stenographer. They don't bear any authentication, nor are they signed by me, as secretary.

Mr. Backes—I object to them, because they are incompetent. They are a mere record at the best of the

dictation made by Mr. Metzger. They don't appear to be the minutes or records of the Harbor Board, and don't appear to be authenticated by the secretary, or any other official of the Harbor Board.

Q. Answer the question.

[Question repeated by examiner.]

A. It is.

Q. I now show you what purports to be a recommendation, addressed to the Honorable the Common Council of the City of Trenton, and purports to be signed by Fred-¹⁰erick W. Donnelly, Clayton L. Traver, R. K. Bowman, Henry C. Moore, attest C. Arthur Metzger, and ask you whether you can identify that paper?

A. I can.

Q. By reference to your minutes can you say whether or not that paper was considered at the meeting of the Harbor Board, held on the 28th day of April, 1911?

A. Yes.

Q. Can you state how it was considered?

Mr. Backes—I object unless the minutes show. 20

Mr. Bird—I am asking him from his minutes.

Q. What do the minutes show?

A. The minutes show that such a resolution was presented and adopted.

Mr. Backes—Read what the minutes say on that subject.

A. The attached list of properties, in the judgment of the board, were to be acquired immediately, and their value determined as follows. Then gives the list of properties, with their appraised value. And then follows this³⁰ recommendation—

Mr. Backes—It is admitted that this recommendation is the same as "A-1" annexed to the petition addressed to the Honorable Thomas W. Trenchard, Justice of the Supreme Court of New Jersey, for the appointment of commissioners in this cause.

[Witness continues]—Apparently nothing is here after that recommendation.

Q. Do you recall that meeting?

A. I do.

Q. Do you know whether this recommendation was considered?

Mr. Backes—I object.

A. Yes.

Q. In what manner?

Mr. Backes—Objected to, unless the records of that meeting, as shown by these minutes, show in what manner this recommendation was considered. I object to this witness testifying to anything that took place at that meeting that is not disclosed by the record.

A. It was read to the members of the board, and approved by them, and I was instructed to send a copy of it to the City Council.

Q. In consequence of that what else was done, if anything?

Mr. Backes—Objection on the same ground.

A. Following that the meeting adjourned.

20 Q. Did the meeting adjourn before this recommendation was signed?

A. No.

Q. Then, something further was done before adjournment was taken?

A. Recommendation, as adopted by the board, was signed at that time.

Q. Do you know the signatures of the members of the Board of Harbor Commissioners?

A. I do.

30 Q. I show you this paper, and ask you whether they are genuine signatures?

A. They are genuine signatures.

Q. This (indicating) is your signature?

A. Yes, sir.

Mr. Bird—I now offer the recommendation in evidence, and ask that it be marked.

[Marked *Exhibit P 1*.]

At this point counsel agreed that *Exhibit P 1* is the

recommendation addressed to the Common Council of Trenton, which has been hereinbefore referred to as "A 1."

Supreme Court Examiner.

Cross-examination by Mr. Backes.

Q. The recommendation which has been referred to, Mr. Metzger, was presented to the body?

A. Yes.

Q. Read to them?

A. Yes.

10

Q. Signed?

A. Yes.

Q. And after that the meeting adjourned?

A. Correct.

Re-direct examination by Mr. Bird.

Q. Was it read and signed before or after they had viewed the properties?

A. After.

Q. And was that all that was done?

A. That is all.

20

Frederick W. Donnelly, being duly sworn according to law, on behalf of the respondent, on his oath, deposed and said:

Direct examination by Mr. Bird.

Q. You are the Mayor of the city of Trenton?

A. Yes, sir.

Q. And have been for how long?

A. About twenty months.

Q. And prior to that were you a member of any official body of the city?

30

A. President of the Harbor Board of the city of Trenton.

Q. And for what length of time?

A. I should judge about two years and a half.

Q. Does that period cover the entire existence of that board?

A. It did.

Q. Have you made a study of water transportation?

A. I have studied water transportation in this country and abroad for the past fourteen years.

Q. You don't mean that you have been abroad for the purpose?

A. What is that?

10 Q. You don't mean that you have been abroad for the purpose of making these studies?

A. No.

Q. Are you a member of any organizations that have to do with the promotion of transportation by water?

A. I am president of the Trenton, Philadelphia and New York Deeper Waterways Association; president of the New Jersey Ship Canal Commission; vice president of the Atlantic Deeper Waterways Association, and vice president, representing the Atlantic seaboard, of the Na-
20 tional Rivers and Harbors Congress.

Q. You have already testified that you have made a general study of this subject?

A. Yes.

Q. Now, I ask you whether you have made a particular study of the Delaware river, between Philadelphia and Trenton, for the purpose of improving transportation facilities of that stream?

A. I have been navigating the Delaware river in various classes of boats for the past thirty years. For the
30 past ten years I have been making a thorough study of the commercial conditions, and depths and channel conditions of the Delaware river, between Trenton and Philadelphia.

Q. Are you particularly familiar with the channel conditions of the Delaware, between what is known as the Lalor street wharf and the Ferry street wharf?

A. Yes; know every bit of ground from observations, soundings, and from United States Government surveys and borings.

Q. What is the condition of that channel with respect to its adaptability to transportation?

A. There is no channel existing there at all at the present time, nor has any for the past sixteen or seventeen years, excepting in some places there may be more depth than there is in others, but no regular channel.

Q. It has been testified to on the part of the prosecutor that a part of this channel or stream is obstructed by what is termed a ridge or ledge of rock. What have you to say in respect to that, if you know? 10

A. I was aboard of the United States Government boring apparatus when the borings were made between Lalor street and the Pennsylvania railroad bridge at Ferry street. According to observations, and what I saw at the time, and from the government maps made since then, they are in a radius of 200 feet, the line adopted for the proposed channel by the government, the boring machine found no difficulty in reaching twenty-five feet through boulders, gravel, sand and clay. Occasionally, a boulder was discovered at a depth of seven to eight or nine feet, 20 but by moving the machine a few feet, there was no difficulty in getting down to twenty-five feet. At the Pennsylvania railroad bridge, at Ferry street, numerous borings were made from the shore to a distance of 400 feet out, in which no rock was found, nothing but boulders, gravel, sand and clay. This additional 200 feet investigation was made for the purpose of establishing a turning basin, for vessels to turn in. To show the absence of rock the three piers at the Pennsylvania railroad bridge, which covers a radius of about the same space, 30 in the construction of them, of which I was an eye-witness, they found no solid foundation, and they had to make concrete foundations.

Q. Are you familiar with the structure known or called the Ferry street wharf?

A. Yes, sir; continual visitor there.

Q. Do you know whether that is in use or not for transportation purposes?

A. It is not in use for transportation purposes, and as a shipper of merchandise by water between Trenton and Philadelphia, it has not been in use for a period of over sixteen years.

Q. Do you know the condition of that wharf?

A. I have visited the wharf almost weekly recently with different parties, and the wharf itself is in a dilapidated condition, and not fit for any use whatsoever in its present condition. The warehouse has been moved back
10 from its original location a distance of about fifty yards, temporarily probably. The front of it is gone. The flooring is more or less demolished; the building is wrenched all out of shape. And from my personal knowledge, the building has not been used for any purpose whatsoever.

Q. Have you had to do with the operation of motor boats?

A. I have operated motor boats on the Delaware river from a draft of eighteen inches to twenty-four inches for
20 a number of years.

Q. Have you ever operated a motor boat having a draft of four feet?

A. Yes.

Q. In your opinion, as an experienced navigator, would it be possible to run a steamboat having a draft of four feet, to the Ferry street wharf?

A. It would be impossible to operate a boat of any kind, drawing four feet of water, between Lalor street and Ferry street, and a great risk at normal high water.
30 I have been in the past ten years only to the Ferry street, or to the Pennsylvania railroad bridge, on two occasions, in my boat, which drew four feet of water, and then at an extreme high tide. I have never been able to land at Ferry street. In fact, it would be impossible to get alongside of the dock.

Q. As a result of your study, what have you to say respecting the operation of a steamboat line for commercial

purposes, by adapting the schedule to the tide? Would that be considered practical or not?

A. One of the reasons that the ferry street wharf was abandoned——

Mr. Backes—I don't think you should speak of one of the reasons. How can you tell what reason actuated the company? You were not a member of the company, were you?

Witness—I was a shipper.

Mr. Backes—I object. 10

[Question repeated by examiner.]

A. The uncertainty of arrivals of shipments doesn't make it a good commercial proposition.

Q. Have you observed the steamboats operating between Philadelphia and Trenton on the Delaware?

A. I have.

Q. Where do those boats land at Trenton?

A. At the foot of Lalor street, which location has been the terminal of the steamboats coming to Trenton for the past sixteen years. 20

Q. Have you ever known of any boats during the past sixteen years to land at the Ferry street wharf?

A. I knew of the "Twilight," I think the name was, that landed there once on a very high tide, with a semi-freshet in the river, with a load of lumber. Occasionally, what was known as the little "Trenton" landed there, but the operation wasn't a success, and they abandoned it and went back to Lalor street.

Cross-examination by Mr. Backes.

Q. You, as head of the city, are very much interested 30 in deeper waterways and water transportation of the city?

A. Yes, sir.

Q. And you were so before you became Mayor, and while you were a member of the Harbor Board?

A. Yes.

Q. And as a member of the Harbor Board you, as a

member thereof, deemed the project of deepening the Delaware river, from Lalor street to Ferry street, a favorable and feasible proposition?

A. We did, and were backed up with our opinion by the United States Government engineers.

Q. And you haven't had any occasion to change your opinion up to the present time, that it is a feasible plan to so deepen the channel, the present channel, of the river in order to make the Ferry street wharf and the
10 surrounding property a landing place of steamboats?

A. The river being a public highway—

Q. Answer the question, if you can?

A. Feasible if the proper parties would improve it, which is the United States Government; it is their property.

Q. In view of what has been testified by you and the other witness, Mr. Thompson, this morning, that the government had adopted the project and plans, and had appropriated the money to prepare a channel to this point
20 known as Ferry street, you still say that that scheme is a feasible one.

A. If the work is carried on by the United States Government.

Q. Is there any question about the government carrying on the work?

A. Yes.

Q. What is the question?

A. Under the congressional act, as approved of by the War Department, and then by Congress, that the \$164,
30 000 for the twelve feet channel, 200 feet wide, with a turning basin of 400 feet, would be carried out, provided the city of Trenton provided terminals commensurate with the present and prospective needs of the city of Trenton, and that we provide a place for the dredging.

Q. Did the government limit the city of Trenton to provide any particular property?

A. No.

Q. Did they limit you to the quantity of property that you were to furnish?

A. No.

Q. Did they designate as to the frontage or the extent of the property that they wanted you to furnish?

A. The city designated to the government the property it would acquire, provided they improved the channel.

Q. What was that property that the city designated it would acquire?

A. All of the unimproved property reaching from the Pennsylvania railroad bridge to the Riverview cemetery, the end of the city line. 10

Q. The entire river front of the city?

A. The unimproved.

Q. What do you mean by unimproved property?

A. I mean that the immense plant of the American Bridge Company was exempt, and that the Kuser plant, which are going industries, were exempt. But it was provided that a street was to be established in front of these plants, which no doubt would become a public terminal in time.

Q. Was the property belonging to the Delaware River Transportation Company exempt? 20

A. Not the upper property, at Ferry street.

Q. The lower property?

A. I can't say whether that was included in the list of resolutions or not.

Q. Did the government make it obligatory to acquire any particular property before the appropriation would become effective?

A. The penalty is that we should provide property that would be commensurate with the present and prospective needs of the city of Trenton. 30

Q. What was deemed by you, representing the city, if you did, and by the government, to be commensurate and to be necessary for its present needs?

A. The key to the whole situation—the property between Ferry and Federal streets, on the water front.

Q. And particularly the property of the Delaware River Transportation Company?

A. Yes, at that point.

Q. Why was the property of the Delaware River Transportation Company designated?

A. Because it would be impossible to carry out the tentative plans for the development of the port of Trenton, as adopted by the Harbor Board, and approved by the Common Council, and submitted to the government, unless we acquire all the property between Ferry street and Federal street.

10 Q. What is the distance between Ferry street and Federal street?

A. I should judge about 800 to 900 feet.

Q. And do you mean to say that the government made it obligatory upon the city to acquire that entire frontage?

A. The city of Trenton pledged itself to acquire that frontage.

Q. What is the penalty, what will be the penalty, if this land is not acquired?

20. A. I can't answer that question. I can answer that, Mr. Backes. I don't think that we will meet with the penalty that has been prescribed by Congress, unless we do acquire that piece of land, because it will be impossible to develop a modern terminal there without that land, to conform with our plans.

Q. But if these tentative plans cannot be carried out by the city of Trenton, the government will go on with the work?

A. There is a possibility that they might.

30 Q. But the work has been authorized, has it not?

A. Yes.

Q. And the government hasn't held you up to show, as an evidence of good faith on the part of the city, that you have acquired any land?

A. I think the government has faith in the Harbor act which we are working under, and we have already acquired a small piece of land under that act, and that a pledge made by the city of Trenton to develop this piece

of land is what has made it possible, and that they are going ahead with faith in the city.

Q. You have acquired some frontage on the river?

A. Small piece.

Q. How much?

A. I should judge about 160 feet.

Q. You have a street or two opening on the river?

A. Sixty feet of street—fifty-five feet of street.

Q. And in your opinion as an expert, now, isn't that sufficient for landing purposes for the city? 10

A. No, that wouldn't take care of one steamboat company.

Q. Hasn't the Pennsylvania property that you acquired a frontage of nearly 250 feet on the river?

A. I can't say exactly. It is a small piece; I should think the street is fifty-five feet wide, and I think the frontage of the Pennsylvania Railroad Company is 150 feet or 170 feet.

Q. If the land between the railroad bridge and Federal street is between 800 and 900 feet, and the Delaware 20 River Transportation Company owned about 400 feet, wouldn't the rest of the property that you may acquire in there suffice for the purpose?

A. It wouldn't conform to the plans the city has adopted.

Q. The city isn't tied fast?

A. Yes, morally.

Q. Legally?

A. By the resolution of Common Council.

Q. It can be undone by another resolution? 30

A. I suppose so.

Q. As a member of the Harbor Commission, you adopted a resolution to acquire the entire river front?

A. No, excepting the unimproved property.

Q. What is the distance on that river front?

A. It is commonly known as a mile from the city line to the Pennsylvania railroad bridge.

Q. Could you not within that distance acquire ample property for your present and future needs?

A. The part from the city line to the American Bridge Company plant is not at all adapted for the present needs, excepting at an enormous expense; depression of streets and a great bluff exists along there. And the only available property that is practical for present needs is the property between Federal street and Ferry street, which is low.

Q. And particularly the property of the Delaware River Transportation Company?

10 A. Yes.

Q. Because of its general characteristics as a landing place?

A. Because with the expense of \$164,000 that the government is going to, with \$5,000 for annual maintenance, it will take to elevate that property, and to build proper terminals there, and the demands for modern vessels for transportation, an investment of \$50,000 to \$75,000, which the city proposes to go into, in building terminals.

20 Q. Do you know Colonel Kuhn?

A. Yes.

Q. He is the official in charge of this work?

A. He is the army officer in charge of this district.

Q. You have had some conferences with him?

A. Yes.

Q. Since the acquisition of some of this property?

A. Yes.

Q. And for the purpose of satisfying him of the good faith of the city?

30 A. Yes.

Q. Hasn't he assured you that the property that you have now, or acquired, will suffice his conditions?

A. He hasn't.

Re-direct examination by Mr. Bird.

Q. Did you have a conversation with Senator Perkins?

A. Many of them.

Q. Particularly with reference to the practicability of this scheme?

A. Yes.

Q. State that conversation, please?

A. Mr. Perkins, that, at a conference recently held when we were negotiating in a peaceable way for the purchase of this property, that they had endeavored to improve the channel up there, and had spent a great deal of money, and they had failed in their purpose. He also said still further that there were so many rocks and so many ledges up there, that it would take, I guess, forty or fifty years to dig a channel up there, and they were satisfied to do business at Lalor street if we would improve conditions down there for them. 10

Mr. Bird—I offer in evidence these photographs of the wharf property, eight in number, and ask that they be marked.

[Photographs marked *Exhibits P 2, P 3, P 4, P 5, P 6, P 7, P 8 and P 9.*]

Mr. Bird—That is all.

Mitchel B. Perkins, being recalled on behalf of the prosecutor, deposed and said: 20

Direct examination by Mr. Backes.

Q. You have just heard the conversation detailed by the Mayor a moment ago on the stand. Did such a conversation take place?

A. It did not, to my knowledge.

Q. If so, what did take place?

A. The conversation that I had with Mayor Donnelly was to the effect that we had endeavored and had spent a large sum of money, and we hadn't given up hopes of getting to Ferry street; that we had been working with the United States Government to enlist them in our effort to get there, and we had accomplished that purpose, and that the government was now working, and we didn't want to forfeit our property in any way, shape or form; that it was our expectation of landing at that property as soon as the channel was made available. 30

Q. Is that the extent of your conversation with the Mayor?

A. I think so.

No cross-examination.

The further taking of depositions was then adjourned to a day to be fixed.

Continuation of the taking of depositions in the above-entitled cause, before me, Harry Heher, a Supreme Court Examiner of the State of New Jersey, on Tuesday, the thirteenth day of May, nineteen hundred and thirteen, at three o'clock in the afternoon, at the office of
 10 the City Counsel of the city of Trenton, in the City Hall, in said city of Trenton, in the State of New Jersey, pursuant to agreement between counsel for the respective parties.

Supreme Court Examiner.

Appearances—

Peter Backes, for prosecutor.

Charles E. Bird, City Counsel, for respondent.

Frederick W. Donnelly, being recalled on behalf of the respondent, deposed and said:

20 Direct examination by Mr. Bird.

Q. On your direct examination you testified that the Ferry street wharf was in a dilapidated condition. How long has that condition existed to your knowledge?

A. During the period that the wharf was occupied by the "Edwin Forrest" landing there, the wharf consisted of a bulkhead along the front and surfacing on the ground level and a warehouse. After the "Forrest" stopped landing there it wasn't used for any purpose whatsoever, excepting for the boatmen and the owners
 30 of small craft in the neighborhood to land, and the whole outfit was allowed to deteriorate until about seven or eight years ago, when some temporary repairs were

made and a shed erected. But after these improvements the wharf was never used by its owners, excepting on one or two occasions on a very high river, and it has been in a state of deterioration since the temporary improvements were made until the condition you find it in to-day.

Q. When you speak of the temporary improvements you mean the improvements that were made during the year 1903 or 1904?

A. Yes, it was 1903, the year of the big freshet—no, 10 the improvements were made in 1904, the following year.

Cross-examination by Mr. Backes.

Q. Weren't these improvements made by the Upper River Navigation Company or the Delaware River Navigation Company?

A. They were made by the owners of the wharf at that time.

Q. They were made at the time they did the dredging in the river—that same year?

A. They made the improvements at the time they at- 20 tempted to dredge a channel through, which wasn't a success.

Re-direct examination by Mr. Bird.

Q. Then the present condition of that wharf isn't the result of a freshet?

A. I should say it was the result of absolute neglect and abandonment.

Re-cross examination by Mr. Backes.

Q. This deterioration of the wharf property, is it not due to the usual decay and natural decays, and standing 30 exposure to the elements?

A. Of course, it is due to natural decay, and it is due to the fact that absolutely no expense and no effort has been made to improve it since they failed to go up there with their boats.

Q. You say there have been no repairs made on that wharf since 1904?

A. Not to my knowledge.

Q. Do you know that there is a watchman who has charge of that wharf?

A. (No answer.)

Q. Do you know whether there is or is not a watchman in charge of that wharf?

A. I know that there is a man who—no, I don't know.

10 Q. That is all.

Stipulations.

It was thereupon stipulated and agreed by and between the counsel for the respective parties:

That at a regular meeting of the Common Council of the city of Trenton, held on May 2, 1911, the resolution annexed to the petition for condemnation presented by the respondent to the Honorable Thomas W. Trenchard, Justice of the Supreme Court, and designated as *A 2*, was introduced and adopted; that an examination
20 of the original resolution failed to disclose any approval endorsed thereon by the Mayor of Trenton.

That at the same meeting, the resolution annexed to the said petition for condemnation presented by the respondent to the Honorable Thomas W. Trenchard, Justice of the Supreme Court, and designated as *A 3*, was introduced and regularly passed and approved by the Mayor of Trenton.

That the city of Trenton issued and sold bonds under the authority of the resolution annexed to the said petition for condemnation, and referred to therein as *A 3*,
30 and that the proceeds were placed to the credit of the Harbor Board, as appears by Ledger 18, 1911-1912, on page 99, produced by City Treasurer Evans, as follows:

Under date of May 23, 1911, credit, \$1,000; under date of July 3, 1911, by cash, bonds, \$49,000, and premiums, \$3,938, making the total amount realized on the bond issue, \$53,938; that the sum of \$5,128.54 has been expended, leaving a balance at the present date of \$48,809.46.

That at an election held on the 20th day of June, 1911, the provisions of an act of the Legislature, entitled "An Act relating to, regulating and providing for a government of cities, towns, boroughs, and other municipalities within this State," approved April 25, 1911 (commonly called the "Walsh" or "Commission Government" act), were adopted by the legal voters of the city of Trenton, and became operative therein. 10

That on the 22d day of August, 1911, the Board of Commissioners elected under the authority of the above-mentioned act, met and organized pursuant to law.

That at a regular meeting of the Board of Commissioners of the city of Trenton a resolution was introduced and adopted, a true copy of which is annexed to the petition for condemnation presented by the respondent to the Honorable Thomas W. Trenchard, Justice of the Supreme Court, designated in said petition as A 4. 20

That by a resolution of the Board of Commissioners of the city of Trenton, adopted on September 6th, 1912, lots 7 and 10, on page 66 of the City Atlas, belonging to the Camden and Amboy Railroad Company, were authorized to be acquired, and were subsequently acquired by condemnation on the 15th day of November, 1912. 30

That at a regular meeting of the Board of Commissioners of the city of Trenton, held on the 11th day of September, 1912, the Director of Parks and Public Property and the Engineer of Streets were directed to treat with the owners of lots Nos. 48, 2, 68, 66, 58, 71R, 72R, 73R, 74R, on page 77 of the City Atlas, the property of the Delaware River Transportation Company,

as well as with the owners of other properties fronting on the Delaware river.

That at a regular meeting of the Board of Commissioners of the city of Trenton, held on the 26th day of September, 1912, Frederick W. Donnelly and William F. Burk reported an inability to agree with the Delaware River Transportation Company for the purchase of lots Nos. 3, 5, 6, on page 66 of the City Atlas; and that a true copy of said report is annexed to the said petition
10 for condemnation presented by the respondent to the Honorable Thomas W. Trenchard, Justice of the Supreme Court, and is therein designated as A 5.

That at a regular meeting of the Board of Commissioners of the City of Trenton, held on the 14th day of October, 1912, the sum of \$4,500 was authorized by the said board to be offered to the Delaware River Transportation Company for lots Nos. 3, 5, 6, on page 66 of the City Atlas; that a true copy of said resolution is annexed to the aforesaid petition for condemnation, and
20 is designated therein as A 6; and that pursuant to the direction contained in the said resolution, such offer was made to the said Delaware River Transportation Company and refused.

That by a resolution of the Board of Commissioners of the city of Trenton, adopted on the 27th day of December, 1912, the legal department was authorized and directed to commence condemnation proceedings to acquire lots Nos. 3, 5, 6, on page 66 of the City Atlas, belonging to the Delaware River Transportation Com-
30 pany, and that, pursuant to the directions of said resolution, these proceedings were commenced.

That the respondent, the Inhabitants of the City of Trenton, now has no right, title, interest, ownership, or possession in any dock, pier, wharf, basin, slip, bulkhead, or other structure, improvements or warehouses fronting on the Delaware river in the city of Trenton, nor in any land under water, nor in any riparian land, nor in any upland along the water front in said city, available for

the construction or maintenance of piers, wharves, docks, slips, bulkheads, retaining walls, warehouses, or other similar structures, excepting only lots Nos. 7 and 10, on page 66 of the City Atlas, which comprises unimproved land on the water front, and which has been acquired from the Camden and Amboy Railroad Company by condemnation proceedings, as will appear by a map or tracing showing the land of the Delaware River Transportation Company and the land acquired by the respondent from the Camden and Amboy Railroad Company, which map or tracing is admitted in evidence, by consent, and is marked *Exhibit P 10*.

And it was further stipulated and agreed between the respective counsel:

That *Exhibit P 2* is a front view of the Ferry street wharf of the said Delaware River Transportation Company, from the river.

That *Exhibit P 3* is a view of the said Ferry street wharf, looking south.

That *Exhibit P 4* is a view of the said Ferry street wharf, looking north.

That *Exhibit P 5* is another view of the said Ferry street wharf, looking north.

That *Exhibit P 6* is a front view of the said Ferry street wharf, from the river.

That *Exhibit P 7* is a view of the said Ferry street wharf, looking west.

That *Exhibit P 8* is a view of the said Ferry street wharf, looking northwest.

That *Exhibit P 9* is the warehouse of the said Delaware River Transportation Company on the said wharf at Ferry street.

That *Exhibit P 10* is a map of lots belonging to the city and those sought to be condemned belonging to prosecutor.

Both parties here rested.

I hereby certify that all of the foregoing depositions were taken and sworn to before me, and that the same were taken stenographically by me, personally, and were then reduced to writing upon the typewriting machine by me, personally, and that they accurately state the evidence given in said cause.

HARRY HEHER,
Supreme Court Examiner.

New Jersey Supreme Court.

OPINION IN CASE No. 1.

PARKER, J. The writ brings up an order of Mr. Justice Trenchard, in a course of procedure regulated by the Eminent Domain act of 1900 (*P. L.*, p. 79; 2 *C. S.* 1910, p. 2182), appointing commissioners to ascertain the amount of compensation to be paid to prosecutor for the taking of lands, partly upland and partly wharf property on the Delaware river in the city of Trenton. The power of the city to exercise the right of eminent domain respecting this property is rested on a statute of 1911 (*P. L.*, p. 233), authorizing the appointment of harbor 10 commissioners in cities fronting on navigable waters, &c. The constitutionality of the act is supported by respondent; but as it is not attacked by counsel for prosecutor, we have not considered it. The adoption by Trenton of what is known as the "Walsh act" (*P. L.* 1911, p. 462) as a city charter seems to have resulted in the assumption by the city commission, under that act, of the powers and duties of the harbor commissioners under the other act, and no question is raised on this score.

1. The first point made is that the property of prose- 20 cutors sought to be taken consists wholly or in part of wharf property, and that the Harbor Board act confers no power to acquire such property. Bearing in mind that the general scheme of the act appears to be the municipal acquisition, control, improvement, and exploitation of water front property on navigable waters, we note that section 4 of the act gives the board control of all water front property at any time belonging to the city, including docks, wharves, &c., and the power to improve

by the construction of wharves and similar structures, and to raise revenue by leasing such property. The power of eminent domain is conferred by section 7, and covers the acquisition of "any upland or riparian land or rights, or lands under water, or any estate, rights, title or interest therein, within the city, suitable or convenient in the opinion of said board for use or improvement in any manner authorized by this act." Prosecutor takes the narrow view that this language does not
 10 embrace a wharf. We are unable to concur in this view. Whatever may be the precise definition of a wharf, and there are many of them (*Bouv. Law Dict., tit. "Wharf"; 40 Cyc. 894; 30 Enc. Law [2d ed.] 469*), or the precise sense in which the word is used in this act (*cf. Wharf act, 4 C. S. 1910, p. 5856*), wharves are classified in section 4 as "water front property," and there can be no question that they are embraced in the generic word "land" in section 7, which speaks, as we have seen, of
 20 "upland or riparian land or rights, or lands under water" (*Smith v. New York City, 68 N. Y. 552; see State [Bentley, prosecutor] v. Jersey City, 25 N. J. Law 530*). So if we imagine a "wharf" beginning on the upland, crossing the ripa, and supported by piles or masonry resting in land under water, it may partake of all three characteristics of this statutory classification, and still be well within its purview. In fact, as appears by the photographs put in evidence, the "wharf" in question
 30 perhaps at all tides, and backed by filling, on which stands a warehouse. It does not appear to project beyond the ordinary shore line; but, be this as it may, the whole property, natural and artificial, is land, and as we have said, embraced in the statutory terms and subjected to the power of condemnation. We deem the first point to be without substance.

2. The next argument is that the prosecutor is a common carrier, and therefore that the act should not be held to apply to its property unless it does so in clear

and unmistakable terms. Counsel cites no authorities in support of this proposition, and we know of none. If correct, it would mean that if a city had general authority to acquire land for a city hall, it would be powerless to condemn property that happened to be owned and used by an express company as its office. We think the proposition answers itself.

3. Next it is urged that the harbor board "did not act in its corporate capacity" in recommending the acquisition of this land. The assumption appears to be 10 that it is a corporation, but we think this is unfounded. An examination of the act, so far from indicating that a corporation was created, shows on the contrary that it is only a municipal agency; that it recommends to the city finance board the acquisition of property, but the recommendation is that the property "be acquired by said city;" any purchase is "on behalf of said city," and the condemnation, if there be one, is "in the name and on behalf of said city." There is no provision in the act laying down any form of procedure for a recommenda- 20 tion by the board, and so there is no legal necessity for action by that of a board of directors. The return shows a written recommendation for the acquisition of this property, signed by every member of the board. This is amply sufficient to comply with the statute in that regard.

4. The next point relates to the sufficiency of the appropriation by the city commission. Section 7 says that upon the recommendation just discussed, if the (finance) "board or body shall by resolution determine that the 30 same should be acquired, and shall make an appropriation of the estimated cost, or any part thereof, for said purpose" the board may proceed to purchase or condemn in the name of the city. The estimated cost of all the land recommended for acquisition was about \$75,000; the amount appropriated by the finance board was \$50,000. The argument seems to be that the appropriation, if not enough for the whole, should be specifically made applicable to a designated part of the property to be

acquired, but we find no such idea in the language of the act, which seems to be intentionally different from section 76 of the School act of 1903. *Wendel v. Board of Education*, 76 *N. J. Law* 499; 70 *Atl. Rep.* 152.

5. Again, it is argued that the recommendation does not comply with the statute as to its contents. Section 7 says that when the board shall deem it advisable to acquire lands, &c., "suitable or convenient in the opinion of said board for use or improvement in any manner authorized by this act," said board may recommend, &c. 10 The recommendation said that in accordance with the provisions of an act (giving its title in full) the undersigned members of the board "under and by virtue of the provisions of said act, do hereby recommend that it is advisable in the opinion of said board to acquire the lands," &c., designating them, "for use and improvement under said act." It is claimed that the recommendation falls for want of a recital that the land in question is suitable or convenient in the opinion of said board, &c. 20 But manifestly, as we think, the making of the recommendation implies an opinion of suitability and convenience.

6. Next the resolution of the finance body (the council) is attacked. The act provides that upon the recommendation, "if said board or body (the finance body) shall by resolution determine that the same should be acquired and shall make an appropriation," &c. The resolution challenged recited the recommendation fully, and then proceeds: Therefore be it "resolved, that it is 30 the sense of this body that the same should be acquired"—and then went on to authorize purchase or condemnation, and to appropriate as already stated. It is said that this resolution is not a determination that the land shall be acquired; but this is not the language of the act. The statutory resolution is that it should i. e., ought to, be acquired, and such a resolution is before us; for to say "it is the sense of this body that the same should be acquired" is as effective as to say "resolved that the same should be acquired." Both are expressions of opinion; and no

more than that (on this phase of the case) is called for by the act. The cases of *Northern R. R. Co. v. Englewood*, 62 *N. J. Law* 191; 40 *Atl. Rep.* 653 and *Dashe v. Freeholders*, 79 *N. J. Law* 431; 75 *Atl. Rep.* 765, are not in point; the first involved alternative action by the public body, and the second was under a statute expressly requiring a determination that a bridge was a public necessity.

7. We see no merit in the point that the act of 1911 is inapplicable unless the city already owns some water 10 front of the character described in the act, and deem it unnecessary to discuss.

8. Nor is there substance in the claim that in fact part of the property recommended was not suitable for the purpose of the act. Assuming this for the sake of argument, it is the opinion of the harbor board as to suitability, and not aliunde proof on the subject, that underlies the jurisdiction to purchase or condemn.

An examination of all the arguments advanced leads us to the conclusion that there is no merit in any of them. 20 The proceedings under review are accordingly affirmed.

Filed March 10, 1914.

NEW JERSEY SUPREME COURT.

Delaware River Transportation Company, <i>Prosecutor,</i> <i>v.</i> Inhabitants of the City of Tren- ton, <i>Defendant.</i>	}	On Certiorari. Rule affirming Proceedings.
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The court having inspected the order made on the 7th day of March, 1913, by the Honorable Thomas W. Trenchard, Justice of the Supreme Court, naming and

appointing three disinterested freeholders residing in the county of Mercer, to examine, appraise and fix the compensation of the prosecutor and certain other persons or corporations for the taking of wharf, lands and property belonging to the said prosecutor by the defendant to be used for the purpose of improving the water front of the city of Trenton, and other proceedings removed by the writ in this cause, and having heard the argument of respective counsel and having duly considered the same,
10 and the reasons filed herein,

It is ordered that the said order and proceedings be and they are in all things affirmed, with costs to the defendant to be taxed.

Entered March 10, 1914.

On motion of

CHARLES E. BIRD,
Attorney.

NOTE.

20 After the entry of the rule affirming the proceedings in the foregoing case was entered, a further application was made to the Honorable Thomas W. Trenchard, justice of the Supreme Court, by the prosecutor for a writ bringing up for a review the following resolution of the commissioners, and upon hearing the counsel of the respective parties, said justice did on the 30th day of April, 1914, grant to the prosecutor another writ of certiorari, a copy of said writ (which is marked case No. 2) is as follows:

Filed March 20th, 1914.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Delaware River Transportation
Company,
Prosecutor and Appellant.
v.
Inhabitants of the City of
Trenton,
Respondents and Appellees. } Notice of Appeal.

10

To Charles E. Bird, Attorney of Respondents and Appellees:

Take notice, that the prosecutor appeals from the whole of the judgment entered in this cause in the New Jersey Supreme Court on the following grounds:

1. That the judgment should have been for the Prosecutor, and not for the Respondent.

2. The Common Council did not determine to acquire prosecutor's land (Resolution A-2), but only resolved that it was the sense of said body that the same should 20 be acquired. The resolution of said Common Council attempted to delegate to said Board of Harbor Commissioners the power to purchase or otherwise acquire the lands in the annexed schedule referred to, or such parts thereof that they might be able to acquire. The resolution placed the determination as to the parcels to be acquired upon the Harbor Board instead of Common Council, which was the only body that could make such determination.

3. The resolution of the Common Council authorizing 30 the issue of \$50,000 of harbor improvement bonds is only an authority to the treasurer to issue and make sale of said bonds pursuant to the authority of the Harbor Board act, and the placing of the avails of such issue to the

credit of the Harbor Board was not such appropriation as required by the statute.

4. No fund was appropriated by the Common Council of the City of Trenton to the Board of Harbor Commissioners for the purpose of purchasing or condemning the prosecutor's land.

5. The direction of Common Council to the treasurer to issue bonds by the treasurer, and the direction of the Common Council of the City of Trenton to the treasurer
10 and to place the avails of said bonds issued to the credit of said Harbor Board Commissioners, was not an appropriation.

6. The recommendation, signed by the individual members of the Board of Harbor Commissioners, is that the council acquire the whole of the water frontage on the Delaware River from the railroad bridge to the city line. The estimate cost is \$73,000. This is the recommendation of the individual members of the board. No corporate or board action is shown.

20 7. No estimate of the cost of acquiring prosecutor's property, affected by these proceedings, was made by the Board of Harbor Commissioners in the recommendations submitted by the said board to the Common Council of the City of Trenton, which was the body having charge and control of the funds of said city.

8. The prosecutor is a common carrier engaged in interstate commerce in the transportation of goods and persons between points in the State of Pennsylvania and New Jersey, and the property of the prosecutor which is
30 sought to be taken under these condemnation proceedings, is a wharf and warehouse property and is an instrument used by the prosecutor in, and necessary to, the performance of its duties as such common carrier engaged in interstate commerce, and the taking of such property from the prosecutor by the inhabitants of the City of Trenton would be an interference with interstate commerce.

9. The Common Council of the City of Trenton, which was the body having charge and control of the finances

of said city, made no determination as to what part of the property recommended to be acquired by the Board of Harbor Commissioners of said City of Trenton, at a total cost of \$73,490, should be acquired by said Board of Harbor Commissioners although said Common Council did not appropriate the whole amount of said cost of acquiring the property recommended by the said Board of Harbor Commissioners to be acquired for the use of said city.

10. The property of the prosecutor which is sought to be taken by condemnation under these proceedings is a wharf or dock and warehouse of the prosecutor, constructed for and used as an instrument in interstate commerce by the prosecutor which is a common carrier engaged in the transportation of persons and goods to and from points in the States of Pennsylvania and New Jersey, and said property is impressed with the nature, character and functions of a public utility, and as such is not within the provisions of the act under which the condemnation proceedings are taken, since the authority conferred by statute is to acquire uplands and riparian rights and lands under water. 10

11. The Board of Harbor Commissioners recommended that the entire river front property within the City of Trenton lying below the bridge of the Pennsylvania Railroad Company should be acquired for harbor purposes.

12. The act authorizing the appointment of the Board of Harbor Commissioners, &c., approved April 15th, 1911 (*P. L. 1911, p. 233*), is unconstitutional, in that it embraces more than one object, and for other reasons. 30

13. Said act does not authorize the acquisition of either upland or riparian land or rights or lands under water or any estate, rights, title or interest therein, except for use or improvement in connection with water front property already belonging to a city and contiguous thereto.

14. The property of the prosecutor is already devoted to public use, and there is no express authority in said act to condemn property so devoted.

15. The order brought up for review is in divers other respects erroneous and contrary to law. 40

16. The act of the legislature under which said condemnation proceedings were started is unconstitutional.

PETER BACKES,

Attorney of Prosecutor and Appellant.

Writ No. 2.

HARBOR BOARD ACT.

Filed May 4, 1914.

NEW JERSEY SUPREME COURT.

10	Delaware River Transportation Company,	<i>Prosecutor,</i>	}	Writ of Certiorari.
	<i>v.</i>			
	Inhabitants of the City of Trenton, ton,	<i>Respondent.</i>		

State of New Jersey, to wit: To Hon. Thomas W. Trenchard, The Inhabitants of the City of [L. s.] Trenton, Charles A. May, Harry A. Ashmore and Gardner H. Cain, Commissioners,
20 and George R. Robbins, Clerk of the County of Mercer.

We being willing for certain reasons to be certified of an order made on this 6th day of March, 1913, by Hon. Thomas W. Trenchard, justice of the Supreme Court, naming and appointing Harry A. Ashmore, Charles A. May and Gardner H. Cain, three disinterested freeholders, resident of the county of Mercer, to examine, appraise and fix the compensation to the Delaware River Transportation Company, the Fidelity Trust Company, the New Jersey Trust Company, and the Wilson &
30 Stokes Lumber Company for the taking of the wharf, lands and property belonging to the said Delaware River

Transportation Company by the Inhabitants of the City of Trenton to be used for the purpose of the improvement of the harbor and water front of the City of Trenton, and to assess the damages by reason of the taking of the same.

We do command you that the said order and all petitions, resolutions, ordinances and other proceedings upon which said order is based, together with all things touching and concerning the making of said order by said justice of the Supreme Court, together with a resolution 10 adopted by the said Commissioners on April 28th, 1914, that the Commissioners proceed to determine the value of the prosecutor's property, as fully and entirely as before you they remain to our justice of the Supreme Court of Judicature, at Trenton, on the 4th day of May, 1914, you certify and send, together with this writ that therein may be done what of right, and according to the laws of this state should be done.

Witness, William S. Gummere, Esquire, Chief Justice of our Supreme Court, at Trenton, this 30th day of 20 April, 1914.

WM. C. GEBHARDT,
Clerk.

PETER BACKES,
Attorney.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court.

The record and proceedings touching and concerning an order made on the sixth day of March, nineteen hundred and thirteen, by Hon. Thomas W. Trenchard, 30 Justice of the Supreme Court, naming and appointing Harry A. Ashmore, Charles A. May and Gardner H. Cain, three disinterested freeholders, resident in the County of Mercer, to examine, appraise and fix the compensation to (be paid to) the Delaware River Transportation Company, the Fidelity Trust Company, the New Jersey (West Jersey) Trust Company, and Wilson &

Stokes Lumber Company, for the taking of lands and property belonging to the said Delaware River Transportation Company, by the Inhabitants of the City of Trenton; and all petitions, resolutions, ordinances and other proceedings upon which said order is based, together with all things touching and concerning the making of said order by said Justice of the Supreme Court; as well as a resolution adopted by the said commissioners on the twenty-eighth day of April, nineteen hundred and four-
 10 teen, that the commissioners proceed to determine the value of the prosecutor's property; as fully and entirely as before us they remain.

THOMAS W. TRENCHARD,
 THE INHABITANTS OF THE CITY
 OF TRENTON.

EDWARD W. LEE,
*Acting Mayor of the City of
 Trenton.*

G. H. CAIN,
Chairman of Commissioners.

20

ATTEST:

FRANK THOMPSON,
 [SEAL] *City Clerk.*

GEO. R. ROBBINS,
Clerk of the Court.

Return to the Writ.

Includes—

1. Affidavit of Gardner H. Cain, Harry A. Ashmore and Charles A. May, taken on March 13th, 1914, before Henry M. Stratton, Notary Public of New Jersey.
- 30 2. Order supplementing the order appointing Commissioners, made March 30th, 1914, fixing from April 6th to April 20th, 1914 (by a subsequent order the time has now been extended to November 1st, 1914), for the return of the Commissioners.

The return also shows service of the following notice:
 On the Delaware River Transportation Company; The

Fidelity Trust Company, Trustee; The West Jersey Trust Company, Trustee; Wilson & Stokes Lumber Company.

BEFORE HONORABLE THOMAS W. TRENCHARD, ONE OF THE JUSTICES OF THE SUPREME COURT OF NEW JERSEY.

In the matter of the application of "The Inhabitants of the City of Trenton" for the appointment of commissioners to fix the compen- sation to be paid for the taking of Lots Nos. 3, 5 and 6, page 66 of the City Atlas, standing in the name of the Delaware River Transportation Company, neces- sary for the improvement of the river front.	}	Notice of Meeting of Commissioners.	10
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To the Delaware River Transportation Company, The Fidelity Trust Company, Trustee, The West Jersey Trust Company, Trustee, Wilson & Stokes Lumber Company, Judgment Creditor: 20

TAKE NOTICE:

That Gardner H. Cain, Charles A. May and Harry A. Ashmore, three disinterested freeholders, resident in the County of Mercer and State of New Jersey, have been appointed by the Hon. Thomas W. Trenchard, one of the Justices of the Supreme Court of New Jersey, by an order dated the sixth day of March, nineteen hundred and thirteen, commissioners to examine and appraise all those certain tracts or parcels of land hereinafter more particularly described, required by The Inhabitants 30 of the City of Trenton for the improvement of the harbor water front of the City of Trenton, and to assess the damages by reason of the taking of such land or property, pursuant to Chapter 53 of the Laws of 1900 and Chapter 161 of the Laws of 1911, to wit:

All those certain lots, parcels or tracts of land standing on the records of the Clerk of Mercer County, in the name of the Delaware River Transportation Company, a corporation of the State of New Jersey, beginning at a point in the westerly line of Fair street, said point being distant southerly sixty-eight (68) feet from the northeast corner of a brick building owned by Timothy Furlong, said building being on the southerly line of McLea alley, and running thence westerly and at right
10 angles to Fair street ninety-four (94) feet to a point in the southwest corner of a lot owned by Timothy Furlong, thence (2) northerly at right angles to the first course sixty-eight (68) feet to the southerly line of McLea alley, thence (3) westerly along the southerly line of McLea alley one hundred and sixty-five (165) feet, more or less, to the Delaware River, thence (4) southerly along the shore of the Delaware River, four hundred (400) feet, more or less, to a point in the northerly boundary line of a lot owned by the Camden Amboy R. R. Co.,
20 thence (5) easterly and parallel to Federal street two hundred and sixty (260) feet, more or less, to a point in the westerly line of Fair street, said point being also one hundred and fifty (150) feet northerly from the northerly line of Federal street, thence (6) northerly along the westerly line of Fair street, two hundred (200) feet, more or less, to a point corner to a lot owned by John Malloy, thence (7) westerly and at right angles to Fair street, one hundred (100) feet to a point, said point being the southwest corner of said John Malloy's lot, thence
30 (8) northerly on a line parallel to Fair street, thirty (30) feet to a point, said point being the northwest corner of said John Malloy's lot, thence (9) easterly along the northerly line of John Malloy's lot one hundred (100) feet to the westerly line of Fair street, thence (10) northerly along the westerly line of Fair street one hundred and two (102) feet, more or less, to the point of beginning; being the same premises which were conveyed (inter alia) to the said the Delaware River Transportation Company, a corporation, by the Delaware River

Navigation Company, a corporation, by deed dated April 2d, 1906, recorded in the Clerk's office of the County of Mercer, in Book 288 of Deeds, page 87, &c., said lots, tracts or parcels of land being known as Lots Nos. 3, 5 and 6, on page 66 of the City Atlas, shown on the annexed tracing or map.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, and also all the estate, right, 10 title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the Delaware River Transportation Company, The Fidelity Trust company, The West Jersey Trust Company and Wilson & Stokes Lumber Company, aforesaid, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances.

You are further notified that the commissioners above named will meet at the Council Chamber, in the City Hall, in the City of Trenton, on Friday, the 10th day of 20 April, A. D. nineteen hundred and fourteen, at ten o'clock in the forenoon, for the purpose of organizing, and will then proceed to view the premises described in the petition filed in this matter and in this notice, and afterwards said commissioners will proceed to fix the compensation to be paid by The Inhabitants of the City of Trenton for the taking of sand lands hereinbefore mentioned and described, required for the purposes stated, according to the statute in such case made and provided.

Dated Trenton, N. J., March 13th, 1914.

30

GARDNER H. CAIN,
HARRY A. ASHMORE,

Commissioners.

To the Delaware River Transportation Company.

Service acknowledged April 2d, 1914.

PETER BACKES,
Attorney.

NEW JERSEY SUPREME COURT.

Delaware River Transportation Company,	<i>Prosecutor,</i>	}	On Certiorari.
<i>v.</i>			
Inhabitants of the City of Trenton,	<i>Respondent.</i>		

Stipulation.

10

Filed May 4, 1914.

It is hereby stipulated and agreed that the following facts hereunder specified be admitted on the argument of the writ of certiorari issued in the above entitled cause, with the same force and effect as if due proof thereof had been made by depositions taken on notice.

1. That the Commissioners appointed to fix the compensation to be paid for the taking of the prosecutor's lands, by an order made by Hon. Thomas W. Trenchard, dated the 6th day of March, 1913, met on Friday, 20 the 10th day of April, 1914, pursuant to a notice given by them to The Delaware River Transportation Company, The Fidelity Trust Company, The West Jersey Trust Company, and Wilson & Stokes Lumber Company, and proceeded to view the land described in said order, and that said Commissioners, by resolution, fixed 06 the 5th day of May, 1914, as the time, and the Council Chamber, in the City Hall, in the city of Trenton, as the place, when and where they would hear testimony produced by the parties in interest, respecting the value 30 of said lands, and the arguments of counsel thereon.

2. That on the 28th day of April, 1914, said Commissioners again met and adopted a resolution, hereto attached and made a part hereof, after hearing Linton Satterthwaite, Esq., counsel for The Delaware River

Transportation Company, The Fidelity Trust Company
and The West Jersey Trust Company.

PETER BACKES,
*Attorney for The Delaware River
Transportation Company.*

LINTON SATTERTHWAITE,
*Attorney for The Fidelity Trust Company
and The West Jersey Trust Company.*

CHAS. E. BIRD, 10
*Attorney for The Inhabitants
of the City of Trenton.*

Dated Trenton, N. J., May 1, 1914.

Whereas, protest has been made, on behalf of The Delaware River Transportation Company, The Fidelity Trust Company, and The West Jersey Trust Company, against any further proceedings by the commissioners appointed the 6th day of March, 1913, by order of Hon. Thomas W. Trenchard, justice of the Supreme Court, to estimate damages to be paid for the property of The Delaware River Transportation Company, on applica- 20
tion of The Inhabitants of the city of Trenton, on the ground that chapter 144 of the Laws of 1914 has repealed the act approved April 15th, 1911, commonly known as the Harbor Board Act, so far as the city of Trenton is concerned; and that any further proceedings under said order will be without warrant of law and in violation of the rights of the said Delaware River Transportation Company, The Fidelity Trust Company and The West Jersey Trust Company; and,

Whereas, the commissioners appointed by said order 30
deem it to be their duty to proceed to perform the duties directed in said order, notwithstanding said protest; therefore, be it

Resolved, that the said commissioners proceed, upon the 5th day of May, 1914, to a hearing upon, and to determine the value of said property, as heretofore they had fixed and determined upon said date, and to make report as required by said order.

Unanimously adopted by Commissioners, April 28th, 1914.

G. H. CAIN, *Chairman.*
 CHAS. A. MAY.
 HARRY A. ASHMORE.

Filed May 7th, 1914.

NEW JERSEY SUPREME COURT.

10	Delaware River Transportation Company,	<i>Prosecutor,</i>	}	On Certiorari. Stipulation.
	<i>v.</i>			
	The Inhabitants of the City of Trenton,	<i>Respondents.</i>		

It is hereby stipulated and agreed that the qualified voters of the City of Trenton, at an election held on the twentieth day of June, nineteen hundred and eleven, adopted the provisions of an act of the legislature of this state, entitled "An act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by Boards of Commissioners or Improvement Commissions in this State," approved April 25th, 1911, the title of the act having been amended to read as herein set forth by an act approved April 2d, 1912, and that this fact be admitted on the argument of the Writ of Certiorari in the above-entitled cause with the same force and effect as if due proof thereof had been made by deposition taken on notice

30 LINTON SATTERTHWAITE,
*Counsel for Fidelity Trust Company
 and West Jersey Trust Company.*

CHAS. E. BIRD,
*Counsel for The Inhabitants of
 the City of Trenton.*

Dated Trenton, N. J., May 6th, 1914.

Filed as of May 7th, 1914.

NEW JERSEY SUPREME COURT.

Delaware River Transportation Company, v. The Inhabitants of the City of Trenton, Respondents.	}	On Certiorari. Stipulation.
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It is hereby stipulated and agreed that the provisions 10
of an act of the legislature of this state, entitled "An act
relating to, regulating and providing for the government
of cities, towns, townships, boroughs, villages and muni-
cipalities governed by Boards of Commissioners or Im-
provement Commissions in this state," approved April
25th, 1911, the title of the act having been amended to
read as herein set forth by an act approved April 2d,
1912, have not been adopted by the qualified voters of the
City of Paterson, the City of Camden, the City of Eliza-
beth, or the City of New Brunswick, cities of the same 20
class as the City of Trenton, to wit, the second class, and
that this fact be admitted on the argument of the Writ
of Certiorari, in the above-entitled cause, with the same
force and effect as if due proof thereof had been made
by depositions taken on notice.

LINTON SATTERTHWAITE,
*Counsel for Fidelity Trust Company
and West Jersey Trust Company.*

PETER BACKES,
Counsel for Delaware River Transportation Co. 30

CHAS. E. BIRD,
*Counsel for The Inhabitants of
the City of Trenton.*

Dated Trenton, N. J., May 6th, 1914.

Filed May 7th, 1914.

Reasons.

1. Chapter 144 of the Laws of 1914 (known as the Hennessy Home Rule act, amending the Walsh act), in effect repeals Chapter 161 of the Laws of 1911 (known as the Harbor Board act), and makes the same inapplicable to the City of Trenton, and takes from said city the right to condemn the lands of the prosecutor for harbor purposes, and renders all proceedings now pending, and taken under Chapter 161 of the Laws of 1911, invalid and of no effect.

2. That the Inhabitants of the City of Trenton possess no power either statutory or otherwise to acquire by condemnation the lands of the prosecutor for harbor purposes.

3. That Chapter 161 of the Laws of 1911 applies only to cities of this state fronting on or containing within their borders navigable or tidal waters, &c., and does not apply to all municipalities of this state, excepting counties and school districts.

4. The order brought up for review is in divers other respects erroneous and contrary to law.

PETER BACKES,

Attorney of Prosecutor.

Filed May 26, 1914.

NEW JERSEY SUPREME COURT.

Delaware River Transportation Company,	} On Certiorari. Rule Affirming Proceedings.
<i>Prosecutor,</i>	
<i>v.</i>	
Inhabitants of the City of Trenton,	} Respondent.
<i>Respondent.</i>	

The Court having heard the argument of counsel and 10 duly inspected the proceedings, removed by the Writ of Certiorari in this cause, and duly considered the reasons filed:

It is ordered that said proceedings be, and the same are hereby affirmed, with costs.

Entered May 26, 1914.

On motion of

CHARLES E. BIRD,
Attorney of Respondent.

A true copy,

WM. C. GEBHARDT,
Clerk.

Notice of Appeal and Reasons.

(Filed in the office of Clerk of the Supreme Court May
29, 1914.)

NEW JERSEY SUPREME COURT.

APPEAL TO THE

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10	Delaware River Transportation Company, <i>Prosecutor-Appellant,</i> <i>v.</i>	} On Appeal. Notice of Appeal and Reasons.
	The Inhabitants of the City of Trenton, <i>Respondents-Appellees.</i>	

Take notice, that the prosecutor appeals from the whole of the judgment entered in this cause in the Supreme Court, on the following grounds:

1. Because the judgment should have been for the prosecutor and not for the respondents.
- 20 2. Because chapter 144 of the Laws of 1914, approved April 9, 1914, does not contravene article IV., section 7, paragraph 11 of the Constitution of this state.
3. Because said act is not a special law regulating the internal affairs of municipalities.
4. Chapter 144 of the laws of 1914 (known as the Hennessy Home Rule Act, amending the Walsh Act) in effect repeals chapter 161 of the Laws of 1911 (known as the Harbor Board Act) and makes the same inap-
30 the right to condemn the lands of the prosecutor for harbor purposes and renders all proceedings now pending,

and taken under chapter 161 of the Laws of 1911, invalid and of no effect.

5. That the inhabitants of the city of Trenton possess no power either statutory or otherwise to acquire by condemnation the lands of the prosecutor for harbor purposes.

6. That chapter 161 of the Laws of 1911 applies only to cities of this state fronting on or containing within their borders navigable or tidal waters, etc., and does not apply to all municipalities of this state, excepting counties and school districts. 10

7. The order brought up for review is in divers other respects erroneous and contrary to law.

PETER BACKES,
Attorney for Prosecutor.

To CHARLES E. BIRD, Esq.,
Attorney of Respondents-Appellees.

Writ No. 3.

PUBLIC PARK ACT.

Filed May 4, 1914.

20

NEW JERSEY SUPREME COURT.

Delaware River Transportation Company,	} Writ of
<i>Prosecutor,</i>	
<i>v.</i>	} Certiorari.
Inhabitants of the City of Trenton,	
<i>Respondent.</i>	

State of New Jersey, to wit: To The Inhabitants of the City of Trenton. 30

We being willing for certain reasons to be certified of certain resolutions passed by the Board of Commis-

sioners of the city of Trenton, dated on the 17th day of April, and on the 29th day of April, 1914, that it is deemed advisable to acquire the lands of the Delaware River Transportation Company by condemnation, and directing the city counsel to make application for the appointment of commissioners to fix the compensation to be paid for said lands in conformity with chapter 53 of the Laws of 1900:

We do command you that the said resolutions together with all things touching and concerning the same as fully and entirely as before you they remain to our Justice of the Supreme Court of Judicature, at Trenton, on this 4th day of May, 1914, you certify and send, together with this writ that therein may be done what of right, and according to the laws of this state should be done.

Witness, William S. Gummere, Esquire, Chief Justice of our Supreme Court, at Trenton, this 30th day of April, 1914.

20

W. M. C. GEBHARDT,
Clerk.

PETER BACKES,
Attorney.

Endorsed—I allow this writ. Let it be sealed.

THOMAS W. TRENCHARD,
J. S. C.

Return.

Filed May 4th, 1914.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court.

30

The record and proceedings touching and concerning certain resolutions passed by the Board of Commissioners of the City of Trenton, dated on the seventeenth day of April, and on the twenty-ninth day of April, nineteen

hundred and fourteen, that it is deemed advisable to acquire the lands of the Delaware River Transportation Company by condemnation, and directing the City Counsel to make application for the appointment of commissioners to fix the compensation to be paid for said lands, in conformity with Chapter 53 of the Laws of 1900, we do hereby certify and send, together with all things touching and concerning the same, as fully and entirely as before us they remain, under the corporate seal of The Inhabitants of the City of Trenton, as within we 10
are commanded.

At a regular meeting of the Board of Commissioners of the City of Trenton, held on the first day of April, nineteen hundred and fourteen, five commissioners being present, a resolution authorizing the issuance of bonds for the purpose of acquiring certain lands for use as a public park, was introduced, read, and ordered to be laid over until April 15, 1914. A true copy of said resolution is hereunto attached and made a part of this return, and marked "A". 20

At a regular meeting of the said commissioners, held on the fifteenth day of April, nineteen hundred and fourteen, five commissioners being present, said resolution was read a second time, and ordered to be laid over until April 17, 1914.

That at a regular meeting of said commissioners, held on the seventeenth day of April, nineteen hundred and fourteen, five commissioners being present, said resolution was read a third time, agreed to, and passed by the unanimous vote of all commissioners. 30

That at a regular meeting of the Board of Commissioners, held on the twenty-ninth day of April, nineteen hundred and fourteen, four commissioners being present, a resolution authorizing and directing the City Counsel to make application to Hon. Thomas W Trenchard, one of the Justices of the Supreme Court, for the appointment of commissioners to fix the compensation to be paid for parts of lots Nos. 48, 2, 66, 68 and 58, on page 77 of the City Atlas, owned by the Delaware River Trans-

portation Company, was passed by a vote of three in the affirmative and none in the negative. A copy of said resolution is hereunto attached and made a part of this return, and marked "B".

That said resolution marked "A" was complete in the form in which it was finally passed when introduced, and that it remained on file with the City Clerk for public inspection for at least two weeks before its final passage.

10 That said resolution marked "A" was published at least twice, before passage, in a newspaper published and circulated in the City of Trenton for at least ten years preceding the date of such publication, and that such publication included the names of the Commissioners who signed it.

That said resolution marked "A" was again published, after its final passage, for at least one insertion in a newspaper published and circulated in the City of Trenton for at least ten years preceding the date of such publication, and that such publication included the names of the commissioners who signed it.

That in conformity with the requirements of Chapter 366 of the Laws of 1912, said resolution marked "A" was recorded in a book provided for that purpose, and signed by a majority of all the commissioners.

That no petition, protesting against the passage of said resolution marked "A" was presented to said Board of Commissioners within ten days after the final passage thereof.

30 In Witness Whereof, I, Edward W. Lee, Acting Mayor of the City of Trenton, have set my hand and affixed the corporate seal of said city, and caused the same to be attested by Frank Thompson, City Clerk of said city, this first day of May, nineteen hundred and fourteen.

EDWARD W. LEE,
*Acting Mayor of the City
of Trenton.*

ATTEST:

FRANK THOMPSON,
40 [SEAL] *City Clerk.*

WHEREAS, it is deemed advisable to acquire a part of lots Nos. 48, 2, 66, 68 and 58, and all of lots Nos. 39, 40, 69, 70, 49 and 50 on page 77 of the City Atlas, for use as a public park; therefore,

Resolved, First, That the City Treasurer be and he is hereby authorized and directed to issue bonds, under the corporate name of the City of Trenton, to an amount not exceeding Fifteen Thousand Dollars (\$15,000) payable in thirty years from the date thereof, with interest at a rate not exceeding four and one-half per centum ($4\frac{1}{2}\%$) 10 per annum, payable semi-annually; and,

Resolved, Second, That said bonds shall be designated on their face "Park Bonds" and shall be sealed with the city seal, signed by the Mayor, Comptroller and Treasurer and attested by the City Clerk. The bonds hereby authorized may be registered or coupon bonds, and shall be numbered, and a register of such numbers, and the date of such bonds, and the date of issuing and time of payment of the same shall be made by or under the direction of the City Treasurer in a book provided for that purpose; if registered bonds they shall only be transferred by duly executed instrument by the holders of said bonds as they shall appear on said books, and an entry of such transfer shall be made on such books; if coupon bonds they shall have interest coupons attached, signed with the fac-simile signature of the City Treasurer, the delivery of which to the City Treasurer shall be a sufficient voucher to him for the payment of the interest thereon specified; provided, however, that if said bonds or any of them are issued in coupon form 30 they may be surrendered at any time to the City Treasurer by the owner or owners thereof, with a written request to have the remaining coupons cut off and destroyed, and said bond converted into a registered bond, both as to principal and interest, and an entry of such conversion shall be made by the City Treasurer on said bonds and in the books of his office; and,

Resolved, Third, That said bonds shall be of the denomination of one hundred dollars or multiples thereof and shall not be sold for less than par value; and, 40

Resolved, Fourth, That the proceeds of the sale of said bonds shall be applied to the purchase of a part of lots Nos. 48, 2, 66, 68 and 58, and all of lots Nos. 39, 40, 69, 70, 49 and 50 on page 77 of the City Atlas, and a part of lots Nos. 1, 2 and 10 on page 79 of the City Atlas, located upon the water front of the Delaware River, between Lalor Street and the city line, delineated on the map hereunto attached; and,

10 *Resolved*, Fifth, That the interest and principal of said bonds shall be raised and paid in the following manner, to wit: A sum equal to the interest and one-thirtieth of the principal shall be added yearly and every year to the sum to be raised by taxes in said city for the period of thirty years from the date of the issuing of said bonds, and said portion of the principal so raised each year shall be paid yearly to the Commissioners of the Sinking Fund, to be used exclusively for the liquidation of said bonds at maturity; provided, however, that whenever
20 ers standing to the credit of said bonds shall be sufficient for the redemption of said bonds, no further sums shall be raised by taxation for that purpose.

Adopted by the following vote: Messrs. Burk, Donnelly, Pres., Fell, LaBarre, Lee—5.

FRED'K W. DONNELLY.

G. B. LA BARRE.

WM. F. BURK.

J. R. FELL.

EDWARD W. LEE.

30

Resolution.

WHEREAS, by resolution of this Board, passed on the seventeenth day of April, nineteen hundred and fourteen, it was deemed advisable to acquire parts of lots Nos. 48, 2, 66, 68 and 58 on page 77 of the City Atlas, under the authority of Chapter 91 of the Laws of 1910, for use as a public park, said lots being delineated on a map hereunto attached and made a part of this resolution; and,

WHEREAS, this Board, being the Board having charge and control of the finances of this city, is unable to agree with the Delaware River Transportation Company, the owner of said lots, as to the price and the terms of purchase, and it is deemed advisable to acquire said lands by condemnation; therefore,

Resolved, that the City Counsel be and he is hereby authorized and directed to make application to Hon. Thomas W. Trenchard, one of the Justices of the Supreme Court, for the appointment of commissioners to 10
fix the compensation to be paid for said lands, in conformity with Chapter 53 of the Laws of 1900.

Adopted April 29, 1914.

FRANK THOMPSON,
City Clerk.

Filed May 7th, 1914.

NEW JERSEY SUPREME COURT.

Delaware River Transportation Company,	} On Certiorari. 20
<i>Prosecutor,</i>	
<i>v.</i>	} Stipulation.
The Inhabitants of the City of Trenton et al.,	
<i>Respondents.</i>	

It is hereby stipulated and agreed that the qualified voters of the City of Trenton, at an election held on the twentieth day of June, nineteen hundred and eleven, adopted the provisions of an act of the legislature of this state, entitled "An act relating to, regulating and providing for the government of cities, towns, townships, 30
boroughs, villages and municipalities governed by Boards of Commissioners or Improvement Commissions in this State," approved April 25th, 1911, the title of the act having been amended to read as herein set forth by an act

of Certiorari, in the above entitled cause, with the same force and effect as if due proof thereof had been made by depositions taken on notice.

LINTON SATTERTHWAITE,
*Counsel for Fidelity Trust Company
and West Jersey Trust Company.*

PETER BACKES,
*Counsel for Delaware River Transportation
Company.*

CHAS. E. BIRD, 10
*Counsel for The Inhabitants of the City of
Trenton.*

Dated Trenton, N. J., May 6th, 1914.

Filed May 7th, 1914.

Reasons.

1. Chapter 144 of the Laws of 1914 (known as the Hennessy Home Rule act, amending the Walsh act), in effect repeals Chapter 91 of the Laws of 1910 (known as the Public Park act), and makes the same inapplicable to the City of Trenton, and takes from said city the right to condemn the lands of the Prosecutor for park purposes, and renders all proceedings now pending, and taken under Chapter 91 of the Laws of 1910, invalid and of no effect. 20

2. That the inhabitants of the City of Trenton possess no power either statutory or otherwise to acquire by condemnation the lands of the prosecutor for park purposes.

3. That Chapter 91 of the Laws of 1910 applies only to cities, and not to all municipalities of this state, excepting counties and school districts. 30

4. The order brought up for review is in divers other respects erroneous and contrary to law.

PETER BACKES,
Attorney of Prosecutor.

NEW JERSEY SUPREME COURT.

Delaware River Transportation Company,	<i>Prosecutor,</i>	}
<i>v.</i>		
Inhabitants of the City of Tren- ton,	<i>Respondent.</i>	

[Submitted May 15, 1914—Decided May 22, 1914.]

10 Before Justice TRENCHARD.

PER CURIAM.

The proceedings brought up by this writ were taken by virtue of the powers conferred upon the City of Trenton by *P. L. 1910, p. 140*, known as the "Park act."

The proceedings will be affirmed, with costs, for the reasons given in an opinion this day filed in a case of the same title.

Filed May 26, 1914.

NEW JERSEY SUPREME COURT.

20 Delaware River Transportation Company,	<i>Prosecutor,</i>	}	On Certiorari. Rule Affirming Proceedings.
<i>v.</i>			
Inhabitants of the City of Tren- ton,	<i>Respondent.</i>		

The court having heard the argument of counsel and duly inspected the proceedings, removed by the writ of certiorari in this cause, and duly considered the reasons
30 filed:

It is ordered that said proceedings be, and the same are hereby affirmed, with costs.

Entered May 26, 1914.

On motion of

CHARLES E. BIRD,
Attorney of Respondent.

A true copy.

WM. C. GEBHARDT,
Clerk.

Notice of Appeal and Reasons.

10

(Filed in the office of Clerk of the Supreme Court May 29, 1914.)

NEW JERSEY SUPREME COURT.

APPEAL TO THE

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Delaware River Transportation
Company,

Prosecutor-Appellant,

v.

The Inhabitants of the City of
Trenton,

Respondents-Appellees.

} On Appeal.
} Notice of Appeal 20
} and Reasons.

Take notice, that the prosecutor appeals from the whole of the judgment entered in this cause in the Supreme Court, on the following grounds:

1. Because the judgment should have been for the prosecutor and not for the respondents.

2. Because chapter 144 of the Laws of 1914, approved April 9, 1914, does not contravene article IV., section 7, 30 paragraph 11 of the Constitution of this state.

3. Because said act is not a special law regulating the internal affairs of municipalities.

4. Because chapter 144 of the Laws of 1914 (known as the Hennessy Home Rule Act, amending the Walsh Act) in effect, repeals chapter 91 of the Laws of 1910 (known as the Public Park Act), and makes the same inapplicable to the city of Trenton, and takes from said city the right to condemn the lands of the prosecutor for park purposes, and renders all proceedings now pending, and taken under chapter 91 of the Laws of 1910, invalid and of no effect.

5. That the inhabitants of the city of Trenton possess no power either statutory or otherwise to acquire by condemnation the lands of the prosecutor for park purposes.

6. That chapter 91 of the Laws of 1910 applies only to cities, and not to all municipalities of this state, excepting counties and school districts.

7. The order brought up for review is in divers other respects erroneous and contrary to law.

PETER BACKES,
Atty. of Prosecutor.

TO CHARLES E. BIRD, Esq.,
Atty. of Respondent-Appellee.

NEW JERSEY SUPREME COURT.

Delaware River Transportation Company, v. Inhabitants of the City of Tren- ton,	Prosecutor, Respondent.	} Opinion in } Cases 2 and 3.
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Submitted May 15, 1914; Decided May 22, 1914.

SYLLABUS. 10

The act known as the "Hennessy Act" (chap. 144, P. L. 1914), approved April 9, 1914, did not divest the city of Trenton, which had theretofore adopted the "Walsh Act" (P. L. 1911, p. 462), of the powers conferred upon the city by the "Harbor Act" (P. L. 1911, p. 233), since the "Hennessy Act," in so far as it provides that all municipalities that have adopted the Walsh Act "shall not be subject to any laws of this State except laws applicable to all municipalities of this State other than counties and school districts," contravenes 20 article 4, paragraph 7, paragraph 11 of the constitution prohibiting special laws regulating the internal affairs of municipalities.

On certiorari.

Before JUSTICE TRENCHARD.

For the prosecutor, *Peter Backes* and *Gilbert Collins*.

For the respondent, *Charles E. Bird* and *Alfred Reed*.

The opinion of the court was delivered by TRENCHARD, J.

This writ brings up for review proceedings taken on 30 behalf of the city of Trenton for the condemnation of lands.

The proceedings were taken under the grant of power to condemn lands for harbor purposes found in P. L. 1911, p. 233, known as the "Harbor Act."

The order appointing commissioners was reviewed in this court by certiorari, and was affirmed.

Delaware River Trans. Co. v. Trenton, 90 *Atl. Rep.* 5.

Since this affirmation the legislature has passed the act known as the "Hennessy Act" (chap. 144, P. L. 1914), entitled "An Act to amend and explain an act entitled 'An Act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by boards of commissioners or improvement commissions in this state,' approved April twenty-fifth, one thousand nine hundred and eleven; as amended as to both its title and body by an act approved April second, one thousand nine hundred and twelve." This act was approved April 9, 1914.

The act which the "Hennessy Act" purports to "amend and explain" is the act known as the "Walsh Act," found in P. L. 1911, p. 462. This act provides for the government of cities, towns, townships, boroughs, villages and municipalities, by boards of commissioners; and by the terms of the act it was to apply to such municipalities as should by popular vote adopt it. The "Walsh Act" was adopted by the city of Trenton on June 20, 1911.

The act thus adopted contains a provision that whenever the word "city" or "cities" appears therein it shall be construed to mean "town" or "towns," "borough" or "boroughs" or other "municipality" or "municipalities."

It also provides in par. 8 that cities adopting it shall have power to enact ordinances, etc., and "shall have all powers necessary for its government not in conflict with the laws applicable to all cities of this state or the provisions of the constitution."

There was thus left in operation in the city of Trenton all pre-existing statutes thereto applicable, including the "Harbor Act" of 1911.

Later there was an amendment (see P. L. 1912, p. 643) to the title and body of this "Walsh Act." In par. 3 of this amending act of 1912, par. 4 of the "Walsh Act" was amended so as to provide that "all acts, general or special, relating to such city, shall, except so far as inconsistent with this act, apply to such city, and such city shall have and exercise the powers and duties thereby conferred or imposed."

The previous situation still existed, namely, that all acts which had theretofore applied to the city of Trenton 10 were still applicable; and so the "Harbor Act" upon which the proceedings brought up rest, was in full force.

Then, on April 9th, 1914, the "Hennessy Act" was approved, the effect of which, it is insisted by the prosecutor, is to strip the "Harbor Act" of all force within the limits of the city of Trenton.

The "Hennessy Act" by par. 1 amends par. 1 of the "Walsh Act" so that it provides that all municipalities, except counties and school districts, that have heretofore adopted or shall hereafter adopt the "Walsh Act" shall 20 be, and are hereby declared to be, a distinct class of municipalities, and shall not be subject to any laws of this state except laws applicable to all municipalities of this state other than counties and school districts."

Inasmuch as the "Harbor Act" is not applicable to all municipalities, it is contended by the prosecutor that by force of the terms of the "Hennessy Act" the "Harbor Act" has ceased to be in force in the city of Trenton, or in any other city which has adopted the "Walsh Act." And that is not all. It is contended with equal force that 30 the effect is to deprive all such commission governed municipalities of the powers that they respectively theretofore had by virtue of that great body of statutes applicable only to the class of which the several municipalities were respectively members.

The language of the "Hennessy Act" is clear and unambiguous. It declares that commission governed municipalities "shall not be subject to any laws of this state except laws applicable to all municipalities." There

is, therefore, no occasion for construction or interpretation, but the act must be given effect by the courts, if constitutional. On behalf of the city of Trenton it is urged that, in respect to that provision, it is unconstitutional for several reasons. I think it is unconstitutional for the reason I will now state.

I think that an attempt to restrict the operation of statutes theretofore operative in the city of Trenton, and all other cities, to those cities which had not adopted
 10 the "Walsh Act," and *pro tanto* repeal those acts so far as respects the adopting cities, contravenes art. 4, par. 7, par. 11 of the constitution prohibiting special laws regulating the internal affairs of municipalities.

It goes without saying that the legislature could not constitutionally have selected those cities which afterwards adopted the "Walsh Act" and legislate for them exclusively as a class. That would have been a glaring instance of special legislation.

The generality, in a constitutional sense, of the "Walsh
 20 Act" rested upon the clause which permitted all of a class to vote upon the question of adoption of the act.

Warner v. Hoagland, 22 Vr. 62, 72.

In re Cleveland, 22 Vr. 319.

Paul v. Gloucester County, 21 Vr. 585, 604.

While, however, the right of all of a class to adopt the
 "Walsh Act" rendered that statute general, the vote upon
 the question of adoption, if favorable, did not bring into
 existence a group of municipalities which was general
 for all purposes of legislation. The fact that they were
 30 governed by Boards of Commissioners did not make them
 a class for all purposes of legislation.

Ross v. Winsor, 19 Vr. 96.

Dobbins v. Long Branch, 30 Vr. 146.

Nor does the fact that the legislature in the "Hennessy
 Act" has declared that the municipalities which adopted
 the act should be a class, solve the question whether all
 statutes applying exclusively to this group are speci-
 mens of general legislation.

The declaration by the legislature in this instance is no more conclusive than was its creation of an artificial classification theretofore existing; and of this classification Mr. Justice Depue said, in *Wanser v. Hoos*, 31 Vr. 482, 532, when speaking of the statute in question in that case: "that the cities or municipalities to which it applies had been properly classified for general municipality purposes, does not of itself furnish a sufficient reason for sustaining such legislation. Otherwise the elaborate reasoning in *Ex parte Hayne*, 25 Vr. 25; 10 *Mortland v. Christian*, 23 Vr. 521, and similar cases was superfluous. The court should simply have said, 'These cities have been legally classified, and the legislature may deal with their internal affairs in its discretion.'"

So in *Calvo v. Westcott*, 26 Vr. 78, Mr. Justice Garrison said (p. 80) that the classification act (P. L. 1882, p. 47) "was a mere formula, a convenient method by which to avoid the repetition of words and numerals when legislating for or interpreting enactments concerning municipalities. Beyond this it is incapable of exercising any controlling effect either upon the legislature or the courts. * * * Its employment will not in the least degree tend to legitimize legislation otherwise vicious in a constitutional sense.

That classification can exist which will afford a foundation for generality for one class of statutes, and not for another, is conspicuous in the well known group of cases in which statutes dealing with the structure of government, although based upon a classification by population, are sustained; while statutes based on the same classification, but dealing with other questions of charter powers, have been discredited. 30

Now, as already observed, when a new group of adopting municipalities sprang into existence by popular vote in the several places, each member of the group retained all the powers which had been possessed by the governing body of the old municipality. Aside from the provision dealing with the structure of government merely, the body of statutory and ordinance legislation covered by

the old and the new, coincided. There was no change in the physical condition or in the substantive grant of power to the municipality brought about by the change in the form of government. The only features in which the new under the "Walsh Act" differed from the old were governmental.

10 While it may well be that a statute changing the method of electing the Board of Commissioners, or the division of the duties of the members of the board, or in other respects affecting the machinery or government in a manner peculiar to this group would be general legislation, it is difficult to see how a statute which deals with a power common to all cities, both those which did and those which did not accept the "Walsh Act," can now be dealt with solely with respect to those which did adopt it, or in respect to those which declined to adopt it.

20 If the view be entertained that by the adoption of the "Walsh Act" the adopting cities become a class, so that legislation for all purposes confined to that class would be regarded as general, the result likely to flow from this view would be quite remarkable. The legislature, instead of framing an entire charter and submitting it for adoption to a vote of a class, might, as it often does, pass a law applying to a single unimportant feature of the municipal government; and those of the class who adopted that insignificant change, would spring into a class and be freed from the requirement that legislation should apply to all the old class to conform to the constitutional requirements.

30 For instance, an act making the mayors of cities of the second class hold a term for five years might be submitted to cities of that class. If adopted by one city, the legislature immediately on the heels of its adoption, could modify or destroy all the charter powers of that single city by an act applying to it alone.

So, in the present case, after the electors had voted only upon the question whether the scheme of government proposed by the new statute was likely to be wiser and more efficient than the old system, the legislature

seized upon the result of that vote to pass an act which radically changed all the powers of the new group without a popular vote and without applying the legislation to all cities invested with the powers thus affected. This, I think, was special legislation. With respect to the prosecutor's suggestion that if the view be taken that the adopting municipalities do not form a class in respect to the "Hennessy Act" it would render the scheme unalterable except by another referendum, it is sufficient to say that I do not think such result necessarily follows. 10
 Without deciding that question it may be proper to suggest that in addition to the referendum, the legislature could pass acts including all cities of the old class from which the new group sprang, and so avoid the vice of special legislation. Moreover, as herein pointed out, it may well be that statutes affecting the machinery of government in a manner peculiar to this group of adopting cities would be general legislation.

The result is that the proceedings brought up for review will be affirmed, with costs. 20

NEW JERSEY COURT OF ERRORS AND APPEALS.

Delaware River Transportation Company, <i>Prosecutor and Appellant,</i> vs. The Inhabitants of the City of Trenton, <i>Respondent-Appellee.</i>	}	Three Cases on Appeal Refusing Writ of Certiorari. Notice of Argument.
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SIR:—Please to take notice, that I shall move the 30
 argument in the three causes, entitled as above, before
 the Judges of the Court of Errors and Appeals on the
 third Tuesday of June next, at the State House in the

city of Trenton, at ten thirty o'clock or as soon thereafter as counsel can be heard.

Dated May 26th, 1914.

Your obedient servant,

PETER BACKES,

Attorney for Prosecutor and Appellant.

To CHARLES E. BIRD,

Attorney for Respondent and Appellee.

Service acknowledged May 26th, 1914.

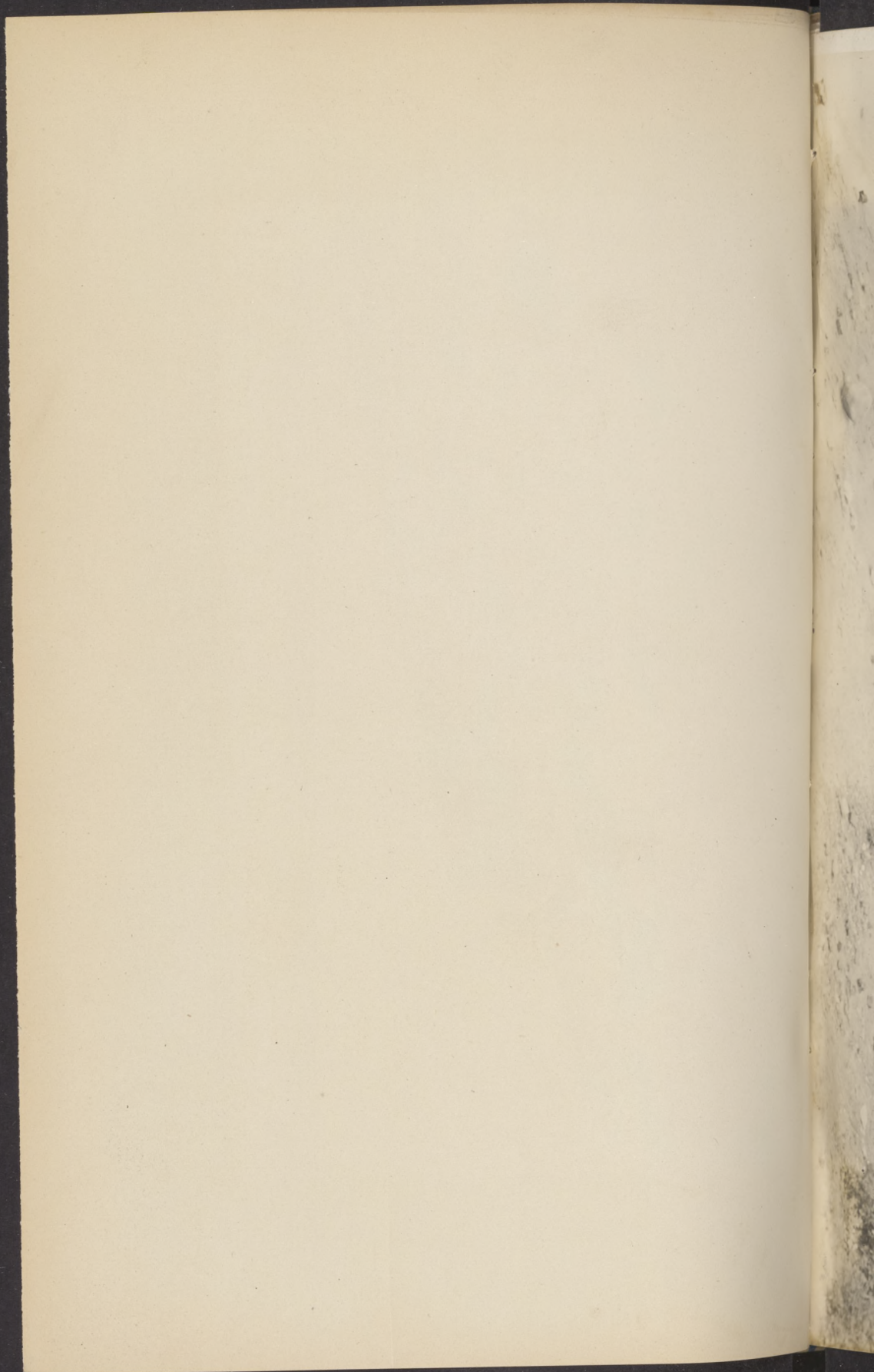
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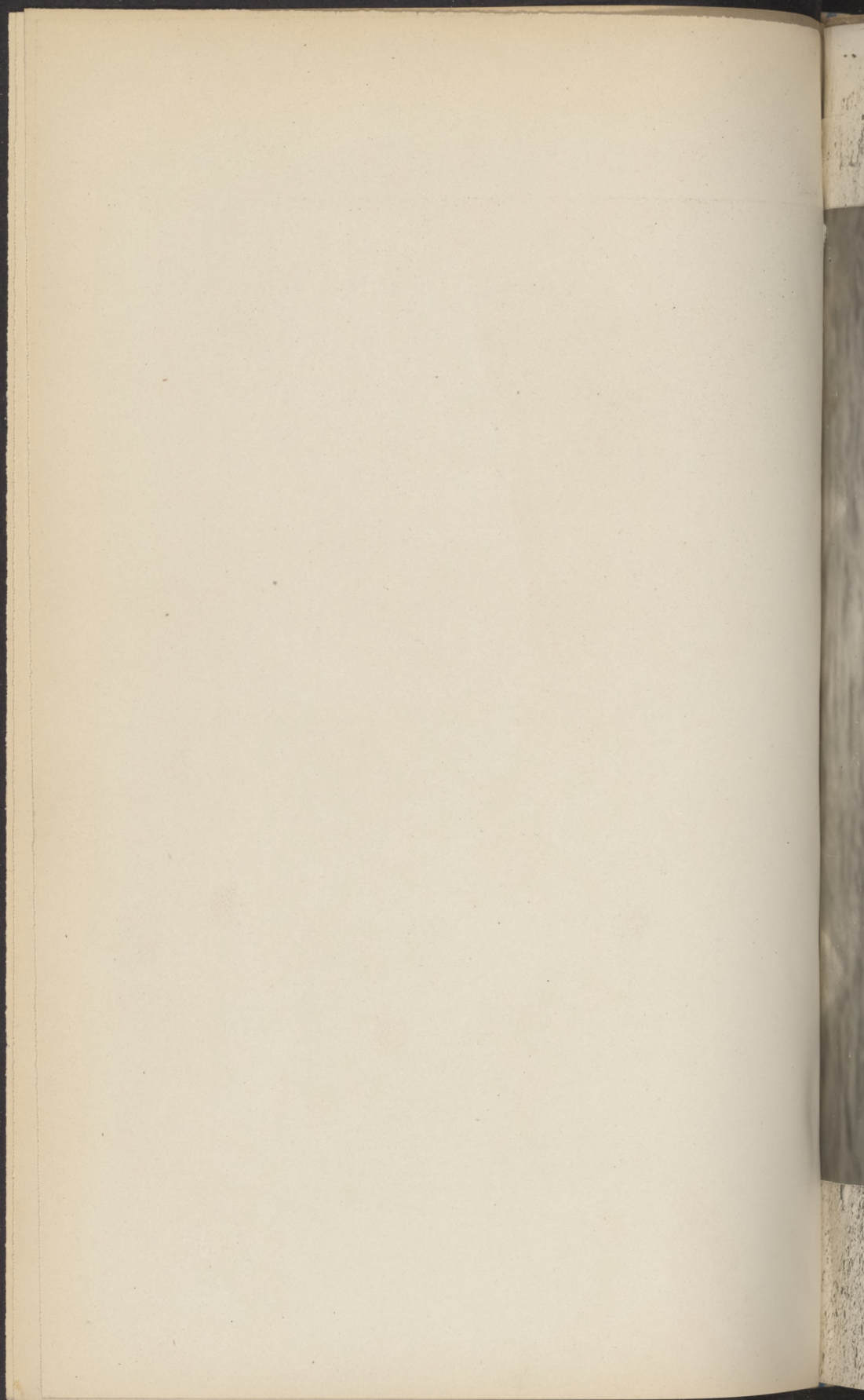
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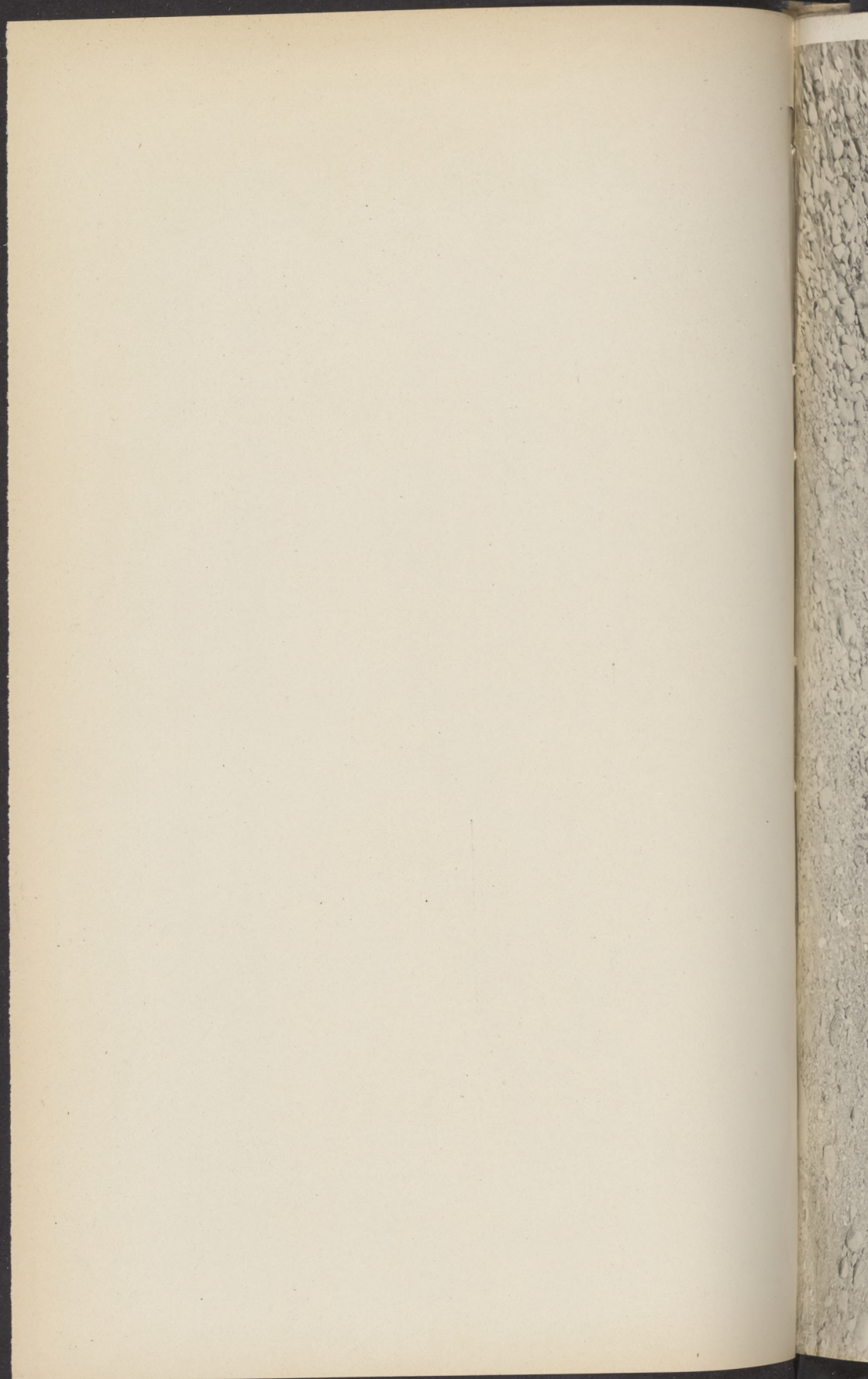
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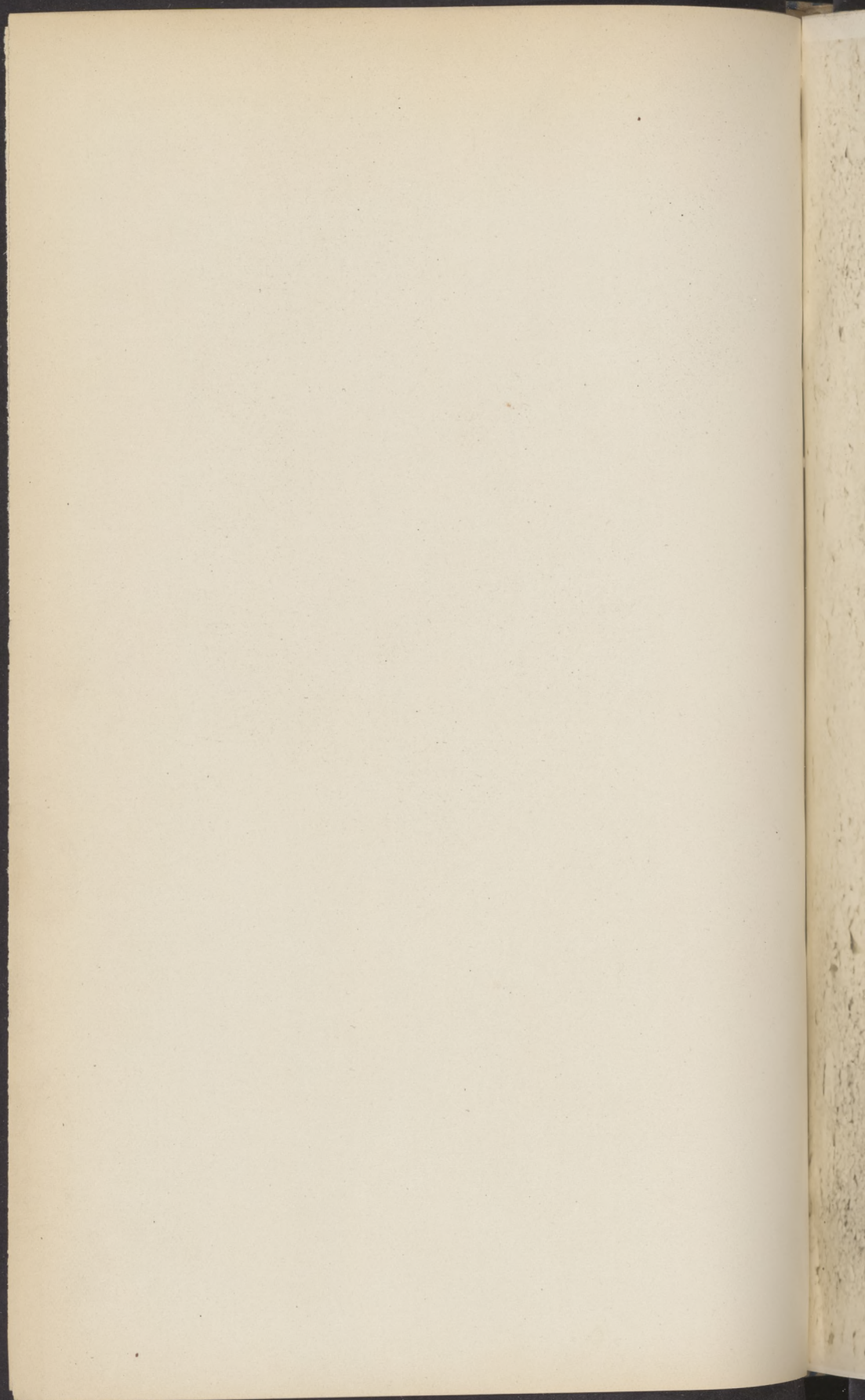
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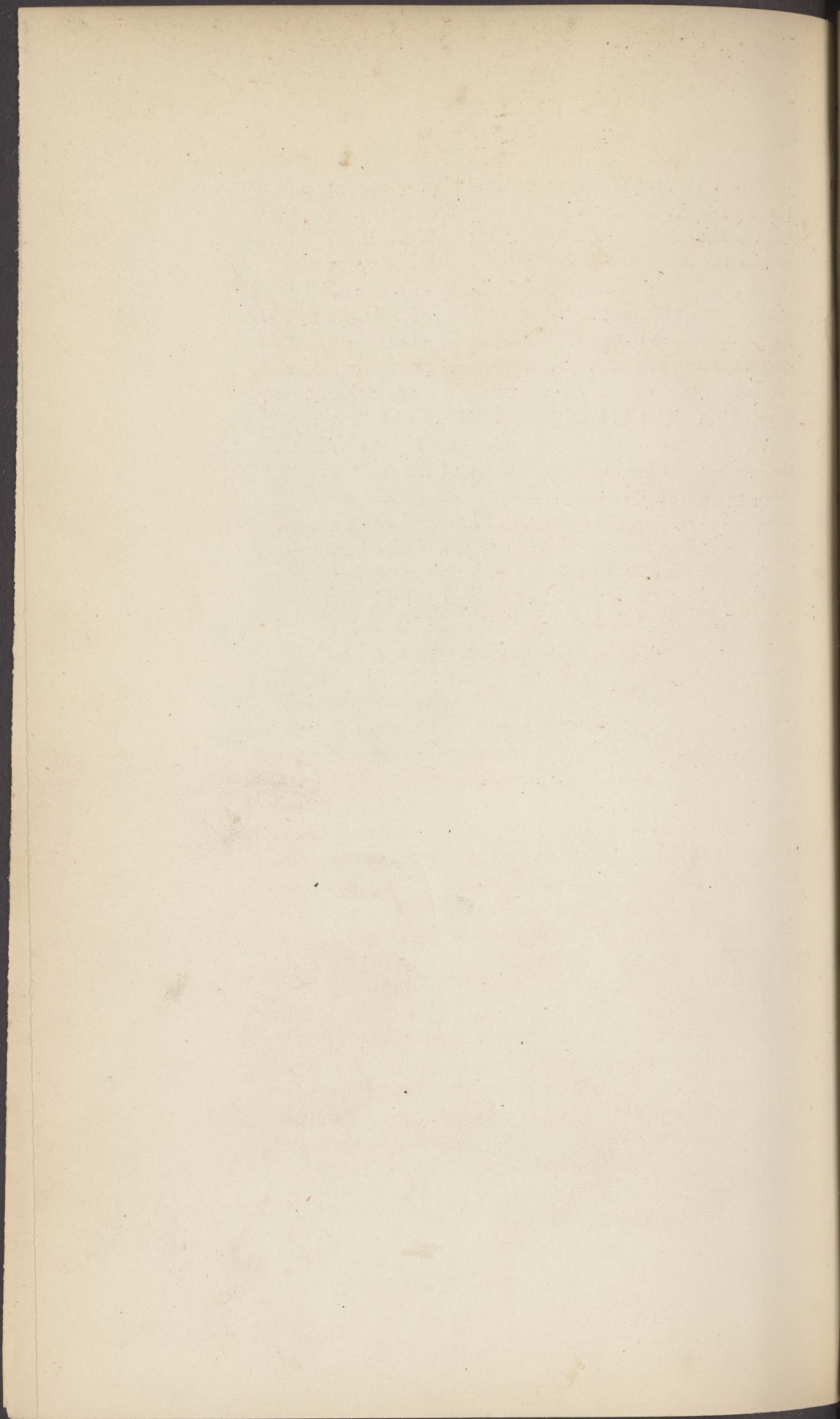


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DELAWARE RIVER
TRANSPORTATION CO.
FREIGHT AND PASSENGER SERVICE
TRENTON - PHILA.
LEAVE LALOR ST. WHARF

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New Jersey Court of Errors and Appeals.

DELAWARE RIVER TRANSPOR-
TATION COMPANY,

Prosecutor-Appellant,

vs.

THE INHABITANTS OF THE CITY
OF TRENTON,

Respondent-Appellee.

On Appeal from
the Supreme
Court Dismiss-
ing Two Writs
of Certiorari.

Brief of Appellant.

The appellant is the owner of a certain wharf property in the City of Trenton, which property the city is seeking to acquire by condemnation proceedings under the authority of the provisions of an act which is herein called the "Harbor Board act" (*P. L. 1911, chapter 161, page 233*). The title of this act is

"An act authorizing the appointment of a Board of Harbor Commissioners in cities of this state fronting on, or containing within their bor- 10
ders, navigable or tidal waters and prescribing their powers and duties; and providing for the improvement of harbors and water fronts and the regulation and use thereof, and the extension of shipping facilities; the acquisition of lands and

property by purchase or condemnation; the acquisition of lands under water or riparian lands from the state; and the raising of funds for the aforesaid purposes by the levy of taxes or the issuance of bonds." Approved April 15th, 1911.

The city is seeking to secure certain other lands of the appellant, situate in the City of Trenton, fronting on Lambertson street, near Lalor, for "Public Park" purposes under the authority of an act herein called the
10 "Park act" (*P. L. 1910, chapter 91, page 140*). The title of this act is

"An act to authorize the cities of this state to acquire lands for public parks by purchase or condemnation, and to improve the same, and to issue and sell bonds to provide for the cost of such acquisition and improvements, and to provide by tax for the payment of the principal of and interest on said bonds." Approved April 5th, 1910.

Both of the aforesaid acts have application only to
20 *cities* of this state.

These appeals are from orders of the Supreme Court dismissing two writs of certiorari, which brought up certain proceedings commenced by the Inhabitants of the City of Trenton to condemn appellant's lands under the authority of the two acts aforesaid.

The prosecutor below, and appellant in this court, insists that all the power and authority which was given to the City of Trenton by the aforesaid acts has been taken away by an act which is herein called the "Hennessy act"
30 (*P. L. 1914, chapter 144, page 253*). The title of this act is

"An act to amend and explain an act entitled 'An act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by Boards of Commissioners or Improvement Commissions in this state,' approved April 25th, 1911; as amended as to both its title and body by an act approved April 2d, 1912."

The foregoing "Hennessy act" is an amendment to what is known as the "Walsh act," or the "Commission Government act" (*P. L. 1911, chapter 221, page 462*). The title of this act is

"An act relating to, regulating and providing for the government of cities, towns, townships, boroughs and other municipalities within this state," approved April 24th, 1911.

The foregoing "Walsh act" was amended (*P. L. 1912, chapter 48, page 75, and P. L. 1912, chapter 366, page 10643*). In this last amendment the title of the act was amended so as to read

"An act to amend the title and body of an act entitled 'An act relating to, regulating and providing for the government of cities, towns, boroughs, and other municipalities within this state.'" Approved April 25th, 1911, so as to define the municipalities to which the act applies as cities, towns, townships, boroughs, villages and municipalities governed by Boards of Commissioners or Improvement Commissions, and further to amend said act generally. 20

Again in 1913 (*P. L. 1913, chapter 179, page 323*), the act and title thereof was again amended, the title reading

"An act to amend an act entitled 'An act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by Boards of Commissioners or Improvement Commissions in 30 this state,'" approved April 25th, 1911, as amended by chapter 366 of the Laws of 1912, approved April 2d, 1912, amending the title and body thereof. And again, at the special session (*P. L. 1913, chapter 22, page 836*) said act was amended. All of the amendments above recited were of material parts of the original act.

It will be observed that this act applies to all classes of municipalities which may adopt the same.

Chapter 144 of the Laws of 1914, the "Hennessy act," above cited, by section 1, as amended, provides:

10 "All municipalities of this state, except counties and school districts, that have *heretofore adopted*, or shall *hereafter adopt* the provisions of this act, shall be governed as herein set forth; and whenever the word 'city' or 'cities' appears in this act, it shall be construed to mean 'municipality' or 'municipalities,' as the case may be, but shall not be construed to include counties or school districts."

And said amended section 1 further provides as follows:

"Such municipalities shall be and are hereby declared to be a distinct class of municipalities, and shall not be subject to any laws of this state except laws applicable to all municipalities of this state other than counties and school districts."

20 It is insisted on by the appellant that the "Harbor Board act," and the "Public Park act" apply only to *cities of this state*, and are not applicable to all municipalities, excepting counties and school districts, and therefore, it is contended by appellant that the "Hennessy act," which declares "That such municipalities shall not be subject to any laws of this state, except laws applicable to all municipalities of this state, other than counties and school districts," has, by implication repealed both the "Harbor Board act" and the "Public Park act," and that, therefore, the power conferred upon
 30 the Board of Commissioners of the Inhabitants of the City of Trenton by said acts, authorizing the condemnation of appellant's lands, has, in all things been taken away, and that the Board of Commissioners of the City of Trenton is now without any power, either under the aforesaid statutes, or of any other statute applicable to all municipalities to acquire by condemnation appellant's land, and therefore, the proceedings instituted by said commissioners of the Inhabitants of the City of Trenton against appellant for such purposes must fall.

The power to acquire lands by condemnation must be expressly given. It cannot be implied. The power to acquire by eminent domain is a legislative power, belonging to the legislature alone, and can only be exercised when expressly given by legislative enactment, and for public use. No such legislative authority is found in the "Walsh act" or its amendments, and none can be inferred under the amendment to said act known as the "Hennessy act," the eighth section whereof as amended vests in the Board of Commissioners power and authority to enact and enforce by imposition of reasonable fines, or by imprisonment or both, all ordinances necessary or proper for the protection of life, health and property; to declare and prevent summarily to abate nuisances; to secure, advance, preserve and enforce the good government and general welfare, order, prosperity and security of such cities; and *shall have all power which it shall deem necessary or convenient for its government or for its welfare and prosperity, not in conflict with the laws applicable to all cities of this state, or the provisions of the constitution.* 10 20

No direct power or authority is therein given to the Board of Commissioners to condemn lands, nor can such power be implied from the language used in said act.

The "Hennessy act" declares in the first section thereof that all municipalities of this state, except counties and school districts that have heretofore adopted, or shall hereafter adopt the provisions of this act, shall be governed as herein set forth.

Section four of the "Walsh act," as amended (*P. L. 30 1912, chapter 366, page 649*), gives to cities adopting said act, the following powers:

"The corporate existence of any city accepting the provisions of this act shall be continued, and its corporate name and seal shall not be changed by such acceptance, and all acts, general or special, relating to such cities, shall, except so far as inconsistent with this act, apply to such cities, and such cities shall have and exercise the powers and duties thereby conferred or imposed." 40

Undoubtedly this amendment preserves to any city or other municipality adopting the "Walsh act," all of its charter rights, and all other power under acts general or special relating to such city, which it possessed at the time of the adoption of said act, providing, they were not inconsistent with the provisions of the "Walsh act."

It is conceded that the "Hennessy act," if constitutional, repeals the "Harbor Board act" as well as the
 10 "Public Park act," and other statutes which may be applicable to all municipalities.

There are two questions for consideration—

(1) Are the various statutes on which must rest the municipal action under review any longer applicable to the City of Trenton since the enactment of the so-called
 "Hennessy Home-Rule Amendment of 1914" to the
 "Walsh act," and

(2) Is that amendment constitutional?

It has very clearly been pointed out that the acts
 20 affecting our client are no longer applicable to Trenton because not applicable to all municipalities other than counties and school districts. Judge Reed and Mr. Bird expressly and Judge Van Syckel inferentially concede this, and Mr. Bird in his separate brief enumerates many pre-existing statutes that are swept away by the amendment as far as Trenton is concerned. His argument for unconstitutionality is largely based on what he thinks is the disastrous effect in this regard of the amendment. There can be no doubt that these gentlemen are
 30 right in this their major premise. No argument is needed; the matter is one of plain and simple expression in the language used in the amendment.

There remains to be considered the question of the alleged unconstitutionality of the Hennessy amendment. Judge Van Syckel in his open letter to the Trenton Times bases his argument for unconstitutionality on paragraph 4 of section 7 of article IV of the constitution, namely:

“No act shall be passed which shall provide that any existing law, or any part thereof, shall be made, or deemed a part of the act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act.”

With all deference to so learned and experienced a jurist, I venture the opinion that this constitutional prohibition is not at all pertinent to the Hennessy amendment, whatever would have been its force if addressed to the fourth section of the Walsh act itself. That section was as follows: 10

“4. The board of commissioners shall have and possess all administrative, judicial and legislative powers and duties now had and possessed and exercised by the mayor and city council and all other executive or legislative bodies in said city, and have complete control over the affairs of the city adopting the provisions of this act.”

* * * *P. L. 1911, p. 465.*

20

Trenton adopted the act in June, 1911, and the commissioners were elected in August of that year. In 1912 section 4 was amended. The language above quoted was not changed, but a new provision was added at the end of the section as follows:

“The corporate existence of any city accepting the provisions of this act shall be continued, and its corporate name and seal shall not be changed by such acceptance, and all acts, general or special, relating to such city, shall, except so far as inconsistent with this act, apply to such city, and such city shall have and exercise the powers and duties thereby conferred or imposed.” 30

I shall not complain if Judge Van Syckel's argument overthrows the Walsh act, for in that case the proceedings under review must of course fall; but I do not contend for this, this court having sustained a similar statute for a transfer of powers. *In re Haynes, 25 Vr.*
6. I do challenge the argument that a legislative pro-

vision declaring laws *inapplicable* offends the constitutional provision above quoted. The first section of the Walsh act as amended by the Hennessy act, after declaring that "city" shall be construed to mean "municipality" but not to include counties or school districts, provides as follows:

10 "Such municipalities shall be and are hereby declared to be a distinct class of municipalities, and shall not be subject to any laws of this state, except laws applicable to all municipalities of this state other than counties and school districts."

The amendment does not attempt to make previous legislation applicable to a given case; it *repeals pro tanto* certain legislation. Repeal of legislation, without inserting it in the repealing act, is permitted by our constitution. It is very common in a statute to declare "that all acts and parts of acts inconsistent herewith be and the same hereby are repealed." No one has ever 20 questioned the validity of such a provision. A legislative declaration that laws of a designated character shall no longer be applicable, within the purview of a statute, stands on the same footing.

The objection that the Hennessy amendment is obnoxious to paragraph 11, section 7 of article IV prohibiting special laws regulating the internal affairs of towns and counties is graver, but I think not fatal. Municipalities adopting the Walsh act seem to me to constitute a legitimate class for legislation. The scheme 30 of government provided by that act is unique, and in the nature of things when the voters of a particular municipality adopt the act they do so with full knowledge that it will be subject to amendment, supplement or other change. To hold otherwise would make the scheme unalterable except by another referendum. Even a *repeal* of the law would be special legislation. Of course, if the declaration in the Hennessy amendment that it is *explanatory* of the previous legislative intent has any force, the question is not open to dis-

cussion; but I lay little stress on this declaration. I am willing to concede that the Walsh act must be judged by the meaning expressed in it rather than by what a subsequent legislature may declare its predecessor meant to enact. I prefer to stand on the firmer ground that it is competent for the legislature to amend an act that has been adopted by popular vote without providing for another referendum. There are many instances of such legislation, and as far as I know it has never been questioned. The Walsh act itself has been several times 10 amended in important particulars. *P. L.* 1912, p. 74; *idem*, p. 643; *P. L.* 1913, p. 323; *idem*, p. 836. If these amendments may be held inapplicable to municipalities that had previously adopted the act, very great confusion will result and "commission government" municipalities will be split up into subdivisions dependent entirely on the date of the adoption of the law. The only safe course is for the courts to declare as the legislature itself did in the Hennessy amendment, that all these municipalities form a proper legislative class. Mr. 20 Justice Swayze at the circuit went even farther than this when he held that it was competent for the legislature to enact as it did (*P. L.* 1913, p. 916) that the adoption of the act should be held valid if it received a majority of the votes, irrespective of whether or not it had received the greater proportion required by the act, provided the ballots had been lost or destroyed.

It may be that some of the objections urged by Mr. Bird to section 2 of the Hennessy amendment are well founded. I will not discuss these objections because it 30 seems to me that section 1 must stand whether or not section 2 is sustainable. The two sections are not so correlated that they must stand or fall together. It is entirely conceivable that the legislature would be willing to limit the powers of municipalities working under the Walsh act to those conferred by that act or under general laws common to all municipalities, even though the attempt to delegate other powers to the municipality itself might fail. Perhaps the municipal scheme might be

left too meagre for efficient administration, but that would be a matter for subsequent legislative relief.

Not only is this conceivable, but we have the explicit declaration to that effect; for section 3 of the Hennessy amendment is as follows:

10 "3. If any proviso, clause or *section* of this act shall be attacked in any court and shall be declared invalid, or unconstitutional, the rest of this act as well as the act of which it is amendatory, shall stand, and the proviso, clause or *section* declared invalid or unconstitutional shall be excluded from this act."

The objection that the title of the Walsh act and its amendments does not express the object of the Hennessy amendment is without merit. The title, "An act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by boards of commissioners or improvement commissions in this state," is broad enough
20 to warrant not only the conferring but the *restricting* of governmental powers.

The suggestion of Justice Trenchard that if it be conceded that by the adoption of the "Walsh act" the adopting cities become a class for legislative purposes, it would follow that the adoption of some insignificant change in a city charter would likewise constitute a class for the purposes of legislation, is, we submit, of the nature of a *non sequitur*.

30 There is a real and well recognizable distinction between a mere amendment or a series of amendments to a charter and an act setting aside an existing charter bodily and substituting a new charter of a wholly different character.

Altering an existing charter by an amendment would not, of course, remove a city from one class and place it in another, but casting aside a charter as a whole and adopting another charter based upon a different kind of municipal government to be run on distinctly different principles, does automatically place the city in a different
40 class.

For the purpose of municipal legislation in relation thereto the legislature has fixed the classification of cities as follows :

Classification of cities. *Comp. Stat.*, p. 956, § 1338.

Cities of the first class shall consist of all cities in this state having within their territory limit population exceeding 150,000. Cities of the second class shall consist of cities in this state having not less than 12,000 population, or more than 150,000. Cities of the third class shall consist of all cities in this state not embraced within either the first or second class as herein distinguished except cities binding upon the Atlantic Ocean as being seaside or summer resort cities. Cities of the fourth class shall consist of cities of this state binding upon the Atlantic Ocean and being seaside or summer resorts. *P. L.* 1882, p. 47 ; as amended, *P. L.* 1901, p. 78.

Is the legislative declaration found in the "Hennessy act" which declares that such municipalities (which have adopted said act) "shall be, and are hereby declared to be a distinct class of municipalities," a proper classification for legislation ?

The act applies to all municipalities that may adopt the commission form of government, a distinct class from all other municipalities organized under special charters, or special and general laws.

It is not included in the Classification act of 1881 as amended, yet undoubtedly the legislature may fix another class, and if this class can be fixed, as it is in this act, then testing the act by the canons of interpretation as to the generality and constitutionality of the laws, this act is constitutional.

The principle deducible from all the decisions above cited is this, that legislation which classifies municipalities in matters of their structure, machinery and powers on a basis of population where population has reasonable relation to the necessities of the municipalities so classified, as contradistinguished from others not similarly circumstanced, is good ; and where it appears that such is the actual effect of the statute, the act is a general law,

and classification being solely a matter for legislative judgment, a legislative classification will always prevail where it appears to be within the principle above stated and there is no apparent attempt to apply it illusively. *Freeholders of Hudson v. Clarke*, 65 N. J. L. 271.

A law may also be a general law when based upon population, or otherwise, even where it only applies to a part of the cities or towns or villages or boroughs or townships of the state, if it appears that the classification upon which it is based has a reasonable relation to the municipality which it includes, as contradistinguished from those which it excludes. *Randolph v. Wood*, 20 Vroom 85; *S. C.*, 21 *Id.* 175; *Freeholders of Hudson v. Clarke*, 36 *Id.* 271.

“The test of generality is that the law shall embrace all and exclude none whose conditions and wants render such legislation equally necessary and appropriate to them as a class.” *Randolph v. Wood*, 20 Vroom 85.

20 The legislature is not confined to the classification which it has fixed by the Classification act, but may make other classifications; nor is it restricted to classification by population.

In *Wilson, Attorney-General, v. McKelvey*, 78 N. J. L. 621, an act of the legislature creating a board of public works in cities having a population of less than 100,000, and not more than 200,000 (*P. L.* 1907, p. 144) was under review. This act in substance practically created an entire new form of municipal government for the city of Paterson. It was held that the act was not a private, local or special law affecting the internal affairs of towns or counties within the constitutional prohibition.

In the foregoing act the limitation by population was not that fixed by the Classification act, but one fixed by the act itself of not less than 100,000, nor more than 200,000 inhabitants.

The class created by the “Hennessy act” does embrace all and excludes none whose conditions and wants render

provisions equally necessary and appropriate to them as a class. It embraces all municipalities which by adopting the provisions of the "Walsh act" which have differentiated themselves as to form of government from all municipalities not so adopting the "Walsh act," and excludes none except those which by failure to adopt the "Walsh act" have, by their own action or inaction, excluded themselves.

In other words, the "Hennessy act" does not in reality create a class; it rather gives legal recognition to a 10 classification already existing in fact, existing by reason of, and resulting from the action of the municipalities themselves, which they departed from the generally established form of municipal government throughout the state, and took upon themselves a distinctively different form, a form so markedly different that the legislation would not impose it in any municipality, but provided that any after adoption by a majority vote, and then only if that majority equaled thirty per cent. of the votes cast at the last general election, should it become 20 operative.

Can it be doubted that if the legislation should authorize the different municipalities of the state to adopt one of two forms of municipal government, the one a government by a commissioner or commissioners appointed by the governor, or by the legislature in joint session, and the other by a common council, elected by popular vote, the municipalities adopting the one or the other would by such act range themselves in distinct 30 classes, would classify themselves? Would not the legislature have the constitutional power to recognize such a classification, in fact by declaring it to be a class?

The Wisconsin case of *Mueller v. Thompson*, which is presented by respondents in the form of a brief, is, it is respectfully submitted, wholly inapplicable to the case at bar. It deals solely with the question of the *constitutional* power of the legislature to delegate the municipalities the power to alter or amend their charters, to adopt new charters by convention in the manner provided by the Home Rule act of Wisconsin. 40

The opinion of the court is confined entirely to the discussion of the right of cities under this legislation under review by their own act to *alter, amend and create their own charter.*

The power conferred by the act under discussion found in the brief on page seven (7) is as follows:

10 "Every city in addition to the powers now possessed, is hereby given authority to alter or amend its charter, or to adopt a new charter by convention, in the manner provided in this act, and for that purpose is hereby granted and declared to have all powers in relation to the form of its government, and to conduct of its municipal affairs not in contravention of or withheld by the constitution or laws operative generally throughout the state."

20 The Hennessy act confers no such broad powers. It confers no power except as such as are to be exercised under its charter prescribed by the legislature, and under such laws as *may be applicable to all municipalities.*

There is not a sentence in the opinion in the Wisconsin case inconsistent with the validity of the Hennessy act.

Under the Wisconsin case, the sovereign right of creating a charter by the inhabitants of cities is delegated by the legislature.

30 Under the Hennessy act, no such delegation of power is given. No charter rights are disturbed; no form of government created by convention, but the sole and only power which is given to municipalities under commission form of government is such legislative authority as may have application to all municipalities.

It being clear that the statutes on which must rest the municipal action under review are no longer applicable to Trenton, such action must be set aside, and I submit, with costs.

GILBERT COLLINS,
PETER BACKES,
LINTON SATTERTHWAITE,
Of Counsel with Prosecutor.

NEW JERSEY
Court of Errors and Appeals.

DELAWARE RIVER TRANSPORTATION
COMPANY,

Prosecutor-Appellant,

vs.

THE INHABITANTS OF THE CITY OF
TRENTON ET AL.,

Respondent-Appellee.

DELAWARE RIVER TRANSPORTATION
COMPANY,

Prosecutor-Appellant,

vs.

THE INHABITANTS OF THE CITY OF
TRENTON,

Respondent-Appellee.

}
On Appeal from
Supreme Court.

HARRY F. SMITH,

Prosecutor-Appellant,

vs.

THE INHABITANTS OF THE CITY OF
TRENTON,

Respondent-Appellee.

Brief on Behalf of the City of Trenton on the Validity and Construction of the "Hennessy Act."

These three cases bring up certain proceedings taken under statutes which previous to April 9, 1914, were operative in the City of Trenton. One of these acts is found in P. L. 1911, p. 233. This act applies to all cities of this State fronting on or having within its boundaries tidal waters. This act contains a grant of power to condemn lands for harbor purposes.

Another proceeding brought up was taken by the Board of Commissioners of the City of Trenton for the purpose of condemning land for the purpose of a park. The authority for such a proceeding was found in P. L. 1910, p. 140, entitled "An Act to authorize cities of this State to acquire lands for public parks by purchase or condemnation, etc., and to issue and sell bonds to provide for the cost of such acquisition," etc.

Under the first of these statutes, known as the "Harbor Act," commissioners were appointed under the Eminent Domain Act (*C. S. 1910, p. 2182*) to ascertain the compensation for the taking of lands. This appointment was by certiorari carried to the Supreme Court and was there affirmed. Since this affirmation the Legislature has passed an act entitled "An act amendatory and explanatory of an act for the government of certain municipalities by boards of commissioners, P. L. 1911, 462, as amended by a Supplement, P. L. 1912, 643."

Now it is insisted by the prosecutor of these writs that the last amendatory act, known as the "Hennessy Act," approved April 9, 1914, operates to nullify the force of the act of 1911, p. 533, as well as the act of 1910, p. 140, which acts alone conferred upon the City of Trenton power to exercise the right of eminent domain respecting the taking of lands for harbors and parks.

The act which the "Hennessy Act" purports to amend and explain is the act known as the "Walsh Act" found in P. L. 1911, p. 462. This act provides for the government of cities, towns, townships, boroughs, villages and municipalities, by Boards of Commissioners; and by the terms of the act it was to apply to such municipalities as should by popular vote adopt it.

The act thus adopted provides in sec. 8 that a city adopting it may enact ordinances, etc., not in conflict with the laws applicable to all cities of this State. There was thus left in operation in the City of Trenton all pre-existing statutes thereto applicable, including the "Harbor Act" of 1911 and the "Park Act" of 1910.

There was an amendment (see P. L. 1912, p. 643) to the title and body of this "Walsh Act." In the third section of this amending act of 1912 it was provided that "all acts, general or special, relating to such city, shall, except so far as inconsistent with this act, apply to such city," etc.

This act, passed after the adoption of the "Walsh Act" by the City of Trenton, was, upon our theory subsequently developed, special and invalid.

But with or without this amendment the situation still existed, namely, that all acts which had theretofore applied to the City of Trenton were still applicable; and so the "Harbor Act" and the "Park Act," upon which these proceedings rest, were in full force.

Then on April 9, 1914, the "Hennessy Act" was approved, the effect of which, it is insisted by the prosecutors, is to strip these statutes of all force within the limits of the city of Trenton.

The "Hennessy Act" provides that municipalities which adopted the "Walsh Act" shall be a definite class and shall not be subject to any laws of this State except laws applicable to all municipalities of this State other than counties and school districts.

Inasmuch as the "Harbor" and "Park Acts" are neither applicable to all municipalities, it is claimed that

by force of the terms of the "Hennessy Act" they have ceased to be in force in the City of Trenton, or in any other city which had adopted the "Walsh Act."

Now we think that an attempt to restrict the operation theretofore operative in the City of Trenton, and all other cities, to those cities which had not adopted the "Walsh Act," and *pro tanto* repeal those acts so far as respects the adopting cities, is in conflict with the constitution prohibiting special legislation respecting the affairs of municipalities.

It goes without saying that the Legislature would not have possessed the ability to select those cities which afterwards adopted the "Walsh Act" and legislate for them exclusively as a class. It would have been a glaring instance of special legislation.

The generality of the "Walsh Act" rested upon the clause which permitted all of a class to vote upon the question of the adoption of the act.

Warner v. Hoagland, 22 Vr. 62, 72.

In re Cleveland, 22 Vr. 319.

Paul v. Gloucester County, 21 Vr. 585, 604.

While, however, the right of all of a class to adopt the "Walsh Act" rendered that statute general, the vote upon the question of adoption, if favorable, did not bring into existence a group of municipalities which was general for all purposes of legislation. The fact that they were governed by Boards of Commissioners did not make them a class for all purposes of legislation.

Ross v. Winsor, 19 Vr. 96.

Dobbins v. Long Branch, 30 Vr. 146.

Nor does the fact that the Legislature in the "Hennessy Act" has declared that the municipalities which adopted the act should be a class, solve the question whether all statutes applying exclusively to this group are specimens of general legislation.

The declaration by the Legislature in this instance is no more conclusive than was its creation of an artificial classification by population theretofore existing; and of

this classification Mr. Justice Depue, in *Wanser v. Hoos*, 31 Vr. 482, 532, and Mr. Justice Garrison, in *Calvo v. Westcott*, 26 Vr. 78, 80, said, in substance, that the fact that the Legislature had classified did not furnish a sufficient reason for sustaining such legislation.

That classification can exist which will afford a foundation for generality for one class of statutes, and not for another, is conspicuous in the well-known group of cases in which statutes dealing with the structure of government, although based upon a classification by population, are sustained; while statutes based on the same classification, but dealing with other questions of charter powers, have been discredited.

Now, as already observed, when a new group of adopting municipalities sprang into existence by popular vote in the several places each member of the group retained all the powers which had been possessed by the governing body of the old municipality. Aside from the provision dealing with the structure of government merely, the body of statutory and ordinance legislation covered by the old and the new, coincided. There was no change in the physical condition or in the substantive grant of power to the municipality brought about by the change in the form of government. The only features in which the new differed from the old in the "Walsh Act" were governmental.

While it may be that a statute changing the method of electing the Board of Commissioners, or the division of the duties of the members of the Board, or in other respects affecting the machinery of government in a manner peculiar to this group would be general legislation, it is difficult to see how a statute which deals with a power common to all cities, both those which did and those which did not accept the "Walsh Act," can now be dealt with solely with respect to those which did adopt it, or in respect to those which declined to adopt it.

If the view be entertained that by the adoption of the "Walsh Act" the adopting cities become a class, so that

legislation for all purposes confined to that class would be regarded as general, the result likely to flow from this view would be quite remarkable. The Legislature, instead of framing an entire charter and submitting it for adoption to a vote of a class, might, as it often does, pass a law applying to a single unimportant feature of the municipal government; and those of the class who adopted that insignificant change, would spring into a class and be freed from the requirement that legislation should apply to all the old class to conform to the constitutional requirements.

For instance, an act making the mayors of cities of the second class hold a term for five years might be submitted to cities of that class. If adopted by one city, the Legislature immediately on the heels of its adoption, could modify or destroy all the charter powers of that single city by an act applying to it alone.

So in the present case, after the electors had voted only upon the question whether the scheme of government proposed by the new statute was likely to be wiser and more efficient than the old system, the Legislature seized upon the result of that vote to pass an act which radically changed all the powers of the new group without a popular vote and without applying the legislation to all cities invested with the powers thus affected. This, we insist, was special legislation.

It has been insisted that the voters knew when they voted for the adoption of the "Walsh Act" that the Legislature had the power to amend the adopted act, and, therefore, the voting citizen cannot complain of the exertion of the power to amend.

It seems to us that what the voter is presumed to have known is that the Legislature could amend by a constitutional statute only, that is, by one general in its quality.

It has been also suggested that the "Walsh Act" being general, is capable of amendment at any time; by which is meant, apparently, that any amendment of the general act will itself be general.

But this supposition is not necessarily true. A statute purporting to deal with cities of from 10,000 to 20,000 population in providing for a structural form of government only, might be general, while a supplement to that act, dealing with municipal affairs not governmental, might be special.

Now, as already remarked, the "Walsh Act" enacted to create a new governmental scheme for all cities, indeed for all municipalities which might accept its terms, was a general act, and we think could have been amended at any time before any municipality of its class had adopted it.

Intervening the time when the "Walsh Act" was enacted and the date of the "Hennessy Act," certain municipalities, including certain cities of the second class, had definitely accepted the provisions of the "Walsh Act" by an adopting vote; so that there existed cities of this class which had come under the provisions of the "Walsh Act" and cities of the class which had failed to adopt it.

We think it is no answer to the insistence that the "Hennessy Act" is special legislation to say that it is general because the present declining municipalities have the privilege of adopting it.

When the "Walsh Act" was enacted, all of a class had the privilege of adopting it, and upon this privilege, conferred upon all of a class, rested the generality of that legislation.

When the "Hennessy Amendment" was passed the situation had shifted. The radical provisions of the "Hennessy Act," apparently stripping these cities of a great part of their former power, legislated absolutely for those cities which had adopted the "Walsh Act," but only contingently for those cities which might thereafter adopt it.

There is no provision in either the "Walsh Act" or the "Hennessy Act" for the re-submission of the amending act to those cities which had already adopted the Walsh statute.

So conceding that for the purposes of the original act all cities and all municipalities which might adopt it were a class, the "Hennessy Act" severed that class into two sections, for one of which it legislated absolutely, and for the other section contingently. To one section was submitted the privilege of adopting or declining the amendatory act, and to the other section this privilege was withheld.

POINT II.

This view has special significance in respect to our next point, namely, that the "Hennessy Act" contravenes the provision of Art. IV, Sec. 7, Par. 4, of our Constitution, which provides that every law shall embrace but one subject, and that shall be expressed in the title.

Grover v. Trustees of Ocean Grove Camp Meeting Assn., 16 Vr. 98.

We are aware that where the title of a statute states it to be concerning a municipality, or concerning a class of municipalities, it will, as a rule, cover legislation concerning any subject appropriate to municipal government.

Corward v. North Plainfield, 34 Vr., p. 61.

Walker v. Union, 4 Vr. 350.

Snipe v. Shriner, 15 Vr. 206.

Anderson v. Camden, 29 Vr. 515.

State v. Belmar, 33 Vr. 20.

But the "Hennessy Act," as entitled, contains features which would not occur to a voter for the adoption of the "Walsh Act" as within the range of legislative intention. No one would suppose from a reading of the title, namely, "To amend and explain the 'Walsh Act' that it was proposed by the new legislation to wipe out the great class of statutes which had theretofore been the main source of the power which inhaled in all cities. What would occur to anyone who had

voted for or against the "Walsh Act," and to anyone supposed to know the frame and scope of that statute, would be that the alterations proposed would be confined to the structural features of the new government.

This legislation seems to be as foreign to the letter and spirit of the title of the "Hennessy Act" as was the legislation involving the power of a Board of Health in the case of *Board of Health v. New York, &c., R. R. Co.*, 77 N. J. L., p. 15, to the title of the act in that case.

POINT III.

We submit, in the third place, that the "Hennessy Act" violates another clause in Par. 4, Sec. 7, Art. IV, of the Constitution. This clause prohibits the passing of any act which shall provide that any existing law, or any part thereof, shall be made or deemed to be a part of the act, or shall enact that any existing law, or any part thereof, shall be applicable except by inserting it in such act.

Christie v. McNeal, 19 Vr. 407.

The criticism of the "Hennessy Act" in this respect is forcibly expressed in a letter to the press by Ex-Judge VanSyckel, as follows:

"The 'Hennessy Act' distinctly provides that not only the existing laws, but that a large body of laws, the purport of which is not even indicated, and which no man can with certainty enumerate, shall be deemed a part of the act and shall be applicable to the Commission government. It declares that a large body of laws not specified shall be applicable to municipalities that have heretofore adopted, or shall hereafter adopt, Commission government, and thereby re-enacts such laws and also repeals all previously existing laws which are not applicable to all of the class. Could the members of the Legislature who voted for this 'Hen-

nessy Act' have known what laws they were giving to this class of municipalities? Did the man who drafted the act know? To acquire that knowledge it will be necessary to ascertain what laws are applicable to each municipality and then reject every law not common to all. The purpose of the constitutional mandate was to prevent legislation, the object of which was not apparent, or which could not be readily ascertained by reference to the act which is passed, and to the particular act to which it is a supplement."

After citing *Campbell v. Board of Pharmacy*, 16 Vr. 241; *Bradley & Currier Co. v. Loving*, 25 Vr. 227; *Hopper v. Stack*, 40 Vr. 562; and *Christie v. McNeal*, 19 Vr. 407, the learned Ex-Justice proceeds:

"No one can tell by reading the first section of the 'Hennessy Act' what powers are granted by it, and even after much research some acts might be overlooked, or there might be a difference of opinion as to what acts were applicable to all of the class."

Now, it will probably be insisted by those supporting the constitutionality of the "Hennessy Act" that the clause which provides that municipalities adopting the "Walsh Act" "shall not be subject to any laws of this State except laws applicable to all municipalities" merely repeals statutes applicable to cities alone, and that repealing acts are not within the constitutional restrictions now invoked; and respecting statutes applicable to all municipalities, that they are not made a part of the "Hennessy Act," but are only recognized as still existing statutes.

But our view is that the effect of the "Hennessy Act" was to affirmatively recognize the existence of those statutes which applied to all municipalities in a manner which made them, in a constitutional sense, a part of the "Hennessy Act."

The "Hennessy Act" endeavored to create a new

group of municipalities, and proceeded to define the powers which those cities should thereafter have. It enacted that they should have power, subject only to restrictions contained in all statutes applicable to all municipalities, and, with the exception of a restriction as to the amount of bond indebtedness, they should have all other municipal powers whatsoever.

This was the equivalent of saying that the new group should have such statutory powers as were contained in such statutes as applied to all the municipalities of the State.

POINT IV.

We submit, in the fourth place, that the "Hennessy Act" is an unconstitutional attempt to delegate powers to Boards of Commissioners.

The ability of the Legislature to delegate some powers to municipalities is conceded; but other powers are incapable of delegation.

Riley v. Trenton, 22 Vr. 498.

Dexheimer v. City of Orange, 31 Vr. 111.

The power to pass police and similar ordinances was inherent in the British municipalities. This inveterate practice in Great Britain early led to the recognition in this country of the capability of municipalities here to exert incidentally and to receive delegations of the power of local governments from the Legislature. These instances of delegation have, so far as I have discovered, been specific, pointing out the subject-matter upon which the municipality was empowered to legislate. I know of no instance in England or in this country without specific constitutional permission, where the Legislature has attempted to throw upon the municipality untrammelled power of municipal legislation, namely, the power to select the subject-matter at the unlimited discretion of council, board, or other city governmental body.

The fact that some constitutional provisions have been adopted and others proposed, which are designed to confer entire power upon the citizens of a municipality to legislate for all purposes, exhibits the general sentiment which pervades the community, that without the assistance of constitutional provisions, a large branch of legislative power is incapable of delegation to municipal bodies.

The generality of this understanding appears from the collection of constitutional provisions made by Mr. Dawes in his brief, which provisions were thought necessary to reach the purpose of those who were working for municipal home government.

Now if the intention of the framers of the "Hennessy Act" was not to equip municipalities of this group with all powers save such as existed by virtue of statutes that applied to all municipalities, it is difficult to conceive their purpose. The explanatory "Whereas" with which the act begins exhibits a design to erect a local legislature to have control of all matters, whether they have been theretofore regarded as incidents of municipal control or not. The taking of land for public purposes, the negotiation of municipal bonds, and a score of other subjects which have heretofore been regarded as not within the incidental power of municipalities, but only existing by virtue of special legislative grant, would come within the grasp of the new governing body. Indeed, the attempted power given is so broad that it would apply to subjects which have never heretofore been regarded of a municipal character. Laws regulating marriage, and wills made of property within the municipality, would be within the terms of the grant of power. The inability of the Legislature to grant such power is too obvious for further remark, and if the legislative intent to do so is apparent in the "Hennessy Act," it so affects the substance of the act as to render the whole unconstitutional; for it is inconceivable that the Legislature—after setting out that the purpose of

the legislation was to give such municipalities the benefit of home rule with power to do any act or thing which the governing body might deem necessary or desirable, unless forbidden by the Constitution of the State or by laws applicable to all municipalities—would have passed the act if it had known that it conferred no new powers, but, instead, stripped the adopting municipalities of a large portion of the powers they already possessed, and so left the municipalities in a great degree helpless.

An interesting and forceful case dealing with the power of the Legislature to delegate its authority to a municipality, or the people of a municipality, is the case of *The State ex rel Mueller v. Thompson*, 149 *Wisconsin* 488, reported also in 137 *N. W. Rep.* 20, and in *vol. 29, Amer. & English Annotated Cases*, p. 774. In this case the Legislature passed an act which provided that "every city in addition to the powers now possessed is hereby given authority to alter or amend its charter, or to adopt a new charter, by convention in the manner provided in the act, and for that purpose is hereby granted and declared to have all power in relation to the forms of government and to the conduct of its municipal affairs, not in contravention of or withheld by the Constitution or laws operating generally throughout the State."

This legislation was discredited by the Supreme Court of Wisconsin.

In that case the power conferred upon the municipality was to alter and amend the old, or adopt a new charter; in the present case the Legislature says to the municipality: you need not even adopt a formal charter, but take whatever powers you wish.

A case in line with the Wisconsin case just cited is that of *Elliott v. City of Detroit*, 121 *Mich.* 611, dealing with a statute which provided for the amendment of the charter of Detroit by a vote of electors. For the convenience of the court a reprint of *State v. Thompson*, in pamphlet form is submitted with the brief.

POINT V.

If, however, the "Hennessy Act" is constitutional, yet a view of its construction, not unworthy of consideration, could be suggested which would leave the old "Park" and "Harbor" Acts still forceful to support the proceedings now *sub judice*.

The language of Sec. 1 of the "Hennessy Act" is that the adopting municipalities shall not be *subject* to any laws of this State except laws applicable to all municipalities. There is no express and absolute repealer of all statutes theretofore applying to the adopting municipalities and not applicable to all municipalities. The text of the act is that the Board of Commissioners shall not be "subject" to these statutes. This may mean that the text of these statutes shall not control the Board of Commissioners in the exercise of the general powers conferred upon the board by Sec. 8 of the act. The language signifies that no limitation contained in these statutes shall fetter the will of the board if the board chooses to adopt a different theory of municipal government; but until the board does register its will in a manner which is in contravention of some statute applicable to cities, the powers and regulative features of the statute continue.

If this construction of the effect of the clause in the "Hennessy Act" is not unconstitutional as a delegation of legislative power, the construction seems not unreasonable, and, if adopted, would save the present proceedings.

POINT VI.

If the "Hennessy Act" is held to be constitutional, the question will arise whether the proceedings brought up by the writs in this case can be vindicated under the power conferred in the "Hennessy Act" without any assistance from the old statutes under which the pro-

ceedings were initiated. If the "Hennessy Act" confers only those powers which have heretofore been regarded as incidental to municipalities, it will follow, as pointed out by Mr. Bird in his separate brief, that not only will the present proceedings fail, but the city will be helpless to meet the pressing necessities of the city in the present stage of its municipal life. Besides this, the grant of power will be so undefined that each attempt to exercise municipal power will entail an appeal to the courts to get judicial sanction for the proposed municipal action. This feature in many of the schemes for the promotion of municipal home rule is pointed out by Judge Timlin in the case of *State v. Thompson*, already mentioned.

If, however, the "Hennessy Act" is constitutional, and repeals absolutely the "Park" and "Harbor" statutes and contains a grant of a right of condemnation, the question is presented whether all proceedings taken under the "Park" and "Harbor" acts, and similar statutes—proceedings which were *in fieri* when the "Hennessy Act" went into effect on April 9, 1914—fall to the ground. We suggest that such is not a necessary result. For instance, take the proceedings for condemnation under the "Harbor Act." These proceedings were taken under Sec. 7, which empowers Harbor Commissioners to recommend to the board having charge of the finances of a city that the land in question be acquired by the city by purchase or condemnation, with a statement of the estimated cost of it; and if the said body shall by resolution determine that the same shall be acquired, should make an appropriation for the estimated costs, or a part thereof, for said purpose; that the said Board of Harbor Commissioners may proceed to purchase the same on behalf of the city, or, if unable to agree with the owner, said Commissioners may condemn and take the same in the name and on behalf of the city, and compensation shall be paid or tendered as provided in the Eminent Domain Act, P. L. 1900, p. 79.

Now, when the "Hennessy Act" went into effect, on April 9, 1914, the city commissioners, acting under the provision of the "Walsh Act" as Harbor Commissioners, recommended the acquisition of the lands now in question, made an estimate of the cost to the finance body and determined to acquire the land and made an appropriation. Then the Board of Commissioners had applied under the Eminent Domain Act for the appointment of commissioners to fix the compensation, which order had been affirmed by the Supreme Court. Now, the clause in the "Hennessy Act" respecting the manner in which the value of the property taken could be ascertained, etc., was of no significance, because the power to take, being once given, the Eminent Domain Act itself furnished the method of acquisition by payment or tender of compensation. So when the municipal will was once declared, the Eminent Domain Act supplied authority for all subsequent proceedings, although the "Harbor Act" was, in the meantime, repealed.

Belvidere v. Warren R. R. Co., 5 Vr. 193.

Indeed, the view thus suggested would support the present proceedings, although the "Hennessy Act" did not contain the power of eminent domain. If the "Hennessy Act" *did* empower the city to condemn, it might be suggested that the power under that act, springing into existence simultaneously with the repeal of the "Park" and "Harbor" acts, the power was a continuous one and relieved the city of the burden and the delay of proceedings *de novo* to utilize the power conferred by the late statute.

DELAWARE RIVER AT TRENTON, N. J.

LETTER

FROM

THE SECRETARY OF WAR,

TRANSMITTING,

WITH A LETTER FROM THE ACTING CHIEF OF ENGINEERS, REPORTS ON EXAMINATION AND SURVEY OF DELAWARE RIVER, NEW JERSEY, FROM LALOR STREET, TRENTON, TO UPPER RAILROAD BRIDGE, WITH A VIEW TO OBTAINING GREATER DEPTH.

APRIL 2, 1910.—Referred to the Committee on Rivers and Harbors and ordered to be printed, with illustration.

WAR DEPARTMENT,

Washington, April 1, 1910.

SIR: I have the honor to transmit herewith a letter from the Acting Chief of Engineers, U. S. Army, of this date, together with copies of reports from Maj. Herbert Deakyne, Corps of Engineers, dated April 20, 1909, and March 3, 1910, with map, on preliminary examination and survey, respectively, of Delaware River, from Lalor street, Trenton, N. J., to upper railroad bridge, made by him in compliance with the provisions of the river and harbor act of March 3, 1909.

Very respectfully,

J. M. DICKINSON,

Secretary of War.

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

WAR DEPARTMENT,

OFFICE OF THE CHIEF OF ENGINEERS,

Washington, April 1, 1910.

SIR: I have the honor to submit herewith, for transmission to Congress, reports dated April 20, 1909, and March 3, 1910, with map, by Maj. Herbert Deakyne, Corps of Engineers, on preliminary examina-

tion and survey, respectively, called for by the river and harbor act approved March 3, 1909, of Delaware River, from Lalor street, Trenton, N. J., to upper railroad bridge, with a view to obtaining greater depth.

The district officer states that steamers formerly ran to the wharf at Ferry street, Trenton, just below the Pennsylvania Railroad bridge, but the depth was not sufficient to permit the operation of boats of increased draft on regular schedules, so that the steamer terminus was transferred to Lalor street, and the object now is to so improve the river as to again bring the river traffic $\frac{1}{2}$ mile nearer to the heart of the city. He states that the city of Trenton is said to own the land at the foot of all streets running to the river, that a harbor board has been created with a view to increasing the city's frontage and improving it for terminal facilities, and that drawings have been prepared for a substantial development of the water front, on which it is proposed to expend about \$2,000,000.

A plan is presented for improvement between Lalor street and the upper railroad bridge by dredging a channel 200 feet wide and 12 feet deep at mean low water, with a turning basin of the same depth 300 feet wide and 400 feet long, all at an estimated cost of \$164,000 and \$5,000 annually for maintenance, this being virtually an extension of $\frac{1}{2}$ mile of the plan for improvement between Philadelphia and Lalor street, Trenton, recommended in House Document No. 702, Sixty-first Congress, second session. The district officer is of the opinion that the proposed improvement is worthy of being undertaken by the United States, subject, however, to the condition that any land required for the disposal of dredged material shall be furnished free of cost to the United States, and the division engineer concurs in the views of the district officer.

These reports have had consideration by the Board of Engineers for Rivers and Harbors, and in report dated March 21, 1910, herewith, the Board recommends the improvement under the plan proposed, provided that no work be undertaken until the Secretary of War shall be satisfied that substantial terminal facilities commensurate with the probable needs of present and prospective commerce will be provided by the city of Trenton.

I concur in the recommendation of the Board of Engineers for Rivers and Harbors, with the added condition that a satisfactory place for disposal of the dredged material shall be provided without cost to the United States.

Very respectfully,

FREDERIC V. ABBOT,
Acting Chief of Engineers.

The SECRETARY OF WAR.

PRELIMINARY EXAMINATION OF DELAWARE RIVER, FROM LALOR STREET, TRENTON, NEW JERSEY, TO UPPER RAILROAD BRIDGE.

ENGINEER OFFICE, U. S. ARMY,
Philadelphia, Pa., April 20, 1909.

SIR: In compliance with department letter of March 8, 1909, I have the honor to submit the following report on a preliminary examination of the Delaware River, from Lolor street, Trenton, to upper railroad bridge.

This examination is required by the following paragraph of the river and harbor act approved March 3, 1909:

New Jersey.—Delaware River, from Lolor street, Trenton, to upper railroad bridge, with a view to obtaining greater depth.

The preliminary examination was made March 30, 1909. The blue-print^a submitted herewith shows this portion of the river according to a survey made in 1900. There is also submitted a map^a of the city of Trenton, which shows the relation of the city to the two points mentioned in the act.

The upper railroad bridge mentioned in the act is the bridge of the Pennsylvania Railroad at Bridge street, just above Ferry street. There is no bridge across the river at Trenton below this point, but a bridge is projected at a site just below the city line, in contradistinction to which the existing Pennsylvania Railroad bridge is called the upper bridge.

The engineer officer in charge of this district submitted a report on the upper Delaware River November 27, 1884. At that time there was a channel between Bordentown and Trenton 4 feet deep at low water. The district officer stated that, while there was no doubt that the channel could be improved, it was necessary to make further study of the river before deciding upon permanent improvement. He recommended a complete detailed survey of the river between Trenton and Philadelphia. The subject was taken up in 1885 by a board appointed to consider the permanent improvement of the river. As the survey above Philadelphia had not been completed, this board made no plans for the improvement of the upper river, but made certain suggestions relative to surveys in the vicinity of Trenton, among which was the recommendation that an estimate be made of the amount of bowlders said to exist in the steamboat channel just below Trenton, N. J.

Between 1885 and 1890 the surveys were completed, and a report thereon was submitted by the district officer February 13, 1890. He reported that a series of borings between the steamboat wharf at Trenton and Perriwig shoal, about 3 miles below, showed the pres-

^a Not printed.

ence of no rock in place within 12 feet below mean low water. Boulders from a few inches to over a foot in diameter were found from the steamboat wharf to a point about 2,500 feet below. From this point downstream it was found that the bed of the river consisted of coarse gravel mixed with small boulders. The steamboat wharf mentioned is the wharf just below the upper railroad bridge named in the act of March 3, 1909.

The length of river from Lalor street to the upper railroad bridge is about 1 mile. The river has a width of about 1,000 feet at the bridge and continues with that width for about two-thirds of a mile downstream, then widens out to about 1,500 feet, and again narrows to 1,000 feet at Lalor street. The best depths at mean low water over this portion of the river as found by the survey made in 1900 vary from 10 feet at Lalor street to 4 and 5 feet on the shoals above, while large areas between the banks are bare at low water. The river is so obstructed by rocks and shoals as to be unfit for navigation in its present condition. The mean range of tide at Trenton is 4.2 feet.

Lalor street is the present practical head of navigation and is the landing place for the steamers of the Delaware River Transportation Company which ply regularly between Philadelphia and Trenton. The improvement of the river above Lalor street is desired for the purpose of enabling boats to land in the vicinity of the bridge, thereby bringing passengers and freight about 1 mile closer to the heart of the city. The principal business section of the city is in the vicinity of the intersection of Broad and State streets. By reference to the map it will be seen that this point is about 1 mile from the foot of Ferry street, while its distance from the foot of Lalor street is about 2 miles. Passengers are enabled to reach Lalor street by an electric-car line. Freight is hauled to and from Lalor street in wagons at a considerable increase of expense in money and time over what would be required if the steamers could land at Ferry street.

The present and prospective commerce of the Delaware River between Philadelphia and Trenton is covered by my report submitted April 19, 1909, on a preliminary examination of the Delaware River from Allegheny avenue, Philadelphia, to Trenton. Attention is invited to that report^a and accompanying papers submitted by persons consulted in regard to the improvement. I submit herewith a list^b furnished by the Trenton Chamber of Commerce showing the inbound and outbound shippers of Trenton. It is evident that Trenton has developed into a manufacturing city of importance. Its population in 1900 was about 73,000; it now claims about 90,000. Very extensive establishments are devoted to the manufacture of pottery, rubber

^a Printed in H. Doc. No. 702, 61st Cong., 2d sess.

^b Not printed.

goods, wire, woolen goods, structural metal, oilcloth and linoleum, tiles, machinery, and plumbing supplies. Statistics collected for the year 1908 from the transportation companies operating between Philadelphia and Trenton show that the through-freight movement between the two cities amounted to about 65,000 tons. The freight rate is 2 cents per 100 pounds lower by water than by rail. The number of through passengers carried in 1908 is reported to be about 60,000. The round-trip fare between Trenton and Philadelphia is 50 cents by water as against \$1.25 by rail. The passenger traffic is almost entirely confined to the summer months, during which time, aside from the cheaper fare, the more agreeable mode of travel makes the river route attractive.

The matter of terminal and transfer facilities has been investigated, as required by the act. It is found that the city of Trenton has taken steps to acquire control of a large part of the water front between Lalor street and the upper railroad bridge, with a view to its development into landing places owned by the city. Room exists for the accommodation of a large amount of commerce. Railroad connection between the water front of the city and existing lines can be established without difficulty. There is already a wharf at the foot of Ferry street owned by the Delaware River Transportation Company. Formerly steamers were operated to this point by timing their trips according to the tide, but the increased draft of the steamers now in use and the desire of operating them on regular schedules have rendered it impossible for steamers to continue to go to the upper railroad bridge.

The advantages of bringing this travel 1 mile nearer to the center of the city of Trenton are sufficient to warrant improvement, providing the work can be accomplished at reasonable cost. This can only be determined by a survey, including necessary additional borings in the river. If no ledge rock should be encountered, the improvement of this part of the river to give it the same depth as the controlling depths between Philadelphia and Trenton would be comparatively simple and not unduly expensive.

The act requires the submission of data in regard to the development and utilization of water power for industrial and commercial purposes. This portion of the river is not adapted to the development of water power, and that feature need not be considered in connection with the improvement.

The act requires that data shall be submitted in regard to such other subjects as may be connected with the project in addition to the terminal facilities and water power. One such subject to be considered is that of floods. Trenton is at times subject to considerable floods, due to the rise of the Delaware River above the city, combined

with ice gorges below the city. The improvement of the river from Lalor street to the bridge could not be expected to affect ice conditions several miles below. It might contribute somewhat to the amelioration of flood conditions by affording a better channel to carry off flood waters in the immediate vicinity of the city.

Another subject connected with the proposed improvement is that of the general improvement of the Delaware River between Trenton and Philadelphia. To secure the full benefit of the latter improvement, it is desirable that the river above Lalor street shall be made equally as navigable as the portion below. The extent of the improvement between Lalor street and the railroad bridge therefore depends upon the improvement decided on between Trenton and Philadelphia. This project is also connected with the development of intracoastal waterways, for which a survey is required by the act of March 3, 1909. As stated in my report of April 19, 1909, the development of an intracoastal waterway passing near Trenton would naturally be accompanied by the development of facilities to connect Trenton with such waterway.

I am of the opinion that the locality is worthy of improvement, and recommend that a survey be made for the purpose of determining on a plan of improvement and estimating the cost thereof. It is estimated that such a survey will cost \$1,000.

Very respectfully,

HERBERT DEAKYNE,
Major, Corps of Engineers.

The CHIEF OF ENGINEERS, U. S. ARMY.
(Through the Division Engineer.)

[First indorsement.]

U. S. ENGINEER OFFICE, EASTERN DIVISION,
New York City, April 21, 1909.

Respectfully forwarded to the Chief of Engineers, U. S. Army.

As the improvement of the stretch of river under consideration appears to be of considerable importance commercially, a survey and estimate of cost are recommended with a view to determining the question of advisability. It is recommended that such sum as may be necessary for the above purposes be allotted.

D. W. LOCKWOOD,
Colonel, Corps of Engineers,
Division Engineer.

[Third indorsement.]

BOARD OF ENGINEERS FOR RIVERS AND HARBORS,

Washington, D. C., May 3, 1909.

Respectfully returned to the Chief of Engineers, U. S. Army.

The act calling for this examination also provides for an examination of the Delaware River from Philadelphia to Trenton, on which subject a report has been submitted. The upper end of the stretch considered in that report is at Lalor street, the present recognized head of navigation, and the present investigation has in view an extension of navigation to the upper railroad bridge, a distance of about 1 mile.

This extension would carry navigation nearer to the heart of the city of Trenton and would no doubt be of advantage to the community.

The river is in bad condition over this reach, and in the opinion of the Board a survey with estimate of cost is necessary to determine the advisability of the General Government's entering upon the work. It therefore concurs with the district officer and the division engineer in recommending that a survey be authorized.

For the Board:

JOHN G. D. KNIGHT,
Colonel, Corps of Engineers,
Senior Member Present.

[Fourth indorsement.]

WAR DEPARTMENT,

OFFICE OF THE CHIEF OF ENGINEERS,

Washington, May 6, 1909.

Respectfully submitted to the Secretary of War.

This is a report on preliminary examination of Delaware River from Lalor street to the upper railroad bridge, Trenton, N. J., authorized by the river and harbor act of March 3, 1909.

Inviting attention to the report of the Board of Engineers for Rivers and Harbors in the preceding indorsement, I recommend that a survey of the locality as proposed be authorized.

W. L. MARSHALL,
Chief of Engineers, U. S. Army.

[Fifth indorsement.]

WAR DEPARTMENT,

May 7, 1909.

Approved.

ROBERT SHAW OLIVER,
Acting Secretary of War.

SURVEY OF DELAWARE RIVER FROM LALOR STREET, TRENTON,
NEW JERSEY, TO UPPER RAILROAD BRIDGE.

UNITED STATES ENGINEER OFFICE,

Philadelphia, Pa., March 3, 1910.

SIR: In compliance with instructions dated May 15, 1909, I have the honor to submit the following report on survey of Delaware River from Lalor street, Trenton, N. J., to upper railroad bridge, with a view to obtaining greater depth, as called for by the act of Congress approved March 3, 1909. A report on preliminary examination was submitted April 20, 1909, and the survey was authorized by the Secretary of War May 7, 1909.

The survey was made in connection with survey of Delaware River from Allegheny avenue, Philadelphia, to Trenton, required by the same act of Congress. The work was done by Mr. John W. Thompson, junior engineer, under the supervision of Mr. John Meigs, assistant engineer. The survey was commenced June 8, 1909, and was carried on until stopped by ice December 28, 1909, at which time all fieldwork had been completed except a few borings. These borings were completed on March 3, 1910. The results of the survey are shown on a tracing forwarded herewith, which also covers the river below Lalor street as far as Biles Creek, giving a comprehensive view of the Trenton water front and vicinity.

The report on preliminary examination gives a description of this portion of the river and information as to commercial conditions, need of improvement, water power, ice gorges and floods, terminal and transfer facilities, and the relation of the proposed work to the general improvement of the upper Delaware River and to the proposed intracoastal waterway. As stated therein, steamers formerly ran to the wharf at Ferry street, just below the Pennsylvania Railroad bridge, but the depth was not sufficient to permit the operation of boats of increased draft on regular schedules, and the steamer terminus was therefore transferred to Lalor street.

The city of Trenton has recently taken up the question of obtaining control of a large part of its water front and improving it for terminal purposes. A harbor board has been created and an engineer employed to make plans for the development of the water front. The city is said to own the land at the foot of all streets running to the river, and to contemplate the acquirement of additional frontage. I forward herewith drawings,^a in three sheets, showing the plans of the city of Trenton for the improvement of the water front. There are no established harbor lines at Trenton; they should be established in case the improvement of the river is undertaken by the Government. The drawings prepared by the harbor board of the city of Trenton

^a Not printed.

show substantial plans in contemplation. I am informed that the city intends to expend about \$2,000,00 in the purchase of land, the construction of bulkheads, piers, slips, and warehouses, and in grading and other work required for the development of the water front.

The survey shows that above Lalor street, where there is a depth of 10 feet, the depth decreases rapidly. By following the tortuous course of the deepest water a depth of 3.5 feet can be carried to Ferry street. The mean range of tide was formerly reported as 4.2 feet. The observations made during the survey gave a mean range of 4.5 feet. Below Lalor street the deepest water is on the New Jersey side. Above this point the natural course of the deepest water follows the Pennsylvania side for a distance of about 1,200 feet and then follows approximately the middle of the river to Ferry street. This would seem to indicate the middle of the river as the best place for a deeper channel, but other considerations lead to a different conclusion. The creation of a channel in the middle of the river would require the construction of piers to give access to it, and the consequent narrowing of the river would have an injurious effect on flood and ice conditions.

The nature of the material in the river bed was determined by borings, of which the results are shown on the tracing. These borings show the presence of rock in the upper end of the harbor at an elevation of 8 feet below mean low water. The rock is higher along the Pennsylvania side than along the New Jersey side. This is an additional reason for placing the channel on the New Jersey side, in order to give the greatest possibilities of future development without encountering rock. The limiting line of the channel on the New Jersey side should coincide approximately with the line of the outer ends of the piers proposed to be constructed by the city. The material to be removed is coarse and heavy. Experience at Sewer shoal, just below Trenton, in dredging a cut in 1909, showed that the material there encountered could be moved with a suction dredge, but the work was more difficult than work by that method usually is, on account of the wear and tear of machinery and the resistance offered by such material in the pipe line. Practically all of this material is suitable for construction work, and its value for building purposes may assist in reducing the cost of its removal.

The channel dimensions recommended in my report dated February 3, 1910, on survey from Philadelphia to Trenton are 12 feet depth by 200 feet width. For the channel in front of the city of Trenton estimates have been made for these dimensions with a turning basin just below the railroad bridge 300 feet wide and 400 feet long. At the outer corner of this turning basin just below the railroad bridge it may be necessary to excavate rock to a few inches in depth over a very small area. Any greater depth and width will in-

volve such an amount of rock excavation as to lead to a large increase in cost.

The material to be dredged can be disposed of by placing it on the Pennsylvania side or by having it taken away to be used for building purposes. It cannot well be placed on the Trenton side, because the river has a high bank on that side and there will be a surplus of material when the bank is graded to give easy access to the water front. The borough of Morrisville on the Pennsylvania side has signified its willingness to have the material deposited on land along the front of the town. This borough has also requested that this project provide for development of shipping facilities on the Pennsylvania side of the river. I am of the opinion that there is at present no commercial necessity of providing a channel along the front of Morrisville. The presence of rock makes it impossible to excavate a channel of any considerable depth along the bank at Morrisville, and the extension of piers from that bank would narrow the river at a point where its width is already none too great.

In preparing the estimate the unit price is based on records of similar work done near Trenton. An allowance is made of 1 foot for overdepth dredging. The maintenance of a dredged channel in this location is not expected to be costly. The experience with dredged channels a few miles below Trenton has shown that they do not deteriorate rapidly. The estimate is as follows:

For a channel 200 feet wide and 12 feet deep at mean low water, with a turning basin at its upper end of the same depth, 300 feet wide and 400 feet long—

Excavation, 426,000 cubic yards, at 35 cents per cubic yard.....	\$149,100
Engineering and contingencies	14,900
	\$164,000
Total first cost	5,000
Maintenance of this channel per year.....	

The necessity of the improvement is explained in the report on preliminary examination. The object is to bring the river traffic about 1 mile nearer to the heart of the city. The improvement from Lalor street to the railroad bridge is necessary in order to enable the present and prospective commerce of Trenton to secure the full benefit of the proposed channel to Philadelphia. The two matters are closely related, but are covered by separate items in the act of March 3, 1909. A channel along the Trenton water front should have an equal depth with that below Trenton. I have therefore to report that, in my opinion, the Delaware River from Lalor street, Trenton, to the upper railroad bridge is worthy of improvement to the extent of creating a channel 200 feet wide and 12 feet deep at mean low water, with a turning basin at its upper end of the same depth, 300 feet wide and

400 feet long, at an estimated cost of \$164,000 and \$5,000 per year for maintenance.

The question of drainage is related to the proposed work only in so far as the improvement may be expected to contribute toward lessening the severity of floods. The proposed channel will make a considerable increase in the cross section of the river and should help in carrying off the flood waters. The same may be said with respect to ice gorges, which are frequently associated with floods at Trenton. No questions of land reclamation are involved. This portion of the Delaware River is not adapted to the development of water power.

As some of the area covered by the proposed channel is bare at low water and may be subject to claims of ownership, any improvement by the United States should be made subject to the condition that any lands or rights included within the channel lines shall be transferred to the United States free of cost. It should also be made a condition that land for the disposal of dredged material, if necessary, shall be furnished free of cost to the United States.

Very respectfully,

HERBERT DEAKYNE,
Major, Corps of Engineers.

THE CHIEF OF ENGINEERS, U. S. ARMY.
(Through the Division Engineer.)

[First indorsement.]

U. S. ENGINEER OFFICE, EASTERN DIVISION,
New York City, March 5, 1910.

Respectfully forwarded to the Chief of Engineers, U. S. Army,
concurring in the views and recommendations of the district officer.

WM. T. ROSSELL,
Colonel, Corps of Engineers,
Division Engineer.

[Third indorsement.]

THE BOARD OF ENGINEERS FOR RIVERS AND HARBORS,
Washington, March 21, 1910.

Respectfully returned to the Chief of Engineers, U. S. Army.
The district officer submits herein a plan for the improvement of the Delaware River from Lalor street, Trenton, N. J., to the upper railroad bridge, which provides for a channel 12 feet deep and 200 feet wide, with a turning basin at its upper end of the same depth, 300 feet wide and 400 feet long, at a total estimated cost of \$164,000, and \$5,000 for annual maintenance. It is his opinion that the improvement is advisable, and in this view the division engineer concurs.

Under date of February 8, 1910, the Board recommended the adoption of a project for the improvement of the Delaware River from Philadelphia to Lalor street, Trenton, the present head of practicable navigation. The improvement now proposed is an extension of that project about 1 mile, the object being to carry navigation nearer to the center of the city and to reach terminals which the city is expected to provide. It is stated that a harbor board has been created and drawings prepared for a substantial development of the water front, on which it is proposed to expend about \$2,000,000.

Should this work be undertaken by the city, it is believed that the channel proposed by the district officer at the expense of the General Government would be justified in the interests of commerce and navigation. As this part of the river is not used for general navigation at present, its improvement without a system of terminals would not, in the opinion of the Board, result in commensurate benefits.

The Board therefore recommends the adoption of the project herein presented, at an estimated cost of \$164,000, and \$5,000 annually for maintenance, provided, however, that no work be undertaken until the Secretary of War shall be satisfied that substantial terminal facilities commensurate with the probable needs of present and prospective commerce will be provided by the city of Trenton.

The district officer describes existing wharves and terminal facilities, and attention is respectfully invited to his remarks on this subject. In compliance with the provisions of section 13 of the act of March 3, 1909, the Board reports that there are no questions of water power or other subjects so related to the project proposed that they may be co-ordinated therewith to lessen the cost and compensate the Government for expenditures made in the interests of navigation.

For the Board:

WM. T. ROSSELL,
Colonel, Corps of Engineers,
Senior Member of the Board.

NEW JERSEY
Court of Errors and Appeals

On Appeal from the New Jersey Supreme Court

DELAWARE RIVER TRANSPORTATION COMPANY, <i>Prosecutor-Appellant,</i> <i>vs.</i> INHABITANTS OF THE CITY OF TRENTON, <i>Respondent-Appellee.</i>	} On Appeal.
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Brief for Respondent-Appellee.

The City of Trenton seeks to condemn certain lands held by the Prosecutor, the Delaware River Transportation Company. The Prosecutor is not a public service corporation, nor does it appear to have been incorporated under the Navigation Act of the State of New Jersey. It does not even appear to be a resident corporation.

The defendant conducted the condemnation proceedings under Chapter 161, Laws of 1911, page 233, entitled: "An act authorizing the appointment of boards

of harbor commissioners in cities of this State fronting on, or containing within their borders, navigable or tidal waters and prescribing their powers and duties; and providing for the improvement of harbors and water fronts and the regulation and use thereof, and the extension of shipping facilities; the acquisition of lands and property by purchase or condemnation; the acquisition of lands under water or riparian lands from the State; and the raising of funds for the aforesaid purposes by the levy of taxes or the issuance of bonds."

Section 7 of this act provides that when any board of harbor commissioners should deem it advisable to acquire any upland or riparian land or rights, or lands under water or any estate, rights, title or interest therein suitable or convenient in the opinion of the harbor board for use or improvement in any manner authorized by the act, it should recommend to the board having control of the finances of the city that the same be acquired by purchase or condemnation, with a statement of the estimated cost of such acquisition.

Section 10 of the act provides that the proceeds resulting from the sale of the bonds issued for the purchase of the rights aforesaid may be used in dredging, excavating and filling in any lands under water, riparian lands or uplands contiguous to the water front, constructing, rebuilding, altering, repairing and maintaining wharves, piers, docks, slips, basins, bulkheads, retaining walls and similar structures and warehouses, sheds and other improvements thereon, approaches thereto, and improvement of the harbor, channels opposite the water front, the acquisition of lands under water, riparian lands or rights and uplands or rights or interests therein, and any work or improvement authorized by said act.

Counsel on page 108 stipulated that each of the several resolutions passed by the defendant for the acquisition by condemnation of the tracts in question had been duly passed, save the one recommending the acquisition of the said tracts by the harbor board,

which recommendation is found on pages 24 and 25 of the book, and the due passage thereof is duly shown by the signatures of the members of the harbor board, attested by the secretary.

OBJECTIONS TO THE PROCEEDINGS.

First—The act is unconstitutional. The act has but one object.

In the *Easton & Amboy R. R. Co. v. The Central Railroad Company of N. J.* (52 N. J. L. 267), the Supreme Court said:

“In giving effect to section 7, article IV, of the Constitution the courts give paramount consideration to the general object of the act—the general purpose of the legislative scheme. The general object of the act being ascertained, the Legislature may include in its provisions of a multiform character, designed to carry into execution the legislative purpose, which are not inconsistent with or foreign to the general object of the act.

“The general object of the act of 1872, being the appropriation of a tract of land under tidewaters to public uses, for the purposes of navigation and commerce. Held, that the act entitled ‘An act to cede to the mayor and common council of Jersey City certain lands of the State now and heretofore under the tidewaters of Communipaw bay, and to establish a tidewater basin adjacent thereto,’ was constitutional, embracing the grant to Jersey City of that part of it next to the city with a duty to improve the same for a basin, with power to erect wharves, and to regulate and control the use of such basin and wharves, and to charge dockage and wharfage; and the dedication of the residue of the tract for a public basin, might be embraced in one act.”

Other cases in point are:

Paterson v. Close, 82 N. J. L. 160.

Allen v. Board of Education of Passaic, 81 N. J. L. 135-141.

Vreeland v. Burdett, 62 N. J. L. 163-164.

In re Port Reading R. R. Co., 75 N. J. L. 430-434, 51 Vr. 520.

Second—It is objected that the property which is sought to be taken under these proceedings is constructed for and used in interstate commerce. (See reasons 7, 8 and 9.)

The evidence is clear that interstate commerce has not been transacted for several years, and consequently that the lands are not now, and have not been for several years last past, devoted to any public use.

The prosecutor does not show that it is a public service corporation, or that it is under any duty whatsoever to render public service. This is essential.

In *Paterson v. The East Jersey Water Company* (4 *Buchanan at 102*) Vice-Chancellor Emory said:

“The East Jersey Water Company, the defendant here, is a private corporation only, incorporated under the general corporation law. * * * Neither is it by law obligated to supply to the public, or any portion of it, any water diverted by it, and such supply is purely voluntary and a matter of contract on its part. Water companies or municipalities, which by their charters or general laws are vested with power of condemnation for water-supply, have this power only for public use, and are under legal obligation to supply the public, or the portion of it included within the scope of their statutory control. The fact that the defendant company voluntarily supplies to public bodies the water diverted may show that the diversion of the water, or the bulk of it, ultimately inures to the public benefit, but in the absence of any legal obligation to supply the water for public use, and perhaps for such use only, the diversion by the

East Jersey Water Company is not such an appropriation of private property for public use as may, under our Constitution, be made upon compensation. For the purpose of this constitutional provision the true criterion by which to judge of the character of the use is whether the public may enjoy it of right or by permission only."

This case was affirmed, 7 *Buchanan* 588.

See, also, *Olmsted v. Proprietors of the Morris Aqueduct* (18 *Vr.* 311), citing *Bonaparte v. Ry. Co. Case*, at page 332.

In *Richardson v. Dover*, 32 *Vr.* 400, it was held that a company organized under the general corporation laws of this State could not exercise the franchises of a gas company. See *Incorporation of Navigation Companies*, 3 *Comp. Stat. of N. J.*, p. 3722.

The land not being used in connection with the franchises of the prosecutor is not exempt from condemnation.

Lewis on Eminent Domain (vol. 2, page 799, section 442):

"PROPERTY NOT IN USE AND NOT NECESSARY. Property of the quasi-public corporation not in use and not necessary for the exercise of its public franchises or discharge of its public duties may be taken under a general power to condemn property, the same as though it belonged to a private individual. Says the court in one of the cases cited: 'Lands held by a corporation or by a public body, but not used for or necessary to a public purpose, but simply as a proprietor and for any private purpose to which they may be lawfully applied, may be taken as if held by an individual owner. * * * The property rights of a corporation in lands not held in trust for a public use are no more sacred than those of individual proprietors.' The same is true of lands of such a corporation in use for purposes not of a public

nature and for which it could not exercise the power of eminent domain."

Chief Justice Beasley, in *Morris and Essex Railroad Co. v. Central Railroad Co.* (2 Vr. 205, at 214), says:

"Does an incorporated company stand in this respect on a higher level than the ordinary land owner? I am not aware that such a prerogative has ever been claimed. If claimed, it ought not to be conceded. It may well be, that where the attempt is to sequester a portion of the franchises of a railroad company, to the use of a company subsequently incorporated such sequestration could not be justified, in the absence of a grant of such authority in clear and express terms. * * * But when the franchises are untouched and the claim is simply to a right of way across the track of a railroad company, such company, in my opinion, occupies no higher ground than the common land owner. An opposite view would be attended with much mischief."

In *Florham Park v. Madison* (48 Vr. 260-262), it was held that where lands had been conveyed to one borough for the purposes of a water plant, and another borough sought to condemn the same, and the statute declared that lands held for water purposes by one borough could not be condemned by another, the fact that such lands were not being used for the purposes contemplated by statute did not exempt them from being taken by the latter borough. This case was affirmed in 49 Vr. 448.

See, also, *Philadelphia and Camden Ferry Company v. Inter City Railroad Company* (73 N. J. L. 86). Mr. Justice Dixon said:

"The evidence in this case shows that the land which the petitioner seeks to condemn is not necessary for the purposes of the prosecutor's franchise. It comprises part of a triangle, * * *

which part is wholly unused save for ornament.
 * * * It would be absurd to regard the present location as necessary for the prosecutor's franchise."

Affirmed in *45 Vr. 517*.

The testimony shows that the proposed plans of the City of Trenton, in respect to the construction of a wharf at Ferry street, has the approval of the Secretary of War.

In the 62d Congress, the Second Session Laws, Chapter 253, page 204, the following appropriation was made: "Improving Delaware River at Trenton, N. J., in accordance with report submitted in House Document Numbered 839, 61st Congress, second session, and subject to the conditions recommended by the Chief of Engineers, on page 2 of said Document—\$50,000."

The *sixth* reason, on page 120, that the recommendation signed by the individual members of the Board of Harbor Commissioners is not a corporate act is invalid. Mr. C. Arthur Metzger, the Secretary of the Harbor Board of the City of Trenton, testifies that the recommendation found on page 24 and 25, State of the Case, was considered in the board at an official meeting of them and was the product of that meeting; that it was signed by the members of the board and attested by the Secretary, and transmitted as a record of the board to the Common Council of the City of Trenton.

Further, the subsequent action of the Board of Commissioners of the City of Trenton, found on page 33, is a complete compliance with the statute. The powers exercised by the Board of Harbor Commissioners is now vested in the Board of Commissioners of the City of Trenton. (See *Hirsch v. Burk*, 83 *At. Rep.* 979.)

* * * A distinction has sometimes been drawn between evidence to contradict facts stated on the record and evidence to show facts omitted to be stated upon the record. Parol evidence of the latter kind is receivable unless the

law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence."

Dil. on Mun. Corps., Vol. 2, Section 557 (4th ed.).

The proof of the passage of the recommendation of the Harbor Commissioners by the Harbor Board is sufficient. There was no statute which required the board to authenticate their proceedings by written records or minutes. This alone shows the inapplicability of *Cook v. Manasquan*, 51 Vr. 206.

In the *U. S. v. Feillebrown*, 7 Peters 28, the Supreme Court of the U. S. held that the acts of boards of public agents or officers, not being required by law to reduce their proceedings to writing in order to make them binding, oral evidence was competent to show the official action of such boards.

Mr. Justice Story, in *Bank of U. S. v. Danbridge*, 12 Wheaton 64, said: "We do not admit, as a general proposition, that the acts of a corporation are invalid merely from an omission to have their acts recorded, unless the statute creating them makes such writing indispensable as evidence, or gives them an obligatory force."

In *Darlington v. Commonwealth*, 41 Penn. St. 68, Mr. Justice Strong, afterwards a Supreme Court Justice of the U. S., decided that the resolution of Council, in reference to the opening of streets were admissible in evidence, though not recorded when recording was not required by law.

Municipal records may be amended. *Dillon on Corporations, section 551, etc.*

The official action of the Board of Harbor Commissioners and of the Board of Commissioners of the City of Trenton manifest that the particular tracts of the prosecutor were, in their judgment, both suitable and convenient for use and improvement under the act. In resolution A4, page 33, lines 33, etc., the

board declared: "That in the judgment of this board it is advisable that said lands should be acquired for the purpose of making the improvements authorized by the said act, and the resolution above referred to;" on page 34, lines 9, etc., these lands are described in the resolution as "lands necessary to be taken and appropriated for the purpose of improving the harbor or river front in conformity with the act of the Legislature," etc.; on page 38, lines 2, etc., these lots are declared as "lots being required by the city for the purpose of improvement as authorized" by the Harbor Act; on page 19, lines 29, etc., these lots are declared to be "adopted to be suitable and needed for the purposes aforesaid."

It is submitted that the several phrases quoted are equivalents of the statutory language "suitable or convenient." The phrase "required by the city for the purposes, etc.," means that these lots are deemed indispensable. The word "necessary" used in one of the resolutions imports that it is convenient, useful, needful. The import of the word "necessary" is declared in *Olmsted v. Proprietors of Morris Aqueduct*, 18 Vr. 311, at pages 328 and 329, Court of Errors case, and citing Chief Justice Marshall as additional authority for such meaning. The testimony is an absolute demonstration of the suitability and convenience of these very lots, and should the prosecutor have raised such an issue of fact the testimony would have overwhelmed the prosecutor. The carefully prepared reasons of the prosecutor do not allege this supposed omission as any ground for invalidating the proceedings.

In *Kountze v. The Morris Aqueduct*, 29 Vr. 303, affirmed 29 Vr. 695, the Court held:

That the application for condemnation of lands necessary for its purposes need not show how the corporation made or expressed its determination "of the necessity" to take the lands sought to be condemned.

Where the directors discussed and agreed on a plan for making use of certain waters, which plan required the acquisition of certain lands and rights, and they had purchased and paid for some of such lands, they have sufficiently determined that it is necessary to acquire the other lands essential to the plan, although they had passed no resolution to that effect.

When the president of the corporation had made unsuccessful efforts to purchase some of the said lands he acquired implied authority from the directors to institute proceedings to condemn, but if he had it not the subsequent approval and adoption of such proceedings of the directors will sustain an order made on proceedings which had been instituted by him.

This case is a strong precedent for sustaining the proceedings at bar, having received the sanction of all the judges, both in the Supreme Court and the Court of Appeals. The prosecutor has waived this particular constitutional or statutory provision by omitting to raise it.

The ample powers of the Court to allow amendments of condemnation petitions and proceedings shows a strong disinclination of the Legislature and Courts of this day in vacating condemnation proceedings. See *3 Dillon on Municipal Corporations, note 1, page 1648.*

It is well established, as *Dillon on Municipal Corporations, section 1037*, declares, that in exercising the powers of eminent domain by municipal authorities, they need not preface their action by declaring the same to be necessary or expedient.

We, therefore, submit that the fair import of the several resolutions above referred to, show that the municipal authorities properly have expressed their judgment and opinion that these lands are convenient and suitable for the purposes aforesaid.

The seventh reason, page 120, is not sound because an estimate of the cost was made by the Board of Harbor

Commissioners, as required by the statute. See *Hoey v. Collector, etc., 10 Vr., page 75 (39 N. J. L.)*, to the effect that:

“The fifth section of the act creating the Long Branch Commission, requiring them to give notice of the amount and purposes for which expenses under the act are to be incurred, does not require them to give notice of the expenses of each purpose required to be stated.”

Affirmed on page 501.

The subsequent action of the Board of Commissioners of the City of Trenton supplies all the requisite official action made necessary by the statute.

CHAS. E. BIRD,
Counsel for Respondent-Appellee.

NEW JERSEY Court of Errors and Appeals

THE DELAWARE RIVER TRANS-
PORTATION COMPANY,
Prosecutor-Appellant,
vs.
THE INHABITANTS OF THE
CITY OF TRENTON,
Respondents-Appellees. }
On Appeal from
Supreme Court.

THE DELAWARE RIVER TRANS-
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HARRY F. SMITH,
Prosecutor-Appellant,
vs.
THE INHABITANTS OF THE
CITY OF TRENTON,
Respondents-Appellees. }
On Appeal from
Supreme Court.

Brief of Chas. E. Bird, for the Respondents-Appellees.

These causes present for consideration and determination questions as to the effect and validity of Chapter 144 of the Laws of 1914, popularly known as the

“Hennessy Home-Rule Act.” The purpose of this legislation seems perfectly clear.

Mr. Justice Trenchard has aptly declared:

“The language of the ‘Hennessy Act’ is clear and unambiguous. It declares that commission governed municipalities ‘shall not be subject to any laws of this State except laws applicable to all municipalities.’ There is, therefore, no occasion for construction or interpretation, but the act must be given effect by the courts, if constitutional.”

The intent of the act was to grant the power of home rule on the one hand and on the other to take away both the powers granted and the restrictions imposed by all other statutes except the Walsh Act and the general statutes referred to by Judge Trenchard.

The act also attempts to grant complete home rule to all the municipalities now or hereafter belonging to this new class, subject only to the Constitution, such general laws and the Walsh Act.

By the enactment of the “Home-Rule” Act the Harbor Act of 1911 (P. L. 1911, p. 233), the Park Acts of 1910 (C. S., vol. 3, p. 4196) and 1904 (C. S., vol. 3, p. 4200), the act of April 22, 1902 (C. S., vol. 1, p. 938), amended by the act of April 7, 1914 (P. L. 191), under whose authority the municipality was proceeding to acquire lands of the Delaware River Transportation Company, for harbor purposes and for park purposes, and to issue long-term bonds for the purpose of improving lands owned by the city, for use as a part of its park system, were made inapplicable to the city.

In order that we may retain the powers conferred by these several acts, we seek to remove from our path the “Hennessy Act” by challenging its constitutionality.

If the constitutionality of the act is sustained the important question arises at once as to whether or not acts applicable to cities of the second class, approved subsequently to the approval of the Hennessy Act, re-

peal that act *pro tanto*. Do the provisions of an act applicable to cities having a population between fifty and one hundred thousand, approved subsequently to the approval of the Hennessy Act, apply to Trenton.

The Government of Trenton is now confronted with these questions.

That the purpose of the enthusiastic and well-intentioned statesmen, who have promoted the enactment of this law, cannot be effectuated by anything less than a grant of "sovereign power," is conclusively shown, it seems to us, by a perusal of the cogent and philosophical discussion of the subject of "Home-Rule," by Judge Timlin, in his (concurring) opinion delivered in the recent case of *State ex rel. Mueller v. Thompson* 149 Wis. 488, which we have had printed in pamphlet form for the use of the Court.

As the City of Trenton has adopted the commission form of government, it is our duty, as well as our pleasure, to advocate such laws as will make that government successful.

The course of legislation and amendments of constitutions of other states in order to give greater latitude to the functions of municipal government may be aidful in solving the questions involved.

Ohio in 1913, Laws of 1913, p. 767, adopted a municipal government act. It provided that any one of three plans might form the basis of municipal government: the commission plan, the city manager plan, the federal plan. The significant feature of this act is that the initiative, the referendum and the recall are adjuncts of all the plans. The powers granted are those conferred upon municipalities by the constitution of Ohio, and any additional powers which have been or may be conferred shall be exercised by the commissioners, or the council, as the case may be.

The constitution of Ohio, adopted in 1912, allows any municipality to have a freeholders' convention, to form a charter for its government, which when adopted by the people shall be the charter of that municipality.

In Massachusetts the Chelsea charter is regarded as a model for adoption by any municipality which desires a new charter. It offers the optional plan of charter, of commission form of government, or the city manager plan, or the mayor and common council plan. Here also the referendum, the initiative and the recall are parts of the machinery of all three forms of municipal government.

The Boston charter (found in Mass. Laws of 1909, p. 5110) is substantially the same as the Chelsea charter. The Constitution of Massachusetts confers power upon the Legislature to delegate to municipalities local powers. (See *200 Mass. 152.*) There is a common feature in all the charters, of securing non-partisan government, by forbidding party names being used on the tickets.

In Wisconsin, in 1911, the municipal act was passed. It allowed cities to alter or amend their charters as they saw fit. The law allowed them to adopt a whole new charter or amend the existing one by their own initiative. The council might submit changes in the charter, which if approved by a majority of the voters at a referendum, would become part of the charter of the city. Ten per cent. of the electors could propose a change, which was to be submitted to the people. Or a convention, consisting of fifteen citizens can be called to draft an entirely new instrument. Such a convention can be called into being by a resolution of the council, or by a petition signed by five per cent. of the electors. When a new charter has been drafted by such a convention, it is then submitted to the people, and if a majority approve it, it becomes the charter of the municipality, as though adopted by the Legislature itself. Twenty-five per cent of the electors of a city can initiate an ordinance and call for a special election. Ordinances enacted by the council are subject to referendum by filing a petition signed by twenty per cent. of the electors.

Although this law has been declared unconstitutional, nevertheless it is valuable as showing that the referendum, initiative and recall are not regarded as peculiarities of the commission form of government.

In California, in the years 1911 and 1912, the commission form of government was adopted in many cities, but in every case a new charter was drawn, either by the Board of Freeholders or the City Council, under the authority of the constitution of the State of California. In New Jersey the commission form of government has annexed to itself the functions and powers which the municipality adopting that form possessed under its old scheme of government.

The commission form of government has been adopted by Jersey City, a city of the first class; by Trenton and Passaic, cities of the second class; by Bordentown and Millville, cities of the third class; by Long Branch and Atlantic City, cities of the fourth class; by the boroughs of Haddonfield and Wildwood; by Union township, Bergen county, a township, and by Ridgefield Park, a village.

In all cases where such powers as are attempted to be conferred by the Hennessy Act have been sustained in sister States, it is due to constitutional authority specially warranting it.

That the Legislature of 1914 entertained doubt respecting its power to grant home rule to cities, is very clearly shown by its act in passing Senate Concurrent Resolution No. 7, proposing an amendment in that regard.

The resolution reads as follows:

BE IT RESOLVED *by the Senate of the State of New Jersey (the House of Assembly concurring)*:

That the following amendment to the Constitution of this State be and the same is hereby proposed, and when it shall be agreed to by a

majority of the members elected to the Senate and to the House of Assembly, it shall be entered upon the journals, with the yeas and nays taken thereon, and referred to the Legislature next to be chosen and published for three months previous to the first Tuesday after the first Monday of November next, in at least one newspaper of each county, to be designated by the President of the Senate, the Speaker of the House of Assembly and the Secretary of State, payment for such publication to be made by the Treasurer on the warrant of the Comptroller.

Add to Article 4, Section 7, the following paragraph:

13. The inhabitants of every municipality in this State, now existing or hereafter created, shall have power to determine, organize and alter, in such manner as they shall by vote prescribe, the system and form of its government, not inconsistent with the Constitution of this State or of the United States; and every municipality shall hereafter have power and authority to do all things whatsoever that shall concern such municipality only, except so far as it may hereafter be restrained, limited or denied by the laws of the Constitution of this State or the Constitution of the United States.

THE TITLE DOES NOT EXPRESS THE OBJECT OF THE ACT, AND THE ACT IS UNCONSTITUTIONAL.

We submit that the Hennessy Act is unconstitutional, because the title does not express the object of the act. The title is, "An act to amend and explain 'An act relating to * * * municipalities governed by Boards of Commissioners or Improvement Commissions in this State.'" The object of the act is to

classify cities which have the commission form of government, and to confer upon them the power to make their own charters, and to make non-applicable all laws of this State, except those applicable to all municipalities other than counties and school districts. These are the objects of the law. The object of releasing the city from all statutes of this State is one of the main objects of the statute. The title as amending and explaining the act is misleading. The explanation contained in the preamble of the statute is incorrect. The object of the Walsh Act was not to give them increased power.

The several amendments and supplements to the Walsh Act manifest clearly the purpose was not to withdraw any of the powers which the adopting municipality possessed, but, upon the contrary, the laws of 1912, sec. 3, p. 649, expressly provide that such municipality shall retain all its former powers. There is not an iota in any of the former statutes relating to the Walsh Act suggesting novel powers were being conferred upon the adopting municipalities. One of the purposes of the constitutional amendment, requiring the object of the statute to be expressed in the title, was to inform the members of the Legislature voting thereon, what was contained in the statute. This statute violates the constitutional amendment.

THE ACT IS UNCONSTITUTIONAL BECAUSE ITS ULTIMATE OBJECT IS NOT EXPRESSED IN THE TITLE.

The act in question, it seems to us, is unconstitutional because its ultimate object is not expressed in the title, and we rely upon the recent case of *Board of Health v. New York, etc., R. R. Co.* (77 N. J. L., p. 15), to vindicate this assertion. At page 17 of the opinion, Justice Garrison observes:

"The title to the act in question is 'An act relating to and providing for the government of

cities in this State containing a population of less than 12,000 inhabitants.' No one, I venture to say, upon reading this title, would find expressed in it any purpose to repeal or in any other respect to alter the procedure established throughout the State by the Board of Health Act, and unless such title in some way expressed such purpose, that is, unless such title is, as Chief Justice Beasley puts it, 'something in the way of being notice of what is doing' (*Rader v. Union, 10 Vroom 509*), such title would not, in a constitutional sense, support the provision thus construed, whence it follows that such construction ought not, or rather cannot, be given to it."

There is nothing in the title of the act of 1914 which indicates an intention to create a new class of municipalities and to repeal the multiform and diversiform statutes brought within its scope by the enactment of Section 1 of the act.

The title of the act violates Article IV, Section VII, Paragraph 4, of the Constitution, both in letter and spirit, because the ultimate object is not expressed therein. Neither legislators nor citizens who concurred in the propriety of the legislation have had any notice from its title as to its legal effect. (*Bolles v. Newark, 81 N. J. L. 184.*)

In *Griffith v. Trenton* (76 N. J. L.), Mr. Justice Garrison, at page 25 of the opinion, said:

"An object of an act is expressed in its title when a correct impression concerning the objects of the act is thereby disseminated."

The force of these decisions, it seems to us, is not lessened by the recent pronouncement of the Court of Errors and Appeals in *Sawter v. Schonthal* (83 N. J. L. 499). In that case Justice Swayze is careful to remark (at page 105):

"If the Constitution means that the immediate object only should be expressed in the title, that

is done in this act; the immediate object is, as the title declares, to change and amend the title of the act of 1894. It would, however, be going too far to say that in every case it suffices to express the immediate object, although the ultimate object be left unexpressed. That would open the door to the abuse so forcibly suggested by the Supreme Court," etc.

This observation of the Court seems to apply with force and propriety to the cases at bar.

THE ACT IS UNCONSTITUTIONAL BECAUSE IT ATTEMPTS TO DELEGATE TO THE BOARD OF COMMISSIONERS POWERS WHICH CAN BE EXERCISED BY THE LEGISLATURE ONLY.

The act is an unconstitutional delegation of legislative powers to municipalities. The second section provides, first, that it shall have certain powers which amount to the ordinary police powers usually granted municipalities, and then provides that it shall have "all powers which it shall deem necessary or convenient for its government, or for its welfare and prosperity, not in conflict with the laws applicable to all cities of this State or the provisions of the Constitution, which powers shall be exercised by the Board of Commissioners, subject to the provisions of this act." The powers it shall have are not defined or determined by the act, but are left to the judgment of the commissioners, who are to determine the range of municipal activity. The query is not what powers the electorate of a municipality may think necessary or convenient for such a municipality to enjoy; not what power the Legislature of New Jersey has conferred upon the municipality, but what power the commission thinks it ought to have, and is necessary and convenient for the welfare and prosperity of the municipality.

In *Attorney-General v. McGuinness* (49 Vr. 346) it was determined that a referendum statute could only

be made effective upon a municipality by the electors of that municipality; that no governing board or board of commissioners could accept the provisions of an act of the Legislature. The decision was based upon the opinion of Chief Justice Green in *Paterson v. The Society* (4 Zab. 385). It was decided in those cases that (1) legislation cannot be exercised directly by the people; (2) that the legislative power can be exercised only in the mode provided by the Constitution; (3) that a law enacted in any other manner is void; (4) that submitting a charter to the would-be incorporators violates none of those fundamental propositions, for the reason that neither the propriety of the provisions themselves, as proper municipal regulations, nor the expediency of granting or tendering a charter, containing these provisions, to the Township of Paterson, was submitted to the people; (5) that the acceptance of a statute, perfect in itself, was not an act of lawmaking, or the action of lawmakers, or a law-making body, and that the constitutionality of the referendum was thereby sustained, but limited to the action of the inhabitants of the district or municipality to accept or reject the charter.

It will be seen that the Hennessy Act violates conspicuously the fundamental propositions laid down, for the reason that the propriety and expediency of the various powers is in effect left to the Board of Commissioners. Neither the referendum nor the initiative helps out in this matter, because it would be an act of legislation for the would-be incorporators to determine the charter provisions, or their expediency or propriety.

In *Gilhooly v. Elizabeth* (37 Vr. 484) it was said:

“The result of all the cases on this subject is that a law must be complete in all its terms and provisions when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointees, or delegate of the Legislature, so that, in form and substance it is a law in all its details *in præsentia*, but which may be left to take effect *in*

futuro, if necessary, upon the ascertainment of any prescribed fact or event."

In *Dexheimer v. Orange* (31 Vr. 111), at page 113, the present Chief Justice declared that the act by its terms conferred on the common council power not only to consolidate offices of the city, "but they have power by ordinance to fix and determine the nature of the duties of the consolidated office, and to a certain extent to fix the length of the term for which the holder thereof shall be elected or appointed."

"By the exercise of these powers, common council can change the whole scheme of government provided by the charter of its city. It can reduce the number of its councilmen one-half by consolidating the office of one councilman with that of another. It can wipe out of existence the office of mayor by consolidating it with that of one of the members of council, * * *."

Here again the principle is that the act must be complete, that its expediency must be determined by the Legislature.

And the Chief Justice declared the act to be unconstitutional, because it attempted to delegate to those cities embraced within its provisions the power to legislate. At page 113 of the opinion the Chief Justice says:

"The act of 1895 is also objectionable because it attempts to delegate to municipal bodies powers which can only be exercised by the Legislature itself."

In commenting upon the power granted the Court said that under it the common council could change the whole scheme of government provided by the charter of the city. The act, however, was declared to be unconstitutional, not because of its far-reaching effect, but because it contained the power to legislate in contravention of the Constitution of this State.

In *Riley v. Trenton* (51 N. J. L. 498), Justice

Garrison makes plain the impotency of the Legislature to delegate law-making power to municipalities.

That the delegation "of all powers," etc., in the Hennessy Act is unconstitutional, is clear from the opinion delivered by Chief Justice Beasley, in *Gaines v. Hudson County Avenue Commissioners* (8 Vr. 12-19) wherein he said:

"A legislative act of taxation, in order to be legal or effectual, must consist of something more than a mere declaration that a certain sum of money shall be raised out of the property within a county. Itself must distribute the burthen. This is as essential as the designation of the amount to be raised. And not only the sum required must be stated, and the property out of which it is to be made designated, but also some certain standard of assessment must be established. No act of taxation can omit any of these components."

He further said, at page 13:

"Its confusion and uncertainty, in respects of the utmost importance, would alone, in my estimation, forbid any judicial attempt to put it in force."

See also *State ex rel. Mueller v. Thompson*, 149 Wis. 488; 137 N. W. Rep. 20; 28 Am. and Eng. Annotated Cases, p. 774, with notes, p. 788. *Elliott v. Detroit*, 121 Mich. 611; 84 N. W. 820.

In considering this branch of the case it should be borne in mind that the draftsman of the act intended to increase and extend the powers of municipalities falling within its scope; not to lessen or restrict them. Section 2 should therefore be construed, it seems to us, according to the intention in view in framing it. When so construed it is clearly violative of the Constitution.

We entertain no doubt that it was intended to clothe all municipalities falling within the scope of the act with power to create all necessary governmental agencies, to

replace those of which they were shorn, and to prescribe appropriate procedure necessary to make such agencies effective.

A merely cursory examination of the few statutes, to which we now make reference, which have been repealed by the enactment of the Home-Rule Act, will disclose that such purpose cannot be effectuated by a municipality without exercising the law-making power of the State. It is impossible to enumerate the numerous statutes that have been excised by the act of 1914. We shall refer briefly, therefore, to a few of the important statutes affected by the enactment of that law. The effect of the law is to render inapplicable the present charter of the city (*P. L. 1874, p. 331*).

The act of 1882 (*C. S., vol. 1, p. 764*) and the act of 1906 (*vol. 1, p. 983*), under the authority of which the sewer system of the City of Trenton was established and built, and the procedure regarding assessments for benefits conferred prescribed.

The act of 1889 (*C. S., vol. 1, p. 734*), commonly known as the "Paving Act," under the authority of which all street improvements have been made since the date of its enactment, and the procedure respecting assessments for benefits prescribed.

The act of 1912 (*P. L. 1912, p. 209*), authorizing the city to license certain occupations and to impose a fee for revenue.

The act to remove the police and fire department from political control (*C. S., vol. 2, p. 2341*); under which these departments were organized and managed, and the police pension fund established, the trustees appointed and their duties prescribed.

The act of 1905 (*C. S., vol. 2, p. 248*), under which the board of trustees of the firemen's police pension fund was incorporated, and the duties of such trustees prescribed.

The act of 1910 (*C. S., vol. 3, p. 405*) establishing police courts in the City of Trenton, and defining the

powers and duties thereof, as well as the act of 1913 (*P. L. 1913, p. 174*), respecting proceedings in certain criminal cases in cities of the second class.

The act of 1912 (*P. L. 1912, p. 127*), under which bonds were issued to provide funds for the erection of the filtration plant, and under which it was proposed to provide for another issue to complete that improvement.

The act of 1909 (*C. S., vol. 1, p. 819*), under the authority of which it was intended to issue bonds for the purpose of funding the cost of erecting a sewage disposal plant, in conformity with the requirement of the State Board of Health.

The act of 1889 (*C. S., vol. 4, p. 5148*), under the authority of which the Board of Commissioners of Assessment of Taxes of the City of Trenton was erected.

The "Martin Act."

As the provisions of these several statutes have been swept away by the enactment of the Hennessy Law, an interesting and important question now arises as to whether or not the Board of Commissioners of the City of Trenton can supply other provisions in their stead, without exercising the law-making power.

To illustrate: Can the Board of Commissioners of the City of Trenton, by ordinance, establish a police court, define its jurisdiction, and prescribe its method of procedure, without exercising that power; can that body clothe such police court with the extended criminal jurisdiction possessed by it under the acts of 1910 and 1913?

Has the City power to make an assessment for benefits conferred by public improvements? Prior to the passage of the Hennessy Act the power and procedure in this regard was clearly granted and defined by the act of March 8, 1882 (*C. S., vol. 1, p. 764*) and the act of 1906 (*C. S., vol. 1, p. 983*). The latter act authorizes the Board of Commissioners of Assessment of Taxes, erected under the authority of an act passed in

1889 (*C. S.*, vol. 4, p. 5148), to make assessments of benefits conferred by such improvements. Both acts are now inapplicable to the City of Trenton. Can the Board of Commissioners of the City, under authority of the Hennessy Act, by ordinance, erect a Board of Commissioners of Assessment of Taxes and clothe such Board with power to make assessments for benefits, and prescribe the course of procedure to be followed?

Under the act of 1906 the Commissioners are required to file their report of the estimates and assessments of benefits in the office of the County Clerk, after which notice is required to be given of an application to confirm the report. Can the Board of Commissioners enact, by ordinance, such a course of procedure and impose upon and clothe the Judge of the Circuit Court with power to hear and determine as to the correctness and justness of such assessments to replace the procedure prescribed in the acts mentioned? And, further, can the Board of Commissioners ordain that such assessments shall be a lien upon the property benefited, upon such confirmation, and prescribe the manner in which such assessments shall be collected? Again, can the Board of Commissioners, by valid enactment, supply the rules necessary to the proper control and management of the police department and the police pension fund? Can a city hereafter adopting the provisions of the so-called "Walsh Act" create a corporation to control and manage the Firemen's Pension Fund, and breathe into such corporation perpetual life, the right to sue and be sued, as well as the power to invest and re-invest the funds of the corporation? Can the Board of Commissioners prescribe procedure to enforce the collection of assessments of benefits for public improvements, by the sale of property, to replace the provisions of the "Martin Act"?

The exercise of such powers by the Board of Commissioners would be an exercise of legislative powers delegated by the people to the Legislature, yet the exer-

cise of such powers is now necessary and indispensable to the proper and efficient administration of public affairs, and such powers the Hennessy Act clearly intended to grant. If the municipality is incapable of legislating, through its Board of Commissioners, respecting these several subjects, as well as many others of like character, under the broad general grant of power contained in the eighth section of the Hennessy Act, its government is totally destitute of power necessary to meet the requirements of its inhabitants.

The ultimate question is, what is comprehended within the clause "shall have all powers which it shall deem necessary or convenient for its government, or for its welfare and prosperity, not in conflict with the laws applicable to all cities of this State, or the provisions of the Constitution; which powers shall be exercised by the Board of Commissioners, subject to the provisions of this act." The powers here enumerated are greater than the powers of local self-government. They embrace more than the mere police powers of the State. Mr. Justice Garrison, in *Attorney-General v. McGuinness* (49 Vr. 346), at p. 353, said:

"If we were to write 'local self-government' into the Constitution, in what terms should it be defined? What class of subjects should local government include? Should it include only local police regulations, strictly so called, or should it include schools, municipal water works, lighting works, sewers, and the like?"

Some prominent publicists advocate that municipalities should purchase and manage dairy farms, and control the milk supply; should house working people; should maintain museums and moving pictures, dance halls, etc.

Goodnow, in *Munc. Home Rule*, p. 77, recites: "But what is a local or municipal affair, as distinguished from a general or state affair, has proved to be a source of controversy."

In *State v. Missouri & K. Tel. Co.* (189 Miss. 83), the Court discusses the difficulties and doubts which surround the question of bounding state and local powers.

In *State v. Lynch* (102 N. E. 670), the Supreme Court of Ohio discusses whether conducting the moving picture business is a municipal affair.

The Supreme Court of the United States, in *Jacobson v. Massachusetts* (197 U. S. 27), said:

"In the Constitution of Massachusetts it was laid down as a fundamental principle of the social compact, that the whole people covenanted with each citizen, and each citizen with the whole people, that all should be governed by certain laws for the common good, and that government is instituted for the common good for the protection, safety, property and happiness of the people."

The good and welfare of the commonwealth, of which the Legislature is primarily the judge, is the basis upon which the police powers of the State rest. In New Jersey the Legislature is the judge of what powers should be included within the term "local government." It is a legislative question. It is not a question which under the McGuinness case and the Paterson case can be submitted to the people. All the power the Legislature has is to confer upon the municipalities such powers of local government as the Legislature deems wise. It is a nullity in this State for the Legislature to abdicate its legislative powers, as it has done in the Hennessy Act.

In *State v. Lynch* (102 N. E. 674), it was said that:

"Under the Constitution of Ohio municipalities shall have authority to exercise all powers of local self-government. The council is not a municipality. It is but the agent of the municipality. When this agent was appointed its powers were definitely enumerated in the Municipal Code. It had not 'all the powers of local

self-government.' It cannot be argued that an agent of the municipality, chosen before the State granted all this local governmental power, may exercise the power not within the scope of the agency when the agency was created. There is no pretence that the principal (the people of the city) has done anything since the council was elected to enlarge the scope of the agent (the council). If the council may do what it seeks to do by this ordinance, it may at once proceed to exercise all the powers conferred by the new constitution upon the people.

"The purpose of the home-rule amendment is to lodge directly with the people of the municipality the authority to govern their domestic local affairs, within the territorial limits of the city, as they may choose. The purpose of the home-rule amendment is to pass the sovereign power of municipal government directly from the people of the State to the people of the city, if they choose to exercise it. 'Municipalities shall have authority to exercise all local power of self-government,' is not the equivalent of saying they must or shall exercise it. 'What is a proper range of government' is not a legal but a political question, to be decided by the people. It cannot be solved by speculation, but must lie open to the teachings of history and experience."

So far as Trenton is concerned the people have not conferred upon the Commissioners these powers. The Legislature has not conferred these powers, but has given the Commissioners an inchoate right to exercise such of the powers as they shall deem wise.

It seems to us that a clearer case of legislative abdication of sovereign powers cannot be imagined than that contained in the Hennessy Act.

THE STATUTE IS A SPECIAL LAW.

It is special because it adopts a new policy for municipalities under Commission form of government; it withholds powers from these municipalities which are appropriate and necessary for municipalities under Commission form of government. *Wanser v. Hoos*, 31 Vr. 482, seems to us to be an important authority upon this question. It was there declared that a statute which introduced a new policy, and which did not effect the structure and machinery of government, was unconstitutional unless it applied to all municipalities embraced within the common-law classification. The new policy of the Hennessy Act is the granting to municipalities, under the Commission form of government, the right to possess such powers as "it deems necessary or convenient for its welfare and prosperity."

Our résumé of municipal legislation in this and other States shows that municipalities not under the Commission form of government enjoyed the same powers and privileges as those under the Commission form of government. It also shows that municipalities under Commission form of government enjoyed the same powers and privileges as do those not under Commission form of government.

The case of *Dover v. Attorney-General*, 33 Vr. 647, seems to us to be absolutely controlling. The statute under consideration there was the incorporation of the town of Dover as a city under a referendum statute granting charter powers. At the end of the first section it was provided that laws applicable to other cities, though they be not general, should not be applicable to cities incorporated under the act unless they were expressly made so.

The Chancellor, speaking for the Court of Appeals, said:

"The enactment has a twofold object; it creates cities, and for those created cities alone

prescribes machinery of government and bestows powers. It does not rest with the mere creation of the cities and leave their governmental machinery and powers to laws applicable to all cities according to their appropriate classes under the law. Cities created out of smaller municipalities in a prescribed manner, without regard to the maximum population they may have or reach, and without regard to their identity with other cities in population and general requirement, are to have the powers and form of government that this act provides, exclusively. The characteristic which is to serve to separate them from other cities for this distinction is their origin—the fact that belonging to a lower municipality and exceeding in population five thousand inhabitants, by the vote of their people, each became a city.”

After citing *Long Branch v. Sloan* (20 Vr. 356) and *State v. Hammer* (13 Vr. 435), affirmed (15 Vr. 667), the Chancellor proceeds:

“Applying to the enactment considered these definitions, it is deemed that the classification it adopts does not in any degree justify the restriction of the powers and form of government given to the cities it creates. It does not exhibit a substantial distinction, with reference to those powers and that form of government, between such cities and other cities of equal population and of similar location and needs.”

In *Dexheimer v. Orange* (31 Vr. 111), the statute was an act concerning cities of the second class, permitting a consolidation of offices, and relating to the election, appointment, terms, duties and compensation of officers. Mr. Justice Gummere said:

“What relation does a fixed number of inhabitants bear to this subject? How is it germane to the law? It is said that cities which have

more than thirty-five thousand inhabitants require a more elaborate system of government, and a greater number of officers than cities having a smaller population, and therefore are properly excluded from the operation of the statute, but this reason demonstrates the law to be special because of its failure to include within its operation cities of the third class, that is, those having less than twelve thousand inhabitants. No reason is perceived why cities having a population of over twelve thousand and less than thirty-five thousand should be empowered to consolidate any and all of their offices, which will not apply either to cities having a larger population than that specified, or else to cities having a smaller one. The act regulates the internal affairs of cities; it is special and local in its operation, and therefore unconstitutional and void."

In *Grey, Attorney-General, v. Town of Union* (38 *Vr.* 363), Mr. Justice Garrison declared that municipalities having a special charter or governed by a special act of incorporation, do not constitute a class for which exclusive legislation is constitutional.

In *Riccio v. Hoboken* (40 *Vr.* 649), at p. 651, Mr. Justice Pitney said:

"Our Constitution has recognized the common law classification of municipalities into counties, cities, incorporated towns, boroughs, villages and townships, and it is already established by repeated decisions of this court that the constitutional inhibition against special legislation regulating the internal affairs of municipalities is not violated by laws that make distinctions between the different forms of municipalities, based merely on the common law classification.

"It is equally well settled that where the legislature makes a departure from the common law

or constitutional classification, either by subdividing one of the classes or by excepting a part of a class from a given legislative scheme, the legislative classification thus resorted to must be germane to the purposes of the enactment—it must rest on peculiarities or characteristics that substantially differentiate the localities included from those excluded, and that render divergent legislative enactments appropriate to the several localities respectively.”

See also *Foley v. Hoboken* (32 Vr. 478), as fortifying the authorities already cited.

In *Salter v. Burk* (54 Vr. 152), Mr. Justice Voorhees declared that the Walsh Act leaves the mechanism of the adopting city's government and the provisions of its charter untouched. It does not alter general laws or charter provisions relating to the government of such city except when inconsistent with its provisions.

The illegal classification of municipalities by the Hennessy Act is made manifest by its application to the statutes under review. The Harbor Act applies to all cities on tidal streams. The other acts (*Laws of 1910, p. 140, Laws of 1904, p. 283, and Laws of 1902, p. 782, 1914, p. 191*) apply—the first act to all cities, the second act to cities of the second class. It is contended that the first section of the Hennessy Act repeals these several statutes. What reason can be assigned why the safeguards provided for cities by the Harbor Act are inapplicable to the City of Trenton, which are applicable to the other cities on tidal streams not under commission government; what reason can be assigned why the City of Trenton should have greater or less power over its harbors and docks than other cities similarly situated? If the Harbor Act specifically excepted cities under commission form of government from its operation, would not such exception make either the Harbor Act or the Hennessy Act unconstitutional as special legislation?

Varney v. Kramer (33 Vr. 483), cited and explained by Mr. Justice Swayze, in *Attorney-General v. McKelvey* (49 Vr. 626), shows that the object of the act in the Varney case was to repeal the act which had been sustained in *Owens v. Fury*, but the Legislature made the repealing act applicable, not to all cities having a population between fifty and one hundred thousand, but to cities having a population between fifty-five and one hundred thousand. And he sustained the legislation in the Varney case on the grounds that the repealing act was germane to the classification. But here we insist that the Harbor Act should apply to all cities on navigable streams, and that any exception therefrom of any such city would be an illusory one.

We, therefore, submit that the classification is not justified under the Constitution of the State of New Jersey. Therefore, the act is unconstitutional and void.

THE FIRST AND SECOND SECTIONS OF THE SO-CALLED HENNESSY ACT ARE UNCONSTITUTIONAL, AS VIOLATING THE PROVISIONS OF THE CONSTITUTION THAT NO ACT SHALL BE PASSED WHICH SHALL PROVIDE THAT ANY EXISTING LAW, OR ANY PART THEREOF, SHALL BE MADE OR DEEMED A PART OF THE ACT, OR WHICH SHALL ENACT THAT ANY EXISTING LAW, OR ANY PART THEREOF, SHALL BE APPLICABLE, EXCEPT BY INSERTING IT IN SUCH ACT.

The first section of the so-called Hennessy Act provides that "such municipalities shall not be subject to any laws of this State, except laws applicable to all municipalities of this State, other than counties and school districts." In the second section it is provided that such municipalities "shall have all powers which it shall deem necessary or convenient for its government, or for its welfare and prosperity, not in conflict with the laws applicable to all cities of this State or the provisions of the Constitution; which powers shall be

exercised by the Board of Commissioners, subject to the provisions of this act."

The language quoted in the first section is equivalent of saying that such municipalities shall be subject to the laws of this State applicable to all municipalities other than counties and school districts, and the second section quoted expressly makes such municipalities subject to the provisions of the laws which are applicable to all the municipalities. Such a law is incomplete.

The object which the Constitution had in view has been stated by Mr. Justice Depue, in *Christie v. Bayonne* (19 Vr. 407), which case has been cited with approval in every later case appearing on this subject, was to obtain a fair and intelligent exercise of the law-making power.

No member of the Legislature called upon to cast his vote on the passage of the act would be informed, by an inspection, what particular rights and privileges were designed to be conferred, nor would the public, by inspection, be informed of the nature of the legislation about to be adopted. It is, therefore, imperfect and incomplete.

This bill, in its progress through the Legislature, compelled every member to recall all the statutes which related to all the municipalities of the State: those which related to cities of the first, second, third and fourth classes, the boroughs, villages, towns and townships; he would have to recall out of the mass of legislation those particular statutes which applied to all municipalities, and, unless he could do this from an inspection of the bill itself, it was, from a constitutional point of view, an incomplete and imperfect piece of legislation. If the law which Justice Depue condemned, in a case cited, was a greater burden than the members of the Legislature could bear, how much more so is the Hennessy Act?

It was argued in the Supreme Court that the first section of the Hennessy Act could stand, while the sec-

ond section might be unconstitutional. These two sections are so closely related to the object of the act as to make it a practical certainty that the first section would not have been passed without the second section. Each is complementary to the other, and effectuates the supposed object of the bill.

V.

ACTS APPLICABLE TO ALL MUNICIPALITIES.

In order to make clear the effect of the enactment of the law of 1914 it will not be out of place to enumerate here the few statutes left undisturbed by that enactment. A reasonably careful examination of the statutes relating to municipalities of this State discloses that the following acts are the only statutes relating to public improvements and bond issues now applicable to municipalities governed under the act commonly known as the "Walsh Act."

Walsh Act, Amendments and Supplements.

Walsh Act,	P. L. 1911, p. 642.
Walsh Act Amdt.,	P. L. 1912, pp. 75-643.
Walsh Act Supp.,	P. L. 1912, p. 177.
Walsh Act Amdt.,	P. L. 1913, p. 323.
Walsh Act Amdt.,	P. L. 1913, p. 581.
Walsh Act Amdt.,	P. L. 1913, p. 836.
Hennessy Act,	Chapter 144, Laws of 1914.

General Powers.

Borrowing in anticipation of taxes, ..	P. L. 1899, p. 35.
(Does not cover Hackensack, perhaps.)	
Joint Hospital bonds,	P. L. 1902, p. 362.
Police Station bonds,	P. L. 1902, p. 16.
Parks, bonds,	P. L. 1902, p. 574.

- R. R. change of grade, Municipal
bonds, P. L. 1904, p. 372.
- Lawns, adj. St. R. R., Municipal
bonds, P. L. 1905, p. 216.
- Tunnel bonds, celebration of open-
ing, P. L. 1909, p. 273.
- Bonds for excess of cost over as-
sessment, P. L. 1876, p. 279.
G. S. 2220, also
P. L. 1893, p. 486.
G. S., p. 2229.
- Bonds, Conversion act, P. L. 1892, p. 39.
- Bills to mun. corps., P. L. 1871, p. 92.
G. S., p. 2237.

(Does not cover Village of Hackensack.)

- Imp. Co. roads in municipali-
ties, bonds, P. L. 1910, p. 253, also
P. L. 1910, p. 273.
Amendment, P. L. 1911,
p. 273.

General.

- Light, heat and power plants, P. L. 1911, p. 690.
Held unconst. Dec., 1912.
- Owning water works, may sell
water, P. L. 1911, p. 435.
- Playgrounds, P. L. 1911, p. 666.
(May not include Hackensack.)
- Joint Imp. bonds, P. L. 1911, p. 158.
- Street Imp. Certs. and Assessments, P. L. 1911, p. 264.
- Grade Crossing bonds, P. L. 1912, p. 597.
- Joint garbage plants, bonds, P. L. 1912, p. 480.
- Grade crossing, P. L. 1912, p. 914.

Sewers.

- Assessments for trunk sewers and
laterals, P. L. 1903, p. 156.
- Connection of buildings with sewers, P. L. 1896, p. 345.

- Change of route of sewers because of
 R. R. tunnel, P. L. 1899, p. 264.
- Institutions may be given power to
 lay pipes in streets, P. L. 1901, p. 251.
- Sewer assessments, P. L. 1907, p. 300.
- Joint sewers and bonds, P. L. 1907, p. 707.
- Joint sewers, P. L. 1899, p. 48.
 Supp. and amendments—P. L. 1903, p. 497;
 1906, p. 676.
 Bonds—P. L. 1904, p. 285; 1905, p. 268; 1901,
 p. 59; 1902, p. 27; 1902, p. 30; 1909, p. 472;
 1902, p. 31; 1903, p. 36.

Sewers.

- Sewer assessments, P. L. 1892, p. 58.
 G. S., p. 2138.
 Supplement P. L.
 1896, p. 253.
- Sewer and drain assessments, P. L. 1895, p. 95.
 G. S., p. 2138.
- Commissioner to assess benefits of
 sewers and draining, P. L. 1895, p. 321.
 G. S., p. 2139.

Water.

- Contracts, P. L. 1897, p. 232.
- Pollution, penalties, P. L. 1899, p. 73.
 Amendment P. L.
 1909, p. 226.
 Supp. P. L. 1909,
 p. 457.
- Reservoir transfer of property, P. L. 1905, p. 265.
- Water contracts, P. L. 1901, p. 416.
- Water Sinking Fund, etc., G. S. 2206, amend.
 P. L. 1905, p. 271.

(Now rep. as to townships.)

- Water Co.'s Act of April 21, 1876, p. 318; G. S. 2199,
 amended to extend to municipalities; P. L. 1906, p. 703.

(This only for private water com. in places of 500 to 15,000 population.)

Contracts with State Water Supp. Com., P. L. 1910, p. 546.

Streets.

- Bonds—Streets between two municipalities, P. L. 1874; G. S. 2819. P. L. 1896, p. 342.
- Bonds—Imp. county roads in municipalities, P. L. 1899, p. 481.
- Bonds—Imp. roads and easements, P. L. 1909, p. 197.
- Contracts validated, P. L. 1900, p. 325.
- Two municipalities, joint imp., P. L. 1902, p. 348.
- Snow, ice and weeds on streets, P. L. 1904, p. 255.
- Consent to use of street and public places, P. L. 1906, p. 50. Supp., P. L. 1906, p. 311; P. L. 1907, p. 385. Amended, P. L. 1908, p. 415. Supp., P. L. 1908, p. 586.

We respectfully submit that the judgment of the court below should be affirmed.

CHAS. E. BIRD,
Counsel of Respondents-Appellees.

NEW JERSEY
Court of Errors and Appeals.

JUNE TERM, NINETEEN HUNDRED AND FOURTEEN.

Hennessy Home-Rule Cases.

OPINION BY HON. BENNETT VAN SYCKEL.

I respectfully submit the following opinion, prepared by Hon. Bennett VanSyckel, respecting the constitutionality of the so-called "Hennessy Home-Rule Act." It is not contended, of course, that this opinion has the force of a court decision, but by reason of the eminence and high legal attainment of the author, it is felt that it is entitled to respectful consideration.

Writing to the "Trenton Times," under date of May 1, 1914, Judge VanSyckel said:

"I have read with much interest the opinion of Messrs. Hawkins, Delafield & Longfellow as to the effect of the Hennessy act upon commission government in the city of Trenton. In compliance with the request of the 'Times,' I give you my opinion of that legislation:

"In so far as they have discussed the legal questions

involved, I concur in the views they have expressed. It is clear that the Walsh act left in the city of Trenton all the powers vested in it by its charter or by any statute at the time it adopted commission government. The Walsh act did not re-enact the charter or statutes, it did not add anything to or detract from their force or effect; it merely created new machinery for the exercise and administration of the powers of local government which had been previously granted to the city. The right to borrow money and issue bonds was one of the powers which had been expressly conferred upon the city and which was possessed by it when the commission form of government was adopted.

"The disturbance and doubt was created by the Hennessy act amending the first section of the Walsh act. The section as amended provides that 'such municipalities shall be and are hereby declared to be a distinct class of municipalities and shall not be subject to any laws of this State except laws applicable to all municipalities of this State other than counties and school districts.'

"This is equivalent to declaring that the city of Trenton, under the Walsh act, shall be subject only to laws which are applicable to all municipalities of this State other than counties and school districts. It has a two-fold purpose:

"1. It grants undefined powers of local government by an omnibus provision.

"2. It denies to the commission government all other powers, that is, all powers not possessed by all municipalities of the State.

"This raises a very important, and, I think, a controlling question, to which the attention of Messrs. Hawkins, Delafield & Longfellow does not seem to have been directed.

"Our State Constitution, article IV, section VII, paragraph 4, provides as follows:

"'No act shall be passed which shall provide that any existing law, or any part thereof, shall

be made, or deemed a part of the act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act.'

"Is a statute constitutional which purports to grant powers of local government by a general reference to existing statutes, without specific reference to such statutes, and without inserting them in the act?"

"The Hennessy act creates a distinct class of cities and then attempts to grant to the class certain powers of government by the language I have quoted. The constitutional provision is expressed and prohibitive; effect must be given to it.

"The Hennessy act distinctly provides that not only the existing law, but that a large body of laws, the purport of which is not even indicated and which no man can with certainty enumerate, shall be deemed part of the act, and shall be applicable to the commission government.

"It declares that a large body of laws, not specified, shall be applicable to municipalities that have heretofore adopted or shall hereafter adopt commission government, and thereby re-enacts such laws, and also repeals all previously existing laws which are not applicable to all of the class.

"Could the members of the Legislature who voted for the Hennessy act have known what laws they were giving to this class of municipalities?"

"Did the man who drafted the act know? To acquire that knowledge it will be necessary to ascertain what laws are applicable to each municipality, and then reject every law not common to all.

"The purpose of the constitutional mandate was to prevent legislation the object of which was not apparent, or which could not be readily ascertained by reference to the act which is passed, and to the particular act to which it is a supplement.

"This seems to have been the view of our courts in the cases which have arisen under it.

"In *Campbell v. Board of Pharmacy*, 16 Vr. 241, the act in question was an act to regulate pharmacy. The act provided a penalty for its violation which was to be sued for in the same manner provided by statute for the recovery of penalties in other *qui tam* actions.

"Mr. Justice Depue delivered the opinion of the court sustaining this statute. He said the pharmacy act was a complete statute in itself, and did not make the act for the recovery of penalties any part of it. He adopted the rule of the New York court, that reference is made to such laws, not to affect, or qualify the substance of legislation, but merely for the formal execution of the power granted by the law.

"*Bradley and Currier Company v. Loving*, 25 Vr. 227, is the case of a supplement to the mechanics' lien law, extending its operation and providing that the work done shall be liable to the contractor in the manner provided by second section of the act. The law was sustained as valid; to ascertain what the purpose of the law was it was necessary only to refer to the law to which it was supplementary.

"*State v. Hancock*, 25 Vr. 393, is in all respects like *Campbell v. Board of Pharmacy*.

"In *Hopper v. Stack*, 40 Vr. 562, Mr. Justice Garrison in delivering the opinion of the court sustaining the legislation, says:

"'Inasmuch as supplemental legislation must always be construed with respect to the statutes that are supplemented, the legislative injunction in question is merely the declaration of a subsisting canon of construction, and hence might be excised from the act without impairing its effectiveness.'

"The case of *Christie v. McNeal*, 19 Vr. 407, in which the opinion was delivered by Mr. Justice Depue after he had decided *Campbell v. Board of Pharmacy*, clearly shows the line of distinction between the cases which I have cited, and the Hennessy act. The court said the act in that case entitled 'An act to give certain

active and exempt firemen the same advantages in respect to taxes, and jury duty as are now or hereafter may be allowed to members of the National Guard of this State,' approved April 25, 1884, is an imperfect and incomplete act of legislation in violation of the constitutional provision above recited, and that it could not be made efficacious without making section 72 of the act entitled 'An act for the organization of the National Guard of New Jersey,' and section 8 of the supplement of April 4, 1873, a part of it.

"No one can tell by reading the first section of the Hennessy act what powers are granted by it, and even after much research some acts might be overlooked, or there might be a difference of opinion as to what acts are applicable to all of the class.

"If this section of the Hennessy act is in conflict with the fundamental law and therefore unconstitutional and void, the city of Trenton is still possessed of all the powers of local government which it had prior to 1914, including among them the power to borrow money and issue bonds.

"This is a question of such gravity that it should be submitted to the judgment of our courts. If this section of the act is set aside there will be no necessity for calling a special session of the Legislature, and the purchasers of the city bonds will be assured of their validity.

(Signed) "Respectfully yours,
"B. VAN SYCKEL."

Respectfully,
CHAS. E. BIRD,
Of Counsel with the Respondent-Appellee.



NEW JERSEY
Court of Errors and Appeals.

JUNE TERM, 1914.

STATE EX REL. MUELLER,
Respondent,
vs.
THOMPSON, CITY CLERK,
Appellant. }

April 8—May 14, 1912.

CONSTITUTIONAL LAW: POWERS OF LEGISLATURE:
GRANTING AND AMENDING MUNICIPAL CHARTERS:
DELEGATION OF POWER: HOME-RULE' ACT.

1. The fundamental law embodies those principles, some in form of declaration, others by way of implied or express prohibition, and some in the form of grant, supposed to be limitations essential to conserve human liberty, security, equality and happiness, and not to be subject to change except in a way calculated to arouse the highest judgment and most efficient deliberate considerate choice.

2. Each of the three distinct departments of government—executive, legislative and judicial—is supreme in its sphere; outside thereof is usurpatious, and that of the judiciary includes power to dominate, efficiently, as regards marking the precise boundaries of each and remedying invasions by either of the territory of the other.

3. The sole power to make law is lodged in the legislature with competency, however, to exercise it, by adopting an enactment,

complete in itself, and prescribing the conditions under which it shall be vitalized, as by a vote of the people at large or those of a particular district, according to circumstances.

4. The power to grant municipal charters is an attribute of sovereignty, exercisable, anciently, solely by the personal sovereign, then by his legislative body by his consent. Here the people succeeded to that prerogative power and, by the fundamental law, made the legislature the repository thereof,

5. The power to make, change or repeal municipal charters was legislative in character by the common law in force when the state was admitted into the Union and so expressly retained by sec. 13, art. XIV, in the general retention of our common-law system, as a whole, to remain in force till changed by the legislature in the constitutional way.

6. Power of the legislature to change the common law, in force in this state when the constitution was adopted, is limited, respecting municipal charters, by sec. 1, art. XI, which, in form, grants thereto power to form municipal corporations, which, by necessary implication, includes power to grant municipal charters, fixing all fundamentals with reference to the special city government and prohibits exercise of such power otherwise, under the rule *Expressio unius exclusio alterius*.

7. Sec. 32, art. IV, of the constitution commanding legislative provision for the transaction of any business, the doing of which by special legislation is prohibited by sec. 31 of such article, contemplates a legislative effort, in general, such as by the enactment of a law to be passive until made active by a vote of the people of any district authorized to act on the question—not delegation of power to the people at large or of districts, or a district, according to circumstances, to do the business.

8. The idea embodied in sec. 31, art. IV, of the constitution, as to city charters, is that they shall be uniform throughout the state, as near as practicable, which would be violated by affording cities capacity to create want of uniformity by the exercise of authority, in severalty, to make, change, and repeal their charters.

9. The power, in form, delegated by ch. 476, Laws of 1911, by the language, "Every city, in addition to the power now possessed, is hereby given authority to alter or amend its charter, or to adopt a new charter," is such dominating feature thereof as to render all others subsidiary thereto and dependable thereon.

10. The power so, in form, delegated is one which was within the exclusive legislative field before the constitution and confined thereto thereby.

11. The ruling feature of ch. 476, Laws of 1911, being unconstitutional, the others, forming an inseparable whole, take the cast thereof and fall therewith as invalid

(Syllabus by MARSHALL, J.)

Appeal from an order of the Circuit Court for Milwaukee County: W. J. TURNER, Circuit Judge. Reversed.

Mandamus proceedings to coerce the clerk of the city of Milwaukee to submit to its electors, under ch. 476, Laws of 1911, a proposed alteration of the city charter. The purpose of such alteration was to allow the city to conduct the business of furnishing its citizens with ice.

All conditions precedent in the law to calling a special election in respect to the matter of the proposed change were satisfied, but the clerk refused to make the call. Whereupon an alternative writ of mandamus was sued out to coerce him to do so. Such proceedings were thereafter had that appellant moved the court to quash such writ, which was overruled. This appeal followed to test the validity of such law.

Daniel W. Hoan, for the appellant.

For the State there was a brief by the *Attorney-General* and *Russell Jackson*, Deputy Attorney-General, and oral argument by *Mr. Jackson*.

For the relator and respondent there was a brief by *Nohl & Nohl*, and oral argument by *Leo F. Nohl*.

On behalf of the respondent there was also a brief by *Erich C. Stern*, *amicus curiæ*, and *William & Stern*, of counsel, and oral argument by *Erich C. Stern*.

A brief was also filed by *F. C. Winkler* on the validity and scope of ch. 476, Laws of 1911.

MARSHALL, J. As indicated in the foregoing, the motion raised the issue of whether ch. 476, Laws of 1911, commonly called the "Home-Rule" act, is constitutional. The trial court decided in the affirmative.

When our state government was formed, the people adopted for the paramount law, a declaration of principles modeled after the prevailing constitutions in this country. It was intended to be exact in its limitations of power, not to be open to change except in such par-

ticular and deliberate way as to render as certain as practicable that the electors desired it, evidenced by an expression of judgment after ample time and facility for investigation and maturity of thought on the subject, not to be subject to violation at all, and to create an instrumentality—a court—to efficiently guard it in that respect. One might exhaust his capability of using the great resources of our language in portraying the necessity for such a foundation for a people's government to rest upon, in picturing the dignity which should be accorded to it by every department of affairs and by the people in their individual capacities, and yet leave the matter incomplete. One might do likewise as to the particular duty resting here to hold up the constitution safely above every act of law-making power which would otherwise violate it, without exaggerating the importance to the people of its faithful performance. Such performance is a judicial function, overshadowing in its significance. That it is sometimes viewed with impatience by those called to face constitutional restraints, cannot have any weight whatever as to whether the duty should be performed or not. History shows, to the great credit of average intelligent comprehension of our system of government, that firm, conservative judicial administration in the field of testing legislative enactments by the constitution, is quite sure to be approved, in general, by the deliberate judgment of the people. In no field have the people, under our form of government, won more distinction than in loyalty, in the ultimate, to their courts.

In our constitutional scheme there are three coordinate, substantially independent branches, namely, executive, legislative, and judicial. Each, so long as operating within its legitimate field, is supreme. It is for the court, in the ultimate, to determine whether the boundaries of a particular field have been overstepped, and, if so, to nullify or stay the transgression.

The power to make law, commonly called legislative power, is dealt with by sec. 1, art. IV, of the constitu-

tion, in these words: "The legislative power shall be vested in a senate and assembly." In thus limiting power to make law to the representative bodies the people, by necessary implication, parted with authority to do so directly, as the court has held, though not to determine by legislative permission whether a law, enacted in the constitutional way, shall be put into operation. *State ex rel. Boycott v. Mayor, etc.*, 107 Wis., 654, 84 N. W. 242; *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N. W. 961.

So it is plain that power to make law, to exercise the function contemplated by that part of the constitution under consideration, was reserved exclusively to the legislature, and any attempt to abdicate it in any particular field, though valid in form, must, necessarily be held void. Just what falls within the scope of this power is not always easy to determine; but, as to a particular subject plainly recognized by the constitution as within such field, there is no room for doubt. Such is the case as to granting corporate charters to cities, as we shall see.

Sec. 1, art. XI, of the constitution vests in the legislature power to form municipal corporations by either general or special laws. Sec. 3 of such article provides that "it shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities * * * and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations."

Those provisions have always been treated, and unavoidably so, as embodying the fundamental law as regards the granting of corporate charters to cities. Such a municipal corporation can only be created by a legislative act; that is, by legislative charter, determining its form of government and its powers. No attempt has ever, before the act in question, been made to grant or change a municipal corporate charter, except by general or special act of the legislature, particularly covering

the subject. Such has been a feature of civil government from time immemorial. Such charters, anciently, emanated from the crown as a prerogative function and went into force by consent of the community afforded the grant. Later such grants were made by legislative power by sovereign permission and went into operation with or without the assent of the community affected according to legislative purpose. The later method became, by adoption, a part of the common law of this country—the prerogative power in the matter being regarded as vested in the people's representatives. At the time of the adoption of our constitution there was no way of forming a city corporation, except by act of the legislature, specifying its form of government and powers. That was entrenched in the fundamental law by sec. 13, art. XIV, providing that "such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

Thus it will be seen power to grant corporate charters for cities, to change and repeal the same, was a legislative function at common law, and made exclusively such by our constitution. While power, in general, was reserved to the legislature to change the common law it was withheld in case of reservation to the legislature of exclusive authority in a particular field, as that of granting, amending and repealing municipal charters.

In view of the foregoing, very little need be said in testing the act in question by constitution restrictions. As we have seen, determination of the form of government and everything appertaining to the fundamentals of a city charter are essentially legislative functions. Power in that respect was so universally regarded before the constitution and thereby the legislature was disabled from delegating it. Can one read the act under consideration and doubt that, in terms and effect, it involves an attempt at legislative abdication of that power, to a large extent? In answering that we need

look but to the first section, which we quote. All which follows is subsidiary thereto and must, necessarily, fall if the substructure cannot stand the constitutional test.

“Every city, in addition to the powers now possessed, is hereby given authority to alter or amend its charter, or to adopt a new charter by convention, in the manner provided in this act, and for that purpose is hereby granted and declared to have all powers in relation to the form of its government, and to conduct of its municipal affairs not in contravention of or withheld by the constitution or laws, operative generally throughout the state.”

Note the two distinct grants of power: first, to alter or amend an existing charter or adopt an entirely new one; second, to exercise all powers in relation to the form of government and conduct of municipal affairs not conflicting with the fundamental or any general law. The second is subsidiary to and in aid of the first and a limitation thereof in some respects. The first is broad, with unmistakable purpose to enable any city in this state to make its organic law to suit the pleasure of its people—to change its existing charter or make a new one without any legislative interference. The second is in the nature of a proviso to the first; that as to the mere form of government and the conduct of municipal business, the exercise of the latter shall be within the designated limitations, leaving the fundamentals of the charter, in general, to local discretion.

It seems plain that, by the first clause of the section, there is indicated, with great clearness, a purpose to delegate power to make law of the nature which was clearly reserved to the legislature, and that in the means attempted to be afforded in aid thereof, there is likewise a manifest purpose to delegate authority which the constitution so reserved. The form of a city government is of vital importance—the very foundation stone of the creation.

It is not intended to suggest that there was any intent

on the part of those responsible for placing the enactment on the statute book to violate the constitution. It is one thing to misconceive or fail to appreciate constitutional limitations, and quite another to intentionally act in violation thereof. One may do the former in the utmost of good faith and intended fidelity to his oath of office. Unconstitutional enactments have occurred from time to time, attributable to the former cause, but rarely, if ever, rightly attributable to the latter. So it happens, as we venture to say, that the good faith characterizing a legislative enactment such as we have under consideration, which it is our duty and pleasure to accord to a co-ordinate branch of the state government, in general, invites, as it were, and approves careful, firm performance of duty here to test such enactments by constitutional safeguards and guarantees willing submission to the result. It is only through such deference by each co-ordinate branch of our system to the other, and submission to and commendation of conscientious, firm, full performance of duty, that the people may enjoy the blessings intended to be secured by our constitutional system.

The only room it seems, there could be, as an original matter, for fair doubt as to the illegitimacy of a delegation of power to create, amend, or repeal corporate charters, is in the fact that, accompanying sec. 31, art. IV, of the constitution,—adopted in 1871, except the ninth subdivision relating to towns, cities and villages added in 1891, prohibiting the incorporation of any city, town, or village or amending the charter thereof by special laws—sec. 32 of such article was adopted declaring that “The legislature shall provide general laws for the transaction of any business” within the prohibition of “section thirty-one,” such laws to “be uniform in their operation throughout the state.” Whether it was intended thereby to authorize the legislature, by a general law, to delegate the power theretofore exercised by the legislature in regard to granting corporate charters by special act to some local body or

the people themselves; or whether the intent was that the constitutional mandate should be exercised by the legislature making a law complete in itself forming the whole or part of a general charter system and leaving it with the community desiring to be a city corporation to adopt the general charter law and with an existing city to adopt it or any complete part thereof in place of its charter or portion of it,—was a subject for thought in *State ex rel. Boycott v. Mayor, etc.*, 107 Wis. 654, 84 N. W. 232. The conclusion was that the change in the constitution did not take the function of making the fundamental law for cities from the legislature or give authority to delegate it; that “transaction of any business” prohibited, within the meaning of the language used, goes no further than some method of adopting a law formulated and enacted by the legislature. The idea that the amendment contemplated delegating authority to do the business in the sense of making the law itself, was, by necessary implication at least, repudiated. The court said, in effect, that any exercise of power in the matter by an existing municipal corporation further removed from direct legislative interference than by adopting a corporate charter or a complete subpart thereof covering a subject, as formulated by the lawmaking power, would be legislation by the corporation and not by the legislature, and so inhibited by the constitution.

True, the precise question here was not discussed or treated in the opinion of the court in the case mentioned; but the plain logic of the decision is that a legislative delegation of authority to make a city charter, or any part of it—a power other than to adopt a legislative creation—would be a delegation of legislative power and so void. The writer deemed a contrary view, at least as to special city charters, of sufficient merit to warrant discussing it at length to aid in reserving the question for future consideration in case of a situation being presented in which it might be vital. The case then in hand was not thought to be such. In

the years which have since elapsed the writer has come to the conclusion that the logic of the court's decision, carried to its fullest extent, is right. So while, if the question were open as to whether the legislature can properly delegate power to make or change a city charter, in the sense of determining the form of government and the fundamentals, in short, except by the option law method, it would have to be answered in the negative, it should be regarded as thus ruled by *State ex rel. Boycott v. Mayor, etc., supra*, and subsequent cases.

The foregoing is reinforced by the plain intent of the constitution that city charters shall be uniform, throughout the state, as nearly as practicable. Before subd. 9 of sec. 31, art. IV, was adopted the general charter law was enacted. The scheme of it was to classify existing cities for general legislation and to afford opportunity, without legislative interference, to adopt an entire charter, or any portion thereof covering any particular subject, in place of an existing special charter or portion thereof. The general law and the new subdivision of sec. 31, art. IV, were companion laws to effect uniformity in city charters. The enactment in question is plainly in violation thereof. Under it facilities for changes in city charters, in number, character, and frequency, regardless of uniformity, would be immeasurably greater than under the system prior to 1891.

We thus reach a very satisfactory conclusion that the law in question is unconstitutional and so did not impose any duty upon appellant to perform that which he refused to do. We have reached that conclusion from the plain purpose of the several constitutional provisions referred to, and the likewise plain violation thereof which the enactment in question, if sustained, would accomplish. We have not found it necessary or advisable to go outside of the very narrow field indicated in order to obtain aids in reaching such conclusion, or illustrations to support its correctness. That

will explain why no reference had been made to many features of the arguments of counsel who favored the court with the results of their efforts to assist.

It is correctly claimed on the one side, and not effectually, if at all, denied upon the other, that in most cases where legislation of the nature of that in question has been adopted it was preceded by a constitutional amendment expressly authorizing it, while in those not so preceded the legislation was condemned as unconstitutional. The most striking instance of that is found in *Elliott v. Detroit*, 121 Mich. 611, 84 N. W. 820. The court's disapproval of such attempted delegation of authority as we have here was expressed very emphatically and without qualification. Such an enactment, as there indicated, has no support whatever in the competency of the legislature to delegate limited powers of local legislation of an administrative character, to cities. All such regulations are, in a broad sense, within the fundamental lines of the legislative charter. The difficulty here is in the attempted delegation of power to make, change, or repeal the charter itself. The distinction between such a power and authority universally exercised by cities before the constitution and preserved under it, to enact by-laws or ordinances in the administration of specific charter powers, is quite marked and commonly understood.

The result of the foregoing is that the order appealed from must be reversed, and the cause remanded with directions to sustain the motion to quash the alternative writ and to dismiss the mandamus action with costs.

By the Court—So ordered.

TIMLIN, J. (concurring). The order does not prevent a judgment from which an appeal might be taken nor is it the final order in a special proceeding, but it may, I think, be considered an order overruling a demurrer. *Sec. 3069, Stats. (1898)*; *State ex rel. Neeves v. Wood Co.*, 41 Wis. 28; *Flannigan v. Lindgren*, 122 Wis. 445, 100 N. W. 818. Attempting to act

under ch. 476, Laws of 1911, the common council of the city of Milwaukee, by a two-thirds vote of its members, adopted a resolution that:

"The charter of the city of Milwaukee is hereby altered and amended by adding to ch. 4 thereof a new subdivision which shall read:

"Sec. 1. The city of Milwaukee is hereby authorized and empowered to establish, maintain, and operate a plant for the manufacture, purchase, and sale of ice and the distribution thereof to its citizens under such terms and pursuant to such regulations as may be prescribed by the common council of said city. The common council of said city is hereby authorized to prescribe such terms and to formulate and adopt such regulations concerning the manufacture, purchase, and sale of ice and the distribution thereof to its citizens as it may deem just and proper.

"Sec. 2. The said city of Milwaukee is hereby authorized and empowered to acquire by gift, grant, or purchase for the purposes aforesaid, suitable lands, buildings, machinery, and equipment to operate and maintain an ice plant and for the keeping, transportation, and distribution of ice under such terms and pursuant to such regulations as may be adopted by the said common council.

"Sec. 3. The said common council is hereby authorized to raise and provide all necessary money and other means for all the purposes aforesaid. Such purpose is declared to be a public purpose.

"Sec. 4. All provisions of the charter and ordinances of the said city of Milwaukee conflicting herewith are hereby modified and repealed so as to give full force and effect hereto."

Ch. 476, Laws of 1911, as amended and corrected by sec. 95, ch. 664, laws of 1911, is a statute which attempts to put in force that condition of city government popularly and vaguely described as "home-rule." This subject of home-rule for cities is new in Wisconsin.

Statutes on the subject have been enacted in Louisiana and Michigan in advance of any amendment to their state constitutions, and several state constitutions have been amended for the purpose of enabling the legislature to confer this power upon cities. Among the states which have adopted such constitutional amendments are California, Michigan, Minnesota, Missouri, Oklahoma, Oregon, and Washington. The reasons urged by the advocates of this plan of city government are: (1) that it will obviate the evil of unwise legislative intermeddling with the local affairs of cities; (2) that it will foster and develop among the electors of the city a sense of responsibility and a knowledge of local municipal affairs; and (3) that such electors have a better knowledge than legislators selected from the entire state concerning local affairs and local conveniences or necessities.

About twenty years ago in this state it was thought the legislature interfered too frequently by special laws in the government of cities, and the state constitution was amended so as to forbid the legislature to enact any special or private law for incorporating a city or to amend its charter. The legislature was thus powerless to act in such matters except by general legislation. But such classification of cities was of necessity and by decisions of this court permitted that there was, with reference to the largest city in the state, about the same freedom of legislation as formerly. The acts of the legislature merely took the form of general legislation for a class of cities. It is said that in Minnesota a like constitutional restriction upon the enactment of special laws produced an opposite result. *State ex rel. Getchell v. O'Connor*, 81 Minn. 79, 84, 83 N. W. 498. But too little legislative power in Minnesota and too much in Wisconsin alike begot a desire for "home-rule." Thus either too little or too much legislative power in this respect would appear to be inconvenient or undesirable, as certain disorders of the stomach may be caused either by surfeit or by famine. Much crude and ill-

digested information on this subject is printed and published by advocates and antagonists more enthusiastic than thoughtful, and considerable pseudo-scientific expositions of the subject may be found in pamphlets, addresses, and books.

We must expect to have many new theories of government and some experiments made in a country which attempts to give a partial education to all its citizens and in which practically unlimited suffrage prevails and whose people are active, alert, and progressive. The theories advanced may have been investigated and rejected or even experimented with and rejected centuries ago, but they are new to most of the electors, and the enthusiastic propagandist obtains an audience and a following. This is very irritating to the citizen who is disposed to sleep at his post of citizenship; to the citizen whose profits are threatened thereby; and to the citizen who reveres old things merely because they are old. Hence the ever-recurring and irrepressible conflict. But those can look on, impartial and entertained, who know that in all things, old and new, good and evil are combined; that the law of this world is struggle, and that balance is preserved only by action of opposing forces; that no legal rule or institution exists without having had at its origin a cause for its existence; that if that cause has passed away the institution cannot be upheld; and that if that cause still exists it will bend and warp all innovation to harmonize with it and vindicate itself through the same force that brought the ancient rule into being in the first instance.

It is obvious and elementary that there can be but one sovereign power in the government of a state. As well might we speak of two centers in a circle as two sovereign powers in a state. Sovereignty, however, may be so divided or distributed that several officers or departments of government must each act in its full exercise. This division of power is at the basis of the check-and-balance theory of government. It is essential to liberty, and it obtains with modifications in detail in

all enlightened governments. Or sovereignty may be otherwise divided so that there is a dual government, each supreme in the same territory, but in certain separable and specified matters, and of this the mediæval governments, where the church was sovereign in ecclesiastical and the state in secular matters, constitute examples. Or sovereign power may be divided with reference to the matters to be acted upon so that there are two sovereigns in the same territory, but each over different matters, and in each of these sovereignties there may exist the division or distribution of sovereign power into separate departments which must all join in its full exercise. And of this, most federal forms, like that of the states and the United States, Canada, and to some extent Germany, constitute examples. Where sovereign power is distributed among officers or departments there may be some encroachment of one department upon another or there may result an impasse; action is slow, efficiency is not great, but there is liberty. Where the division of power is with reference to subjects of regulation, a clash is inevitable unless there is some authority or overlord empowered to determine what matters belong under the jurisdiction of each sovereign, because it is impossible to specify in advance the unknown or unforeseen. That government possessing this power is the real sovereign. Two opposing theories of the origin of this sovereign power prevail and appear in written constitutions. One is that the full sovereign power was originally vested in an autocrat, and he has granted to the people a constitution but still retains all sovereign power not thus granted. This is the theory of the constitutions of Prussia and, I think, of most of the other states of Germany, and its result with reference to cities which are not states is that the administrative department of the government, which is a branch of the executive, interferes with the local government of cities promptly and efficiently by disapproval of their choice of city officers and veto upon their exercise of any power not granted away by the

autocrat when he gave his people the constitution or given by anterior executive grant to the city or long user presupposing a grant. The other theory is that sovereign power resides in the people, and to a greater or less extent, the power of all their officers and their own power to change the constitution except in the manner provided therein. All persons and institutions in a state of this kind are subject to laws made conformably to the constitution, and the consequence is that under such conditions the legislature, representing the people has the power to interfere in the government of cities as the executive may in Prussia and other German states. To some this executive interference by one autocrat seems infinitely better than legislative interference by the majority voice of 133 autocrats; but I think it will be found that the basic difference between municipal government in Europe and that in this country rests upon the fact that here the man who pays no taxes and he who would be considered in continental Europe a temporary sojourner or a transient, is permitted to vote and so indirectly control the fiscal affairs of the municipality, while there such persons are not electors of the city and have no voice in such affairs. There, also, the law frequently prescribes necessary qualifications or conditions of eligibility to city offices; here there is no such thing. There may exist a city-state possessing many of the powers of sovereignty, and that state may have its local government include a small adjoining rural area and be a member of a confederacy with other states and represented in the federal or national congress, like Lubeck, Bremen, and Hamburg in the German federation. Or the city may be the sole and absolute sovereign within its boundaries and over its dependencies like the old city-states of Rome, Carthage, or Venice. But neither of these forms of city government is possible in this country under our national and state organizations. Here a city is only possible as an administrative agency of the state, having a measure of local legislative or ordinance power and a limited

proprietary capacity. There is no instance, I think, in history where such civil divisions have been authorized to exercise absolute home rule except that of the communal law of France of 1789, which was attended with disastrous results. All laws relating to the autonomous government of cities in this country, in order to be valid, must fit into our fundamental conditions of government, and in order to be successful must not only be valid but also appropriate to sociological and political conditions existing here, not to those existing elsewhere, and they must respond to our changing conditions and to constitutional rights of the citizens affected thereby.

In *Straw v. Harris*, 54 Oreg. 424, 103 Pac. 777, the court considered sec. 2, art. XI, of the constitution of Oregon as amended in 1906. That reads as follows:

"Sec. 2. Corporations may be formed under general laws, but shall not be created by legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the state of Oregon."

This seems to exclude all state laws except the criminal laws. The court said:

"The language used in the amendments considered would appear to give incorporated cities the exclusive control and management of their own affairs, even to the extent, if desired, of legislating within their borders without limit, to the exclusion of the state. But, as stated, these provisions must be construed in connection with others of our fundamental laws, which can but lead to the conclusion above announced; and whatever may be the literal import of the amendments it cannot be held that the state has surrendered its sovereignty to the municipalities to the extent that

it must be deemed to have perpetually lost control over them. This no state can do. The logical sequence of a judicial interpretation to such effect would amount to a recognition of a state's independent right of dissolution. It would but lead to sovereigntial suicide. It would result in the creation of states within the state, and eventually in the surrender of all state sovereignty—all of which is expressly inhibited by art. IV, sec. 3, of our national constitution. Power to enact local legislation may be delegated, but this of necessity, whether stated or not, is always limited to matters consonant with, and germane to, the general purpose and object of the municipalities to which such prerogatives may be granted. Municipalities are but mere departments or agencies of the state, charged with the performance of duties for and on its behalf, and subject always to its control. The state, therefore, regardless of any declarations in its constitution to the contrary, may at any time revise, amend, or even repeal any or all of the charters within it, subject, of course, to vested rights and limitations otherwise provided by our fundamental law."

I think this is a correct statement of the law as it is and as it must finally prevail. It can in no way be avoided so long as our present system of federal and state governments obtains and so long as those underlying forces operate which always tend to lodge ultimate authority and sovereign power with him best able to exercise it and whose position makes him the final arbiter of his own claim to such power. This is the state, not the city. There can be no absolute autonomy in American cities no matter how limited as to subject.

We may now leave for a space these larger observations and come down to the details of the legislation of several states upon this subject, the questions which arose, and the disposition which was made of them.

These instances will serve to draw away the mind from mere theorizing and disclose some of the points of friction as well as some of the impending or threatened effects of such laws.

The experience of California in this respect is instructive. The constitution in force in that state in 1880 authorized any city containing a population of more than 100,000 to frame a charter for its own government, consistent with and subject to the constitution and laws of the state, by causing a board of fifteen freeholders to be elected who should prepare and propose a charter which must be submitted to the qualified electors of said city, and, if a majority of the latter ratify the same, submit it to the legislature for its approval or rejection as a whole, and if approved by a majority vote of the members elected to each house it should become the organic law of the city and supersede any existing charter and all amendments thereof and all special laws inconsistent with such charter. It was decided that the purpose of this section was to emancipate municipal governments from the authority and control formerly exercised over them by the legislature (*People v. Hoge*, 55 Cal. 612); that the legislature could not abridge the right given by these provisions to cities (*People ex rel. Johnson v. Bagley*, 85 Cal. 343, 24 Pac. 716); that a city might provide in its charter for taxation for municipal purposes (*Security Sav. Bank & T. Co. v. Hinton*, 97 Cal. 214, 32 Pac. 3). This constitution apparently proved unsatisfactory, and it was amended in 1887 by providing that such charter or amendment thereto, or any alternative article or proposition, might be presented for the choice of the voters and voted on separately; by including a consolidated city and county having a population of more than 10,000 and not more than 100,000; and in other respects. This constitution was again amended in 1902 so as to include cities containing a population of more than 3,500 and permitting fifteen per cent. of the

qualified voters of the city to petition the legislative authority of the city to submit any proposed amendment or amendments to said charter to the qualified voters thereof for approval. This constitution was again amended in 1906 in this respect. All these amendments retained the feature of the first California constitution requiring the election of a board of fifteen freeholders whose duty it should be to prepare and propose a charter for the city and requiring the submission of the charter to the legislature for approval after its approval by the electors of the city. Considerable difficulty was experienced and some confusion occasioned by a constitutional amendment to sec. 6, art. XI, adopted in 1896, which read: "All charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws." A municipal affair was defined in *Fragley v. Phelan*, 126 Cal. 383, 58 Pac. 923, as one which related to the internal business affairs of the municipality, and that the election of the freeholders*for framing of the charter was not a municipal affair. Salaries of officers of the police and fire departments of a city are municipal affairs. *Popper v. Broderick*, 123 Cal. 456, 56 Pac. 53. The control of the almshouse of San Francisco is a municipal affair. *Weaver v. Reddy*, 135 Cal. 430, 67 Pac. 683. The functions of the board of health are municipal affairs. *People ex rel. Lawler v. Williamson*, 135 Cal. 415, 67 Pac. 504. A statute forbidding the imposition of a license tax for the purpose of revenue deals with a municipal affair. *Ex parte Helm*, 143 Cal. 553, 77 Pac. 453. The registration of voters for a municipal election is a municipal affair. *People ex rel. Martin v. Worswick*, 142 Cal. 71, 75 Pac. 663. A section in a city charter conferring upon the city power to impose license taxes for the purpose of revenue relates to a municipal affair and is paramount to a general statute forbidding such taxes. *Ex parte Braun*, 141 Cal. 204, 74 Pac. 780. In this case it appears that the city of

Los Angeles, under this constitutional power, imposed a license tax upon the great majority of callings and occupations in the city, including callings or occupations in no degree subject to police regulation, sometimes basing the amount of tax upon the amount of business transacted. Braun was a wholesale liquor dealer and it imposed upon him a tax of \$60 per month. These occupation taxes were upheld, Justices Beatty and Lorigan dissenting. Justice McFarland says: "The section of the constitution in question uses the loose, indefinable, wild words, 'municipal affairs,' and imposes upon the courts the almost impossible duty of saying what they mean." Chief Justice Beatty, discussing the statement in the opinion of Justice Angellotti that "when a power is conferred upon a municipality for municipal purposes that power becomes a municipal affair," calls attention to the fact that the definition does not define or render any more definite or understandable the words of the constitution. Justice McFarland said: "It is difficult to realize that the people of the state, through their legislature, have no longer the power to say that a license tax—a tax upon the right to do business, a tax upon capacity—is unjust, unequal, and oppressive, and should not be tolerated anywhere within the state; but we think such is now the law." This case shows what may take place under a constitutional grant of this kind. The school system is a matter of general concern and not a municipal affair. *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44. The payment of fees to jurors in criminal actions is not. *Jackson v. Baehr*, 138 Cal. 266, 71 Pac. 167. A county affair is not a municipal affair. *Popper v. Broderick*, *supra*. The opening of streets in a city is a municipal affair. *Byrne v. Drain*, 127 Cal. 663, 60 Pac. 433. The issuance of bonds for the repair of existing school houses and for a new school house is a municipal affair. *Law v. San Francisco*, 144 Cal. 384, 77 Pac. 1014. The collection of fines for misdemeanors punishable under state law is not a municipal affair. *Marysville v. County of Yuba*, 1 Cal. App. 628,

82 Pac. 975. The fixing of the boundaries of a territory to be annexed to a city or town is not a municipal affair. *People v. Ontario*, 148 Cal. 625, 84 Pac. 205. Nor the trial and punishment of offenses defined by the laws of the State. *Robert v. Police Court*, 148 Cal. 131, 82 Pac. 838.

These words are not as ambiguous in the California constitution as they are in ch. 476, Laws of 1911, for the reason that the California constitution, art. XI, sec. 8½, by expressly conferring upon the municipality certain designated powers, unmistakably makes these subjects municipal affairs. One is the constitutional regulation governing the manner of selection and the compensation of police court judges and their clerks and attaches; another the manner, times at which, and terms of which, members of the boards of education shall be elected or appointed and the number of such members; and another confers similar powers with reference to boards of police commissioners. There is also enumerated government of the municipal police force and the selection, compensation, regulation, etc., of boards of election and clerks and their attaches. These, together with some other constitutional powers and the existing powers conferred by general statutes upon municipal corporations, cover the subjects described as "municipal affairs" to a considerable extent. It is said in *Security Sav. Bank & T. Co. v. Hinton*, 97 Cal. 214, 32 Pac. 3, quoting from *U. S. v. New Orleans*, 98 U. S. 381, 393: "When such a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited." Where the legislature controls the city, this subject is regulated by express delegation of power, supplemented by a rule of the common law that the city possesses no power not thus delegated or necessarily implied from the delegated power. Licensing horse races may be a municipal affair if the municipality has power from the state to tax and regulate that sport. *Alexander v. Elizabeth*, 56 N. J. Law

71, 28 *Atl.* 51. So licensing all occupations would include the licensing of the retail sale of liquors. Full power to tax for municipal purposes or for municipal affairs, together with the power to determine what affairs were municipal affairs, would include the power to destroy property or make the license fee burdensome to the point of suppression upon some or all professions or occupations. Those Californians who sought refuge from legislative meddling with city charters in a constitutional amendment must have since experienced a good deal of constitutional intermeddling, judging from the frequent changes in the state constitution.

No doubt the words "municipal affairs," "municipal concerns," or "municipal purposes" in a constitution could be handled by a slow process of inclusion and exclusion until some workable theory of local government could be developed, but this promises a long period of uncertainty and a multiplication of legal questions and local quarrels and does not seem to possess much advantage over the older system. If, on the other hand, the constitution is so framed as to prevent the legislature from interfering with the city charter (assuming that could be done), the consequence must be that instead of executive interference as in Germany, or legislative interference as heretofore in the United States, we will develop a system of judicial interference, because of the constantly recurring necessity for construction to determine what subjects are within and what without the local power. There also must be a great variety of city charters if each charter is to be made and enacted by the electors of each municipality according to their different notions, and, unless the restriction is contained in the constitution, any provision of statute by which the so-called home rule charter is made subject to the laws of the state will not prevent local differences, appeals to the paramount legislature, nor prevent legislation by the latter changing and undoing what has been done by the locally adopted charter,

for no legislature can tie the hands of succeeding legislatures.

The Missouri constitution of 1875 is perhaps the first and typical to some extent of other home rule constitutional provisions. The city "may frame a charter for its own government, consistent with and subject to the constitution and laws of this state * * *. But such charter shall always be in harmony with and subject to the constitution and laws of the state." Sec. 16, art. IX. When conflict as to mere municipal regulations such as assessment of benefits and damages arising from grading streets, exists between such charter and the general laws of the state, the former supersedes the general laws on that subject (*Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S. W. 943), but not in police matters (*State ex rel. Goodnow v. Police Commissioners*, 184 Mo. 109, 88 S. W. 27), nor as to occupation licenses (*Kansas City v. Lorber*, 64 Mo. App. 604); nor to the regulation of telephone rates (*State ex rel. Garner v. Missouri & K. T. Co.* 189 Mo. 83, 88 S. W. 41), nor to create a right of civil action between citizens *inter esse* (*Sluder v. St. Louis T. Co.*, 189 Mo. 107, 88 S. W. 648). Such charter is subject to legislative control. *Erwing v. Hoblitzelle*, 85 Mo. 64; *State ex rel. Kansas City v. Field*, 99 Mo. 352, 12 S. W. 802. The charter can contain only provisions essential to a city government. Within that scope the charter so adopted has the force of an act of the state legislature. *State ex rel. Abel v. Gates*, 190 Mo. 540, 548, 89 S. W. 881. But the charter may authorize the local legislative body of the city government to compel the attendance of witnesses and the production of books and other documents relating to any subject under investigation in which the interests of the city are involved, and an ordinance enacted under such charter power may authorize the city council to imprison for contempt for failure to attend and produce books of account. *In re Dunn*, 9 Mo. App. 255. It is also ruled in Missouri that if the constitutions confers upon a city the power of eminent

domain, the city by adoption of a home rule charter may regulate the exercise of such power, but it could not by such charter confer this power upon itself. *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S. W. 943. The constitution merely transfers to the people of the city power to legislate in purely municipal affairs. *Morrow v. Kansas City*, 186 Mo. 675, 85 S. W. 572. The power to require the production of documents under such vague general issues and the power to imprison for contempt seem extraordinary and liable to abuse, while the ruling relating to occupation licenses seems to conflict to some extent with the California rulings on the same subject hereinbefore noticed. But on the whole it seems that the government of Missouri cities has not been much changed or benefited by this change of the state constitution.

The constitution of the state of Washington authorizes certain cities to adopt their own charters consistent with and subject to the constitution and laws of the state. Art. XI, sec. 10. General laws cannot be affected by such charter (*Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077); nor can the city under this power provide a tribunal and clothe it with authority to try contested election cases (*State ex rel. Fawcett v. Superior Court*, 14 Wash. 604, 45 Pac. 23); nor can the city under such charter fix the price of gas to be furnished its citizens or inhabitants (*Tacoma G. & E. L. Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655). The state may nevertheless pass laws relating to the assessment and collection of taxes in such city, because the state has an interest and duty in the collection of a tax levied by the city. *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428. But a city may not confer upon itself power to extend its boundaries, but must do so under existing general laws. *State ex rel. Snell v. Warner*, 4 Wash. 773, 31 Pac. 25.

The constitution of Minnesota as amended in 1898 authorizes cities to frame their own charters, which

must be consistent with and subject to the laws of the state. Sec. 36, art. IV. "Such charter shall always be in harmony with and subject to the constitution and laws of the state of Minnesota." *Id.* An amendment to this part of the constitution was proposed by the Minnesota legislature of 1911. The power thus given embraces any subject appropriate to the orderly conduct of municipal affairs. *State ex rel. Barber A. P. Co. v. District Court*, 90 Minn. 457, 97 N. W. 132. Under this power the city may enact ordinances relating to the bonds of contractors and payment of laborers and materialmen, including the contents of the bonds and conditions and limitations as to their enforcement, differing in detail from the requirements of existing general laws. *Grant v. Berrisford*, 94 Minn. 45, 101 N. W. 940, 1113. The city may also regulate the manner of presenting claims against itself, auditing and allowing the same, and regulate the proceedings for reviewing the same upon appeal. It is said that these are "municipal affairs." *State ex rel. Barber A. P. Co. v. District Court*, 90 Minn. 457, 97 N. W. 132. I should regard this case as going very far if it includes the regulation of the appeal procedure. If such cities have the power of eminent domain, the home rule charter may prescribe means for its exercise and impose duties on the courts of the state in the condemnation of property. *State ex rel. Ryan v. District Court*, 87 Minn. 146, 91 N. W. 300. Notwithstanding the home rule charter, a general law restricting the municipalities from contracting indebtedness in excess of five per cent. of the value of the taxable property of the city remains in force. *Beck v. St. Paul*, 87 Minn. 381, 92 N. W. 328. Under such charter the city council may supersede the general laws of the state relative to local assessments for street improvements (*Turner v. Snyder*, 101 Minn. 481, 112 N. W. 868), and may regulate the manner of filing claims against the city before bringing action thereon (*Peterson v. Red Wing*, 101 Minn. 62, 111 N. W. 840).

In Michigan the legislature attempted to delegate to cities by legislation resembling ch. 476, Laws of 1911, containing somewhat similar vague general words, power to amend their charters, but the supreme court of that state held the act unconstitutional as an attempt to delegate wholesale unqualified and undefined authority to the mayor and electors of the city. It was considered that the legislature must itself determine what powers the municipality shall have, and not leave it to the electors residing in the municipality to determine what legal power the latter should have. *Elliott v. Detroit*, 121 Mich. 611, 84 N. W. 820. The state constitution was then amended (art. VIII, secs. 20-25) so as to require the legislature to provide by a general law for the incorporation of cities, and by another general law for the incorporation of villages, and such general laws must limit their rate of taxation for municipal purposes and restrict their powers of borrowing money and contracting debts. "Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter, and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this state." Sec. 21. The next section of the Michigan constitution expressly confers upon cities certain powers relating to parks, boulevards, cemeteries, hospitals, almshouses, and all works which involve the public health or safety. The next two sections confer power to acquire, own, and operate public utilities for supplying water, light, heat, power, and transportation, with certain limitations not relevant here. The next confers the power to incur debts for the acquisition or operation of public utilities with certain restrictions and limitations. The next is negative and forbids the city to abridge the elective franchise, to loan its credit, to lay a tax for other than a public purpose, etc. It will be observed that the constitutional grant is hedged in by certain

safeguards, and that while the vague words "municipal concerns" are used, still these things, or the most important of them, are specified in the constitution, and these specifications furnish something definite to which the words "municipal concerns" may be applied and from which they may be extended, "*noscitur a sociis.*" In this way a home rule charter properly limited may be made intelligible and effective. The statement, in general terms at least, of what are municipal affairs or municipal concerns is indispensable to intelligibility wherever the limitation "subject to the constitution and laws of this state" occurs. For otherwise we move around to our starting point. Under home rule amendments to the constitution thus guarded the city of Detroit undertook to amend its charter so as to authorize it to own and operate the street railways. The attorney general attempted to restrain by mandamus the submission of such amendment to the electors of the city and prevailed on the ground that a revision of the charter so as to make it contain the restrictions and limitations found in secs. 3 and 5 of ch. 279, Public Acts of Michigan for 1909, should precede such submission. The court upholds the law, but the city in attempting to amend its charter failed to proceed properly so as to take on with the enlarged power the legislative and constitutional limitations restricting the rate of taxation, etc.

In upholding the law the court said: "It should also be remembered constantly that 'home rule' is the fundamental purpose of the amendments and that cities can only become financially ruined by accomplishing such ruin themselves." *Att'y.-Gen. ex rel. Hudson v. Common Council*, 164 Mich. 369, 380, 129 N. W. 879. To me this is a surprising sentiment, a most unusual consolation to the court. What of the citizens whose property is swept away by such ruin accomplished by the votes of perhaps an irresponsible and non-taxpaying majority? Home rule even with reference to local matters and universal suffrage, in industrial cities where the

non-taxpaying electors are in a majority, cannot, I think, exist together, without legislative interference, or at least without judicial interference, which will be found quite as frequent and quite as objectionable to the defeated party as the old legislative interference from which he sought to escape. So long as the paramount law charges the courts with the duty of protecting personal and property rights, and so long as there will exist under such home rule charter a tendency to encroach upon these rights, there will be judicial interference either of the state or federal judiciary or both. So we have of interference in municipal regulations this progress: executive interference, legislative interference, judicial interference. But there always is and must be interference of some kind unless the city is sovereign. We may indulge in vague generalities about "home rule in municipal affairs," but reflection and analysis must disclose that in so far as the city is engaged in the exercise of the taxing power or in the power of incurring obligations which must be met by taxation, so far as it may deny the equal protection of the laws, unreasonably restrain liberty, or proceed without due process, the sovereign power must always, in some form or through some department of the government, interfere with and restrain the city. The numerous instances referred to tend to illustrate at what points and upon what subjects the authority of the city in the exercise of its purely local or corporate powers will conflict with personal or property rights of others. Each citizen has, under the United States and the state constitutions, a bill of rights for his protection. These may be infringed as well by local regulations as by state-wide regulation. The area in which the regulation is in force has nothing to do with this. Neither has the fact that the regulation relates to a city obligation or duty rather than to a state obligation or duty. There can be no home rule which is worth considering without the power of taxation on the part of the city for city purposes, and there can be no taxation under our system without getting into

the field of general law and constitutional rights. Neither can there be any taxation not subject to regulation by the master hand of the state legislature. Where "sovereignty" or even "control" is by constitution or statute distributed between the state and the city with reference to the subjects of regulation by each, if the city were sovereign in all "municipal affairs" and the state in all other affairs, still the city could not conclusively determine what affairs are "municipal," for to permit it to do so would be to confer upon the city an overlordship which would finally draw all power to the city. But in such case either one must have this power and that one is the state. Under our American theory of the origin and office of constitutions the state may do this through its legislature and judiciary. The former can create legal conditions, can make "affairs" municipal or state, as it deems wisest or most expedient. The latter can apply these laws to concrete cases, and in attempting to do this can interpret the law only so far as is necessary to apply it to the instance or cause before the court. For illustration: the subjects of public health and quarantine regulations, highways, education, taxation, liquor or other licenses, hours of labor, street railway or gaslight rates, etc., within city boundaries might by one legislature be placed under the regulatory power of the city and thus become "municipal affairs." The next legislature might think it better that the state resume its exclusive authority over some or all of these and thus make them "state affairs." It would be impossible, both on account of changing conditions and because the state could not wholly abdicate its sovereign functions over such and similar subjects, to hold that that which a legislature had once made a "municipal affair" must always thereafter remain such. So it is apparent that such "home rule" tends to invite rather than prevent interference by the state in the government of cities. Whether this interference on its own initiative or on request of the city electors be direct and plain, or whether it be accomplished by legislative shifting of

subjects in and out of the class called "municipal affairs," seems to be matter of form rather than substance.

Again, considering the foregoing instances, which are part only of a greater number which have occurred, the home rule law would seem to promise neither peace nor uniformity in city government. So long as the home rule charter must be subject to legislative authority in all matters, the power of the legislature to interfere in city government is not changed, nor is there anything in the situation to lessen the disposition of the legislative body to so interfere. The dissatisfied faction in the city will come to the legislature for relief after this charter is adopted as freely as before. General laws will be enacted from time to time continually conflicting with the local charter at unexpected points and creating doubt and uncertainty, and each city will by original adoption or subsequent amendment produce a charter differing in detail from that of any other city. On the other hand, if the legislature could be constantly prohibited from any interference with the so-called home rule charter adopted by the city so far as the same related to municipal affairs, this would substitute the interference of the judicial department of government for that of the legislative department, and every section of the charter and every ordinance must in time come before the courts in order to ascertain whether it related to a municipal affair only and so whether subject to repeal or amendment by the state legislature. Municipal affairs, however, change from time to time. The telephone was a short time ago a matter of local accommodation. Now it extends beyond the boundaries of the city and even beyond those of the state. Electric light and power plants were local utilities but a short time ago; with the development of water power and the transmission of electric current to distant points their character is changed; so has that of the street railway. *2 Wilcox, Mun. Fran., sec. 509.* There is also a tendency in the other direction. The state may authorize a city to maintain and operate an ice

plant or garbage crematory or an opera house, and immediately the maintenance and operation of these become municipal affairs. But they were not such before. As the powers of a city broaden in consequence of the constitution or the statute conferring additional powers and duties, so does the meaning of the words "municipal affairs." As the legal powers of the city narrow, so does the meaning of this phrase. But there is this difference: they can never broaden to include sovereign power in an American city, although they may narrow to zero.

So far we have dealt with constitutional law, which is of course paramount to the statute, and which may itself create certain things municipal affairs or may recognize existing municipal authority under statutes as constituting what the constitution terms municipal affairs. This, as we have seen, will present a number of difficult legal questions, but we have to do with a somewhat different situation where there is no constitutional provisions and the whole question rests upon statute, as in the present case. It is perhaps worthy of remark that the same legislature which enacted the statute in question here, proposed by resolution No. 73 (Laws of 1911, p. 1142) an amendment to the constitution of this State as follows:

"Cities and villages shall have power and authority to amend their charters, and to frame and adopt new charters, and to enact all laws and ordinances relating to their municipal affairs, subject to the constitution and general laws of the state."

Ch. 476, Laws of 1911, as amended and corrected by sec. 95, ch. 664, Laws of 1911, provides that every city shall have authority to alter or amend its charter or adopt a new charter in the manner there specified, and for that purpose it "is hereby granted and declared to have all powers in relation to the form of its government, and to the conduct of its municipal affairs not in contravention of or withheld by the constitution or laws, operative generally throughout the state."

Sec. 2. "When a new charter shall have been adopted, or the old charter altered or amended, by any city, in the manner provided by this act, such new charter or alterations or amendments shall supersede any existing charter or statutory provision inconsistent therewith, and the same is in that event hereby repealed; two copies of such new charter or alterations or amendments, duly certified by the city clerk, shall be filed in the office of the secretary of state."

The remaining portions of the act authorize and regulate the procedure for making and amending charters and are not especially important in the instant case. It is sufficient to say that the alterations or amendments may originate with the common council or with the state board of electors and they shall be adopted by the common council and by the voters at an election or rejected by the common council and adopted by a vote of the electors, or the question of holding a charter convention for framing a new charter may in a somewhat similar manner be submitted to a vote of the electors. Delegates are chosen to frame a new charter, which becomes effective when approved by a popular vote of the electors of the city. It will be observed that the city is in the first section granted, for the purpose of amending its charter or adopting a new one, "all powers in relation to the form of its government, and to the conduct of its municipal affairs not in contravention of or withheld by the constitution or laws, operative generally throughout the state."

In relation either to (1) the form of government, or (2) the conduct of its municipal affairs, the city has by this statute all power not withheld (a) by the constitution, or (b) by laws operative generally throughout the state, and not in contravention (a) of the constitution, or (b) of laws operative generally throughout the state. Constitution here mentioned is the constitution of Wisconsin, and laws generally operative throughout the state must mean (1) the federal constitution,

treaties, and statutes of the United States according to their true meaning as settled by judicial interpretation; (2) the statutes of the state of Wisconsin according to their true meaning as settled by judicial interpretation; (3) such parts of the common law as were in force in the territory of Wisconsin at the time of the adoption of the state constitution and which were not inconsistent with that instrument (Const. art. XIV, sec. 13). This common law is evidenced by the decisions of the courts involving common-law questions. Powers not withheld by either of these comprehensive bodies of law is perhaps not such a sweeping exception as powers not in contravention thereof. Contravention means "transgression" or "violation." So that we have a statute which gives to the city power in two fields of operation, namely, (1) in relation to the form of city government, and (2) in relation to the conduct of its municipal affairs, excepting, however, from each, such powers as are in violation of existing law. The exception seems to take away about all that is given by the granting clause of the sentence. Among the rules of law operative generally throughout the state and referable to that part of the common law continued in force by our state constitution is one to the effect that municipal corporations possess no powers not expressly granted to them by the legislature or included within those granted by reasonable implication. *Hasbrouck v. Milwaukee*, 13 Wis. 37; *Madison, W. & M. P. R. Co. v. Watertown & P. R. R. Co.*, 7 Wis. 59; *Trester v. Sheboygan*, 87 Wis. 496, 58 N. W. 747, and authorities cited. We have no statute purporting to repeal or change this rule. It was said by counsel in argument that the furnishing of water by a city to its inhabitants is a municipal affair; that ice is but frozen water; hence the furnishing of ice must be a municipal affair. But things which are similar from a physical or chemical viewpoint may be dissimilar from the legal viewpoint; under a statute authorizing a city to buy coal it probably could not buy

diamonds, although it is said they are chemically identical. Neither is atmospheric gas passed through a varying aperture and articulated by varying contacts always equivalent to argument. The difference between the collection and distribution of water by means of pipes laid in the streets and the manufacture, sale, and distribution of ice is that the first is in the nature of a monopoly, while the second is a competitive business enterprise. The first does not depend so largely upon skill in management. The legislature has expressly authorized the first and has not expressly authorized the latter. If the manufacture, sale, and distribution of ice is included in the existing grants of power to cities by reasonable implication, then it was not necessary to amend the Milwaukee charter in this respect. If it is not by reasonable or necessary implication included, then such action by the municipality is in contravention of a law operative generally throughout the state, hence forbidden by the very statute under which the relator proposes to act. There is also this further difficulty inherent in the words "municipal affairs." What are municipal affairs? The first impression is that they are the legal affairs of the city. If we wish to escape from this impression we must recast the phrase so as to describe the city by reference to its physical peculiarities. But aside from artificial changes made by authority of law, such as streets, sewers, water pipes, wire conduits, and such like, the only distinctive physical feature of a city consists in an area of congested population. If we substitute for the expression "municipal affairs," "affairs of areas of congested population," we are able to get away from the legal view, but we encounter other difficulties. If a mere congested area can be given by the legislature power to provide for its own local government so far as such provisions are not in contravention of the constitution or laws generally in force throughout the state, the powers thus conferred would be few, feeble and ineffective.

The state laws relative to highways, taxes, police powers, licenses, and other like subjects would be in force, but the corporate entity, the juristic personality, would be lacking and must be conferred by some higher power or else a new state must emerge. The congested area could not confer political and legal existence upon itself. But the words "municipal affairs" assume the pre-existence of a corporate entity having affairs. Such juristic person exists only in the law and consequently its affairs are legal affairs, namely: the exercise of the powers conferred upon it by law. The manufacture, sale, and distribution of ice was not a municipal affair because the municipality had never been by statute authorized to embark in, conduct, or carry on such business. It could amend its charter relative to the conduct of its municipal affairs only, and this is not such an affair. The city could not make that a municipal affair which the state legislature had not made so. This statute purports to confer no new or additional power on the city so as to make that a municipal affair which was not so before the enactment. Scanning the statute still further, it appears to relate only to the form of the city government and the conduct of its municipal affairs. Making, selling, and delivering ice do not relate to the form of the city government. "Conduct" means "to carry on," "to manage," "to regulate," "to direct the course of," and "municipal affairs" means, as we have seen, those affairs or concerns of the city which fall within its statutory and common-law powers and duties. The establishment and operation of this municipal ice plant relates, therefore, neither to the form of the city government nor to the conduct of its municipal affairs. The city cannot confer corporate existence or power upon itself, because this would be an exercise of sovereign power. Such power comes from the state. All municipal affairs, according to the definition above given, whether made such by existing law or to be made such by future statutes, are the subjects of municipal regulation. The city may by

amendment to its charter or adoption of a new charter, provide for the "conduct" of such affairs and nothing more under this statute. This being the scope of the power granted, the effect given to the exercise of that power, viz.: "to supersede any existing charter or statutory provision inconsistent therewith," must refer not to general rules of statutory law, but to local statutes, or to statutes of the same or similar legal nature, as special city charters. The statute could not at the same time be subject to the laws operative generally throughout the state and supersede these laws. If this statute could be construed to be an attempt to confer upon the city general legislative power not only to enact laws creating municipal corporations, but also to extend its own corporate powers to new subjects so as to make that a "municipal affair" which was not so under state laws, therefore to exercise full legislative power, the act would also, I think, be invalid as an unconstitutional delegation of legislative power. Const. art. XI, sec. 3. While I would not carry criticism of this statute to the extent to which it was carried by the supreme court of California when it described the words "municipal affairs" as "loose, indefinable, wild words," I do think the expression lacks clearness and definiteness, but this is in all probability due not so much to poverty of expression as it is to the fact that the writer had no very definite knowledge upon the subject. The statute appears to be a very fair reflection of such mental condition. However that may be, we much derive the intention of the legislature from the words of the statute. Weighing these words with reference to the subject matter concerning which they were written, I think they will admit of no other reasonable interpretation than that here suggested. If the statute in question attempted to confer upon the city or its electors power or authority to make laws conferring power upon itself or themselves not otherwise conferred, it would also be invalid as in conflict with the sovereignty of the state. I think the proposed amendment to the Milwaukee charter is not

within the purview of the statute in question, and if it were the act would also be unconstitutional as a delegation of legislative power to an extent not warranted even by the most liberal interpretation of the constitution.

It follows that the order of the court below should be reversed and the cause remanded with directions to quash the writ.

New Jersey Court of Errors and Appeals.

DELAWARE RIVER TRANSPORTATION
COMPANY,

Prosecutor and Appellant,

against

THE INHABITANTS OF THE CITY OF
TRENTON,

Respondent and Appellee.

On Appeal.

3 Cases.

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HARRY F. SMITH,

Prosecutor and Appellant,

against

THE INHABITANTS OF THE CITY OF
TRENTON,

Respondent and Appellee.

On Appeal.

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**BRIEF IN SUPPORT OF CHAPTER
144 OF THE LAWS OF 1914.**

The undersigned respectfully begs leave to submit this brief as a friend of the Court. As an officer of the New Jersey Commission Government League, he is interested in upholding the principle of municipal home-rule for commission-governed towns; and as the draftsman of the "Hennessy Act," he may be pardoned for this intrusion in its defense. Moreover, he has been retained by the Villages of Ridgewood and Ridgefield Park as associate attorney for them, with the object of securing, if possible, a decision by this Honorable Court favorable to that Act, of which their Boards of Commissioners fully approve.

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I.

The Hennessy Act is not unconstitutional.

Every presumption should be made in favor of its validity, since the Court will not lightly find the Legislature guilty of overstepping the bounds of its authority. As was said by the Supreme Court of the United States:

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“It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.”

Ogden v. Saunders, 12 Wheat., 213, 270.

The same principle was stated more at length by Mr. Justice Garrison, writing for this Court in *Attorney-General v. McGuinness*, 49 Vr., 346. After referring to various decisions of other jurisdictions, he proceeded (at page 371, et seq.):

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“These citations, which might be indefinitely extended, show the existence of a well-defined though self-imposed limitation of the judicial function of declaring legislative acts to be void for unconstitutionality, which limitation is for practical purposes stated to be that an act will not be declared void by the courts if its unconstitutionality is in anywise doubtful.”

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* * * * *

“The difference in principle is fundamental and the practical distinction as clear and of the same nature as that which is applied every day in the review of verdicts, where the question is not whether the court finds that a given state of facts is as the jury found it, but whether it finds that such given state of facts could not be legitimately found by the jury. * * *

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“The judicial function therefore with re-

"spect to the invalidation of a legislative act
 "does not consist merely in comparing the
 "determination evinced by such act with that
 "reached by the court and the substitution of
 "the latter for the former whenever they hap-
 "pen to differ. On the contrary, the ultimate
 "judicial question is not whether the court
 "construes the constitution as permitting the
 "act, but whether the constitution permits the
 "court to disregard the act; a question that
 "is not to be conclusively tested by the court's
 "judgment as to the constitutionality of the
 "act, but by its conclusion as to what judg- 10
 "ment was permissible to that department of
 "the government to which the constitution has
 "committed the duty of making such judg-
 "ment.

"A court by force of its own reasoning, or
 "by reason of the diversity of sentiment
 "among its own members, may often conclude
 "that, while according to what it deems the
 "correct view, an act is void, still there is
 "another view that is permissible that would 20
 "support the act. As legislators the judges
 "would be bound to follow their own judg-
 "ment, but as a court they must accord that
 "same right to those in whom the constitution
 "has reposed it."

See also: Sutherland on Statutory Construc-
 tion, (2d. Ed., 1904), §§81, 82.

A.

THE ACT IS NOT IN CONFLICT WITH ARTICLE IV.,
 SECTION VII., PARAGRAPH 11 OF THE CONSTITU- 30
 TION.

So far as relevant, this paragraph reads as follows:

"The legislature shall not pass private,
 "local or special laws in any of the following
 "enumerated cases, that is to say:

* * * * *

"Regulating the internal affairs of towns
 "and counties."

The Supreme Court holds that the "Hennessy Act" violates this injunction. The learned Justice seems to argue upon the theory that the "Walsh Act" did no more than change the title of the governing body,—that a city of the second class or a village adopting the provisions of that act remain and must forever remain a city of the second class or a village, with all the limitations imposed by the Legislature on those kinds of municipalities. Apparently he overlooked the fact that, whatever may have been the effect of the "Walsh Act," the main purpose of the "Hennessy Act" was to create a new class of municipalities, no longer to be cities or towns or boroughs, and to give them all the powers that can be conferred upon municipal corporations. To some extent, he recognized this purpose and held it to be unwarranted by the Constitution; but with the utmost deference it is respectfully suggested that he failed to appreciate the essential changes made by the "Walsh Act."

From the very beginning, the Legislature of this State has enacted laws applying only to cities, to incorporated towns, to boroughs, to villages, or to townships. Who can discover any real differences among these classes except in their forms of government? The distinction does not find its justification in geographical location. It is not due to historical development; for, barring certain peculiar exceptions, one kind may at any time be changed into another by vote of the inhabitants. It is not based upon population. There are cities in New Jersey so small as almost to escape the census; while there are towns and boroughs with large numbers of inhabitants. Ingenuity would be taxed beyond its capacity to discern any essential reason for the discrimination, except the forms of government.

In *Fitzgerald v. New Brunswick*, 18 Vr., 479, the Supreme Court had before it a statute which was operative only in cities. Mr. Justice Reed said, on pages 487 and 488:

“Could the point involved in this contention be now regarded as open for discussion, untrammelled by previous judgments, it would present, in my opinion, a question not easily resolved in favor of the classification. But the recognition of cities as a class for legislative purposes in respect to other subjects, as obviously common to both cities and boroughs as this, seems to have been too frequent to be now disregarded in this court.

* * * * *

“In view of the array of cases in which classification similar to this has been already recognized, I am constrained to regard the present as a general act.” 10

That case came before this Court, where the judgment below was affirmed (19 Vr., 457). The reluctant conclusion of Mr. Justice Reed, indicated by the foregoing excerpt, was here approved, seemingly without reluctance, in the following brief paragraph (Page 487):

“In the Supreme Court, so far as this point was concerned, the subject was disposed of on the ground that this classification had been so repeatedly recognized in judicial decisions and in acts of legislation as not to be open to further discussion, but that it was to be treated as *res adjudicata*. In that view this Court entirely concurs.” 20

In the very case at bar, the Supreme Court, while condemning the “Hennessy Act” because it seeks to free certain municipalities from the restrictions contained in such laws as the “Harbor Act” of 1911 and the “Park Acts” of 1904 and 1910, yet by the same judgment sustains these Acts themselves. By their express terms, they apply only to cities, and one of them only to cities of the second class. Can any inherent reason be suggested why the privileges of the “Harbor Act” should not be granted to towns or boroughs “fronting on, or containing within their borders, navigable or tidal waters”? If that 30 40

act is valid; if it is legitimate for the Legislature to grant certain powers to cities, and to provide that these powers shall not be subject to the provisions contained in any other law, while it denies like powers and immunities to towns and boroughs with identical situations and differing from cities only in their framework of government; if the Legislature may do this, why may it not with equal propriety give peculiarly broad powers and freedom from restrictions to a new class of municipalities?

10

If the "Walsh Act" or the "Hennessy Act" had given to this new class a new name of its own; if, for instance, it had called them "Hamlets" (the very difficulty of inventing a suitable name shows the great diversity of municipalities in this State); the point would then have been clear. Surely this Court will not determine the validity or invalidity of the statute by the mere presence or absence of a name; but on the other hand,

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there is nothing sacred in the name "cities" or "boroughs", to justify the Legislature in making discriminations among them which it must not make in respect to municipalities known by other titles.

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See:

Hermann v. Guttenberg, 34 Vr., 616;
Boorum v. Connelly, 37 Vr., 197;
Lewis v. Jersey City, 37 Vr., 582;
Riccio v. Hoboken, 40 Vr., 649.

It is, of course, true that the Constitution mentions municipalities called by certain names; but it refers to them in such a way as to recognize only their existence, and not at all to give express authority for discrimination among them

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in respect to legislation,—still less to limit the possible classes to those so named. The real force of the reasoning by which this Court has thus sustained the classification, is not that the classes are known by titles mentioned specifically in the Constitution, but rather that the very manner in which they are mentioned,—as it were, merely in passing—shows that from the earliest days discrimination has been made among different kinds of municipalities according to their style or method of government, and that neither the statesmen who drafted nor the people who adopted the Constitution questioned for a moment the propriety of such a distinction. 10

Now, it is incredible that this Court should, unless in obedience to the unmistakable commands of the Constitution, so construe that instrument as to block forever the wheels of progress. Just because in the year of Grace 1875, no other kinds of municipalities were known, can it be that students of political science must not devise nor the Legislature sanction new forms of municipal government which, according to the teachings of experience, promise betterment in local affairs? If the Legislature creates a class of municipalities for which it provides a charter likely, in its judgment, to result in better management of municipal business, and in which, therefore, it deems it safe to confide a larger measure of power and discretion, must its hands be tied and its wise plans impeded (for of their wisdom, the Legislature itself is the sole judge), merely because based upon principles not dreamt of in the philosophy of forty years ago? 30 30

In *Van Riper v. Parsons*, 11 Vr. 1, Mr. Chief Justice Beasley, writing the opinion of the Supreme Court, said on pages 8 and 9:

“All legislation is based, of necessity, on
“a classification of its subjects, and when 40

10 “such classification is fairly made, and the
 “legislation founded upon it is appropriate
 “to such classification, such legislation is as
 “legitimate now as it would have been prior
 “to the recent amendments to the constitu-
 “tion. My theory is, that if a set of objects
 “be fairly classified, a law embracing them
 “will be a general one, and in all respects
 “unobjectionable; but undoubtedly, if the
 “classification be illusive, being contrived
 “with a view of escaping the constitutional
 “restriction, it can lend no support to the
 “legislation connected with it. * * * *
 “Interdicted local and special laws are all
 “those that rest on a false or deficient classi-
 “fication; their vice is that they do not em-
 “brace all the class to which they are natu-
 “rally related; they create preference and
 “establish inequalities; they apply to persons,
 “things or places possessed of certain quali-
 “ties or situations, and exclude from their
 “effect other persons, things or places which
 “are not dissimilar in these respects.”

20 In that case the statute in question was held
 to be valid, though it applied only to Jersey City;
 and the judgment was affirmed by this Court
 (11 Vr. 123), whose decision is thus expressed in
 the syllabus:

30 “A law, framed in general terms, restricted
 “to no locality, and operating equally upon
 “all of a group of objects, which, having
 “regard to the purposes of the legislation, are
 “distinguished by characteristics sufficiently
 “marked and important to make them a class
 “by themselves, is not a special or local law,
 “but a general law.”

In *Wanser v. Hoos*, 31 Vr. 482, population was
 held not to be a legitimate basis for classification
 for the enactment in question, and this Honorable
 Court laid down the rule as follows:

40 “A general law, as distinguished from a
 “special or local law, within the meaning of
 “the constitutional provision, is a law that

“embraces a class of subjects or places and
 “does not exclude any subject or place natu-
 “rally belonging to such a class. The test
 “of the generality of a law is that it shall
 “embrace all and exclude none whose condi-
 “tions and wants render such legislation
 “equally appropriate to them as a class.”

In *Budd v. Hancock*, 37 Vr. 133, Mr. Justice Garrison said, at page 135:

“A law is special in a constitutional sense
 “when, by force of an inherent limitation, it 10
 “arbitrarily separates some persons, places
 “or things from others upon which, but for
 “such limitation, it would operate. The test
 “of a special law is the appropriateness of
 “its provisions to the objects that it excludes.
 “It is not, therefore, what a law includes
 “that makes it special, but what it excludes.
 “If nothing be excluded that should be con-
 “tained the law is general. Within this dis-
 “tinction between a special and a general 20
 “law the question in every case is whether
 “any appropriate object is excluded to which
 “the law, but for its limitations, would apply.
 “If the only limitation contained in a law
 “is a legitimate classification of its objects it
 “is a general law. Hence, if the objects of a
 “law have characteristics so distinct as rea-
 “sonably to form, for the purpose legislated
 “upon, a class by itself, the law is general,
 “notwithstanding it operates upon a single
 “object only.”

So, in *Riccio v. Hoboken*, 40 Vr. 649, this Court 30
 said, by Mr. Justice Pitney, at page 652:

“The legislative classification thus resorted
 “to must be germane to the purposes of the
 “enactment—it must rest on peculiarities or
 “characteristics that substantially differen-
 “tiate the localities included from those ex-
 “cluded, and that render divergent legislative
 “enactments appropriate to the several locali-
 “ties respectively.”

See also:

Rutgers v. New Brunswick, 13 Vr., 51;
Kennedy v. Belmar, 32 Vr., 20, 26.

Moreover it should not be forgotten that it is for the Legislature to delineate the classes, and if the classification be not plainly elusive of constitutional restrictions, it cannot be interfered with judicially.

10 “Whether the basis of classification is wise or judicious, or whether it will operate as fairly as some other basis that might be adopted, is a question for the legislature, and not for the courts. The extreme limit of our inquiry in this direction is, Does population bear any reasonable relation to the subject to which the legislature has applied it; is it germane to the law?”

Van Syckel, J., for this Court, *Paul v. Gloucester County*, 21 Vr. 585, 592.

See also:

Matheson v. Caminade, 26 Vr. 4;
Hermann v. Guttenberg, 34 Vr. 616;
Freeholders v. Clarke, 36 Vr. 271.

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Now it is respectfully submitted that the elevation of “Walsh-Act” municipalities into a class by themselves is fair and legitimate, based upon characteristics peculiar to them, and by no means illusory or evasive, at least in respect to a grant of powers and relief from restrictions.

30 The two cases cited by Mr. Justice Trenchard (*Ross v. Winsor*, 19 Vr. 95; and *Dobbins v. Long Branch*, 30 Vr. 146), involved a mere change in the name of the governing body; but the “Walsh Act” goes much further than that. It creates a new kind of municipalities, with a new form of government differing obviously and materially from any other type found in this State. In the first place, all powers are vested in and, therefore, all responsibility is centred upon, a few men, thus incidentally gaining the benefits of the “short ballot”, which have been enjoyed as to State officials for many years. 40 Special provisions are made to secure the utmost publicity for the proceedings

of the Commissioners; to require an almost, or quite, unanimous vote by them in order to grant or renew special franchises; to afford to the voters ample opportunity to veto ordinances before they shall become effective; to secure service by the Commissioners with eye single to the public good. And perhaps more important for the present purpose, these are the only municipalities in the State where the voters have the right of the initiative, referendum and recall; and whatever the Court may think of these modern expedients, they certainly furnish a reasonable basis upon which the Legislature might fairly be moved to grant extensive powers and large discretion to the governing body. 10

Again, it should be borne in mind that under the construction made in this case, differences exist among municipalities governed under the "Walsh Act", based not upon inherent peculiarities or present conditions, but solely upon the corporate names they happen to bear and the particular charters under which they were formerly governed. It has been held that where the sole effect of a statute is to remove in some degree the differences existing in the various regulations of internal affairs, and to subject those affairs to the operation of a general law, then the statute is not special or local in the constitutional sense, although the pre-existing legal conditions were such that it would effect a change in only one town or county. 20 30

Bumstead v. Govern, 18 Vr. 368; affirmed, 19 Vr. 612.

See also:

Van Riper v. Parsons, 11 Vr. 1, 123.

In *Dover v. Grey*, 33 Vr. 647, this Court had before it a statute (P. L. 1895, p. 506), authorizing the inhabitants of any town, borough or township having a population in excess of 5,000, to be- 40

come a city. The act provided that none of the provisions of any general or special laws relative to cities should apply, but that such new cities should continue to be subject to and governed by the laws applicable to them in their previous corporate form; and it was held for that very reason to be special legislation. If then it is invalid to provide that a municipality changing its form of government shall continue to be subject to the same laws as before, and if at the same time it is unconstitutional to provide that it shall no longer be subject to those laws, what is the Legislature to do? Is it forever held down to the same kinds of municipal charter that were familiar to statesmen at the adoption of the Constitution? Surely this Court will impose no such limitation.

If the objection be based upon the fact that the "Walsh Act", with its amendments, is not operative except where it has been adopted by the voters, it has already been overruled by the Courts in similar cases:

Warner v. Hoagland, 22 Vr. 62;
Matter of Cleveland, 23 Vr. 188;
Noonan v. Board of Freeholders, 23 Vr. 398.

B.

THE ACT DOES NOT INVOLVE AN UNWARRANTED DELEGATION OF LEGISLATIVE POWERS..

The rule that the Legislature must not delegate its legislative functions is one of those fundamental principles of government which are only by implication made a part of the organic law of the State,—so to say, a sort of Constitutional common-law. That being true, all the limitations of the rule must be deemed incorporated in the Constitution along with the rule itself.

From time immemorial, in the English-speaking

countries, local communities have been allowed at least some measure of self-government. Unless the Legislature can find a way to impose upon municipalities mandatory directions as to exactly what they shall do, and how they shall do it, in every conceivable,—nay, in every possible,—state of circumstances; unless it will regulate the internal affairs of every community in every detail, however minute, and that too, by general and uniform laws in order not to violate another provision of the Constitution; it must leave to each community and to its proper officials some degree of discretion. Whenever the Legislature gives a city authority to do any of the countless acts of merely local concern, these grants are only permissive. It is, and must always be, left to the judgment of the municipal governing body to determine whether, and when, each of these powers shall be exercised; and that decision is, in essence, a legislative function.

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But it is the constant practice of the Legislatures of all the States to go much further than this. If there be one function of the Legislature which is more essentially legislative than another, it is the so-called "Police Power,"—a power for which there is no express warrant, and yet one which is allowed to be superior to the prohibitions of the Federal and State Constitutions, against depriving a person of his property without due process of law and without compensation, and against the invasion of the individual's right to liberty and the pursuit of happiness. And yet there is probably not a municipal corporation in the United States to which has not been given authority to pass ordinances for the peace and good order of the community, and in other respects to exercise the "Police Power" within its limited territory. And, as it was held in *Bohan v. Weehawken*, 36 Vr., 490, ordinances

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for municipal regulation passed under a delegation of legislative authority have, within their respective spheres, the force of general laws.

That such delegation of power is valid is now universally recognized.

See:

- 10 Cooley on Constitutional Limitations
(7th Ed., 1903), Chap. V., p. 163;
Ibid., Chap. VIII., p. 264;
Dillon on Municipal Corporations (5th
Ed., 1911), §573;
Sutherland on Statutory Construction,
(2d Edition, 1904), §§87, 95.

20 And it is abundantly sustained by the decisions of the Courts of New Jersey. Thus, in *Paul v. Gloucester County*, 21 Vr., 585, Mr. Justice Van Syckel, writing the opinion of this Court, said, at pages 593, et seq.:

“It is pertinent to remark, that there is
“no express provision in our constitution
“that legislative power shall not be dele-
“gated.

30 “The assumed incapacity to delegate is
“implied, as a necessary result, from the fact
“that, in our system of government, the
“power to make the laws is lodged in our
“senate and general assembly; that a conse-
“quent obligation rests upon them to exer-
“cise the function with which they are en-
“trusted; and that in the absence of express
“authority to delegate, such authority does
“not exist.

“The only restraints upon the exercise of
“the legislative prerogative are those ex-
“pressly or impliedly contained in the federal
“and state constitutions, and those immu-
“table principles which lie at the very foun-
“dation of society.

40 “When we recur to the fact that the power
“of eminent domain has been delegated to
“railroad and other corporations without

“challenge, that the important power of
 “taxation and all the powers of local gov-
 “ernment have, for more than three genera-
 “tions, been delegated in our state, we are
 “admonished not to be too confident in as-
 “serting where the precise limitation is upon
 “the competency of the legislature to dele-
 “gate powers of government.

“We must be careful, therefore, how, in
 “the absence of express injunction or clear
 “implication, we strip a co-ordinate branch
 “of the state government of the right to give
 “expression to its will, in the form of law,
 “within its own department.” 10

* * * * *

P. 600. “The validity of this law may be
 “rested securely upon the right of the legis-
 “lature to delegate the powers of local gov-
 “ernment to political subdivisions of the state.

“The capacity to grant such legis-
 “lative powers, commonly called police pow-
 “ers, to municipal corporations, is admitted.” 20

* * * * *

P. 602. “The legislature is omnipotent
 “to grant these powers to political sub-
 “divisions of the state, now existing or to be
 “created by it.”

See also:

Freeholders of Hudson County v. State,
 4 Zab., 718;

*State ex rel. Morgan v. Monmouth Plank
 Road Co.*, 2 Dutch., 99;

Matter of Drainage &c., 6 Vr., 497; 30

Howe v. Plainfield, 8 Vr., 145;

Glen Ridge v. Stout, 29 Vr., 598; af-
 firmed, 30 Vr., 201;

Allison v. Corker, 38 Vr., 596;

Schwartz v. Dover, 41 Vr., 502; affirmed,
 43 Vr., 311;

*Van Cleve v. Passaic Valley Sewerage
 Commissioners*, 42 Vr., 183;

Rutten v. Patterson, 64 Atl., 573;

Atlantic City v. France, 65 Atl., 894. 40

It has, moreover, been a frequent practice of the Legislature to enact laws which were not to be effective in any community until accepted by the legal voters thereof; and such legislation has uniformly been sustained by the Courts.

Paterson v. Society, 4 Zab., 385;
Warner v. Hoagland, 22 Vr., 62;
In re Cleveland, 23 Vr., 188;
Noonan v. Freeholders, 23 Vr., 398;
 10 *Kennedy v. Borough of Belmar*, 32 Vr.,
 20;
DeHart v. Atlantic City, 33 Vr., 586; re-
 versed on other grounds, 34 Vr., 223;
Ross v. Freeholders, 40 Vr., 291.

The right of delegation being so far beyond dispute, what is there in the Act in question that involves an unwarranted delegation? It provides that each municipality affected by it "shall have
 20 "all powers which it shall deem necessary or convenient for its government or for its welfare and "prosperity * * *." It must be conceded that the Legislature might have granted all municipal powers by enumerating them specifically, one by one; and it cannot be doubted that the grant may be, indeed must be, permissive, to be availed of only if the municipality shall find it "necessary or convenient." The only difference is, that by
 30 this law the Legislature, instead of covering several pages with a list of powers granted, and probably omitting many by inadvertence, has used the general and inclusive word "all." Whatever powers the Legislature may grant specifically, surely it can grant by a general term which includes each specific power.

And to the suggestion that the phrase "all powers" literally includes functions not properly municipal, which, therefore, could not constitutionally be conferred upon a municipality, the
 40 answer is obvious. First of all, the expression

must be read in the light of its context; it is a grant to a class of *municipalities*, and only of such powers as it shall deem necessary or convenient "for its government or for its welfare and prosperity." In the second place, it is well settled that where of two possible interpretations of a statute, one renders it valid and the other invalid, the Courts will adopt the former. It is always presumed that the Legislature intended to enact a valid law; the Courts will resort to implications to sustain a statute, though never to defeat it. 10

Sutherland on Statutory Construction,
(2d Edition, 1904), §498;

Colwell v. Power Co., 4 C. E. Green, 245;

In re *Drainage, &c.*, 6 Vr. 497;

Bowyer v. Camden, 21 Vr. 87;

Water Works Co. v. Water Co., 17 Stewart
art 427;

Road Commission v. Harrington, 25 Vr.
274; affirmed, 26 Vr. 327; 20

East Orange v. Hussey, 41 Vr. 244;

Rutten v. Paterson, 64 Atl. 573.

As an illustration of the extent to which such delegation of legislative functions has been carried in other States, it may not be without value to refer to the "Greater New York Charter" of 1901. (New York Laws, 1901, chap. 466.) Section 1620, Subdivision 3, of that Act gives the board of aldermen power to repeal statutes; and the grant has been upheld by the Courts. 30

In re *William Morris, Inc.*, 131 App.
Div. 767;

*City of New York v. Alhambra Theatre
Co.*, 136 App. Div. 509; affirmed, 202
N. Y. 528.

See also:

Clarke v. Rochester, 28 N. Y., 605;
*Saratoga Springs v. Saratoga Gas &c.
Co.*, 191 N. Y. 123. 40

In this case, however, interpretation is unnecessary, since the grant is expressly limited to such powers as are not in conflict with "the provisions of the constitution".

C.

THE ACT DOES NOT VIOLATE THE FIRST CLAUSE OF ARTICLE IV., SECTION VII, PARAGRAPH 4 OF THE CONSTITUTION.

That clause is as follows:

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"To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

20

"The constitution itself gives the reason for the requirement that every law shall have but one object, and that shall be expressed in the title. It is to avoid the evil of intermingling in one act things which have no proper relation to each other."

Chancellor Runyon, in *Payne v. Mahon*, 15 Vr. 213, 216.

"The constitutional requirement that the object of every law shall be expressed in its title, is satisfied when the title fairly indicates the general object of the statute, although it does not indicate the means or method of attaining that object."

30

Bumstead v. Govern, 18 Vr. 368; affirmed, 19 Vr. 612.

"The practice in this state of employing general titles in public laws regulating municipal government has come to be so established that we ought not, on this ground, to hold the act invalid."

Knapp, J., in *Randolph v. Wood*, 20 Vr. 85, 91; affirmed, 21 Vr. 175.

40

"The criticism upon the title is that 'An act concerning cities' expresses nothing defi-

"nite and could embrace any one of a thousand or more different subject-matters connected with the affairs of cities. But the fact that the object of the act might, with propriety, be expressed more specifically in its title than the legislature has seen fit to do, is no reason for declaring it void, so long as the title fairly points out the subject of the legislation."

GUMMERE, J., in *Anderson v. Camden*, 29 Vr., 515, 518.

"Under our constitutional provision the title of an act is in the nature of a label by which the object of the act is displayed; it is not a table of contents or an index to everything that the statute enacts."

Gottuso v. Baker, 51 Vr., 520.

These numerous extracts have been inserted as the best means of illustrating the principles followed by the Courts in applying this Constitutional command.

The "Hennessy Act" is entitled:

"An Act to amend and explain an act entitled 'An act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and municipalities governed by boards of commissioners or improvement commissions in this State', approved April twenty-fifth, one thousand nine hundred and eleven; as amended as to both its title and body by an act approved April second, one thousand nine hundred and twelve."

If that title fails sufficiently to express the object of a law designed to affect the powers of the municipalities described, then a very large number of the statutes of this State, especially those relating to municipal corporations, are *a fortiori* obnoxious to the Constitution. For instance, boroughs are governed under an act entitled: "A general act relating to boroughs (Revi-

“sion of 1897)”); and during the years 1898-1913, no less than sixty Acts were passed entitled only as supplements or amendments to the general Borough Act. These enactments covered objects as various as the construction of water-works, sewers, streets and sidewalks; the establishment of a sinking fund; change of the corporate name; maintenance of a life-saving guard; building of pavilions at shore resorts; taxation for the purpose of advertising the borough; the building of a municipal street railway; the straightening of streams; renting part of the borough hall; removal of garbage; representation in the board of chosen freeholders; and many others. Is all this legislation unconstitutional? The Courts have not seemed to think so.

See:

Moore v. Burdett, 33 Vr., 163;
Coward v. North Plainfield, 34 Vr., 61.

20 Again, in the Compiled Statutes of 1910, under the heading, “CITIES”, are grouped at least forty-eight different Acts bearing the title, “An Act concerning cities”, or “An act concerning the government of cities of this state”, or “An Act relating to, regulating and providing for the government of cities,” or other titles no more descriptive; and many of these have been amended and supplemented without more detailed specification. Surely all these statutes are not invalid for lack of sufficient titles.

See:

Randolph v. Wood, 20 Vr. 85; affirmed,
21 Vr. 175;
French v. East Orange, 20 Vr. 401;
Rahway Savings Inst. v. Rahway, 24 Vr.
48;
Anderson v. Camden, 29 Vr. 515.

D.

THE ACT DOES NOT VIOLATE THE LAST SENTENCE OF ARTICLE IV., SECTION VII., PARAGRAPH 4, OF THE CONSTITUTION.

The sentence is this:

“No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of the act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act.” 10

The distinguished Counsel for the Appellee suggested, in the Supreme Court, that the Act contravenes this provision; but it is submitted that the point is not well taken.

If the language of the inhibition were enforced literally and strictly, the statute books of the State would be encumbered beyond endurance with enactments incorporating in themselves the applicable provisions of previous laws. Very few cases are found in the books where a statute has been held to offend against this provision; on the contrary, the tendency of the Courts has been to sustain the action of the Legislature. 30

See:

Campbell v. Board of Pharmacy, 16 Vr. 241; affirmed, 18 Vr. 347;

In re Haynes, 25 Vr. 6; 30

Bradley & Currier Co. v. Loving, 25 Vr. 227;

Kennedy v. Borough of Belmar, 32 Vr. 20;

Re Trenton Street Ry. Co., 47 Atl. Rep. 819;

Hopper v. Stack, 40 Vr. 562;

Conover v. Atlantic City, 44 Vr. 596;

Hutches v. Ho-Ho-Kus, 53 Vr. 140. 40

The Legislature cannot, of course, interpret the Constitution for itself or acquire prohibited powers by exercising them without question. But when for years it has, times without number, enacted laws declaring that other laws should be applicable, without re-enacting their provisions, and such practice has raised almost no protest or complaint from litigants interested in defeating the particular statutes, it seems fair to assume that the Legislature has not offended against the organic law of the State.

10

A merely cursory examination of the Laws grouped in the Compiled Statutes of 1910, under the single title of "CITIES," discloses many instances of such incorporation by reference. Indeed it has seemed to be the rule, rather than the exception, to insert such a clause in the acts for the incorporation of cities. For example:

20 An Act providing for the incorporation of cities: (P. L. 1895, p. 551; Comp. Stat., p. 596.)

"§7. All cities incorporated under this act shall be governed by the laws of this state relating to and regulating the government of cities."

An Act concerning consolidated cities and annexed municipalities and townships and portions thereof. (P. L. 1900, p. 152; Comp. Stat., p. 598.)

30 "§1. Whenever one or more cities, boroughs, towns or townships, or portions thereof, shall be annexed to * * * any city * * * , the charter of the city, * * * , and the supplements thereto, and all general laws affecting the same, * * * , shall extend to and have the same force and effect within the territories of the municipalities * * * so annexed to * * * said city as the same shall have theretofore had within the original limits of such city."

40 An Act enabling adjoining municipalities, other than cities, lying in the same county, to consoli-

date and form a city. (P. L. 1908, p. 295; Comp. Stat., p. 607.)

“§17. The provisions of all general acts
“relative to the government of cities and the
“provisions of all general acts relative to the
“government of cities of the population of the
“proposed new city shall apply to cities or-
“ganized or incorporated under this act.”

An Act relating to and regulating the govern-
ment of cities. (P. L. 1894, p. 75; Comp. Stat.,
p. 1124.) 10

“§86. All laws in force in any city of this
“state not inconsistent with or repugnant
“to the provisions of this act shall remain
“and continue in force, and all powers con-
“ferred and duties imposed thereby upon the
“governing body or any municipal officer
“thereof shall apply to and be conferred upon
“all boards and bodies hereby created and
“officers to be elected or appointed under
“the authority of this act having like or 20
“corresponding powers and duties.”

See also similar provisions in

P. L. 1899, p. 96, §87; Comp. Stat., p.
1365;

P. L. 1902, p. 284, §115; Comp. Stat., p.
1162;

P. L. 1903, p. 292, §84; Comp. Stat., p.
1197;

P. L. 1908, p. 303, §48; Comp. Stat., p. 30
1265.

A very interesting illustration is found in para-
graph 1400 on page 976 of the Compiled Statutes,
being §14 of the Act, P. L. 1891, p. 264:

“That all laws or parts of laws, general,
“special, local or private, in force in any
“such city of the first class aforesaid, * * * ,
“and relating to the subject-matters contained
“in or contemplated by the provisions of this
“act, and consistent with its provisions, shall 40

“apply to such board * * * , and such
 “law or laws, or parts thereof as aforesaid,
 “hereby are continued in force, and are made
 “applicable to such board * * * except
 “so far as the provisions of the same may
 “conflict with or be not consistent with the
 “provisions and intent of this act; and such
 “board * * * shall in general be fully
 “authorized and absolutely empowered to do
 “any other act or thing necessary or con-
 “venient for the fulfilling and carrying out
 “and accomplishing the purposes of this act.”

10

And that section has been sustained by this Court:

Board v. Jersey City, 28 Vr. 452.

It is also interesting to notice that the amend-
 ment of 1912 at the end of §4 of the “Walsh Act”,
 contains the following provision, which so far as
 known has not been questioned, but, on the con-
 trary, was cited by the Court below:

20

“All acts, general or special, relating to
 “such city, shall, except so far as inconsistent
 “with this act, apply to such city.”

But perhaps more interesting still is the exam-
 ple found in §13 of the “Harbor Act” (P. L. 1911,
 p. 233), which is sustained by the Supreme Court
 in these cases:

30

“The powers conferred by this act shall
 “be deemed to be in addition to, and inde-
 “pendent of, any and all power and authority
 “conferred by any other law or laws, and not
 “subject to any limitations, restrictions or
 “provisions contained in any other law or
 “laws.”

A careful examination of the language of the
 “Hennessy Act” will, however, show that the re-
 striction, even if rigidly construed, is not vio-
 lated. There is nothing in the Constitution that
 forbids the Legislature to *repeal* a statute, either
 40 by reference to its title or by merely general men-

tion of "all inconsistent laws"; and this practice is almost universal. The Act of 1914 provides in §1:

"Such municipalities * * * shall not be subject to any laws of this State except laws applicable to all municipalities of this State other than counties and school districts."

And in §8:

"All powers * * * not in conflict with the laws applicable to all cities of this State." 10

The meaning and effect are precisely the same as if the Act had read:

"All laws not applying to every municipality in the State are hereby repealed so far as they impose restrictions upon municipalities of this class."

The clauses in question are clearly repealers, and the reference to laws generally applicable is merely incidental and by way of exception out of the repealing clause. 20

See:

Van Riper v. Parsons, 11 Vr. 1, 123;
Hartshorne v. Avon, 46 Vr. 407; affirmed,
49 Vr. 556.

II.

The language of the Act is effective to accomplish its purpose; the Act confers all powers which can constitutionally be granted to any municipality.

10 The important clause is in §8, as amended, the amendments made by the Act of 1914 being italicized:

20 "All cities adopting the provisions of this act shall be and are hereby vested with the general powers and authority to enact and enforce by imposition of reasonable fines or by imprisonment or both all ordinances necessary or proper for the protection of life, health and property; to declare and prevent and summarily to abate nuisances; to secure, advance, preserve and enforce the good government and general welfare, order, prosperity, and security of such city; and shall have all powers which it shall deem necessary or convenient for its government or for its welfare and prosperity not in conflict with the laws applicable to all cities [municipalities] of this state or the provisions of the constitution; which powers shall be exercised by the board of commissioners subject to the provisions of this act."

30 It surely needs no citation of authority to convince this learned Court that:

1. The sole purpose of statutory construction is to ascertain the intention of the Legislature, as expressed in the language used;
 2. Unless clearly contrary to the legislative intent, the words of a statute must be taken in their plain, ordinary, popular sense;
 3. The Court will not apply its own opinion as to the policy of legislation, but the decision of that question rests entirely with the Legislature.
- 40 The duty of the Court is to discover what the

Legislature intended to provide, and if not in conflict with the Constitution, to enforce such purpose; beyond that its functions do not go.

Sutherland on Statutory Construction,
§§364, 366, 487;

Doyle v. Newark, 5 Vr. 236.

When, therefore, the Legislature declares that a municipality shall have "all powers", it must be assumed that the Legislature meant to bestow, literally, all powers that may be conferred upon a local community. Cogent reasons must be adduced to overcome this presumption. 10

See:

Stewart v. Lehigh Valley R. R. Co., 9 Vr.
505, 513;

State v. Kelsey, 15 Vr. 1.

If "all" does not mean "all", what does it mean? No reasonable line can be drawn between "all" and "none". If the language does not include every municipal power, there is no sound basis for holding that it includes any; and there is thus displayed the remarkable spectacle of a Legislature deliberately creating a class of municipalities and depriving them of every power by which their prosperity or even their effective existence can be sustained. 20

Even if it were to be held that "all powers" means only "all powers of the same sort as are specifically mentioned in the preceding clauses", we fare little better. The municipality may pass ordinances "for the protection of life, health and property"; it may "abate nuisances": if that be all it can do, it is indeed in sorry plight. Then come the clauses in question: 30

"To secure, advance, preserve and enforce the good government and general welfare, order, prosperity and security of such city; and shall have all powers which it shall deem necessary or convenient for its government or for its welfare and prosperity." 40

These two clauses should evidently be read together; but if they be limited to such subjects as nuisances, and the protection of life, health and property, the city must cease to exist. Perhaps it could build sewers, as necessary for the health of the inhabitants; but it could hardly be said that laying out roads, erecting public buildings, levying taxes, or many other necessary municipal functions, are a part of the "Police Power" as usually understood.

10 If, then, this narrow construction be upheld, the result is absurdity. It is well settled that the Court will, if necessary, distort the language from its natural and literal sense, in order to avoid a result which is absurd or highly inconvenient; whereas those who insist upon this view demand that the language shall be thus distorted in order to produce absurd and most harmful results.

20 In Broom's Legal Maxims (8th Edition, 1911), we find the following statement in explanation of the maxim, "*argumentum ab inconvenienti plurimum valet in Lege*":

30 Page 151. "Unless it is very clear that violence would be done to the language of the Act by adopting any other construction, any great inconvenience which might result from that suggested, may certainly afford fair ground for supposing that it could not be what was contemplated by the legislature, and will warrant the Court in looking for some other interpretation."

Again, on page 475:

"A somewhat strained interpretation of an instrument may be admissible where an absurdity would otherwise ensue."

So in Sutherland on Statutory Construction:

40 §367. "An interpretation of a statute which must lead to consequences which are mischievous and absurd is inadmissible if the statute is susceptible of another interpretation by which such consequences can be avoided."

§390. "The words of a statute are to be read in their ordinary sense unless so construing them will lead to some incongruity or manifest absurdity."

§488. "Considerations of what is reasonable, convenient, or causes hardship and injustice, have a potent influence in many cases. It is always assumed that the legislature aims to promote convenience, to enact only what is reasonable and just. Therefore, when any suggested construction necessarily involves a flagrant departure from this aim, it will not be adopted if any other is possible by which such pernicious consequences can be avoided." 10

§489. "A statute may be construed contrary to its literal meaning, when a literal construction would result in an absurdity or inconsistency, and the words are susceptible of another construction which will carry out the manifest intention. 'When the literal enforcement of a statute would result in great inconvenience and cause great injustice, and lead to consequences which are absurd and which the Legislature could not have contemplated, the courts are bound to presume that such consequences were not intended, and adopt a construction which will promote the ends of justice and avoid the absurdity'". (*People v. Chicago*, 152 Ill. 546, 552.) 20

In view of this clear rule of construction, surely the Court will not depart from the natural and ordinary meaning of the words, "all powers", in order to produce a result so absurd and inconvenient that it cannot have been intended by the Legislature. 30

Moreover, if there be doubt as to the meaning of the language in the enacting portion, resort may be had to the preamble to gain light upon the legislative intention. As expressed by Lord Coke (*Co. Litt*, 79a.), "The rehearsall or preamble of the statute is a good meane to find out the meaning of the statute, and as it were a key to open the understanding thereof." 40

See:

Blackstone, I., 60;
Hardcastle on Statutory Law, p. 186;
Sutherland on Statutory Construction,
 §341;
Northampton v. Stafford, 1 Pennington
 125;
Lloyd v. Urison, Id. 212;
James v. DuBois, 1 Harrison 285;
Camden &c. Co. v. Briggs, 2 Zabriskie
 623;
Leonard v. Lawrence, 3 Vr. 355;
Horner v. Webster, 4 Vr. 387;
Shields v. Lozear, 5 Vr. 496.

10

Now the preamble to this Act recites as follows:

20

“WHEREAS, The act to which this is amend-
 atory was intended to provide for a new and
 distinct class of municipalities in this State
 and to give such municipalities the benefits
 of home-rule with power to do any act or
 thing which the governing body thereof
 might deem necessary or desirable, unless
 forbidden by the constitution of this State
 or by laws applicable to all municipalities of
 this State, * * * ; but doubts have
 arisen as to whether the language of said
 act sufficiently expresses such intention.”

30

Here is a clear statement of the motives which
 actuated the Legislature and a sure guide to the
 real intention of the Act. It evinces a purpose
 to give to the new class of municipalities “the
 benefits of home-rule”. In a measure, all munici-
 palities have always enjoyed self-government, so
 far as concerns the passing of such ordinances as
 are expressly permitted, the exercise of discretion
 as to whether and when the powers granted by
 the charter shall be exercised, and the execution
 of local functions by officials locally chosen.
 40 that were all that the Legislature meant by

“home-rule”, it would not have complained that its purpose to confer this boon had been misunderstood, and would not have passed the new law. Indeed, if the contentions of the Appellants be sound, the Act of 1914 deprives Commission-governed cities of much of the self-government which they formerly enjoyed. Of course, it is always possible that the Legislature may fail to accomplish its object by using words which cannot be interpreted in harmony with such intent; but it does not seem to be a very violent stretch of language to hold that “all powers” may mean literally “all powers”, when the Legislature insists that such is its intention. 10

And it should be noticed that the equivalent of the phrase “all powers” is used in the preamble with no context by which it can possibly be limited in scope. There is no reference here to “Police powers” and the protection of life, health and property. The intention is declared to be to give to these communities “power to do any act or thing which the governing body thereof might deem necessary or desirable, unless forbidden,” &c., &c. 20

In view of this emphatic declaration as to the design of the Act,—in view of the recognized failure on the previous occasion to make itself understood,—must it not be assumed that the Legislature appreciated the natural and ordinary meaning of so simple a word as “all”? If ideas can be expressed by words, and language has any meaning, must we not believe that the Legislature meant just what it said, and knew just what it meant to say? 30

Now, if it be conceded that “all powers” are not confined to the abatement of nuisances and the like, but include every power consistent with constitutional limitations, then this answers every doubt that may be raised. Municipalities may validly be given power to condemn lands for any 40

authorized public purpose, to issue bonds, to establish and maintain public parks, libraries and markets, to make harbor improvements, and all the other public works which any municipality in the State is now permitted to undertake. Since these powers may be conferred upon municipalities, they have by this Act been bestowed upon those governed under the "Walsh Act"; and in each case, the only question must be, not whether the Legislature *has granted* the requisite authority, but whether it *could* do so, consistently with the Constitution and with laws applicable to all the municipalities in the State.

So far as a question is raised as to the power to issue bonds, the above argument is fortified by the proviso in §8, which is reenacted by the Act of 1914, without change in form, and which reads as follows:

20 "Provided, however, that no ordinance or resolution increasing the net bonded indebtedness of the city to a sum in excess of fifteen per centum of the assessed valuation of all property within said city shall be valid unless the same shall * * * receive the approval of a majority of the voters."

Now, of course, it is not contended that a proviso is a grant of power, or can be allowed to enlarge the clear language of the enacting clause. But a proviso must be supposed to mean something.

See:

Sutherland on Statutory Construction,
§§351, 380;
Lanning v. Lanning, 2 C. E. Greene, 228,
234;

If, then, this Act deprives the municipalities affected by it of power to issue any bonds for any purpose, the question at once arises, What con-

40 ceivable object did the
Proviso have?

ing that they should not issue bonds above 15% of taxable values without a referendum? Surely it was not filling the statute books with idle words, without significance or effect. The fact that the power to issue bonds in excess of the limitation was excepted by the proviso, affords at least a strong implication that the "all powers" granted by the enacting clause were intended to include the issuance of bonds.

Again:

10

"A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there; and the amendment itself so thoroughly becomes a part of the original statute that it must be construed, in view of the original statute, as it stands after the amendments are introduced and the matters superseded by the amendment eliminated."

Farrell v. State, 25 Vr., 421.

20

In other words, nothing in the "Walsh Act" as it formerly stood is repealed by the amendments, unless necessarily in conflict with them, and the language of the amendments must be read in the light of the other provisions of the original law.

Now look at §17 of the "Walsh Act", as amended by P. L. 1913, Chap. 179:

"No petition or submission to the vote of electors shall be necessary to authorize * * * the borrowing of money and the issuance of bonds or other obligations for any purpose for which any city [municipality] may be authorized by law to issue bonds or other obligations."

30

It was obviously intended that these municipalities might issue bonds for any municipal purpose. And this fact, in turn, lends support to the view that the grant of powers was intended to be all-inclusive. As shown by Judge Dillon, the

40

power to issue bonds is probably the last power that would be upheld by implication; the Courts are always readier to find a grant of authority to condemn lands or to construct public works, than to issue evidences of debt with the peculiar qualities of negotiability. Since the Legislature, therefore, clearly meant to bestow this great power, it is reasonable to assume that it also purposed to confer the lesser powers.

- 10 If it be suggested by some line of very ingenious reasoning that there is an inconsistency between the language of §1 and §8, then it must be conceded that the provisions of §8 would prevail.

Sutherland on Statutory Construction,
§349.

- 20 And of course this rule would apply with still greater force to any discrepancy between §8 as amended in 1914 and §4 as amended in 1912.

- But it is believed that the act can legitimately be construed so as to harmonize all its parts. No one will doubt that if this be possible, it must be done. Mr. Justice Trenchard said in his opinion: "The language of the 'Hennessy Act' is clear and unambiguous. It declares that commission gov-
 30 "erned municipalities 'shall not be subject to any laws of this State except laws applicable to all municipalities.' There is, therefore, no occa-
 "sion for construction or interpretation, but the act must be given effect by the courts, if constitutional." But he evidently understood the language quoted to mean that these municipalities were thereby bereft of all powers not common to every municipality, in direct contradiction to the grant of "all powers" in §8, and certainly in contradiction to the purpose distinctly stated in the preamble. If the wording of §1 conveys that
 40 meaning, then it is respectfully submitted that there is "occasion for construction or interpreta-

"tion." The word "subject" is not always,—perhaps it would be safe to say that it is seldom—employed with respect to powers and privileges: its more natural use seems to be with relation to restrictions and limitations. Bearing in mind the recital in the preamble and the provision of §8; if the language of §1 deprives the municipalities of powers formerly possessed, it either repeals the later section, which is impossible, or else it merely takes away with one hand what with the other, immediately afterward, it bestows again in yet richer measure. 10

It is submitted that the fair construction of the act may be briefly stated thus:

"Such municipalities shall have all powers they may desire to exercise, and shall not be subject to any restrictions, limitations or disabilities, except such as are common to all municipalities in the State or are imposed by the Constitution itself." 30

If the act be so interpreted, the intent of its draftsman and the views of many thoughtful students of municipal government will prevail.

Respectfully submitted,

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J. W. Sloyer,
Council for the
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