

NEW CASTLE COMMON

NEW CASTLE

DELAWARE

1701

1764



1792

NEW CASTLE COMMON

✽

NEW CASTLE, DELAWARE

✽

October 31, 1701

Common located by Warrant for Survey from William Penn

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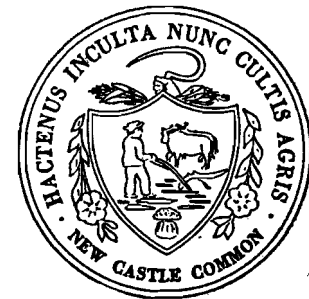
October 31, 1764

Trustees of New Castle Common Incorporated by Charter
from the Proprietaries, Thomas Penn
and Richard Penn

✽

January 25, 1792

Trustees of the New Castle Common Re-incorporated by
Special Act of Delaware Assembly



NEW CASTLE COMMON

THE mere fact that a large tract of land has, since the earliest Colonial times, remained in an almost unaltered form and under the same management may not, in itself, be of sufficient historical interest to justify publication of the details of its origin and background. This justification may be found in the fact that the tract at all times has been an active, living and useful trust, unique in character, and almost without its counterpart in this or any sister state and reflecting in our original settlers the ancient customs and habits of the land from which they came.

Just when New Castle Common had its origin has not, as yet, been definitely determined. As first actually located by metes and bounds in 1704 it consisted of 1068 acres of land near New Castle, Delaware, and must not be confused with other and smaller lots in which some right of common existed.

It has generally been assumed and often stated as a fact that New Castle Common had its origin in a grant from William Penn in 1701 and thus many are led to believe that it was to the generosity of Penn that we are indebted for the Common. Such was not the case. William Penn's place in history has been insured by his character and achievements and our appreciation of his worth and charity needs the addition of no incident unsupported by fact.

New Castle Common had its origin many years before Penn had any thought of America or any connection with the soil of Delaware. What Penn did was merely to confirm and definitely locate a Common which had theretofore existed in fact. In the following pages we shall give the reasons for this belief including the statements from the records themselves and representations of those who had personal knowledge of the facts and of others who, like Thomas McKean, were entirely familiar with the history of the Common.

The first definite mention of New Castle Common, of which we now have knowledge, appears in the Minutes of the Colonial Assembly which met in Philadelphia, September 15, 1701. This was the last session in which the Province of Pennsylvania and the Three Lower Counties on the Delaware joined in legislation.

When the Assembly of 1701 met it immediately began the compilation

of an address containing twenty-one objections or requests directed to Governor Penn. No. 14 was as follows:

"That the thousand acres of land formerly promised by the Governor to the Town of New Castle for Common be laid out and patented for that use"

Nine days later, on September 29, 1701, Penn said:

"I allow it according to what I lately exprest at New Castle and it is not my fault it has not been done sooner"

It seems not improbable that at a prior visit to New Castle Penn had been requested to confirm the Common to the Town and had agreed to do so and that this present request was in furtherance of that understanding.

Pursuant to the foregoing request, William Penn, on October 31, 1701, made his warrant directing Edward Penington, Surveyor General, to survey and lay out 1000 acres in one convenient tract for the only use and behoof of the inhabitants of New Castle, to be in common for their accommodation forever.

It will be well to carefully note Penn's language. He instructs the surveyor to survey land "hitherto reputed called New Castle Common." This would be most unusual language to employ if New Castle Common had had no prior existence.

The warrant was as follows:

WARRANT FROM WILLIAM PENN,
FOR THE SURVEY OF ONE THOUSAND ACRES OF LAND, FOR A COMMON
FOR THE USE OF THE INHABITANTS OF THE TOWN
OF NEW CASTLE, 1701.

*William Penn Proprietary and Govr. of the Province
of Pensilvania and Counties annexed.*

PENSILVANIA,

[L. s.]

For the accommodation of the Inhabitants of the Town of New Castle These are to require thee forthwith to survey or cause to be surveyd to the only use and behoof of the said Inhabitants to lie in Common one thousand acres of the Land adjoining or near to the said Town hitherto reputed called New Castle Common in one convenient Tract, and if there prove more than the sd. number of Acres lay out the residue in one convenient piece to me and for my use and make returns thereof into my Secretaries office. Given under my hand and Seal at New Castle the 31st Day of 8ber. 1701.

WM. PENN.

TO EDWARD PENINGTON,

Surveyor Generall of the Province of Pensilvania & Territories.

Recorded in the Recorder's Office at New Castle, in Book of "New Castle Warrants," page 293.

Edward Penington, the Surveyor General of Pennsylvania, issued his warrant on December 23, 1701, to George Dakeyne, Deputy Surveyor of New Castle County to make the survey.

The survey if promptly made was not promptly returned and, that the limits of the Common as subsequently settled, had not been definitely fixed before 1703 may be seen from the following letter from James Logan, Secretary to Penn, to William Houston, then a resident of New Castle.

Philadelphia 12th 2nd Mo. 1703

[April 12, 1703]

Wm. Howston, Loving Friend: Richard Hallowell, in behalf of the Town of New Castle, making application to have the Commons granted to that Town settled and confirmed, I, once more, while there is an opportunity, request thy final answer about that additional tract and the overplus we have so much discoursed of: we set the price as low as possible viz £15, under which we cannot nor shall not come. If thou please to accept of it on these terms and order the money it shall be confirmed without delay: if not it must go into the Commons, and for it we shall add the like quantity to that reserved on the back of it, where it will at least be worth the money asked and therefore where it lies worth double. I request thy speedy answer, which, or thy silence will positively determine us

I am thy very loving Friend

James Logan

From the letter it will be seen that the location of the Common might have been very much closer to the Town than it eventually became, for, as Logan says, if Houston had not accepted his grant it would have been included in the Common. The facts were that Houston had, since 1696, owned a tract supposed to contain 50 acres. This was portion of a property patented by Governor Edmond Andros to John Moll March 24, 1676. Upon a resurvey it was found that Houston, instead of 50 acres, had 73 acres and this was "overplus" mentioned by Logan. Then, too,

New Castle, Delaware,
September 20, 1944.

Trustees of the New Castle Common,
New Castle, Delaware.

Gentlemen:

By resolution of the Board there has been committed to the undersigned the duty of making publication of information relating to New Castle Common. In the performance of this duty your Committee has ascertained certain facts, and submits the following pages as the result of its investigation.

In 1851 the Trustees of New Castle Common published, for the information of the citizens of New Castle, the Charter and by-laws of the corporation and the title papers by which the Common is held. In 1893 these items were re-published, together with such pertinent Acts of the General Assembly as then existed.

Since the latter date a number of legislative Acts have been passed, having a direct bearing upon the Trustees, and certain legal opinions have been obtained concerning the management and operation of the trust estate. To these we have added certain administrative regulations adopted by the Trustees, and a substantial amount of historical material bearing upon the origin and development of the trust, believing that such material should be preserved in some enduring form.

Since these opinions and regulations and this historical material have never before been published, they are now submitted with the hope that they may prove to be of interest to the citizens of New Castle, the beneficiaries of the trust.

The publication at this time and during the year 1944 seems particularly pertinent. William Penn was closely identified with the New Castle Common, and his heirs granted the original Charter creating its governing body, and evidenced great interest in its welfare. During the year 1944 a fitting celebration is planned to commemorate the 300th anniversary of the birth of William Penn, which occurred on October 14, 1644. It is particularly fitting, therefore, that, as part of this anniversary celebration, there should be brought to light, so far as possible, all hidden facts in connection with the great Proprietor, and places and events with which he was closely associated.

RICHARD S. RODNEY
NEWLIN T. BOOTH
DONALD C. BANKS

Committee.

there was some adjacent land not covered by any patent so, Houston having accepted the property, received on June 15, 1703, a patent for 118 acres, being his original 50 acres, 23 acres of "overplus" and the additional tract mentioned by Logan of 45 acres. This patent included all the land constituting the western portion of New Castle down to Beaver Street, now Fourth Street, near Delaware Street. As Logan says if Houston had not accepted the grant most of this land would have been included in the Common and in place of it a like quantity was added at the back to the Common.

On 11th Mo. 10, 1703 [Jan. 10, 1704] the following petition was presented to the Board of Property.

"The inhabitants of New Castle Town having presented a petition that a certain Parcel of Marsh on the South west end of said Town might be added to the 1000 acres granted to them by the Prop'ry for a Com'on, of which Com'on the said marsh has always been reputed a part, notwithstanding it has lately been divided from the same by a grant made to Wm. Houston: which sd petition being considered 'tis ordered that the said marsh be preserved for the said Town and upon no terms be granted to any other person until we hear further of the Prop'rys resolution by himself or son in relation to such affairs and that the said petition be endorsed accordingly."

This was the marsh now lying between Seventh Street and the River and North of Dobbinsville.

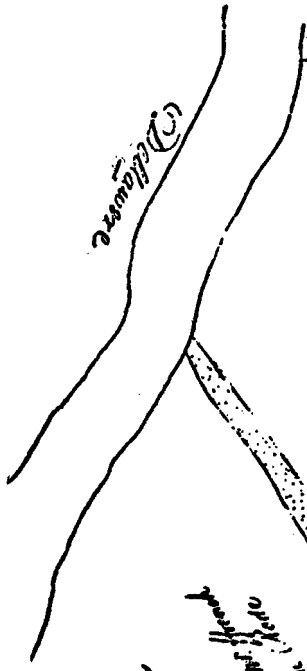
It will be noted that in 1704 the inhabitants stated that the Common was in existence and that the marsh "has always been reputed a part notwithstanding it has lately been divided from the same by the grant made to William Houston." Up to this time, then, the boundaries of the Common have not been definitely described but its former existence, as such, would seem to be clear.

No direct action on the petition can be found but it evidently was not granted. On October 1, 1714, John Brewster appeared before the Board of Property on behalf of the Town and asked that the marsh be granted to the inhabitants in proportional lots so that the marsh could be drained. The Board stated that no patent had been made for the marsh "but on the contrary that it was reserved when the grant of the Common was made" and prescribed certain conditions as to patents to the inhabitants of the Town. On June 8, 1715, Gilbert Falconer stated that the inhabitants of the Town of New Castle declined the terms proposed by the Board and asked that the marsh be granted to himself and Jasper

ORIGINAL RETURN OF SURVEY-1704

*By Virtue of a Writ to me directed bearing date the twenty third Day of the Month
in 1704 to Survey and lay out to the Inhabitants of New Castle to be in common for their
accommodation and to their only use and to be of one thousand acres of Land adjoining or
near to the said Town of New Castle. Deputed a large to be common, and to make the lines of the
same into the General Survey office at Philadelphia. This may be refer'd into the Gen Survey
office*

1601



*Office at Philadelphia that I have designed this
tract of Land being formerly Survey'd this fourth Day
of April 1704 beginning all on an old corner
Black oak of Joseph Woods showing
the same to be
of 1000 acres
more or less*

Yeates. Subsequently in 1718 the marsh was divided into a number of small lots all of which were acquired about 1768 by George Read.

On April 10, 1704, the survey of New Castle Common was made and returned and, since then, the boundaries have been fixed and settled.

In the return the surveyor in speaking of the tract says "reputed always to be common." This is additional evidence of the existence of the Common prior to the survey. In the return the surveyor also says that he has made a survey on April 10, 1704, "being formerly surveyed." This probably refers to a prior survey made by himself after his warrant of December 23, 1701 for in the survey of 1704 he uses the boundaries of William Houston's grant which had no existence prior to 1703.

The return of survey is in the following language:

RETURN OF SURVEY

By George Dakeyne, 1704.

By vertue of a Wart. to me directed, bearing date the twenty third Day of the tenth mnth, 1701, to Survey and lay out to the Inhabitants of New Castle, to lye in common for their accommodation and to their onely use and behoofe, one thousand acres of Land adjoining or near to the said Town of New Castle, Reputed always to be common, and to make Returns of the same into the Generall Surveyrs office att Philadelphia. This may certifie into the Genll. Surveyrs. office, att Philadelphia, that I have Resurveyd this Tract of Land (being formerly survey'd) this tenth Day of Aprill, 1704, begining att an old corner Black Oake of Joseph Wood's, standing by the Rode that leades to Christina fferry and running along the Rode towards New Castle, S. 9° Easterly 68 pch. to an old corner Black Oake of Robt. Ffrench Land; then by his old line of marked Trees, S. 85° westerly 182 pch. to an old corner Black Oake of Robt. ffrench; then by an old—of marked Trees, S. 20° Westerly 109 pch. to another old corner Red Oake of Robt. ffrench; then along the cripple N. 82 Westerly 18 pch. W. 16 pch. S. 70° Westerly 18 pch. S. 23° Westerly 55 pch. S. 68° Easterly 84 pch. to an old corner White Oake of Robt. ffrench; then along the criples S. 56° Westerly 44 pch. to a Black Oake, S. 5° Easterly 44 pch. to an old corner White Oake of William Houstons, standing near to the Smith Boom; then along the said Houstons line S. 39 Westerly 92 pch. to an old corner Spanish Oake of the said Houstons, standing by Maryland Rode; then by the severall courses of the said Rode N. 84° Westerly 87 pch. N. 75° Westerly 134 pch. over against Joseph Kents House; then

By Virtue of a Warrant to me directed bearing date the twenty third Day of the tenth m^o 1701 to Survey and lay out to the Inhabitants of Newcastle to live in common for their accommodation and to their only use and behoof one thousand acres of Land adjoining or near to the said Town of Newcastle reputed always to be common, and to make Returns of the same into the General Survey office at Philadelphia. This may certify into the Gen Survey office

1704

office at Philadelphia that I have Resurveyed this Tract of Land being formerly Surveyed the Tenth Day of April 1704 beginning at an old corner Black oak of Joseph Woods standing by the Road that leads to Christina Ferry and running along the Road towards New Castle 192 to 83 p^{ch} to an old corner Black oak of Rob^t French Land then by his old line of marked Trees 185 to 152 p^{ch} to an old corner Black oak of Rob^t French then by an old line of marked Trees 170 to 109 p^{ch} to another old corner Black oak of Rob^t French then along the Crispie 182 to 18 p^{ch} to 17 to 16 p^{ch} 170 to 18 p^{ch} 123 to 53 p^{ch} 168 to 84 p^{ch} to an old corner White oak of Rob^t French then along the Crispie 136 to 110 p^{ch} to a 180 15 Ell 110 p^{ch} to an old corner White oak of William Newtons standing near to the Smiths Down then along the said Newtons line 139 to 92 p^{ch} to an old corner Spanish oak of the said Newtons standing by Mary Lund-Rode then by the several courses of the said Ride 184 to 57 p^{ch} 175 to 131 p^{ch} over against Josephs Kents House then by the several courses of the Ride that Leads to Christina Bridge 165 to 75 p^{ch} 186 to 112 p^{ch} 16 to 15 p^{ch} 185 to 30 p^{ch} 176 to 34 p^{ch} 182 to 62 p^{ch} 138 to 20 p^{ch} 180 to 64 p^{ch} to a new corner Hickory by the said Ride then by a line of marked Trees N 36 Ell 33 p^{ch} to an old corner Tree of John Wilsons then by the line of Rob^t Hutchinson and Garrell Garretson N 6 39 p^{ch} to an old corner Hickory Sapling then by an old line of marked Trees S 6 200 p^{ch} to an old corner Red oak being a corner Tree of Rob^t Dyers Land and Edward Blake then along their line N 6 110 p^{ch} to an old corner Red oak of the afforsaid Dyers and Blakes and still by their line N 110 to an old corner Hickory of John Haysays Land then with the said Haysays line N 68 Ell 268 p^{ch} to an old corner white oak of the said Haysays and continuing the same course 62 p^{ch} to a new corner Black oak standing in a line of Joseph Woods land and running by his line 152 Ell 28 p^{ch} to an old corner Black oak of the said Joseph Woods and running by his line 180 Ell 155 p^{ch} to the beginning containing 1068 acres of Land Resurveyed the Day and year above written of G^o Dakeyne Surveyor



1704

by the severall courses of the Rode that Leads to Christina Bridge, N. 62° Westerly 75 pch. N. 64° Westerly 42 pch. W. 48 pch. N. 85° Westerly 30 pch. N. 76° Westerly 34 pch. S. 82° Westerly 62 pch. S. 58° Westerly 20 pch. S. 80° Westerly 64 pch. to a new corner Hickery by the said Rode; then by a line of marked Trees N. 36° Easterly 33 pch. to an old corner Tree of John Wilsons; then by the line of Robt. Hutchison and Garrett Garretson, N. E. 329 pch. to an old corner Hickery Sapling; then by an old line of marked Trees S. E. 200 pch. to an old corner Red Oake, being a corner Tree of Robt. Dyers Land and Edward Blake; then along their line, N. E. 114 pch. to an old corner Red Oake of the afforesaid Dyers and Blakes, and still by their line, N. W. 144 pch. to an old corner Hickery of John Husseys Land; then with the said Husseys line, N. 68° Easterly 268 pch. to an old corner White Oake of the said Husseys, and continueing the same course 62 pch. to a new Corner Black Oake, standing in a line of Joseph Woods land, and running by his line S. 52 Easterly 28 pch. to an old corner Black Oak of the said Joseph Woods, and running by his line S. 80° Easterly 155 pch. to the begining, containing 1068 acres of land.

Resurveyd the Day and Year above written.

Pr. G. DAKEYNE, *Surveyr.*

Recorded in the Recorder's Office at New Castle, in Book of "New Castle Surveys," page 400.

From the date of the survey in 1704 to 1760 New Castle Common lay open and exposed. There was no person or body charged with the duty of preservation of the land or enabled to protect the timber or to prevent encroachments on the tract. All these difficulties were constantly arising, and on October 20, 1760, the following petition was presented to the General Assembly of the "Three Lower Counties" then meeting in New Castle:

To the Honorable Representatives of the Freemen of the Counties of Newcastle, Kent and Sussex upon Delaware in General Assembly met at Newcastle.

The Petition of the Inhabitants of the Town of Newcastle Most humbly sheweth,

That there is a tract of land containing 1068 acres situate on the North West side of the Town of Newcastle and near the same, which has laid in common for the use of the Inhabitants of the said Town and been constantly by them enjoyed as such, upwards of one hundred years; That our late worthy Proprietor The Honorable

William Penn Esquire, at the instance of the Assembly of Pennsylvania and Territories before they separated in legislation, and from a desire of securing the same land for the use of the Inhabitants of the afsd. Town for ever, did on the thirty first day of October 1701 make his Warrant in Writing under his hand & seal, and directed the same to Edward Pennington Esquire then Surveyor General of the Province of Pennsylvania & territories afsd., to resurvey the tract of land afsd. for the only use & behoof of the Inhabitants of Newcastle to be in common for their accommodation for ever; That the said Edward Pennington did afterwards on the twenty third day of December in the year last mentioned make his Warrant and direct the same to George Dakeyne then Surveyor of the county of Newcastle thereby commanding him to resurvey the premisses for the uses afsd., and the said George Dakeyne accordingly resurveyed the same and made return thereof into the Surveyor General's Office at Philadelphia, as by the said Resurvey & Return thereof dated April 10th, 1704, and which your Petitioners lay before your Honors herewith, more at large appears.

Your Petitioners further shew, that all the timber and trees lately growing on the said tract are now cut down and destroyed, not only by the Inhabitants of the Town, but also by persons living in the country; and that great quantities of the said tract have been inclosed and tilled by the Owners of the lands contiguous thereto, and are now claimed by them as part of their plantations, and that the same Evil is daily increasing, in so much that the same Common will be rendered almost useless to your Petitioners, for whose sole benefit it was intended according to the original Grant thereof, unless some remedy is very soon had; That your Petitioners are remediless in the premisses, as they are not incorporated, and have not capacity to commence a suit against the trespassers afsd., nor can have (as they are advised) without the aid of the Legislature of this Government.

Your Petitioners therefore humbly pray that this Honorable House would be pleased to take the premisses into consideration, and grant them leave to bring in a Bill for the vesting the legal Estate in the said tract of land in certain Trustees and their Successors for the use of the Inhabitants of the Town of Newcastle forever, with such powers as shall be thought necessary for the enabling them to manage the same to the best advantage for all concerned, and in such a manner and form as to your Honors shall seem meet. . . .

Newcastle

October 20th 1760

James Dyer	Jno. Thompson	*Tho. McKean
Robt. Furniss	John Garretson	Aeneas Ross
Manlove Tennent	John Steuart	*Jn. VnGezell
John Silsbee	*Geo. Read	Jacob Ross
Samuel Janvier	*Danl. McLonen	*Slator Clay
Fredrick Tussey	Robt. McLonen	William Spencer
Stephen Alexander	Alexr. Harvey	*Z. VnLeuvenigh
John Booth	Jacob Janvier	*Geo. Monro
Wm. Blackburn	*Robt. Morrison	James Boggs
*David Finney	*Nathl. Silsbee	

Ten of those marked (*) were later named as Trustees in 1764. Other trustees of 1764 not on this list were John Finney, Richard McWilliam and John Yeates.

Endorsed upon the petition is the statement that the petitioners have "leave to bring in a Bill." This was the common legislative formula but the loss of all legislative Records for 1760 prevents all knowledge of the Bill, if any was presented to the Assembly.

No further action is known to have been taken on the petition, and it was possibly realized or thought that, under the existing form of Government, Acts of Incorporation were the functions or perquisites of the Proprietors and not of the people acting through the Assembly.

The language of the petition has much of interest. It is dated October 20, 1760. It says the tract of land "has laid in Common for the use of the inhabitants of the Town and been constantly enjoyed by them for upwards of one hundred years." That would place the establishment and use of the Common at least as early as 1660. In view of the fact that the English had no jurisdiction at all in Delaware until 1664, and Penn had no connection with Delaware soil until 1682, the inference is strong that the first use of the Common, as such, is of Dutch origin and existed many years before Penn came.

Among the signers of the petition there were probably a number who had personal knowledge of the facts. John VanGezel, for example, had been born in 1687, and was 17 years old when Penn had the tract surveyed. When they stated that the Common had existed prior to the coming of Penn there seems every probability that those statements were correct.

When the Assembly took no action on the petition in 1760 appli-

cation was made to the Proprietaries, for the Charter was granted by them in 1764, in the following words:

CHARTER

From Thomas Penn and Richard Penn, Proprietaries, incorporating the Trustees. 1764.

THOMAS PENN AND RICHARD PENN, ESQS., true and absolute Proprietaries and Governors in Chief of the Counties of New Castle, Kent and Sussex, on Delaware, and Province of Pennsylvania, TO ALL to whom these presents shall come, GREETING.

WHEREAS, in pursuance of a warrant from the late honoured father, William Penn, Esquire, there was surveyed and laid out, on the tenth day of April, in the year of our Lord one thousand seven hundred and four, to the inhabitants of the town of New Castle, in the County of New Castle, a tract or parcel of land, adjoining or near to the said town, containing one thousand and sixty-eight acres, as and for a common, for the use, behoof and accommodation of the inhabitants of the said town of New Castle; beginning at an old corner black oak, formerly of Joseph Wood, standing by the road that leads to Christiana ferry, and running along the road towards New Castle south nine degrees easterly sixty-eight perches to an old corner black oak formerly of Robert French's land; then by his old line of marked trees, south eighty-five degrees westerly one hundred and eighty-two perches, to an old corner black oak formerly of the said Robert French; then by an old line of marked trees, south twenty degrees westerly one hundred and nine perches, to another old corner red oak, formerly of the said Robert French; then along the cripple, north eighty-two degrees westerly eighteen perches, west sixteen perches, south seventy degrees westerly eighteen perches, south twenty three degrees westerly fifty-five perches, south sixty degrees [sixty-eight degrees in original survey] easterly eighty-four perches, to an old corner white oak, formerly of the said Robert French; then along the cripple, south fifty-six degrees westerly forty-four perches, to a black oak, south five degrees easterly forty-four perches, to an old corner white oak, formerly of William Houston, standing near to the Smith's boom; then along the said Houston's line, south thirty-nine degrees westerly ninety-two perches, to an old corner Spanish oak of the said Houston, standing by Maryland road; thence by the several courses of the said road, north eighty-four degrees westerly eighty-seven perches, north seventy-five degrees westerly one hundred and thirty-four perches, over against the house formerly of Joseph Kent; then by the several courses of the

road that leads to Christiana-Bridge, north sixty-two degrees westerly seventy-five perches, north sixty-four degrees westerly forty-two perches, west forty-eight perches, north eighty-five degrees westerly thirty perches, north seventy-six degrees westerly thirty-four perches, south eighty-two degrees westerly sixty-two perches, south fifty-eight degrees westerly twenty perches, south eight degrees westerly sixty-four perches, to a new corner hickory, by the said road; then by a line of marked trees, north thirty-six degrees easterly thirty-three perches, to an old corner tree, formerly of John Wilson; then by the line, formerly of Robert Hutchinson and Garret Garretson, north-east three hundred and twenty-nine perches, to an old corner hickory sapling; then by an old line of marked trees south-east two hundred perches, to an old corner red oak, being a corner tree formerly of Robert Dyer's and Edward Blake's land; then along their line, north-east one hundred and fourteen perches, to an old corner red oak of the aforesaid Dyer and Blake, and still by their lines, north-west, one hundred and forty-four perches, to an old corner hickory, formerly of John Hussey's land; then with the said Hussey's line, north sixty-eight degrees easterly two hundred and sixty-eight perches, to an old corner white oak of the said Hussey, and continuing the same course sixty-two perches, to a new corner black oak, standing in a line of the aforesaid Joseph Wood's land, and running by his line, south fifty-two degrees easterly twenty-eight perches, to an old corner black oak of the said Joseph Wood, and running by his line south eighty degrees easterly one hundred and fifty-five perches, to the first mentioned black oak and place of beginning; containing, within the said bounds, one thousand and sixty-eight acres of land, more or less, as by the said warrant and survey, remaining of record in our Surveyor General's office, at Philadelphia, may more at large appear.

AND WHEREAS, the inhabitants of the said town of New Castle have lately represented to us, that, notwithstanding the said warrant and survey, and the many benefits and advantages which our said honoured father intended the inhabitants of the said town of New Castle should reap and enjoy under the same, great quantities of the said tract of land, surveyed as a Common, in manner aforesaid, have been enclosed by the owners of tracts of land lying contiguous thereto, and by them tilled and cultivated, and encroachments are daily making on the same, and that great waste and destruction of the wood and timber on the said tract growing, hath been and still is committed by many evil disposed persons, to the great damage and injury of the inhabitants aforesaid, who at present

are remediless in the premises, for want of a legal power in them, or any of them, to sue and implead the wrong-doers. WHEREFORE, they have humbly requested us to incorporate a certain number of them, the said inhabitants of the town of New Castle, and give them perpetual succession, and to confirm to them the said tract of land in common for the use and behoof of all the inhabitants of the said town.

NOW KNOW YE, that we, favouring the request of the said inhabitants of the town of New Castle, have, of our special grace, certain knowledge and mere motion, named, constituted and appointed, and by these presents do name, constitute and appoint John Finney, Richard M'William, David Finney, Thomas M'Kean, George Read and George Munro, Esquires, John Van Gezell, Zachariah Van Leuvenigh, Slator Clay, John Yeates, Nathaniel Silsbee, Daniel M'Lonen and Robert Morrison, gentlemen, thirteen of the present inhabitants of the town of New Castle, to be trustees of New Castle Common, hereby giving and granting, willing and ordaining for US, our heirs, successors or assigns, that they, the said trustees and their successors, forever hereafter, shall be one body corporate and politic, in deed, by the name of the Trustees of New Castle Common; and by that name shall have perpetual succession, for the special ends and purposes, and with the powers hereinafter mentioned, and no other. AND we have given, granted, released and confirmed, and by these presents do give, grant, release and confirm for us, our heirs and successors, unto them, the said John Finney, Richard M'William, David Finney, Thomas M'Kean, George Read, George Munro, John Van Gezell, Zachariah Van Leuvenigh, Slator Clay, John Yeates, Nathaniel Silsbee, Daniel M'Lonen and Robert Morrison, and their successors, for ever, all that the aforesaid tract and parcel of land, situate in the said county of New Castle, adjoining or near to the town of New Castle, as the same is hereinbefore set forth, butted and bounded, containing one thousand and sixty-eight acres, more or less, with all the woods, waters, pastures, feedings, ways, rights, privileges, advantages and appurtenances whatsoever thereunto belonging, or in any wise appertaining. TO HAVE AND TO HOLD the said one thousand and sixty-eight acres of land and premises hereby granted, with their appurtenances, unto the said John Finney, Richard M'William, David Finney, Thomas M'Kean, George Read, George Munro, John Van Gezell, Zachariah Van Leuvenigh, Slator Clay, John Yeates, Nathaniel Silsbee, Daniel M'Lonen and Robert Morrison, and their successors, in trust, nevertheless, and to and for the uses, intents and purposes following, THAT IS TO SAY, to and for the use of the present inhabitants and those who shall hereafter become and be inhabitants of the said town of New

Castle, and dwelling within the bounds and limits thereof, as a Common, forever, and to no other use, intent or purpose whatsoever. TO BE HOLDEN of US, our heirs and successors, proprietaries of the said counties of New Castle, Kent and Sussex, on Delaware, as of our manor of Rockland, in free and common socage, by fealty only, in lieu of all other services. YIELDING AND PAYING, therefore, yearly and every year, unto us, our heirs and successors, at the town of New Castle, aforesaid, the rent of one ear of Indian corn, if demanded. AND WE DO further, for us, our heirs and successors, grant, ordain and declare, that the aforesaid trustees and their successors, by the name of the Trustees of New Castle Common, be and shall forever hereafter be, persons able and capable, in law, to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in all or any court or courts, and before any judges or justices, in all manner of actions, suits, complaints, pleas, causes and matters whatsoever, and of what nature or kind soever. AND that it shall and may be lawful to and for the said trustees and their successors forever hereafter, to have and use one common seal for the transacting any business respecting the said corporation; and the same, from time to time, at their will and pleasure, to change and alter, and to summon and convene a meeting of the said trustees as often as there shall or may be occasion: *Provided, always*, and we do will and ordain, that no business of any kind whatsoever done or transacted at any meeting of the trustees, or their successors, shall be valid or of any effect unless nine of the said trustees, or their successors, be present, and seven of those met assent thereto. AND we do further give, grant and ordain for us, our heirs and successors, that it shall and may be lawful for the said trustees and their successors to make, frame, and establish, from time to time, such and so many good and reasonable by-laws, ordinances and constitutions, respecting the said Common, for the supporting, bettering and improvement thereof, for the uses herein before mentioned, and for the good ordering and governing the inhabitants of the said town of New Castle, and every of them, in the reasonable use they shall make thereof, as to them shall seem just, convenient and necessary: *Provided*, That such by-laws, ordinances and constitutions are not repugnant to the laws of England or the government of the counties aforesaid; and the same to be put in force, revoke, alter and make new, as occasion shall require. AND, also, to impose and levy reasonable mulcts, fines and amerciaments on the breakers of such by-laws, ordinances and constitutions to their own use, without rendering any account therefor to us, our heirs or successors, or the same to mitigate, remit or release at their pleasure: AND, in case

any of the said trustees shall die, be removed from his office for misbehaviour therein, or remove himself out of the said town of New Castle, and dwell elsewhere, then and in such case, the inhabitants of the said town of New Castle, who have freeholds therein, or otherwise pay a yearly rent of forty shillings per annum, within ten days after the death, removal of any such trustee for misbehaviour, or removal out of the said town, shall, and they are hereby authorized, directed and empowered to meet at the court house, in the said town of New Castle, and choose and elect, by a majority of voices of the said electors, by ballot or otherwise, another trustee or trustees in his or their stead: *Provided always*, and it is our express intent, will and meaning, that the said trustees, or their successors, shall not have, nor be deemed or construed to have, any right, power or capacity, as a body politic, by these our letters patent or charter of incorporation, or any thing herein contained, to purchase, take or hold by deed, gift or will, any lands, tenements hereditaments, rents or other estate, real or personal, of any kind whatsoever, except the tract of land herein before mentioned by us, granted to them for a Common for the inhabitants of the town of New Castle, and for the uses herein before expressed; but every such other purchase, gift or devise of lands, hereditaments, rents or other estate, real or personal, to them made, shall be, and is hereby declared to be, null and void, as if these presents had never been made: *Provided, also*, That the said trustees, or their successors, shall not have, nor shall be deemed or construed to have, any right, power or authority to grant, bargain, sell, alien, convey, release or confirm the hereby granted premises, or any part thereof, to any person or persons whatsoever; but that the same shall be and remain, and be held and enjoyed by them, for the use of a Common for the inhabitants of the town of New Castle, and to no other use, intent or purpose whatsoever. *And, further*, These presents are made, and hereby declared to be made, upon and under this express condition: THAT IS TO SAY, that if the said trustees, or their successors, shall, at any time hereafter, give, grant, alien, bargain, sell or convey away the hereby granted tract of land and premises, or any part thereof, or dispose of the same to any other use than that of the Common for the inhabitants of the said town of New Castle, or if the said trustees or their successors, who are, by these presents, incorporated and made a body politic, shall, by any means, be dissolved, or do any act by which this charter may become forfeited, then, or in any or either of the said cases, these presents and the grant hereby made, and every matter and thing herein contained, shall cease, determine and become absolutely void, to all intents and purposes whatsoever, as if the same

had never been made or granted, these presents, or any thing herein contained to the contrary thereof in any wise notwithstanding; and thereupon all and singular the said hereby granted premises, with the appurtenances, shall revert and return to the said Thomas Penn and Richard Penn, their heirs and assigns forever, as of their former estate. *In testimony whereof*, we have caused these our letters to be made patent. WITNESS John Penn, Esquire, Lieutenant Governor and Commander in Chief of the Counties of New Castle, Kent and Sussex, upon Delaware, and province of Pennsylvania, who, by virtue of certain powers and authorities to him, for this purpose (among other things) granted by the said Thomas Penn and Richard Penn, Esquires, proprietaries of the said counties and province, hath to these presents set his hand and caused the great seal of the government of the said counties to be hereunto affixed, at New Castle, this thirty first day of October, in the fifth year of the reign of our Sovereign Lord, George the third, of Great Britain, France and Ireland, King, Defender of the Faith, &c., and in the year of our Lord one thousand seven hundred and sixty-four.

JOHN PENN.

Recorded in the Rolls Office at New Castle, in Book W. page 631, &c. In witness whereof, I have hereunto put my hand and seal, November 14, 1764.

R. M'WILLIAM, R. Deeds.

From 1764, then, there existed a body charged with the duty of preserving and protecting the existence of the Common. From 1764 until 1790 nothing is known of the changing membership of the Board. George Read and David Finney were the only trustees named in 1764 who remained as such when the consecutive minutes start in 1791. No minutes have survived for the intervening period and it is doubtful if any ever existed, for there could have been little to record but the fact of membership, itself. **The tract was not tilled and probably consisted entirely of woodland from which the heavier timber trees had been taken, leaving little but overgrown fields and brush land.**

In 1775 it was realized that the **restrictive terms of the Charter prevented the inhabitants from obtaining much benefit from the Common**, and, with the approval of Gov. John Penn, a bill was to be presented to the Assembly, but "was obstructed by the progress of the Revolution." Little is known of this proceeding.

In 1789 the Proprietary family of Penn in England became interested

in the ungranted land in Delaware over which it had lost control by the Revolution. In 1789 Edmund Physick returned from England as the agent for the Penn's and immediately steps were taken in connection with New Castle Common. The matter was started with the following petition to Mr. Physick:

New Castle

3 November, 1789

Sir: There is a tract of land adjacent to the Town of New Castle on Delaware originally granted by Messrs. Thomas Penn & Richard Penn by Charter unto certain of the inhabitants of the same Town and their successors thereby constituted a body corporate to hold the same in trust for the benefit of the inhabitants thereof as and for a Common. The appropriation of this tract of land for this particular use hath ceased to be of that advantage to the inhabitants of the Town which was at first experienced therefrom and it is apprehended by them that the same might be appropriated to purposes more beneficial had they such an estate therein as would warrant their so doing but the Charter operating as a conditional grant prescribing the mode of user, marking out the particular channel thro which the benefits to be derived therefrom are to flow, and prohibiting the use thereof in any other manner hath prevented them from receiving those advantages from that species of property which would otherwise have accrued.

We therefore who composed a majority of a committee of the Board of Trustees specially appointed for the purpose having received information that you are the proprietary agent for the Delaware State take the liberty of requesting you to inform us whether the powers of your agency extend so far as to enable you, should you think proper, to transfer by lawful conveyances the Estate in Possibility which the heirs of the original grantors may have in the before mentioned tract of land. If you have those powers we, in behalf of the inhabitants of the Town of New Castle solicit a transfer or conveyance from you of such interest or estate unto such persons as may be appointed by them to receive the same. It is an object of some importance to the Town tho' of very small moment to the late Proprietaries. We therefore very confidently hope the present application will meet with a favorable reception.

Should you not consider yourself invested with those powers that are necessary to effectuate this business we then request you to

inform us of the earliest and most favorable opportunity by which we may communicate a similar application to the late Proprietaries now in Great Britain.

The Gentleman who will hand this to you is an inhabitant of New Castle by whom we beg the favor of you to transmit an answer unto us.

Your most obedient servants

To Mr. Edmund Physick

George Read, Jun
Kensey Johns
James Booth

Favored by Joseph Tatlow, Esq.

Physick immediately sent the Petition to Chief Justice Thomas McKean of Pennsylvania who was associated with him as agent for the Penns. McKean had formerly lived in New Castle and had been a Trustee of New Castle Common while living there.

McKean then wrote the following letter to Physick:

Dec 14, 1789

I have read the letter from Messieurs Read, Jr., Johns & Booth a committee of Trustees of New Castle Common requesting a conveyance of the Estate or interest which may yet remain in the Proprietaries in the tract of land called the New Castle Common and will cheerfully inform you of what has come to my knowledge concerning this land.

This tract of territory contains about eleven hundred acres. It was held as a Common by the inhabitants of New Castle at the time of the Deed of feoffment from the Duke of York for the twelve mile circle to the first Proprietor, who near a century past issued a warrant of resurvey of it, for the use of the inhabitants as a Common and a resurvey was accordingly made soon after. It was still used as a Common under this title until the year 1764 as nearly as I recollect when upon my application at the request of the inhabitants a Deed or Charter, with clauses of incorporation was granted by the then Proprietors, Thomas & Richard Penn Esq. for it. There is a clause in this instrument reserving a right to the Proprietaries in case of some possible but not probable contingency happening which is the estate now requested to be conveyed.

There is evidenced by these gentlemen such a sacred regard to the

rules of property that I cannot doubt you will with pleasure gratify their wishes: but I am of the opinion from the other papers you have shown me that the conveyance had better be executed by the Proprietaries themselves or that you obtain a letter of attorney with a special clause therein for this purpose.

I am Sir with Esteem

Your most obedient servant

Thos McKean

It may be proper that you should know Geo Read Jr is the Atty Gen of the District under Congress and son of George Read Esq. Senator in Congress. Kensey John Esq a lawyer of reputation & a member of the Present Assembly & James Booth Esq Secretary of State, Clerk of the House of Assembly, &c

This overture appears to me to open a door for a conversation respecting the other affairs of the Proprietaries & I think you ought not to neglect so favorable an opportunity but proceed to New Castle as soon as convenient

Yours &c

McKean

It is not without interest to note that McKean expressly says that the Common "was held by the inhabitants of New Castle at the time of the Deed of feoffment from the Duke of York." This Deed of feoffment was in 1682 and represented Penn's first connection with Delaware soil. McKean was thoroughly familiar with the facts and his statement gives entire support to the petition to the Assembly of 1760, viz: that the New Castle Common did not have its origin in Penn's survey, but existed as a Common long before Penn set foot in America.

On February 2, 1790, Physick wrote to the Proprietaries in London as follows:

Gentlemen * * * "On the 5th of November * * * I was not a little surprized with the receipt of a letter written under the direction of the Trustees of a certain tract of land adjacent to the Town of New Castle containing upwards of 1200 acres which had been long since granted for the use of the inhabitants of the Town of New Castle to be enjoyed as a Common. This letter contains a request from the Trustees to be relieved from the effects of an inconvenient clause in their Patent or Charter as you will perceive by a copy of it which I think you will be pleased to see & is therefore enclosed.

My answer to it was verbal and signified that I would do myself

the pleasure of waiting upon the Trustees in person at New Castle on the 18th day of next month. During the intervening time I showed the letter to Judge McKean whose sentiments you will see at large in the enclosed copy of his letter to me which will supersede the necessity of any observations of mine except that it may not be improper to remind the elder Mr. Penn that I have understood the business will not be new to him because in the year 1775 he professed his willingness to comply with an application then made to him for assenting to a certain act which would have relieved the Trustees from the object of their present request if it had passed into a law but was obstructed by the progress of the Revolution.

I was careful to attend at New Castle on the 18th of December according to my appointment and immediately made known my being there. I received notice soon afterward that the Trustees intended to meet me at my lodgings in the afternoon and would bring their Charter with them and accordingly at 3 o'clock we were all assembled when I had the opportunity of perusing this instrument of writing signed by the elder Mr. Penn which vests the right to the above mentioned tract of land in trustees and their successors for the use of the inhabitants of New Castle as a Common but restrains them from making any other use of it for if they do the inhabitants are to lose their right and the land becomes the property of the Proprietaries. The Trustees observed that the land was really of little or no value to the inhabitants in the state of an open Common but might be made considerably beneficial if employed to other purposes. This was what they wished to do as soon as possible and only leave some part as a Common and was their motive for soliciting the favor of the Proprietaries to renounce and disclaim for themselves and their heirs all right they might otherwise have to prevent such intended use of it both now and forever. I assured them without hesitation I was confident the Proprietary family meant to benefit the Town by their grant but if their design had proved abortive from the restrictive clause already mentioned I had no doubt but you would most cheerfully execute a release of that contingent right they wished you to relinquish. For my part I would immediately do it for you if I had the power to do it in legal form and should think myself sure of your approbation but at present I could do no more than treat their application to me with all the consent and countenance in my power. They seemed pleased and then withdrew and after some time spent with each other in deliberation they returned

again having, as I understood, made a minute of what had passed in terms both proper and genteel: they were now pleased to bestow upon me their compliments of thanks for the trouble I had taken in coming to New Castle and for the candid and polite attention I had shown to this business and withal observed that as the sending of bulky papers to England would be attended with expense they would be sure to reimburse me all such costs. After returning my thanks for more respectful civility than I had merited the gentlemen Trustees informed me that they intended to send me for the purpose of forwarding to you a copy of their minute, another of their Charter, also a letter from themselves, with a release or deed they would request the favor of you to sign but observed that as the transmission and return of papers from England would consume much time they intended when the Assembly met to apply to them for an enlargement of their legal powers as a corporation which could only come from the Government and, being obtained, would enable them when they got possessed of your deed of relinquishment to proceed without any further delay in their intended pursuits. I told them that what was expected of you I thought should be considered as certain. They assured me they did and that this matter of private right would be certainly kept distinct and not embarrassed by any thing that was proposed to be transacted with the Assembly and thus the business of the day ended. We afterwards spent a most agreeable evening together which gave me an opportunity now & then of speaking on other branches of your business but it would have been indelicate to have been too lengthy so that I could not expect clearly to discover whether bringing forward your business in general would be at this time eligible or not. Perhaps a further acquaintance with both the business and the people will be best.

I left New Castle the next day when the tavern keeper told me he had orders to receive nothing from me. During my being there I took the opportunity of delivery to Mr. Read the letter I received from the elder Mr. Penn. He is a very sensible gentleman and expressed great regard for Mr. Penn and entertained me with much agreeable conversation about many of his old friends but his present avocations considering his age and the toils he has undergone with other reasons he gave me should certainly make his private friendship very acceptable without the expectation of any other active or more laborious service. I breakfasted with him and he was very obliging. * * *

On April 5, 1790, and again on July 5, Physick complained of the delay in the preparation of the papers, but in November, 1790, they arrived. On November 29, 1790, Physick again wrote to the Proprietaries:

"* * * a few days ago I received from the Trustees of New Castle Common in behalf of themselves and other the inhabitants of New Castle Town a very polite and respectful address to yourself and cousin accompanied with a copy of the grant long since made to them of a tract of land joining or near said Town and draught of a deed they have had lately prepared for the purpose of making the former grant just mentioned more useful to them which papers were intended to be immediately forwarded but there is in the deed a clause respecting the appointment of attornies to prove it which appears to be unnecessary and therefore Mr. Boggs, the gentleman who brought me the papers, and myself have concluded to defer sending them for a short time which will afford the opportunity for the Trustees to reconsider this matter and at the same time occasion no delay to the business."

On May 2, 1791, Physick wrote again:

"In November last I was requested by the Trustees of New Castle Common to transmit you by some convenient opportunity the three instruments of writing enclosed. As I have in a former letter mentioned the request of these gentlemen to be relieved from the inconvenience of a particular clause in their present Charter dated in 1764 I conceive a repetition at this time unnecessary especially as it forms the subject of a formal address signed by themselves which is one of the writings above mentioned. Another is an exemplified copy of their just mentioned Charter forwarded for the purpose of explanation and the other is a fair draught of a deed they solicit the favor of you to execute which Mr. McKean has seen and considered and says is right and proper and if it meets with your approbation you will be so good as to insert our names in the blank for acknowledging in open Court your hands and procure for a witness to your signing some persons who may be coming to America besides the usual proof before the Lord Mayor."

The address from the Trustees was as follows:

To the Honorable John Penn the Elder and John Penn the younger of the City of London, Esqrs.

We the subscribers, Trustees of New Castle Common and inhabitants of the Town of New Castle respectfully represent

That your illustrious ancestor William Penn by his Warrant of the 10th of April in the year of our Lord one thousand seven hundred and four caused to be surveyed for the inhabitants of the said Town of New Castle a tract of land adjoining or near said Town containing one thousand and sixty eight acres for a Common for the use, behoof and accommodation of the said inhabitants. That about the year one thousand seven hundred and sixty four the inhabitants of said Town finding notwithstanding the warrant and survey aforesaid frequent encroachments made upon the said Common by the owners of contiguous lands and great destruction of the timber thereon which they were unable to prevent for want of legal power to sue and implead the wrong doers humbly besought the Hon. Thomas Penn and Richard Penn, Esq for an Act of Incorporation. That the said Thomas Penn & Richard Penn by their Charter dated the thirty first day of October one thousand seven hundred and sixty four granted and confirmed the aforesaid tract of land in certain Trustees for the use and benefit of the inhabitants of the said Town of New Castle as a Common and vested the said Trustees and their successors with corporate powers for the management of the same restraining them by a clause in the said Charter from appropriating the same to any other use than that of a Common. That this limitation of the grant to the use of a Common only without affording any benefit to your honorable family prevents the inhabitants from deriving any considerable advantages from it. That the wood being destroyed, a part of the tract appropriated to the purposes of a Common would produce equal advantages and were the rest cultivated and the annual rent arising from it applied to charitable and useful purposes within the said Town the grant would be rendered much more beneficial to the present and future inhabitants. With the desire therefore of effectuating this useful appropriation we respectfully solicit that we be enabled to carry it into execution by your relinquishment of that prohibitory right which is retained in your honorable family by the restrictive clause above recited in the Charter and we flatter ourselves that your benevolence will be cheerfully exercised in gratifying our request and thus promoting the beneficent intention of your illustrious ancestors.

Agreed to by the Board of Trustees convened at New Castle the 22d day of November 1790 and signed by them for themselves and

on behalf of the other inhabitants of the Town of New Castle.

David Finney
Gunning Bedford
John Stockton
James Booth
Kensey Johns
Archibald Alexander
Matthew Pearce
Joseph Boggs
George Read Junior
Joseph Tatlow
James Riddle

[Not signed by George Read
John Silsbee]

The Deed was signed quite promptly in England on July 7, 1791, and received back in America in September, 1791, when Physick forwarded it to New Castle.

On September 30, 1791, Physick wrote again to Mr. Penn:

"I have received within a few days last past your favors of the 8th & 22nd of July with a Deed to the Trustees of New Castle Common and Power of Attorney to Mr. McKean and myself. The Deed I have forwarded to New Castle and am confident it will be gratefully accepted."

The Deed was as follows:

DEED

From John Penn, of Stoke Pogis, and John Penn, of Dover Street, late Proprietaries, conveying all their Right and Title, in trust, for the use of the Inhabitants of the Town of New Castle. 1791.

THIS INDENTURE, made the seventh day of July, in the year of our Lord one thousand seven hundred and ninety-one, BETWEEN John Penn, of Stoke Pogis, in the County of Bucks, Esquire, and John Penn, late of Wimpole Street, in the Parish of Saint Marylebone, but now of Dover Street, in the County of Middlesex, Esquire, (late Proprietaries of the Province of Pennsylvania, in America,) of the one part, and Isaac Grantham, Esquire, The Reverend Robert Clay, clerk, and William Lees, merchant, all of the Hundred and County of New Castle, in the Delaware State, of the other part: WHEREAS, Thomas Penn and Richard Penn, Esquires, who in their lives, were true and absolute Proprietaries and Governors in Chief of the Counties of New Castle, Kent and Sussex,

upon Delaware, and Province of Pennsylvania, by a charter, bearing date the first day of October, in the year of our Lord one thousand seven hundred and sixty-four, did give, grant, release and confirm unto John Finney, Richard M'William, David Finney, Thomas M'Kean, George Read, George Monro, John Vangezell, Zachariah Vanleuvenigh, Slator Clay, John Yeates, Nathaniel Silsbee, Daniel M'Lonen and Robert Morrison, ALL that tract or parcel of land adjoining or near the Town of New Castle: BEGINNING at an old corner black oak, formerly of Joseph Wood, standing by the road that leads to Christiana Ferry, and running along the road towards New Castle, south nine degrees easterly sixty-eight perches, to an old corner black oak formerly of Robert French's land; then by his old line of marked trees, south eighty-five degrees westerly one hundred and eighty-two perches, to an old corner black oak formerly of the said Robert French; then by an old line of marked trees, south twenty degrees westerly one hundred and nine perches, to another old corner red oak formerly of the said Robert French; then along the cripple, north eighty-two degrees westerly eighteen perches, west sixteen perches, south seventy degrees westerly eighteen perches, south twenty-three degrees westerly fifty-five perches, south sixty degrees [sixty-eight degrees in original survey] easterly eighty-four perches, to an old corner white oak formerly of the said Robert French; then along the cripple, south fifty-six degrees westerly forty-four perches, to a black oak, south five degrees easterly forty-four perches, to an old corner white oak formerly of William Houston standing near to the Smith's boom; then along the said Houston's line, south thirty-nine degrees westerly ninety-two perches, to an old corner Spanish oak of the said Houston standing by Maryland road; then by the several courses of the said road, north eighty-four degrees westerly eighty-seven perches, north seventy-five degrees westerly one hundred and thirty-four perches over against the house formerly of Joseph Kent; then by the several courses of the road that leads to Christiana bridge, north sixty-two degrees westerly seventy-five perches, north sixty-four degrees westerly forty-two perches, west forty-eight perches, north eighty-five degrees westerly thirty perches, north seventy-six degrees westerly thirty-four perches, south eighty-two degrees westerly sixty-two perches, south fifty-eight degrees westerly twenty perches, south eighty degrees westerly sixty-four perches, to a new corner hickory by the said road; then by a line of marked trees, north thirty-six degrees easterly thirty-three perches, to an old corner tree formerly of John Wilson; then by the line formerly of Robert Hutchinson and Garret Garretson, northeast three hundred and twenty-nine perches, to an old corner hickory

sapling; then by an old line of marked trees, south-east two hundred perches, to an old corner red oak being a corner tree formerly of Robert Dyer's and Edward Blake's land; thence along their line, north-east one hundred and fourteen perches, to an old corner red oak of the aforesaid Dyer and Blake, and still by their lines, north-west one hundred and forty-four perches, to an old corner hickory formerly of John Hussay's land; then with the said Hussey's line, north sixty-eight degrees easterly two hundred and sixty-eight perches, to an old corner white oak of the said Hussey, and continuing the same course sixty-two perches, to a new corner black oak standing in a line of the aforesaid Joseph Wood's land, and running by his line, south fifty-two degrees easterly twenty-eight perches, to an old corner black oak of the said Joseph Wood, and running by his line, south eighty degrees easterly one hundred and fifty-five perches, to the first mentioned black oak and place of BEGINNING: Containing within those bounds one thousand and sixty-eight acres of land, be the same more or less, as and for A COMMON, for the use, behoof and accommodation of the inhabitants of the said Town of New Castle, which said tract of land and premises, in pursuance of a warrant from their late honoured father, William Penn, Esquire, was surveyed and laid out on the tenth day of April, one thousand seven hundred and four, for the use and purpose aforesaid. AND WHEREAS, the restrictive terms of the said grant do now prevent the Inhabitants of the said Town of New Castle from deriving all those benefits and advantages which would result from a free and absolute grant thereof, and the trustees of the said Common have solicited the said John Penn, of Stoke Pogis, and John Penn, of Dover Street, to grant the free and absolute property of, in and to the said premises, to them and their successors, to and for the use of the Inhabitants of the said Town of New Castle; and the said John Penn, of Stoke Pogis, and the said John Penn, of Dover Street, being willing to promote the prosperity of the ancient Town of New Castle, and desirous to benefit the descendants of the inhabitants of the said town, for the regard, honour and respect always exhibited on the part of the predecessors of the said inhabitants to the ancestors of the said John Penn, of Stoke Pogis, and John Penn, of Dover Street: NOW THIS INDENTURE WITNESSETH, That the said John Penn, of Stoke Pogis, and John Penn, of Dover Street, for and in consideration of the love and regard which they have for the Inhabitants of the said Town of New Castle, and for and in consideration of the sum of five shillings to them in hand paid by the said Isaac Grantham, Robert Clay and William Lees, the receipt whereof

they do hereby acknowledge, HAVE granted, bargained and sold, released and confirmed, and by these presents DO grant, bargain and sell, release and confirm unto the said Isaac Grantham, Robert Clay and William Lees, and the survivors or survivor of them, ALL that the aforesaid tract or parcel of land adjoining or near the said Town of New Castle, with the appurtenances to the same belonging, or in any wise appertaining; TO HAVE AND TO HOLD the said tract or parcel of land and premises hereby granted, or intended so to be, with every the appurtenances, unto the said Isaac Grantham, Robert Clay and William Lees, and the survivors or survivor, and the heirs of the survivor of them, to and for the use and behoof of the said Isaac Grantham, Robert Clay and William Lees, and the survivors and survivor, and the heirs of the survivor of them forever, IN TRUST NEVERTHELESS, to and for the use, benefit and behoof of the Inhabitants of the Town of New Castle, to be conveyed, transferred and set over by such assurance or assurances as counsel learned in the law may devise or advise, by the said Isaac Grantham, Robert Clay and William Lees, or the survivors or survivor, or heirs of the survivor, in trust, unto the present or future trustees of the said tract or parcel of land, and their successors, or unto such future trustees and their successors as may be chosen or appointed, in and by virtue of an act of incorporation, when the same may be passed by an act of the General Assembly of the Delaware State, to and for the use and behoof of the Inhabitants of the said Town of New Castle, FOREVER, to be appropriated in such manner as a majority of trustees in their wisdom may direct: *Provided*, that nothing herein contained, or in the assurance or assurances so to be made as aforesaid, shall vest the trustees of the said Common with any power or authority to sell the same, or any part thereof; and the said parties of the first part, do nominate, constitute and appoint the Honourable Thomas M'Kean and Edmund Physick, Esquires, or either of them, to be their attorneys or attorney, to acknowledge and deliver these presents, as their act and deed, in any Court of Common Pleas to be held at New Castle, for the County of New Castle, after the date hereof. *In witness whereof*, the parties to these presents have hereunto set their hands and seals the day and year first above written.

JOHN PENN, [SEAL.]

JOHN PENN, [SEAL.]

*Signed, sealed and delivered,
in the presence of*

JOHN OSMON,

FRAN. GRICE.

To all to whom these presents shall come, I, John Boydell, Esquire, Lord Mayor of the City of London, do hereby certify, that on the day of the date hereof, personally came and appeared before me, Francis Grice, the deponent named in the affidavit hereunto annexed, being a person well known and worthy of good credit, and by solemn oaths, which the said deponent then took before me, upon the Holy Evangelists of Almighty God, did solemnly and sincerely declare, testify and depose to be true the several matters and things mentioned and contained in the said annexed affidavit.

In faith and testimony whereof, I, the said Lord Mayor, have caused the seal of the Office of Mayoralty of the said City of London to be hereunto put and affixed, and the indenture mentioned and referred to in and by the said affidavit to be hereunto also [SEAL.] annexed. Dated in London, the eighth day of July, in the year of our Lord one thousand seven hundred and ninety-one.

WINDALE.

Francis Grice, of the City of Philadelphia, master of the ship called Marquis De La Fayette, maketh oath that the indenture hereunto annexed, bearing date the seventh day of July, instant, was duly signed, sealed and delivered by John Penn, of Stoke Pogis, Esquire, and John Penn, of Dover Street, Esquire, therein named, as and for their acts and deeds, respectively, in the presence of John Osmon, of the City of Philadelphia, aforesaid, Captain of the ship called the Harmony, and of this deponent; and this deponent saith that the names of the said John Penn, of Stoke Pogis, and John Penn, of Dover Street aforesaid, as the same appear to be set and subscribed to the said indenture as the parties executing the same, and the names of the said John Osmon, and of this deponent, as the same appears to be set and subscribed thereunto, as witnesses attesting the execution of the said indenture, are of the proper hands writing of the said John Penn, of Stoke Pogis, John Penn, of Dover Street, John Osmon, and of this deponent, respectively.

FRANCIS GRICE.

Sworn this 8th day of July, 1791, at Guildhall London, before me,

JOHN BOYDELL, Mayor.

New Castle County, ss.

Inrolled in the Rolls office of the said County, at New Castle, [SEAL.] in Book L. of Vol. 2, Fol. 394, &c. Given under my hand and the seal of said office, November 12th, Anno Domini 1791.

JAS. BOOTH, Recorder.

This deed required the three grantees named therein (Isaac Grantham, Robert Clay and William Lees) to convey the land to the Trustees of New Castle Common, when incorporated by Act of the General Assembly.

This Act was passed January 25, 1792. It was both an Act of Incorporation and an enlargement of the powers existing in the old Corporation by the Charter of 1764. The Act was as follows:

ACT OF THE GENERAL ASSEMBLY.

Enlarging the Corporate Powers of the Trustees. 1792.

An Act to enlarge the Corporate Power of the Trustees of the New Castle Common.

WHEREAS, there is a tract of land situate near to the Town of New Castle, in the Hundred and County of New Castle, in the Delaware State, commonly called and known by the name of the New Castle Common: Beginning at an old corner black oak, formerly of Joseph Wood, standing by the road that leads to Christiana Ferry, and running along the road towards New Castle, south nine degrees easterly sixty-eight perches, to an old corner black oak formerly of Robert French's land; then by his old line of marked trees, south eighty-five degrees westerly one hundred and eighty-two perches, to an old corner black oak formerly of the said Robert French; then by an old line of marked trees, south twenty degrees westerly one hundred and nine perches, to another old corner red oak formerly of the said Robert French; then along the cripple, north eighty-two degrees westerly eighteen perches, south twenty-three degrees westerly fifty-five perches, south sixty degrees [sixty-eight degrees in original survey] easterly eighty-four perches, to an old corner white oak formerly of the said Robert French; then along the cripple, south fifty-six degrees westerly forty-four perches, to a black oak, south five degrees easterly forty-four perches, to an old corner white oak formerly of William Huston, standing near to the Smith's boom; thence along the said Huston's line, south thirty-nine degrees westerly ninety-two perches, to an old corner Spanish oak of the said Huston standing by Maryland road; thence by the several courses of the said road, north eighty-four degrees westerly eighty-seven perches, north seventy-five degrees westerly one hundred and thirty-four perches, over against the house formerly of Joseph Kent; then by the several courses of the road that leads to Christiana bridge, north sixty-two degrees westerly seventy-five perches, north sixty-four degrees westerly forty-two perches, west forty-eight perches, north eighty-five degrees westerly thirty perches, north seventy-six degrees westerly thirty-four

perches, south eighty-two degrees westerly sixty-two perches, south fifty-eight degrees westerly twenty perches, south eighty degrees westerly sixty-four perches, to a new corner hickory by the said road; then by a line of marked trees, north thirty-six degrees easterly thirty-three perches, to an old corner tree formerly of John Wilson; then by the line formerly of Robert Hutchinson and Garret Garretson, north-east three hundred and twenty-nine perches, to an old corner hickory sapling; then by an old line of marked trees, southeast two hundred perches, to an old corner red oak being a corner tree formerly of Robert Dyer's and Edward Blake's land; then along their line, north-east one hundred and fourteen perches, to an old corner red oak of the aforesaid Dyer and Blake, and still by their line north-west one hundred and forty-four perches, to an old corner hickory formerly of John Hussey's land; then with the said Hussey's line, north sixty-eight degrees easterly two hundred and sixty-eight perches, to an old corner white oak of the said Hussey, and continuing the same course sixty-two perches, to a new corner black oak standing in a line of the aforesaid Joseph Wood's land, and running by his line, south fifty-two degrees easterly twenty-eight perches, to an old corner black oak of the said Joseph Wood and running by his line, south eighty degrees easterly one hundred and fifty-five perches, to the first mentioned black oak and place of BEGINNING: Containing within said bounds one thousand and sixty-eight acres of land, be the same more or less. AND WHEREAS, the Inhabitants of the said Town of New Castle have heretofore been restrained in using or occupying the before described tract of land, in other manner or for other purpose than as and for a Common, which hath not been productive of benefit or advantage to the said town, equivalent to the disadvantage arising from so large a body of land lying in a waste and uncultivated state. AND WHEREAS, the trustees of the said Common, who are the organ of the said inhabitants in the disposition and management of the said tract of land, are vested with corporate powers merely adequate to the regulation and protection of the said inhabitants in the use and enjoyment of the said tract of land as a Common. AND WHEREAS, it hath been represented to the General Assembly by the said inhabitants, that the cultivation and improvement of the said tract of land, and appropriation thereof, to other purposes than as and for a Common, would redound much more to the benefit and advantage of the said inhabitants, and that in order to effect such purpose, it is essential the corporate capacity and powers of the said trustees be enlarged and extended:

BE IT THEREFORE ENACTED, by the General Assembly of Delaware,

that those who are at the time of passing this act, and those who shall hereafter be and become trustees of the before described tract of land for the use of the Inhabitants of the Town of New Castle aforesaid, be, now are, and hereafter shall be, one body politic and corporate, in deed and in law, to all intents and purposes, by the name, style and title of the Trustees of the New Castle Common. And that the said trustees, as a corporate body, in deed and in law, shall have perpetual succession; and that in case of a vacancy or vacancies that shall hereafter happen, or that heretofore have happened, in any event specified in the said charter of incorporation, the said vacancy or vacancies shall be supplied, and the perpetual succession aforesaid of the said trustees, kept up and preserved by the Inhabitants of the said Town of New Castle, by election or choice, in manner and form, according to the mode, and at the place prescribed by their existing charter of incorporation, and within such time as hath been or shall be fixed and determined by the ordinances of the said corporation. *Provided always*, that the electors of the said trustees shall have the like qualification as are prescribed for electors of the Trustees of the New Castle Common, in and by the aforesaid charter of incorporation.

AND BE IT ENACTED, That in addition to the corporate powers vested in the trustees aforesaid, as Trustees of the New Castle Common, under their existing charter of incorporation, they are hereby declared and made able and capable, in law and equity, to have, purchase, take, accept, receive, possess, enjoy and retain, to them and their successors, all that the aforesaid tract or parcel of land, with the appurtenances, and the same, or any part thereof, to grant, demise and dispose of for the use and behoof of the Inhabitants of the said Town of New Castle, to be appropriated in such manner as a majority of the said trustees in their wisdom may direct. *Provided always*, that they reserve to themselves, and their successors, for the benefit and use of the inhabitants of the said town, an annual or other rent, as a reasonable equivalent for the leasing or disposing of the before described tract of land, or any part or parts thereof, and that neither the said trustees, nor their successors, shall have power to sell the said tract of land, nor any part or parts thereof, absolutely, nor lease, nor otherwise dispose thereof for a longer term than thirty years from the commencement of the lease or other contract.

AND BE IT ENACTED, That not less than seven trustees shall constitute a board for the transaction of business, and the said trustees, on the first Tuesday of March, annually, and when intermediate vacancies may happen, shall and are hereby authorized to choose one of their number as president.

AND BE IT ENACTED, That the said corporation be, and hereafter shall

be capable, in law, to sue and be sued, implead and be impleaded, answer and be answered unto, defend and be defended, in courts of law and equity, or any other place whatsoever, and to do and execute all and singular other matters and things which bodies politic or corporate lawfully may do, and also to make, have and use a common seal, and the same to break, alter and renew at their pleasure.

AND BE IT ENACTED, That the trustees of the said corporation shall be capable of exercising such powers, for the well governing and ordering the said corporation and the affairs and business thereof, and of holding such occasional meetings for that purpose, as have been or shall be fixed, described and determined by laws, regulations and ordinances of said corporation.

AND BE IT ENACTED, That the said corporation shall and may make, ordain and establish such laws, regulations and ordinances as to them shall seem necessary and convenient for the government of the said corporation. *Provided always, nevertheless*, that nothing herein contained shall be construed to authorize the said corporation to exercise any powers repugnant or contrary to the laws or constitutions of this State.

Signed by order of the House of Assembly.

A. M'LANE, *Speaker*,

Signed by order of Council.

GEO. MITCHELL, *Speaker*.

Passed at Dover, January 25th, 1792.

Delaware, ss.

I do certify, that the above, and preceding four pages, are a true copy of the original act, whereof the same purports to be a copy.

[SEAL.] In testimony whereof, I have hereunto set my hand and seal, this fifth day of February, one thousand seven hundred and ninety-four.

JAMES BOOTH,

Secretary of the State of Delaware.

After the Act of Incorporation was passed, and on July 30, 1792, Grantham, Clay and Lees made the deed to the Trustees of the New Castle Common, and the matter was settled.

This Deed was as follows:

DEED

From the Trustees of John Penn, of Stoke Pogis, and John Penn of Dover Street, to the Trustees of New Castle Common. 1792.

THIS INDENTURE, made the thirtieth day of July, in the year of our Lord one thousand seven hundred and ninety-two, BETWEEN Isaac Grantham, Esquire, the Reverend Robert Clay, clerk, and William Lees, merchant, all of the Hundred and County of New Castle, in the Delaware State, of the one part, and David Finney, George Read, the elder, Gunning Bedford, James Booth, John Stockton, Archibald Alexander, Kensey Johns, James Riddle, George Read, the younger, Matthew Pearce, Joseph Tatlow, all of the Town of New Castle, in the Hundred and County of New Castle, in the Delaware State, Esquires, surviving Trustees of the New Castle Common, of the other part: WHEREAS, by an indenture of bargain and sale, bearing date the seventh day of July, in the year of our Lord one thousand seven hundred and ninety-one, and made or mentioned to be made by and between John Penn, of Stoke Pogis, in the County of Bucks, Esquire, and John Penn, late of Wimpole Street, in the Parish of Saint Marylebone, but now of Dover Street, in the County of Middlesex, Esquire, late Proprietaries of the Province of Pennsylvania, in America, of the one part, and the said Isaac Grantham, Robert Clay and William Lees, by the names of Isaac Grantham, Esquire, The Reverend Robert Clay, clerk, and William Lees, merchant, all of the Hundred and County of New Castle, in the Delaware State, of the other part, reciting that Thomas Penn and Richard Penn, Esquires, who, in their lives, were true and absolute Proprietaries and Governors in Chief of the Counties of New Castle, Kent and Sussex, upon Delaware, and Province of Pennsylvania, by a charter, bearing date the first day of October, in the year of our Lord, one thousand seven hundred and sixty-four, did give, grant, release and confirm unto certain trustees therein named, a certain tract of land adjoining or near the Town of New Castle: BEGINNING at an old corner black oak, formerly of Joseph Wood, standing by the road that leads to Christiana Ferry, and running along the road towards New Castle, south nine degrees easterly sixty-eight perches, to an old corner black oak formerly of Robert French's land; then by his old line of marked trees, south eighty-five degrees westerly one hundred and eighty-two perches, to an old corner black oak formerly of the said Robert French; then by an old line of marked trees, south twenty degrees westerly one hundred and nine perches, to another old corner red oak formerly of the said Robert French; then along the cripple, north eighty-two degrees westerly eighteen perches, west sixteen perches, south seventy degrees westerly eighteen perches, south twenty-three degrees westerly fifty-five perches, south sixty degrees [sixty-eight degrees in original survey] easterly eighty-four perches, to an old corner white oak formerly

of the said Robert French; then along the cripple south fifty-six degrees westerly forty-four perches, to a black oak, south five degrees easterly forty-four perches, to an old corner white oak formerly of William Houston, standing near the Smith's boom; then along the said Houston's line, south thirty-nine degrees westerly ninety-two perches, to an old corner Spanish oak of the said Houston, standing by the Maryland road; then by the several courses of the said road, north eighty-four degrees westerly eighty-seven perches, north seventy-five degrees westerly one hundred and thirty-four perches, over against the house formerly of Joseph Kent; then by the several courses of the road that leads to Christiana bridge, north sixty-two degrees westerly seventy-five perches, north sixty four degrees westerly forty-two perches, west forty-eight perches, north eighty-five degrees westerly thirty perches, north seventy-six degrees westerly thirty-four perches, south eighty-two degrees westerly sixty-two perches, south fifty-eight degrees westerly twenty perches, south eighty degrees westerly sixty-four perches, to a new corner hickory by the said road; then by a line of marked trees, north thirty-six degrees easterly thirty-three perches, to an old corner tree formerly of John Wilson, then by the line formerly of Robert Hutchinson and Garret Garretson, north-east three hundred and twenty-nine perches, to an old corner hickory sapling; then by an old line of marked trees, south-east two hundred perches, to an old corner red oak, being a corner tree formerly of Robert Dyer's and Edward Blake's land; thence along their line, north-east one hundred and fourteen perches, to an old corner red oak of the aforesaid Dyer and Blake, and still by their lines, north-west one hundred and forty-four perches, to an old corner hickory formerly of John Hussey's land; then with the said Hussey's line, north sixty-eight degrees easterly two hundred and sixty-eight perches, to an old corner white oak of the said Hussey, and continuing the same course sixty-two perches, to a new corner black oak standing in a line of the aforesaid Joseph Wood's land, and running by his line, south fifty-two degrees easterly twenty-eight perches, to an old corner black oak of the said Joseph Wood, and running by his line, south eighty degrees easterly one hundred and fifty-five perches, to the first mentioned black oak and place of BEGINNING: Containing within those bounds one thousand and sixty-eight acres of land, be the same more or less, as and for A COMMON, for the use, benefit and accommodation of the Inhabitants of the said Town of New Castle.

AND WHEREAS, the restrictive terms of the said grant do now prevent the inhabitants of the said town of New Castle from deriving all those

benefits and advantages which would result from a free and absolute grant thereof, and the trustees of the said Common have solicited the said John Penn, of Stoke Pogis, and John Penn, of Dover street, to grant the free and absolute property of, in and to the same premises, to them and their successors, to and for the use of the inhabitants of the said town of New Castle; and the said John Penn, of Stoke Pogis, and the said John Penn, of Dover street, being willing to promote the prosperity of the ancient town of New Castle, and desirous to benefit the descendants of the inhabitants of the said town, for the regard, honour and respect always exhibited on the part of the predecessors of the said inhabitants to the ancestors of the said John Penn, of Stoke Pogis, and John Penn, of Dover street, and for divers good causes and considerations therein expressed, did grant, bargain, sell and confirm unto the said Isaac Grantham, Robert Clay, and William Lees, and the survivors or survivor of them, all that the aforesaid tract of land, adjoining or near the said town of New Castle, with the appurtenances to the same belonging, or in any wise appertaining, TO HOLD the said tract of land and premises thereby granted or intended so to be, with every the appurtenances unto the said Isaac Grantham, Robert Clay, and William Lees, and the survivors or survivor, and the heirs of the survivor of them, to and for the use and behoof of them, the said Isaac Grantman, Robert Clay, and William Lees, and the survivors or survivor, and the heirs of the survivor of them forever, IN TRUST, NEVERTHELESS, to and for the use, benefit and behoof of the inhabitants of the town of New Castle, to be conveyed, transferred and set over by such assurance or assurances as counsel, learned in the law, may devise or advise, by the said Isaac Grantman, Robert Clay and William Lees, or the survivors or survivor, or heirs of the survivor, in trust, unto the present or future trustees of the said tract or parcel of land, and their successors, or unto such future trustees and their successors as may be chosen or appointed in and by virtue of an act of incorporation, when the same may be passed by an Act of the General Assembly of the Delaware State, to and for the use and behoof of the inhabitants of the said town of New Castle, forever, to be appropriated in such a manner as a majority of trustees in their wisdom may direct: *Provided*, That nothing herein contained, or in the assurance or assurances so to be made, as aforesaid, shall vest the trustees of the said Common with any power or authority to sell the same or any part thereof.

NOW THIS INDENTURE WITNESSETH, That the said Isaac Grantman, Robert Clay and William Lees, as well in consideration of the sum of five shillings, to them in hand paid by the said trustees, as also in pursu-

ance of the trust reposed in them by the said John Penn, of Stoke Pogis, Esquire, and John Penn, of Dover street, Esquire, and at and by their special request and direction, as testified by the indenture aforesaid, have granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release and confirm unto the said David Finney and others, surviving trustees of the New Castle Common aforesaid, being particularly named, aforesaid, and their successors in said trust, all the beforementioned tract of land and premises, with the appurtenances, as the same is particularly described aforesaid.

TO HAVE AND TO HOLD, all and singular the said tract or parcel of land and premises, hereby granted, or intended so to be, with every the appurtenances, unto the said David Finney and others, trustees as aforesaid, and their successors, in said trust forever, IN TRUST, NEVERTHELESS, to and for the special uses, benefits, ends, intents and purposes, and under and subject to the several provisos contained, mentioned and declared, as well in the beforementioned indenture of conveyance from the said John Penn, of Stoke Pogis, and John Penn, of Dover street, as also in an Act of General Assembly of the Delaware State, passed at Dover, the

day in the year of our Lord

one thousand seven hundred and ninety-two, entitled "An Act to enlarge the Corporate Powers of the Trustees of the New Castle Common." AND the said Isaac Grantham, Robert Clay and William Lees, do hereby freely and absolutely remise, release and surrender to the said David Finney and others, trustees, as aforesaid, and their successors in said trust, ALL the estate, right, title, interest, use, trust, benefit, privilege and demand, whatsoever, which they, the said Isaac Grantham, Robert Clay and William Lees have or may have, or claim of, in and to the said premises, or other matter or thing whatsoever, in the said indenture contained, mentioned and expressed, so that neither the said Isaac Grantham, Robert Clay and William Lees, or any of them, their heirs, executors or administrators, or either of them, or any of them, at any time hereafter, shall or will ask, claim, challenge or demand any interest, use, benefit, trust, privilege or other things, in any manner whatsoever, by reason or means of the said indenture aforesaid, but thereof and therefrom, and from all actions, suits and demands, shall be utterly excluded, and forever barred by these presents. AND, lastly, the said Isaac Grantham, Robert Clay and William Lees, do nominate, constitute and appoint James Bayard and Nicholas Vandike, Esquires, or either of them, to be their attorneys or attorney, to acknowledge and deliver these presents as their act and deed, in any Court of Common Pleas, to be held at New Castle, for the County of New

Castle, after the date hereof. *In witness whereof*, the said Isaac Grantham, Robert Clay and William Lees have hereunto set their hands and seals, the day and year first above written.

ISAAC GRANTHAM, [SEAL.]

ROBERT CLAY, [SEAL.]

WM. LEES, [SEAL.]

*Signed, sealed and delivered,
in the presence of*

JOHN BIRD,

JNO. WILEY, Sen.

MARY GRANTHAM.

New Castle County, ss.

The execution of the within was proved by John Wiley, one of the subscribing witnesses thereto, in open Court of Common Pleas, held at New Castle, for the County of New Castle, of the December [SEAL.] Term, A. D. 1803. In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court.

ARCHD. ALEXANDER, *Proth'y.*

New Castle County, ss.

Recorded in the Rolls Office, at New Castle, in and for the County aforesaid, in Book A. Vol. 3, folio 480, &c. In testimony [SEAL.] whereof, I have hereunto set my hand and affixed the seal of said office, July 24th, A. D. 1804.

DANL. BLANEY, *Recorder.*

Shortly after the absolute title had been vested in the Trustees they had a survey made by Peter Hyatt and the tract divided into farms, reserving a small portion as a Common. This reserved portion was subsequently divided into lots and at a later date these, in turn, consolidated into a farm now known as the Model Farm. The farms were numbered, and subsequently named as follows: The original No. 1 farm became the Jefferson; Nos. 2 and 4 were combined about 1812 and later became the Stockton Farm; No. 3 became the Oglethorpe; No. 5 became known as Centre Hall, and No. 6 was divided in 1812 between No. 5 and No. 7 which later became known as the Penn Farm; No. 8 was the first farm to which a name was given, that of Union Farm in 1861. The first tenant (1797-1815) was John Hair from which tenancy the name "Hare's Corner" was derived. Here a tavern was conducted originally known as "Sign of the Green Tree." Here, for many years, all general elec-

tions in New Castle Hundred were held, and it was a drover's resort in driving their cattle from the Peninsula to the market in Philadelphia. A large brick hotel was built in 1872 and demolished for the widening of the Du Pont Highway in 1932. A race track was here maintained for many years. No. 9 was later known as the Bayard Farm until the destruction of all buildings by fire in 1883, when the farm was added to Union No. 8. No. 10 became the Clayton Farm. No. 11 originally consisted of 10 small lots which in 1815 were consolidated and subsequently called the Model Farm.

In 1941 there was taken by condemnation as part of the New Castle County Airport all the land on the northwest side of the State Road. This included much of the land of Union Farm No. 8 and all of the original Bayard Farm No. 9. The remaining part of these farms was incorporated into Penn Farm No. 7.

After the original survey was made in 1791 the farms were leased upon improving leases of from 15 to 30 years. These leases provided that the tenants should erect houses and buildings on the farms. It was thus that all of the houses and some of the farm buildings on the farms were originally erected.

The rental received from the farms has always been used for the benefit of the Town. These uses have included paving streets, erecting wharves, providing schools, providing means for the prevention of loss by fire, aiding the location of industries furnishing employment to citizens, purchasing play grounds and parks, and in beautifying the Town, and many other uses coming within the terms of the trust. With the income from the farms the Town Hall and Market House was built, and here the District Court of the United States was held from 1827 to 1852. While in the early years the income was used to defray the ordinary expenses of the Town, yet for many years it has been thought desirable to expend the money solely for those beneficial objects for which no ordinary money of the Town, derived from taxes, would be available or could be spent. A list of some of the objects for which the money has been expended through the years is appended hereto.

The New Castle Common as originally laid out consisted of 1068 acres. With the exception of a small lot sold to straighten property lines, no part of the tract has been voluntarily disposed of by the Trustees. In 1791 when the first County Almshouse was provided, the Trustees offered 60 acres of land for this purpose, which offer was refused. Again in 1804, when the Almshouse had been destroyed by fire, the Trustees offered to set aside 100 acres for the establishment of the home. In

1881, when the public institutions were established at Farnhurst, the Trustees offered land for the purpose. In 1899 when the New Castle County Workhouse was to be established, the Trustees offered to lease a tract for the purpose, for a period of 999 years, but none of these offers were accepted.

When New Castle Common was first laid out no roads ran through the tract. The old King's Highway, leading toward what is now Hare's Corner, formed the Southwest boundary of the tract, and accounts for the present holding on the Southwest side of the present road to Hare's Corner. Subsequently a number of roads were opened through the land, such as the present road to Hare's Corner and Christiana, the road to Newport, the School House Lane, the State Highway from Wilmington to Dover, known as the Du Pont Highway and Churchman's Bridge Road. The Delaware Railroad also, by condemnation, runs through the land.

On July 28, 1941, there was acquired from the Trustees of New Castle Common, by condemnation proceedings, for the New Castle County Airport, all that portion of the New Castle Common lying northwest of the State Highway leading from Wilmington to Dover, and bounded on the north by the road leading to Newport, known as the Basin Road, and on the south by the road known as the Churchman's Bridge Road. All funds received from condemnation proceedings have been segregated, and invested by the Trustees as a capital fund, and the income therefrom expended for the purposes of the trust, as the income from the land itself had been expended.

ELECTION OF TRUSTEES

The qualification of voters at elections for Trustees is of an unusual nature. The Charter provides that voters shall be "inhabitants of the said Town of New Castle, who have freeholds therein or otherwise pay a yearly rent of forty shillings per annum."

In 1914 the Trustees obtained a legal opinion determining just who were entitled to vote at such elections. The opinion was rendered by Alexander B. Cooper, Esq., then a citizen of the town, and an eminent and able lawyer. The opinion was as follows:

New Castle, Delaware;
December 19, 1914.

To the

Trustees of New Castle Common,
Gentlemen:—

At the request of your committee,—consisting of Messrs. Janvier, Rodney and McGrory,—and after a careful examination and consideration of the questions involved in their inquiry,—I hereby submit to you my opinion as to the qualifications which are necessary to constitute a legal voter at an election, held for the purpose of electing a trustee or trustees of New Castle Common.

I purposely omit any detailed reference to the interesting history of the origin, creation and uses of the Common, under and in pursuance of the Warrant of Survey from William Penn in 1701, as it would throw no additional light upon the questions which I am called upon to answer.

The legal qualifications of a voter at such elections, depends, solely, upon the construction of the language of what is called the "Penn Charter," which was granted in 1764,—and which created and incorporated the "Trustees of New Castle Common." This language is in the following words:—"the inhabitants of the said town of New Castle, who have freeholds therein, or otherwise pay a yearly rent of forty shillings per annum."

It therefore, conclusively follows, that all persons, coming within the legal and proper construction and meaning of this language, are legal voters and none other.

The first question which presents itself to my mind is the meaning and scope of the word "inhabitants," as it is there used. Does it by necessary implication or by a clear intent, include or embrace the word "citizen"?

It is well settled by judicial authority that the word "inhabitant," standing by itself or when used in the abstract, is not synonymous with the word "citizen." But, it is also equally well settled, that when it is used in the concrete or in connection with other words or circumstances, which necessarily or clearly show an intention to include citizenship,—the two are synonymous.

Guided by this view of the law, I have no hesitation in saying, that it was the evident intention of the grantor of the "Penn Charter," in using the language I have quoted, to include citizenship. Because,—if for no other reason,—under the law as it then existed, no person, *except a citizen*, could hold a freehold estate. The "inhabitants," therefore, were those who resided permanently in the town and who were citizens, also.

The word "inhabitant" may have several meanings. Thus, it has been construed to mean an occupant of land, a resident, a permanent resident, one having a domicile, a citizen, a qualified voter, etc., etc. Its legal construction is governed by the connection in which it is used. For instance, foreign laborers who come to the United States in search of work, leaving their families at home and are employed in constructing railroads, etc., liable to be discharged at any time and free to leave their employment when they see fit and living in rough shanties, built by the railroad contractors, are not inhabitants of the town in which they work for a year.

In New Hampshire, an inhabitant, does not include an alien or unnaturalized foreigner.

The Supreme Court of the United States, in *Walnut vs. Wade*, 103 U. S. 683, 693, decided, "that in a statute providing that a majority of the inhabitants of the town, to be ascertained by an election, might authorize the issue of bonds,—the word "inhabitant," means, a legal voter."

It is equally well settled that the words of an instrument of writing,—their intent and meaning,—must be construed in the light of the law, as it existed, at the time and place of the making and execution of the instrument.

The present territory of Delaware, was at the time of the granting of the "Penn Charter," a colony of Great Britain and primarily governed by its laws. Under the law of that country, at that time, no person, except a citizen of that country, was permitted to take and hold real estate, either by descent or purchase,—and he was

under the same disabilities as to trusts and uses, arising out of real estate. In each case the property would escheat.

Sir William Blackstone, in his Commentaries on the Law of England, says:—"If an alien could acquire permanent property in lands, he must owe allegiance, equally permanent with that property to the King of England." He cannot serve two masters at the same time. So that in order to hold lands, he must become a naturalized subject or citizen of England.

Chancellor Kent in his Commentaries on American Law, says: "If aliens come to this country, with the intention of making it their permanent residence, they are still aliens and are unable to hold a freehold interest in land, or to hold any civil office, or to vote at any election, or to take any active share in the administration of government."

Such was the law, at the date of the "Penn Charter." It therefore, conclusively follows,—without regard to any other qualification,—that no person is qualified to vote at an election for trustees of the New Castle Common, except, native or naturalized citizens of the United States.

But in addition to his personal qualifications, as I have stated them, the legal voter, must also possess certain property qualifications, to wit:—he must "have a freehold," in the town, "or otherwise pay a yearly rent of forty shillings per annum." A freehold is an estate of inheritance or an estate for life in land.

The meaning of the words used in the Charter,—“or otherwise pay a yearly rent of forty shillings per annum,”—is somewhat obscure. But, when taken in connection with the previous words, which confer the right to vote upon a freeholder, and also in connection with the legal character of land tenures then existing in England, are sufficient, to my mind, to show, that the framers of the Charter,—insofar as a property qualification was concerned,—intended only to extend the right to vote to those *renters* who were bona fide renters from the owner of the freehold. That is, such inhabitant, shall have a freehold, "or otherwise," (if he has no freehold), he shall, "pay a yearly rent," etc.

"RENT," is a species of property, known in the law, as an "incorporeal hereditament." It is not the thing corporate, itself,—such as

lands, etc.,— but is something collateral thereto,—and issues out of those lands, etc. It is a technical word of the law, and is defined to be,—“A certain profit issuing yearly, out of lands and tenements.” The framers of the charter apparently used it, advisedly and with a full knowledge of its legal significance. They took care to plainly express its essential elements. The profits must be certain, to wit:—“forty shillings per annum.” The time must be certain, to-wit:—“a yearly rent.”

In my opinion, a freehold was intended to be the basic property qualification of a voter. That is, it was founded upon a land tenure, in the owner of the freehold, or in his immediate tenant for years in possession.

Mere lodgers, boarders, visitors, hirers of rooms in hotels, boarding houses or other places, are not, in my opinion, within the language and intent of the Charter and consequently are not entitled to vote at said elections. Such persons as these,—even though they may reside in the town,—do not possess that permanency of residence and abode and that permanency of property, which the Charter contemplated and which the law required.

Let me briefly recapitulate. The only qualified voters at such elections, in my opinion, are:—

1. Permanent inhabitants of New Castle, who are citizens of the United States and have at the time of voting a freehold interest in real estate located in New Castle.

2. Permanent inhabitants of New Castle, who are citizens of the United States and rent real estate located in New Castle, from one having a freehold therein and pay a rent, aggregating at least forty shilling a year.

Any broader or looser construction of the words of the Charter than that which I have given, would, in my opinion, tend to jeopardize and seriously injure the valuable trust which you hold as trustees and of which the permanent inhabitants of New Castle are the sole beneficiaries.

Believing that this covers the full scope of your committee's inquiries,

I am very respectfully yours,

(Signed) ALEX B. COOPER,
Attorney at Law.

ELECTIONS

ORDINANCE OF TRUSTEES OF NEW CASTLE COMMON

WHEREAS the efficient conduct of elections for Trustees of New Castle Common can best be had by the use of uniform ballots at such elections and the interests of the citizens and voters best subserved by a timely knowledge of candidates to be voted for at such elections:

THEREFORE BE IT RESOLVED by the Trustees of New Castle Common (more than nine trustees being present and more than seven assenting thereto), as follows:

Sec. 1. That at all future elections for Trustees of New Castle Common uniform ballots shall be used.

Sec. 2. Any person intending to become a candidate as Trustee of New Castle Common at any election held pursuant to the Charter of the said Board shall, at least ten days before said election, file with the Secretary of said Trustees (or in case of his absence with the President of the Board) a written notice of his intention to become a candidate, and paying the fee herein provided for.

Sec. 3. It shall be the duty of the Secretary of the said Trustees of New Castle Common (or in his absence, of the President of the said Board) to prepare and have printed a sufficient number of ballots to be used at each election, mentioned as aforesaid, using only the names of candidates who have complied with the provisions of Section 2 of this ordinance. The said ballots shall be of uniform size, color and material, and the candidates thereon shall be arranged alphabetically. Two hundred and fifty ballots for each name appearing on the ballot as a candidate shall be delivered on the morning of the day set for the election to the Inspector or Judge holding the election, and as many to any candidate as he shall have previously requested, charging such candidate the actual cost of printing such ballots, and the candidates shall be entitled to receive their ballots at least three days before election day.

Sec. 4. A voter shall designate the candidate for whom he wishes to vote by leaving such name unmarked on the ballot and shall designate those for whom he does not wish to vote by drawing a line through their

name or names with pencil, ink or crayon. Inspectors or Judges of elections shall not canvass or count any ballots that are cast for any person not on the official ballot herein provided for.

Sec. 5. When filing their names, as provided in Section 2 of this ordinance, candidates shall pay to the Secretary of the Trustees of New Castle Common the sum of \$5.00, which shall be turned over to the Treasurer of the said Board for the partial defraying of the expenses of printing.

Adopted December 3, 1940.

ORDINANCE RELATING TO FILING AS A CANDIDATE

BE IT ORDAINED; That the Secretary notify each person who shall hereafter file his name as a candidate for the office of Trustee of New Castle Common, that it is the opinion of the Board that no person is legally qualified to be elected to such office who does not, in himself, possess the qualifications of an elector or voter at such election, and that, in case of the selection of an unqualified person, the Board will declare that the existing vacancy has not been filled.

AND BE IT FURTHER ORDAINED; That this notice be given without delay after the filing of any name in order that any candidate may, if he so desires, become qualified as a candidate before any election is held.
Adopted March 17, 1942.

AN ORDINANCE PROVIDING FOR THE REGISTRATION OF ELECTORS QUALIFIED TO VOTE FOR MEMBERS OF THE BOARD OF "TRUSTEES OF THE NEW CASTLE COMMON."

WHEREAS in the original charter creating and incorporating the "Trustees of the New Castle Common" dated October 31, 1764, provision was made by election for filling vacancies in the Board of "Trustees of the New Castle Common" and the qualification of electors was prescribed as "inhabitants of the said Town of New Castle who have freeholds therein, or otherwise pay a yearly rent of forty shillings per annum":

AND WHEREAS such qualifications of electors are repeated in the Act of the General Assembly of the State of Delaware passed January 25, 1792, reincorporating and enlarging the corporate powers of the said "Trustees of the New Castle Common," and in the Act of the General Assembly passed April 15, 1885, whereby the conduct of such election is vested in the Board of Trustees:

AND WHEREAS the original charter of the said "Trustees of the New Castle Common" grants to the said Trustees the power to make

"by-laws, ordinances and constitutions" with respect to matters coming within the jurisdiction and scope of the corporation by said charter created, and the said Act of January 25, 1792 recognizes the power of said corporation to make ordinances:

AND WHEREAS the enlargement of the said Town of New Castle and the great increase in population above the population at the time of the creation of the said Board of Trustees in 1764 and the present constant movement in said population make it impossible to exactly ascertain on the day of election the qualifications of individual voters:

AND WHEREAS every prospective voter should have the privilege of having his or her right to vote determined before his or her actual appearance at the election and without the embarrassment of a possible challenge:

AND WHEREAS, in furtherance of said charter and Acts of said General Assembly, it is desired that each qualified voter may have the opportunity to so vote without having such vote nullified by the voting of unqualified persons:

THEREFORE, in pursuance and by virtue of the power and authority vested in the Board of Trustees of the "Trustees of the New Castle Common" by the charter of the "Trustees of the New Castle Common," BE IT ORDAINED by the Board of Trustees of the "Trustees of the New Castle Common," a majority of all the Trustees concurring therein:

Section 1. That a list of persons qualified to vote for Trustees of the "Trustees of the New Castle Common," to fill vacancies in the Board of Trustees, shall be made in the manner hereinafter provided, upon which list every qualified voter as prescribed by the charter of the "Trustees of the New Castle Common" shall have the right to have his name enrolled.

Section 2. That in all future elections for Trustees of the New Castle Common, the electors of such Trustees shall consist only of those persons whose names appear on such list of qualified voters to be maintained by the Board of Trustees and under the following regulations, viz.,—

(1) There shall be maintained by the Trustees of the New Castle Common, in the custody of the Secretary thereof, a permanent list of inhabitants of New Castle who either own a freehold interest in real estate in said city or who rent a property in New Castle for a rental amounting to forty shillings (or \$10.00 per year), and who desire to be enrolled as qualified voters at elections for Trustees of the New Castle Common.

(2) Every owner and every renter as mentioned in the immediately preceding paragraph (1) shall have the right to have his name enrolled on such list.

(3) Every owner or renter as aforesaid may file his or her name with the Secretary of the Board for enrollment on the list of qualified voters for any future election. Such name may be filed at any time not less than twenty days before the day fixed for an election.

(4) Upon the filing of a name for enrollment on the list of qualified voters, the Secretary shall present such application to the Election Committee of the Board of Trustees. If the Election Committee approves the qualifications, such name shall be enrolled and included in the list of qualified voters and the applicant shall be so notified. If the Election Committee does not approve the qualifications, then such matter shall be referred to the entire Board of Trustees for decision. If the Board shall approve the qualifications, such name shall be added to the list and the applicant shall be notified. If the Board does not approve the qualifications then the applicant shall be notified to present any further qualifications or that he will be allowed a further hearing if he so desires. No name shall be added to the list except by the action of the Election Committee or the Board of Trustees.

(5) When the name of a person has appeared upon the list as a qualified voter, it shall not be necessary to register again for a future election but the name shall remain on said list until changed circumstances have removed the qualifications. If qualifications be lost by change of circumstances and there be no new registration there may be ground for refusal of the vote or challenge at the polls. The Trustees reserve the right, from time to time, to remove from the list the names of persons who may be deceased, removed from the City of New Castle or be or become disqualified as a voter for Trustees of the New Castle Common.

(6) The list of qualified voters shall be made available for the inspection or information of any candidate at any election to be held for a Trustee of the New Castle Common, or, at proper times, for the information of any interested voter.

Section 3. That a copy of this Ordinance be mailed to all the voters whose names have appeared as voters on the poll lists of the last five elections for Trustees of the New Castle Common, that at least fifty copies be placed in ten or more of the most public places in the City of New Castle, and that a copy be printed in a newspaper published in the City of New Castle.

Adopted February 1, 1944.

MEMBERSHIP OF TRUSTEES

A complete list of the Trustees is as follows:

The following were named as Trustees in the charter of Thomas Penn and Richard Penn, dated October 31, 1764:

John Finney	Zachariah Van Leuvenigh
Richard McWilliam	Slator Clay
David Finney	John Yeates
Thomas McKean	Nathaniel Silsbee
George Read	Daniel McLonen
George Munro	Robert Morrison
John Van Gezell	

The following were the Trustees named as "surviving Trustees of New Castle Common," in 1791:

David Finney	James Riddle
Gunning Bedford	Archibald Alexander
Kensey Johns	Joseph Boggs
Joseph Tatlow	John Stockton
James Booth	Matthew Pearce
George Read	John Silsbee
George Read, Jr.	

The following is a list of all Trustees elected since 1792 with the dates of their election:

Dec. 10, 1795	John Bird
Dec. 10, 1795	Nicholas VanDyke
Dec. 10, 1795	James McCallmont
Dec. 10, 1795	William Aull
Dec. 10, 1795	James Caldwell
Mar. 6, 1798	John Crow
Mar. 6, 1798	Henry Colesbery
Mar. 6, 1798	Alexander Duncan
Mar. 13, 1804	John Janvier
June 18, 1805	Charles Thomas
Oct. 30, 1809	Thomas Magens, Sr.
Oct. 30, 1809	James R. Black
Jan. 8, 1811	Benjamin Marley
Jan. 30, 1815	Richard Sexton
Jan. 30, 1815	Nicholas Van Dyke
Jan. 30, 1815	George Read, Jr.
Dec. 27, 1819	Jeremiah Bowman
Dec. 27, 1819	James McCallmont

Mar. 30, 1822	James Booth, Jr.
Sept. 13, 1826	Kensey Johns, Jr.
Sept. 13, 1826	Thomas Stockton
Nov. 1, 1832	James Couper
Nov. 1, 1832	Thomas Janvier
Nov. 1, 1832	James McCullough
Nov. 1, 1832	William B. Janvier
July 6, 1833	John Bradford
Mar. 24, 1837	Thomas Challenger
Mar. 24, 1837	Ephraim Fithian
Mar. 24, 1837	William Robinson
Sept. 28, 1839	Andrew C. Gray
Sept. 28, 1839	George Houston
Sept. 18, 1841	Elihu Jefferson
Sept. 18, 1841	William H. McCullough
Mar. 14, 1846	Isaac Grubb
Mar. 14, 1846	William Miller
Mar. 14, 1846	James Blount
Mar. 14, 1846	Joseph Caldwell
June 30, 1847	John Janvier
Dec. 23, 1850	Charles H. Black
Jan. 23, 1851	William Couper
June 16, 1852	William H. Dobb
Aug. 4, 1852	William Janvier
Aug. 28, 1854	Thomas M. Robinson
May 26, 1855	Ferdinand Lechler
May 2, 1857	Peter B. Vandever
May 2, 1857	Daniel R. Wolfe
Dec. 20, 1858	James Crippen
May 14, 1859	William Herbert
Jan. 4, 1862	James Duncan
May 23, 1863	Allen V. Lesley
Dec. 16, 1865	Israel H. Fols
June 5, 1866	John White
Apr. 3, 1869	John C. Mahoney
May 8, 1869	James G. Shaw
Dec. 20, 1871	John J. Black
Jan. 9, 1875	John H. Rodney
Dec. 3, 1878	William F. Lane
Jan. 10, 1882	Elmer W. Clark
May 29, 1883	William J. Ferris

Jan. 24, 1885	George A. Maxwell
June 20, 1885	Edward Challenger
May 28, 1889	Hiram R. Borie
May 28, 1889	Michael B. King
Feb. 3, 1891	James B. Toman
Dec. 31, 1892	Patrick McGrory
Feb. 25, 1893	Robert R. Morrison
Feb. 25, 1893	James M. Wise
Oct. 28, 1893	Edward Dalby
Jan. 2, 1896	John M. Hance
Apr. 25, 1903	Francis deH. Janvier
Sept. 26, 1903	James G. Shaw, Jr.
Jan. 26, 1907	James E. Biggs
Jan. 26, 1907	Selden S. Deemer
Dec. 28, 1907	John E. Taylor
Sept. 27, 1913	Richard S. Rodney
Nov. 28, 1914	James B. Toman, Jr.
Apr. 29, 1916	James T. Challenger
Jan. 26, 1918	James B. Lancaster
Sept. 28, 1918	John F. Z. Clayton
May 24, 1919	James B. Hance
July 26, 1919	George T. Hewlett
Mar. 25, 1922	James T. Morrison
Sept. 29, 1923	Dr. Lewis Booker
Nov. 29, 1924	William Weggenman
Aug. 1, 1925	Dr. Julius Dodd
May 1, 1926	George T. Tobin
Jan. 26, 1929	Mark J. Clymer
Aug. 23, 1930	John F. Cloud
June 24, 1934	Jacob H. Speicher
Feb. 23, 1935	Chandler H. Gebhart
Feb. 4, 1939	Donald C. Banks
Sept. 30, 1939	Samuel B. McKnitt
Nov. 30, 1940	Richard M. Appleby
Feb. 14, 1942	Joseph L. Mullin
Apr. 4, 1942	Nelson C. Quillen
Oct. 3, 1942	Frank H. Long
Nov. 28, 1942	Newlin T. Booth
Oct. 30, 1943	John C. Roman
Jan. 15, 1944	James E. Carlin

TRUSTEES OF THE NEW CASTLE COMMON

1944

James G. Shaw	elected	Sept. 26, 1903	President *
Richard S. Rodney	"	Sept. 27, 1913	President
George T. Hewlett	"	July 28, 1919	
George T. Tobin	"	May 1, 1926	
Jacob H. Speicher	"	June 24, 1934	Treasurer
Chandler H. Gebhart	"	Feb. 23, 1935	
Donald C. Banks	"	Feb. 4, 1939	Secretary
Richard M. Appleby	"	Nov. 4, 1940	
Nelson C. Quillen	"	Apr. 4, 1942	
Frank H. Long	"	Oct. 3, 1942	
Newlin T. Booth	"	Nov. 28, 1942	
John C. Roman	"	Oct. 30, 1943	
James E. Carlin	"	Jan. 15, 1944	

*Deceased Nov. 14, 1944

In the early days and until 1826 the meetings of the Trustees were held in various public houses or taverns of the Town. Thus in 1796 the meeting was at the "house of Mrs. Darby." This, so far as can be ascertained, was at the N. W. corner of 3d and Delaware Streets. In 1798 and 1800 meetings were at "the house of John Darragh" then known as "Arms of the United States," and subsequently as the "Gilpin House," opposite the Court House. After 1803 most of the meetings were at "the house of John Crow," the Secretary of the Board, which house was afterwards known as the "Delaware House" and located opposite the Town Hall. After the Town Hall (originally called the Town House) was built in 1824 the meetings seem uniformly to have been held in some one of the rooms there until 1885. After the county seat was moved from New Castle the Trustees obtained the room in the old Court House formerly occupied by the Recorder of Deeds, and here they have met since February 27, 1885.

OFFICERS OF THE BOARD

PRESIDENTS

Prior to 1791 the presiding officer was known as "Chairman"

-1791—David Finney	1855-1871—Elihu Jefferson
1792-1797—Gunning Bedford	1872-1876—Allen V. Lesley
1797-1798—Kensey Johns	1876-1907—John J. Black
1798-1805—Archibald Alexander	1907-1913—John H. Rodney
1805-1820—James Booth (Sr.)	1913-1917—William J. Ferris
1820-1832—James Riddle	1918-1918—James M. Wise
1832-1839—James R. Black	1918-1940—Francis deH. Janvier
1839-1850—Thomas Janvier	1941- 1944—James G. Shaw
1850-1855—James Booth, Jr.	1944- —Richard S. Rodney

SECRETARIES

-1795—Matthew Pearce	1863-1879—Peter B. Vandever
1796-1801—John Bird	1879-1889—William F. Lane
1801-1826—John Crow	1889-1904—William J. Ferris
1826-1847—Cornelius D. Blaney	1904-1918—Francis deH. Janvier
1847-1850—Isaac Grubb	1918-1941—Richard S. Rodney
1850-1860—Peter B. Vandever	1941- —Donald C. Banks
1860-1863—James Duncan	

TREASURERS

1792-1798—James Booth, Sr.	1847-1863—Thomas Challenger
1798-1800—Kensey Johns	1863-1891—William Herbert
1800-1803—Nicholas VanDyke	1891-1900—William J. Ferris
1803-1810—Kensey Johns	1900-1943—Patrick McGrory
1810-1818—Daniel Blaney	1943- —Jacob H. Speicher
1818-1847—Cornelius D. Blaney	

TAXATION OF NEW CASTLE COMMON

In the early days it seems to have been assumed that the lands embraced within the New Castle Common were not liable for county assessment or taxation. The Act of Assembly of February 9, 1796, provided

"that all real and personal property in this State, not belonging to this State or to the United States or to any church, county, religious society or parish, or to any college or to any county school or to any corporation for charitable uses shall be valued agreeably to the directions of this Act and shall be chargeable according to such valuation with the public assessment * * *"

It was probably assumed that the lands belonged to a "corporation for charitable uses" and were thus exempt.

No mention of the taxability of the land is found prior to 1827. The minutes of the Trustees of New Castle Common from 1828 to 1834 contain four entries showing a desire to have the matter adjudicated and from independent sources, such as the minutes of the Levy Court, some information may be gathered. On those minutes appear:

"Sept. 23, 1827 Resolved that the assessor for New Castle Hundred be and is hereby instructed to value and assess the lands in the neighborhood of this Town known by the name of New Castle Common."

"Feb. 9, 1829 Mr. James McCullough, representative of Henry Bowman, dec'd, late collector, reports Trustees of Common refuse to pay tax alleging they are exempt. Committee appointed to investigate."

"Mar. 4, 1830 Messrs. Gordon and Vandever appointed a committee to take advice whether the New Castle Common land can be legally taxed."

"Mar. 9, 1831 Messrs. Springer and Delaplaine were appointed a committee to assist in collecting tax of New Castle Common and to retain counsel."

"Feb. 7, 1832 Mr. Gordon put on Committee of Commons Tax in place of Mr. Springer."

"Feb. 11, 1835 Committee was appointed to call on John Wiley late collector of taxes to find out what instructions James A. Bayard as attorney for Levy Court had given him with regard to the Commons Tax."

Wiley evidently was instructed to collect the tax and, for the tax, he levied on a horse belonging to James Smith who held a long lease on land belonging to the Trustees of New Castle Common. Smith promptly brought suit against the collector in an action of trespass, being No. 176 May Term, 1835. Wiley, the collector, justified his levy as being for taxes due on the land held by Smith. Smith replied that the lands were part of the New Castle Common and exempt from taxation. To this replication Wiley demurred, thus raising the legal question as to whether the lands were liable to be taxed. In these proceedings George Read, Jr.,

represented the Trustees of New Castle Common and James A. Bayard represented the collector.

On May 23, 1836, the Court sustained the demurrer, without opinion, thus holding that the lands were liable to taxation.

On Nov. 9, 1838, a committee of Levy Court reported:

"That Thomas H. Tatlow appears—to owe—the county tax due from the tenants of New Castle Common * * * and the committee * * * think that the allowance asked by Tatlow should not be granted because they think that full power was vested in Tatlow by the Levy Court for collecting the same and a decision of the Superior Court which went to establish the power of collectors to collect all taxes on the Common property."

For some 70 years no further mention appears as to the liability of the land for taxation but about 1900 the Trustees again raised the question and in 1903 refused to pay the tax. The arrearage of tax accumulated until 1907 when the Levy Court and the Trustees of New Castle Common entered into an amicable action to have the matter determined. Evidently no one knew of the former proceeding for it was not mentioned. Amicable Action No. 176 May Term, 1907, was entered by J. Frank Megginson, Collector of Taxes, against the Trustees of New Castle Common, to collect the tax for 1903. By a curious coincidence this suit bore the same number to the same term as the former suit some 72 years before. The Superior Court on December 13, 1907, again determined, without extended opinion, that the land was liable to the tax.

The matter was then taken to the Supreme Court of Delaware, where on June 21, 1910, and in an elaborate opinion reported in 24 Delaware (1 Boyce) 361, 77 A. 565, Annotated Cases 1914 A 1207, the Superior Court was reversed and the lands held not liable for taxation under the statute as it existed in 1903.

On April 5, 1909, the statute was amended to read:

"All real and personal property not belonging * * * to any corporation created for charitable purposes and not held by way of investment shall be liable to taxation and assessment for public purposes."

Since that time taxes have been paid.

The opinion of the Supreme Court of Delaware was as follows:

NEW CASTLE COMMON VS. MEGGINSON

SYLLABUS

TRUSTEES OF NEW CASTLE COMMON, defendant below, plaintiff in error *vs.* JABEZ FRANK MEGGINSON, late Collector of Taxes for New Castle Hundred, plaintiff below, defendant in error.

1. A gift of land to trustees "for the use of the inhabitants of the town of New Castle," is a charitable trust or use.

2. A gift of land to a corporation created for the purpose of administering a trust of a gift of land "for the use of the inhabitants of the town of New Castle," is a gift to "a corporation for charitable uses."

3. Gifts to and for a general public use or for lessening the burdens of Government are charitable trusts; are not within the prohibition of the rule against perpetuities; and are valid and will be enforced and administered by the Court of Chancery.

4. The words "charitable uses" include all gifts for a general public use, independent of benevolence, educational or religious purposes.

5. The particular uses to which the trust property is in fact put is not material in deciding whether a particular trust is a charitable one.

6. Where a statute exempts from taxation property "belonging to any corporation for charitable uses" properly donated to trustees for a charitable use and afterwards vested in a corporation enacted by special Act to administer that particular trust, is property belonging to a corporation for charitable uses and is exempt from taxation.

7. Gifts in trust for the support of the public schools for municipal improvements and for gifts to needy persons of a town, are gifts for charitable uses.

(June 21, 1910.)

CURTIS, Chancellor, PENNEWILL, Chief Justice and Associate Judges CONRAD, WOOLLEY and HASTINGS sitting.

John H. Rodney, Francis deH. Janvier and Richard S. Rodney for plaintiff in error.

Sylvester D. Townsend, Jr., and William G. Jones, Jr., for defendant in error.

Supreme Court, January Term, 1909.

WRIT OF ERROR to Superior Court, for New Castle County.

Action by Jabez Frank Megginson, late Collector of Taxes for New Castle Hundred, against the trustees of New Castle Common. Judgment for plaintiff, and defendant brings error. Reversed, and judgment entered for defendant.

The case in the Court below was an amicable action of assumpsit upon a case stated, of which the following is a copy, the immaterial parts being omitted:

AND NOW TO-WIT this tenth day of July, A. D. 1907, it is agreed by

and between the attorneys, for the plaintiff and the defendants in the above stated cause, that the following case be stated for the opinion of the Court, in the nature of a special verdict, either party to have the right to sue out a writ of error on the judgment to be entered in the cause.

STATEMENT OF FACTS

That the above named plaintiff was the collector of taxes for New Castle Hundred in the year 1903, duly appointed by the Levy Court of New Castle County, and as such collector authorized, empowered and directed to collect the taxes assessed upon and against the property of the above named defendants.

That William Penn, Proprietary and Governor of the Province of Pennsylvania and the Counties annexed, in the year A. D. 1701, made a certain warrant directed to Edward Pennington, Surveyor General of the Province of Pennsylvania and Territories in the following words, to-wit:

"William Penn, Proprietary and Govr. of the Province of Pennsylvania and Counties annexed.
Pennsylvania

(L. S.)

"For the accommodation of the Inhabitants of the Town of New Castle. These are to require thee forthwith to survey or cause to be surveyed to the only use and behoof of the said Inhabitants to lie in Common one thousand acres of Land adjoining or near to the said Town hitherto reputed called New Castle Common in one convenient Tract, and if there proved more than the sd. number of Acres lay out the residue in one convenient piece to me and for my use and make returns thereof into my Secretary's office. Given under my hand and seal at New Castle the 31st day of 8ber 1701.

WM. PENN."

"To Edward Pennington, Surveyor General of the Province of Pennsylvania and Territories."

That by virtue of a warrant directed to George Dakeyne, Surveyor, bearing date the twenty-third day of the tenth month, 1701, commanding him to survey and lay out to the inhabitants of New Castle to lie in common for their accommodation and to their only use and behoof, 1000 acres of land adjoining or near to the town of New Castle reputed always to be common and to make return of the same unto the General Surveyor's office at Philadelphia that he had resurveyed said tract of land, and that the same contained 1068 acres.

That Thomas Penn and Richard Penn absolute Proprietaries and

Governors in Chief of the Counties of New Castle, Kent and Sussex on Delaware and Province of Pennsylvania by their Charter dated October 31st, 1764, under the hand of John Penn, Esq., Lieutenant Governor and Commander in Chief of the Counties of New Castle, Kent and Sussex on Delaware and Province of Pennsylvania and the Great Seal of the Government of said Counties, (which said Charter recited that in pursuance of said warrant of said William Penn, there was surveyed and laid out on the tenth day of April, A. D. 1704, to the inhabitants of the town of New Castle in the County of New Castle, a tract or parcel of land adjoining or near to the said town containing 1068 acres, as and for a common, for the use, behoof and accommodation of the inhabitants of said town of New Castle; that the inhabitants of said town had represented to said Proprietaries and Governors that, notwithstanding said warrant and survey and the many benefits and advantages the said William Penn had intended the inhabitants of said town should reap and enjoy great quantities of said land, surveyed as a common, had been enclosed by the owners of tracts of land lying contiguous thereto and by them tilled and cultivated and that the said inhabitants were remediless for want of legal power to sue and implead the wrong-doers; and that the said inhabitants had requested the said Proprietaries and Governors to incorporate a certain number of them and give them perpetual succession and confirmed to them the said tract of land in common for the use of all the inhabitants of the said town), favoring the request of said inhabitants, nominated, constituted and appointed thirteen trustees in said charter named wherein and whereby said trustees and their successors were incorporated as one body corporate and politic by the name of "Trustees of New Castle Common" and by such charter said trustees and their successors forever became seized of all the aforesaid tract or parcel of land, together with all the woods, waters, pastures, feedings, ways, rights, privileges, advantages and appurtenances whatsoever thereunto belonging or in anywise appertaining; to have and to hold said tract of land with the appurtenances unto the said Trustees and their successors in trust nevertheless and to and for the uses, intents and purposes following, that is to say: to and for the use of the present inhabitants of the said town and those who shall hereafter become and be inhabitants of the said town of New Castle and dwelling within the bounds and limits thereof as a Common forever, and to no other use, intent or purpose whatsoever. To be holden of the said grantors their heirs and successors, Proprietaries of the said Counties of New Castle, Kent and Sussex on Delaware, in free and common socage, by fealty only, in lieu of all other

services; with the proviso that said Trustees or said successors, shall not have nor shall be deemed or construed to have any right, power or authority to grant, bargain, sell, alien, convey, release, or confirm the hereby granted premises or any part thereof to any person or persons whatsoever; but that the same shall be and remain and be held and enjoyed by them for the use of a common for the inhabitants of the town of New Castle and to no other use, intent or purpose whatsoever; and further provided that if the said Trustees or their successors shall at any time grant, bargain or sell the said tract of land or any part thereof or dispose of the same to any other use than that of the common for the inhabitants of the said town of New Castle or its said Trustees shall by any means be dissolved, then the grant so made shall cease and determine and become absolutely void to all intents and purposes whatsoever, and all and singular the granted premises with the appurtenances shall revert to the said Thomas Penn and Richard Penn, their heirs and assigns forever;

That John Penn, of Stoke Pogis, in the County of Bucks, and John Penn, of Dover Street, in the County of Middlesex, (heirs at law of Thomas Penn and Richard Penn, aforesaid and reversioners under the deed made by them,) late Proprietaries and Governors of Pennsylvania in America, by their deed dated July 7th, A. D. 1791, (wherein it was recited that Thomas Penn and Richard Penn, who in their lives were absolute Proprietaries and Governors in Chief of the Counties of New Castle, Kent and Sussex on Delaware and Province of Pennsylvania, by charter dated October first, A. D. 1764, did grant and convey unto thirteen trustees, the hereinbefore mentioned tract of land as and for a common, for the use, behoof and accommodation of the inhabitants of the town of New Castle, which tract in pursuance of a warrant from William Penn was surveyed and laid out April 10th, A. D. 1704, for the uses aforesaid; and wherein it was recited further that the restrictive terms of said grant do now prevent the inhabitants of said town of New Castle from deriving all those benefits and advantages which would result from a free and absolute grant thereof; and that the said last mentioned Trustees of said Common have solicited the said last mentioned grantors to grant the free and absolute property of, in and to the said premises, to them and their successors, to and for the use of the inhabitants of the said town of New Castle, and that the said last mentioned grantors were willing to promote the prosperity of said town and desired to benefit the descendants of the inhabitants of the said town for the regard, honor and respect always exhibited on the part of the predecessors of said inhabi-

tants to the ancestors of said grantors), granted, bargained and sold unto Isaac Grantham, Robert Clay and William Lees and to the survivors of them, all the aforesaid tract or parcel of land, with the appurtenances to have and to hold the same with the appurtenances to the said Isaac Grantham, et al., the survivor and the heir of the survivor of them, to and for the use and behoof of the said Isaac Grantham, et al., and the survivor and heirs of the survivor, forever in trust, nevertheless, to and for the use, benefit and behoof of the inhabitants of the town of New Castle to be conveyed, transferred and set over by the said Isaac Grantham, et al., or by the survivor or heirs of the survivor, in trust, unto the present or future trustees of said tract and their successors or of such future trustees and their successors as may be chosen or appointed by virtue of an act of incorporation when the same may be passed by an Act of General Assembly of the State of Delaware to and for the use and behoof of the inhabitants of the said town of New Castle forever to be appropriated in such manner as a majority of the Trustees in their wisdom may direct, provided that nothing herein contained shall vest the trustees of said commons with any power or authority to sell the same or any part thereof;

That the General Assembly of the State of Delaware on the 26th day of January, A. D. 1792, passed an Act purporting to enlarge the corporate powers of the Trustees of the New Castle Common, which said Act purported to provide that the Trustees of said tract be incorporated as one body politic and corporate by the name and style of "Trustees of New Castle Common," and that said Trustees of New Castle Common should be able and capable in law and equity, to have, purchase, take, accept, receive, possess, enjoy and retain to them and their successors all of said tract of land and the same or any part thereof to grant, demise and dispose of for the use of the inhabitants of said town of New Castle to be appropriated in such manner as a majority of the said Trustees in their wisdom may direct, provided always that they reserve for the benefit and use of the inhabitants of said town, an annual or other rent, as a reasonable equivalent for the leasing or disposing of the before described tract, and that neither of said Trustees nor their successors shall be empowered to sell the said tract of land or any part thereof nor lease or otherwise dispose of the same for a longer term than thirty years.

That the said Isaac Grantham, et al., in pursuance of the trust by them held did by their deed dated July 30th, A. D. 1792, convey to David Finney, et al., Trustees of the New Castle Common, the said tract of land, to have and to hold the same in trust to and for the special uses, intents

and purposes and under and subject to the proviso mentioned and described in the before mentioned deed of John Penn of Stoke Pogis and John Penn of Dover Street and in the said mentioned Act of General Assembly; that the said lands herein mentioned and referred to are still held by the defendants, the successors of the original trustees, by virtue of said charter and the various deeds and Act of Assembly.

That the net income, rents and profits arising from the said premises has been exclusively used and expended by the said Trustees of New Castle Common for the use, benefit, and behoof of the inhabitants of the said town of New Castle in the support of public schools, public improvements and charitable donations and gifts; and only for the inhabitants of the said town generally.

That the said lands in accordance with the provisions of the statute in such cases made and provided, were duly assessed by the Assessor of real estate for New Castle Hundred for the year 1901; that the said assessment was duly returned to the Levy Court of New Castle County and thereupon in accordance with the statute in such cases made and provided the Levy Court of New Castle County proceeded to levy and assess a tax on the said premises based upon said valuation;

That in pursuance of said assessment a warrant and duplicate was duly made out and given to Jabez Frank Megginson, Collector of Taxes as aforesaid, wherein and whereby he was authorized and directed to levy and collect from the Trustees of New Castle Common, the defendants, and the property owned and possessed by them assessed as aforesaid, the sum of five hundred and twenty-two and 12-100 dollars being the taxes for the year A. D. 1903; that the said plaintiff the Collector as aforesaid has made demand for the payment of the taxes so assessed which said payment has been refused by the defendant and the said tax for which this suit is instituted still remains unpaid.

The said defendant claims that the said premises are exempt under the provisions of *Chapter 11, of the Revised Code*, and that it is a corporation for a charitable use and that under the provision of said chapter, the real estate so held by it is not liable to the assessment and collection of County Taxes.

If the Court should be of opinion that the said property is exempt from assessment and tax by the Levy Court of New Castle County for County purposes under the provisions of the said statute, then judgment shall be entered for the defendant and with costs of the suit; otherwise for the plaintiff for the sum of \$522.12 and costs of suit.

Afterwards, in the Superior Court, the following opinion was rendered:

"Dec. 13, 1907. The case stated and the arguments in this case having been carefully considered, the Court is of the opinion that "The Trustees of New Castle Common," the defendant, is not a corporation for charitable uses within the meaning of *Section 1 of Chapter 11 of the Revised Code*; that the property mentioned in the said case stated is not used for charitable purposes within the meaning of said section; that the net income, rents and profits arising from the said property are not used and expended for charitable purposes within the meaning of said section, but for such purposes as are the moneys raised and collected by municipal taxation; and that the said property is not exempt from assessment and taxation for county purposes, under the provisions of the said section.

"It is therefore ordered that judgment be entered in favor of the plaintiff and against the defendant for the sum of five hundred and twenty-two dollars and twelve cents and costs of suit."

The assignment of error is in general terms that the Court below erred in the judgment entered for the plaintiff.

OPINION.

CURTIS, *Chancellor*, delivering the opinion of the Court:

The case is before this Court on a writ of error to the Superior Court for New Castle County, and was an amicable action heard there on a case stated. The plaintiff was the collector of County taxes for New Castle Hundred, and claimed that land held by the defendant, The Trustees of New Castle Common, was liable to the payment of the tax levied against it for the year 1903, amounting to \$522.12, while the defendant claimed that the premises are exempt from taxation as being the property of a corporation for charitable uses. In the agreement for docketing the amicable action the facts are fully set forth. As appears from the statement, William Penn in the year 1701 directed that "For the accommodation of the inhabitants of the town of New Castle," one thousand acres of his land be surveyed "to the only use and behoof of the said inhabitants to lie in common," and this survey having been made, the legal title to the land was by deed of the then Proprietaries of Pennsylvania conveyed to certain trustees and thereafter by them conveyed to the defendant, The Trustees of New Castle Common, a corporation created by the General Assembly of Delaware in 1792 to take title to the commons "for the use of the inhabitants of the town of New Castle." The corporation was empowered by the charter to lease but not to sell the land, and appropriate the moneys in such manner as the trustees should

in their wisdom direct. By the agreed statement of facts the net income has been used for the use of the inhabitants of the town of New Castle exclusively in the support of public schools, public improvements and charitable donations and gifts and for the inhabitants of the town generally.

The statute under which the exemption from taxation is claimed is an Act passed in 1796, published in the *Revised Code* as *Chapter XI, section 1, page 114*, as follows:—

“All real and personal property, not belonging to this State, or the United States, or any county, church, religious society, college or school, or to any corporation for charitable uses, shall be liable to taxation and assessment for public purposes. (Provided, that legacies for religious, charitable and educational purposes, shall not be subject to taxation.)”

In the Superior Court it was held:

“The defendant is not a corporation for charitable uses within the meaning of *Section 1 of Chapter 11 of the Revised Code*; that the property mentioned in the said case stated is not used for charitable purposes within the meaning of said section; that the net income, rents and profits arising from the said property are not used and expended for charitable purposes within the meaning of said section, but for such purposes as are the moneys raised and collected by municipal taxation; and that the said property is not exempt from assessment and taxation for County purposes, under the provisions of the said section.”

On December 13, 1907, judgment was found for the plaintiff and upon this judgment the writ of error was taken to this Court.

It will be seen from the above that the property taxed is owned by a corporation created for the sole purpose of administering the particular trust respecting this land and no other property, and the sole question is whether this trust was a charitable use. The trustees were limited in their use of the income of the property to such objects as were for the use, benefit and advantage of the inhabitants of the town, and in fact made such use of them. They had no power to undertake any other trust respecting any other property and were and are subject to supervision as other trustees respecting their administration of the trust. The question for decision is a very narrow one. Did the gift by William Penn constitute a charitable use or trust within a proper definition thereof as settled by precedents? The question may be more broadly stated thus: Is a donation of land to trustees for the use and benefit of the inhabitants of a certain town a charitable use or trust?

Turning first to the decisions of our own Courts, we find that in Delaware charitable trusts have been considered by the Courts in several cases. Benjamin Potter, by will, gave part of his real estate to named trustees “to and for the support, maintenance and education of the poor white citizens of Kent County generally.” This gift was upheld as a charitable use and enforced by the Court of Chancery. In *State vs. Griffith, 2 Del. Ch. 392*, Chancellor Johns held that the jurisdiction to protect and enforce charitable uses was vested in the Court of Chancery in England prior to the *Statute of 43 Elizabeth, Chapter 4*, and was not founded on that statute, and that the Court of Chancery of the State of Delaware is vested with like jurisdiction, independent of that statute. Also that uncertainty as to the individual beneficiaries until appointment, or selection, by the trustee, or other designated agents, was a characteristic of charitable trusts and that such uncertainty did not therefore invalidate the gift under the Potter will. These conclusions were affirmed by the Court of Errors and Appeals in an appeal taken from Chancellor John’s decree, in *Griffith vs. State, 2 Del. Ch. 421, Appendix*. Both Courts held that the rule of law against perpetuities did not apply to that or any other charitable or public trust or use. Later the Court of Errors and Appeals, in *Tharp vs. Fleming, 1 Houst. 593*, affirmed a decree of Chancellor Johns restraining the sale of the Potter land by Commissioners created by an Act of the General Assembly for that purpose, and held that the Legislature had no power to authorize the sale. Afterwards at the request of Chancellor Saulsbury, Nathaniel B. Smithers, Esq., prepared an opinion as to the power of the Court of Chancery to order a sale of the land upon application of the trustee for sufficient reasons, and advised the Chancellor that such power was vested in the Court of Chancery as part of its inherent jurisdiction over the administration of charitable estates. The learned *amicus curiae* adopts the following language of *Shelford on Mortmain* in defining a public charity:

“Public charities are hardly distinguishable from private; the charter of the Crown does not make a charity more or less public, but only more permanent than it otherwise would be; but it is the *extensiveness* which will constitute it a public one. A devise to the poor of a parish is a public charity.”

This opinion of Mr. Smithers is reported in the *Appendix to Vol. 8 of Delaware Chancery Reports*. In *Doughten vs. Vandever, 5 Del. Ch. 51 (1875)*, Chancellor Saulsbury was called on to construe the will of Amy Doughten, where there was ambiguity in the identification of the legatees, because of the indefiniteness of the corporate name of the bene-

ficiaries, though the will made clear the use to which the legacies were to be put. One of the gifts was of a part of the residue "To the Trustees and Managers of the Philadelphia Waterworks * * * to be applied to the benefit of the said institution or corporation." This gift the Chancellor declared invalid, holding that it was not good at common law because there was no such corporation as that named in the will, the title to the waterworks of Philadelphia being in the City of Philadelphia, and it was not valid in equity because it was not a public charity. The Chancellor distinguished *Jones vs. Williams Amb.* 651, which was a gift in trust to bring in spring water to a town and keep the plant in good order. It is not important to consider whether the distinction was well taken, but it is of importance that Chancellor Saulsbury approved of *Jones vs. Williams*, and adopted as his own the definition of Justice Gray, in *Jackson vs. Phillips*, hereinafter quoted. Gifts to general public uses and for lessening the burdens of government are clearly recognized by Chancellor Saulsbury as charitable trusts or uses. From these decisions in the Delaware Courts it may be concluded that the Statute of Elizabeth was not the origin of charitable uses and is therefore not controlling in its designation of certain gifts as being public, charitable trusts, but rather as illustrative of what objects should be so considered; that the uncertainty of the beneficiaries is a characteristic of such benefactions; that they are not within the prohibition of the rule against perpetuities; and that any gifts to and for a general public use or lessening the burdens of government are valid as charitable trusts and uses.

It is obvious that the word "charitable" implies primarily a donation to the poor, the sick, or the needy. But it undoubtedly has been given a much wider definition, as thus stated in *Perry on Trusts, Vol. 2, Sec. 687*:

"Charitable trusts include all gifts in trust for religious and educational purposes in their ever varying diversity; all gifts for the relief and comfort of the poor, the sick and the afflicted; and all the gifts for the public convenience, benefit, utility or ornament, in whatever manner the donor desires to have them applied."

This broad meaning the word "charity" had in 1796, the time when the exemption Act in question was passed. Trusts for public purposes independent of benevolence, educational or religious purposes were held to be charitable trusts many years before the Act was passed. In 1592 a gift to support bridges and highways was held by Lord Coke to be a public and charitable gift in *Porter's Case*, 1 Coke 26. The case of *Jones vs. Williams, supra*, was decided in 1767, wherein Lord Camden held

that a gift of money to be applied by trustees for bringing spring water into a town by pipes and for keeping the plant in repair was a charitable trust, and there gave the oft quoted definition of a charitable use, which has survived to this day as the one comprehensive one, viz.: "A gift to a general public use which extends to the poor as well as to the rich." The statute of Elizabeth itself furnishes material for a definition, though it was not an all inclusive statute. It recited that moneys had been given in trust for certain objects, naming them, and that there had been abuses of trusts, and empowered certain officers to investigate and correct these abuses. It may well be said, therefore, that it does not define charity, or exclude as not charitable all objects not named therein; but the enumerations therein are illustrative of the trusts in which abuses existed. As was said by Sir John Leach, in *Atty. Gen. vs. Heclis*, "It is not material that the particular public or general purpose is not expressed in the *Statute of Elizabeth*, all other legal public or general purposes being within the equity of that Statute." But it should be noted that this *Statute of 43 Elizabeth, c. 4*, commonly called the *Statute of Charitable Uses*, passed in 1601, includes in the enumeration of charitable objects and purposes, to which it relates, gifts for public purposes, where benevolence is not an element. The statute includes existing trusts for "repairs of bridges, ports, havens, causeways, churches, sea banks and highways." All these are public works such as municipalities construct and maintain for the general comfort, convenience or utility of the particular country. Such also would be municipal buildings, parks and museums. If a trust to provide repairs for highways or bridges be charitable uses, so also, in principle, would a trust to make highways, or build bridges, be charitable uses. It may safely be asserted, therefore, that both by the adjudged cases cited and others that might have been cited, and by the *Statute of Elizabeth*, at the time the exemption Act in question was passed, the word "charity" had a well known and acknowledged meaning, broad enough to include every gift for a general public use. Such definition must therefore be read into this statute in deciding this case. Where a statute uses a word which is well known and has a definite sense at common law, or in the written law without defining it, it will be presumed to be used in that sense and will be so construed. *Sutherland on the Construction of Statutes, Sec. 398*. In addition, however, there are many cases decided in England and in this Country which sustain this interpretation of the word "charitable."

The following are illustrations of this numerous class of cases establishing as charitable trusts gifts for public purposes, independent of

benevolent, educational or religious purposes: A trust "for purposes conducing to the good of the County of W. and the parish of L. especially." *Atty. Gen. vs. Lonsdale*, 1 Sim. 105. For the improvement of a specified town. *Atty. Gen. vs. Heelis*, 2 Sim. & Stu. 67; *Howse vs. Chapman*, 4 Ves. 542. Gifts to discharge a tax on a commonalty. The tax no longer existed but the Chancellor held it a charity to relieve the whole community of a tax due from it, and directed that a scheme be devised for using the income of the fund for the benefit of the whole community. *Atty. Gen. vs. Busbley*, 24 Beav. 290. A gift for the advantage and benefit of Great Britain. *Nightingale vs. Goulbourn*, 5 Hare 484 (2 Phil. 594). Gifts to pay part of the national debt. *Ashton vs. Langdale*, 4 Eng. L. & Eq. 139; *Newland vs. Atty. Gen.*, 3 Mer. 684 (1809). A gift of real estate, the profits to be used for repairing certain highways, held to be a valid charitable trust. *Collison's Case*, Hob. 136. A trust to build a bridge or life boat for a town. *Johnson vs. Swann*, 3 Madd. 457; *Forbes vs. Forbes*, 23 Eng. L. & Eq. 335. Money to be applied to "charitable, beneficial and public works at and in the City of Dacca in Bengal." *Mitford vs. Reynolds*, 1 Phil. 192 (1841) 41 Eng. Reprint 604. A gift "for the benefit and ornament" of a town. *Faversham vs. Ryder*, 27 Eng. L. & Eq. R. 367. A gift of money to be spent for the use and benefit of a town or of the institutions thereof. *Mayor &c. of Wrexham vs. Tamplin*, 21 Weekly Rep. 768. A trust to use the rents of land in paving, lighting or cleaning the streets of a town, conveying water thereto and other public improvements. *Atty. Gen. vs. Heelis*, 2 Sim. & Stu. 67. For erecting a town house. *Coggeshall vs. Pelton*, 7 Johns. Ch. 292. For planting shade trees. A gift to the City of Philadelphia in trust, the income to be expended in planting shade trees, "especially in situations now exposing my fellow citizens to the heat of the sun." *Cresson's Appeal*, 30 Pa. St. 434. A gift of money, interest of which should be "laid out in repairing highways, and bridges" of a certain town. "The object of the devise is to confer a public benefit; something beneficial and necessary to all persons indiscriminately, quite as much as gifts to institutions for learning, or religion, or to the poor and helpless." *Hamden vs. Rice*, 24 Conn. 350.

From these and other cases which were cited by the counsel for the appellant, it is evident that the following definition of charitable uses stated by Justice Gray, in *Jackson vs. Phillips*, 14 Allen 566, is sound and well established by many cases:

"A charity, in a legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite

number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of taxation. It is immaterial whether the purpose is called charitable in the gift itself if it is so described as to show that it is charitable in its nature." This definition was adopted by Chancellor Saulsbury in *Doughten vs. Vandever*, and has been quoted by other Courts. Indeed, there seems to be few if any cases holding contrawise. The case at bar is within this definition. The uses for which the corporation was created was "for the use and benefit and behoof of the inhabitants of the town of New Castle." It is public, because it relates to all the inhabitants of a particular community and not to any classification of such inhabitants, or to any group thereof separately from the other inhabitants by any distinction of race, creed, social rank, wealth, property, occupation, or business, or even separated by geographical lines subdividing the community into wards, districts or otherwise. It is general, in that the objects to be accomplished are as wide as possible. They may be educational, philanthropic, eleemosynary or religious. They may be the erection of public works or buildings, public streets, and any other form of municipal improvement. It is indefinite, because it is not for any particular person, or set of persons fixed by any artificial or arbitrary selections, designated in the gift. It is enduring because it is not for a day, or a generation, but has the element of permanence and continuity for coming generations.

The particular uses to which the rents received from the land have been, in fact, put, as shown by the agreed statement of facts, are quite immaterial and have no bearing on the question. But it should be noted that these actual uses were those which distinctly belong to charitable uses. A trust created to accomplish either of the purposes for which the proceeds of the land have been used would be held to be a charitable trust—viz.: a trust to support the public schools, for municipal improvements, or for gifts to needy persons of a community. It is also quite unimportant that these purposes are among those for which moneys are raised by the assessment and collection of municipal taxes. It rather demonstrates the public character and generality of the purposes and objects of the trust to show that property within the town is subjected to taxation for the same purposes by the municipality, for taxation is of the property of the rich and poor and for the benefit of both and the burdens of taxation are lessened by reason of this trust.

It was urged, however, by the appellee that the gift was not to a corpo-

ration for charitable uses because the land itself was not so used, but the income thereof, and that the land being used as a source of revenue was subject to assessment and taxation. Many cases were cited in the comprehensive brief of counsel for the defendant in error to support this position. But a careful examination of the constitutions and statutes of the several states in which these cases were decided, as set out in the appellants' brief, shows that these cases do not apply aptly to the case at bar. Almost all the states have constitutional or statutory regulations different from those of our own State, and which control the courts in deciding whether particular property is exempt from taxation. None of them are identical with, or are as broad and general as the Delaware statute. In Arkansas, Colorado, Connecticut, Indiana, Iowa, Maryland, Minnesota, North Dakota, Rhode Island, and New Jersey, the exemption expressly relates to buildings used for charitable purposes. In Arkansas, Florida, Illinois, Kansas, Missouri, Mississippi and New Jersey the use to which the property is put for charitable purposes is clearly made the test of exemption and not the ownership. The occupation of the property by charitable institutions is the test enacted in Florida, Massachusetts, Michigan, North Dakota, and South Carolina. Other states, such as Arkansas, Georgia, Louisiana, Massachusetts, Michigan, Minnesota, South Carolina and Tennessee, exempt "institutions" of public charities, indicating the habitation in which the charitable work is carried on, as distinct from the property owned by the organization by which its work is done. Some states expressly make subject to taxation such of the property owned by charitable corporations as is held as an investment or source of profit or revenue, viz.: Florida, Illinois, Iowa, Louisiana, Minnesota, Mississippi, North Dakota, Ohio, Pennsylvania, Tennessee and West Virginia. The decisions of the courts of these states, therefore furnish no help to this Court in construing the Delaware statute.

The recent amendments of the exemption Act under consideration confirm the interpretation herein put on the Act. By an Act approved April 5, 1909, the Act in question was so changed as to read:

"All real and personal property not belonging * * * to any corporation created for charitable purposes and not held by way of investment, shall be liable to taxation and assessment for public purposes." 25 *Del. Laws, c. 36, p. 82.*

The conclusion of this Court, therefore, is that the gift by William Penn of the land in question constituted a charitable use or trust, and that that land held and owned by the defendant, a corporation created for the purpose of administering that trust, was real property belonging

to a corporation for charitable uses and therefore exempt from taxation for public purposes. It was, therefore, not liable to the tax mentioned in the case stated, and the judgment of the Court below should be reversed.

Let a judgment be entered accordingly, and judgment entered for the appellant, the defendant in the Court below, with costs.

The following Acts of the General Assembly have dealt with the Trustees of New Castle Common:

LAWS OF DELAWARE

Volume 14, Ch. 640, P. 697

AN ACT TO AMEND THE ACT ENTITLED AN ACT TO ENLARGE THE CORPORATE POWERS OF THE TRUSTEES, OF THE NEW CASTLE COMMON, PASSED AT DOVER, JANUARY 25TH, 1792.

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met.

That the second enactment clause of the said act be, and the same is hereby amended by striking out the word thirty and inserting in lieu thereof the words nine hundred and ninety-nine.

Passed at Dover, February 18th, 1873.

LAWS OF DELAWARE

Volume 17, Ch. 574, P. 848

AN ACT IN RELATION TO THE ELECTION OF TRUSTEES OF THE NEW CASTLE COMMON.

WHEREAS by the charter creating the Board of Trustees of the New Castle Common, and by the act of the General Assembly, passed January 25, A. D. 1792, it is provided that all vacancies in the said board shall be filled by the inhabitants of the town of New Castle at an election to be held at the Court House in the said town at such time as the said trustees shall appoint; and whereas the courts have been removed from the said town; therefore,

Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met (two-thirds of each branch concurring therein):

SECTION 1. That hereafter all vacancies in the said board shall be filled by an election held at such place and at such time and by such persons as the said trustees shall appoint, according to the mode and in the manner and form as provided by the said charter and act of Assembly, and that the electors of the said trustees shall have the qualifications therein provided.

SECTION 2. That this shall be deemed and taken to be a public act. Passed at Dover, April 15, 1885.

LAWS OF DELAWARE

Volume 17, Ch. 575, P. 848

AN ACT AUTHORIZING THE TRUSTEES OF NEW CASTLE COMMON TO DISPOSE IN FEE SIMPLE OF THE REAL ESTATE BELONGING TO THE TRUST.

WHEREAS by warrant from William Penn and by subsequent charter and deeds from his heirs, certain real estate adjacent to the City of New Castle (then town) was vested in trustees for the benefit of the citizens of said city (then town); and whereas it has been represented to this General Assembly that it would be greatly for the benefit of the said city and its inhabitants if the said real estate should be sold; therefore.

Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met (two-thirds of each branch concurring therein):

SECTION 1. That the Trustees of New Castle Common be and they are hereby authorized and empowered to sell and convey in fee simple, in whole or in part, the said real estate now held by them in trust, making therefor good and sufficient deeds under the corporate seal of said trustees, in such manner that the purchaser or purchasers shall take and hold the said property free and discharged from the said trust, and without liability as to the application of the purchase money.

SECTION 2. Upon sale of the said premises, in part or in whole, as aforesaid, the purchase money arising therefrom shall be invested by the said trustees in good real estate security, to be held upon the same uses and trusts as the said real estate is now held and for no other, and the income arising from the said investments shall be applied by them as the rents and profits of the real estate have heretofore been applied, for the benefit of the inhabitants of the City of New Castle in the discretion of the trustees.

SECTION 3. Any act or parts of acts inconsistent herewith or with the duties of the trustees as herein provided are hereby repealed.

SECTION 4. This shall be deemed and taken to be a public act. Passed at Dover, April 15, 1885.

LAWS OF DELAWARE

Volume 18, Ch. 698, P. 964

AN ACT TO ENLARGE THE CORPORATE POWERS OF THE TRUSTEES OF NEW CASTLE COMMON.

WHEREAS, By reason of the infirmities of age or other causes, one or

more of the members of the Board of Trustees of the New Castle Common are frequently incapacitated from attending to their active duties as members of the said Board of Trustees;

AND WHEREAS, By reason of such inability on the part of one or more trustees, there is often a difficulty in getting together a legal quorum of members for the purpose of transacting the necessary business of the board much to the detriment of the proper workings of the trust; therefore,

Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met, (two-thirds of each branch of the Legislature concurring therein):

SECTION 1. That any member of the Board of Trustees of the New Castle Common, who from mental or physical inability of any kind or from any other cause, shall find himself unable to properly attend to the duties of his office, may of his own volition offer his resignation as a member of said Board of Trustees of the New Castle Common, at any regular meeting of the said board; such resignation having been offered in writing, it shall be the duty of the Board of Trustees of New Castle Common, to accept such resignation and have a copy of such resignation entered on the minutes of the board, and the said Board of Trustees of the New Castle Common shall at once issue its call according to its usual custom in such cases for an election to fill the vacancy caused by such resignation.

SECTION 2. This act shall be deemed and taken to be a public act. Passed at Dover, April 17, 1889.

LAWS OF DELAWARE

(March 7, 1921)

Volume 32, Chapter 121, Page 370, Section 1

BOARD OF WATER & LIGHT COMMISSIONERS

SECTION 1. A Board of Water and Light Commissioners for the City of New Castle is hereby created, which shall be composed of three members who shall be residents of and qualified voters of the City of New Castle and who shall have resided in said City for at least three years prior to their appointment. They shall serve until their successors shall have been appointed and qualified. One of said Commissioners shall be appointed by the Mayor of the City, one by the Council of the City, and one by the Trustees of the New Castle Common of said City. The first Commissioners shall be appointed as soon as practicable after this

Act goes into effect. *The first Commissioner appointed by the Trustees of the New Castle Common shall serve until April 1, 1922; the first Commissioner appointed by the Mayor shall serve until April 1, 1923; and the first Commissioner appointed by the Council of the City shall serve until April 1, 1924; and thereafter in the month of March in each year a successor to the Commissioner whose term expires on April 1 in that year shall be appointed for the term of three years by the power who appointed the member whose term is to expire.* Any vacancy during a term shall be filled for the remainder of the term by appointment of the power who made the original appointment. In exercising the above appointing power, the Mayor shall not appoint himself, the Council shall not appoint one of its own members, and the Trustees of the Common shall not appoint one of its own members.

PARKS

(April 14, 1941)

Volume 43, Chapter 176, page 763, Section 5. This Act provided for municipal bond issue for parks, and Section 5 provided:

SECTION 5. WHEREAS, The Trustees of New Castle Common is a body created and incorporated for the purpose of managing and operating a large tract of land for the benefit of the citizens of New Castle, the said Trustees being elected by the citizens of New Castle, and WHEREAS the said Trustees of New Castle Common have, by Resolution, agreed to pay the interest on the bonds issued under the provisions of this Act, and have further agreed to pay and discharge said bonds when and as they fall due, it is therefore enacted that the superintendence, management, operation and control of any parks or open spaces acquired for the benefit of the citizens of New Castle, shall be held by those persons who from time to time constitute the duly elected membership of The Trustees of New Castle Common, which persons are hereby designated "The Park Commission of the City of New Castle," and the said Park Commission of the City of New Castle shall have power to make all needful rules and regulations for the management and use of any park under its control, not inconsistent with the laws and constitution of the United States and the State of Delaware, or with the ordinance of the City of New Castle; and any person who shall violate any of the said rules or regulations shall be guilty of a misdemeanor and shall pay such fines as may be prescribed by the Park Commission, not to exceed Ten Dollars (\$10.00) for each and every violation thereof, to be recovered before the Mayor of said City, or any Justice of the Peace in New Castle County, as debts of that

amount are recoverable, which fine shall be paid into the City Treasury. No intoxicating liquors shall be sold in any such public parks, and no meetings of any kind assembled through advertisement shall be permitted in any such park without the license or permission of the Park Commission having the park in charge; nor shall any gathering or meeting for political purposes in any park be permitted at any time, nor shall any person or corporation be granted any special rights or privileges therein.

The Trustees of New Castle Common may superintend, manage and control the said parks through proper committee or committees appointed by it, the members of said committee being either members of said Board of Trustees or other citizens of New Castle.

SALE OF LAND

When the New Castle County Airport, on July 28, 1941, took a large part of New Castle Common by condemnation the question of the investment of the proceeds became acute. The Act of 1885 (in case of voluntary sale) had provided "upon sale of the said premises, in part or in whole, as aforesaid, the purchase money arising therefrom shall be invested by said trustees in good real estate security * * *." It was not desired to dispose of land in a high state of cultivation, with buildings splendidly maintained, and reinvest in land and buildings of far inferior nature. Then, too, the validity and constitutionality of the Act had been severely questioned. Accordingly, the Trustees sought a legal opinion as to the necessity of investing in real estate security the proceeds of land taken by condemnation and not by voluntary sale, and also the right of the Trustees to sell land.

This opinion was obtained from Robert H. Richards, Esq., a distinguished and able member of the Bar, and was as follows:

RICHARDS, LAYTON & FINGER

May 13, 1941.

Trustees of the New Castle Common
New Castle, Delaware.

Honorable Richard S. Rodney, Secretary.

Dear Judge Rodney:

Your letter of April 14 submits four questions for an opinion, as follows:

1. Whether the Trustees of the New Castle Common, a Delaware corporation, have the *power* and the *right* to sell, in whole or in part, the real estate held by them and known as the New Castle Common.

2. What is the meaning of the phrase "good real estate security."

3. Whether, if the land known as the New Castle Common or part thereof should be taken by condemnation, the damages awarded to the Trustees of the New Castle Common for the taking of said land can be invested in the class of securities prescribed by the statutes of the State of Delaware as permissible securities for the investment of trust funds or whether the same must be invested in "good real estate security."

4. If the Trustees of the New Castle Common have the power and right to convert by sale the real estate held by them into personalty, how, if at all, can the provisions of Section 2 of the Act of April 15, 1885, (Vol. 17, Laws of Delaware, page 848), for the investment of the pro-

power to convey the real estate or any part thereof. In other words the corporation created by the instrument dated October 31, 1764, is denied the corporate power to convey the real estate that by the same instrument is granted in trust. (Pamphlet pg. 8.) The corporation (Trustees) are also, as a restriction on the administration of the trust, denied the right to sell but this is connected with and a necessary part of the conditions subsequent. Whether the grantors in the last named instrument had the sovereign or quasi-sovereign powers of proprietaries with respect to the three lower counties or whether they were merely the owners of the title to the real estate acquired by deed from the Duke of York, may be a question. If they had no such powers, their right to create a corporation in their capacity as proprietaries of the three lower counties may be questioned. We will assume that they had the right to create the corporation as proprietaries of Pennsylvania. We do not deem the question as to their power to create the corporation to be important, however, because, as will be seen hereafter, the General Assembly of Delaware in 1792 recognized the existence of the corporation created by the last named grant and apparently recognized its validity. (Pamphlet pg. 15.) Consequently the present Trustees of the Common, a corporation created by Act of the General Assembly of Delaware in 1792, cannot now question the validity of the pre-existing corporation, nor can the General Assembly of Delaware, nor can anybody else so question it.

The Trustees of the Common, the corporation created by the Penns, continued to hold the land as a Common and to manage it as such until 1792.

On the 7th of July, 1791, John Penn, of Stoke Pogis, and John Penn, (of the County of Middlesex, as late Proprietaries and, I assume, as the heirs or successors of Thomas and Richard Penn, for the recited purpose of giving to the Trustees of the New Castle Common an *unrestricted* (Pamphlet pg. 11) fee simple title to the land in question, *finally* completed the gift of the land in trust by executing a deed in fee simple for said land to three named individuals, Isaac Grantham, Robert Clay and William Lees, in trust to convey the same to the present or future Trustees of said land or to such future Trustees as might be appointed by an act of incorporation, when the same is passed, to be enacted by the General Assembly of the Delaware State, the said land to be granted to such then existing Trustees or new Trustees as so incorporated in trust for the use and behoof of the inhabitants of New Castle forever, to be appropriated in such manner as a majority of the Trustees in their wisdom may direct; provided that nothing contained in said deed to the said Grantham, Clay

and Lees or nothing to be contained in the deed to be made by them to the Trustees of the Common when so incorporated by the Delaware Legislature should vest in the Trustees of the Common *any power or authority to sell the land or any part thereof*.

It is to be noted and is of the highest importance and significance that this deed grants to the grantees the fee simple title to the property in trust to convey the same in fee simple to the new corporation to be created by the Delaware Legislature and to be held in trust by such new corporation for the benefit of the inhabitants of the Town of New Castle and to be applied or "appropriated" for their benefit in such manner as the Trustees may determine. By this deed the grantors, having the power so to do, wiped out the conditions subsequent and other restrictions contained in the grant of October 31, 1764, and released all vestige of control over the trust property and all remaining vestige of interest therein and it is particularly to be noted that the Trustees of the Common are not *denied* the right to sell the real estate conveyed or to be conveyed to them in fee simple and it is not provided that the deed to be executed by Grantham, Clay and Lees to the Trustees to be incorporated by the Delaware Legislature shall *deny* such Trustees the right to sell the real estate. All that is stated is that nothing contained either in the deed to Grantham, Clay and Lees or in the deed to be executed by them to the Trustees of the Common shall vest in the Trustees of the Common *any power or authority* to sell the real estate.

On January 25, 1792, the Delaware Legislature passed an act entitled, "An Act to Enlarge the Corporate Powers of the Trustees of the New Castle Common."

This Act creates a corporation and creates the Trustees of the New Castle Common, as existing at the time of the passage of the Act, and those who may thereafter become Trustees, a body politic and corporate by the name of "Trustees of the New Castle Common." This act in several places clearly recognizes the existence of the former corporation and recognizes its validity. It recreates it, however, gives it somewhat broader powers and inserts the word "the" in the corporate name. The land which the corporation holds in trust is no longer required to be held as a Common, but is to be administered by the corporation for the benefit of the inhabitants of New Castle by leasing.

It is to be noted that in the last part of the second enacting clause of this statute the corporation is *expressly denied the corporate power* to sell the land or any part thereof. It is also to be noted that this act was passed before Messrs. Grantham, Clay and Lees had conveyed to the new

corporation the title to the property. The denial of the right to sell is in my opinion a denial of corporate power and not a regulatory provision for the administration of the real estate constituting the trust fund intended thereafter to be held in trust and expected thereafter to be conveyed to such corporation. It is also to be noted that this provision in the charter is a provision inserted therein not by the donor of the trust property but wholly and entirely by the Legislature of Delaware, which was merely creating a corporate instrumentality to administer a trust previously created and thereafter expected to be enlarged.

Subsequently, on July 30, 1792, the said Grantham, Clay and Lees, as Trustees, under the deed above mentioned of July 7, 1791, granted the land in question in fee simple to the surviving Trustees of the Common in trust for the benefit of the inhabitants of New Castle, to be held by them upon the trusts and for the uses and purposes set forth in the above mentioned deed to the said Grantham, Clay and Lees and also in the Act of the General Assembly last referred to, but relieved of the restrictions and conditions subsequent in the original deed of grant dated October 31, 1764, and, so far as a sale of the land that is granted is concerned, it is merely recited that the deed to them and the subsequent deed they are authorized to make to the new corporation provides that nothing contained therein "shall vest the Trustees of the said Common with any power or authority to sell the same (the land) or any part thereof." It is to be noted that this is not a denial of the right of the Trustees of the Common ever to sell the land. It is merely a statement that nothing contained in the document shall vest in the Trustees any power or authority to sell the land. In view of this language the Trustees of the Common, the Delaware corporation, took the fee simple title to a trust fund consisting wholly of real estate without any provision in the trust deed authorizing them to sell it. The corporation was in the same position as any other trustee of a charitable trust to whom real estate has been granted in fee simple as the trust *res* without any express authority to sell the real estate and with the administrative instruction to the effect that it shall be leased and the income applied to the beneficiaries of the trust in perpetuity.

It is pointed out, therefore, that the corporation created by the Delaware Legislature is *denied* the corporate power to sell the real estate that it is expected to hold in trust. The pre-existing corporation was likewise *denied* such corporate power. (Pamphlet pg. 8.) This is a mere denial of corporate power and can be corrected at any time by amendment of the corporate charter. It is an entirely different thing from a denial of a right to sell imposed as an administrative limitation by the donor of a

trust with respect to the real estate, or other property constituting the trust *res* conveyed or transferred in trust by such donor.

The corporate power of the corporation created by the Delaware Legislature to lease the land in question was limited to leases for thirty years. Subsequently the Delaware Legislature amended the charter of the corporation by giving it the power to execute leases for a longer period than thirty years. Thereafter, in 1885, the Delaware Legislature by an act amending the charter of the Trustees of New Castle Common, by Section 1 of the Act, gave the corporation power to sell the land in whole or in part in fee simple and also gave the corporation the authority to make such sales; and, by Section 2 of the Act, provided that the money received from such sales should be invested in "good real estate security," to be held upon the same uses and trusts as the real estate prior to its sale and the income from such investments to be applied in the same manner as the income from the real estate, for the benefit of the inhabitants of New Castle.

It is my opinion that the Legislature in enacting Section 1 of the statute last mentioned acted in two capacities, (1) as the sovereign power of the State entitled to create corporations or amend their charters or give them additional powers, and (2) as *parens patriae* having the power to convert real estate held in trust into personal property under such circumstances as that it appears to the Legislature that such conversion is in the interest of the objects and purposes of the trust. Acting in the former capacity, the Legislature gave the corporation the power to sell the real estate, which the corporation did not theretofore have, and acting in the second capacity the Legislature authorized the corporation as Trustees to make such sales; and also acting in its capacity as *parens patriae* the Legislature, in enacting Section 2 of the Act, prescribed the kind of investments in which the proceeds of the sales of the real estate should be invested.

The Penns, by their gift in trust of the real estate referred to, finally completed by the grants made by the deed of July 7, 1791, to Grantham, Clay and Lees, and the deed from such grantees to the Trustees of the New Castle Common, Delaware corporation, created a public charitable trust. It has been so decided by the Supreme Court of this State in the case of *New Castle Common v. Megginson*, 1 Boyce 361.

The following has been stated to be the law of this State by the Supreme Court in the case of *Delaware Land & Development Co. v. First & Central Church*, 16 Del. Ch. 410 (428), (decided in 1929),—

"In the absence of a power of sale in the instrument creating a charitable trust, the property conveyed for such purposes, theoretically at least, is practically inalienable; it usually being of the very essence of a charity that it shall endure forever. *Seif v. Krebs*, 239 Pa. 423, 86 A. 872; *Bridgeport Public Library v. Burrough Home*, 85 Conn. 309, 82 A. 582; *Drury v. Natick*, 10 Allen (Mass.) 169; *Lackland v. Walker*, 151 Mo. 210, 52 S.W. 414; *Gray on Perpetuities*, § 5, 90; 11 C.J. 354.

While the facts should always be carefully scrutinized, a court of equity may, however, order the conversion of such property if it appears that such a conversion is essential to properly carry out the purposes of the trust. *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502; *Atty. Gen. v. South Sea Co.*, 4 Beav. 453; *Weeks v. Hobson*, 150 Mass. 377, 23 N.E. 215, 6 L.R.A. 147; *Rolfe, etc., Asylum v. Lefebvre*, 69 N.H. 238, 45 A. 1087; *Trustees for Baptist Church v. Laird*, 10 Del. Ch. 118, 85 A. 1082; 11 C.J. 354.

The legislature, also, has the same right, though as in a conversion by a court of equity, the fund must, ordinarily, at least, be used to carry out the purposes of the original trust. *Norris v. Clymer*, 2 Pa. 277; *In re Van Horne*, 18 R.I. 389, 28 A. 341; *Crawford v. Nies*, 220 Mass. 61, 107 N.E. 382; *Sobier v. Trinity Church*, 109 Mass. 1; *Stanley v. Colt*, 5 Wall. 119, 18 L.Ed. 502; 10 Amer. Dig. (Cent.), pp. 1325, 1326. See, also, *Roe v. Doe ex dem. Town of Seaford*, 2 Boyce, 348, 80 A. 250. (See *Tharp v. Fleming*, 1 Houst. 480.)

The authority of both the court of equity and the legislature is based on its rights as *parens patriae* in one case originally exercised by the English Court of Chancery by delegation from the King and in the other as succeeding to the original sovereign rights of the King. *Doughten v. Vandever*, 5 Del. Ch. 51."

FIRST, the first question is whether the Trustees of the New Castle Common, a Delaware corporation, have the power and the right to sell, in whole or in part, the real estate held by them and known as the New Castle Common.

The Act of the General Assembly of April 15, 1885 (Pamphlet pg. 26), clearly gives the corporation both the power and the right to sell the Common land or any part thereof. The question therefore is whether this Act of the General Assembly is a valid constitutional enactment. The case of *Tharp v. Fleming*, 1 Houst. 580, is undoubtedly responsible for this question.

In the case of *Tharp v. Fleming* the old Court of Errors & Appeals of Delaware, in a *per curiam* opinion, decided, with respect to the historic Potter trust, that an Act of the General Assembly previously passed authorizing a sale of the real estate which, as in the case of the New Castle Common, alone constituted the trust fund, was invalid and void for the reason that the will of Mr. Potter, the donor of the trust, expressly provided that the real estate should be held in perpetuity and rented out and the income derived from rents should be applied for the benefit of

the poor people of Kent County. The testator's will originally devising the land in trust gave the Trustees authority to sell and reinvest the proceeds. Later by a codicil the testator revoked the portion of the will giving the Trustees authority to sell and directed that they should hold the land in perpetuity as a trust fund to rent and collect the income and pay it over for the benefit of the poor of Kent County.

In *Tharp v. Fleming*, the Court states that inasmuch as the Court of Errors & Appeals had previously decided (2 Del. Chancery 421) that the devise of the land in trust "to be rented and not sold, or in perpetuity for the purposes of the charity mentioned" was a valid devise, it was not in the power of the Legislature to authorize and direct the sale and conversion of the land into personalty. The *per curiam* opinion does not state the reasons which impelled the court to the conclusion reached. It is to be presumed that the court was of the opinion that the statute was unconstitutional on the ground that it impaired the obligation of a contract; in other words that, inasmuch as the testator had the power to devise his real estate in perpetuity as a charitable trust, the Legislature had no power to repeal or modify this devise or to divest the title and estate given by it.

The Court of Errors & Appeals evidently viewed the will of Mr. Potter as expressly prohibiting a sale of the property or as *expressly denying* the Trustees the right to sell the property, such denial being a regulatory limitation of the trust. *Trustees of Baptist Church v. Laird*, 10 Del. Ch. 118 (1913).

Whatever may have been the reasoning of the Court of Errors & Appeals in the case of *Tharp v. Fleming*, the case stands alone in the United States.

It is doubtful whether the Supreme Court of this State, if the same question were again submitted to it, would follow the rule that appears to be laid down in *Tharp v. Fleming*. Personally I believe that the rule would not be followed. The correct rule is stated in the language hereinabove quoted from the opinion of the Supreme Court of this State in the case of *Delaware Land & Development Co. v. First & Central Church*, supra.

A note in *Gray on the Rule against Perpetuities* (3 Ed.), page 472, seems to intimate that that author may have thought the Court of Errors & Appeals of Delaware, in the case of *Tharp v. Fleming*, merely intended to hold that an Act of the Legislature cannot destroy a charitable gift. If this was the idea it must have been on the theory that the perpetual character of the charitable trust inhered in the land itself. It is hard for

me to believe that such could have been the idea of the court. The characteristic of perpetuity inheres in the charitable nature of the trust and not in the sort of property that originally constitutes the trust *res*.

Very little has been said by the Delaware courts about *Tharp v. Fleming* since that decision was handed down. The opinion of the Honorable Nathaniel B. Smithers found printed in 8 Del. Ch. page 554, written at the request of Chancellor Saulsbury with respect to certain questions that had arisen concerning the Potter trust, indicates to my mind that Mr. Smithers questioned the correctness of the opinion of the Court of Errors & Appeals in *Tharp v. Fleming*.

In the case of *Trustees of Baptist Church v. Laird*, 10 Del. Ch. 118, the Chancellor, dealing with a charitable trust in which real estate had been conveyed in trust, with "no express or implied restriction against the sale and conveyance of the land" in the instrument by which the trust was created, distinguished the case from the case of *Tharp v. Fleming* on the ground that there was no prohibition of sale in the instrument creating the trust and no express or implied condition subsequent that would terminate the trust in case of sale. In this case the land which had been conveyed in trust was being sold and the trust fund converted into personalty. The Chancellor said,—

"The case of *Tharp v. Fleming*, 1 Houst. 580, arising under the Potter will, is not an authority against the conversion, *because in that case a conversion was expressly prohibited by the will creating the trust.*"

In the case of *Delaware Land & Development Co. v. First & Central Church*, supra, the Supreme Court of this State were considering a trust of real estate with respect to which they found that there was no condition subsequent in the deed that originally granted the real estate in trust, nor does it appear that there was any express prohibition or denial of right to the trustee to sell the land. The opinion of the court makes no reference to *Tharp v. Fleming* except on page 428 of the report, where it merely says "(See *Tharp v. Fleming*, 1 Houst. 480)" without any comment on the case. This is in a paragraph in the opinion which states the general rule that the Legislature, as *parens patriae*, has the right to authorize the conversion of real estate held by a public charitable trust into personalty to be used to carry out the purposes of the original trust. It would seem to me from the opinion of the Supreme Court of this State that that court would not follow *Tharp v. Fleming* if the same question were again submitted to it. No pains was taken by the Supreme Court in *Delaware Land & Development Co. v. First & Central Church* to distinguish *Tharp v. Fleming* or to discuss it.

Wherever the case of *Tharp v. Fleming* is referred to in the Delaware reports, which is only in one or two other cases, nothing is said about it that throws any light upon its meaning or the attitude of the court with respect to it.

In *Lackland v. Walker*, 52 S.W. 414 (426), the Supreme Court in Missouri, in 1899, has this to say,—

"And with the exception of a single per curiam deliverance, and that in a state which accords no particular favor to charitable trusts (*Tharp v. Fleming* (1858), 1 Houst. 580, 592), the American courts, and particularly those which recognize the doctrine of an enlarged jurisdiction in respect of such trusts, have been most emphatic in their recognition of the power in question."

referring to the power of a court of equity to authorize real estate held by a charitable trust to be sold altho' the instrument creating the trust and transferring the real estate held in trust prohibits its sale, such power to be exercised only where the court finds it is in the interest of and promotes the purposes of the trust to authorize such sale.

The leading case in this country sustaining the proposition that, where real estate is devised or conveyed in trust for the purposes of a public charitable trust and the devise or conveyance prohibits its sale, a court of equity exercising its supervisory power as *parens patriae*, or a State legislature exercising the same power, has the right and the power to authorize the conversion of the real estate held in trust into personalty to be invested and applied upon the same trusts for which the real estate was held, is the case of *Stanley v. Colt*, 5 Wall. 119, decided by the Supreme Court of the United States in 1866. This case has been followed in many cases in the Federal and State courts.

I am of the opinion that the case of *Tharp v. Fleming* does not govern the question now being discussed. The case *must* be distinguished on the ground that when the New Castle Common trust was finally completed there were no conditions subsequent affecting the gift of the real estate trust and the donors had not expressly denied the Trustees (incorporated) the right to convert the real estate into personalty. All that was said by the donors was that the final grant completing the trust was not to be construed as giving the Trustees the power or right to so convert. The Delaware Legislature in creating the corporation which was to be the vehicle for the administration of the trust denied the corporation the corporate power to convey the real estate and assumed to deny the Trustees (incorporated) the right or authority to convert. What the Legislature did in creating the corporation is an entirely different thing from what was done by the donors of the trust property. They not having expressly

denied the Trustees the right to convert, it seems clear to me that *Tharp v. Fleming* can have no application and is clearly distinguishable.

As stated above, the Delaware Legislature, exercising its power to create corporations, undoubtedly had the right to amend the charter of the Trustees of the Common by giving that corporation the power to sell land and, exercising its function as *parens patriae*, had the right to give the Trustees the right and authority to convert the real estate into personalty provided the personalty was to be held in trust for the same purposes as the real estate. By the Act in question the Delaware Legislature granted the corporate power to the corporation to sell the real estate and authorized them to convert it into personalty by Section 1 of the Act, and by Section 2 of the Act required that the proceeds be reinvested and held for the same purposes that were originally prescribed by the creators of the trust.

The Act was undoubtedly intended to be an amendment of the corporate charter of the Trustees of the New Castle Common. It was passed by the vote required by the then existing constitution for the creation of corporations or the amendment of their charters.

It is my opinion therefore that the first question must be answered in the affirmative and that the Trustees of the New Castle Common have the power and the right to sell the real estate in whole or in part, provided the proceeds of the sale are invested and used as prescribed by Section 2 of the Act last referred to and the income devoted to the same purposes as those finally provided for by the donors of the trust.

SECOND, the second question is what is the meaning of the phrase "good real estate security" as used in the said Act of the Delaware Legislature of April 15, 1885.

The general term usually used at the present time to describe investments of trust funds is the word "securities." It is to be noted that in the Act referred to the word used is "security." While the word "security" is but the singular of the word "securities," I am convinced that in determining the meaning of the phrase "good real estate security" it is not permissible to consider merely the numerous cases in which the word "securities" has been judicially defined.

The word "security" is a word of broader connotation than the word "securities." The primary meaning of "security" as given by *Bouvier* is, "that which renders a matter sure"; or as otherwise defined is something which makes the enjoyment or enforcement of a right more secure or certain; that which secures or makes safe; *In re New York Title & Mort-*

gage Co., 289 N.Y.S. 771 (785). The word "security" as used in the phrase "a security" also has the meaning of the singular of the word "securities" and is defined to be an evidence of debt or of property, as a bond, stock certificate or other instrument, etc., *Groby v. State*, 143 N.E. 126. The word "securities" is generally defined as referring to written assurances for the return or repayment of money or evidences of indebtedness, *Jaffe v. Goldner*, 251 Ill. App. 188; or the word in its broadest sense has been held to embrace bonds, certificates of stock and other evidences of debt or of property, *Thayer v. Wathen*, 44 S.W. 906 (909); *City Bank Farmers Trust Co. v. Lewis*, 189 Atl. 178. I think it is pretty safe to say that the word "securities" does not include land. *Pratt v. Worrell*, 57 Atl. 450 (453).

It is my opinion that the phrase "good real estate security" as used in the Act in question means either real estate itself or first mortgages on real estate. Of course the meaning of language is always affected by surrounding circumstances; hence the varieties of meanings given to words or phrases in reported cases. It is evident that the good security which the statute requires is security that is based on real estate. This may be either real estate itself or it may be first mortgages on real estate. Inasmuch as the original trust fund of the completed trust was nothing but real estate, when authority is given to convert by sale the trust fund, or *part* thereof, into personal property and to reinvest that personal property (the proceeds of the sales) in "good real estate security," there is no reason to suppose that the Legislature intended to exclude real estate itself from the meaning of the phrase "good real estate security," if the commonly accepted meaning of the phrase would include real estate itself, as I think such meaning does. It is likewise clear that first mortgages on real estate were intended to be included within the meaning of the phrase; but, in view of all the circumstances including the time when the act was passed, I do not think the phrase can be given a more extensive meaning and cannot be held to include first mortgage bonds issued by a corporation and secured by deed of trust.

In the case of *In re Mendel's Will*, 159 N.W. 806 (9), the pertinent language of the will was,—

"I direct my Executors and Trustees to convert as early as practicable all my property and estate into first class interest bearing real estate mortgage securities and keep the same so invested."

The court said that the testator meant more than that the "securities" should be good and of real estate character, in the broad sense of the term. "He meant to confine the investments to the narrow class characterized by sole ownership of the entire mortgage indebtedness, so the

securities might be enforced by the Trustees, if necessary, without regard to any other party interest therein. 'First class' was not thought by the creator would permit his estate to be complicated with rights of any number of persons who might be interested, as creditors, in the mortgaged property. He intended to require mortgages, running to the Trustees, or held by them for the sole benefit of the trust fund. Evidently, in his judgment, a mere participating certificate, entitling the Trustees, as such, to share with many persons in a mortgage indebtedness, or a bond entitling them to share with a large number of bondholders, located in many places throughout the country, and, perhaps, in foreign countries, with many possible efficient difficulties to contend with, in case of necessity to enforce the security, would not answer the call for first class mortgage securities to be the repository of the trust fund."

Other cases cited in reference works were, when examined, found not to be helpful.

It is my opinion that the phrase "good real estate security" should be construed to mean either real estate itself or first mortgages on real estate in which the trustees have the sole interest.

THIRD, the third question is whether, if the land known as the New Castle Common or part thereof should be taken by condemnation, the damages awarded to the Trustees of the Common for the taking of the land must be invested in "good real estate security" as required by Section 2 of the Act of April 15, 1885, in case of a sale of real estate constituting the Common land.

It has been said that the condemnation of land for public use is a "compulsory purchase" or a "compulsory sale," dependent upon whether the transaction is viewed from the position of the taker of the land or that of the owner of the land.

In the case of *In re Barre Water Co.*, 20 Atl. 109 (110), 9 L.R.A. 195 (197), it is stated that the phrase "compulsory purchase" has been used to characterize the exercise of the power of eminent domain.

In 20 C.J. 515, it is stated that the exercise of the right of eminent domain is in the nature of a "compulsory sale" of the owner's interest in the property sought to be appropriated. Quite a number of cases are cited to this text.

In the case of *Atlanta etc. R. R. Co. v. Southern R. R. Co.*, 131 Fed. 657 (certiorari denied 95 U.S. 634), it is stated that "a proceeding to condemn is, in substance, a proceeding to compel a sale by the owner to the petitioner."

If consideration should be given to the above mentioned authorities and similar cases, alone, it would probably be necessary to conclude that condemnation is in effect a sale and that therefore the reinvestment of the proceeds must be as required by Section 2 of the above mentioned Act of April 15, 1885.

However, I do not reach this conclusion. I am very clear that the Legislature of Delaware when the act last mentioned was passed did not have in its mind a condemnation of the property concerning which it was legislating. The primary purposes of this Act were (1) to give the Trustees of the Common, a Delaware corporation, corporate power, which it did not theretofore have, to sell the real estate which it owned (in fact it had no power to sell any real estate); (2) to authorize the Trustees of the Common, Delaware corporation, qua trustees, to convert the real estate, in whole or in part, into personalty, an authority that the Trustees qua trustees did not theretofore have; and (3) to provide for the investment of the proceeds of such sales and to prescribe the kind of investments in which such proceeds might be invested. Undoubtedly these things and nothing else were all that the Legislature had in mind and the sole purposes it sought to accomplish. It was providing for voluntary acts by the Trustees, a Delaware corporation, and providing for the consequences of such acts.

My view is based on the construction of the language of the statute. Section 1 of the statute contemplates no sales except sales which are the voluntary act of the Trustees of the Common and which are to be consummated by the execution and delivery by the Trustees of deeds to the purchaser. Section 2 of the Act relates only to sales such as are provided for by Section 1 of the Act. The language of the Section begins, "Upon sale of the said premises, in whole or in part, *as aforesaid*, the purchase money arising therefrom shall be invested, etc."

It is clear to me that the legislative intent contemplated nothing more than voluntary sales by the Trustees of the Common and the investment of the proceeds of such voluntary sales. To say now that the statute covers the investment of proceeds of condemnation of the land would be to include something within the legislative intent which, in my mind, was not in the legislative intent when the act was passed and for the inclusion of which therein there is now no justification. Certainly this would seem to be true when there is another Delaware statute, 4401 of the Code of 1935, Section 35 of Chapter 117, as amended, which prescribes the manner in which the proceeds of a condemnation of the land must be invested, if such proceeds are not included within the purview

of the Act of April 15, 1885. The Code provides that trustees may invest the trust funds (A) in accordance with the provisions pertaining to investments contained in the instruments under which they are acting, or (B) in the absence of any such provisions, then in certain specified classes of securities. This statute means that if there is an express direction in the instrument creating the trust for the investment of funds, that direction must be followed; otherwise the Code must be followed. The statute of April 15, 1885, does not expressly provide for the investment of the proceeds of condemnation of the land and consequently the Code provisions must be followed. There is no justification to stretch the legislative intent of the Act of April 15, 1885, to include the proceeds of condemnation when by doing so we cut down the application of the Code provisions. While statutes are to be liberally construed, such liberal construction is for the purpose of effectuating the legislative intent. They are not to be liberally construed for the purpose of bringing something within the legislative intent that was not there when the statute was passed. Especially is this true when there is another statute which, without such construction, covers the situation.

If there were no Code provisions for the investment of trust funds and the Trustees of the Common should apply to the Chancellor for instructions as to how to invest money received from the condemnation of their land, the Chancellor might be inclined to say that, while a condemnation is not a voluntary sale, nevertheless by analogy to the statutory provision for the investment of proceeds of sales as contained in the Act of April 15, 1885, he would follow the rule there laid down for sales and direct the investment as therein provided. By reason of the fact that the Code provisions for the investment of trust funds do exist, there is no necessity for reasoning from analogy nor indeed is there any opportunity to do so. On the other hand, if the money received from condemnation is not expressly within the language of the Act of April 15, 1885, the Chancellor would have no choice in the matter nor any right to reason from analogy. The Code provisions operate automatically and they prescribe the rules for investment.

I am therefore of the opinion that the proceeds of condemnation of the lands of the Trustees of the Common should be invested in accordance with the provisions of 4401 (B) of the Code of 1935, as amended, and I have no doubt with respect to the correctness of this view.

If there were any doubt upon this point, I am of the opinion that the Trustees of the Common could have the doubt settled by an application to the Chancellor, exercising his supervisory power over trusts, for

instructions as to the manner in which it is their duty to invest the proceeds of any money received from condemnation of their real estate.

In considering the Act of April 15, 1885 (Vol. 17, pg. 848, Del. Laws), it is clear to me that in authorizing the sale (not granting corporate power) and in providing for the investment of the proceeds, the Legislature was acting as *parens patriae*. The power and jurisdiction of the Chancellor, as *parens patriae*, is coordinate with that of the Legislature. The Chancellor can exercise this power whenever a proper application is made invoking that jurisdiction and his action must be based upon the facts and circumstances existing at the time and the determination of the question as to what is for the best interest of the trust and most in furtherance of the purposes thereof. If at some time the Legislature, not enacting general law but acting as *parens patriae* with respect to a particular trust, specified certain investments of the funds of the trust; undoubtedly the Chancellor, acting as *parens patriae*, at some later date, can by reason of changed conditions and then existing facts and circumstances authorize the investment of the trust funds in other kinds of securities in addition to those prescribed by the Legislature. Indeed Section 35 of Chapter 117 of the Code of 1935 (4410 of said Code), which prescribes classes of investments for trust funds generally, preserves to the Chancellor, exercising his supervisory jurisdiction over trusts, his general power to authorize the investment of trust funds in such manner as he sees fit, by paragraph (14) of subdivision (B) of Section 35, which paragraph, after the preceding paragraphs have specified particular kinds of investments, authorizes trustees to invest in "such stocks, bonds and securities as may be approved by the court having jurisdiction," which court is the Court of Chancery.

FOURTH, the last question is, if the Trustees of the New Castle Common have the power and right to convert by sale the real estate held by them into personalty, how, if at all, can the provisions of Section 2 of the Act of April 15, 1885 (Vol. 17, Laws of Delaware, page 848), for the investment of the proceeds of any such sale be changed, modified or amended so as to give more latitude for investment.

As stated above, it is my opinion that the Act of April 15, 1885 (Vol. 17, pg. 848, Del. Laws), does three things, viz., (1) it gives to the corporation power to sell its real estate; (2) expressing the will of the Legislature acting as *parens patriae*, it authorizes the corporation administering the charitable trust to convert the real estate constituting the trust fund into personalty; and (3) exercising the will of the Legislature

acting in the same capacity, it prescribes investments for the proceeds of such sales.

Although, generally speaking, one might say that what the Act of April 15, 1885, does while expressing the will of the Legislature acting as *parens patriae*, is not an amendment of a corporate charter but merely gives a direction to a corporation administering a charitable trust, just as a Chancellor might do by decree; nevertheless all of the three things effectuated by the Act are effectuated in a single act passed by the vote required for an amendment of a corporate charter, and I think it cannot be denied that all of the things provided for in said Act are now included in and parts of the corporate charter of the Trustees of the New Castle Common.

At the time of the last mentioned Act, the Legislature had the power to create corporations by special act and to amend the charters of corporations previously created.

At the present time, however, the Legislature does not have, except to a very limited extent, the power to create or amend the charters of corporations by special act. It is provided by the Constitution now in force, Article IX, Sec. 1, that—

"No corporation shall hereafter be created, amended, renewed or revived by special act, but only by or under general law, nor shall any existing corporate charter be amended, renewed or revived by special act, but only by or under general law; but the foregoing provisions shall not apply to municipal corporations, banks or corporations for charitable, penal, reformatory, or educational purposes, sustained in whole or in part by the State."

It is clear from the foregoing constitutional provision that the field of legislative power to create corporations by special act, or to amend their charters by special act, is limited to "municipal corporations, banks or corporations for charitable, penal, reformatory, or educational purposes, sustained in whole or in part by the State." The Trustees of the New Castle Common is a corporation for a charitable purpose but it is not "sustained in whole or in part by the State." Consequently the amendment of its charter is no longer within the field of legislative power. It is therefore clear that the Legislature cannot, by special act or otherwise, strike out from Section 2 of the Act of April 15, 1885, the words "good real estate security," or change them, or substitute other words for them, or otherwise change the language of said Act.

It does not follow from the foregoing, however, that the Legislature does not now have the power to broaden the field for the investment of the proceeds of real estate sold by the Trustees of the New Castle Com-

mon under the power and authority granted by the said Act of April 15, 1885. While the Legislature no longer has the power to change or amend the charter of the Trustees of the New Castle Common, it nevertheless has all the power it ever had to act in its capacity of *parens patriae* with respect to the administration of the trust that is now being administered by the Trustees of the New Castle Common, as a corporate trustee. Acting in this capacity, the Legislature does no more than express the legislative will, acting as *parens patriae*, and the act of the Legislature expressive of such will is substantially the same as a decree of the Chancellor acting as *parens patriae* in the exercise of his supervisory jurisdiction over trusts. The Legislature, acting as *parens patriae*, cannot strike out from the charter of the corporation the words "good real estate security" now contained therein, nor change those words, because to do so would be to amend the charter, but the Legislature, acting as *parens patriae*, can authorize the corporate trustee to invest the proceeds of the sale of real estate not only in "good real estate security," which they now have the authority to invest in, but also in other classes of securities that would be specifically or generally prescribed by the Act of the Legislature.

Consequently it is my opinion that the field for the investment of the proceeds of the sale of real estate by the Trustees of the New Castle Common can be validly extended and broadened by an Act of the Legislature of Delaware, passed by mere majority vote, acting in its capacity as *parens patriae*, prescribing other classes of investments for the proceeds of such sales *in addition to* the class of investments already prescribed by Section 2 of the Act of April 15, 1885. Such an Act should recite the special reasons and changed conditions why such field of investment should be broadened and why to do so would be in furtherance of the purposes of the trust confided to and administered by the Trustees of the New Castle Common, as a corporate trustee.

While the Chancellor, acting as *parens patriae*, would, in my opinion, also have the power to make a decree, for good cause shown, directing the investment of the proceeds of the sale of real estate in other classes of securities in addition to those prescribed by the Act of April 15, 1885, it is quite probable that the Chancellor would not, and possibly may not have the power to, make a decree that would be general in its nature and that would apply to the investment of anything else than the proceeds of a specific sale which had been made and with respect to the investment of the proceeds of which the jurisdiction and assistance of the Chancellor is invoked. In other words, courts act in specific cases and do not by

decrees or orders make general rules. For this reason, it is my opinion that the Trustees of the New Castle Common, if they should desire to have the field of investment of the proceeds of sales of real estate broadened, should seek relief from the Legislature and not from the Court of Chancery.

Yours very truly,

ROBT. H. RICHARDS.

NOTE—The word "pamphlet" used in the foregoing opinion refers to the pamphlet printed and published by The Trustees of the New Castle Common called "Title Papers of the New Castle Common, etc."

It will be noted that at the time of the preparation of the foregoing opinion there was not available much of the information contained in this booklet covering the origin and history of New Castle Common.

Pursuant to this opinion there was prepared and subsequently adopted by the General Assembly of Delaware, in 1943, the following Act, known as Chapter 213, Volume 44, Laws of Delaware:

LAWS OF DELAWARE

Volume 44, Chapter 213, Page 617

AN ACT CONCERNING THE INVESTMENT OF THE PROCEEDS OF SALES OF REAL ESTATE BY THE TRUSTEES OF THE NEW CASTLE COMMON.

WHEREAS by warrant from William Penn and by subsequent charter and deeds from his heirs certain real estate adjacent to the City of New Castle was vested in the Trustees of the New Castle Common for the benefit of the inhabitants of said City;

AND WHEREAS the Trustees of the New Castle Common having charge of said real estate were also incorporated by Act of the General Assembly of the State of Delaware, passed January 25, 1792;

AND WHEREAS in said charters there existed in the said corporation, the Trustees of the New Castle Common, no corporate power to sell the said real estate;

AND WHEREAS by Act of the General Assembly of the State of Delaware, passed April 15, 1885 (Vol. 17, Laws of Delaware, Chapter 575), the legislature granted to the said corporation, the Trustees of the New Castle Common, the corporate power to sell the said real estate, and also by the said Act the legislature acting as "parens patriae" authorized the sale of said real estate and provided that the proceeds of sale, if made, should be invested in "good real estate security";

AND WHEREAS, by reason of changes in economic conditions since the

passage of said Act, it may now and hereafter be impossible or inadvisable to invest all of said proceeds in good real estate security at the time of any such sale;

Therefore, be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met, and acting as "Parens Patriae":

SECTION 1. That in addition to the real estate security in which proceeds of sale may be invested as provided by Section 2 of Chapter 575 of Volume 17, Laws of Delaware, it shall and may be lawful for the Trustees of the New Castle Common to invest any purchase money arising from the sale of real estate in such other securities or investments as may be legal investments for other trust funds under the Laws of the State of Delaware. The said real estate security or other securities or investments shall be held upon the same uses and trusts as the said real estate has been held, and for no other, and the income arising from the said securities or investments shall be applied by the Trustees of the New Castle Common as the rents and profits of the real estate have heretofore been applied, for the benefit of the inhabitants of the City of New Castle, in the discretion of the said Trustees.

Approved January 27, 1943.

SOME PURPOSES FOR WHICH FUNDS HAVE BEEN APPLIED

The funds derived from New Castle Common have, through the years, been devoted to so many purposes that only the larger interests can be considered.

PUBLIC EXPENSES, &c.

For many years the Trustees assumed all the expenses of Town Government, and until after 1850 there was no town tax at all. As early as 1807 the Trustees defrayed the expenses of furnishing lights for the Town, and enclosed the public square and planted trees. Trees have been furnished a number of times and recently many have been planted both on public property and throughout the Town. In 1822 the Town Clock was purchased by the Trustees, and through all the years has been maintained by the Trustees and has given remarkable satisfaction. The

Town Hall was built by the Trustees on public property, and for over a century has furnished a meeting place for the people of the Town.

PREVENTION OF FIRE

As early as 1819 the Trustees purchased a fire engine for the Town. Appropriations and assistance have been repeatedly and freely given to the Volunteer fire companies who have served the Town so well. These companies have been the Union, Penn, Delaware, Goodwill, Lenape and the present excellent Goodwill Company. The Trustees originally built the lower floor of the Town Hall for fire companies, and a few years ago took title to the present fire hall, discharged the indebtedness, and turned the property over to the city, free of debt. Since ambulances have been adopted as part of the firemen's equipment, the Trustees have gladly aided in their purchase and maintenance.

STREETS

In the early days the Trustees paid all the costs of improving the streets, first with gravel and then with cobble stones, which was then the best known means of paving. As late as 1912 the Trustees spent \$7000 in assisting the paving with more modern material.

WHARVES

At an early date the Trustees built the wharf at the foot of Harmony Street, and in 1914 paid half the cost of the Delaware Street Wharf, of about \$7000.

SCHOOLS

The very first appropriation of funds in 1798 was for educational purposes. For a time all the funds of the trust were devoted to the erection and maintenance of the New Castle Academy. Later the Arsenal Building on the Green (then a one-story building) was taken by the Trustees and rebuilt, and here the Trustees established the New Castle Institute. The Trustees then operated and entirely supported all the public schools of the town until 1875, when the Board of Education was created. The Trustees furnished the site for the District School on School House Lane, recently demolished for the Airport. A large contribution later made possible the erection of the school building at the West end of the town at 11th and Gray Streets. About 1931, when William Penn School was built, the State appropriation was not sufficient without serious

curtailment of the plans. The value of the building was secured by the aid of the Trustees to the extent of \$20,000.

WATER

As early as 1823 the Trustees expended a large sum in boring for artesian wells for the use of the Town. When the first public water system was suggested in 1869 the project could not be carried out unless the Trustees guaranteed the interest on a large amount of bonds. This was done, and the water works installed and the interest paid until about 1899. When the City of New Castle acquired its own Public Utilities the management was entrusted to a commission appointed respectively by the Mayor, City Council and Trustees of New Castle Common.

EMPLOYMENT OF CITIZENS

Between 1903 and 1915 the Trustees, at the earnest request of the citizens, took steps to provide employment for the citizens of the town. By providing sites and other material aid to the extent of upwards of \$26,000 the Brylgon, Baldt and Tropenas Steel Companies were located in New Castle and for many years furnished employment to a large number of inhabitants.

RELIEF

In times of financial stress the funds of the Board have been freely devoted to purposes of the relief of the inhabitants who have been denied all opportunity of employment. Calls of the Red Cross or more local charities have been speedily and liberally answered.

PARKS

In 1939 the Trustees, for the sum of \$25,000, purchased the large tract on the River front, known as the Battery, for a park and public playground. It was subsequently deeded to the city. The inhabitants are thus assured, for all time, that this splendidly located tract will always be open for their enjoyment. It may be, that in the years to come, the future of the Trustees of New Castle Common will be in the nature of a Park Board. To this end the Legislature of the State in 1941 created the Trustees of New Castle Common as the Park Board to have supervision and charge of all parks acquired for the use of the City of New Castle.

In thus presenting some details of this unusual and unique institution the limitation of space has necessarily required the elimination of many

events of more local color—those interesting items which constitute the folk lore inevitably attaching to a continuous history from the earliest colonial times.

We have attempted merely to present the outlines of this active, living and useful trust which has continued to function in its full vigor for a period of almost three centuries. We have viewed the preservation of this material as important, not merely because of its value for the proper administration of the trust itself, but because it typifies the survival of a rare example of an ancient mode of life, now scarcely to be elsewhere found, together with its adaptation to more modern conditions.

As we have herein shown, there is substantial evidence to the effect that New Castle Common had its existence prior to 1664, when the English first exercised any jurisdiction over Delaware soil. The first recorded mention of the tract, of which we now have knowledge, was, however, in the Minutes of Assembly of September 20, 1701. The date of submission of this booklet of September 20, 1944, exactly two hundred and forty-three years later, has, therefore, been advisedly chosen and is deemed as not an inappropriate date.