# SUPREME COURT DECISIONS.

[Filed January 4, 1891.]

Appeal from Superior Court, Contra Costa County—Joseph P. Jones, Judge.

For appellant, W. S. Tinning.

For respondent, Chase, Chase & Miller.

IN BANK.

W. A. KIRKWOOD, Respondent, vs. A. J. SOTO, Appellant. } No. 13,894.

The respondent was elected Superintendent of Schools for Contra Costa County at the general election held in 1886. His term was four years, commencing on the first Monday of January following. In due time he qualified and entered upon the discharge of his duties, and has ever since continued to hold the office.

At the time of his election, Contra Costa was a county of the seventeenth class, and the County Government Act contained the following provision in regard to his salary:

"Section 179. In counties of the seventeenth class, the county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries, to wit: * * *

"11. The Superintendent of Schools, $1,800 per annum." (Stats. 1885, p. 176.)

In March, 1889, Section 1552 of the Political Code was amended so as to read as follows:

"Sec. 1552. Each County Superintendent shall receive his actual and necessary traveling expenses, said expenses to be allowed by the Board of Supervisors, and to be paid out of the county general fund; provided, that this amount shall not exceed ten dollars per district per annum. He shall also be allowed postage and expressage, payable out of the county school fund, two dollars for each school district; provided, that in incorporated cities each school containing three hundred pupils shall be considered equal to one school district."

After this amended section took effect the respondent incurred, in the performance of his official duties as School Superintendent in visiting schools in his county, actual and necessary traveling expenses to the amount of $76 75. For this amount he presented a claim to the Board of Supervisors, properly itemized and verified, for allowance. The claim was examined and allowed by the board and a warrant was ordered drawn on the County Treasurer therefor. The appellant was County Auditor at the time, and as such refused to draw the warrant ordered, and thereupon this proceeding was commenced to compel him to do so.

After a hearing the court below granted the prayer of the petition and ordered a peremptory writ of mandate to issue, commanding the appellant to forthwith draw his warrant in favor of the petitioner upon the County Treasurer for the amount allowed and ordered paid by the Board of Supervisors. From that order or judgment this appeal is prosecuted.

The only contention of appellant is that Section 1,552, *supra*, is inapplicable and unconstitutional, so far as the respondent is concerned, it having been passed after he was elected to office, because, in authorizing the payment of his necessary traveling expenses, it in effect increases the compensation or salary allowed him at the time of his election.

The clause of the Constitution relied upon reads as follows: "The compensation of any county, city, town or municipal officer shall not be increased after his election or during his term of office." (Art. XI., Sec. 9.)

The words "compensation" and "salary" were evidently used synonymously in the Constitution and in the County Government Act. Thus in Art. V., Sec. 19, of the Constitution it is provided: "The Governor, Lieutenant-Governor, Secretary of State, Controller, Treasurer, Attorney-General and Surveyor-General shall, at stated times during their continuance in office, receive for their services a compensation which shall not be increased or diminished during the term for which they shall have been elected," etc. In Article IX, Section 2, it is provided: "A Superintendent of Public Instruction shall, at each gubernatorial election after the adoption of this Constitution, be elected by the qualified electors of the State. He shall receive a salary equal to that of the Secretary of State," etc. And in Article VI., Section 17, this language is used: "The Justices of the Supreme Court and Judges of the Superior Court shall severally, at stated times during their continuance in office, receive for their services a compensation which shall not be increased or diminished after their election, nor during the term for which they shall have been elected. The salaries of the Justices of the Supreme Court shall be paid by the State. One-half of the salary of each Superior Court Judge shall be paid by the State; the other half thereof shall be paid by the county for which he is elected. During the term of the first Judges elected under this Constitution, the annual salaries of the Justices of the Supreme Court shall be six thousand dollars each." In the County Government Act the same language is used at the commencement of each section, which fixes the compensation of county officers. It is: "The county officers shall receive as compensation for the services required of them by law, or by virtue of their office, the following salaries."

Since the adoption of the present Constitution many Acts have been passed by the Legislature, after the commencement of terms of office, providing for the payment of necessary expenses incident to the offices. Among them the following may be noted:

The Justices of the Supreme Court and the Judges of the Superior Court, who were first elected under the Constitution, entered upon the discharge of their duties as such on the first Monday of January, 1880. In April following, an Act was passed to amend Part I. of the Code of Civil Procedure and substituting a new Part I., to take the place thereof. (See Am. to Codes, 1880, p. 21.) By Section 47 of this Act it was provided that the Supreme Court shall hold regular sessions at the Capital of the State, at the city and county of San Francisco and at the city of Los Angeles; and that "The Justices and officers of the Supreme Court shall be allowed their actual traveling expenses in going to and from their respective places of residence upon the business of the court, or to attend its session." By Section 71 it is provided that a Judge of any Superior Court may hold the Superior Court in any county, at the request of the Judge of that county, "and, upon the request of the Governor, it shall be his duty to do so." And by Section 160 it is provided that "A Judge so holding a court, at the request of the Governor, shall be allowed his actual expenses in going to, returning from and attending upon the business of such court, which shall be a charge against the treasury of the county where such court is held and paid out of the general fund thereof."

The constitutionality of these provisions has never been questioned, so far as we are advised, in any court or elsewhere, and yet, if the theory of the appellant be true, they would seem to have been subject to the same objections raised here, during the terms of the Justices and Judges who were in office at the time the Act was passed.

The question now presented for decision does not appear to have been ever passed upon by the Supreme Court of this State, but a similar question was before the Supreme Court of Illinois in Briscoe vs. Clark County, (95 Ill. 309).

The Constitution of that State provided that the County Board should fix the compensation of all county officers, with the amount of their necessary expenses, "provided that the compensation of no officer shall be increased or diminished during his term of office." The Supreme Court held that it was the salary of the county officer—the compensation for the personal discharge of official duty—which the board was forbidden to change. The compensation or salary was to be fixed in advance, but the expenses were to be determined by the *necessity* which the business of the office should develop, and being so, the allowance for expenses could be increased.

In our opinion, it was the compensation for services to be rendered, and not the incidental expenses of the office, that the Legislature was forbidden by Section 9 of Article XI. of the Constitution to raise.

We therefore advise that the judgment appealed from be affirmed.

We concur: FOOTE, C. GIBSON, C. BELCHER, C. C.

THE COURT.

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

Filed, January 12, 1891.

Appeal from Superior Court, Santa Barbara County—R. M. Dillard, Judge.

For appellant, Putnam & Nichols.

For respondent, B. F. Thomas, W. P. Butcher.

DEPARTMENT ONE.

PETTINGER, Respondent, vs. FAST, Appellant. } No. 13,735.

Action to recover the sum of $1,950, alleged to be due plaintiff, for the balance of the purchase price of land conveyed by plaintiff to defendant. The court below gave plaintiff judgment for that sum, and also denied defendant's motion for a new trial, and the defendant appeals from such judgment and order.

The facts as found show, that on November 17, 1886, plaintiff executed to appellant a deed of his farm, the appellant agreeing in writing to pay therefor the sum of $4,000, and to give one-half of all, in excess of that sum, which "the farm can be sold for within two years," such additional sum "to be also a part of the purchase price, when so sold for a larger sum." It is also found that on September 1, 1887, "appellant entered into an agreement in writing with one Ed. Culbert, whereby he sold to said Culbert the said parcels of land for the sum of $8,000."

The principal question to be determined on this appeal is whether the finding of the court in relation to the sale of the land is justified by the evidence. It was shown upon the trial that on September 1, 1887, the appellant and one Culbert entered into an agreement in writing by which the appellant "promises and agrees to sell and convey unto the party of the second part (Culbert) and to make and execute and deliver to him a deed" of the land purchased by appellant from the plaintiff in this action, the said Culbert "to have and to hold all and singular said premises, together with all the tenements, hereditaments and appurtenances thereunto belonging * * * except that portion of the timber thereon, hereinafter mentioned and reserved unto the party of the first part." The agreement further recited that the appellant was to have all the timber on said land, "except that on the southern line on the mesa, adjoining the Rincon Rancho, and on the east end of said mesa."

It is clear that under appellant's agreement with respondent an actual sale of the farm within the time limited was not indispensably necessary in order to establish as a fact the price for which it could have been sold, and thus fix the liability of appellant thereunder. The appellant would not have been at liberty to reject any *bona fide* offer of purchase for a sum exceeding $5,000 without the consent of the respondent. But the complaint alleges an actual sale to Culbert for the sum of $8,000, and the Court so finds, and it is therefore necessary to consider whether such fact was established upon the trial.

The appellant insists that there was no sale to Culbert at all, but only an agreement to sell. But we are of opinion that such contention cannot be sustained. In the case of Eaton vs. Richeri, (83 Cal. 185), the plaintiff therein was to wait for any balance that might be due him until certain mining property was sold and an executory contract for the sale of the mine was made, and the court held that the plaintiff could recover, saying: "The word "sold" does not necessarily and in all connections mean that a conveyance must be made, or that the title must pass."

The fact that no money was received by appellant on the contract is immaterial. The transaction was none the less a sale, and by it the equitable title of the property sold passed to Culbert. But in one respect the evidence does not sustain the finding of the court as to this sale. The written agreement of sale contained a reservation of standing timber, and, we think, notwithstanding some conflict in the evidence, that the real transaction between appellant and Culbert was a sale of the farm for the sum of $6,000, and the appellant reserving the growing timber thereon as specified in the contract of sale. The fact that this timber may have been estimated by both appellant and Culbert as of the value of $2,000, or that appellant's price for the land with timber standing was $8,000, and with a reservation of such timber $6,000, cannot change the terms of the actual sale, as made to appear by the written contract of sale. By that contract, as we have said, the farm was sold for the sum of $5,000, the appellant reserving as an interest therein the standing timber referred to, and proof of such a contract is at variance with the contract alleged in the complaint and found by the court, and the finding that the farm was sold for the sum of $8,000 is not sustained by the evidence.

Undoubtedly the respondent's right to recover on his contract is not limited to the sum agreed to be paid by Culbert, but if he seeks to recover more it must be upon a complaint which shows the facts as they really exist. It is clear that upon the execution of the contract of sale appellant disabled himself from thereafter accepting any *bona fide* offer for the farm, and the respondent became entitled to recover, not only upon the basis of the price agreed to be paid by Culbert, but in addition thereto one-half of the market value of the standing timber reserved, or, at his option, one-half of the net sum for which such timber may have been sold by appellant.

Judgment and order reversed.

DE HAVEN, J.

We concur: PATERSON, J. GAROUTTE, J.

[Filed January 17, 1891.]

IN BANK.

THE PEOPLE EX REL. LAINE, Respondents, vs. G. G. TYRRELL, Appellant. } No. 14,076.

On November 17, 1884, during a recess of the Legislature, a vacancy existed in the membership of the State Board of Health, and on that day the appellant, Tyrrell, was appointed a member of said board, and in the commission issued to him by the Governor it was recited that he was thereby appointed "a member of the State Board of Health, vice F. W. Hatch, deceased, *for the term expiring January 11, 1888.* Appellant duly qualified as such officer November 19, 1884, and since that date has continued to discharge the duties of said office.

Upon January 20, 1885, the Legislature being in session, the Governor transmitted to the Senate a message informing that body of appellant's said appointment, on November 17, 1884, "*for the term of four years, vice F. W. Hatch, deceased,*" and the Senate was requested to consent thereto. The Senate took action upon said message, and the question, "will the Senate advise and consent to the appointment of G. G. Tyrrell of Sacramento as a member of the State Board of Health for the term of four years, *vice* F. W. Hatch, deceased?" was decided in the affirmative. The Governor did not thereafter issue to appellant any commission for said office, nor has he since such action of the Senate taken any oath of office as a member of said Board.

On March 18, 1889, during a recess of the Legislature, the Governor appointed the relator, Laine, to the said office of member of the State Board of Health, and upon that day he duly qualified as such.

The judgment of the court below was in favor of the relator, and ousting the appellant from said office. From this judgment and an order denying his motion for a new trial, the defendant, Tyrrell, appeals.

We think the commission issued by the Governor to appellant on November 17, 1884, must be held to have legal effect, simply as an appointment to fill the vacancy then existing, until the adjournment of the next session of the Legislature, as the Governor was not authorized to make an appointment for any longer time than during the recess of the Legislature. (Pol. Code, Section 1000.)

Upon the issuance of this commission the appointment to fill such vacancy temporarily was complete, and needed no action of the Senate to confirm it. (People vs. Cazneau, 20 Cal. 504). And we think that under this commission the appellant was vested with the right to hold said office until the appointment and qualification of a successor, in the mode provided by law. Section 879 of the Political Code declares: "Every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified," and Section 1000 of the Political Code does not create an exception to this rule, in the case of officers temporarily appointed by the Governor. The language of that section, "but the person so appointed can only hold the office until the adjournment of the next session of the Legislature," simply means when construed with Section 879, as it must be, that the term of such appointed officer *shall expire* upon the adjournment of the next session of the Legislature, and his successor may take his place; but if no successor has been appointed, then the very condition of affairs intended to be provided for by Section 879 has arisen and that section applies.

It is the settled law of this State that the mere expiration of the term of the incumbent of an office does not create a vacancy therein such as the Governor alone is authorized to fill by the appointment of a successor. (People vs. Tilton, 37 Cal. 614; People vs. Bissell, 49 Cal. 407.)

It would follow from this that the appointment of the relator during a recess of the Legislature was invalid, unless, under Section 996 of the Political Code, a vacancy was created by the failure of the appellant to take and file his official oath after the confirmation of the Senate. The obligation to take and file such oath did not arise unless the message of the Governor announcing the appointment of appellant during the recess, and the action of the Senate advising and consenting to the same, constituted an appointment of appellant as his own successor. But even construing these acts of the Governor and Senate as a nomination and confirmation of appellant as his own successor (and whether they can be so construed we do not determine), such appointment was not completed, no commission having been subsequently issued to the appellant. In the matter of an executive appointment, with the consent of the Senate, the issuance of a commission is not a mere ministerial act, but is a part of the act of appointment. It is this act which completes the appointment, as well as perpetuates the evidence of it. (People vs. Murray, 70 N. Y. 526.) And this is also the doctrine of the case of Conger vs. Gilmer (32 Cal., 76).

It follows that the court below erred in rendering judgment for the relator upon the findings.

Judgment and order reversed.

DEHAVEN, J.

We concur: SHARPSTEIN, J. BEATTY, C. J. HARRISON, J. GAROUTTE, J. MCFARLAND, J.

[Filed January 12, 1891.]

IN BANK.

BENSON, Respondent, vs. SHOTWELL, Appellant. } No. 12,661.

BY THE COURT.

January 10, 1891.

After a careful reconsideration of this case we are satisfied that, although the facts have been stated too strongly against the respondent with respect to the first point discussed in the leading opinion heretofore filed, the decision is nevertheless correct and fully sustained upon the ground stated and relied upon in the concurring opinion of Mr. Justice Works. For this reason respondent's petition for a rehearing is denied.


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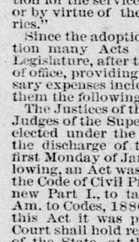

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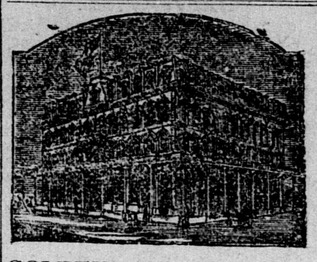

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ST. DAVID'S, 715 Howard Street, near Third, San Francisco, A FIRST-CLASS LODGING HOTEL, CONTAINING 200 rooms; water and gas in each room; no better beds in the world; no guest allowed to use the linen once used by another; a large reading room; hot and cold water baths free. Price of Rooms—Per night, 50 and 75 cents; per week, from $2 upwards. Open all night. R. HUGHES, Proprietor.

☞ At Market-street Ferry take Omnibus Line of street cars for Third and Howard. TTS

TRADE COMPOUND Sulphur Powder! MARK.

—THE— Most Perfect Laxative and Cathartic KNOWN!

Will Give Instant Relief and Effect Permanent Cures in Cases of

HABITUAL CONSTIPATION, INDIGESTION, PILES, BILIOUSNESS, DISEASED LIVER, SCIATICA, RHEUMATISM, GRAVEL, ETC., ETC.

The Greatest Blood Purifier OF THE AGE.

Pleasantest to the Taste! Wonderful in Its Results!

PUT UP ONLY BY THE W. H. BONE CO., 12 Bush street, San Francisco.

KIRK, GEARY & CO., Sole Agents, Sacramento. ja16-tf


TRUSTEES' SALE OF REAL ESTATE.

WHEREAS, OLIVER E. HOTCHKISS made a certain deed of trust to W. P. Coleman and F. R. Dray, dated December 12, 1888, and recorded on the 13th day of December, 1889, in Book Number 121 of Trust Deeds, at page 305 and following, records of the County of Sacramento, State of California, the said trust deed conveying the real property hereinafter described, for the purpose of securing the payment of a certain promissory note of even date therewith, made by Oliver E. Hotchkiss; and whereas default has been made in the payment of the principal and interest of said note, now, therefore, by the authority vested in them by said trust deed, and upon application of the owner and holder of said note, the undersigned, as such Trustees, will, on MONDAY, the 9th day of February, 1891, between the hours of 10 and 11 o'clock A. M., in front of the Court-house door, in the City of Sacramento, County of Sacramento, State of California, sell at public auction to the highest bidder for cash, in United States gold coin, all the said real property, situate in the County of Sacramento, State of California, and described as follows, to wit: All of sections twenty-two (22) and twenty-seven (27) in Township Eight (8), north of Range Seven (7) east, Mount Diablo base and meridian, lying north of that part of the Omochumnes or Sheldon Grant, known as Upper Daylor Estate, excepting therefrom the west half of the northwest quarter of said section twenty-two (22), and containing five hundred and forty-three (543) acres, more or less; also, all water rights and water ditches and privileges now or hereafter in any way appertaining to, or used, or connected with said lands, together with all the improvements and appurtenances belonging to said land.

Sacramento, January 14, 1891.

F. R. DRAY, Trustee. ja15-TTS3w W. P. COLEMAN, Trustee.


SHERWOOD HALL NURSERIES Timothy Hopkins, MENLO PARK, SAN MATEO COUNTY, CAL. Carnations, Roses, Chrysanthemums and Cut Flowers. ☞ SWEET PEA SEED A SPECIALTY. ☜

SPECIALTY FOR THIS WEEK: Quaker Drops! 510 K STREET. ja5-tf


## Banking Houses.


NATIONAL BANK OF D. O. MILLS & CO., Sacramento, Cal.—Founded, 1850. Saturday Hours.....10 A. M. to 1 P. M.

Directors and Shareholders:

| | |
|---|---|
| D. O. MILLS | 1,538 Shares |
| EDGAR MILLS, President | 1,538 Shares |
| S. PRENTISS SMITH, Vice-Pres. | 250 Shares |
| FRANK MILLER, Cashier | 351 Shares |
| C. F. DILLMAN, Asst. Cashier | 125 Shares |
| Other persons own | 1,198 Shares |

Capital and Surplus, $600,000.

☞ Chrome Steel Safe Deposit Vault and Time Lock.

FARMERS' AND MECHANICS' SAVINGS BANK Southwest Corner Fourth and J streets, Sacramento, Cal. Guaranteed Capital.....$500,000

LOANS MADE ON REAL ESTATE. INTEREST paid semi-annually on Term and Ordinary Deposits.

B. U. STEINMAN.....President
EDWIN K. ALSIP.....Vice-President
D. D. WHITBECK.....Cashier
C. H. CUMMINGS.....Secretary
JAMES M. STEVENSON.....Surveyor

DIRECTORS: B. U. STEINMAN, EDWIN K. ALSIP, C. H. CUMMINGS, W. E. TERRY, SOL. RUNYON, JAMES MCNASSER, JAS. M. STEVENSON.

CALIFORNIA STATE BANK And Safe Deposit Vaults, SACRAMENTO, CAL. Draws Drafts on Principal Cities of the World. Saturday Hours, 10 A. M. to 1 P. M.

OFFICERS:

President.....N. D. RIDEOUT
Vice-President.....FRED'K COX
Cashier.....A. ABROTT
Assistant Cashier.....W. E. GERBER

DIRECTORS: C. W. CLARKE, JOS. STEPPENS, GEO. C. PERKINS, FRED'K COX, N. D. RIDEOUT, J. R. WATSON, W. E. GERBER.

PEOPLE'S SAVINGS BANK, Sacramento City.....California CAPITAL STOCK PAID UP, $225,500; Reserve and Surplus, $54,253 26. Term and Ordinary Deposits received. Dividends paid semi-annually. Money loaned on Real Estate only. WM. BECKMAN, President. GEO. W. LORENZ, Cashier.

SACRAMENTO BANK. THE OLDEST SAVINGS BANK IN THE city, corner of Fifth and J streets, Sacramento. Guaranteed capital, $500,000; paid up capital, gold coin, $300,000; loans on real estate in California, July 1, 1890, $2,398,442; term and ordinary deposits, July 1, 1890, $2,769,394. Term and ordinary deposits received. Dividends paid in January and July. Money loaned upon real estate only. The Bank does exclusively a savings bank business. Information furnished upon application to W. P. COLEMAN, President. ED. R. HAMILTON, Cashier.

CROCKER-WOOLWORTH NATIONAL BANK, 322 Pine street, San Francisco. PAID-UP CAPITAL, $1,000,000. SURPLUS, $250,000.

DIRECTORS: CHARLES CROCKER.....E. H. MILLER, JR. R. C. WOOLWORTH.....President W. E. BROWN.....Vice-President W. H. CROCKER.....Cashier


## Fruits, Seeds, Produce, Etc.


CULTIVATED WHITE WILD OATS And ALFALFA SEED in lots to suit. W. H. WOOD & CO., WHOLESALE PRODUCE, Nos. 117 to 125 J Street, Sacramento.

S. GERSON & CO., —WHOLESALE— Fruit, Produce and Commission Merchants, SACRAMENTO, CAL. P. O. Box 170.

CURTIS BROS. & CO., GENERAL COMMISSION MERCHANTS, Wholesale Dealers in Fruit and Produce, 308, 310, 312 K st., Sacramento. Telephone 37. Postoffice Box 335.

W. R. STRONG CO., Wholesale Fruit and Produce Dealers, SACRAMENTO, CAL.

EUGENE J. GREGORY. FRANK GREGORY. GREGORY BROS. CO., SUCCESSORS TO GREGORY, BARNES & CO., Nos. 126 and 128 J st., Sacramento, wholesale dealers in Produce and Fruit. Full stocks of Potatoes, Vegetables, Green and Dried Fruits, Beans, Alfalfa, Butter, Eggs, Cheese, Poultry, Etc., always on hand. Orders filled at LOWEST RATES.

THE PARKER HAMMERLESS SHOTGUN

AT THE ANNUAL TOURNAMENT OF 1889, held at Cannes, France, the grand prize, consisting of 2,000 francs and a valuable cup, was won with the Parker Hammerless. The first Parker Hammerless gun made won the championship of America at Decatur, Ill. Send for illustrated circular.

PARKER BROS., Makers, MERIDEN, CT. New York Salesroom, 97 Chambers St.

"NO HUMBUG," 5 CENTS "Spanish Blossom," 10 Cents. THE BEST 5 AND 10-CENT CIGAR EVER PLACED ON THE MARKET.

A. HERTZEL, Dealer in Cigars and Tobacco, No. 826 K street

HENRY ECKHARDT, GUNSMITH, MANUFACTURER AND DEALER IN Guns, Rifles, Revolvers, Ammunition and Sporting Goods. All the leading makes of Guns and Rifles at popular prices—Parker, Lefever, Colts, Smith, Ithaca, new Baker and new make Guns. First-class Gun and Rifle Work. Send for price-list of Guns. No. 523 K Street, Sacramento, Cal.


CAUTION AGAINST FRAUD.

IN THE MATTER OF THE ESTATE OF Thomas Harrigan, deceased, now pending in the Probate Court, no final account has ever been made nor no final settlement as yet. MARGRET HARRIGAN, executrix and administratrix. ja8-1m

## Business Cards.


ARCHITECTS.

N. D. GOODELL AND F. H. SCHARDIN have associated themselves together as Architects and Builders. Office, Pioneer Hall, Seventh street, between J and K, Sacramento, Cal. Consultation and estimates made free of charge.

MRS. MARION STIRLING, M. D., LATE LADY PRINCIPAL OF DUFFERIN Medical College for Women, and Superintendent of Women's Hospitals and Dispensaries in Northern British India. Diseases of women and children a specialty. OFFICE—Room 7, Odd Fellows' Temple.

H. F. ROOT. ALEX. NEILSON. J. DRISCOL. ROOT, NEILSON & CO., UNION FOUNDRY—IRON AND BRASS