CONNECTICUT REPORTS.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

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JUDGES

OF THE

SUPREME COURT OF ERRORS

DURING THE TIME OF THE WITHIN DECISIONS.

Hon. CHARLES B. ANDREWS, Chief Justice.
Hon. DAVID TORRANCE.
Hon. AUGUSTUS H. FENN.
Hon. SIMEON E. BALDWIN.
Hon. WILLIAM HAMERSLEY.

JUDGES OF THE SUPERIOR COURT.

Hon. Frederick B. Hall.
Hon. Samuel O. Prentice.
Hon. John M. Thayer.
Hon. Silas A. Robinson.
Hon. George W. Wheeler.
Hon. Ralph Wheeler.
Hon. Milton A. Shumway.
Hon. William T. Elmer.

The Statute Book referred to in this volume as the Revised Statutes or General Statutes, is the Revision of 1888.

The month given at the top of each page is that within which the opinion was filed.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

HENRY DORRANCE *vs.* IRA RAYNSFORD ET UX.

First Judicial District, Hartford, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

By the law of this state, as well as by the common law, the real estate of a deceased person vests immediately upon his death in his heirs or devisees. It can be taken from them, only to satisfy some claim existing against the estate, or some condition arising in its settlement which makes the sale of the land necessary or advantageous, and then only in the manner provided by law.

A Court of Probate in ordering a sale of any of the real estate of a deceased person, is exercising a special statutory power, and not one that pertains to the ordinary settlement of the estate.

It is essential to the validity of an order of a Court of Probate directing the sale of land of a deceased person, as well as to the validity of the deed of the administrator given pursuant thereto, that public notice of the application to sell should have been given to the parties adversely interested in the estate. The burden of proving these facts rests upon the party who sets up and relies upon the administrator's deed.

A written application to sell, if not essential in every case to the validity of the subsequent proceedings, is at least the only prudent course. If an oral application could ever be tolerated, it could only be in a case where the record itself set forth in full the facts on which the sale was sought and on which it was authorized.

It is a principle of natural justice of universal obligation, that before the right of an individual can be determined by judicial sentence, he shall have notice, either actual or constructive, of the proceedings against him.

[Argued October 1st—decided November 22d, 1895.]

ACTION to recover the possession of certain real estate, together with damages, brought to the Superior Court in Windham County and tried to the court, *Thayer, J.*; facts found and judgment rendered for the defendants, and appeal by the plaintiff for alleged errors in the rulings of the court. *No error.*

The land in question had been owned and occupied by George W. Palmer up to the time of his death, and both parties to the action claimed under him. The defendants were in possession of the land, holding adversely to the plaintiff. To show his title to the demanded premises, the plaintiff offered in evidence a deed purporting to convey the said premises, executed by Gilbert A. Palmer as administrator of the said George W. Palmer, deceased, which recited that it was given "by virtue of an order of the Court of Probate for the District of Canterbury, dated the 29th day of September, A. D. 1892, authorizing and directing me to sell at public or private sale the real estate of the said George W. Palmer, deceased." The order so referred to was as follows:—

"On the application of Gilbert A. Palmer, administrator on the estate of Geo. W. Palmer late of Canterbury in said district, deceased, showing that it is for the interest of said estate that such of the real estate of said deceased as is hereinafter described should be sold: And further showing, that the real estate of said deceased proposed to be sold consists of a certain piece or parcel of land with buildings thereon, situated in the town of Canterbury in said probate district: This court finds the facts as set forth in said application to be true. Whereupon the court doth authorize and direct said Gilbert A. Palmer, administrator, to sell either at public or private sale, and in such manner as will least injure the heirs, the real property of said estate; first giving at least ten days' notice of the time and place of the proposed sale, by advertising in a newspaper having a circulation in said Canterbury, and by posting on the public sign-post nearest the estate to be sold and within the same town, and make return to this court to whom sold and for how much, with the expense of sale."

The finding states that "no written application was ever made to said Court of Probate for authority to sell said real estate." Oral evidence—to which the defendant objected—was admitted, from which the Superior Court found that "an oral application was made by the said administrator to sell said real estate for the purpose of raising money to pay the debts of the said intestate estate;" but that "no public notice of any hearing upon an application for such sale was ever offered or given," and that "no evidence, other than the said order of sale, was offered tending to show that any hearing was had before said Court of Probate with reference to the sale of said real estate, or the issuing of said order."

The return made on said order, to the Court of Probate, by the administrator, stated that he had given the notice thereon required, of the time and place of the proposed sale, and that he had sold and conveyed said land to Henry Dorrance.

The defendants offered no evidence, but insisted that they were entitled to a judgment, for the reason that the plaintiff had failed to make out any title in himself. The court rendered judgment in their favor, and the plaintiff appealed to this court.

Charles F. Thayer, for the appellant (plaintiff).

The trial court erroneously decided that a written application, a newspaper notice, a formal hearing, and possibly the consent of the widow in writing, were jurisdictional facts necessary to be proved by the plaintiff as a part of his title. Standard Dict.; Hawes on Jurisdiction, Chap. 1, §§ 2, 3; *U. S.* v. *Arredono*, 6 Pet., 709; *McNitt* v. *Turner*, 16 Wall., 352; *Shelton* v. *Hadlock*, 62 Conn., 143; *Grignon* v. *Astor*, 2 How., 317; 23 Amer. & Eng. Ency. of Law, 406, note 2.

The law now confers upon the Court of Probate the power to order the sale of a deceased person's realty, in its discretion. Its jurisdiction is no longer limited to cases where the debts of the estate exceed the personal property, as when *Wattles* v. *Hyde* was decided. Gen. Stat., § 600; *Buel's Appeal*, 60 Conn., 65.

The statute is directory merely. *Gallup* v. *Smith*, 59 Conn., 354; *Grignon* v. *Astor*, 2 How., 317; *Lynch* v. *Baxter*, 4 Tex. 431, 51 Am. Dec. 735; 23 Amer. & Eng. Ency. of Law, 460.

As to the application, the statute does not in terms require that it be made in writing.

If the legislature had intended to limit the jurisdiction of the Court of Probate to cases brought before it by a written application, it would not have struck out the word "written" —the only word indicating such limitation—from the then existing statute. Rev. 1875, 394, §§ 37, 38; *Mechanics' Bank* v. *Woolen Co.*, 59 Conn., 347. Notice does not determine the jurisdiction. The provision for notice is directory to the administrator. Moreover, sales of land under orders of the Court of Probate are judicial sales, and proceedings *in rem*, to which all claiming under the intestate are parties. The only question of jurisdiction here, is the power of the court over the thing, the subject-matter before it, without regard to the parties who may have an interest in it. *Simmons* v. *Saul*, 138 U. S., 439; *Davis* v. *Gaines*, 14 Otto, 386; *Grignon* v. *Astor*, 2 How., 317; *Lynch* v. *Baxter*, 4 Tex. 431; *Colt* v. *Eves*, 12 Conn., 243; *Donovan's Appeal*, 40 id., 154; *Gallup* v. *Smith*, 59 id., 354.

Whether there was or was not a formal hearing, is not a jurisdictional fact. *Gallup* v. *Smith*, 59 Conn., 354; *Miller* v. *U. S.*, 11 Wall., 268.

The widow's consent was not necessary, and the failure to obtain it could not oust the court of jurisdiction. The widow's rights are preserved to her by the same statute that now leaves the sale of land to the sound discretion of the Court of Probate. *Buel's Appeal*, 60 Conn., 65.

Having shown an application by an administrator for authority to sell; the decree of the Probate Court giving the authority, and the administrator's deed given under it; the plaintiff was entitled to judgment, under the rule which protects *bona fide* purchasers of land at a judicial sale. The fact that the court made the order is presumptive proof of the existence of all other necessary acts prior thereto. *Law-*

rence's Appeal, 49 Conn., 423; *Florentine* v. *Barton*, 2 Wall., 210; *Thompson* v. *Tolmie*, 2 Pet., 157; *Nash* v. *Williams*, 20 Wall., 226; *Grignon* v. *Astor*, 2 How., 319; *Simmons* v. *Saul*, 138 U. S., 439; *Davis* v. *Gaines*, 104 id., 386; *Miller* v. *U. S.*, 11 Wall., 368; *McNitt* v. *Turner*, 16 id., 352; *Goforth* v. *Longworth*, 4 Ohio, 129; *Lynch* v. *Baxter*, 4 Tex., 431, 51 Am. Dec. 735.

This judgment of the Court of Probate could have been attacked directly by appeal, but it can be attacked in a collateral proceeding for fraud only. Gen. Stat., § 436; *Gallup* v. *Smith*, 59 Conn., 354; *Bell* v. *Raymond*, 18 id., 100; *Sears* v. *Terry*, 26 id., 279; *Coit* v. *Haven*, 30 id., 197; *Dickinson* v. *Hayes*, 31 id., 422; *Bulkeley* v. *Andrews*, 39 id., 535; *Gregory* v. *Sherman*, 44 id., 471; *Culver's Appeal*, 48 id., 133.

J. H. Potter, for the appellees (defendants).

There is no error in the judgment of the Superior Court.

The Court of Probate had no power to decree the sale of the real estate, except on application of the administrator while the estate was in settlement, and upon hearing, (upon said application) after public notice. Gen. Stat., § 600. That there must be a hearing on the application before a decree, renders it necessary that it should be in writing. Conn. Civil Officer, 15th Ed., 417. The court had no power to decree the sale of the real estate *even upon* an application, until after a hearing, and until public notice of such hearing had been given by publishing it in a newspaper having a circulation in the probate district. Gen. Stat, §§ 600, 446. *Potwain's Appeal from Probate*, 31 Conn., 383; *Wattles* v. *Hyde et al.*, 9 id., 9; *Griffin* v. *Pratt*, 3 id., 513, 515; *Goodwin* v. *Chaffee*, 4 id., 163; *Mitchell* v. *Hazen*, 4 id., 495; *Watson* v. *Watson*, 10 id., 77; *Howard* v. *Lee*, 25 id., 1–5.

ANDREWS, C. J. The only substantial question presented by this appeal is whether or not the deed under which the plaintiff claimed, was valid to convey the real estate that had belonged to George W. Palmer in his lifetime. All the other questions in the case are included in this one.

"It is a general principle, that the party who sets up a title must furnish the evidence necessary to support it. If the validity of a deed depends on an act *in pais*, the party claiming under that deed is as much bound to prove the performance of the act, as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he became a purchaser, and the evidence of them should be preserved as a necessary muniment of title." *Williams* v. *Peyton's Lessees*, 4 Wheat., 79 (MARSHALL, Ch. J.); *Ransom* v. *Williams*, 2 Wall., 313, 319; *Early* v. *Doe*, 16 Howard, 610; *Mason* v. *Fearson*, 9 id., 248; *Thatcher* v. *Powell*, 6 Wheat., 119, 125; *Beekman* v. *Bingham*, 5 N. Y., 366; *Mut. Benefit Life Ins. Co.* v. *Tisdale*, 91 U. S., 238; Wharton on Evidence, §§ 176, 923.

To support his title under this deed, it was necessary for the plaintiff to show that the said adminstrator had a valid power to sell the land of his intestate, and that such power had been exercised in the manner required by law. To do this he put in evidence the order of the Court of Probate and the other evidence mentioned in the finding.

By the law of Connecticut, as by the common law, the real estate of a deceased person vests at once in his heirs or legatees. 2 Blackstone's Comm., 201; 1 Swift's Dig., 113. George W. Palmer died intestate, and whatever real estate he owned at the time of his death, vested immediately in his heirs, and could be taken from them only to satisfy some claim existing against him in his lifetime, or some condition arising in the settlement of his estate which made the sale of land necessary or advantageous, and then only in the manner pointed out by law. *Shelton* v. *Hadlock*, 62 Conn., 143; *Buel's Appeal from Probate*, 60 id., 65–67.

The several statutes and statutory changes according to which the Courts of Probate have from time to time been empowered to authorize the sale of any interest which a deceased person, whose estate was being settled, had in such

real estate, have been very recently considered by this court in *Buel's Appeal*, *supra*. We have no occasion to repeat that examination.

Originally, courts exercising jurisdiction over the settlement of estates of deceased persons, had no authority whatever over the real property belonging to the deceased. In later times such courts could, by the authority of the statutes, order the sale of so much, and only so much, of the land of the deceased, as was necessary to pay any excess there might be of the indebtedness of the deceased over the value of the personal property. This was the law of Connecticut down to very recent times, as is shown in *Buel's Appeal*. But under the later statutes, as well as under all former ones, a Court of Probate, when ordering a sale of any of the real estate of a deceased person, is exercising a special statutory power. It is a power not regarded as one that pertains to the ordinary settlement of the estate. In all such cases the rule is that the authority must be strictly followed, otherwise the order will be void. *Wattles* v. *Hyde*, 9 Conn., 10; *Watson* v. *Watson*, 10 id., 77; *Howard* v. *Lee*, 25 id., 1; *Atwater* v. *Barnes*, 21 id., 237; *Parsons* v. *Lyman*, 32 id., 566, 571; *Potwine's Appeal*, 31 id., 383; *Thatcher* v. *Powell*, 6 Wheat., 127.

The evidence offered by the plaintiff was insufficient to support the deed. Whenever the land of a deceased person is sold by an order of the Court of Probate, the only prudent course is that the application to the court should be in writing, so that the facts on which the sale of the land was sought and on which the sale was authorized, should appear distinctly on the record. If an oral application could ever be tolerated, it could only be in a case when the record itself set forth the facts in full. In this case the record is fatally defective, and is not saved by the provisions of § 436 of the General Statutes.

But there is a much stronger reason. The statute—§ 600—under which the Court of Probate acted, requires that there should be a hearing after a public notice, before any order for the sale of any land of a deceased person can be made. In this case there is no evidence that any public notice or any notice whatever, of the application to sell, was given

to the parties interested adversely in the estate sought to be sold. The order of sale was invalid for this reason. It appears that among the persons so adversely interested were the present defendants; as also were the heirs of George W. Palmer. They had no notice of any hearing, nor did they have any hearing as to the proposed sale. As to them the proceedings before the Court of Probate were *coram non judice* and wholly void. It is a principle of natural justice of universal obligation, that before the right of an individual can be bound by judicial sentence, he shall have notice, either actual or constructive, of the proceedings against him. *The Mary*, 9 Cranch, 126; *Bradstreet* v. *Insurance Co.*, 3 Sumner, 607.

The evidence failed to show that the said administrator had power to sell the land described in the deed.

There is no error.

In this opinion the other judges concurred.

GEORGE P. ROCKWELL, EXECUTOR AND TRUSTEE, *vs.* EDWARD BRADSHAW ET AL.

First Judicial District, Hartford, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

An Englishman, who had formerly lived in Connecticut, died, domiciled in England, leaving personal property here and a will, executed and probated in England, an exemplified copy of which was duly admitted to probate in this State. In his will the testator sought to provide for the distribution of his American property among his American relatives through an American administration, and his English estate among his English relatives through an English administration. The will directed that one third part of the residue of the American property should be divided equally by his American executor and trustee, between his niece *S*, her two sons *C* and *H*, and her three daughters *B*, *E*, and *R*; but made no express provision for the case of a lapse by the death of any of them prior to the death of the testator. A subsequent clause bequeathed all the "personal estate not herein before respectively disposed of," to English executors and trustees in trust for English relatives. *H* died prior to the testator, and in a suit brought by

the American executor and trustee to determine what disposition should be made by him of that portion of the American property bequeathed to *H*, the English executors and trustees were not made parties. The Superior Court adjudged that the bequest to the testator's niece and her children was not a gift to them as a class, as claimed by them, but a gift in severalty to the legatees named therein; that the gift to *H* had lapsed and become intestate estate by reason of his death before that of the testator, and that it should be distributed *per stirpes* among certain persons named, some of whom were Americans and some English, as next of kin of the testator. *Held* :—

1. That the English executors and trustees were indispensable parties to the suit, and that the decree of the trial court could not be sustained in so far as it had resulted, or could result, in prejudice to them.
2. That the conclusion of the trial court that the legacy in which *H* had a share was not a class gift, but a lapsed bequest, was correct, and favorable to the interests of the English executors and trustees. But that the rest of the decree could not be upheld, since the English executors and trustees were entitled to be heard upon the question whether the effect of such lapse was to vest the property, as intestate estate, in the next of kin, or in themselves as trustees under the residuary clause above quoted.
3. That the fact that the fund was in the hands of a citizen of this State, who received it as an executor or trustee under an English will, did not give the Superior Court jurisdiction to compel the English executors and trustees to submit their claims to its administration or accept the ordinary consequences of a default.
4. That the Court of Probate had possession of the *res*, and was fully competent to pass such orders in the premises as would protect the plaintiff, and at the same time secure the rights of all who were interested in the result.

The succession to a testator's personal estate must be regulated by the laws of the country of his domicil, except so far as, by their authority, the will may have provided for a local and limited administration elsewhere.

Under a legacy given to several, *nominatim*, to be equally divided between them, they take, *prima facie*, severally as tenants in common; but this presumption obtains only in the absence of, and not in opposition to, a contrary intent apparent from the whole will, viewed in the light of surrounding circumstances, so far as they may properly be taken into consideration.

It is the duty of every court to see to it that no judgment is rendered against one who has not had an opportunity to be heard in his own behalf.

[Argued October 2d—decided November 22d, 1895.]

SUIT to determine the construction of the will of Henry Wright of England, deceased, brought to the Superior Court in Hartford County, and tried to the court, *Thayer, J.*; facts

found and judgment rendered in favor of the next of kin, and appeal by the respondents Edward and Sarah Bradshaw, for alleged errors in the rulings of court. *Judgment affirmed in part, and set aside as to the residue.*

The testator was an Englishman, who had formerly lived in this country, and died possessed of personal estate in this State. His will, after referring to such estate, contained a clause appointing the plaintiff, and John B. Talcott who renounced the trust, trustees and executors thereof, "limited to and so far as the same relates to and affects any property which at the time of my death I may hold or be possessed of in the United States of America (but not including any Bonds or Securities of the United States or of any separate State of the Union which I may hold in England and which are negotiable there)."

The trusts declared were, after paying certain legacies, to divide the residue into three equal shares, one of which was to be paid and divided "unto and equally between my nephew, William Wright, son of my brother, Samuel Wright, my sister, Sarah Brookes, wife of William Brookes, her son, Peter Brookes, her daughter, Mary Yates, and her two grandchildren, Emma Brookes and Lillian Brookes (the two children of her deceased son, James Brookes), the said two grandchildren to take equally one share equally with the said four other legatees. One other of such three equal shares unto and equally between my nephew, William Wright, son of my brother, Thomas Wright, my sister, Hannah Foulds, the widow of Henry Foulds, deceased, her sons, Walter Foulds, Roland Foulds, Oliver Foulds, and her daughter Alice, wife of Eric F. Carlson, all of New Britain aforesaid; and the third of such equal shares unto and equally between my niece, Sarah Bradshaw, wife of Edward Bradshaw of Bristol, her sons, Charlie Bradshaw and Harry Bradshaw, and her daughters, Belle, Emma, and Sarah Ruth Bradshaw." The legatees in respect to each share were all American citizens.

After making a specific devise of English lands, he then proceeded as follows: —

"I give and devise all other my real estate and give and

bequeath all my personal estate not hereinbefore respectively disposed of, with the respective appurtenances thereto belonging, unto and to the use of my friends, Godfrey Sherwood Brameld, of Loughborough aforesaid, Manager of the Nottingham and Nottinghamshire Banking Company there, and Henry Claypoole the younger, of Loughborough aforesaid, Pawnbroker, their heirs, executors, and administrators respectively, according to the nature and tenure thereof respectively, upon trust," etc. The trusts declared were to convert the property into money, and invest it for the benefit of his widow during her life, and then, after paying certain legacies, to "divide the residue of said trust monies in four equal shares amongst such of the persons hereinafter named in each class as shall be living at my decease (which shall be the period for vesting)." Four classes were then described, in which were several minors, and it was provided that the members of each were "not to take separate shares, but one share equally between them;" also that children were "only to be entitled who attain the age of twenty-one years." This clause was also added: "I direct that if any legatee of a portion of any of the aforesaid four shares of the said trust monies shall die in my lifetime after having attained the age of twenty-one years, and shall have any child or children living at my decease, such child or children shall take, and equally between them if more than one, the portion or share which his or their parent would have taken if living at my decease." All the members of these four classes were British subjects.

The trustees of this residuary estate were made "executors of this my Will, except in respect to my aforesaid property in the United States of America herein before bequeathed to the said John B. Tallcott and George P. Rockwell."

Harry Bradshaw died two years before the testator, aged seventeen years, and unmarried.

The will which was attested by only two witnesses, and had three codicils similarly attested, was admitted to probate in the Probate Division of the High Court of Justice, at Leicester, England, and an exemplified copy was filed in and

admitted to probate by the Court of Probate for the District of Berlin in this State, in which district part of the testator's American property was situated, at the time of his decease.

The plaintiff brought his action as executor and trustee of that part of the estate of the testator which was within the United States, for an adjudication as to the effect of the death of Harry Bradshaw, and as to who were the parties entitled to receive the share of the estate which would have been his, had he survived the testator. The only parties cited in as defendants were four Americans, namely, the parents of Harry Bradshaw, and William Wright and Hannah Foulds, two of the testator's next of kin. The complaint alleged that the parties who might be made defendants were very numerous, and some of them residents of other States and countries, so that it would be impracticable to make them all parties, and that the four persons cited in represented the various conflicting interests involved. The court found that these allegations were true, and that the interests of Mr. and Mrs. Bradshaw were identical with those of their surviving children, and the interests of Mr. Wright and Mrs. Foulds identical with those of all interested in the estate as next of kin.

The cause was heard upon the complaint and the respective claims filed by way of answer on the part of the four defendants, and a decree passed adjudging that the legacy in favor of Harry Bradshaw had lapsed and become intestate estate, and that it should be distributed among certain persons, who were named, some of them Americans, and some English, being the next of kin of the testator, *per stirpes*. The Bradshaws appealed, on the ground that there was no lapse, the legacy being part of a class bequest, and also that it was error to distribute it as intestate estate.

Epaphroditus Peck, for the appellants, Edward and Sarah Bradshaw.

John Walsh and *James Roche*, for the appellees, Hannah Foulds, William Wright, *et al.*

BALDWIN, J. The testator sought to provide for the distribution of his American funds among his American relatives through an American administration, and of his English estate among his English relatives through an English administration. By his surviving one of those to whom a share of his residuary American estate was bequeathed, a lapse occurred, unless the legacy can be construed as a class bequest.

The plaintiff, who sues as an American executor and trustee for a construction of the will in this respect, has only cited in, out of the numerous parties who might have been made defendants, two who would be members of the class, if there be a class gift, and two others who are among the testator's next of kin. All these four are Americans, and they were approved by the Superior Court as proper representatives of all with whom they were respectively identified in interest.

None of the defendants have taken any exception to the jurisdiction of the courts of Connecticut over this proceeding; nor was it the interest of any of them to do so. It is however obvious from an inspection of the will that there were others who were neither present nor represented as parties to the action, who had a right to be heard, before the title to the property in controversy was made the subject of final adjudication.

The succession to the testator's personal estate must be regulated by the laws of the country of his domicil, except so far as he has, by their authority, provided for a local and limited administration in the United States. The residuary bequest to Mrs. Bradshaw and her children was not followed by any express provision for the case of a lapse by the death of any of them. If, however, a lapse occurred by the death of Harry Bradshaw, we are not prepared to say that the only possible result would be that the bequest in his favor became intestate estate. The legacy in question was followed by a bequest of all the testator's "personal estate not herein before respectively disposed of," to Godfrey Sherwood Brameld and Henry Claypoole, Jr, of Loughborough, England, in trust for the benefit of his widow, and certain of his English

relatives. Had these trustees been made parties to the action, and submitted themselves to the jurisdiction of the court, it is not improbable that they would have claimed first, that the legacy to Harry Bradshaw lapsed by his death, and second, that it passed to them as part of the residuary bequest in trust.

The plaintiff was not entitled to seek the advice or direction of the Superior Court, except so far as might be necessary for his protection in the administration of his testamentary trust. The will from which he derives his appointment is that of an Englishman, and receives its force and effect, so far as concerns the property in question, from English law. *Russell* v. *Hooker*, 67 Conn., 24. While providing for two administrations, it is a single and entire document, and purports to dispose of the testator's whole estate. It cannot have two meanings, one in England and another in Connecticut. If the residuary bequest to the English trustees is broad enough by English law to cover a lapsed legacy of American funds, that effect will be accorded to it in American courts, for the simple reason that such was the intent of the testator; his intent necessarily being that which is attributed by the laws of his domicil to the words which he has used. *Harrison* v. *Nixon*, 9 Pet., 488, 502; *Mullen* v. *Reed*, 64 Conn., 240, 247.

The plaintiff has money in his hands which belongs either to the mother and brothers and sisters of Harry Bradshaw, or to the next of kin of the testator, or to trustees in England to be held for the benefit of his widow and certain of his English relatives. He had the right to ask the direction of the Superior Court as to its transfer to the Bradshaws, as surviving legatees of a class gift; for this presented a question necessarily incident to the local administration which the will was designed to secure. He had no right in this proceeding to ask, as he did, for directions as to the distribution of the fund among the next of kin, if it were to be treated as intestate estate.

The defect of parties, occasioned by the omission to cite in the English executors and trustees, is a fatal one, if it has resulted or can result to their prejudice. So far as concerns

the Superior Court that the legacy in which Harry Bradshaw was to share, was not a class gift, it is evidently favorable to their interests. We therefore think the ends of justice will be best served by our proceeding to dispose finally of the first reason of appeal, which is based upon that decision.

The residuary American estate is to be divided into three equal shares. One of these is to be divided "unto and equally between" the testator's nephew, William Wright, son of Samuel, his sister, Mrs. Brooks, her two children, and her two grandchildren, by a deceased son, "the said two grand children to take equally one share equally with the said four other legatees." Another share is to be divided "unto and equally between" another nephew, William Wright, son of Thomas, his sister, Mrs. Foulds, and her three sons and a daughter. The third is to be divided "unto and equally between" his niece, Mrs. Sarah Bradshaw, and her two sons and three daughters. Each of the individuals to be included in the division of these shares is described both by his name and by the nature of his kinship to the testator. The first and second shares are given to members of different families, and it seems highly improbable that the testator meant to provide that if William Wright, the son of Samuel, died before him, his portion would enure to the benefit of the members of the Brookes family; or that should he survive William Wright, the son of Thomas, that event would increase the portions of the Foulds family. *Bill* v. *Payne*, 62 Conn., 140. The fact that the third share is left in similar words to those who are all members of one family, cannot suffice to vary their construction.

The draftsman of the will was well acquainted with the appropriate terms for establishing a class gift, or providing against a lapse. As to the testator's house at Long Whatton, left in trust for his nephews Joseph and Peaceful Cartlidge, it is declared that, "if they or either of them shall die in my lifetime, then the children of such deceased nephews or nephew shall take and equally between them the share which their deceased parent would have taken if living at my decease."

The residuary fund left to the English trustees, after the death of the widow, and the satisfaction of certain legacies and devises, is to be divided "in four equal shares amongst such of the persons hereinafter named in each class as shall be living at my decease (which shall be the period for vesting), that is to say, I bequeath one of such equal fourth shares unto and equally between the three children of my deceased sister, Mary Smith (formerly Cartlidge), my two nieces, daughters of my brother, William Wright, my nephew, Ephraim Cartlidge, my niece, Hannah Foulds, wife of John Foulds, of Long Whatton, and her children, my niece, Carrion Smedley, wife of Robert Smedley, of Austy, my niece Eliza, wife of William Wain, of Long Whatton, and my niece, Bessie Wright, of Hathern. The said Hannah Foulds and her children are not to take separate shares, but one share equally between them, and children only to be entitled who attain the age of twenty-one years." The three other shares are left in similar terms to others of his English relatives, and then follows this general provision: "I direct that if any legatee of a portion of any of the aforesaid four shares of the said trust monies shall die in my lifetime after having attained the age of twenty-one years, and shall have any child or children living at my decease, such child or children shall take, and equally between them if more than one, the portion or share which his or their parent would have taken if living at my decease."

The explicit description of the legatees of each of these four shares as a class, and the express provisions as to when the class shall be formed, and for the event of deaths occurring before that time, with the distinction made between those of minors, and those of persons of full age, are in significant contrast to the terms employed in constituting the three shares given to his American relatives. Apparently the testator was content, should he survive any of the latter, to let the disposition of whatever they did not live to receive, be governed by the general rules of law.

These rules are the same in England as in Connecticut. Under a legacy given to several, *nominatim*, to be equally

divided between them, they take, *prima facie*, severally as tenants in common; but this presumption obtains only in the absence of, not in opposition to, a contrary intent apparent from the whole will, viewed in the light of the surrounding circumstances, so far as they may be properly taken into consideration. *Bolles* v. *Smith*, 39 Conn., 217, 220; *Morris* v. *Bolles*, 65 id., 45, 52; *Bill* v. *Payne*, 62 id., 140; *In re Smith's Trusts*, L. R. 9 Ch., 117; *In re Stansfield*, L. R. 15 Ch., 84; Hawkins on the Construction of Wills, *112.

There is nothing in the will before us to rebut the ordinary presumption of a gift in severalty; and it was republished and confirmed by a codicil executed on January 29th, 1892, seven months after the death of Harry Bradshaw.

That codicil also clearly indicates that the testator understood that he had provided for a sharing of his American property between certain individuals. It was drawn, and evidently by the testator's own hand, to reduce the amount which was to go to one of his nephews, out of the second of the three shares of the American residuary estate, and reads thus: "I in my will for my nephew, Roland foulds in New Britain, connecticut, America, insted of the said Roland taken equal share with is mother and Brothers and sister, Device the the said Roland foulds shall only take twenty five dollars for his share." This provision restricts the operation of the requirement of equality of division, so far as relates to the interest of Roland Foulds, but leaves him still the recipient of a "share" or designated portion of the fund.

The Superior Court, then, correctly decided that the provision for Harry Bradshaw lapsed by his decease; but the English executors and trustees were indispensable parties to any proceeding for the determination of those who were to benefit by that lapse. Nor can the fact that the fund is in the hands of a citizen of this State, who received it as an executor or trustee, under an English will, give the Superior Court jurisdiction to compel the English executors and trustees to submit their claims to its determination or accept the ordinary consequences of a default.

The plaintiff will be fully protected by any orders which

the Court of Probate for the District of Berlin may properly make in the settlement of the testator's estate. That court has possession of the *res*, and the proceedings before it are in the nature of proceedings *in rem*, which (under the limitations prescribed by our statutes) bind all parties in interest, whether present or absent, for all have had at least constructive notice. There, if the fund in controversy be intestate estate, and if it is proper that any court in this State should order its distribution among those entitled to the succession, is the place to ascertain who they are and what shares they are to receive. General Statutes, § 628; *Beach* v. *Norton*, 9 Conn., 182, 196; *Clement* v. *Brainard*, 46 id., 174. If, on the other hand, it be either testate estate, forming part of the residuary fund given to the English trustees, or intestate estate which no court in Connecticut, under the circumstances of the case, should assume to distribute, then the Court of Probate has authority to order it to be remitted to the seat of the principal administration, to be there disposed of as the laws of England may prescribe. *Lawrence* v. *Kitteridge*, 21 Conn., 577, 584.

As to what may be the proper course for the Court of Probate to pursue, we deem it inappropriate to express an opinion. That court can, if it sees fit, issue a citation to the English executors and trustees, to appear and be heard upon the matters in question, and they can then be determined with due regard to the rights of all who are interested in the result.

The second reason of appeal, though probably framed with a different view, is sufficiently specific to bring up for revision the action of the Superior Court in holding that the fund in question was intestate estate, and ordering its distribution among certain designated individuals; nor would we intimate that, had it been less certain, we should not have felt bound to come to the same result, in view of the duty which rests upon every court to see to it that judgment goes against no one who has not had an opportunity to be heard in his own behalf.

The judgment of the Superior Court is affirmed as respects

the adjudication that the bequest in favor of Harry Bradshaw lapsed by his decease, but is set aside as respects the residue thereof.

In this opinion the other judges concurred.

HENRY E. PITKIN ET AL., ADMINISTRATORS, *vs.* THE NEW YORK & NEW ENGLAND RAILROAD COMPANY.

First Judicial District, Hartford, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Section 1129 of the General Statutes regulating appeals to the Supreme Court of Errors, provides that any party who thinks himself aggrieved by the decision of the trial court upon questions of law, may appeal from its judgment to this court "next to be held in the judicial district or county where the judgment was rendered." *Held* that the words "next to be held" meant the term of this court to be held next after the filing of the appeal, rather than the term held next after the judgment of the trial court, or next after the filing of the notice of appeal; and that chapter 116 of the Public Acts of 1889, which provided that appeals might be taken to the term to be held "next after the filing of the appeal," did not create the right to appeal to another or different term, but was merely declaratory of the meaning of § 1129.

An appeal to the Supreme Court of Errors, taken to a term already past at the date of the appeal, will be dismissed on plea in abatement.

[Argued October 2d—decided November 22d, 1895.]

ACTION to recover damages for negligence in causing the death of the plaintiff's intestate; brought to the Superior Court in Hartford County and heard in damages to the court, *Thayer, J.;* facts found and judgment rendered for the plaintiffs for $10 damages only, and appeal by the plaintiffs for alleged errors in the rulings of the court.

In this court the appellee filed a plea in abatement, upon the ground that the appeal was taken to the May term of this court, instead of to the October term, as it should have been taken. *Plea in abatement sustained and appeal dismissed.*

The case is sufficiently stated in the opinion.

John A. Stoughton, for the appellants (plaintiffs).

Edward D. Robbins, for the appellee (defendant).

TORRANCE, J. In this case, the appeal to this court was taken by the plaintiffs "to the Supreme Court of Errors to be holden at Hartford, in and for the first judicial district, on the first Tuesday of May, 1895." The defendant, claiming that said appeal should have been taken to the succeeding October term of said court, filed in due time in this court a plea in abatement in said cause, setting up the facts upon which its claim was based, and praying that the appeal might be dismissed for the reasons set forth in said plea. The facts set up in the plea are substantially admitted in the answer thereto made by the plaintiffs, and to this answer the defendant demurred.

The record shows that the judgment from which the present appeal was taken, was rendered May 1st, 1895; that notice of appeal was filed on the fourth of the same month; that a finding of facts was filed by the judge with the clerk, on the 16th of May, 1895; and that the appeal in writing was filed and allowed on the 24th day of that month. It further appears that the term of the Supreme Court of Errors, to which the appeal was thus taken, had ended before the written appeal was filed and allowed.

It thus appears that the May term of this court, to which the appeal was taken, was the term "next to be held" after the *judgment* was rendered and after the *notice* of appeal was filed; while the October term, 1895, was the one "next to be held" after the *written appeal* was filed and allowed.

Under the Act of 1889 (Public Acts of 1889, Chap. 116), providing that an appeal of this kind may be taken to the term to be held next after the filing of the appeal, it is conceded that the plaintiffs might have taken their appeal to the October term; but they claim that they were also at liberty, under the provisions of the General Statutes relating to appeals of this kind, to take it, at their option, to the May term; and the question here is whether this claim is well founded.

It will of course frequently happen that the court to be held next after the rendition of the judgment appealed from, and the one to be held next after the filing of the written appeal, will be one and the same court; and whenever this is the case an appeal taken to that court will, in this respect, be properly taken; but whenever, as may often happen, a term of the Supreme Court intervenes between the date of the judgment and the time of filing the appeal, it becomes important in point of practice to determine whether the appeal can be taken to such intervening term.

The answer to the question thus raised by the plea in abatement depends upon the construction to be put upon § 1129 of the General Statutes, which in cases of this kind provides as follows: "If either party thinks himself aggrieved by the decision of the court upon any question or questions of law arising in the trial, he may appeal from the judgment of the court in such cause or action and remove the said question or questions, for revision, to the Supreme Court of Errors next to be held in the judicial district or county where the judgment was rendered."

What do the words "may appeal . . . to the Supreme Court of Errors next to be held," as they stand in this section, mean? Do they mean the term of court to be held next after the rendition of the judgment, even in cases where the written appeal is filed after such term has begun or has ended; or do they invariably mean the term of court next to be held after the written appeal is filed?

We think this last is the true meaning of the words in question, whether considered as standing by themselves, or when read, as they ought to be, in the light of the four sections immediately following § 1129. If we once determine when, and at what stage of the proceedings described in the five sections referred to, an appeal is or may be said to be "taken," it will go far to settle the question under consideration.

The plaintiffs seem to contend that the appeal is taken when the notice of appeal is filed, but this clearly cannot be true. The notice of the appeal is not the appeal itself. It is not required that the notice shall state the court to which

the appeal is taken, nor the reasons nor grounds of the appeal. It is in substance and effect only a statement that the party then intends to appeal within the time and upon the conditions prescribed by law and the rules of court. It is but one step in the process of taking an appeal, and at the time when it is required to be filed the party himself, in many cases, cannot know to a certainty that he will take the appeal, or that he will have any just grounds for an appeal. Within the time prescribed for taking an appeal, the party desiring to take one may delay taking it to the last moment. Up to that time, all the steps in the process, preceding the filing of the written appeal, are preparatory merely. When he in fact "appeals," he is required within the proper time to file with the clerk of the court where the judgment was rendered or decree passed "an appeal in writing substantially in the form" prescribed in § 1133, and then and there to give security to the adverse party for costs. When this is done, and not till then, the appeal is taken.

Under these sections then, we think the appeal is taken only when the written appeal is filed in substantial compliance with their provisions; and when, therefore, § 1129 says a party "may appeal . . . to the Supreme Court of Errors next to be held in the judicial district or county where the judgment was rendered," it means an appeal to a term of court to be held next subsequent to the time of filing the written appeal, and not an appeal to a term of court ended, or already begun at that time. In short we think the words last above quoted must be construed as if they read, "may appeal . . . to the Supreme Court of Errors next to be held after the filing of the appeal, in the judicial district or county where the judgment was rendered."

This construction we think best carries out the legislative intent expressed in those sections; it preserves the rights of all parties; it leads to no absurd results; and it gives a general, certain, and imperative rule, easily understood and easily followed. On the other hand, the construction contended for by the plaintiffs serves no useful purpose, and leads, or

may lead, to the somewhat singular result of taking an appeal to a term of court long past at the date of the appeal.

In the light of what has been said, we think the Act of 1889 hereinbefore referred to, must be regarded simply as declaratory of the meaning of § 1129, and not as giving a right of appeal which did not exist before. The conclusion reached makes it necessary to hold that the plea in abatement must be sustained and the appeal dismissed.

The plea in abatement is sustained and the appeal is dismissed.

In this opinion the other judges concurred.

BRISTOL SAVINGS BANK *vs.* SARAH GRAHAM.

FARMINGTON SAVINGS BANK *vs.* BURRITT HILLS.

Marcus H. Holcomb, in support of the plea in abatement.

Frank L. Hungerford, in opposition to the plea in abatement.

TORRANCE, J. In each of these cases, which are appeals to this court brought by Sarah Graham from judgments rendered in the Superior Court, pleas in abatement were in due time filed in this court, on the ground that the appeals in each case were taken to the May term, 1895, of this court, instead of to the present October term. In both cases the facts set up in abatement are the same, and they are substantially admitted by the pleadings in this court. The facts are briefly these: —

In each case the judgment appealed from was rendered March 12th, 1895; in each, notice of appeal was filed March 13th, 1895; in each, the judge filed a written finding of facts on the 6th day of May, 1895; and in each a written appeal, as required by law, was filed and allowed on the 10th of May, 1895. In each case the written appeal was taken to the Supreme Court of Errors to be holden in and for the first judicial district, at Hartford, on the first Tuesday of May, A. D. 1895. The May term 1895 of said court began on the 7th day of May, three days before the written appeals were filed.

It thus appears that the appeals in question were not taken to the term of court next to be held after the appeal was filed; and in this respect the two cases are similar to the case of *Pitkin* v. *R. R. Co.*, just decided by this court. This last case is controlling in these two; and in each case, for the reasons stated in the Pitkin case, the pleas in abatement must be sustained, and the appeals dismissed.

In this opinion the other judges concurred.

HENRY E. RUSSELL, JR. TRUSTEE, *vs.* FRANK H. HOOKER ET AL., EXECUTORS.

Third Judicial District, Hartford, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Personal property, so far as any question of testamentary succession is concerned, has its *situs*, in the eye of the law, at the testator's domicil; and to the courts of such domicil the executors are obliged to account for its management and disposition.

A resident of this State, claiming payment of a legacy under the will of a New York testator whose estate is in due course of settlement in the Surrogate's Court of that State, must resort to the New York courts for the determination and enforcement of his rights as legatee.

That the testator owned real estate here and that ancillary administration was, for that reason, granted in this State, to one of the executors, does not aid the plaintiff; nor does the fact that the legacy consisted of shares of stock in a Connecticut corporation, upon which he served process of foreign attachment at a time when it had in its possession a dividend on the stock left by the testator and still standing in his name upon its books, which had been declared and become payable since his death. Both shares and dividend are equally assets of the estate to be accounted for before the Surrogate's Court in New York.

[Argued October 3d—decided November 22d, 1895.]

SUIT to compel the transfer of certain stock and for other relief, brought to the Superior Court in Hartford County and tried to the court, *Thayer, J.;* facts found and case reserved for the advice of this court. *Superior Court advised to dismiss the complaint.*

The defendants were sued as executors of the will of Henry E. Russell of New York, which it was alleged had been duly probated in the Surrogate's Court of the City of New York. One of them, Frank H. Hooker, was a citizen of Connecticut, and was personally served within this State. The others were citizens of New York, and no service was made upon them. The complaint alleged that the will had also been probated in this State, where the testator owned property, real and personal, and administration granted to said Frank H. Hooker. The plaintiff claimed that the leg-

acy, which was one of shares of stock in a Connecticut corporation, was specific, and asked for payment of certain dividends collected by the executors since the testator's decease, and for a transfer of the shares to him by them, or by Frank H. Hooker, if he should be deemed to be the sole executor. Frank H. Hooker only appeared, and filed an answer.

Frank L. Hungerford, for the plaintiff.

I. The legacy to the plaintiff was a specific legacy. Redfield on Wills, 131, 134, 141, 142; 2 Williams on Executors, 1040, 1047; *Walton* v. *Walton*, 9 Amer. Dec. 468; *Kunkel* v. *McGill*, 56 Md., 120; *Morton* v. *Murrell*, 68 Ga., 142; Schouler on Executors and Administrators, § 480.

II. The courts of this State have jurisdiction over the subject-matter of this suit. 1 Woerner on Law of Administration, 167; *Dawes* v. *Head*, 3 Pick., 144; *In re Hughes*, 95 N. Y., 55; *Parsons* v. *Lyman*, 20 id., 103; Cook on Corporation Law, 485; *Winslow* v. *Fletcher*, 53 Conn., 394.

III. It is claimed that the plaintiff cannot maintain this suit, because he has never qualified as trustee in any Court of Probate in this State.

It is found that before bringing this suit Mr. Russell had accepted the trust under the will, and this is sufficient to enable him to maintain this action. The plaintiff obtains his title from the will and not from the Court of Probate, and acceptance of the trust is the only qualification necessary to enable him to bring suit. *Baldwin* v. *Porter*, 12 Conn., 473.

Samuel A. York, for the defendant, Hooker.

I. The plaintiff cannot maintain his action against the defendant in this State.

In his official capacity, "an executor can neither sue nor be sued, outside of the jurisdiction of the State from which he derives his authority." 8 Amer. & Eng. Ency. of Law, 421; 3 id., 646, and note 2, page 649; *Riley* v. *Riley*, 3 Day, 74; Story's Conflict of Laws, § 514; *Hobart* v. *Turnpike Co.*,

15 Conn., 145; *Upton* v. *Hubbard*, 28 id., 274; *Holcomb* v. *Phelps*, 16 id., 127; *Hedenberg* v. *Hedenberg*, 46 id., 30; 2 Kent's Comm., 13th Ed., *431 note *c*. If this plaintiff is entitled to anything under this will, all he has to do is to go to the court which has jurisdiction of the person and of the property, and he will get just what he is entitled to. All questions as to the faithful or unfaithful discharge of an executor's duty must be decided by the laws of the State where he is appointed. *Fay* v. *Haven*, 3 Met., 109.

II. The plaintiff never having qualified in this State as trustee, or in any other, so far as it appears, cannot maintain suit here in his representative capacity. 8 Amer. & Eng. Ency. of Law, 421; 3 id., 646, and note 2, p. 649; *Riley* v. *Riley*, *supra*; Story's Conflict of Laws, § 514; *Hobart* v. *Turnpike Co.*, *Upton* v. *Hubbard*, *Holcomb* v. *Phelps*, *Hedenberg* v. *Hedenberg*, *supra*; 2 Kent's Comm., 13th Ed., *431, note *c*. The same rule which applies to the case of an executor would seem to apply to a testamentary trustee.

III. The property in question is not and never has been within the jurisdiction of the courts of this State, and must be disposed of by the Surrogate's Court of New York, whose jurisdiction is complete and exclusive. 2 Kent's Comm., 13th Ed., *429, and note 4; *Hedenberg* v. *Hedenberg*, *Holcomb* v. *Phelps*, *supra*; *Sills* v. *Worswick*, 1 H. Black. 690; 3 Amer. & Eng. Ency. of Law, 567, 568; Story's Conflict of Laws, § 379; *Davis* v. *Crandall*, 101 N. Y., 311; *Richards* v. *Dutch*, 8 Mass., 506; *Daws* v. *Boylston*, 9 id., 337; *Stevens* v. *Gaylord*, 11 id., 256.

IV. This legacy of the 100 shares of stock in question, is a general legacy, not specific. There is nothing in the will to indicate in any way that any particular shares of the stock of this company were given to the plaintiff. Redfield's Practice of Law in Surrogate's Court, 587; 13 Amer. & Eng. Ency. of Law, 22, note 4; *Baldwin* v. *Coudrey*, 16 Conn., 1; *Tefft* v. *Porter*, 8 N. Y., 516; 2 Williams on Executors, 1047.

BALDWIN, J. This action is brought by a citizen of Con-

necticut against another citizen of Connecticut and two citizens of New York. The defendants are sued as executors of the will of a New York testator, which has been duly admitted to probate in that State. A legacy of a hundred shares of stock in a Connecticut corporation was left in the will to the plaintiff, in trust for a citizen of this State, and the ground upon which he rests his action is that this legacy was a specific one.

The will under which the plaintiff claims, was that of a citizen of New York, and the property bequeathed to him, so far as any question of testamentary succession is concerned, had its *situs*, in the eye of the law, at the testator's domicil. *Marcy* v. *Marcy*, 32 Conn., 308, 319. The executors were bound to inventory and account for it before the proper Surrogate's Court in that State. This obligation was not affected by the grant of ancillary administration to one of them by a Court of Probate in this State. He did not include, and ought not to have included, the stock in question in his inventory filed in that court. It was an asset to be administered under the laws of New York, and under those, only. If the executors transfer it to the plaintiff, or pay him any dividends which they may have collected on it, they must justify their action in the Surrogate's Court by which their letters testamentary were issued. The shares of stock, which are in controversy, in effect are in the possession of that court. It would therefore be manifestly unreasonable and improper to require the executors to account for them in an action brought by a legatee in the courts of another State. *Byers* v. *McAuley*, 149 U. S. 608, 613, 614.

The plaintiff's title is derived through the statutes of New York, which regulate testamentary succession. A will operates as a conveyance from the testator, but his right to dispose thus of personal property by a transfer taking effect only after his decease, is derived wholly from the positive law of the State of his domicil. A legatee is in the position of a mere volunteer. He takes only what the law may allow the testator to give him, and it is that law which must determine the construction of the bequest, and the conditions of payment.

This action was commenced by a process of foreign attachment, which was served upon the Connecticut corporation at a time when it had in its possession a dividend on the shares formerly owned by the testator, and still standing in his name upon its books, which had been declared and become payable after his death.

The plaintiff's case is not helped by this attachment. The moneys which were thus separated from the general assets of the corporation, and divided among its shareholders, came to them as an incident of their stock interests. Whoever owned the shares in question, when the dividend was declared, was entitled to collect it. In law, these shares were then owned by the three executors, claiming under the New York probate proceedings. The plaintiff claims his legacy under the same proceedings. If it is, as he contends, a specific one, he can still gain possession only through a transfer made by the executors, or at least by one of them. The dividends likewise are payable only to them, or to their order. Their relations, so far as the present controversy is concerned, to the shares and the dividends are the same. Both are equally assets of the estate to be accounted for before the Surrogate's Court in which it is in course of settlement. The plaintiff can no more transfer his controversy with them, as to the true meaning of the will, into the courts of Connecticut by this process of attachment, than he could transfer it to any other State in which he might make some other corporation a garnishee, from which dividends were due and payable upon stock standing in the testator's name.

The Superior Court is advised to dismiss the plaintiff's complaint.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *vs.* JOHN T. GLAVIN.

Second Judicial District, Norwich, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The common council of the city of New London, which was authorized by charter to regulate, license, or prohibit the peddling or vending of any merchandise in or through the streets of the city, passed an ordinance providing that no person should, under penalty of a fine, peddle or sell in any street, or from house to house, in said city, any merchandise, without a license from the mayor or the common council, and requiring for such license a fee of not more than $50. *Held* that such ordinance was void, since it did not determine with reasonable certainty the duration of the license; and also because the fee of $50 required therefor, was so greatly in excess of the cost of issuing the license as to amount in reality to an irregular and unauthorized revenue tax.

The power given by charter to the common council of a city to license the peddling or vending of goods in its streets, involves the necessity of determining with reasonable certainty the extent and duration of the license and the sum to be paid therefor. Such power must be exercised by the common council itself, and cannot be delegated by it in whole or in part to any person or authority.

[Argued October 15th—decided November 22d, 1895.]

PROSECUTION for a violation of an ordinance of the city of New London relating to peddlers; brought to the Police Court of said city, and thence by defendant's appeal to the criminal term of the Court of Common Pleas for New London County, and tried to the jury before *Noyes, J.*; verdict and judgment of guilty, and appeal by the defendant for alleged errors in the rulings and charge of the court. *Error, and judgment reversed.*

The case is sufficiently stated in the opinion.

Jeremiah J. Desmond, for the appellant (defendant).

I. No ordinance can be considered reasonable, that vests in the mayor or common council the power to discriminate unfairly between persons equally entitled to the same rights or privileges. The effect of this ordinance is to permit the

mayor or common council to arbitrarily grant privileges and favors to one citizen that may be withheld from another; and this without any hearing, without any rule or guide beyond their unrestrained whim or caprice. *State* v. *Conlon*, 65 Conn., 478.

Legislation of this character has never been sanctioned by the courts of this country, and it is safe to assert that it never will be tolerated. *Borough* v. *Phillips*, 148 Pa. St., 482, 24 Atlantic Rep., 76; *State Center* v. *Barenstein*, 66 Iowa, 249; *Yick Wo* v. *Hopkins*, 118 U. S., 356; *Barthel* v. *New Orleans*, 24 Fed. Rep., 563; *In re Frazee*, 63 Mich., 396; *Anderson* v. *City*, 40 Kan., 173; *State* v. *Orange*, N. J. L., 389; Tiedeman on Police Power, 197–200, 289–327, with notes and cases cited.

II. The ordinance contravenes provisions of the Federal Constitution, as well as of the Constitution of this State.

By its terms it discriminates against the citizens and products of other States, allowing the produce of Connecticut farms, and fish taken from Connecticut waters, to be sold and peddled without the restrictions it imposes on similar products of other States.

It also enables the mayor or common council of New London, to grant licenses for the kinds of business it relates to, for a merely nominal fee to citizens of Connecticut, or even residents of New London, and to demand a large or exorbitant fee from the citizens of other States. This objection alone is clearly fatal to the validity of this ordinance. *Brown* v. *Maryland*, 12 Wheat., 419; *Woodruff* v. *Parham*, 8 Wall., 123; *Hinson* v. *Lott*, ibid., 148; *Ward* v. *Maryland*, 12 id., 418; *Welton* v. *Missouri*, 91 U. S., 275; *Wallaing* v. *Mich.*, 116 id., 446; *Emert* v. *Missouri*, 156 id., 296, and cases therein cited; *Donald* v. *Scott et al.*, 67 Fed. Rep., 854; Cooley's Constitutional Limitations, 199, *et seq.*; Tiedeman on Police Power, *supra*.

III. The charter of the city of New London empowers that city to license, regulate or prohibit peddling or vending merchandise or any article of trade within its streets; but does not confer any authority to impose, or collect a revenue

tax in this manner. *Welch* v. *Hotchkiss*, 39 Conn., 140; *New Haven* v. *New Haven Water Co.*, 44 id., 105.

IV. Again, the language of this ordinance is too broad and vague to define, or to constitute, a crime. It does not seem possible to determine the scope or the meaning of the broad terms "peddle, vend or sell any merchandise," as employed therein. It provides no term or period of time for which a license is to be granted. If a license is obtained, how long can the licensee operate under it? And who shall decide this question?

Hadlai A. Hull, Prosecuting Attorney, for the appellee (the State).

I. The defendant in this case was unquestionably a peddler and was clearly violating the provisions of the ordinance. Any questions suggested by the exemption of farm products, or fish, with the stamp of this State on them, will have no place in this discussion, because if that part of the ordinance were bad, it would not necessarily vitiate the rest. *State* v. *Wheeler*, 25 Conn., 290. If it had, it might be disposed of by the ruling of this court in *State* v. *Geer*, 61 Conn., 144.

The mayor has no power to discriminate. If the mayor has any power to fix the license fee, he has it purely by implication of law. The right to discriminate between different classes of peddlers certainly should exist, and the only discrimination of which complaint can be made is discriminating between individuals. No power of discretion as to the person, or fitness of persons, is hinted at. A person who tenders the price fixed by the mayor or Common Council, is entitled to a license, and has a plain remedy if it is withheld. The case of *State Center* v. *Barenstein*, 66 Iowa, 249, upon which the defendant relies, is not applicable to this case, because the Code of Iowa authorizes cities and towns simply to license peddling, but gives them no power to prohibit.

II. The defendant next avers that the ordinance is invalid because opposed to common justice, right and reason.

This ground would have little standing independent of

the first, for our court has refused to go into judicial legislation to the extent suggested by such grounds. This court refused, in *State* v. *Conlon*, to consider "the propriety of legislation." See also *Trustees of the Bishop's Fund* v. *Rider*, 13 Conn., 103.

III. The ordinance in question is not void as an illegal restraint of trade. Legitimate trade—trade that is not in any way designated as dangerous or injurious to the public—is the trade intended in all cases; because the General Assembly have the right, and the city council had the right delegated to it, not only to "restrain" but to prohibit this branch of trade, if it can be dignified by such a term.

IV. The fourth ground of demurrer raises the question whether the General Assembly, or a city council by delegation, can impose a license fee, which shall more than pay the expense of issuing the license and supervising the licensee by police regulation. Before this question can fairly avail the defendant, it must be determined that the fee charged, or which may be charged, exceeds the cost of issuing the license, and of maintaining police inspection and regulation. *City of Fayettsville* v. *Carter*, 52 Ark., 301. A license fee in Connecticut, as applied to this class of business, has never been regarded by the profession as invalid, because its collection results in a revenue. The cases upon which the defendant relies, *New Haven* v. *New Haven Water Co.*, 44 Conn., 105, and *Welch* v. *Hotchkiss*, 39 id., 140, contemplate business which the city council cannot prohibit or destroy by any regulation, and business upon which, under the police law of the State, no suspicion has ever been cast. Some municipalities in Connecticut under the liquor license law have collected a great many thousand dollars, without being put to a dollar of expense for the issuing of a license.

ANDREWS, C. J. The defendant was prosecuted in the Police Court of the city of New London, upon a complaint made by the prosecuting attorney of that city, charging "that John T. Glavin, of said city, on the 11th day of July, A. D. 1895, with force and arms, at said city, did peddle, vend and

sell in Potter Street in said city, and from house to house in said city, merchandise, to wit: wringing machines, lamps, and other merchandise, not the product of farms of this State, or fish taken in the waters thereof, without a license from the mayor or Court of Common Council of said city, against the peace, of evil example, and contrary to the form of the statute in such case made and provided, and to an ordinance of the city of New London relating to peddlers."

He was convicted, and appealed to the Criminal Court of Common Pleas in New London County, where he filed a demurrer to the complaint as follows:—

"1. The ordinance of the city of New London, Connecticut, upon which said complaint and information are based, is unconstitutional and void, inasmuch as it contravenes the provisions of the Federal Constitution, and also the provisions of the Constitution of this State.

"2. Said ordinance is invalid, for the reason that its provisions are contrary to common justice, right and reason, and abhorrent to the established principles of natural justice and equity.

"3. Said ordinance is void, as it is in restraint of trade, and an instrument of oppression, and of unfair and intolerable discrimination.

"4. Said ordinance is invalid, because it imposes a revenue tax entirely without legal warrant, and beyond any authority granted by the legislature to the said city of New London, or to its Court of Common Council, or to its mayor."

This demurrer was overruled, whereupon the defendant pleaded "not guilty." He was tried to the jury who returned a verdict of guilty. He was sentenced to pay a fine of $15, and has appealed to this court.

The ordinance of the city of New London passed on the 4th day of August, 1879, on which the prosecution was brought, is as follows: —

"Sec. 1. No person shall peddle, vend or sell, in any street, or from house to house in the city of New London, any merchandise other than the product of farms in this State, or fish taken in the waters thereof, without a license from the mayor

or the Court of Common Council. Sec. 2. Every person so licensed shall pay therefor, for the use of said city, a license fee of not more than fifty dollars. Sec. 3. Every person who shall violate the provisions of this ordinance, shall be guilty of a misdemeanor, and pay a fine to the treasury of the city of New London of not less than five nor more than thirty dollars."

The charter of New London (§ 18) provides that "the Court of Common Council, when assembled according to law, shall have power by a major vote of the members present, . . . to regulate license or prohibit the peddling or vending of any goods, wares, merchandise or other articles in and through the streets of said city;" and to regulate and require license fees from all peddlers and vendors of various commodities in and about the streets and buildings of said city.

It is certainly the settled law that "when by the charter of a city, the power to license a particular occupation within its limits is given to the common council of the city, such power involves the necessity of determining with reasonable certainty both the extent and duration of the license, and the sum to be paid therefor; such power must be exercised by the common council, and cannot be delegated by it, in whole or in part, to any other person or authority." *Darling* v. *City of St. Paul*, 19 Minn., 389; Beach on Public Corporations, § 276; Dillon on Mun. Corporations, 4th Ed., § 357; *Pinney* v. *Brown*, 60 Conn., 164; *State* v. *Fiske*, 9 R. I., 94.

The ordinance in question affixes, in some cases at least, a license fee of fifty dollars. If authority is attempted therein to be given to the mayor or to the Common Council itself, to grant a license for any less sum, the power to do which is very questionable, yet the applicant in every case may be required to pay the sum of fifty dollars. "Whenever a municipal corporation is authorized to make by-laws relative to a given subject, and to require of those who desire to do any act or transact any business pertaining thereto, to obtain a license therefor, the reasonable cost of granting such licenses may be properly charged to the persons obtaining them." *Welch* v. *Hotchkiss*, 39 Conn., 143. The fee of $50 required

by the city of New London for a peddler's license, is so greatly out of proportion to the reasonable cost of issuing it, as to force us to declare that it is not designed for the sole purpose of paying the cost of the license; but that under the name and form of a license fee it was in reality an irregular assessment of taxes for revenue. As such it is void. *City of New Haven* v. *The New Haven Water Co.*, 44 Conn., 108; *State* v. *Hoboken*, 33 N. J. L., 280; *North Hudson County Ry.* v. *Hoboken*, 41 id., 71; *Muhlenbrinck* v. *Commissioners*, 42 id., 364; *Clark* v. *New Brunswick*, 43 id., 175; *Mayor, etc.*, v. *Second Ave. R. R.*, 32 N. Y., 261. Besides, the ordinance is clearly defective in that it does not fix the time for which the license is to be given. We think the demurrer to this information should have been sustained.

There is error and the judgment is reversed.

In this opinion the other judges concurred.

FRANK J. ATCHISON *vs.* JOSEPH ATCHISON.

Second Judicial District, Norwich, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Under the common counts, supplemented by a bill of particulars, the plaintiff sought to recover, among other items, for the reasonable worth of several months' board furnished the defendant, and the sum of $50 for money paid on his behalf for legal expenses. The defendant, having pleaded a general denial and payment, testified that it was expressly agreed that the price of the board should be $8 per month, and that his share of the legal expenses should not exceed $25; and that for these items he had fully paid the plaintiff. He also offered in evidence two receipts, one for "one month's board, $8," and one "in full in regard to $25. R. M. Douglass bill," as applicable to these items respectively, and requested the court to charge the jury that if they should find the said sums were paid by the defendant in full of the plaintiff's claim, they might then treat them as payments in full, under the pleadings. The court did not so charge, but instructed the jury that the receipt for $8 was not in terms a receipt in full, but might be considered as evidence tending to show the agreed price of board as claimed by the defendant, and thus indirectly to prove pay-

ment in full as to this item, as claimed by him; and that the receipt for $25 was not in itself a receipt in full, but that said sum if found to have been paid and received in full for the defendant's share of the legal expenses, either as agreed upon, or in the absence of any agreement, would establish the defendant's claim of payment, as respects that item. *Held* that the defendant had no just cause of complaint.

In order to make a receipt admissible to prove not only payment of the sum therein indicated, but also an accord and satisfaction, or to have it operate as a release or discharge, such accord and satisfaction, or such release and discharge, must be specially pleaded.

Where an instruction to the jury, once correctly and fully given, is equally applicable to another and similar claim in the case, the failure of the trial court to repeat it in full with reference to such other claim, cannot avail the losing party, if it is apparent from the whole charge that the jury could not have failed to understand their right and duty in the premises.

[Argued October 15th—decided November 22d, 1895.]

ACTION to recover for board and lodging and money paid, brought to the Court of Common Pleas in New London County and tried to the jury before *Noyes, J.*; verdict and judgment for the plaintiff, and appeal by the defendant for alleged errors in the charge of the court. *No error.*

The case is sufficiently stated in the opinion.

S. H. Thresher, for the appellant (defendant).

I. The jury were misled by the charge of the court relative to the receipt for board. It was not disputed, and in itself shows that the plaintiff's claim for $4 per week for board was not well founded, but that there was a price fixed by the *month*, and that the plaintiff had receipted for the payment of the board of the defendant for the *last month* he resided at his house. The court should, therefore, have charged as requested by the defendant.

II. The receipt for $25 is in form and by its very terms *in full*, and in full of the account of R. M. Douglass; and the jury should have been instructed to so treat it. They were certainly misled by the charge of the court when told that "under the pleadings in this case, and from its form I charge you that such a receipt is not a receipt in full," etc. In effect, the jury were permitted by the charge to credit these specific payments made for specific purposes, as a gross

amount of $30 to be applied generally upon the plaintiff's account. There is nothing in the pleadings to prevent this receipt from being considered by the jury as in full, and they should have been so instructed by the court. *Elting* v. *Sturtevant*, 41 Conn., 176; *Aborn* v. *Rathbone*, 54 id., 446; *Gates* v. *Steele*, 58 id., 316; 19 Amer. & Eng. Ency. of Law, 1120, 1122, 1124 and authorities there cited.

Donald G. Perkins, for the appellee (plaintiff).

I. The court properly declined to charge in the language of the defendant's request, for it was vague and misleading, and based upon a claim of fact not in evidence. There was no evidence that the payments were made *in full* of the plaintiff's *claim*. Yet the request is that the $8 payment was a discharge, not only of the board claim but also of all the other items of the plaintiff's claim, and the same also as to the $25 payment. There was no evidence that the amounts were tendered and received in full of an unliquidated claim. The claim was entirely as to the effect of the receipts. The payments were admitted by the plaintiff and credited on the bill of particulars.

Under the pleadings, the receipt was admissible solely to prove the payment, and not as evidence of accord and satisfaction or as a release. As such, they should have been specially pleaded. Practice Act, 16, Rule IV., § 6.

II. The charge, as actually given on these receipts, was correct and sufficiently favorable to defendant. The jury were told that the $8 receipt was evidence tending to show the agreed price of board, and if the amount stated was paid and received in full of a month's board, whether an agreed price or not, then it was a defense to such item. The charge as to the effect of the $25 payment, was more favorable to the defendant than it should have been. The claim, for $50 paid out for the defendant at his request, was a liquidated claim, and the payment of $25 in full of it would not discharge it, and an accord and satisfaction, or a receipt in full, to have that effect must have been pleaded.

The receipt is not a receipt in full. It is just as it reads,

"in full in regard to $25.00." It was intended, and is a receipt of a sum of money toward that particular account.

III. Even though there were error as to this item of $25—or any one of the separate small items—there should not be a new trial; for the error, if any, can be corrected by remitting the item. *Smith* v. *Brush*, 11 Conn., 368; *Baldwin* v. *Porter*, 12 id., 485; *Collender* v. *Cosgrove*, 17 id., 33; *Cook* v. *Loomis*, 26 id., 486–7; *Trischet* v. *H. Ins. Co.*, 14 Gray, 458; *Doyle* v. *Dixon*, 97 Mass., 213.

FENN, J. The complaint in this action is in the form denominated "the common counts," supported by a bill of particulars containing nine items aggregating $158.97. One of the items was for 23½ weeks' board, from April 17th to September 28th, 1894, at $4. Another item was for money paid for legal expenses for the defendant—$50—which, as alleged, he agreed to repay.

The answer was *first*, a general denial; *second*, a plea of payment in these words: "The defendant has paid and satisfied any claim of the plaintiff, arising out of the matters mentioned in his said complaint." The case was tried to the jury, which rendered a verdict, accepted by the court, in favor of the plaintiff for the full amount of his claim, that is to say, the aggregate of his bill of particulars less $33, which the plaintiff had credited on said bill as cash received at sundry times.

The reasons assigned for the defendant's appeal relate entirely to the charge of the court to the jury. A brief statement of facts is necessary for a proper understanding of the claims made. In relation to the item for board, the plaintiff offered evidence to prove that he furnished board and lodging for the defendant as charged in the bill of particulars, at the defendant's request; that there was no agreed price, but that such board and lodging were reasonably worth $4 per week, and $94 for the whole time; and that the defendant had paid only $8 on account thereof. The defendant, on the other hand claimed, and offered evidence to prove, that he went to board with the plaintiff, who was his sister's husband, under

an agreement that the price of board and lodging should be $8 per month; that he paid $8 on the first days of June, July, August and September, 1894; and that at the time of the September payment he received a receipt signed by the plaintiff, reading as follows: "Received of Joseph Atchison for one month's board $8."

In regard to the item of $50 in the bill of particulars, the plaintiff claimed and offered evidence to prove, that he paid an attorney $50 for the defendant, under an agreement that they should share equally in the expenses of certain litigation concerning an estate in which they were both interested; that such expenses amounted to $100, and that the defendant had only reimbursed him $25 on account of his share. The defendant claimed and offered evidence to prove, that he never agreed to share equally in the aforesaid legal expenses, but that he agreed to pay $25 only, towards them, and that he paid to the plaintiff such sum and received a receipt from him reading thus: "September 1, 1894. Received from Joseph Atchison in full in regard to 25_{00}^{00} dollars, R. M. Douglass bill."

The defendant requested the court to charge the jury: "If the jury find that these payments shown by the two receipts, . . . were in fact paid by the defendant in full payment of the plaintiff's claim, they may treat such payments as in full discharge and satisfaction of the plaintiff's claim, under the pleadings in this case." The court, instead, charged the jury that "the receipt for $8 is not in terms a receipt in full, but you may properly consider it as evidence of payment of such sum, and as evidence tending to show the agreed price of board. And also if you find as a fact that the sum of $8, as evidenced by this receipt, was paid and received in full of a month's board, either as being the agreed price or in the absence of any agreed price—then you should find the defendant's defense of payment, so far as it respects this item, established.

"In regard to the receipt for $25: Under the pleadings in this case and from its form, I charge you that such receipt is not such a receipt in full or release as, in itself in the

absence of fraud or mistake, operates as a bar to the plaintiff's claim for $50. But if you find as a fact that the sum of $25 as evidenced by such receipt, was paid by the defendant and received by the plaintiff in full payment of the defendant's share of the expense of said litigation—as such share had been agreed upon, or in the absence of any previous agreement concerning such share—then you should treat such evidence as establishing the defendant's claim of payment as respects this item."

That error cannot be found from the failure of the court to charge the jury precisely as requested by the defendant, is evident.

It appears from the record that as to the other items in the bill of particulars, in addition to those of $94 and $50 respectively, no claim was made or evidence offered by the defendant that the payments evidenced by the receipts were intended to extend to pay or discharge them. The defendant's defense as to such other items was based on entirely distinct and independent grounds. It would therefore have been incorrect to instruct the jury that such payments might, in case they found something neither claimed nor offered to be shown in evidence—namely, that these payments were paid in full of the plaintiff's claim—be treated in full discharge and satisfaction of such claims.

More than this, in order to make a receipt admissible to prove not alone payment of the sum indicated, but also accord and satisfaction, or to operate as a release or discharge, such accord, satisfaction, or release, "must be specially pleaded." Rules of Practice, 58 Conn., 566, § 6. This requirement rests upon the principles stated in *Atwood* v. *Welton*, 57 Conn., 522, 523.

It appears that neither the receipts nor the amount of payments evidenced by them, aggregating $33, the sum credited upon the plaintiff's bill of particulars as filed, were disputed. But, concerning the receipt for $8, the defendant asserts that it showed "that the plaintiff's claim for four dollars per week for board was not well founded, but that there was a price fixed by the month; and that the plaintiff had receipted

for the payment of the board of the defendant for the last month he resided at his house." The defendant treats his request to charge, above quoted, as amounting substantially to this statement, and insists that the jury should have been so told.

It seems to us that the charge made upon this point is unexceptionable. The jury were, as we have seen, instructed that while the receipt was not *in terms* a receipt in full, as clearly is the case, it might properly be considered not only as evidence of the undisputed fact of the actual payment of the sum named, but also as evidence (bearing of course in favor of the defendant) upon the disputed question as to whether there was any agreed price for board. The jury was then told that whether there was an agreed price or not, if the $8 evidenced by the receipt was paid and received in full for a month's board, they should "find the defendant's defense of payment, so far as it respects this item, established." Certainly, we think, if any criticism can be made relating to the accuracy of this portion of the charge, the defendant is not, as the party aggrieved thereby, the one to make it.

Finally, we think that part of the charge relating to the receipt for $25 should also be supported. That such receipt could not, in itself, under the pleadings in the case, operate as a bar to the plaintiff's claim for $50, is clear. The accompanying statement of the court that it could not so operate, on account of its form, is of more doubtful accuracy. But, granting it to be incorrect, this addition of a wrong ground for a right result could not, we think, have injured the defendant. It would only have done so if it caused the jury to understand that, in the opinion and under the instruction of the court, they could not consider this receipt as evidence tending to prove the correctness of the defendant's contention as to the transaction itself, or to disprove the plaintiff's. But we think they could hardly have so understood, especially as the court had just before, in far more explicit language, declared the first paper "not in terms a receipt in full," and added, in the same context and sentence, the declaration that it was properly to be considered in evi-

dence for the purpose for which the defendant claimed the receipts to be such. It can scarcely be doubted that, without repetition of the statement, the jury understood the same rule would apply here. Then the court, as we have seen, added in the same words as it before used in reference to the other receipt, barring necessary changes, that if the jury found as a fact that the sum of $25, as evidenced by this receipt, was paid by the defendant and received by the plaintiff in full payment of the defendant's share of the expense of the litigation, whether with or without previous agreement concerning such share, such evidence established the defendant's claim of payment as respected this item.

Taking the charge together, considering the language as a whole, we think the jury could not have failed to comprehend their right and duty in the consideration of the paper in question as evidence.

There is no error.

In this opinion the other judges concurred.

EUGENE PELTIER *vs.* THE BRADLEY, DANN AND CARRINGTON COMPANY.

Third Judicial District, New Haven, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

A driver of a team who is about to stop on his left hand side of the road, for the purpose of entering a building there situated, has the right to shape his course in that direction; and in so doing he is bound simply to exercise ordinary and reasonable care with reference to such teams as he may encounter.

Sections 2689, 2690 of the General Statutes do not prescribe any rule at variance with these principles. The manner of passing upon the highway, as there laid down, is limited to the meeting of vehicles, each one of which must be for the conveyance of persons. The statute does not oblige the driver of a truck to turn to the right when meeting a vehicle for the conveyance of persons; although he may be negligent, if he does not do so.

Negligence is a question of law when the case turns upon the standard to be applied to measure the care due from the party whose conduct is under

consideration; but seldom, if ever, when it turns upon what his conduct in fact was, and there is no uncertainty as to the rule of law by which it is to be governed.

The Act of 1893 (Chap. 174) in regard to appeals, did not authorize appeals from findings as to matters of fact, upon which no error of law was assignable.

[Argued October 22d—decided November 22d, 1895.]

ACTION to recover damages for personal injuries received by the plaintiff while riding a bicycle, by a collision with a team of the defendant; brought to the Court of Common Pleas in New Haven County, and tried to the court, *Studley, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiff for alleged errors in the rulings of the court. *No error.*

The complaint contained two counts, each alleging that while the plaintiff was attempting to pass the team, on Court street in the city of New Haven, the driver carelessly drove against and over the bicycle, and broke it, whereby the plaintiff was thrown to the ground and run over by a wheel of the defendant's wagon, and his leg broken. The second count alleged that the driver of the defendant's team willfully, wantonly and violently drove against the bicycle and over the plaintiff.

The case was tried to the court on the general issue, and judgment rendered for the defendant. The plaintiff appealed, on the ground that the court erred in holding the defendant not negligent, and the plaintiff negligent; and also, under the statute of 1893, in finding certain facts from the evidence, and in refusing to find, as respects certain points, as requested by him. Each party requested the court to certify up portions of the evidence which bore upon these points, and they were certified accordingly and made part of the record on appeal.

The finding stated these facts: The defendant's team, a heavy one horse truck, was being driven at a walk on Court street, westerly, while the plaintiff was riding on his bicycle easterly on the same street. The defendant occupied a store on the corner of State and Court streets, and the team was

going to the entrance to an elevator contained in the store, which entrance was 70 feet west of State street, on the south side of the street. The street was paved, and 23 feet wide. The team was a little to the south of the center of the street, and 400 feet from the plaintiff when he first saw it. He was an experienced bicycle rider, going about five times as fast as the team, and keeping to the right. When 70 feet from the elevator door, he ran out towards the center of the street to clear a team hitched on the south side, and then turned to the right again. He reached a point about 4 feet from the south curb of the street, and 15 feet from the head of the team, at a time when the latter was also about 4 feet from the curb, heading in towards the elevator door. There was nothing on the street to prevent the plaintiff from turning to the left and passing the team, and he could have stopped his bicycle in a space of three feet. He, however, kept on to the right. The driver of the team then began to rein his horse to the right for the purpose of giving him more room to pass. He also could have stopped his team in the space of three feet, and afterwards did. Four feet give room enough for an experienced bicycle rider to pass a team. The street was paved with rough granite blocks, sloping slightly towards the gutters, which were 15 inches wide, sloping slightly towards the curb, and paved with flag-stones. The granite blocks and the gutter flag-stones opposite the elevator door were wet and slippery with mud. The plaintiff could see that the team, at the rate at which it was going, would be considerably less than 4 feet from the curb before he could get past it. As he rode in between the horse and the curb, the wheels of the bicycle slipped in the mud towards the gutter, and it fell over, together with the plaintiff, towards the horse. The plaintiff, either by his own exertions, or by reason of falling against the horse, or the shaft of the truck, fell back towards the curb and lay partly on the side of his bicycle, the front wheel of which, when it fell, was nearly in a line with the left fore wheel of the truck. The momentum of the bicycle, as it fell, carried the top of its front wheel under the wheel of the truck, which passed over the front part of the bicycle

and the plaintiff's leg, before it could be stopped. It was brought to a stop in the space of three feet, and the driver then backed off; but the bicycle had been ruined and the plaintiff's leg broken.

It was unnecessary and was dangerous for the plaintiff to attempt to pass between the team and the curb as the team was approaching said curb, by reason of the uneven surface of the pavement near the gutter and the muddy and slippery condition of the pavement; and in so doing the plaintiff was guilty of gross negligence, which resulted in the injury to himself and to his bicycle. The driver, one Scoville, was not guilty of negligence.

Upon these facts the plaintiff claimed that the injuries in question were solely caused by the negligence of the defendant, in that its team was on the wrong side of the street; that even if the plaintiff had been chargeable with negligence contributing to the fall, yet that the gross negligence of the driver occasioned the injuries after the fall; that the fact that the team was on the left side of the road, in violation of the statute, and of the law of the road, made the defendant chargeable with such negligence, *per se*, as would entitle the plaintiff to recover, unless he were grossly negligent; that when the defendant's driver attempted to keep to the left in passing the plaintiff, the law imposed on him the duty of exercising the highest and most unusual care; and that thereby the defendant took upon itself the responsibility for any accidents that might occur to any person who was on the right of the road. These claims were overruled by the court.

Lucius P. Deming and *J. Birney Tuttle*, for the appellant (plaintiff).

I. The standard of conduct in the case at bar is a standard fixed by law and even enacted into statutes of this State (§§ 2689–90–91), and also a standard fixed by the general agreement of men's judgments (Law of the Road), and plaintiff claims the court did not apply either of these standards to the case. The plaintiff had a right to be on the street,

for the bicycle is a vehicle, and entitled to all the rights and privileges which the law extends to vehicles. *Taylor* v. *Goodwin*, 4 Q. B., 229; 12 Amer. & Eng. Ency. of Law, 958. The plaintiff was riding on the side where he should be, before meeting defendant's team, and followed the law when he attempted to pass. General Statutes, §§ 2689, 2690. The defendant was not where he should have been. He attempted to pass plaintiff contrary to statute. The defendant occupied his position only permissibly, and was charged with entire responsibility for any injury to others, arising from the fact that he was out of place. 12 Amer. & Eng. Ency. of Law, 957; Cooley on Torts, 2d Edition, 799; *Palmer* v. *Barker*, 11 Me., 338. A special duty concerning the conduct of persons in certain relations may be created by statute, and a failure to observe such statutory duty is sometimes said to be negligence *per se*. Wharton on Negligence, 433; Shearman & Redfield on Neg., 13.

II. In answer to the claim that negligence has been found as a fact, on the part of the plaintiff, and no negligence on part of defendant, and therefore this court will not review the case, the plaintiff claims that precisely such conclusions of the trial court were reviewed by this court in *Bailey* v. *H. & C. V. R. R.*, 56 Conn., 444; *Beardsley* v. *Hartford*, 50 id., 529; *Nolan* v. *Railroad*, 53 id., 461, *Dyson* v. *Railroad*, 57 id., 9; *Gallagher* v. *Railroad*, ibid., 442.

William H. Ely, for the appellee (defendant).

I. The court has found that the plaintiff was guilty of contributory negligence, and that Scoville, the defendant's agent, was not guilty of negligence, and the question of negligence is a question of fact. *Park* v. *O'Brien*, 23 Conn., 339; *Dexter* v. *McCready*, 54 id., 171; *Fiske* v. *Forsyth Dyeing Co.*, 57 id., 118. In order to recover, the plaintiff must show that he was not guilty of negligence and that the defendant was. Having failed to do this, judgment was rightly rendered for the defendant. *Park* v. *O'Brien*, 23 Conn., 339; *Bennett* v. *R. R. Co.*, 57 id., 422. There was no error in finding the plaintiff guilty of contributory negligence, and

the defendant's driver not guilty of negligence, so far as the law is concerned; and so far as the facts are concerned, the court will not review them. *Styles* v. *Tyler*, 64 Conn., 432; *Curtis* v. *Bradley*, 65 id., 99.

II. It is impossible to make out any question of law raised by the plaintiff, that is not clearly and positively answered by the finding and the cases already cited. There is no law which holds that it is negligence *per se* for a driver to have his team on the left hand side of the center of the traveled path, and the plaintiff is not relieved from ordinary care of himself on that account. *Brooks* v. *Hart*, 14 N. H., 317; *Daniels* v. *Clegg*, 28 Mich., 32; *Wrinn* v. *Jones*, 111 Mass., 360. No error appears in the record, and the judgment of the lower court should be sustained.

BALDWIN, J. The plaintiff's main contention is that whoever drives a team upon what to him is the left hand side of the road, thereby assumes the responsibility of exercising an unusual and the highest degree of care to avoid a collision with any other vehicle which he may have occasion to pass, and which is being kept on what to it is the right hand side of the road.

Such is not the law. It is necessary and proper for any driver, who is about to stop for the purpose of going upon land or into buildings situated on what to him is the left hand side of the road, to shape his course in that direction; and he is bound simply to exercise ordinary and reasonable care with reference to such teams as he may encounter. Whether such care was exercised by the defendant's driver, under the circumstances of the case, was a pure question of fact, on which the finding of the court below is conclusive. *Wrinn* v. *Jones*, 111 Mass., 360; *Fiske* v. *Forsyth Dyeing Co.*, 57 Conn., 118.

It is equally conclusive in charging the plaintiff with contributory negligence. He too was bound to exercise the same degree of care which the law required of Scoville, the defendant's driver. It was not his absolute right to pass between the defendant's team and the southern curb of the

street, or to assume that Scoville must and would turn out for him. The defendant's right to use its elevator and to place its truck as close to it as it could, was as perfect as that of the plaintiff to ride through the street. Each party was equally bound to use his rights so as not to injure the other.

We have no statutory rule at variance with these principles. General Statutes, §§ 2689, 2690, provide that when the drivers of any vehicles for the conveyance of persons shall meet each other in the public highway, each shall turn to the right and slacken his pace so as to give half the traveled path, if practicable, and a fair and equal opportunity to pass, to the other; and that the driver of any such vehicle who shall, by neglecting to conform to these requirments, drive against another vehicle, shall be liable in treble damages for any injury thereby done, and if the injury were done designedly, forfeit not exceeding $100 to the State; such damages, if the driver is unable to pay them, to be recoverable of the owner of the vehicle by writ of *scire facias*. The action before us was not brought upon the statute, and could not have been, since that gives a remedy only against the driver, or (in case of his inability to respond) the owner, of a vehicle for the conveyance of persons. The rule which it lays down is limited to vehicles of the same description. The driver of a truck for the conveyance of goods, when he meets on the road a vehicle for the conveyance of persons, is not under any statutory obligation to turn to the right. It may be reasonable, and, if so, necessary, that he should do so, but this depends solely on what should be the conduct, under the circumstances of the occasion, of a driver of ordinary skill and prudence.

The plaintiff filed written exceptions to certain of the findings of fact made by the court below, and to its refusal to make certain findings of fact which he had requested, and the evidence claimed by each party to be material to such questions of fact has been certified up, and made part of the record, under Chap. 174 of the Public Acts of 1893. This Act was repealed in 1895, but by General Statutes, § 1, such

repeal did not affect actions then pending, of which the present suit was one.

By the reasons of appeal founded upon these exceptions, the plaintiff asks this court to compare the evidence as to several of the circumstances preceding or attending the collision between the bicycle and the truck, with the findings of the trial court as to what those circumstances were. There was evidence in respect to some of these circumstances tending to support the plaintiff's view of them. There was evidence in regard to all of them tending to support the views taken by the trial court.

Negligence becomes a question of law, when the case turns upon the standard to be applied to measure the care due from the party whose conduct is the subject of consideration, but seldom, if ever, when it turns on what his conduct in fact was and there is no uncertainty as to the rule by which it was to be governed. *Farrell* v. *Waterbury Horse R. R. Co.*, 60 Conn., 239, 246. The case at bar is one of the latter description, and the plaintiff's exceptions to the finding constituted no ground of appeal under the Act of 1893. *Styles* v. *Tyler*, 64 Conn., 432; *Meriden Savings Bank* v. *Wellington*, ibid, 553. Whatever points of law he was entitled to raise were fairly presented by the state of facts found by the trial court.

There is no error in the judgment appealed from.

In this judgment the other judges concurred.

SAMUEL P. WILLIAMS *vs.* GEORGE L. LILLEY ET UX.

Third Judicial District, Bridgeport, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The plaintiff leased the upper floors of a business block owned by the defendants, for the term of ten years at an annual rent of $3,000, with an option to purchase the entire property during, or at the end of the term, for $120,000 (of which $100,000 might remain on mortgage upon the property), less such sum as he might then have paid by way of rent. The contract further required the plaintiff to pay all taxes and insurance upon the property, to heat the building and furnish fuel therefor, to maintain the elevator, and generally to do all things necessary to make the premises desirable for tenants, and prevent depreciation in the value of the property. The defendants, upon their part, covenanted that if the net receipts of the plaintiff by way of rents, should not equal the rent paid by him, they would repay him the loss, provided he should make a written statement of such deficit each year, and give them notice of his intention to claim reimbursement therefor. The agreement also provided that the defendants, upon receipt of such a notice, might cancel the lease. The plaintiff entered into and continued in possession, under the contract, performing all his covenants, until the upper stories of the building were rendered untenantable by fire. The defendants adjusted the loss, and received from the insurance companies as compensation therefor, about $24,000, of which they expended about $15,000 only, in rebuilding; but whether the building was fully restored to its former value and usefulness or not, did not appear. Shortly thereafter the plaintiff notified the defendants of his election to buy the property, demanded of them a deed, offering to give back a mortgage pursuant to the contract, and at the same time insisted that the unexpended insurance money belonged to him, and should be credited to him as part of the cash payment of $20,000 called for by the agreement. This sum if credited to the plaintiff would, together with the amount of rent then paid by him, have equaled or exceeded the stipulated cash payment of $20,000. The defendants refused to comply with these demands, and the plaintiff brought suit for the specific performance of the agreement. *Held:*—

1. That the intent of the parties, as evidenced by the peculiar and exceptional features of the agreement, was to treat the plaintiff's election to purchase the property, whenever in fact made, as relating back to the date of the execution of the agreement, thus constituting in legal effect a present purchase of the property.
2. That in absence of controlling precedents to the contrary, the agreement ought to be so construed as to accomplish this intent, which accorded with the principles of equity and good conscience, as well as with the doctrines applicable to the equitable conversion of property.

8. That as it did not appear that the building had been in fact fully restored by the expenditure of part only of the insurance money, the plaintiff was equitably entitled to have the unexpended insurance money applied upon the cash portion of the purchase price.

Whether the application might not have been made in reduction of the mortgage note instead of the cash payment, had the defendants seasonably insisted upon that course, *quære*.

The plaintiff alleged in his complaint that the property was not fully restored by the partial expenditure made, which the defendants denied; but upon the trial the plaintiff was prevented by the objection of the defendants, which the court sustained, from offering evidence in proof of this averment. *Held* that whether the question of full restoration was immaterial to the rights of the plaintiff, as decided by the trial court, or not, the defendants certainly could not question the correctness of the ruling.

[Argued October 23d—decided November 22d, 1895.]

SUIT to enforce the specific performance of a contract for the sale of real estate, and for other relief; brought to the Superior Court in New Haven County and tried to the court, *Prentice, J.*; facts found and case reserved for the advice of this court. *Judgment advised for the plaintiff.*

The case is sufficiently stated in the opinion.

William C. Case and *William H. Ely*, for the plaintiff.

The sole question is whether the plaintiff is entitled to the unexpended balance of the insurance money, to wit, $8,789.94, as a part of the purchase money.

It is plain from the terms of the agreement that the plaintiff's right to become the owner of the property, might be exercised at any time during the lifetime of the lease. The happening of no event which did not terminate the lease, could defeat or impair that right. The contingency of fire was foreseen and provided for, and the conduct of the parties in relation thereto, both before and after the fire occurred, shows clearly that they did not regard that event as interrupting or in any way changing their contract relations. It is plain, too, that the insurance was to be for the benefit of both. That was the intention of the parties as manifested by their conduct both before and after the fire. The plaintiff was to pay "all taxes and insurance." He was to do all

things "necessary to prevent depreciation of the property." This was the letter of his agreement. But the defendants after this agreement was made, had several conversations with the plaintiff about the amount of insurance to be placed on the property. Why? If the plaintiff had no interest in the insurance, why consult him as to the amount?

Again, when the fire occurs the parties together commence the reconstruction of the building and apply the proceeds of the insurance to the work without a word—as a matter of course—until after two thirds of the money had been expended for their mutual benefit.

All the plaintiff contends for here is that the entire insurance money shall be applied in accordance with the evident intention of the parties, for the mutual benefit of both. The fire did not terminate the lease. General Statutes, § 2969.

It is no answer to say that the plaintiff need not have chosen to purchase the property after the fire. He was and is bound to do all the things as lessee to which the contract ever held him. But the option is an integral part of that contract. It was in consideration of that right that he agreed to do what he is now bound to do, and it is the defendants' part of the contract to convey to him the entire property which they agreed to convey, or its equivalent, and the unexpended insurance is an acknowledged part of that equivalent.

The great weight of authority in this country is in support of the proposition that where there is a contract for the purchase and sale of property, the vendor, if he remains in possession, holds it in trust for the vendee, and the vendee must bear the loss, and is entitled to all the benefits and gains of the property after the contract is made. *Frick's Appeal*, 101 Pa. St., 488; *McKechnie* v. *Sterling*, 48 Barb., 330; *Hill* v. *Protection Co.*, 59 Pa. St., 474; Sugden on Vendors, 254; *Insurance Co.* v. *Updegraff*, 21 Pa. St., 513; *Reed* v. *Lukins*, 44 id., 200; Fry on Specific Performance, 360.

John W. Alling and *Charles G. Root*, for the defendants.

I. The statement of facts does not permit the plaintiff to

maintain his case, unless the court will make a new contract for him, or will add a new term to the written contract not embraced therein, and which it is clear the parties probably never would have inserted.

II. The authorities are clearly in favor of the defendants; the case of *Gilbert & Ives* v. *Port*, 28 Ohio St. 276, is in principle exactly like the case at bar. And the facts are very similar to those involved in the present case. See also *Poole* v. *Adams*, 33 L. J. Eq., 369; *Raynor* v. *Preston*, 14 Ch. Div., 297; *Lees* v. *Whiteley*, 2 Eq. Cas., 13; *Loft* v. *Dennis*, 1 E. & E., 474; *Kerr* v. *Day*, 14 Pa. St., 112; *Edwards* v. *West*, 7 Ch. Div., 858; *Sutherland* v. *Parkins*, 75 Ill., 338; *Dunston* v. *School District*, 94 Mich., 502; *Waterman* v. *Banks*, 144 U. S., 394; *Bostwick* v. *Hess*, 80 Ill., 138; *Newton* v. *Newton*, 11 R. I., 390; *Weston* v. *Collins*, 11 Jur. N. S., 190; *Harding* v. *Gibbs*, 125 Ill., 85; *Richardson* v. *Hardwick*, 106 U. S., 252.

FENN, J. This is a case reserved by the Superior Court for the advice of this court. The facts found, so far as material to be stated here, are as follows:—

On June 20th, 1890, the defendants, husband and wife, married since 1877, were, and still are, the equal owners, as tenants in common, of a piece of land situated in Waterbury, in this State, with a business block, five stories in height, standing thereon. On said day, the plaintiff and defendants executed in duplicate an instrument by which the defendants leased to the plaintiff the four upper floors of said building, for the term of ten years from the 1st day of July, 1890, for the annual rent of three thousand dollars. Said lease was in the usual form of such instruments, but contained the following peculiar provisions: "With right to purchase said property at the expiration of this lease, or before, at the option of said Williams, for the sum of $120,000, whatever sum said Williams shall have paid before that time, by way of rent, to be deducted from that sum. Said Williams covenants to pay all taxes and insurance, to keep said building, to operate and keep running the elevator in said building, to heat said

building and furnish fuel therefor, and generally to do and perform all things necessary to make said property desirable for tenants, and prevent the depreciation in value thereof. Said Williams shall keep books of account in which shall be entered all receipts and expenditures relating to said property, with vouchers for the payment of all moneys therefor, which books and vouchers shall at all reasonable times be open to the inspection of the lessors or their agents, and shall render a statement once each year, of his receipts and expenditures relating to said property. . . . And said lessors hereby further covenant and agree that in case said Williams shall not, at the expiration of this lease, have realized from rents collected by him after the payment of expenses as aforesaid, so much as he shall have paid the lessors by way of rent, in such event they will repay him such a sum as he shall have paid by way of rent in excess of his net receipts from rents collected by him; but it is mutually understood and agreed that at the expiration of each year said Williams shall make a written statement of such deficit and of his intention to claim reimbursement therefor, if any such deficit at any time occur, and on receipt of such notice said lessors may cancel said lease if they so desire, by notice in writing to said Williams within ten days from the receipt of such said statement and notice of claim by Williams. . . . It is agreed that if said Williams shall purchase said property, $100,000 of the purchase price shall remain on mortgage at five per cent."

Upon July 1st, 1890, the plaintiff entered into possession and has continued in possession down to the present time. Shortly after the lease was executed, the plaintiff and the defendant Lilley had several conversations concerning the amount of insurance which should be placed upon the property. As the result of these talks, insurance to the amount of $35,000 was placed, to the mutual satisfaction of the parties. The building continued to be insured for said sum down to the time of the fire hereinafter described. The policies were all issued to Geo. L. Lilley and wife, and as soon as issued, were delivered to the defendant, Lilley, who kept

them. The plaintiff paid the premiums. At no time was any conversation had between the parties as to the terms of the policies, the interest to be insured, for whose benefit the insurance was to be, or the use or application of any insurance money which might be received in case of a loss. The plaintiff regularly continued to pay to the defendants the payments of rent stipulated in the lease, and in other respects to keep the covenants of said instrument, until the time of the fire.

On April 9th, 1893, a fire occurred in the upper portion of said building. As a result, the four stories occupied by the plaintiff were seriously injured both by fire and water, so that they were wholly untenantable. Immediately after the fire, Mr. Lilley adjusted the loss with the several insurance companies, and received from them the sum of $24,351.54 in settlement. Immediately after the fire, steps were taken for the reconstruction of the building. The plaintiff desired some changes made for the better adaptation of the building for renting. As the result of the conferences between him and Mr. Lilley, who in all matters connected with the care and charge of the premises acted as the agent of his wife, it was arranged and agreed that such changes should be made, and contracts for the reconstruction of the building, incorporating such changes, were made by Mr. Lilley, acting for himself and his wife. In consideration of the making of these changes, the plaintiff agreed to make his monthly payment of rent without interruption, and to do on his part, as ordinary repairs, some minor things involved in putting the property into condition suitable for renting. Said restoration was wholly completed in the early part of July, 1893, and the tenants then began to re-occupy.

The defendants expended in restoring said building, $15,161.60. They also performed services by themselves and their teams and laborers, of the value of $400, leaving in the defendants' hands a balance of said insurance money unexpended in the restoration of said property, of $8,789.94.

Ever since the restoration of said building was completed and paid for, the plaintiff has claimed and persistently asserted to the defendants that the excess of insurance re-

ceived over and above the cost of restoration belonged to him, and that whenever he should exercise his right to purchase the property under the provisions of the instrument referred to, he would be entitled to have such excess applied on account of the purchase price. This claim of the plaintiff the defendants have ever disputed and now dispute. The correctness of this claim of the plaintiff is the sole question we are now called upon to determine.

Without adopting what may be termed the extreme theories of either party, and confining ourselves to what we deem manifest and clear, it is evident, we think, that the option to purchase the entire property, conferred by the contract upon the plaintiff, constituted a material inducement to the agreement in question, which established the relation between the defendants and the plaintiff of lessors and lessee of a portion only of such property. There were in fact two contracts, evidenced by the same instrument, related in some degree, in other essentials distinct. The same consideration extended, measurably at least, to both. The right to purchase the entire property furnished an inducement to the plaintiff to make and carry out the stipulations in regard to such entire property, though he was to be a tenant of only a portion of it.

If the case before us, then, is not one in which the relation of parties to a contract for the sale and purchase of real estate exists, it is also clearly not one in which that of lessor and lessee of property, with an incidental option to the lessee to purchase only the leased property, is created, or of a simple unilateral contract of option. None of the cases cited in the briefs and arguments of the counsel, in other jurisdictions, are precisely in point, and as confessedly there is no similar case in our own State, we deem ourselves fully at liberty, and in duty bound, to consider the question presented to us *res integra*, and to decide it upon our view of what is reasonable, equitable, and just. Indeed, the provisions of the agreement between the parties are so exceptional and peculiar, that we desire it to be clearly understood that our decision is largely based upon them, and confined to the

individual case presented, and should not be regarded as laying down general principles alike applicable to all contracts of option, or to such contracts usually. Here, in fact, was not only a lease of a portion of certain premises, with the grant to the lessee of the right to purchase all of such premises, to be exercised at the lessee's option, either at the time specified in the instrument for the termination of the lease, or at any earlier time, but upon such purchase the sums theretofore received by the defendants from the plaintiff by way of rent, it was provided, should be applied as part payment of the purchase price. The intent of the parties to treat the contract, in the event of the plaintiff's election to take the property, as in effect a present purchase of it, as of the date of the agreement, appears to be thus clearly manifested.

Again, that it was the clear understanding of both parties that the plaintiff would purchase the property, and also that the right granted him to do so constituted a material consideration and inducement for his undertakings, is shown by other provisions of the instrument, namely, the covenant of the plaintiff to pay all taxes and insurance on the entire property, to keep the whole building, to operate and keep running the elevator in it, to heat it, furnish fuel therefor, "and generally to do and perform all things necessary to make said property desirable for tenants and prevent the depreciation in value thereof."

Thus the situation of the parties was this: During the term of the lease, or until the plaintiff exercised his right to purchase, the defendants were relieved from all expenditure upon, or by reason of, the property in question, and secured as their net income therefrom the full rental of the ground floor of the building, and $3,000 a year, paid them by the plaintiff. When the plaintiff used his option, the defendants would retain what they had received, except that then the $3,000 per year paid by the plaintiff was to be applied as part payment of the purchase price. It was provided that in case the plaintiff failed to realize from rents collected by him, after payment of the expenses provided for, so much as he paid for rent, he should then be entitled to relief on the

specified conditions, as hereinbefore appears. But in this event he would receive nothing for his services in the care of the property, and the defendants would enjoy the entire gross receipts from the rental of the first floor, without deduction in any contingency.

From a careful consideration of these peculiar features of the instrument, it appears clear to us that the plaintiff's relation to the premises in question, as lessee of a portion thereof, was, and was designed, understood and intended by the parties to be, subordinate and incidental to a broader connection with the entire property, as an inchoate or initiate purchaser thereof; that his position was analogous to what it would have been if he had entered into possession under an agreement to purchase, which contained a provision that on failure to complete the contract his rights should cease at a stipulated time, possession should be surrendered, and the money before that time paid should be forfeited to the vendor; in other words, a contract relating to real estate, but similar in form and effect to such conditional sales of personal property, as that considered in *Loomis* v. *Bragg*, 50 Conn., 228.

Under such a construction—which seems to us a just one—ought it not to be held that the sums stipulated to be paid, and in fact paid by the plaintiff for insurance upon the property, were so paid with the intention, attributable to both parties, that such insurance should protect both; should, in case of loss, though payable to the defendants as owners of the legal title to the property insured, be, what the property itself was, a thing to which an equity applied, a trust attached, a matter to which the contract in its spirit and essence extended? If such was the intention and understanding of the parties, plainly discoverable and apparent from the instrument itself, ought it to be enforced and effectuated by the decree of a court of equity? These are in effect the questions which we are now called upon to decide.

Here then, was, as has been stated, at the time of the fire, an existing contract between the parties, upon full consideration, embracing a right of option to purchase, of the exceptional character described. That right had not been lost,

but existed, and was recognized by the defendants as existing, at the time the plaintiff sought to exercise and enforce it after the fire. Meanwhile an event had happened for which the contract did not in express terms provide. Insurance to reimburse the loss by fire of property embraced within the option, had been received by the defendants. This insurance had, as we have seen, been effected pursuant to that part of the contract which was not confined to the leased property, in the name of the defendants, but at the expense of the plaintiff.

To whom, to repeat, as between the parties, upon the exercise of the option, does such insurance belong? The plaintiff contends that the benefit of this payment received by way of indemnity belongs to him who bore the burden of paying the premium, for which the risk was taken by the insurance companies. The contract, so far as express and specific language is concerned, is silent. The defendants say truly: "In the enforcement of contracts, no principle should be more carefully guarded than that it is the function of the court to interpret, and not alter, contracts." They also say correctly that the court should not "add a new term to the written contract, not embraced therein, and which it is clear that the parties probably never would have inserted." We will go further than this. We assume no right to add a new term to a contract, though it were clear that had the attention of the parties been called to it in all probability it would have been inserted. But notwithstanding this, and in entire consistency with it, it has ever been held that "the great object in the construction of contracts is to give effect to the intention of the parties." 1 Swift's Digest, side page 221. Such being the rule, where, as in the present instance, a contingency occurs for which no express provision is made, the question is not what the parties would have provided in case such a contingency had occurred to them, as it may have done, but what they have provided in the language used, construing it, not by "sticking in the bark," and confined to the letter "which killeth," but in the spirit which "maketh alive." For this purpose, the familiar rule was established, and is in-

voked, "that the parties are deemed to have intended that each respectively should have and bear the full and just benefit and burden of his contract." Let us, if possible, ascertain what will result from the application of such principle to this case.

At the time the plaintiff declared his option to take the property, by demanding a deed pursuant to the contract, such property had been materially damaged by fire, and the defendants had received, as compensation or equivalent, the insurance money in question. It is true they had also expended a considerable portion of such insurance in the work of restoration, so that the subject-matter of the present controversy is the unexpended balance of such money only. But let us first, with a view to clearness, look at the matter as it would have stood if, when the option was exercised, none of it had been so expended, but all remained intact in the hands of the defendants, while the property itself continued in the condition in which the fire left it. What would be the rights of the parties in such a case? The money was derived from an insurance of the defendants' interest in the property. It belonged to them. But so did the property insured. Indeed the money itself was theirs, because it represented in another form, stood for, and took the place of, what had been theirs; what, so far as it remained, continued to be theirs. But when the plaintiff elected to exercise the option which was his, because he had purchased and paid for it, the defendants were bound by the obligation of their contract to convey such property to him. They were not less bound to convey what remained, because, through no fault of theirs, it did not all remain. They were not, indeed, themselves in any way insurers to the plaintiff that, during the space of time for which his right to exercise his option continued, the property should remain unchanged in form, or undeteriorated in value. Changes that would appreciate or depreciate price or utility, independent of any act of the parties, might occur in an infinite variety of ways, and such occurences would leave the contract by which the option was conferred, untouched, and itself unchanged. If such change

occurred in consequence of no act or conduct of the defendants which was in itself a violation of duty imposed by the letter or spirit of the contract, it would be their duty, upon demand properly made, in accordance with and during the life of the contract, to convey the property, not as it was at the date of the making of the contract, but as it existed at the time of the demand. How then, in the case as we are now supposing it to be, does the property so stand? A part of it remains in a damaged and ruinous condition. But the balance is represented by a sum of money received by the defendants, upon the adjustment of insurance, upon the basis of a just representative and equivalent for the loss. Why should not the two, the injured property and the sum received for the injury, stand together, and constitute together in its present form, the estate contracted to be conveyed to the plaintiff, in the event of his exercise of his option? It seems to us that they should. What injustice is done to either by this result? How is it possible to do justice to both in any other way? It gives the plaintiff no benefit beyond his original contract. It imposes upon the defendants no burden which they did not therein, voluntarily and unquestionably, for full consideration received, assume. The plaintiff gets nothing from the defendants, except what they themselves have received, not for the use of their property, but for the property itself, which they had agreed to convey to the plaintiff, in case he elected to take it. In this conclusion, no obligation on the part of the defendants to insure the property at all is involved, nor that the insurance, if placed, should be adequate to cover loss.

It is true that in the contract before us it was provided that the property should be insured, and this to be done, as it was done, at expense of the plaintiff. But, no matter here, the point is that there was in fact adequate insurance received by the defendants. To whom, by the principles of equity and good conscience, upon the exercise of the plaintiff's option, does it belong? It appears to us that the principles of natural justice, the teachings of conscience, and the rules of that reason which has been denominated the life of

the law, and without which it should not now exist, demand that when a party holds property which another has a right to purchase from him at a fixed sum, he should be faithful to the obligation which that right imposes upon him, in its very spirit and essence; that he should not keep the idea of obligation out of sight whenever some chance occurrence renders it convenient and pecuniarily profitable for him to do so.

We conclude, then, that if in the case before us, the property, at the time the plaintiff demanded the conveyance, had remained as it was after the fire, without reparation, while the money received for insurance was unexpended and unpledged for repairs in the hands of the defendants, the plaintiff would have been entitled to receive such money as part and parcel of the property, which it would have been the duty of the defendants to convey to him. Being money, it of course amounts to the same thing to deduct it from the stipulated purchase price.

We will say further (although we wish it to be clearly understood that we do so, not for the purpose of supplying an additional ground for our decision, nor as adopting as correct—certainly not without careful limitations—the doctrine to which we refer, but because the matter was fully argued before us) that the same results as those which we have stated would also, we think, be reached by the logical and consistent application of the established equitable doctrines concerning estates arising from conversion. Regarding this, Pomeroy, in his work on Equity Jurisprudence, 2d Edition, Vol. III., § 1163, supporting the statement made with abundant citation of authorities, both English and American, says: "In contracts of sale upon the purchaser's option, the question whether or not a conversion is effected at all, cannot of course be determined until the purchaser exercises his option; but the moment when he *does* exercise it, the conversion, as between the parties claiming title under the vendor, *relates back* to the time of the execution of the contract. Thus, where a lessee with an option to purchase—or any other purchaser with an option—duly declares his option after the death of the lessor or vendor, who is the owner in fee, the

realty is thereby converted *retrospectively* as between those obtaining under the lessor or vendor, or under his will; that is, as between the heir or devisee on one side and the legatees or next of kin on the other, the proceeds will go to his personal representatives, though the heir or devisee will be entitled to the rents up to the time the option is declared." To this statement, Pomeroy, however, adds: "This rule is confined to conversion between the parties claiming title under the vendor or lessor, his heirs, or devisees, or his legatees, next of kin, and personal representatives, and does not apply as between the vendor and purchaser themselves." The only authority cited by this author for the statement last given, is the case of *Edwards* v. *West*, L. R. 7 Ch. Div., 858, 862, 863. This case has, however, been followed in some more recent cases in England, and to some degree in this country, most noticeably in *Gilbert & Ives* v. *Port*, 28 Ohio St., 276. But on the other hand, there are recent and well considered cases in which the courts of this country have failed, as we do, to recognize the consistency to the established principle stated, of *Edwards* v. *West*. See *Kerr* v. *Day*, 14 Pa. St. 112, 53 Amer. Dec. 526; *Peoples Street Railway Co.* v. *Spencer*, 156 Pa. St. 85.

Such then, as above expressed, being our judgment as to how the case would stand if all the money had remained unexpended, and no repairs had been made, we come to the inquiry, how is the case altered by what, as the record shows, was in fact done? On the part of the plaintiff it was argued, and with force, that the conduct of the defendants, in the expenditure of insurance in repairs, was a recognition of the right of the plaintiff to its benefit, in case he elected to take the property. But if we assume this to be correct, and further, that such recognition would fix and establish the liability, if in any wise doubtful before, we think the extent of such liability, so established, would only be the amount expended, and a recognition of the right of the plaintiff to take the real estate in its present form. Concerning this, no dispute comes before us. The unexpended portion of the insurance money is the entire subject-matter of the

present controversy. Whether the money which was expended, actually restored the premises to their former usefulness and value, does not appear.

The record shows that a sum of money has been acquired by the defendants, which was paid to them upon a larger insurance upon the property, as an ascertained and adjusted compensation for the loss sustained. A portion of that money has been expended upon the work of rebuilding. In the absence of anything further appearing, has the plaintiff any claim to the benefit of the unexpended balance? We think he has. Advancing from the position we have already taken, that if none of the money had been expended the plaintiff could claim the benefit of all, we think—if part was properly expended upon the property, as is the undisputed fact here—the plaintiff is equally entitled to the balance; unless indeed, some further fact exists, of the character of what, under the old system of pleading, was known as matter in confession and avoidance—matter which, alike under our present system of pleading, should be "specially pleaded" (Rules of Practice, 58 Conn. 566, § 6)—which satisfied, destroyed, or barred such right. As regards the subject of pleading or statement, the plaintiff indeed anticipated in his complaint, what we consider, if material, as more properly a matter of defense. He assumed the burden of showing that the property was not restored by the expenditure of a portion only, of the money paid upon it. Whether such fact would alter his equitable claim to the money may be doubtful. But it was stated in argument as a fact admitted by both parties, that the plaintiff was prevented by the objection of the defendants, sustained by the court, from offering evidence in support of his allegation; and by such ruling the court has held that the allegation of the plaintiff was unnecessary, and that the equitable right of the plaintiff, if it existed at all, extended to the balance in question, irrespective of the question as to full restoration. This ruling may be correct —in any event it is final for the purposes of this case. The defendants certainly cannot question its correctness.

Taking the case as it stands, the only case we feel at lib-

erty to take, we think the plaintiff is entitled to have the unexpended balance of the insurance money appropriated and applied towards the purchase price, and that judgment should be rendered in his favor accordingly for the relief prayed for in the complaint.

Possibly such application should have been in reduction of the mortgage note instead of the cash payment, if the defendants had so desired and had made that claim in time; but they did not object to the tender on this ground, made no such claim upon the trial below, and in the argument here did not raise the question; perhaps because the mode of application is not very material, in view of the fact that the mortgage note is on demand and payment can be enforced at the defendants' pleasure. Whatever view we might take of the defendants' right to direct the application of the money in their hands equitably belonging to the plaintiff, if they had properly made such claim, we are satisfied that equity does not require us to now alter the application which was made by the plaintiff when the demand for conveyance of the property was made, and to which the defendants by their conduct at the time of the tender, and in the trial of the case, apparently acceded. We therefore hold the plaintiff entitled to the application of the unexpended insurance money towards the cash payment of $20,000. The Superior Court is thus advised.

In this opinion the other judges concurred.

HARRY W. CUMNOR, TRUSTEE, *vs.* BENJAMIN SEDGWICK ET AL.

Third Judicial District, New Haven, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The parties to an action, which had been substantially heard upon the issues raised by the pleadings, in view of pending negotiations for an amicable settlement and to prevent unnecessary increase in the expense "by the entering up of judgment," stipulated in writing, by their respective attorneys, that judgment might be rendered on a stated day in the future "by the clerk, in term time or vacation," in favor of the plaintiff for a certain sum and costs. This stipulation was duly filed and approved in writing by the trial judge; and on the day mentioned (no amicable settlement having been reached) judgment was rendered pursuant to the agreement, as evidenced by the judgment file in the usual form. *Held:*—

1. That the stipulation, when read as a whole and in the light of the attendant circumstances, did not empower or require the clerk to render judgment, but only to enter it up.
2. That the judgment file plainly showed that the court, and not the clerk, rendered the judgment; and that the record was conclusive upon this appeal.
3. That the defendants' allegation, in their reasons of appeal, that the judgment was rendered by the clerk, was not legally assignable as error since it contradicted the record.

The defendants also assigned as error certain rulings of the court respecting the pleadings, but did not claim that the judgment rendered was not in accord with the terms of the stipulation, or that it was unjust or inequitable, or that upon a new trial any other judgment would or ought to be rendered. *Held* that the defendants could not now avail themselves of these alleged errors, since the stipulation thus solemnly entered into must be regarded, in legal effect, as a judgment by confession, and as such, final and conclusive upon the parties, irrespective of possible errors in earlier stages of the trial.

[Submitted on briefs October 25th—decided November 22d, 1895.]

SUIT to foreclose certain real estate, brought to the Superior Court in New Haven County and tried to the court, *George W. Wheeler, J.;* facts found and judgment rendered for the plaintiff, and appeal by the defendants for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

John O'Neill, for the appellants (defendants).

It seems that the attorneys agreed that on June 20th, 1895, the clerk might enter up a judgment in favor of the plaintiff. It is doubtful if attorneys at law have any such power as the attorneys here assumed to exercise. *Daniels v. New London*, 58 Conn., 157. A clerk has no jurisdiction to enter up judgments. Jurisdiction comes from the sovereign. Parties even cannot confer it. It certainly is doubtful if a married woman can agree that a judgment may be entered up against her by the clerk of a court, and that he may fix a law day beyond which she is not entitled to redeem her property.

The agreement is, that on the motion of the plaintiff the clerk may enter judgment. There is nothing in the record to show that the plaintiff made any such motion, or that the clerk did not enter up a judgment of his own volition.

George E. Terry, for the appellee (plaintiff).

If the pleadings were correctly disposed of by the court, and if the facts were properly adjudicated upon, the defendants cannot be injured by any possible peculiarities in the method of rendering judgment. 1 Amer. & Eng. Ency. of Law, 954; *Union Bank v. Geary*, 5 Pet., 99; *Denton v. Noyes*, 6 Johns. (N. Y.), 296.

The attorney signing the agreement was the duly and regularly authorized attorney of record, was present, and had full knowledge of the facts. If so, it is immaterial how or when such judgment is rendered. *Gifford v. Thorn*, 9 N. J. Eq., 702; 2 Freeman on Judgments, § 500. There was no fraud, mistake, inadvertence or collusion, and, further, no injury.

This judgment is the judgment of and by the court, and cannot be disputed. *Colt v. Haven*, 30 Conn., 199.

TORRANCE, J. Upon this appeal five errors are assigned. The first four are based upon the action of the court in overruling a demurrer to the complaint, and in sustaining de-

murrers filed to certain paragraphs of the answers and to the "cross bill," while the fifth arises out of the claim that the judgment appealed from was rendered by the clerk of the court, and that no judgment in the cause was ever rendered by the court.

In the view we take of the case, a decision of the points involved in the fifth assignment of errors will dispose of the case; but before proceeding with the discussion of those points, it may be well to make a preliminary statement showing under what circumstances the agreement, hereinafter referred to, and upon the effect of which the decision hinges, was signed.

This suit, seeking to foreclose a mortgage of real estate, was brought to the Superior Court in September, 1894. The defendants therein were Benjamin Sedgwick and Sarah, his wife, and Charles G. Belden, the trustee in insolvency of Benjamin Sedgwick; while the plaintiff was, or claimed to be, the trustee for certain creditors of the Sedgwicks. In November, 1894, the defendants filed a demurrer to the complaint, substantially on the grounds that it showed on its face that the real indebtedness secured by the mortgage deed was not described nor mentioned in said deed; and that it further showed on its face that the note and mortgage upon which the suit was based, were given upon conditions which had never been performed.

At the same time the defendants also filed an "Answer and Cross-bill" consisting of three separate defenses, and an answer in the nature of a cross-complaint asking for certain equitable relief.

In December, 1894, the demurrer to the complaint was overruled. In March, 1895, the plaintiff filed a reply to the "Answer and Cross-bill," in which he denied certain paragraphs thereof, and demurred to certain others, and demurred to the "Cross-bill;" and these demurrers were subsequently sustained.

Thus the pleadings stood in May, 1895, when the cause came on for trial. Whether the case was tried in full or not, the record, outside of the judgment and the agreement to

be presently stated, does not disclose. In the plaintiff's brief it is stated that "the case was tried before Hon. George W. Wheeler in May, and on May 21st was partly heard." The judgment is in the usual form, and clearly imports a full hearing; while the agreement itself, as will be seen, seems to indicate that at the time it was entered into, the case had been either wholly or partially tried, and that nothing remained to be done but to render and enter up judgment.

In this condition of things the parties, on the 29th of May, 1895, by the attorneys of record who had from the beginning appeared for them—and so far as the record discloses in open court and in the presence of the judge—entered into the following agreement in writing:—

"It is hereby agreed by the attorneys for the parties in the case of Henry W. Cumnor, Trustee, vs. Benjamin Sedgwick and others, now pending in the Superior Court of New Haven County, and standing upon the Waterbury docket, that judgment may be rendered on June 20th, 1895, by the clerk, in term time or vacation, upon the application of the plaintiff or his attorneys for the foreclosure of said mortgage, and judgment for the plaintiff in the sum of six thousand three hundred and thirty-five dollars and twenty-five cents ($6,335.25) (being the debt, $5,986.01, the sum shown upon Exhibit B, and interest thereon from the 9th day of June, 1894, the date hereof, $349.19) and costs taxed at $, and that the law day for the parties shall be on the 1st Tuesday of August, 1895. The reason for this agreement being that negotiations for settlement being now pending it is considered unnecessary to increase the expense by the entering up of judgment. It is agreed that otherwise the judgment may be entered up by the clerk in the usual form. Dated at Waterbury this 29th day of May, 1895."

After being approved in writing, upon its face, by the judge holding said court, the agreement was filed in court on the day of its date.

The judgment in the cause, which is entered up in the usual form, purports to have been rendered by the court on the 20th of June, 1895; its terms are in substantial accord

with the terms of the agreement; and no claim is made that the judgment is other than what it was solemnly agreed it should be.

The same attorneys who signed the agreement on behalf of the defendants, now seek to repudiate it on behalf of the same defendants; not on the ground that the judgment entered up in pursuance of it is different in any respect from that which they agreed to, nor because it works them the slightest injustice, but because, as they claim, it was rendered by the clerk and not by the court, and is therefore erroneous.

Now even if the record clearly sustained this claim, it is very questionable whether the defendants, under the circumstances of this case and upon this appeal, could avail themselves of such a mere technicality. Certainly we think it would be the duty of the court to go as far as the law would permit, to sustain a judgment made in pursuance of such an agreement as the present. But the record does not sustain this claim, and so we need not consider the question above suggested.

The claim for relief under the fifth assignment of error, is based upon two assumptions, both of which are groundless. The first is that the agreement empowered and required the clerk to render the judgment; and the second is that the record shows that the clerk did in fact render the judgment, and that no judgment was ever rendered by the court.

As to the first assumption, we do not think the agreement, when read as a whole and in the light of the circumstances under which it was made, either empowers or requires the clerk to render the judgment, but only to enter it up. The only reason why judgment was not entered up on the day the agreement was made, was the desire of the parties to save additional expense. They deemed it "unnecessary to increase the expense by the entering up of judgment." It was not the rendition, but the entry, of judgment that would make expense, and it was of the entry of judgment that they were chiefly thinking. If the negotiations for a settlement were successful, there would be no need to enter up the judg-

ment; and if they were not, then "the judgment may be entered up by the clerk in the usual form."

The amount of the indebtedness was ascertained and agreed to, the interest thereon was computed up to the day of the agreement, and the law day was fixed. The essential elements of the judgment were thus agreed to by the attorneys for all concerned; and the court by its action on the agreement says, in effect, this shall be the judgment to be entered up by the clerk, when it is entered up. Nothing was left to the discretion of the clerk in the entire matter.

On the whole, we think the agreement after it was approved by the court, should be construed as relating to the entry and not to the rendition of the judgment; as empowering the clerk to enter up on June 20th, if the parties failed to settle, a judgment which the court then rendered; and not to enter it up, if they did settle the case.

But if we are wrong in this, and the agreement is to be regarded as one empowering and requiring the clerk to render as well as to enter judgment, this will not avail the defendants here, unless the record shows that the clerk and not the court did in fact render the judgment.

What the defendants complain of is, not that they empowered the clerk to render the judgment, but that he rendered it in pursuance of their agreement. They assume that the record shows that the clerk and not the court rendered the judgment—and as before stated we think this assumption is wholly groundless. The record plainly shows that the judgment and the only judgment rendered in the case, was rendered by the court. This is the record of a court of general jurisdiction, and is conclusive upon this point upon this appeal. Upon this point then, that the judgment was rendered by the clerk and not by the court—which is the main claim made under the fifth assignment of error—the assignment clearly contradicts the record; and it is elementary law that nothing which does this can be assigned for error. *Wetmore* v. *Plant*, 5 Conn., 541; *Burgess* v. *Tweedy*, 16 id., 39. It thus appears that there is no foundation for any of the claimed

errors of law set forth in the fifth assignment of errors, and therefore upon that assignment the defendants must fail.

This being so, the question remains whether the defendants can now and here avail themselves of any of the other claimed errors assigned. As the case now stands before us, it is one where the judgment was rightly rendered pursuant to the agreement of the parties; it is one where the defendants have admitted in the most formal and solemn manner known to the law that the plaintiff is entitled to that judgment; it is one in which no claim is even now made that the judgment is in any respect an unjust or inequitable one, or that it ought in any respect to be changed or modified; or that upon a new trial any other ought to be rendered.

Assuming now for the moment, that the court erred in the matter of the demurrers, as claimed by the defendants, the question is whether those errors can here and now avail the defendants, in view of the agreement subsequently made and the admissions therein contained.

This agreement was in effect an absolute and unqualified admission that the amounts therein stated were then and there due from the Sedgwicks to the plaintiff, that he was entitled to a decree of foreclosure, and that judgment accordingly ought to be rendered in his favor. The agreement was entered into after all the pleadings had been filed, and the case either entirely or substantially heard. It was entered into by both sides in good faith, with full knowledge of all the facts, and after full consideration. It was, and was intended to be, final and conclusive upon all concerned, for its terms were to be merged in a final and conclusive judgment. The agreement was, and was intended to be, in effect, a confession of judgment made to save further time and expense to all concerned, and it should now be treated as such.

"Judgments entered for the plaintiff, upon the defendants' admission of the facts and the law, as the same are known to the common law, and exist independently of statutes, are of two varieties; first judgment by *cognovit actionem*, and second by confession *relicta verificatione*. In the former case the defendant after service, instead of entering a plea, acknowl-

edges and confesses that the plaintiff's cause of action is just and rightful. In the latter case, after pleading and before trial, the defendant both confesses the plaintiff's cause of action and withdraws or abandons his plea or other allegations, whereupon judgment is entered against him without proceeding to trial." 1 Black on Judgments, § 50.

We think this agreement should be treated as in effect a confession of the latter kind above mentioned; and when it was made the demurrers and answers were in effect withdrawn, and the case stood just as if they had never been filed.

To hold otherwise would make this agreement merely a snare to the plaintiff. In this view of the matter, we hold that the defendants cannot upon this appeal avail themselves of the first four errors assigned, even on the assumption that the court did really err as claimed. Even on that assumption the errors claimed did the defendants no harm.

This conclusion makes it unnecessary to further consider the first four assignments; but we may add that we discover no error in the action of the court in overruling the demurrer to the complaint, nor in sustaining the other demurrers; except the merely technical error, in this last matter, of sustaining demurrers in some instances where they did not comply with the statute in specifying distinctly the reasons why the pleading demurred to was insufficient. The demurrers to the "cross-bill" and to paragraphs two and three of the second defense, were defective in this respect; but for the reasons before given, this cannot now be of any avail to the defendants.

There is no error.

In this opinion the other judges concurred.

ANDREW J. HATCH ET AL. *vs.* CHARLES P. THOMPSON.

Third Judicial District, New Haven, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The statement in a judgment file signed only by the clerk, that the court finds the issue for the plaintiff, necessarily imports that all the issues closed to the court were so found. Such form is, however, irregular, and clerks should use the word "issues," where the pleadings raise more than one issue.

The general issue and a plea of tender, whether of the whole or of part of the plaintiff's demand, are repugnant to each other and cannot properly be pleaded together. If, however, they are so pleaded, and the plaintiff prevails on the general issue and the defendant on the issue of tender, the former is entitled to costs but the latter is not.

Under the practice in this State, proof of tender entitles the party pleading it to costs, only when it is pleaded as a sole defense.

Where the question of law the appellant seeks to have reviewed, is apparent on the face of the pleadings, it is unnecessary, and therefore improper, to seek to raise it by reference to evidence adduced under those pleadings, and certified up to this court under the Act of 1893. Reasons of appeal thus assigned rest on a wrong foundation, and are therefore substantially defective.

[Argued October 29th—decided November 22d, 1895.]

ACTION to recover for work and labor and materials furnished, brought to the City Court of New Haven and tried to the court, *Dow, J.;* facts found and judgment rendered for the plaintiffs to recover $137.69, and for the defendant, who had pleaded a tender of $140, to recover his costs of the plaintiffs, and appeal by the latter for alleged errors in the rulings of the court.

The bill of particulars contained items amounting to $145.04. The answer contained two defenses: the first a general denial, and the second, which was traversed by the plaintiffs, that the goods and services were worth no more than $140, and that the defendant had tendered that sum in payment, but the plaintiffs had refused to receive it.

The judgment, which was signed only by the clerk, after stating that the parties appeared and were at issue to the

court, as on file, proceeded as follows: "The court having heard the parties finds the issue for the plaintiffs. Whereupon it is adjudged that the plaintiffs recover of the defendant one hundred thirty-seven and $\frac{69}{100}$ dollars damages, and that the defendant recover of the plaintiffs his costs, taxed at $."

The plaintiffs appealed, and at their request a special finding of facts was made by the court, from which it appeared that the defendant was indebted to the plaintiffs on an unsettled account, in the sum of $137.69, and that he had offered to pay them $140 in settlement of said account, in a manner and under circumstances which were particularly set forth, which offer they refused.

An additional finding was subsequently filed, on the plaintiffs' request, which detailed all the testimony respecting the tender, and also stated that the bill for $145.04 presented to the defendant, prior to the tender, was not correct, the real amount then due being only $137.68.

The plaintiffs assigned as reasons of appeal, the invalidity of the tender, the denial of costs to them, and their award to the defendant, and also the refusal of the court to find certain facts upon the evidence in the cause, which they claimed were material for a presentation of the questions of law. Certain other parts of the evidence bearing on these questions were certified by the court, at the plaintiffs' request, and made part of the record.

Richard H. Tyner, for the appellants (plaintiffs).

John C. Gallagher, for the appellee (defendant).

BALDWIN, J. The recorded judgment of the City Court presents a plain case of an erroneous conclusion from the facts found. The issue is found for the plaintiffs, and it was thereupon adjudged that they recover $137.69 damages, and that the defendant recover of them his costs. Two defenses were pleaded, and each presented a separate issue. The statement in a judgment file signed only by the clerk,

that the parties were at issue as on file, and that the court finds the issue for the plaintiff, necessarily imports that all the issues closed to the court were so found. Supplement to Practice Book: Rules as to Records of Judgments, I., § 1; II., § 2. It is more regular in a case where there are several issues, to use the phrase, "The court finds the issues for the plaintiff," and clerks should be careful in this respect to follow the proper form. See Supplement to Practice Book, Forms 469, 472, 477; *Perkins* v. *Brazos*, 66 Conn., 242, 249. There are few answers in the nature of a denial, even if the defense be single, which do not raise several issues, upon as many paragraphs of the complaint. The denial of any material allegation constitutes an issue of fact. Practice Book, p. 17, Rule IV., § 12.

The defendant saw fit to plead a general denial to the plaintiffs' complaint, when his only real defense, as appears by the additional findings, was that more was demanded than was due, and that what was really due had been duly tendered. This was in direct violation of both the letter and the spirit of the Practice Act. General Statutes, §§ 874, 881. A plea of a general denial, when there are any material allegations in the complaint which the defendant knows to be true, subjects him to the payment of any reasonable expenses, necessarily incurred by the plaintiff to establish their truth. Practice Book, p. 16, Rule IV., §§ 5, 6. Much more should it subject him to the taxable costs, when judgment goes against him on the whole defense thus interposed.

The special finding of facts and the additional finding both support the general finding in the judgment file, so far as relates to the first defense. They show that the defendant was indebted to the plaintiffs for work and materials furnished, and that the dispute was not as to the existence of such a debt, but as to its amount.

As to the second defense, it is a question between the parties whether the special finding is or is not in accord with that in the judgment file. If the facts specially found necessarily constitute a valid tender, then they are inconsistent with the general finding. If they do not necessarily constitute a

valid tender, they are consistent with the general finding, by which the issues upon both defenses were found for the plaintiffs.

It is unnecessary, upon this appeal, to determine the question of their legal effect. If they proved a tender, as to which we intimate no opinion, they did not justify the interposition of the first defense, and upon that (no offer of judgment having been filed) the plaintiffs were entitled to full costs. The Practice Act, as concerns actions or defenses not of an equitable nature, has not altered the general rule by which costs go, as a matter of course, to the prevailing party. General Statutes, § 3720; *Blydenburgh* v. *Miles*, 39 Conn., 484, 497; Practice Book, p. 20, Rule VIII., § 8.

Nor if they proved a tender, does it follow that the defendant was entitled to costs upon that issue. He would have been, under the practice in this State, had a tender been thus pleaded as a sole defense. *Tracy* v. *Strong*, 2 Conn., 659. But even before the strict requirements of the Practice Act as to truthful pleading, it was the rule at common law that the general issue and a tender, whether of the whole or of part of the plaintiff's demand, could not be pleaded together. To set up a tender necessarily admits that something was due, and so is clearly repugnant to a denial that anything is due. *Maclellan* v. *Howard*, 4 Term Rep., 194; *Orgill* v. *Kemshead*, 4 Taunt., 459; 2 Saunders on Pl. & Ev., 834. Where the general issue is improperly joined with another defense, and found against the defendant, he cannot ask for costs, should he prevail on the issue raised upon the latter, since this would be to allow him to profit by his own wrong.

The reasons of appeal, predicated upon the denial of costs to the plaintiffs and their award to the defendant, state that the court erred in coming to that result upon the evidence introduced at the hearing, and which was certified up at the plaintiffs' request, in support of certain exceptions which they have taken to the finding. This evidence tended to show an admission by the defendant that something was due on the items contained in the plaintiffs' bill of particulars; but when evidence is certified up to this court, upon an

appeal, under the provisions of the Act of 1893, it is the proper subject of consideration only when this is necessary to enable the parties to present the questions of law which they desire to raise. *Styles* v. *Tyler*, 64 Conn., 432. The question of law which determines the award of costs between the parties to this action, is apparent on the face of the pleadings. It was unnecessary, and therefore improper, to seek to raise it by any reference to evidence adduced under those pleadings. Both reasons of appeal are therefore placed on a wrong foundation, and so are substantially defective. General Statutes, § 1135; General Rules of Practice XVI., 58 Conn., 584.

The facts in this case are not such as to induce us to relax a salutary rule, merely to shift the burden of a bill of costs; and for want of any sufficient assignment of error, the judgment of the City Court of New Haven is affirmed.

In this opinion the other judges concurred.

MINNIE MCMAHON, ADMINISTRATRIX, *vs.* NEWTOWN SAVINGS BANK.

Third Judicial District, New Haven, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN AND HAMERSLEY, Js.

A gift *causa mortis* cannot be established by proof of mere declarations, oral or written; delivery, either actual or constructive, is essential.

[Argued October 30th—decided November 22d, 1895.]

ACTION to recover the amount of a savings bank deposit alleged to have been owned by the plaintiff's intestate at the time of her decease; brought to the Court of Common Pleas in Fairfield County and tried to the court, *Curtis J.*; facts found and judgment rendered for the plaintiff, and appeal by the defendant for alleged errors in the rulings of the court. *No error.*

The answer alleged that the intestate while in life, trans-

ferred by gift all title in the sum deposited in the bank, to one Thomas Reilly, and payment by the defendant to said Thomas.

The finding of the trial court discloses the following facts: The plaintiff's intestate, Hannah McMahon Reilly, died on December 27th, 1891, while residing in the town of Newtown. At various times during a long course of years previous to her death, the plaintiff's intestate deposited with the defendant small sums of money which, with the accumulated interest thereon, amounted to $240.99 at the time of her death. This deposit was evidenced by a certain savings bank book, No. 1455, issued to her in the name of Hannah McMahon, previous to her marriage with her husband Richard Reilly. About a year before her death, the plaintiff's intestate placed said bank book in custody of one Margaret McCarthy, her next door neighbor, for safe keeping, in whose possession it remained until December 28th, 1891, the day following the decease of said Hannah. On December 24th, 1891, said Hannah told said Thomas Reilly that she had a little money in the bank and some chickens, and that she wanted him to have the money and chickens, together with her furniture. Said Thomas Reilly thereupon drew up a paper of which the following is a copy: "I give my son, Thomas Reilly, all my money in Newtown Savings Bank and all my chickens and furniture. Newtown, December 24th, 1891;" and asked her to sign it, which she did by affixing her mark thereto as follows: Hannah $\overset{\text{her}}{\underset{\text{mark}}{\times}}$ Reilly. There were no witnesses of this transaction, and Thomas retained said paper in his possession until after her death.

At the time of this transaction, said savings bank book was in the possession of said Margaret McCarthy, a half mile distant from the place of the execution of said paper. The plaintiff's intestate did not inform the said Thomas Reilly that she had the savings bank book, or that it was in the custody of said Margaret McCarthy, until about six o'clock in the evening of December 27th, 1891, about three hours before

she died. Thomas then asked her whom she wished to have that money. She replied that she wanted him to have it and everything else. She then said to him, "I give it to you and anything I own is yours. You will find the book at Pat McCarthy's." One George Toby and Thos. Reilly's wife heard this conversation. In executing said paper and making said declarations, said Hannah intended to make a gift *causa mortis* to said Thomas Reilly.

Upon the facts as found, the defendant claimed that there was a valid gift by Hannah to Thomas Reilly, of the money in the savings bank; the court overruled this claim.

The reasons of appeal assigned the following error: "In overruling the claim of the defendant, that upon the facts as proven, there was a valid gift by Hannah McMahon Reilly to Thomas Reilly, of the money in the Newtown Savings Bank belonging to her."

William J. Beecher, for the appellant (defendant).

Daniel Davenport, for the appellee (plaintiff).

HAMERSLEY, J. Delivery of possession is essential to a *donatio causa mortis;* and if the subject of the gift is a chose in action, there must be a delivery of evidences of the debt, or an assignment, or some act effective to vest the beneficial interest in the donee. *Raymond* v. *Sellick*, 10 Conn., 480, 484; *Brown* v. *Brown*, 18 id., 410, 416; *Camp's Appeal*, 36 id., 88, 92.

The defendant proved nothing but declarations: "I want you to have the money; I give my son all my money in the savings bank; I want him to have it and everything else." Such declarations, whether oral or written, do not, of themselves, consummate a valid gift.

When Mrs. Reilly signed the writing in evidence, she did not transfer her savings bank account; her title and benficial interest remained unchanged. The declarations might prove an intent to make a gift *causa mortis*, as found by the trial

court, but something more was necessary to give effect to that intention.

There is no error in the judgment of the Court of Common Pleas.

In this opinion the other judges concurred.

GOLDSMITH D. JOHNES *vs.* CHARLES E. JACKSON, EXECUTOR.

* Third Judicial District, Bridgeport, October T., 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

An executor's title to the personal estate of his testator is conferred by the will as a recognized instrument of conveyance at common law, and accrues at the moment of the latter's death, when the will at once becomes operative. Ceremonies of authentication may be necessary thereafter, but do not create or enlarge the title.

Service of foreign attachment in accordance with § 1231 of the General Statutes, made upon the executor of a will before the probate thereof, is effectual in securing the debt, legacy or distributive share due the defendant. But judgment on *scire facias* following such a foreign attachment, cannot be rendered against the executor before the time when it becomes his duty to deliver to the legatee the legacy or distributive share thus attached.

[Argued October 31st—decided November 22d, 1895.]

ACTION of *scire facias* to recover the amount of a judgment rendered against one Charles R. Alsop, in which suit the defendant was garnishee; brought to the Superior Court in Middlesex County and tried to the court, *Shumway, J.;* facts found and case reserved for the advice of this court. *Judgment advised for the defendant.*

The case is sufficiently stated in the opinion.

William L. Bennett and *D. Ward Northrop*, for the plaintiff.

I. The bare possibility of receiving a legacy from, or share in the estate of, a living person, is not property. It cannot

* Transferred from first judicial district.

be assigned, for there is nothing in existence to assign. *Dart* v. *Dart*, 7 Conn., 250; *Smith* v. *Pendell*, 19 id., 107, 111; *Comstock* v. *Gay*, 51 id., 45; *Lacy* v. *Tomlinson*, 5 Day, 77. The head note of *Low* v. *Pew*, 108 Mass., 349, expresses proverbially the rule so far established here: "A sale of fish, hereafter to be caught in the sea, does not pass title to the fish when caught."

II. An assignment of an expectancy is void in equity. *Alves* v. *Schlesinger*, 81 Ky., 290; *Hart* v. *Grigg*, 32 Ohio St., 502. The question is an open one in this State.

III. The assignment is void at law. Assuming that equity may, in certain cases, recognize the assignment of a bare expectancy, yet this bargain is one of a class which a court of chancery will refuse to enforce. Equity will not enforce a bargain which is against public policy, or tainted with fraud or suspicion of unfairness. If the assignment is not made known to the person from whom the estate is expected, and he put in full possession of the facts concerning such transaction, and his consent obtained, it operates as a fraud upon him. Such consent is necessary to the validity of the contract, and without it, it is held to be void as against public policy. *McClure* v. *Raben*, 125 Ind., 146–7, 133 id., 507; *Boynton* v. *Hubbard*, 7 Mass., 112, 120; *Fitch* v. *Fitch*, 8 Pick., 480; *Trull* v. *Eastman*, 3 Met., 121; *Poor* v. *Hazelton*, 15 N. H. 564; 2 Swift's Dig., 88. The consideration for the assignment must be shown to have been the full value of the property estimated as if the estate had fully vested at the time of the bargain, and without regard to any hazard resulting from the uncertain nature of the estate. *McClure* v. *Raben*, *supra*; *Salter* v. *Bradshaw*, 26 Beav., 161. The finding shows that the parties to this assignment concealed the knowledge of it from the testatrix, and that her consent was neither asked nor given. The whole value of the consideration had by the assignor, down to the time of the trial of this case, is not equal to one-half the value of the legacy.

IV. Inasmuch as it is found that the plaintiff's attachment was made before any notice of said assignment was given, either to the testatrix in her life or to the executor, the plain-

tiff's lien is entitled to priority. It is true that Charles R. Alsop had on March 3d, 1894, caused the assignment to be recorded in the land records of the town of Middletown. But the assignment is of personal property and purports to "grant, sell, transfer and deliver the following goods and chattels." It had, therefore, no right to appear of record, and cannot be used to show constructive notice. *Carter* v. *Champion*, 8 Conn., 548; *Sumner* v. *Rhodes*, 14 id., 134.

The plaintiff's first attachment (March 5), although made prior to the probate of the will, was good and valid. As to contingent nature of factorized property, see *Holbrook* v. *Waters*, 19 Pick., 354; *Wheeler* v. *Bowen*, 20 id., 563; *Boston Sav. Bank* v. *Minot, Admr.*, 3 Met., 507; *Mechanics' Sav. Bank* v. *Waite*, 150 Mass., 234; *Sinnickson* v. *Painter*, 32 Pa. St., 384. In this State an executor's title to all the movable property of a testator is derived, not from a grant of administration but from the will as a recognized conveyance at common law, and accrues at the instant of death. *Marcy* v. *Marcy*, 32 Conn., 308–316; *Selleck* v. *Rusco*, 46 id., 370; *Hathorn* v. *Eaton*, 70 Me., 219; *Mechanics Bank* v. *Waite*, 150 Mass., 234. If an executor can be sued before the probate of the will, it must follow that he can be factorized.

The property having been attached prior to any notice, the assignment was not perfected as against the plaintiff. *Dearle* v. *Hall*, 3 Russ., 1; *Bishop* v. *Holcomb*, 10 Conn., 444; *Vanbuskirk* v. *Hartford F. I. Co.*, 14 id., 140; *Adams* v. *Leavens*, 20 id., 72; *Foster* v. *Mix*, 20 id., 395. The verbal information to the executor after March 5th is not found to be notice to him, nor is it in substance notice. The burden of proof is upon the assignee to establish either notice to the executor, or his knowledge. *Re Tichener*, 35 Beav., 317; *Saffron, etc. Benefit Society* v. *Rayner*, L. R. 14 Ch. D. 406; *Lloyd* v. *Banks*, L. R. 3 Ch. App., 490.

V. A court of equity will not give full force to this assignment, because it was in its nature a fraud upon creditors, on the part of Charles R. Alsop, and its consideration has not been fully paid by his sister, who now has notice of the fraud. *Morse* v. *Wood*, 100 Ill., 451; *Beers* v. *Botsford*, 13 Conn.,154;

Freeman v. *Burnham*, 36 id., 469; *Paulk* v. *Cooke*, 39 id., 573; *Barbour* v. *Conn. Mutual Life Ins. Co.*, 61 id., 248.

It is clearly sufficient to defeat a conveyance as to creditors, if it appears that any part of the consideration is to be paid in future support of the grantor, or if the property be held in secret trust for him. *Lawson* v. *Funk*, 108 Ill., 502; *Lukin* v. *Aird*, 6 Wall., 78; *Guffin* v. *First National Bank*, 74 Ill., 259; *Sidensparker* v. *Sidensparker*, 52 Me., 491; *Merchants Savings Bank* v. *Lovejoy*, 84 Wis., 611; *Young* v. *Harmon*, 66 N. Y., 382; *Powers* v. *Alston*, 93 Ill., 590; *Work* v. *Coverdale*, 47 Kan., 307; *Bush* v. *Collins*, 35 id., 535; *Hayden* v. *Charter Oak Driving Park*, 63 Conn., 142; *Baldwin* v. *Sager*, 70 Ill., 503; *Burton* v. *Reagan*, 75 Ind., 77; *Dresser* v. *Missouri Ry. Co.*, 93 U. S., 92; *Cutcheon* v. *Buchanan*, 88 Mich., 594; *Harder* v. *Rohn*, 43 Ill. App., 365; 2 Pom. Eq., §§ 691, 750.

The equity of the assignee, if any, is only a right to reimbursement. Beyond that she has no interest in the enforcement of the contract. Beyond that Charles, the debtor, is the sole beneficiary. If it be finally determined by the court that the assignment has any validity, the assignee should be permitted to demand only the amount or value of her advances, and the plaintiff must hold the balance.

Charles E. Perkins, for the defendant.

I. It is well settled that an heir or devisee may transfer his interest during the lifetime of the ancestor or testator, and that such a transfer, for a good consideration, will be sustained in equity. 1 Amer. & Eng. Ency. of Law, 830; 21 id., 475, 476, note.

II. Whether the factorizing process is a prior lien, is really the only question which arises upon the pleadings.

At common law an administrator or executor could not be factorized. *Winchell* v. *Allen*, 1 Conn., 385.

The statute (§ 1231) gives a limited right to hold "any debt, legacy, or distributive share due or that may become *due to him* (the defendant) from such executor." This evidently refers only to personal property, and the whole pro-

cess of foreign attachment relates only to personal property. The words "distributive share," mean, like debt and legacy, a share in personal property. Nothing is said about devises, nor would it be possible under the statutes to hold by this process any distributive share of an heir in real estate.

It is a fundamental principle of foreign attachment that the liability of the garnishee is to be considered as of the date of service of the process. *Capen* v. *Duggan*, 136 Mass., 501; Drake on Attachment, § 667; *Fitch* v. *Waite*, 5 Conn., 122. The liability must be absolute at the time of the attachment; if it is contingent, depending on circumstances thereafter to arise, the attachment will not hold. Drake on Attachments, § 551, and cases cited; 8 Amer. & Eng. Ency. of Law, 1189; Whaples on Attachment, § 373; *Godfrey* v. *Macomber*, 128 Mass., 188; *Bevenstohe* v. *Brown*, 157 id., 565.

Before the plaintiff can recover, therefore, he must show that on the 5th of March, 1894, Jackson had in his hands some personal property, which would absolutely go to Charles R. Alsop. If all that he shows is that the executor had personal property which only in a certain contingency would so go, it is not enough. But it is entirely doubtful and contingent whether Charles' share will be distributed to him in personal property or real estate, and such a contingency, under all the decisions, prevents its being the subject of foreign attachment. The words of the statute, that a distributive share "due, or which *may* become due," were not intended to change the whole principle applicable to foreign attachments. The word "due" certainly may mean either "existing" or "payable," and in this statute it clearly means the latter. *Foster* v. *Singer*, 24 Wis., 671.

III. Even if, in such a condition of things, an attachment could be made at all, it was premature. By our statutes executors have to be approved by the Court of Probate, and before they can be approved they must give bond. On the 5th of March, 1894, when this attachment was made, Mr. Jackson had not proved the will, or accepted the position as executor, or given a bond. It was not known on that day whether he would do either. Nor is the Court of Probate

bound to approve the person named in the will as executor, if he is incapable or an improper person. In *Davis* v. *Davis*, 2 Cushing, 111, it was held that after a person had been appointed administrator, but before he had given his bond, he could not be factorized. It may be claimed that an executor is in a different position from an administrator, as the former takes title under the will, and has certain powers before the will is proved. The case of *Marcy* v. *Marcy*, 32 Conn., 308, does so hold; but it does not follow that he can be factorized the moment the testator dies, and before he has accepted and given bonds, merely because theoretically the title is in him. It is believed that the only cases where executors have been held as garnishees, are where there was a debt, or legacy, or distributive share of personal property only, coming to the defendant in the original suit under the will, and where they had accepted the position and given bonds. 1 Woerner's Law of Admin., § 186; 3 Redfield on Wills, 20.

IV. Sufficient notice was given of the conveyance. It was recorded on the town records on March 3d, and so far as Charles R. Alsop's interest in the real estate of the testatrix was concerned, this was notice to all the world, both the executor and creditors. As it was, and is, uncertain whether his share would be personal property or real estate, or part of each, it would be unreasonable to hold that what would be good notice in one event would be bad in another. This creditor, as well as the executor, was affected with notice that Charles had transferred *all* his interest in the estate, by the record, and if they had notice for one purpose they should be held to have notice for all.

The attachment of March 17th was clearly unavailing, as before that time the executor had received notice, and therefore as soon as he accepted the position and qualified, he knew of the transfer. No special form of notice was necessary; the fact of knowledge was all that was required.

ANDREWS, C. J. This is an action of *scire facias*. The controlling facts are as follows:—

Clara P. Alsop died on the 28th day of February, 1894, leav-

ing a last will and testament, in which she appointed the present defendant her executor, and named Charles R. Alsop a legatee. The estate of the said testatrix consisted partly of real estate and partly of personal property.

On the 5th day of March, 1894, the present plaintiff brought a suit against said Charles R. Alsop, in the Superior Court in Middlesex County, demanding $4,000 damages, and caused the interest of the said Charles R. in the estate of the said Clara P. Alsop to be attached, by directing the officer to leave a true and attested copy of the writ and complaint in the said suit with the present defendant as such executor—describing him as the agent, trustee and debtor of the said Charles R., and having the goods or estate of the said Charles R. Alsop in his hands. The process was duly served, and the plaintiff recovered judgment in that suit against the said Charles R., on the 27th day of April, 1894, for the sum of $3,446.63 damages, and $31.68 costs of suit; and for those sums took out execution, and caused legal demand to be made thereon of the present defendant, as such garnishee. The defendant refused to pay said execution, or to show any estate of the said Charles R. on which said execution could be levied.

On the 17th day of March, 1894, the will of the said Clara P. Alsop was duly proved and approved by the Court of Probate in the District of Middletown, and the defendant accepted the trust of being the executor thereof, and gave bonds. Other facts appeared in the case, but in the view that the court has taken, it is not necessary that they be stated.

Section 1231 of the General Statutes provides, among other things, that where any debt, legacy, or distributive share is or may become due from the estate of any deceased person, to a defendant in a civil action in which a judgment for money damages may be rendered, the plaintiff may insert in his writ a direction to the officer to leave a true and attested copy thereof and of the accompanying complaint, with the executor or administrator of such estate; and from the time of leaving such copy, any debt, legacy, or distributive share due, or that may become due to him from such executor or administrator,

shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover.

It is strenuously urged that because the will of Clara P. Alsop had not been approved by the Court of Probate on the 5th day of March, 1894, the leaving of a copy of the complaint with the defendant on that day, was not a good attachment of the legacy or distributive share in the estate of Clara P. Alsop which might become due to Charles R. Alsop.

We cannot assent to this view. On the contrary, it seems to us that the title to, and the possession of, the property of the testatrix, was at that time so in the defendant, that the service on him was a good service to secure in his hands such part of her estate as may be found to belong to Charles R. Alsop. An executor takes his title to the movable estate of a deceased person from the will, as a recognized instrument of conveyance at common law. "No probate (of the will) is essential to his title, unless there is some local statute which makes it essential. His title accrues at the instant of death, and without probate he may do many acts which appertain to his office. He may collect debts, sell property, pay debts and legacies, etc., and his acts will be legal. . . . So far as the local laws require him to prove the will, file an inventory, and settle the estate according to its provisions, he must conform to their directions, but such conformity is not essential to his *title* unless expressly made so by statute. And he may be sued and charged as executor *de jure*, not *de son tort*, unless he renounce, and upon proof of his acceptance by having acted as such, before he proves the will, for he *is* executor *de jure*, irrespective of such probate." *Marcy* v. *Marcy*, 32 Conn., 308, 316. The doctrine of this case has been referred to in several later cases with approval, and we understand it is the settled law of this State. *Irwin's Appeal*, 33 Conn., 128,137; *Hedenburg* v. *Hedenburg*, 46 id., 30; *Selleck* v. *Rusco*, ibid., 370; 372; *Hartford & N. H. R. R. Co.* v. *Andrews*, 36 id., 213,215.

"An executor is a person appointed by a testator to carry out the directions and requests in his will, and to dispose of the property according to his testamentary provisions after his decease. As his interest in the estate of the deceased is

derived from the will, it vests, according to the common law, from the moment of the testator's death. The will becomes operative, including the appointment of executor, not by the probate thereof, not by the act of the executor in qualifying, which are said to be mere ceremonies of authentication, but by the death of the testator." Woerner's Law of Admin., § 172; *Wankford* v. *Wankford*, 1 Salk., 299; *Graysbrook* v. *Fox*, 1 Plowd., 275, 277*a*; *Smith* v. *Milles*, 1 Term, 475, 480; *Humphreys* v. *Humphreys*, 3 P. Williams, *351. "The law knows no interval between the testator's death and the vesting of the right of his representative." DENMAN, CHIEF JUSTICE, in *Whitehead* v. *Taylor*, 10 Ad. & E., 210, 212. In *Rand* v. *Hubbard*, 4 Met., 252, 257, CHIEF JUSTICE SHAW says: "But the title of an executor is derived from the will itself, and he may perform most of the acts incident to his office, before probate." See also: *Hathorn* v. *Eaton*, 70 Me., 219; *Shirley* v. *Healds*, 34 N. H., 407; *Lane* v. *Thompson*, 43 id., 320; *Johns* v. *Johns*, 1 McCord, *132; *Seabrook* v. *Williams*, 3 id., *371; 1 *Williams on Executors* (6th Ed.), 338, 347; 7 Amer. & Eng. Ency. of Law, 230.

A statute would hardly undertake to say that the title of an executor to the movable property of his testator, did not come from the will. Such a statute would in effect declare that a will was not a will. There are statutes which say that an executor may not bring a suit respecting such property, until the will has been duly established in the proper court and he has given bonds. *Dixon* v. *Ramsay*, 3 Cranch, 319. There is, upon principle, no necessity for the probate of a will to establish the title of an executor to the movable property of the deceased, any more than to establish the title of a devisee to the land devised to him. In either case the title comes from the will, and the title accrues at the moment of the testator's death. The probate of the will does not give a title to either, but it does furnish incontrovertible evidence that the will is what it purports to be. If a party should claim title to land by deed, or to personal property by a bill of sale he must establish by preliminary proof that the deed was duly signed, witnessed and acknowledged, or

that the bill of sale was authentic, before the deed or the bill of sale could be admitted in evidence to prove his title to the land in the one case, or to the movable property in the other. No document is received as evidence until the party desiring to offer it has first established its genuineness to the satisfaction of the judge. Reynolds on Evidence, 157. Where a party claims property by a will, the probate of the will furnishes the preliminary proof that the writing purporting to be a will was duly executed, and that the testator was of sound mind. The will then can be admitted in evidence and proves the title. Our statutes commit the probate of all wills to the Courts of Probate; and it has been held in this State that that court is the only tribunal competent to decide the question of the due execution of a will—including the testamentary capacity of the testator. *Fortune* v. *Buck*, 23 Conn., 1, 8. Hence a party who desires to show title by a will, to personal property or real estate, can have it received as evidence of such title, only after it has been established in the proper Court of Probate; because that is the only way in which he can show that the will under which he claims, is genuine. *Tompkins* v. *Tompkins*, 1 Story, 547; *Smith* v. *Fenner*, 1 Gall., 171; *Langdon* v. *Goddard*, 2 Story, 267.

The final decree of the proper Court of Probate as to the validity or invalidity of a will is conclusive, so that the same question cannot be re-examined or litigated in any other tribunal. The reason is, that it being a decree of a court of competent jurisdiction, directly upon the very subject-matter in controversy, to which all persons who have any interest are made or may make themselves parties—because they are notified by the fact of death, as well as by the requirement of the statute to be present for the purpose of contesting the validity of the will—it necessarily follows that it is conclusive as to them all. Such decrees are treated as of the like nature as sentences or proceedings *in rem*, necessarily conclusive upon the matter in controversy, for the common safety and repose of mankind. 1 Williams on Executors, (6th Ed.) 549; *Merrill* v. *Harris*, 26 N. H., 142; *Allen* v. *Dundas*, 3

Term Rep., 125. But the party has no greater, or better, or different *title*, after the probate than he had before. *Bent's Appeal*, 35 Conn., 523.

The record before this court shows that the estate of Clara P. Alsop was appraised at $82,838.77, of which $17,000 was in real estate; and that the share of Charles R. Alsop will be, in no event, less than one twenty-fourth part of the whole. It appears that a suit is pending in court for a construction of the will of the said Clara P., and that her estate is not yet settled. Obviously a judgment cannot now be rendered against the defendant, for the reason that the time has not come when, if the attachment had not been made, it would have become his duty in the settlement of the estate to deliver to the said Charles R. Alsop the legacy or distributive share to which he is entitled.

As the case now stands, we advise the Superior Court to render judgment for the defendant.

In this opinion the other judges concurred.

FISHER, BROWN & COMPANY *vs.* WILLIAM I. FIELDING.

First Judicial District, Hartford, March Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN AND HAMERSLEY, Js.

Unless procured by fraud, a judgment for a pecuniary demand, rendered by a competent court of Great Britain against a Connecticut citizen who was personally served with process within its jurisdiction, is conclusive upon the merits of the cause of action, in a suit brought here for the collection of such judgment. (One judge dissenting.)

In an action upon a judgment of a court of a foreign country, it is unnecessary for the plaintiff specifically to allege that such court had jurisdiction of the parties and subject-matter, that the defendant had reasonable notice of the institution of the suit and a fair opportunity to be heard, or that any hearing or trial was had. These facts are the indispensable conditions of the due adjudication of the foreign court, and are necessarily implied in the averment, (authorized by the Practice Book, Form 169,) that the court "duly adjudged" the defendant should pay, etc.

The motive which prompts the exercise of a legal right is of no importance. Accordingly it is no defense to an action on such a judgment, that the original action was brought when the defendant was about to leave the foreign country after a brief business visit, for the purpose of embarrassing and impeding him and preventing him from having a fair opportunity to defend the suit.

The law and practice determining the form of judicial proceedings in a foreign court may always be shown, and shown by parol.

Whenever a judgment on a copartnership demand may lawfully be rendered in its favor without stating the names of the copartners, such judgment is, in legal effect, one in favor of the individual members of the firm, and may properly be declared on as such, in any proceeding subsequently brought to enforce it.

[Argued March 5th—decided December 16th, 1895.]

ACTION on a judgment obtained in England, brought to the Superior Court in Hartford County and tried to the court, *George W. Wheeler, J.*, upon the plaintiffs' demurrer to the answer of the defendant; the court sustained the demurrer, and thereafter, upon trial, judgment was rendered (*Robinson, J.*) for the plaintiffs, and the defendant appealed for alleged errors in the rulings of the court. *No error.*

The plaintiffs were Joseph B. Clarke and John Edward H. Brown, of Birmingham, England, partners in trade under the name of Fisher, Brown & Company, by which name they recovered, in England, the judgment now sued upon, against the defendant, then and now a citizen of Connecticut.

The complaint merely alleged that on April 3d, 1889, at Birmingham, in the kingdom of Great Britain, the High Court of Justice, Queen's Bench Division, Birmingham District Registry, in an action therein pending between the plaintiffs and the defendant, duly adjudged that the defendant should pay to the plaintiffs the sum of two hundred and ninety-three pounds, thirteen shillings, and three pence damages, and four pounds and fourteen shillings costs, amounting in all to two hundred and ninety-eight pounds, seven shillings and three pence, which in lawful money of the United States is of the value and amount of fourteen hundred and fifty dollars and four cents; and that the defendant had not paid the same.

The defendant demurred for want of allegations that the

court in question had jurisdiction of the alleged action, or of the subject-matter, or of the parties; or that the defendant had notice of the action, or was summoned to appear therein, or did in fact appear; or that there was any hearing or trial. This demurrer was overruled, (*Robinson, J.*).

An answer was then filed, containing four defenses. The first was a general denial. The second defense was that in March, 1889, the defendant, being a citizen of the United States, and an inhabitant of Connecticut, and president of the National Wire Mattress Co., a corporation located at New Britain, in Hartford County, was temporarily at a hotel in Birmingham, in the course of a business trip to England; that just as he was about to make his departure for the United States, the plaintiffs caused to be served upon him, on March 26th, 1889, a summons to appear in eight days in said High Court of Justice, to answer to a writ there brought against him by the plaintiffs; that he was then nowise indebted to them, but any claim they had in which he was in any way interested was one against said National Wire Mattress Company, as they well knew; that they sued him personally at that particular time for the purpose of embarrassing him, and to prevent his having a fair opportunity of defense, unless he prolonged his stay in Birmingham indefinitely, and that they thereby sought to obtain an unjust and unfair advantage over him; that immediately after such service of process he returned to the United States, and made no appearance, and had no knowledge of any subsequent proceedings in said court, except from the present complaint; and that said court had no jurisdiction over him, and its judgment was null and void. The third defense was that he was never indebted to the plaintiffs. The fourth defense was the same as the second, except that it omitted the allegations that the plaintiffs' claim, if any, was, as they well knew, only against the National Wire Mattress Company, and that they sued, when and as they did, to embarrass the defendant and prevent his having a fair opportunity to make a defense, and thereby to gain an unjust and unfair advantage over him. Demurrers to the second, third and fourth defenses were filed and sustained, (*George W. Wheeler, J.*).

The cause was then heard on the issue of fact before *Robinson, J.* The plaintiffs introduced a certified copy of the record of the High Court of Justice, which read as follows:

"OFFICE COPY.

(Original Filed 26th March, 1889.)

1889, F. No. 549.

In the High Court of Justice, Queen's Bench Division, Birmingham District Registry.

Between Fisher, Brown & Co., *Plaintiffs*, and W. I. Fielding, *Defendant.*

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith, to W. I. Fielding, of the Queen's Hotel, in the city of Birmingham, We command you that, within eight days after the service of this writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of Fisher, Brown & Co. And take notice, that in default of your so doing, the plaintiff may proceed therein, and judgment may be given in your absence.

Witness, Hardinge Stanley, Baron Halsbury, Lord High Chancellor of Great Britain, the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

STATEMENT OF CLAIM.

The plaintiffs' claim is for balance of account for goods sold and delivered.

Particulars.

1887.	£	s.	d.	1888.	£	s.	d.
Aug. 22, to goods,	260	7	0	July 27, by draft,	336	4	0
" " "	232	7	6	1887.			
Sept. 12, "	168	9	10	Dec. 21, by cash,	68	6	10
Oct. 22, "	350	11	6	" " " "	627	19	1
" " "	299	13	10				
1888.					1032	9	11
Mar. 3, "	12	7	6	Balance due,	293	13	3
" 11, "	2	6	0				
	1326	3	2		1326	3	2

Place of trial, Warwickshire (Birmingham Division).

Signed, J. B. Clarke & Co., and the sum of £2 15s. 0d., or such sum as may be allowed on taxation for costs. If the amount claimed is paid to the plaintiffs or their solicitors within four days from the service hereof, further proceedings will be stayed.

This writ was issued by J. B. Clarke & Co., of 40 Waterloo street, in the city of Birmingham, whose address for services is 40 Waterloo street aforesaid, or at the office of Messrs. H. Tyrrell & Son of 3 Raymond Buildings, Gray's Inn, London, agents for the solicitors for the said plaintiffs, who reside at Lionel street, Birmingham.

OFFICE COPY.

(Original Filed 3d April, 1889.)

1889, F. No. 549.

In the High Court of Justice, Queen's Bench Division, Birmingham District Registry.

Between Fisher, Brown & Co., *Plaintiffs*, and W. I. Fielding, *Defendant*.

I, Arthur Llewellyn Tangye of 40 Waterloo street, Birmingham, in the county of Warwick, clerk to Messrs. J. B. Clarke & Co., of the same place, solicitors for the plaintiffs in this action, make oath and say as follows:

1. I did, on the twenty-sixth day of March, 1889, at the Queen's Hotel, Birmingham aforesaid, personally serve the above-named defendant, W. I. Fielding, with a true copy of the writ of summons in this action, which appeared to me to have been regularly issued out of the Birmingham District Registry of the Supreme Court of Judicature against the above-named defendant, at the suit of the above-named plaintiffs, and which was dated the twenty-sixth day of March, 1889.

2. At the time of the said service the said writ and the copy thereof were subscribed and indorsed in the manner and form prescribed by the rules of the Supreme Court.

3. I did, on the twenty-sixth day of March, 1889, indorse

on the said writ the day of the week and the month of the said service.

ARTHUR L. TANGYE.

Sworn at Birmingham in the county of Warwick, this 3d day of April, 1889.

Before me,

A. W. FREEMAN.

A commissioner to administer oaths in the Supreme Court of Judicature.

This affidavit is filed on behalf of the plaintiffs.

OFFICE COPY.

(Original Filed 3d April, 1889.)

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In the High Court of Justice, Queen's Bench Division, Birmingham District Registry.

Between Fisher, Brown & Co., *Plaintiffs*, and W. I. Fielding, *Defendant*.

Final judgment on non-appearance, 3d April, 1889. The defendant, W. I. Fielding, not having appeared to the writ of summons herein, it is this day adjudged that the plaintiffs recover against the said defendant, £293 13s. 3d., and £4 14s. 0d. for costs."

The identity of the defendant in the action which was the subject of this record, with the defendant in the present action, and the fact of the service of the summons upon him on March 26th, 1889, were admitted; but he objected to the admission of the copy of the record, on the ground that it did not purport to be a record of a judgment in favor of the plaintiffs, but only of Fisher, Brown & Company; that it did not disclose whether Fisher, Brown & Company was a corporation, a copartnership, or an individual trading by that name, nor, if a copartnership, who were the copartners; and did not show that the plaintiffs were copartners.

Thereupon the plaintiffs introduced certain depositions tending to prove that the plaintiffs were bedstead manufacturers, and throughout the year 1889 were copartners, under

the firm name of Fisher, Brown & Company, and were the only persons interested in the judgment recovered, or the claim out of which it arose; and that by the English Rules of Court under the Judicature Act, suits could be brought and maintained by a partnership in the firm name, without specifying who were the partners. These depositions were admitted against the objection of the defendant that they were not receivable to help out or supplement the record, or to show that Fisher, Brown & Company was a firm name, or who the copartners were; and that they did not purport to show that the plaintiffs were members of such a firm when the contract sued upon in England was made.

The court found from the evidence that by the law of England the names of the partners need not be stated in complaints by or judgments in favor of a copartnership; admitted the copy of the record; and, no evidence being offered in defense, rendered a judgment for the plaintiffs for the full amount of the judgment and interest; from which judgment the defendant took this appeal.

Frank L. Hungerford, with whom was *John H. Kirkham*, for the appellant (defendant).

I. Is a citizen of the United States and of the State of Connecticut, who is temporarily upon English soil, and who is served with process to appear in Her Majesty's Court of Justice, bound to appear therein and defend, or else be conclusively bound by a judgment the world over, which has been obtained without a trial upon the merits, but by default only?

It will be observed that the question, as above stated, takes at once out of the discussion, the effect of foreign judgments in the following cases: (*a*) Judgments *in rem*. (*b*) Judgments defining the *status* of individuals. (*c*) Judgments obtained in cases in which our citizens have been voluntary plaintiffs in a foreign jurisdiction. (*d*) Judgments obtained in cases in which our citizens have appeared as defendants and gone to trial upon the merits, either to save property attached in the foreign jurisdiction, or voluntarily to save

themselves from a judgment *in personam.* (*e*) Judgments against American citizens in a foreign country, not temporarily but as residents for a longer or shorter period, either for the purposes of business or pleasure, and therefore owing some sort of duty to the foreign country.

It is not necessary for the determination of this case that we should undertake a review of all the decisions, English and American, as to the effect of foreign judgments, much less that we should undertake to reconcile those decisions or the *dicta* contained therein. The most that can be said is that foreign judgments are sometimes conclusive, and sometimes they are not. Whether they are or not, depends altogether upon the circumstances under which they were obtained.

The principle upon which any foreign judgment is held in this country to be conclusive, is that justice has already been done between the parties to it, according to the standard of justice as administered in our courts. It is not in any degree a matter of international comity. Our government owes it to all its citizens to see that they have at least one fair opportunity to try their causes at such times, in such places, and under such circumstances that justice—not necessarily justice according to the idea of the nation in whose tribunals the cause has been tried, but justice according to the American idea—has been done.

The cases generally will be found, with some unimportant exceptions, to fall within the general principle above stated; and it is quite safe to say that no case can be found, either English or American, that holds that a citizen of any country temporarily in a foreign land, and there sued and not appearing, but standing upon his rights of citizenship, is bound by a judgment against him by default, even though he was summoned to appear and defend. *Schibsby* v. *Westenholz et al.*, L. R. 6 Q. B. D., 155; *Trumbull et al.* v. *Walker*, 67 L. T. R. (Q. B. D.) N. S., 767; *Rousillon* v. *Rousillon*, L. R. 14 Ch. Div., 351; *General Steam Navigation Co.* v. *Guillon*, 11 M. & W., 877; *Voinet* v. *Barrett*, 65 Law J. N. S. Q. B., 39; 2 Freeman on Judgments (4th Ed.), 597; *Hilton et al.* v.

Guyot et al., 159 U. S., 113, 42 Fed. Rep., 249, and cases therein cited.

II. The plaintiffs had no just claim against the defendant, and they knew it; they took advantage of the defendant's temporary presence in England to obtain a judgment to which they knew they were not entitled; their object in suing him in England was to embarrass him and to prevent his having a fair opportunity to resist an unjust demand; they sought to obtain an unjust and unfair advantage over the defendant, and the judgment thus obtained is the one that this court is asked to hold conclusive, upon the ground that Mr. Fielding has had a full and fair opportunity to try the merits of his cause in a court where he was bound to appear. Such a judgment would not be held conclusive in England, and these English plaintiffs cannot justly complain of the application of their own law to themselves. *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. Div., 295.

III. The proof was insufficient to enable the court to render judgment in favor of the plaintiffs. But, aside from this, a judgment in favor of Fisher, Brown & Co., would not sustain a declaration setting forth a judgment in favor of Joseph Bennett Clarke and John Edward H. Brown, even if they did in fact constitute the copartnership of Fisher, Brown & Co., in 1887 and 1888. In other words, a copartnership judgment cannot be enlarged by an action of debt thereon, into a judgment in favor of the individual members of that copartnership. This was a correct claim, and should have been sustained. 2 Freeman on Judgments (4th Ed.), 456.

Henry G. Newton and *Livingston W. Cleaveland*, for the appellees (plaintiffs).

I. The allegations of the complaint were sufficient, and the defendant's demurrer was properly overruled. The complaint followed the Form No. 169, p. 107, of the Practice Act Book. This should be conclusive. Although the form itself refers to a court in the State of Massachusetts, the title shows it to be applicable in a suit on any foreign judgment. Again, Form 100, page 216, of an answer asserting the "Invalidity of a

foreign judgment," expressly alleges that: (*a*) No process was served upon the defendant in the action resulting in the judgment mentioned in the complaint. (*b*) He never appeared in person or by attorney in said action. If these defenses could be raised by demurrer, they would not have been set up in these forms by way of answer. The forms under the Practice Act clearly establish the sufficiency of the complaint. See also 2 Sw. Dig. 494; *Hatch* v. *Spofford*, 22 Conn., 501; *Gunn* v. *Peakes*, 36 Minn., 177, and citing numerous cases; 2 Black on Judgments, § 835; *Horton* v. *Critchfield*, 18 Ill., 133; *Robertson* v. *Struth*, 5 Ad. & El. N. S., 941; Van Fleet on Collateral Attack, 919; *Phelps* v. *Duffy*, 11 Nev. 80; Freeman on Judgments, § 453; *Bruckmann* v. *Taussig*, 7 Colo., 561; *Crake* v. *Crake*, 18 Ind., 156, 157; *Lathrop* v. *Stuart*, 5 McLean, 167.

II. The essence of the second defense seems to be that plaintiffs knew the defendant was not indebted to them, and brought the suit to embarrass and impede him, and obtain an unjust and unfair advantage over him. This, apparently, is an attempt to bring the case within *Stanton* v. *Embry*, 46 Conn., 66. In that case the defendants had no reason to suppose that plaintiff would endeavor to take judgment for more than the amount actually due. In the present case the defendant was served with a bill of particulars, showing the precise amount which plaintiff claimed to recover, and he defaulted the case, knowing the precise sum for which judgment would be rendered against him. There was no accident, no mistake, no surprise. All the cases of relief against judgments where the court had jurisdiction, contain some deceit practiced upon the defendant. *U. S.* v. *Throckmorton*, 98 U. S., 64, 65; *Pearce* v. *Olney*, 20 Conn., 555; *Moffatt* v. *U. S.*, 112 U. S., 24, 32; *Vance* v. *Burbank*, 101 id., 514, 519; *Green* v. *Green*, 2 Gray, 361; *Price* v. *Devhurst*, 8 Sim., 279. "Although it may be shown that a foreign judgment was fradulently obtained, yet it cannot be shown that the contract sued upon was procured by fraud." *Bank of Australasia* v. *Nias*, 16 Ad. & El. N. S., 717. "If, in any case, the plea of fraud is admissible in an action on the judgment of a sister State, it must be fraud practiced in

the very procurement of the judgment, not fraud anterior to it." 2 Black on Judgments, §§ 921, id., 544; Bigelow on Estoppel, 5th Ed., 307; *Ward* v. *Quinlivan*, 57 Mo., 425. That a judgment can only be attacked for fraud in its procurement, is very fully set forth in *Hilton* v. *Guyot*, 42 Fed. Rep., 249. See also 1 Swift's Digest, *753, 2 id., *138; Van Fleet on Collateral Attack, §§ 558, 586. The question is not whether there is ground for the interposition of a court of equity, but whether, as a matter of law, the defendant may prove to the jury the allegations of his second, third and fourth defenses. Nothing is alleged which might not as well have been made a defense in the action in England, and he was not prevented by any fraud or trick from making such defense there.

The third defense is a simple allegation that defendant was not indebted to the plaintiff. Apparently this defense is based on the obsolete doctrine that judgments of foreign courts are only *prima facie* evidence of indebtedness. That foreign judgments are conclusive, and that *nil debet* cannot be pleaded to them, has long been practically settled. *Hatch* v. *Spofford*, 22 Conn., 500; *Wood* v. *Watkinson*, 17 id., 504, 506; 1 Swift's Digest, *753, 754; *Dunstan* v. *Higgins*, 138 N. Y., 70; *Bank of Australasia* v. *Nias*, 16 Ad. & El. N. S. 729; *Trafford* v. *Blanc*, L. R. 36 Ch. Div., 600; *Glass* v. *Blackwell*, 48 Ark., 50; *Ferguson* v. *Oliver*, 99 Mich., 161, 58 N. W. Reporter, 43; *Baker* v. *Palmer*, 83 Ill., 568; *Lazier* v. *Westcott*, 26 N. Y., 146; *Silver Lake Bank* v. *Harding*, 5 Ohio, 545; Van Fleet on Collateral Attack, §§ 848–851; 2 Black on Judgments, §§ 825–829.

The foreign judgment although rendered on default, is equally conclusive. *Hart* v. *Granger*, 1 Conn., 154; *Bishop* v. *Vose*, 27 id., 1; *Hatch* v. *Spofford*, *Wood* v. *Watkinson*, *supra*; *Bradford* v. *Bradford*, 5 Conn., 131; *Pearce* v. *Olney*, 20 id., 555. From the above cases it is clear that such service as was made upon the defendant in England would, if made in this State, be sufficient to establish a judgment here. Surely our courts will acknowledge the validity in England of the practice which we have adopted here.

III. The fourth reason of appeal is the overruling of the objections to the record of the judgment. These objections were that the copy of judgment named Fisher, Brown & Co. and did not name Joseph Bennett Clark and John Edward H. Brown, and that it did not disclose whether Fisher, Brown & Co. was a copartnership or an individual, and, if a copartnership, did not give the names of the partners.

It is sufficiently evident from the judgment that Fisher, Brown & Co. was a partnership. Fisher, Brown & Co. are described as plaintiffs, and in the body of the judgment they are spoken of as plaintiffs. An individual or corporation would have been plaintiff, not plaintiffs. The name Fisher, Brown & Co. is apparently a partnership name, and in the absence of some allegation to the contrary, it must be presumed to be a partnership name. It is presumed that when a judgment is rendered, everything necessary to the validity of the judgment has been correctly done. Freeman on Judgments, §§ 452, 453; *Lathrop* v. *Stuart*, 6 McLean, 167; *Wright* v. *Fire Ins. Asso. of London*, 19 L. R. A. 215; *Smith* v. *Chenault*, 48 Texas, 455; *Lafayette Insurance Co.* v. *French*, 18 Howard, 404; Van Fleet on Collateral Attack, § 857.

IV. Defendant's fifth reason of appeal is the overruling of his claim that it could not be shown by testimony that Fisher, Brown & Co. was a partnership, and that the plaintiffs constituted that partnership. No question is made but that the law of England as to bringing suits and taking judgments in the name of a partnership may be thus proved, and is correctly stated. No reason is given why the statutory requirements as to the names of the partners in Connecticut should be made a condition of enforcing English judgments, and we have heard of no authority for such a proposition.

BALDWIN, J. The plaintiffs' complaint was drawn in the form authorized by the Practice Book (No. 169, p. 107) in actions on a foreign judgment. In actions on a domestic judgment, the authorized forms (Practice Book, No. 166 and No. 167, pp. 106, 107) state the fact, but not the manner of

its recovery; but in declaring on the judgment of a foreign court, the approved averment is that such court, "in an action therein pending between the plaintiffs and the defendant, duly adjudged that the defendant should pay to the plaintiffs" the sum in question. No court can "duly" adjudge such a payment, except in an action conducted in due course of law. Due course or process of law, with respect to such a judicial proceeding, necessarily involves reasonable notice to the defendant of the institution and nature of the action, given (unless this be waived), if he be a non-resident, by personal service within the jurisdiction, and a fair opportunity to be heard before a tribunal of competent jurisdiction. So much is due to every person from whom another seeks to recover in a judicial controversy before a court of justice. *Pennoyer* v. *Neff*, 95 U. S. 714, 733.

In the case of a domestic judgment, it is unnecessary to allege that these conditions have been fulfilled, because our law requires it, and it is to be presumed that the law has been obeyed. In respect to a foreign judgment, nothing can safely be taken for granted, and the Practice Book has therefore provided a different form of complaint.

The Practice Act was designed to simplify our legal procedure, and to abbreviate pleadings by the omission of all unnecessary allegations. The demurrer to the complaint, on the ground that it did not allege that the High Court of Justice, Queen's Bench Division, Birmingham District Registry, had jurisdiction of the action, or of the parties, or of the subject-matter, nor that the defendant had notice of its pendency, or was summoned to appear, was therefore properly overruled. These facts were the indispensable conditions of a due adjudication by the foreign court; and whatever is necessarily implied is sufficiently pleaded. Nor was it cause of demurrer that the complaint did not state that any hearing or trial was had. The averment as to a due adjudication implied that there was a fair opportunity for a hearing; and the defendant could not complain that he did not avail himself of it.

Three special defenses were pleaded, and, on demurrer, held insufficient.

The second of these set up that the defendant was served with the process in the English action, while transiently stopping at a hotel in Birmingham, and when he was about to take his departure for home; and that such service was so made and timed for the purpose of embarrassing him, and obtaining an unjust and unfair advantage, by preventing his having a fair opportunity to make his defense, unless he prolonged his stay abroad indefinitely.

The rights of sovereignty extend to all persons and things, not excepted by some special privilege, that are within the territory of the sovereign. An alien friend, however transient his presence may be, is entitled to a temporary protection, and owes in return a temporary allegiance. Story on the Conflict of Laws, §§ 18, 22, 541; *Carlisle* v. *U. S.*, 16 Wall., 147, 154.

The fact that the defendant was a foreigner, making but a brief stay in the country, and on the point of leaving it for his own, did not deprive the courts of England of all jurisdiction over him. The Roman maxim, *Actor sequitur forum rei*, if it has any force in English or American jurisprudence, operates as a permission, rather than a command. A man who is absent from his domicile can still be sued there; but he can also be sued wherever he is found, if personally served with legal process within the jurisdiction where the plaintiff seeks his remedy. The action must be brought, indeed, in a court to which the defendant is subject, and subject at the time of suit; but, unless protected by treaty stipulation or official privilege, he is subject to every court within reach of whose process he may enter. The Roman law allowed a non-resident to be sued where he had established a temporary seat of business, and, in some cases, where he had simply contracted a single obligation. Dig. V, 1, *de judiciis, et ubi quisque agere vel conveniri debeat*, 2, 19, 24. The common law, so far as concerns the enforcement of a pecuniary liability, goes farther, and operates alike upon every private individual who may be found, however transiently, within the territory, where it is in force. Wharton on the Conflict of Laws, § 653. An English court will take cognizance of an action on a con-

tract wherever made and between whatever parties. Holland on Jurisprudence (5th Ed.), 349. So the courts of this State have always regarded transitory actions as following the person, and entertained them against foreigners found within our jurisdiction, whether brought by a foreigner or a citizen. *Place* v. *Lyon*, Kirb., 404, 406; *Potter* v. *Allin*, 2 Root, 63, 66, 67. "Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country." *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, L. R., Appeal Cases of 1894, 670, 683.

The several States of the United States are, as respects their relations to each other, excepting only such of these as are regulated by the Constitution of the United States, independent and foreign sovereignties. *Buckner* v. *Finley*, 2 Pet., 586, 590; *Pennoyer* v. *Neff*, 95 U. S., 714, 722. The effect in one of them of a suit brought or judgment rendered in another is precisely the same as if the latter were a foreign country, except so far as Art. IV, § 1, of the Constitution of the United States may have established a different rule. *Hatch* v. *Spofford*, 22 Conn., 485, 498; *M'Elmoyle* v. *Cohen*, 13 Pet., 312, 324; *Thompson* v. *Whitman*, 18 Wall., 457, 461. Notwithstanding that provision of the Constitution and the statute passed to enforce it (U. S. Rev. Stat., § 905), the jurisdiction of a State court whose judgment is brought in question in another State is always open to inquiry. In that respect, every State court is to be regarded as a foreign court. *Hall* v. *Lanning*, 91 U. S., 160, 165; *Grover & Baker Machine Co.* v. *Radcliffe*, 137 id., 287, 294, 298.

The courts of this State have never before had occasion to pass directly upon the defenses which may be open here to an action upon a judgment of a court of a foreign country, but they have often been called to consider the effect of legal proceedings instituted in one of the United States against a citizen of another; and the right to secure jurisdiction over a non-resident, who is served with process while

transiently in the State, has been uniformly upheld. *Hart* v. *Granger*, 1 Conn., 154, 165, 173; *Wood* v. *Watkinson*, 17 id., 500, 504; *Hatch* v. *Spofford*, 22 id., 485; *Bishop* v. *Vose*, 27 id., 1, 11, 12; *Duryee* v. *Hale*, 31 id., 217, 223; *Easterly* v. *Goodwin*, 35 id., 273, 278; *O'Sullivan* v. *Overton*, 56 id., 102, 103.

These decisions are based on what has been deemed an accepted principle of international law, applicable between the States, on no other ground than that they are, as to such a question, in the position of foreign nations to each other. *Grover & Baker Machine Co.* v. *Radcliffe*, 137 U. S., 287, 298; *Lazier* v. *Westcott*, 26 N. Y., 146, 154.

The English court having, then, jurisdiction of the parties, and presumably of the action, and the subject-matter, as to which no question has been made, there is nothing in the defense now pleaded that the suit was brought as it was and when it was, "for the purpose of embarrassing and impeding the defendant, and to prevent his having a fair opportunity to defend said suit unless he prolonged his stay indefinitely at said Birmingham, and thereby said plaintiff sought to obtain an unjust and unfair advantage over said defendant." Where there is a legal right to do a certain act, the motive which induces the exercise of the right is of no importance. *McCune* v. *Norwich City Gas Co.*, 30 Conn., 521, 524; *Occum Company* v. *Sprague Mfg. Co.*, 34 id., 529, 540. *Nullus videtur dolo facere, qui suo jure utitur.* The act complained of having been fully stated, and being one which the law permitted, whatever advantage it gave the plaintiffs could be neither unjust nor unfair, and these epithets are therefore of no effect. *Middletown* v. *Boston & New York Air Line R. R. Co.*, 53 Conn., 351, 359. They had the right to sue the defendant where they found him, or at his domicil in Connecticut, and in the choice of the forum were free to consult their own convenience, without regard to any loss he might sustain from "the law's delays." *Lovell* v. *Hammond Co.*, 66 Conn., 500, 512.

The demurrer to the second defense also admitted that the defendant when served with the process of the foreign court,

was president of the National Wire Mattress Company, a Connecticut corporation, and "was in nowise indebted to the plaintiffs in said suit, all of which was well known to said plaintiffs, but any claim that they had or may have had in which the defendant was in any way interested was a claim against said National Wire Mattress Company, all which was well known to said plaintiffs."

By this, and by the third defense, is raised the question as to how far a foreign judgment for a sum of money, rendered against one of our citizens by a competent tribunal, acting within its jurisdiction, should be held conclusive in a suit brought here for its collection.

It is the settled rule in England, that in an action instituted there on a foreign judgment, rendered by a court of competent jurisdiction, the proceedings before which were not so conducted as to be clearly contrary to natural justice, the defendant cannot be allowed to go into the merits of the original cause of action, which were tried in the foreign court, unless it be necessary in order to support a claim that the judgment was procured by fraud. In such case, the merits may be re-tried, not to show that the foreign court came to a wrong conclusion, but that it was fraudulently misled into coming to a wrong conclusion. If the triers are convinced that the foreign judgment should have been rendered, on the merits, the other way, but still do not find that there was fraud, the defense fails. *Abouloff* v. *Oppenheimer*, L. R., 10 Q. B. D., 295, 302; *Vadala* v. *Lawes*, L. R., 25 Q. B. D., 310, 316, 319.

JUDGE STORY, in his work on the Conflict of Laws, concludes a discussion of this subject, which is referred to in terms of commendation by this court in *Hatch* v. *Spofford*, 22 Conn., 501, with the remark that the principle of reciprocity may not improperly be applied, and foreign judgments treated as conclusive in any country, if rendered in another where like effect is conceded to judgments of the courts of the former. "This," he observes, "is certainly a very reasonable rule: and may, perhaps, hereafter work itself firmly

into the structure of international jurisprudence." Story on the Conflict of Laws, § 618.

What is termed the comity of nations is the formal expression and ultimate result of that mutual respect accorded throughout the civilized world by the representatives of each sovereign power to those of every other, in considering the effects of their official acts. Its source is a sentiment of reciprocal regard, founded on identity of position and similarity of institutions.

The effect to be given to a foreign judgment *in personam*, for a money demand, must be determined either by the comity of nations, the rule of absolute reciprocity, or the personal obligation resting upon the defendant. *Hilton* v. *Guyot*, 159 U. S., 113.

Whichever test may be adopted, the result would be the same where the question arises between the courts of England and those of an American State which was once an English colony. They are engaged in administering the same system of jurisprudence, and are bound together by common institutions and modes of thought, no less than by sharing the same language and the same history. The close and extensive commercial intercourse also between the United States and England, and across the long Canadian frontier, makes it especially important that the many controversies to which it must give rise should be promptly brought to a final settlement. When an American voluntarily places himself on English soil, he comes under a local and temporary allegiance to its sovereign which makes it his duty to respect any summons with which he may there be served, to appear before the courts of the country.

The process served upon the defendant gave him full notice of the character and items of the plaintiffs' claim. He was bound either to enter an appearance or submit to the consequences of a default. He put himself under the power of the court, the moment he entered the territory which was subject to its authority. Nor did he put himself under its power, simply in the sense that it could issue process and render judgment against him, which would be of force within

the limits of that territory. To that extent its judgments might be valid, though rendered without any personal service, upon a simple attachment of goods or by publication. But they would be mere expressions of the will of the sovereign, and impose no personal obligation which other sovereigns could recognize or enforce. *Bischoff* v. *Wethered*, 9 Wall., 812. Judgments rendered against a foreigner who is personally served when personally present, stand on a ground wholly different. These and these only, so far as actions for money damages are concerned, are entitled to full respect in the courts of other countries, by the principles of international law. As between the United States and Great Britain, it may be fairly assumed that every citizen of either, while within the territory of the other, assents to the jurisdiction of its courts of justice over all pecuniary controversies to which he may be duly made a party before them.

This doctrine, that presence confers jurisdiction, may not be one recognized in Roman law or the modern civil law. Dig. XLII., 1, *de re judicata etc.*, 53; Story on the Conflict of Laws, §§ 611–617; Wharton on the Conflict of Laws, § 653; Mourlon's Répétitions Écrites sur le Code Civil, Tom. III., § 1469. The Romans viewed law as personal rather than territorial in its operation. The traveler carried with him the shield of his own law; and on the same territory there might be, even for its permanent inhabitants, two systems of jurisprudence of equal force, each governing a different race. Such principles of government find no place in the common law of England and of Connecticut. With us the law of the land protects all who stand upon it, and whenever a right has been violated, gives a remedy, without regard to the nationality of the offender.

In our opinion, the Queen's Bench Division of the High Court of Justice had full jurisdiction to decide the original controversy between the parties to this action. The defendant accepted the forum, when he voluntarily placed himself on English soil, and so came under an implied obligation to respect such legal process as might be served upon him there, to the extent of satisfying any resulting judgment, duly ren-

dered for a pecuniary demand. The law raises this obligation because the interests of human society require it; and it is not escaped by departing from one country into another, except so far as a judicial sanction may be withheld because reciprocity is refused. The maxim, *Interest reipublicæ ut sit finis litium*, is not restricted in its application to controversies or suits originating in the State before whose courts it is invoked. It does not rest on the excellence of any particular system of jurisprudence. It governs wherever the parties come, in the last resort, before a court constituted under an orderly establishment of legal procedure. No one who has been or could have been heard upon a disputed claim, in a cause to which he was duly made a party, pending before a competent judicial tribunal, having jurisdiction over him, proceeding in due course of justice, and not misled by the fraud of the other party, should be allowed, after a final judgment has been pronounced, to renew the contest in another country. The object of courts is hardly less to put an end to controversies, than to decide them justly.

The defenses in question do not, in terms, charge the plaintiffs with fraud. The averments that they well knew, when they brought their suit, that the defendant was in no wise indebted to them, and that the only claim they had or might have, in which he was in any way interested, was one against the corporation of which he was an officer, do not, standing alone, import that they attempted to impose and did impose upon the court. Fraud is never presumed. The claim against the corporation may have been such that the defendant could be held collaterally liable upon it, although it remained the debt of the corporation, only. It may have been contracted by him in behalf of the corporation, but without its authority. It may have arisen from a transaction that was *ultra vires*, but which he had falsely represented to be within its powers.

If he was in no way liable to the plaintiffs, the place to show it was in the English court. A state of facts quite similar to that here alleged was set up and established by proof, in one of the leading cases in our reports. A citizen and resident of Connecticut, while transiently in New York, was

served with process from one of her courts, in an action based upon a contract made by the plaintiff with a Connecticut corporation, but which, in his declaration, he had, as the defendant asserted, "falsely assumed" to have been made by the latter personally, and on his own personal credit. The defendant entered no appearance, and judgment by default was rendered against him, for the sum demanded, to collect which suit was instituted against him here. He thereupon brought a bill in equity for an injunction, and in addition to what has been already stated, alleged and proved that the plaintiff's attorney assured him, after the service of the process, that a mistake had been made in suing him individually instead of the corporation, and thereupon agreed that nothing further should be done in relation to the action, without previous notice to him; in consequence of which assurance he had omitted to enter an appearance. The injunction was granted on this last ground; but that founded on the false averments in the declaration in the New York suit was rejected as untenable, in these words: "A suit was commenced in New York, against the present plaintiff, by virtue of which, and of the process thereon, he was arrested, and such proceedings were had, that a judgment for about six hundred dollars was obtained against him, on a cause of action founded wholly on a contract, with which, personally, he had nothing to do; but which was entered into by him, as the agent of the Norwich Foundry Company, a corporation with which the plaintiff in that suit had had previous dealings, and was well known to him, at the time, as the party with whom he was contracting. If this was all, the plaintiff would have no remedy, however unjust it might be, to compel him to pay that judgment. Still, as he was duly served with process in that suit, it was his duty to make defense in it; and an injunction ought not to be granted to relieve him from the consequences of his own neglect." *Pearce* v. *Olney*, 20 Conn., 544, 555; *Embry* v. *Palmer*, 107 U. S., 3, 12, 13.

The doctrine of *Pearce* v. *Olney* is not less applicable to the case at bar because the judgment in question there was one of a sister State, while here it emanates from the court

of a foreign country. It is true that fraud in procuring it is no defense at law to an action on a judgment of the former description. *Christmas* v. *Russell*, 5 Wall., 290. It is, however, an equitable bar to its enforcement, just as it is in case of a domestic judgment. A judgment may be good at law, and yet equity may deem it against conscience for the plaintiff to stand upon his legal rights. In such a case it is because the judgment is good at law that equitable relief is granted.

In *Pearce* v. *Olney*, these principles governed the decision. An injunction was granted on account of a fraud as to a matter which could not have been put in issue in the New York suit. An injunction was refused, on account of a fraud as to a matter which could have been put in issue in the New York suit. In the case at bar, by the force of the Practice Act, equitable defenses could be pleaded by way of answer, but the defendant had no equity, because the question of his indebtedness to the plaintiffs, if it was to be contested, should have been put in issue before the English court. *Bank of Australasia* v. *Nias*, 16 Ad. & El. (N. S.), 735, 4 Eng. Law & Eq., 252.

Nor did the case of *Pearce* v. *Olney* rest on any special duty of a citizen of one of the United States, as such, to submit himself to the jurisdiction of a court of another State, before which he may be duly summoned. The conclusiveness of a judgment rendered in one State, when relied on in another, is in no manner dependent on the citizenship of the parties to it. It has equal weight whether they are Americans or foreigners. The Constitution of the United States secures to the citizens of each of them certain privileges and immunities as respects every other State, but it imposes upon them no particular duties in return. It places the citizen of one State, who enters the territory of another, no more under the power of its courts, than if he were an alien visitor. See *Bonaparte* v. *Tax Court*, 104 U. S., 592, 595.

It follows that the judgment in suit was conclusive as to the merits of the cause of action, and that the several special

defenses, so far as they sought a re-trial of them, were properly overruled. The defendant had already had his day in court.

The present action was brought by two individuals, described as partners doing business under the firm name of Fisher, Brown & Company, and the English judgment was alleged in the complaint to have been recovered by "the plaintiffs," on April 3d, 1889. Upon the trial of the issue closed upon the first defense, they offered in evidence a copy of the record in the English suit, in which the plaintiffs were named throughout simply as Fisher, Brown & Company. They also offered at the same time certain depositions tending to prove that the plaintiffs constituted, during the whole of the year 1889, the copartnership of Fisher, Brown & Company, and as such recovered the judgment in question; and that by the laws and rules of court in England, any persons claiming as copartners could sue in the name of the firm of which they were members at the time of the accruing of the cause of action. The defendant objected to all this evidence, on the ground that the record offered varied from that alleged, and did not show whether Fisher, Brown & Company was a corporation or copartnership, or, if a copartnership, that the plaintiffs were members of it, and could not be helped out by parol; and also claimed that the depositions did not show that the plaintiffs were members of such a firm when the original cause of action arose.

The court committed no error in overruling these objections and claims, and admitting the evidence. The law and practice determining the form of judicial proceedings in a foreign court may always be shown, and shown by parol. The testimony that the plaintiffs were the members of a firm styled Fisher, Brown & Company throughout 1889, and as such recovered the judgment in suit, gave an intelligible meaning to the words Fisher, Brown & Company, as used in the record of the High Court of Justice, and in connection with it tended to show that they were also copartners when the cause of action accrued; for else they could not have been entitled to such a judgment, under the rules governing suits by copartners in the copartnership name. Wherever a judg-

ment on a partnership demand can lawfully be given in favor of the copartnership, without stating the names of the copartners, it is, in effect, a judgment in favor of such copartners, described by their copartnership name, and may properly be declared on as such, in any proceedings subsequently brought to enforce it. This is merely describing it according to its legal effect.

The defendant admitted that he was the person against whom the English judgment was rendered, but put the plaintiffs on proof that they were the parties by whom it was recovered. Extrinsic evidence of this was therefore required, and the depositions were clearly admissible to identify particular individuals as those to whom the description of the judgment creditors in the record, by a partnership name, properly applied.

There is no error in the judgment appealed from.

In this opinion ANDREWS, C. J., TORRANCE and FENN, Js., concurred.

HAMERSLEY, J. The action on a foreign judgment is an action at common law sanctioning an obligation legal by force of the common law. Our law on this subject depends on the common law of England as it stood at the date of our independence. The authority which lies at the foundation of that law is *Sinclair* v. *Fraser*, decided by the House of Lords in 1771. The judgment creditor sued his debtor in Scotland. The Court of Sessions refused to give any effect to the foreign judgment, and held the party bound to prove the nature and extent of his demand. The House of Lords, upon appeal, reversed this decision, upon the ground as stated in the order of reversal, "that the judgment of the Court of Jamaica ought to be received as evidence *prima facie*, of the debt, and that it lies on the defendant to impeach the justice thereof, or to shew the same to have been irregularly or unduly obtained." 20 How. St. Tr., 468, 469.

In *Walker* v. *Witter*, Doug. 1, decided in 1778, it was held that an action of debt would lie for the collection of a foreign

judgment, because *indebitatus assumpsit* would lie; but in a declaration in debt, the plea of *nul tiel* record was bad, because the action was not on a specialty, but for recovery of a simple contract debt; and LORD MANSFIELD said that the doctrine of *Sinclair* v. *Fraser* was unquestionable. "Foreign judgments are a ground of action everywhere, but they are examinable." And ASHURST, J., indicates the ground of the right, when he says, "in *indebitatus assumpsit* on a foreign judgment, the judgment is shewn as a *consideration*."

In *Galbraith* v. *Neville*, decided about 1781, Doug., 6, note, there was apparently an attempt to set up a defense on the ground that the foreign judgment offered in evidence was wrongly decided on the merits, and BULLER, J., expressed an opinion based on his understanding of a reported saying of LORD HARDWICKE, that the foreign judgment was not conclusive upon the merits of the questions actually adjudicated; while LORD KENYON took a different view; but the case was decided in favor of the judgment, as all the judges were of opinion that no evidence had been adduced to impeach it.

In *Philips* v. *Hunter*, 2 H. Bl., 402, 410 (1795), a dictum of CH. J. EYRE supports the suggestion of ASHURST, J., in *Walker* v. *Witter*, and asserts that as a ground of action a foreign judgment is treated "not as conclusive, but as matter *in pais*, as consideration *prima facie* sufficient to raise a promise; we examine it, as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign State is, and whether the judgment is warranted by that law. In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive."

And the suggestion of ASHURST, J., is further supported by BEST, CH. J., in *Arnott* v. *Redfern*, 3 Bing., 353, 357, (1826). He says: "It has been decided by the highest authority in the case of *Sinclair* v. *Fraser*, 'that foreign judgments are *prima facie* evidence of a debt, although it is competent to the defendant to impeach the justice of them, or to

shew that they are irregularly or unduly obtained.' This is founded on a plain and obvious principle of natural justice."

The common law, as established by *Sinclair* v. *Fraser* and *Walker* v. *Witter*, is the law adopted by this State. 1 Swift's Digest, 573; *Aldrich* v. *Kinney*, 4 Conn., 380, 382. The same law has generally been adopted by other States as their common law. *Bissell* v. *Briggs*, 9 Mass., 462; *Taylor* v. *Phelps*, 1 Har. & G. (Md.), 492; *Mills* v. *Duryee*, 7 Cranch., 481; *Burnham* v. *Webster*, 1 Woodb. & M., 172; *Christmas* v. *Russell*, 5 Wall., 290, 304.

This law declares that when a judgment is rendered by a foreign court, that fact may be the source of a legal obligation between the parties to such judgment, which can be enforced in our courts through the ancient form of an action on the case. But beyond this the law is not clear. The nature and ground of such obligation is not defined. The defenses to such action are not settled. In respect to these matters, in this State, and generally with American courts, the field is an open one,—not to make law by arbitrarily recognizing or rejecting a defense, but to declare the law resulting from established principles.

In the present case the second defense alleges sufficiently for the purpose of this decision, that the judgment was rendered by a court of Great Britain upon default of appearance; that the defendant is a citizen of the United States, never a subject of the Queen nor resident within her dominions; that he was served with the notice to appear while casually in England and on the eve of departure; that he was absent from the Kingdom at the time he was required to appear, and during all subsequent proceedings; that the cause of action on which the notice to appear in court was based, did not arise in England, and did not concern any conduct, act or contract of the defendant, done or entered into within the dominions of the Queen. This defense was held insufficient by the trial court; and my associates reach the conclusion that such facts do not constitute a good defense to the action. I must dissent from that conclusion.

I believe it cannot be supported, except on the theory that

our courts have at common law the power to authorize the execution of the will of a foreign sovereign signified in a judgment; and to set the conditions on which such execution will be granted. I believe such theory to be inconsistent with established principles of common law; that the power of authorizing such execution of the will of a foreign sovereign belongs, not to the judicial, but to the executive or legislative department; and that it would be against public policy to exercise the power under such conditions as exist in this case, even if it were vested in the court.

A defense cannot be intelligently passed upon, unless the nature of the obligation it is claimed to negative is clearly defined. What is this common law obligation whose violation was originally enforced by the common law action on the case? It clearly does not arise from a tort; nor does it arise from a contract. Although a judgment is sometimes spoken of as in the nature of a contract, such language must be confined to certain analogies not affecting the essential character of a judgment. *Rae* v. *Hulbert*, 17 Ill., 572; *Todd* v. *Crumb*, 5 McLean, 172; *Wyman* v. *Mitchell*, 1 Cow., 316, 320; *Kramer* v. *Rebman*, 9 Iowa, 114, 117. When the clause in the Federal Constitution prohibiting States from passing any law impairing the obligation of a contract, was appealed to as protecting judgments, the appeal was denied by the United States Supreme Court, on the ground that a judgment is in no sense a contract or agreement between the parties, even when founded upon a contract; citing LORD MANSFIELD in *Bidleson* v. *Whytel*, 3 Burr., 1545: "A judgment is no contract, nor can be considered in the light of a contract: for *judicium redditur in invitum.*" *Morley* v. *Lake Shore Ry. Co.*, 146 U. S., 162, 169. An obligation which is neither *ex contractu* nor *ex delicto*, must spring from the relation of the parties to some event under such circumstances that a legal duty arises. Our common law obligation, therefore, belongs to those miscellaneous obligations arising from facts which are not conventions nor yet wrongs, but nevertheless are causes of obligations, which for want of a better name are classed as *quasi-contracts*. The principal fact from which the

obligation arises, is a rendition of final judgment by a foreign municipal court, and the main difficulty in defining that obligation is found in the particular character of a judgment, which is not only a fact that may, in connection with other facts, raise an obligation between the parties, transitory in its nature and so cognizable in our courts; but is also an act of the foreign sovereign imposing an obligation of obedience which, as such, can only be put in execution within the territory subject to that sovereign. This double aspect of a judgment is distinctly recognized and established in our common law, although it has been obscured by using in some cases the form of an action to put in execution a domestic judgment. So our first step towards ascertaining the nature of the common law obligation which may arise between the parties to a foreign judgment, is to make clear this distinction established by our law between that obligation and the obligation of obedience imposed by a domestic judgment and sometimes enforced through the form of an action.

The final judgment of a court of competent jurisdiction puts an end to all further litigation between the parties in respect to the specific cause of action adjudicated between them and decided and settled by the judgment; and the original obligation which the action was brought to enforce no longer exists. Gaius notes the application of such rule in the early Roman law. "*Tollitur adhuc obligatio litis contestatione, si modo ligitimo judicio fuerit actum.*" Gai., III., § 180 (see also § 181). And Austin demonstrates that the extinction of the original cause of action by the rendition of final judgment, results from fundamental principles of jurisprudence; the obligation has been violated, the right of action arising from that violation has been exercised, and the sanction prescribed by law has been administered. Austin on Juris., *passim.* Such judgment, therefore, is a declaration of the sovereign, through his court, that a legal obligation has been violated, and is a final determination of the penalty imposed by him for that violation. This result is commonly, and perhaps somewhat inaccurately, expressed by the phrase, "the original right of action is merged in the judgment."

But this act of the sovereign not only satisfies and puts an end to the original obligation, it also imposes a new obligation on the subject of the judgment, and this obligation implies a corresponding right in the person to whom the subject of the judgment is commanded to pay its amount. Such corresponding right is a right to the execution of the command by which it was created; and the remedy given by our law is the execution, or process by which the property of the delinquent may be distrained, or his person imprisoned until the obligation is satisfied. This remedy may be granted on application, as in the case of a *capias*, or after notice to the delinquent, as in the case of a *scire facias*. A remedy is also given by means of the action of debt on judgment; as now permitted, this remedy is an anomalous proceeding. BLACKSTONE says: "This method seems to have been invented, when *real* actions were more in use than at present, and damages were permitted to be recovered thereon; in order to have the benefit of a writ of *capias* to take the defendant's body in execution for those damages, which process was allowable in an action of debt (in consequence of the statute 25 Edw. III., c. 17) but not in an action real. Wherefore, since the disuse of those real actions, actions of debt upon judgment in personal suits have been pretty much discountenanced by the courts, as being generally vexatious and oppressive, by harassing the defendant with the costs of two actions instead of one." 3 Bla. Com., 159, 160. COKE says that the remedy was provided by common law, as the only method (prior to the Statute of Westminster 2, authorizing a writ of *scire facias* for that purpose) of reviving a judgment dormant by reason of the failure to sue out a writ of execution within a year and a day, and of obtaining execution thereon. Coke, Litt., § 290.

Whether the remedy was originally "invented" to provide a more effective writ of execution in a peculiar action, or as a means of reviving a dormant judgment so that execution might issue after the time fixed by law for its issue had expired, it is certain that its purpose was to provide a method of obtaining execution of the original judgment in

cases where the law regulating the issue of execution was defective. The use of the action of debt on judgment, when the remedy by execution is complete, which was occasionally permitted at common law, is therefore anomalous; it was discouraged by the courts, and by statute (44 Geo. 3,) costs were not allowed on such action, unless by special order of court. The Court of King's Bench, taking advantage of an Act reconstituting the county courts and making some cumulative provisions as to the issue of executions, held that the Act, by making new provisions, restricted the remedy to the writ of execution, and that debt on the judgment of a county court would not lie. The motive of the decision is indicated in the expression of CAMPELL, C. J.; "I rejoice that we are able to come to this conclusion by the established rules of law; for there can be no doubt that it is most desirable that such actions should not lie." *Berkeley* v. *Elderkin*, 1 El. & Bl., 805, 809, (1853). This decision was followed the same year by the Court of Exchequer. *Austin* v. *Mills*, 9 Ex., 288.

In this State the right of a judgment creditor to execution, was not limited to a year and a day after the judgment was entered, and the English common law permitting an action of debt on judgment when the remedy by *capias* was adequate, was not regarded as adopted in this particular. The common understanding of the profession and the weight of authority, so far as the question had been before the courts, was stated by JUDGE SWIFT in his Digest, Vol. 1, p. 573, (original edition): "In this State, an execution can be prayed out at any time during the life of the parties, and debt on judgment is not sustainable, unless one of the parties is dead, or some new object is to be obtained." But in 1822, in the case of *Denison* v. *Williams*, 4 Conn., 402, a majority of the court held that the English common law, in this particular, must be regarded as in force here.

We find, therefore, that a domestic judgment is an exercise of the power of the State over its citizens by which the obligation sought to be enforced in the action resulting in the judgment ceases to exist, and a new obligation to pay the

amount of the judgment is imposed. This latter obligation, unlike one arising from the agreement of parties between themselves, is not transitory; the rule "*debitum et contractus sunt nullius loci*" (1 Saund., 74) does not apply. The obligation or debt created by the act of the State is enforceable by the State only within its own limits. "Judgment creates a debt all over the kingdom." Gilbert, Debt, 392. The appropriate remedy given to one holding the right corresponding to this obligation, is not by action calling for judicial adjudication, but by writ of execution; this writ is granted on application or after notice, and when such remedy is defective a peculiar action is authorized whereby the right to execution may be made effective; and by an anomaly in the law, this action may lie when the reasons for its use do not exist. But under all circumstances such action is, in its essential characteristics, not an adjudication between the parties in any ordinary sense of the word, but simply a method of verifying the command of the State signified in the judgment, and of enforcing by writ of execution that command. *Williams* v. *Cable*, 7 Conn., 119.

It follows that the obligation arising from a domestic judgment enforceable in our courts, differs materially from any ordinary obligation arising from the acts of the parties, whether *ex contractu* or *quasi ex contractu;* that it is imposed directly by the State, and is an obligation of obedience, not simply of the law in general, but of this particular command; and that the corresponding right is a right to the process of the State for the execution of the judgment. The fact that an action of debt may be resorted to, instead of a *capias* or *scire facias* to obtain execution of the judgment, does not affect its essential nature. "The form of procedure cannot change their (its) character." *Meriwether* v. *Garrett*, 102 U. S. 514.

It also follows that this peculiar obligation of obedience, *ex vi termini*, has no existence beyond the limits of the State which imposed it. That these conclusions are settled by the common law, cannot be questioned. When a foreign State has ascertained the violation of any obligation between par-

ties, and by judgment of its court has put an end to the obligation whose violation is thus ascertained, and fixed its punishment, creating a new obligation to obey the command of the State by submission to that penalty—our law is settled that such an exercise of sovereign power cannot operate beyond the limits of the State where the judgment is rendered. This principle is commonly expressed by the saying, "the original cause of action is not merged in a foreign judgment." It is true the judgment may be shown as a fact which, under our law, may be material in establishing the allegations of plaintiff or defendant (a subject which will be considered directly), but the act of the foreign sovereign in putting an end to the obligation has no force within our territory, and the original obligation remains subject to the adjudication of our courts as truly as if the judgment had not been rendered. This is in accordance with well recognized principles of international law. "Since a judgment is merely an act of sovereign power, it can of itself have no extra-territorial effect. The officers of the State in which it is pronounced must carry it into execution, whether with or without the intervention of any farther formalities, but it can convey no authority to the officers of another State." Westlake, Int. Law, *361; Story's Confl. of Laws, 278; and is thoroughly established as our municipal law. Bigelow on Estoppel, 246; *Smith* v. *Nicolls*, 7 Scott, 147; *Hall* v. *Odber*, 11 East, 118, 124; *Wood* v. *Gamble*, 11 Cush., 8; *Bank of Australasia* v. *Harding*, 19 L. J. C. P., 345; 2 Smith's L. C., *702. And the law is so clear that the action to recover the amount of a foreign judgment is an action concurrent with that on the original cause of action, that the forms given in Chitty's Pleading for an action on the judgment all contain the instruction, "Add counts for the original debt;" and the practice of trying the right in the original cause of action, as well as the right to the amount of the judgment in the same proceeding, has always prevailed, and continues under the new method of procedure in England, so that a verdict may be given on both issues.

And herein is found the radical distinction between the

obligation of obedience imposed by a domestic judgment, (and by a foreign judgment within the territory of the foreign sovereign) and the common law obligation which may arise between the parties to a foreign judgment. The latter cannot involve the right to the execution of the judgment; it must be consistent with the continued existence of the original cause of action; it cannot depend on the mere rendition of the judgment, but requires certain relations of the parties to the fact of the judgment, which may not exist in respect to every such judgment.

Our next step in ascertaining the nature of this common law obligation is to fully recognize the established principle that such obligation must depend upon the municipal law, and cannot result from any rule of international law, nor yet from the application of any so-called rule of "comity." It is unnecessary to repeat or extend the argument which demonstrates that by international law a judgment has no force beyond the territory of the State where it is rendered. It cannot be executed in a foreign State unless by authority of that State. No rule of international law requires the exercise of such authority. In fact it has been exercised absolutely by no nation. It is rarely exercised at all, except by force of an express treaty or the implied treaty of reciprocity, and then only upon conditions fixed by the laws of the nation where execution is sought. There being no international law in respect to the execution of foreign judgments, it is certain that the common law obligation arising from the relation of parties to the fact of such judgment, cannot be the result of any rule of international law. I believe, indeed, there is no nation, unless possibly Denmark, whose municipal law recognizes (as our common law does) as legal and enforceable by action in its courts, any obligation arising between the parties to pay the amount of a foreign judgment. Such obligation—as distinguished from the obligation of a subject to obey the specific command of his sovereign—is pecular to the English common law, and depends wholly upon our municipal law.

It is equally clear that such obligation cannot result from

any rule of comity of nations, so called. Such "comity" implies a general practice of all nations; there is no such general practice. On the contrary, the action of other nations in respect to foreign judgments, indicates that there is not even a generally prevailing opinion which it would be practicable to make the basis of any rule of comity. In examining the law of other countries we should keep in mind the tendency to overlook the essential distinctions, clearly indicated in our own law, between a foreign judgment as a ground for asking the issue of process to put the judgment in execution,—as a ground for the application of the law of estoppel on the principle of *res judicata*,—and as a ground for a civil action between the parties to the judgment. In England, if recent cases can be treated as not altering the common law which once prevailed there, the law in respect to foreign judgments is the same as our own; but among the dependent states of England marked differences exist. Among other nations there is an almost uniform rejection of any right in a foreign judgment creditor as against the judgment debtor, to enforce any obligations arising from their relations to such judgment. There is an almost equally uniform rejection of any right to demand of the government, process by which a foreign judgment shall be put in execution. Where such execution is granted at all, it is granted on conditions that are governed by no common principle. The nearest approach to a common principle is found in the general refusal to grant any execution, unless in pursuance of an express treaty or the implied treaty of recognized reciprocity of action. Sweden and Norway refuse any recognition of foreign judgments. Russia also refuses unless bound by a treaty. Germany refuses except in cases where reciprocity is guaranteed. The law of Austria is similar. France and Belgium practically refuse; for consent is given only after inquiry into the merits of the judgment. A similar rule prevails in Portugal and Spain. The refusal to execute any judgment on default against one of its own subjects is general. Besides the differing rules of conduct established by special treaties, the various conditions upon which exe-

cution of a foreign judgment may be granted, include the following: That the judgment is satisfactory in the discretion of the executive; that it is satisfactory in the discretion of the court; that it is rendered in a country which guarantees reciprocity; that it meets various conditions specified by the local law; that it is not rendered on default; that it is shown to be just upon examination of its merits. The only government which unqualifiedly treats a foreign judgment (excluding however one which has been rendered on default of appearance) as a domestic one, is the republic of Liberia. (See collation of laws in Piggott on Foreign Judgments, 357 *et seq.*).

It is evident that such action furnishes no ground for claiming an existing "comity of nations;" it rather indicates that the wished for uniformity of action must be secured through international treaties. The only countries where the duties arising between the parties to a foreign judgment can be enforced by civil action, are those where the common law is administered; and it may well be doubted if a more desirable and practicable basis for an international agreement on this subject can be found, than is furnished by the analogies of that common law.

It was in view of this condition of the usage of nations that LORD BLACKBURN, in *Godard* v. *Gray*, 6 L. R. Q. B., 139, 148, stated so emphatically: "It is not an admitted principle of the law of nations that a State is bound to enforce within its territories the judgment of a foreign tribunal;" and in *Schibsby* v. *Westenholz*, repudiated the suggestion that the principle on which foreign judgments were enforced was that which is loosely called "comity."

Closely connected with what has been said in respect to the office of a judgment, is the specious claim that the voluntary presence of a person within the territory of a State, implies an obligation to respect such legal process as may be served on him there, to the extent of satisfying any valid resulting judgment; and that such obligation is the one recognized by our common law as enforceable by a civil action in our courts. Such "implied obligation" is admittedly one due

from a person to the State, *i. e.*, to respect the process of the State—to obey the mandate of its judgment. To call such an obligation "implied," is but another form of expressing the old fancy of the social compact,—that all laws are binding by reason of an implied obligation. This fancy cannot affect the fact that the lawfully expressed will of the sovereign directly imposes a legal obligation on the subject, and on all within his lawful power. This is an obligation of obedience resulting from positive law. Within the limit of the sovereign's power over an alien, the obligation due from such alien is the same as that due from a native subject. So whatever obligation is due from the alien to respect the process and obey the judgment of the sovereign in whose territory he may be, is not implied (unless for the purposes of speculation), but is directly imposed by positive law, binding within, but not without, the territory of that sovereign. Such an obligation cannot be the one enforced by our common law action; because our law distinctly pronounces it invalid. If the obligation is valid the judgment must be valid throughout. If it binds one party to obedience to the mandate of payment for injury done, it must bind the other to obedience to the mandate of extinction of the original cause of action. Our common law says the original cause of action is not extinguished, and the obligation of obedience cannot be enforced in our courts.

By this process of exclusion we are enabled to mark the limits of the obligation legal by our law, enforceable in our courts, which arises from the relation of the parties to the fact of a foreign judgment, so that its real nature can be ascertained with adequate accuracy. It is not the obligation of obedience imposed by the command or sovereign act signified in the mere rendition of the judgment; still less is it the "implied obligation" which the votaries of the social compact fancy to be the origin of all law; it is not imposed by any rule of international law, nor by any existing "comity of nations." All such grounds of obligation are excluded by the settled principles of common law.

The only remaining ground of obligation must be found

in the principle, well established and of constant application in our law, that when the relations of the parties to a fact or facts are such that the ties of natural justice require the performance of certain acts, such duty may be a legal obligation enforceable in our courts by an appropriate action. This principle is far from countenancing the claim that a mere moral duty must be a legal obligation. To come within the operation of the principle, the duty must be such as our law has recognized as legal, or at least be clearly and strictly analogous to recognized legal duties.

Our common law, in respect to the principle of *res judicata* and its application, distinctly recognizes as legal, a duty resulting from the ties of natural justice, to accept as true, in future proceedings, the facts established in a judicial contention, when the parties have participated in such contention and submitted the controverted facts to such adjudication. In speaking of the principle of *res judicata*, I do not mean the fiat of the State which compels obedience to a final judgment and forbids the parties to again contest the cause of action extinguished by that judgment (although such meaning is properly expressed in the broad use of the term), but I confine the term to its expression of the principle by which the parties are bound in other proceedings by the facts once submitted by them to a final adjudication. In examining the relation of this principle of *res judicata* to a foreign judgment, we must remember that there is a vital distinction between a foreign judgment *in rem* and the ordinary foreign municipal judgment *in personam*. It is true, that to a certain extent the principle of *res judicata* applies in the same manner to both; but there is a principle which controls judgments *in rem* that has no application to municipal judgments. This principle most clearly appears in the case of courts of admiralty administering justice in accordance with international law. The principle is, that certain courts by the law of nations exercise a jurisdiction co-ordinate with that of other like courts throughout the world, and that their judgments in determining the status of certain things and persons are adjudications to which all the world are parties, and

have in every nation a binding force equivalent to the judgments of the courts of that nation. As early as 1674 this principle was outlined in *Hughes* v. *Cornelius*, 2 Show., *232, and was developed in the judgment announced by LORD MANSFIELD in *Bernardi* v. *Motteux*, 2 Doug., 575. In *Roach* v. *Garvan*, 1 Ves. Sr., 157, LORD HARDWICKE declares that the principle results "from the law of nations in such cases; otherwise the rights of mankind would be very precarious and uncertain." This principle has been affirmed by our Federal Courts. In *Croudson* v. *Leonard*, 4 Cranch, *434, JUSTICE JOHNSON rests the principle, in the case of a court of admiralty, on considerations of necessity and the impropriety of revising the decisions of the maritime courts of other nations whose jurisdictions are co-ordinate throughout the world; and in *The Mary*, 9 Cranch, 126, CH. J. MARSHALL states that these reasons given by JUSTICE JOHNSON must be taken as the unanimous opinion of the court. The principle was recognized in *Stewart* v. *Warner*, 1 Day, 142, and was fully sanctioned by a unanimous judgment of this court in 1810; CH. J. SWIFT in delivering the opinion, based the conclusion distinctly on "our acknowledgment of the *law of nations*." *Brown* v. *Union Ins. Co.*, 4 Day, 179, 186. The law of nations was adopted by the legislature as a rule of adjudications in our courts of admiralty in 1776. 15 Colonial Records, 281.

The same principle extends, with some modifications, to courts exercising a peculiar jurisdiction in respect to the status of marriage and of universal succession. *Roach* v. *Garvan*, 1 Ves. Sr., 157; *Tomkins* v. *Tomkins*, 1 Story, 547, 553; *Holcomb* v. *Adams*, 16 Conn., 127.

While judgments of this class have a legal effect in all nations which recognize international law as a part of their municipal law, judgments *in personam* of municipal courts have no extra-territorial effect by virtue of international law; so that language used in discussing one class of judgments may produce confusion if applied unqualifiedly to the other.

The principle of *res judicata* found its earliest application in a technical effect given to the document called a record,

containing a portion of the proceedings of a superior common law court. This technical rule was, in its inception, applied only to records of those courts whose proceedings were kept in this peculiar manner; it did not extend to inferior courts, nor to the High Court of Chancery. A similar technical rule applied, as between the parties, to the recitals of a deed. The "record," and the deed as between the parties, was treated as importing an absolute verity which could not be attacked collaterally; every one was estopped from making such attack. And so the principle of *res judicata* has been treated as belonging to the law of estoppel, and shared in early days the odium pertaining to a technical rule which closed the gates of justice to the entrance of truth.

But this technical rule, although still recognized, is not the ground on which the principle of *res judicata* rests. Its real foundation must be sought in principles which pervade all jurisprudence; in the considerations of public policy, which recognize that the adjudications of courts cannot serve their legitimate purpose unless final; in the universal law of equity and justice, which forbids parties who have once submitted their differences to the final decision of a court of competent jurisdiction, to question a result induced by their own act; and so the protection of *res judicata* does not depend upon the mere contents of court documents kept in a particular manner, but also, in some cases, upon the question whether the matter in dispute has in fact been submitted by the parties to a court, has in fact been heard, determined and finally decided by that court. The estoppel involved in the establishment of such facts is more than the old technical estoppel of record; it rests on matter *in pais*, and partakes of the nature of an equitable estoppel. *Supples* v. *Cannon*, 44 Conn., 424, 429; *Sargent & Co.* v. *N. H. Steamboat Co.*, 65 Conn., 116, 126. It is evident that while an estoppel dependent on the particular form of a document peculiar to certain courts, must of necessity be confined to the judgment of those courts, the estoppel involved in the principle of *res judicata* must of necessity apply to the judgments of all courts exercising a competent and final juris-

diction. The principle broadly stated is this: A claim once submitted by the parties to a court of competent jurisdiction, fully heard, determined and decided by that court, shall not thereafter be controverted between the same parties. This principle is entirely distinct from the right, given by law to a party to a judgment, to ask the State to exercise its sovereign power in compelling obedience to that judgment. It is simply a principle of jurisprudence firmly established in our municipal law, and based on considerations so general in their application, so clearly equitable and essential in any administration of justice, that it may fairly be called a universal principle of jurisprudence. The principle does not, and from its very nature cannot, depend upon the particular court whose judicial action has been invoked, so long as its jurisdiction is competent and its judgment final. It applies wherever the parties have so submitted their claims to a final decision by a court of competent jurisdiction, whether that court be inferior or superior, of law or of equity, domestic or foreign.

The only difference between a domestic and a foreign judgment in respect to the application of this principle, is a question of evidence. Can the laws of a foreign country, which prove that the foreign court was in fact a court of competent jurisdiction, and that the controverted claim was in fact submitted by the parties, heard, determined and finally settled by the court, be admitted in accordance with the rules of evidence established by our municipal law? If the foreign laws are admitted in evidence, the fact proved by them must have like effect with a similar fact proved in the case of a domestic judgment. The admissibility of proof of foreign laws for the purpose of establishing the judicial character of a court, and the legal effect of its acts, as well as the legal effect of all acts done in a foreign country under the laws thereof, is thoroughly established as a part of our municipal law. Whether we call this law a rule of comity of nations, is immaterial to the matter in hand. It is a part of our law, and derives its force from that fact; and foreign laws, as conclusive evidence of the legal effect of acts done under them, are re-

ceived by virtue of our law, with the vital qualification stated by Story: "unless they are repugnant to its policy, or prejudicial to its interest." Story on the Conflict of Laws, § 38.

It may avoid some confusion, to call attention here to the practical distinction between the admission in evidence of the acts and laws of a foreign sovereign, and the recognition of the necessary effect of such acts and laws in the determination, as between parties, of the result of their agreements or conduct while within the operation of such foreign law; and the putting in execution within our territory of the command of a foreign sovereign. The former results from a principle of our municipal law deemed essential to the administration of justice; in assuming that the real obligations of the parties are controlled by the fact that they arose or were undertaken with reference to the law prevailing where their acts were done, our courts do not assume to execute a foreign law, although the obligation they enforce as legal under our own law may also find its ultimate source in the command of a foreign sovereign; they treat the foreign law as a fact essential in connection with other facts, to ascertain what the parties really meant by what they have done, and if in receiving and weighing such fact they may also theoretically enforce the will of a foreign sovereign, it is only as an incident to the exercise of the judicial power vested in the courts, and does not offend the sovereignty of the State where such law may be proved as a fact. But the execution of a foreign law as ordinarily understood, is practically a very different thing; it cannot be authorized by the judicial department; and is an offense to our sovereignty unless permitted by special legislation. This distinction is clearly marked in the case of a foreign judgment, which is merely an act or special command of a foreign sovereign. Its execution within our dominion is an offense to our sovereignty; is forbidden by our law. Our courts deny such execution, both by refusing to recognize any extinction of the original cause of action by the judgment, and by refusing to issue process to enforce the obligation of obedience to its command. But when obligations between the parties, other than the mere obligation of obe-

dience, may arise from or be supported by the fact of such foreign judgment, it is admitted in evidence as a fact material to the determination of such obligations.

The principle of *res judicata* as stated and its application to conditions resulting from a foreign as well as from a domestic judgment, subject to the rule of evidence as stated, is a firmly established principle of our common law. In its earliest application to foreign judgments some doubt was entertained as to its equal conclusiveness in such cases, as appears from the arguments of counsel in the *Duchess of Kingston's Case;* but such doubts arose from a confusion of principle with a question of evidence, and never received judicial sanction. The principle cannot now be questioned. *Bissell* v. *Briggs*, 9 Mass., 462; *Taylor* v. *Phelps*, 1 Har. & G. (Md.), 492; *Konitzky* v. *Meyer*, 49 N. Y., 571; Story on the Conflict of Laws, § 598; CH. J. EYRE in *Philips* v. *Hunter*, 2 H. Bl., 402; *Aldrich* v. *Kinney*, 4 Conn., 380. "It is an established rule, that a foreign judgment, when used by way of *defense*, is as conclusive, to every intent, as those of our own courts." GOULD J., in *Griswold* v. *Pitcairn*, 2 Conn., 85, 92.

But the principle is based in part on the universal law of justice and equity which binds one to submit to a final decision resulting from his own acts, and should not be extended beyond the limits of its foundation. Where in fact both parties to the controverted claim have not been heard, and judgment has not been rendered upon a claim contested and adjudicated, but the only adjudication between the parties is a mere legal fiction, for a penalty imposed for a disobedience of process issued by the court; while such judgment may be enforced as the command of the State, binding on its citizens, this particular foundation of *res judicata* does not exist. The distinction between the principle of a judgment as a bar to recovery in a cause of action which has been extinguished by the judgment, and this principle of *res judicata*, is indicated in *Smith* v. *Sherwood*, 4 Conn., 276. The former controls when the estoppel is what was formerly called estoppel by judgment; the latter where it was called estoppel by verdict; the former is founded on the supremacy

of a sovereign within his own territory; the latter is a universal principle of jurisprudence, and can only apply to a fact "tried and found between the parties." This distinction was affirmed in *Bradford* v. *Bradford*, 5 Conn., 127, 132. The defendant, in pursuance of notice under the general issue, offered in evidence as bar to the action, a judgment by default; and the court said, "no estoppel is created by a default." (HOSMER, C. J., in his opinion, assumed that the judgment by default involved the same legal consequences as if there had been a verdict under the general issue, the record not disclosing the ground of the verdict, and added: "there existing no solid distinction, between a title confessed, and one tried and determined." This saying applies only to the effect of a judgment by default in respect to the special cause of action it determines. It does not assert that a judgment by default is an adjudication between the parties, within the meaning of *res judicata;* an assertion which is expressly negatived by the opinion. And the saying is not strictly accurate under our practice. It was used by the English judges in respect to the old action of ejectment, at a time when judgment by default could only be rendered after the appearance of the defendant, when his neglect in open court to deny the allegations of the plaintiff was treated as a confession. *Aslin* v. *Parkin*, 2 Burr., 665. The settled principle of our law being that a common law court has no jurisdiction for the purpose of adjudication, until both parties appear in court and submit to the jurisdiction. In the modern practice of judgment by default, this principle is evaded through a legal fiction. 1 Reeve's, Hist. of Eng. Law, 452; 3 Bl. Comm., 279).

"A judgment by default determines nothing except the plaintiff's right to recover in that action." *Lord* v. *Litchfield*, 36 Conn., 116, 131. In *Cromwell* v. *County of Sac*, 94 U. S., 351, 356, FIELD, J., in illustrating the principle that an estoppel by judgment in a former action on a different cause exists only where the controverted claim was in fact litigated and adjudicated, says: "A judgment by default only admits for the purpose of the action the legality of the

demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action on a different claim." In a recent case in England, where a judgment by default of appearance in a French court was set up as a bar to the claim, the court held that such a judgment did not come within the rules of *res judicata* which calls for a judgment on the merits, and a judgment in default of appearance is one on a matter of form only; and SIR ROBERT PHILLIMORE, delivering the opinion of the court says: "The foreign judgments not having been given on the merits of the case, but on matter of form only, cannot be set up as a bar to a decision on the merits." *The Delta*, L. R. 1 P. D., 393; *Frayes* v. *Worms*, 10 C. B. N. S., 148.

As the principle of *res judicata* established and administered by our common law, is based not only on considerations of public policy, but in part upon the obligation arising from ties of natural justice, it recognizes as legal the duty arising between parties who have contested a controverted claim before a judicial tribunal, thereafter, as between themselves, in a judicial proceeding to accept as true the facts adjudicated upon such contest. This principle may be invoked by plaintiff or defendant, to defeat or support an action; as it depends in part upon the equities arising from the relation of the parties to the fact of adjudication, and not wholly on the form of a judgment or its effect in compelling obdience to a particular command, it applies in the case of any final judgment, whether rendered by a superior or inferior court, whether foreign or domestic. This legal duty to accept as true such adjudicated facts in subsequent judicial proceedings, necessarily involves the duty to pay any sum the facts so adjudicated conclusively prove to be due. The obligation is not like the one arising from the mere command of a foreign State, intra-territorial; but, as in the case of many transactions outside our territory which give rise to an obligation legal under our law and not illegal by the law of the place, it is transitory in its nature and enforceable in our courts. *Ruckmaboye* v. *Mottichund*, 8 Moo. P. C. C., 4; *Scott* v. *Seymore*, 32 L. J. Ex., 61.

The necessary result of established principles discloses the real nature of the obligation in question. It was recognized by the ancient common law, but it did not come within the few specific forms of action. It did come within the action on the case established for the enforcement of all rights not within those specific forms, including obligations arising from the ties of natural justice. Y. B. 14 Henry VIII., 31. The convenient fiction of *indebitatus assumpsit* was applied to this obligation, on the same principle that it was applied to the obligation to pay money in the hands of the defendant; not by reason of any contract or of any delict, but under such circumstances that it equitably belonged to the plaintiff. *Moses* v. *MacFerlan*, 2 Burr., 1005, 1008. Controlled by this fiction, the foreign judgment stood for the consideration of the promise. *Walker* v. *Witter*, *supra*. It was treated as the *prima facie* cause of action (*Philips* v. *Hunter*, *supra*; *Houlditch* v. *Donegall*, 2 Cl. & Fin. 470), *i. e.* the fact of the consideration or judgment established the plaintiff's case, unless the defense set up facts which impeached the consideration, that is, such facts as proved the judgment to have been rendered under circumstances that negatived any obligation between the parties. *Russell* v. *Smyth*, 9 M. & W., 810; *Williams* v. *Jones*, 14 L. J. Ex., 145; *Godard* v. *Gray*, L. R. 6 Q. B. 139; *Schibsby* v. *Westenholz*, ibid., 155. The fictitious character of the action first used to enforce this obligation, has been the cause of confusion which has now no excuse. The fictions of the remedy removed, the essence of the obligation clearly appears. It is this: When a valid and final judgment has been rendered in respect to controverted claims tried and determined upon their merits, there arises a *quasi*-contract obligation as between the parties to such judgment, which binds them in future proceedings to admit the facts so adjudicated to be true, and to pay over money whose ownership as between themselves has been established by such adjudication.

This obligation exists in the case of every judgment rendered under the conditions described. It might be enforced, if there were occasion, in the case of a domestic judgment; it

has not been so enforced, because the wider and more effective obligation of obedience has excluded its consideration; the remedy by execution, whether with or without the intervention of other formality, is so complete, that there has been no occasion to resort to the *quasi*-contract obligation. But in the case of a foreign judgment the obligation of obedience does not exist, no remedy by execution direct or indirect exists; the only obligation enforceable in our courts is the one arising between the parties to any judgment when there has been an adjudication to which the equitable principle of *res judicata* applies.

The determination of the nature of the obligation simplifies the problem of defenses. "Anything which negatives the existence of that legal obligation, or excuses a defendant from the performance of it, must form a good defense to the action." *Godard* v. *Gray*, *Schibsby* v. *Westenholz*, *supra*. If in fact the judgment is a mere expression of sovereign will which does not involve any actual adjudication of claims put in issue by the parties and tried and determined by the court, the particular principle of *res judicata* essential to the right of action does not apply, and such fact must negative the obligation of which the judgment is considered as *prima facie* evidence. If the adjudication resulted from the fraud of the plaintiff, such fraud of necessity vitiates the foundation of the obligation. *Abouloff* v. *Oppenheimer*, L. R. 10 Q. B. D., 295; *Vadala* v. *Lawes*, L. R. 25 id., 310. But if in fact the final result of the adjudication was not justified by the evidence produced on the trial, such fact cannot constitute a defense; the obligation sought to be enforced is not concerned with the merits of the controversy submitted to adjudication; it arises solely from the fact of such adjudication under the required conditions; the original controversy is not in issue; the trial court has no power to determine that question nor to review by way of appeal or error the judgment of a foreign court (*Messina* v. *Petrococchino*, L. R. 4 P. C., 144); the fact of the judgment and the conditions under which it was rendered are in issue, but not the merits of the controversy adjudicated. Upon the invalidity of such

a defense, the actual results of decided cases are practically uniform. In all the recent American cases where the courts have refused to receive evidence upon the merits, the defendant had appeared in the foreign court and defended. *Lazier* v. *Westcott*, 26 N. Y., 146, 151; *Dustan* v. *Higgins*, 138 N. Y., 70; *Baker* v. *Palmer*, 83 Ill., 568; *McMullen* v. *Richie*, 41 Fed. Rep., 502. (Since this opinion was written, the opinions in *Hilton* v. *Guyot*, 159 U. S., 113, and *Richie* v. *McMullen*, ibid., 235, have been filed. In these cases also, the defendants had appeared in the foreign court and there had been an actual adjudication upon the claims presented. Whether the exhaustive examination made of the history of this action, justifies the theory advanced by a majority of the judges, and whether a theory so novel to English and American law will hereafter control the treatment of defenses by the Federal courts, may be doubtful).

There is a defense which depends rather on a question of evidence. Our municipal law admits in evidence a foreign judgment and foreign law, *unless* repugnant to the policy of our law or unjust and prejudicial to our own subjects. A judgment obnoxious to this exception might not be admissible as evidence, and so the action might be defeated. In *Castrique* v. *Imrie*, 30 L. J. C. P., 177, the distinction in this respect between a judgment *in rem* and *in personam* was noted. In *De Brimont* v. *Penniman*, 10 Blatchf., 436, a demurrer was sustained in an action brought to enforce an obligation between the parties arising in France under French law and established by a French judgment, after full contest by the parties, on the ground that the foreign law and judgment was repugnant to the policy of our law and did violence to the rights of our citizens. The claim that evidence of a foreign judgment may be rejected because the courts of the state where the judgment was rendered do not receive in evidence our own judgments, would fall under this defense. The object sought by such a claim seems more political than judicial; it is not so much to administer justice in the case on trial, as to compel other nations to administer justice in other cases. It may be doubted whether the accomplishment

of such an object by such means, fairly comes within the province of a court. Reciprocity is not a principle to be weighed in the scales of justice; it is rather a weapon to be wielded by the executive. The other defenses are—the invalidity of the judgment, which must be determined by the law of the state where rendered; payment, release, etc.

In the present case, the facts alleged in the second defense conclusively show that no obligation can be predicated in respect to the judgment produced, except that of obedience imposed by the act of a foreign sovereign, which has no extra-territorial force, and cannot support this action; that the facts technically established by the judgment are conclusive only for the purposes of the action in which it was rendered, and within the limits of the foreign state; that the conditions which under our law support a legal obligation between the parties arising from the equities of the case and the ties of natural justice, have no existence. The operation of the principle of *res judicata* upon facts actually adjudicated, and the equities involved by some actual participation in such adjudication, are essential to the *quasi*-contract obligation this action is brought to enforce. These conditions are negatived by the allegations of the second defense. The demurrer to that defense should therefore have been overruled.

The conflict of dicta, and even of results reached in adjudged cases, is such that it is impossible to explain any principle as the real ground of this action, without running counter to some general language of courts or text writers. LORD CAMPBELL said, in *Bank of Australasia* v. *Nias* (16 Ad. & El. N. S. 717, 734), "there is no advantage in going over the authorities, or in attempting to reconcile or contrast them."

The conflict which has induced most comment, is that between the cases holding that a foreign judgment is *prima facie* evidence only, and those holding that it is conclusive on the merits of the claim adjudicated. This conflict is substantially reconciled when the true ground of the action is considered. LORD HARDWICKE, CH. J. EYRE, LORD MANS-

FIELD, and others cited in support of the former dictum, were speaking of the judgment when produced as the cause of action, as the ground of a common law obligation; and as such it is only *prima facie* evidence, that is, the conditions necessary to raise the obligation do not attach to every foreign judgment. LORD CAMPBELL and others, cited in support of the latter dictum, were speaking of the effect of the judgment when its conditions are such that the common law obligation is raised; in such case it is conclusive; the merits of the controversy adjudicated cannot be tried in an action to enforce the obligation arising from the fact of that adjudication.

But the expressions used when a foreign judgment on default has been under discussion, are more variant and less clear; and for the most part they have not as yet received practical application. So far as results are concerned, an action has never been sustained by this court, and I believe by no American court, in the case of a foreign judgment rendered on default of appearance; and has rarely been sustained in England. The principal English case is *Douglas* v. *Forrest*, 4 Bing., 686. A Scotchman, absent beyond the seas, was summoned to court by the peculiar process called "horning," which consisted I believe, in blowing a horn at the cross of Edinburgh. Not responding to the summons, judgment against him was rendered. An action was brought in England to recover the amount of this judgment, and sustained. If the court acted on the theory that the division between the jurisdiction of Scotch and English courts was one imposed by an imperial government in respect to subject provinces, and not the division existing between the courts of foreign and alien states—a distinction drawn by LORD SELBORNE in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, L. R. (1894) App. Cas., 670—its decision is explicable. On that theory it might well treat the judgment as in effect an English judgment, and entitled to execution; such was the real condition, and forty years later an Act of Parliament (the Judgment Extension Act of 1868) recognized its existence and provided for the execution of Scotch judgments in

England and English judgments in Scotland, upon registration. But if the court regarded the action as one to enforce the obligation that arises in respect to a judgment strictly foreign, its conclusion can only be supported on the theory that by force of the ties of allegiance a subject is present for all purposes of adjudication in the courts of his sovereign when commanded to be present, and that this fiction may be treated in such case as the equivalent of an issue actually presented by the parties, tried and determined by the court, and so support an action based upon an obligation arising from such actual adjudication. The court is careful to expressly limit its judgment to "a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it; and by the laws of which country his property was, at the time the judgment was given, protected;" and when the debt was contracted in the country of the judgment while the debtor resided in it. It is evident that the adoption of such fiction would modify the principle which supports our action on a foreign judgment. Whether any such modification can consistently be recognized, and if so, to what extent, has not been considered by our courts. This much is certain—and that is enough for the present case,—no modification can be so extended as to destroy the principle. It is plain that no action can be sustained in the case of a judgment rendered on default of appearance against one of our own citizens, whose only connection with the foreign sovereign was that of a mere passenger through his territory, without wholly ignoring the principle on which the action is based. The proceeding would no longer be a civil action to enforce a common law obligation, but would be a mere form of obtaining from the court a writ of execution on a foreign judgment. And so the questions which have been discussed in several cases subsequent to *Douglas* v. *Forrest*, in respect to the international jurisdiction of a municipal court—meaning a jurisdiction conferred by a sovereign and recognized by international law, as distinguished from a jurisdiction so conferred and not recognized by that law—were both induced

and obscured by an uncertainty as to what the action on a foreign judgment really is. If it is an action to enforce an ordinary obligation arising from the participation of the parties in an adjudication resulting in a valid final judgment, the question of jurisdiction is not a troublesome one; it is settled for most purposes of the action (as in other cases where foreign law is admitted in evidence) by the law of the country where judgment is rendered. But if the proceeding is not an ordinary civil action, but, like debt on a domestic judgment, is a mere form for procuring from our government the issue of an execution on a foreign judgment, then the speculations on the jurisdiction of municipal courts internationally considered, as it is phrased, may be useful; *but only* as guiding the discretion of the court. For nothing is more fixed than that a municipal judgment cannot receive execution in a foreign country, unless by permission of the government of that country; and nothing is more certain than that the conditions of such permission are controlled by no international law or custom, but are determined by the views of public policy held by the authority exercising the sovereign power in granting the permission. The rule is the same whether that authority is judge or king. If our courts assume the power of the government to put in execution within our territory the judgments of foreign sovereigns, they must assume the duty of the government in fixing the conditions on which such executions shall issue. These conditions of necessity must be controlled by views of public policy. The duty of the court in this particular is not strictly a judicial one. There is no settled law which dictates the policy. There are variant opinions as to what the international law in respect to the execution of foreign judgments ought to be, supported by reasoning useful in developing a sound theory of jurisprudence; but there is no international law except the universally admitted law that execution can only be granted at the will of the sovereign in whose territory it is sought.

The nearest approach to an international rule is the one laid down by LORD SELBORNE in one of his last opinions:

"The plaintiff must sue in the court to which the defendant is subject at the time of the suit ('*actor sequitur forum rei*'); which is rightly stated by Sir Robert Phillimore to lie at the root of all international, and of most domestic, jurisprudence on this matter." *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, *supra*. It is true, our municipal law adopts the policy (possibly questionable) of offering our courts for the litigation of the whole world, assuming jurisdiction of any defendant who comes within the range of our process. Within our own limits such policy is the law. But the adoption by one nation, in the administration of its municipal law, of a policy differing from that on which established international law is based, does not of itself abrogate that law; much less can such municipal policy have the force of international law.

The more important consideration, however, is that there is no international law which recognizes the right of one nation to conclusively determine the legal duties of the subject of another nation who may be temporarily within its limits, in respect to transactions occurring at his own domicile and not related to any act or conduct within the foreign territory. Territorial jurisdiction, or the right of might to exercise its own will on all persons within its territory, asserted by each independent nation, is countered by the right of protection of its citizens while guests of foreign governments, asserted by every civilized nation. This right of protection is maintained in unmistakable terms by our own government: "The United States believe it to be their duty, and they mean to execute it, to watch over the persons and property of their citizens visiting foreign countries, and to intervene for their protection when such action is justified by existing circumstances and by the law of nations." 2 Whar. Dig. Int. L., 434. All jurists affirm that the power over the person of a friendly alien who is a mere passenger through a nation's territory, is limited to matters relating to his acts and conduct while within that territory. Phillimore emphasizes the warning that the distinction between domiciled persons and visitors or passengers is never to be

lost sight of. 2 Int. Law, *4. An alien has no legal right enforceable by action, to enter foreign territory; *Musgrove* v. *Chun Teeong Toy*, L. R. (1891) App. Cas. 272; but if he is permitted to enter, he carries with him his allegiance to his own country and is still bound by the laws of that country. *Philips* v. *Hunter*, 2 H. Bl., 402; *Henderson* v. *Staniford*, 105 Mass., 504. He carries with him the protection of that country, and owes no duty or *quasi*-allegiance to the foreign sovereign which can support the conclusive jurisdiction of his courts, unless in respect to conduct while there, or acts there done. Story on the Conflict of Laws, § 613.

The adjustment of territorial jurisdiction as based on the brute force of might, to the principle of protection as based on the reciprocal duties between sovereign and subject which exist wherever the subject may be, is now making international law. It is still within the range of diplomacy. But it is enough for present purposes, that there is no international law by which a citizen of London or New York, traveling in Turkey or Morocco, can be compelled by reason of the mere fact of his casual presence in the foreign country, to there litigate controversies arising at his own domicil. When our court, in the exercise of its assumed power, is asked to grant execution of a judgment based on the right of such compulsion, its decision on the question of policy is controlled by no rule of international law. And certainly there can be no doubt but that public policy demands the refusal of execution in such case. It can hardly be claimed that the interests of our own citizens, or friendly intercourse with other nations, will be served by encouraging the establishment of a sort of international syndicate for promoting the collection of home debts, through foreign courts, so that each traveler shall be compelled to run the gauntlet of such litigation under threat of snap judgments, upon which his own government must issue execution on his return. Such a policy would offer premiums to scavengers of sham and stale claims at every center of travel, breeding a class of process firers to lie in wait for their game at docks and railway stations. It is certainly significant that since the first case on this subject

was reported, no English or American court has in fact sustained an action on a foreign judgment, rendered on default against one of its own citizens, in respect to a cause of action arising at his domicil, and that no nation, so far as can be ascertained, has ever suffered such a judgment to be put in execution within its territory.

It seems clear to me, notwithstanding some *dicta* entitled to the highest respect may support a contrary view, that if this proceeding is, as I have attempted to prove, a common law action to enforce a common law obligation, the facts set up by the defendant constitute a good defense; and if it is—as some general language used by courts, especially of late years, seems to imply—a mere form for procuring the issue of execution on a foreign judgment, the facts set up are conclusive against the issue of execution on the judgment produced.

The argument from analogy, much pressed by counsel, has been substantially disposed of in reaching the conclusions stated. The argument is: 1. A judgment on default obtained in Connecticut against a non-resident served with process while transiently in the State, is valid and will be enforced in this State. 2. Under the Constitution of the United States, such judgment has the same effect and will be enforced in every other State. 3. Some analogy exists between the relation of the States to each other, under the Constitution, and the relation of independent and foreign nations to each other; *ergo*, such a judgment obtained in a foreign nation will be enforced in the United States. The gap between the premises and the conclusion is patent, and impassable if the essential premise omitted is supplied, *i. e.*, the sovereign power signified in the judgment of a State court extends, by force of the United States Constitution, to all subjects of the one nation throughout its whole territory; while the sovereign power signified in a foreign judgment does not extend beyond the limits of that nation, and can be recognized elsewhere only by the grace of some other nation.

The character of a State judgment as representing the sovereignty of the nation as well as of the State, and so unal-

terable by State action, is well settled. *Christmas* v. *Russell*, 5 Wall., 290. JUSTICE CLIFFORD says such judgment is "equally binding and may be executed in every State. The established rule is, that so long as the judgment remains in force it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor, and gives him a right to process, mesne or final, as the case may be, to execute the judgment." Such fanciful analogies as the one alleged between the effect of a State and foreign judgment, when produced for execution within the sovereignty of the United States, are unsafe as well as unreal.

There was a clear analogy between the relations of the several States to each other, and the relations of foreign nations, from the opening of the Revolution to its final consummation in the adoption of the Constitution of 1787, and the establishment of the new "composite republic," as it has been aptly termed by Austin. But these analogies were then radically disturbed. The nation and the government established was new, absolutely unique, and cut loose from the traditions and analogies that had formerly prevailed. And so the division of sovereign powers between the people as citizens of one nation and as citizens of its component parts, the relations of such governments to each other, the relations of citizens to the State and to the general government, in their double and not inconsistent capacity of citizens of the United States and of the several States; in short, the new and intricate conditions involved in the establishment of the "indissoluble union of indestructible States," must be settled in accordance with the law and circumstances which called the new nation into existence; which law of necessity is peculiar to itself. It is only by acknowledging the fact that the relation of our citizens to their government and its several parts, are to be determined by a law peculiar to that government and necessarily distinct from that controlling the relations of foreign governments and their citizens, that we can distinguish between the constitutional law which controls the relations of all States and citizens within the scope of the Federal Constitution, and the international law which con-

trols the relations of foreign nations and their citizens, and be able to accurately apply each law to its appropriate subject. The United States Constitution declares that the act of sovereignty signified in a judgment of one State shall receive execution in every State. International law declares that such act of one nation is not entitled to execution in any other; and the law of this State forbids such execution. The defense in this case brings into sharp contrast the two views of this action which have apparently influenced courts, especially in their discussion of defenses. One view recognizes a common law obligation arising from facts proved, the other a governmental duty called into action by the verification of the act of a foreign sovereign; the defenses under one turn on questions of law, under the other on questions of policy. It is therefore essential for the application of any principle to cases as they arise, that one or the other view should be frankly adopted and its logical consequences accepted.

For the reasons stated, I believe the view which regards this proceeding as a common law action to enforce a common law obligation, to be the only one consistent with the established principles of our municipal law, and that such obligation is expressly negatived by the defense in this case. If, however, the other view can be maintained, I believe the defense is sufficient, although for different reasons.

I think there is error in the judgment of the Superior Court.

ERASTUS GAY, EXECUTOR, ET AL. *vs.* SUSAN WARD, ADMINISTRATRIX ET AL.

First Judical District, Hartford, October Term, 1895. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and GEORGE W. WHEELER, Js.

A guarantor may, upon notice, revoke or terminate a contract of continuing guaranty, unless such right is excluded by the terms of the contract.

While the death of the guarantor will not *ipso facto* terminate such a contract, yet his death coupled with knowledge thereof by the party guaranteed is, in legal effect, a revocation, and precludes the latter from thereafter making fresh advances or renewing notes given for former advances, in reliance upon the credit of the guarantor under the contract.

Whatever may be the liability of the estate of such deceased guarantor, it does not extend to his distributees or their vendees, who are strangers to the guaranty.

These principles are equally applicable to a suit for contribution by a co-guarantor who has been compelled to pay the full amount guaranteed by the contract.

One co-guarantor who has voluntarily paid to his associate a portion of the sum the latter has been obliged to pay on the contract of guaranty, cannot join with such associate in a suit against the other co-guarantors for contribution.

[Argued October 1st—decided December 16th, 1895.]

ACTION for contribution, brought to the Superior Court in Hartford County and reserved by that court, *Thayer, J.*, upon an agreed statement of facts, for the advice of this court. *Judgment advised for the defendants.*

The case is sufficiently stated in the opinion.

Charles E. Perkins, with whom was *Arthur Perkins*, for the plaintiffs.

I. The death of Augustus Ward and Samuel S. Cowles did not free their estates from liability which might thereafter accrue upon the bond. Brandt on Suretyship, §§ 248, 258, 320; DeColyar on Guaranties, 344; *Richardson* v. *Draper*, 87 N. Y., 347; *Hecht* v. *Weaver*, 34 Fed. Rep., 111; *Knotts* v. *Butler*, 10 Rich. Eq. (S. C.,) 143. This conclusion necessarily

results from the position of the signers of this bond to each other. The bond itself provided for a release from this liability by notice, which might be given either by the signer, or by his executors or administrators after his death; and as no such notice was given, it remained in full force notwithstanding the death.

This same principle also applies to the claim of the defendants, that the limitation of presenting claims against the estates of deceased persons, is a bar.

A point is made that it is necessary to make all the cosureties parties to this proceeding; but it is held in many cases, and in good sense, that it is not necessary to make those who are insolvent, or are out of the State, parties. Brandt on Sureties, § 256.

II. The other important question in the case is as to the direct liability of Mrs. Hardy in this suit. Her claim is that no action will lie against her individually, but the only way of reaching any of the property which came from Samuel S. Cowles, and which she now owns, is by a proceeding against his administrator. No doubt this would be the proper and only course in an action at law for contribution, where each of the guarantors was liable for a specific proportion of the amount guaranteed. If all the signers or their estates were solvent, actions would only lie at law, as each one would be liable only for a specific amount, and there would be no joint liability.

By the terms of the Practice Act, as well as by its spirit, a suit is to be brought against the person who is really and directly liable for a claim, and all the old strict rules of law by which one had to sue this, that, or the other person, who were not the real ones who ought to pay, have been done away with.

T. Henry Dewey of New York, for Mary C. Hardy and the executors of Samuel S. and Horace Cowles.

I. The complaint should be dismissed for want of equity. If any right exists, there is an adequate remedy at law. The contract of January 30th, 1872, fixed the amount of contri-

bution which each should pay, making insolvency and non-residence immaterial. Baylies on Sureties and Guaranties, 447; DeColyar on Guarantors, 349; Brandt on Suretyship and Guaranty, § 291; *Brace* v. *North*, 30 Conn., 60; 1 Parsons on Contracts, 37, and cases cited; 1 Story's Eq. Jur., § 498; *Stone* v. *Stone*, 32 Conn., 143; *Bulkeley* v. *Welch*, 31 id., 339, 344.

II. The death of Samuel S. Cowles, with notice of the same to all parties interested, operated as a revocation of his guaranty to the bank, as to discounts made subsequent to his death.

In the guaranty in question the guarantors themselves provided for release from liability thereon, by giving notice; but that was cumulative only, as the law incorporated into the contract a similar provision, as it did also, a provision of revocation in the event of death. The authorities on this point are numerous and conclusive. 2 Parsons on Contracts, 30; Baylies on Sureties and Guarantors, 8, 9, 10, 287, 298 and 299, note; 2 Williams on Executors (9th Ed., 1893), 1660; 1 Smith's Mercantile Law (10th Ed., 1890), 587, 588; *Jordan* v. *Dobbins*, 122 Mass., 168; *Hyland* v. *Habich*, 150 id., 112; *Nat. Eagle Bank* v. *Hunt, Admr.*, 16 R. I., 148; *Kernochan* v. *Murray*, 111 N. Y., 309; *Agawam Bk.* v. *Strever*, 18 id., 502, 513, 514; *Hunt* v. *Roberts*, 45 id., 691, 696; *Michigan State Bank* v. *Estate of Lavenworth*, 28 Vt., 210; *Rapp* v. *Phœnix Ins. Co.*, 113 Ill., 390, 395, 396; *Jeudevine* v. *Rose*, 36 Mich., 54; *Pleasanton's Appeal*, 75 Pa., 344; *Slagle* v. *Forney's Executors*, 15 Atl. Rep., 427; *The Home National Bk. of Chicago* v. *Estate of Waterman*, 30 Ill. App., 535; *La Rose* v. *Bank*, 102 Ind., 332; *Conduitt* v. *Ryan*, 3 Ind. App., 1; *Taussig* v. *Reid*, 145 Ill., 488; *Menard* v. *Scudder*, 7 La. An., 385, 391, 392; *Cremer* v. *Higginson*, 1 Mason, 323; *Gelpcke* v. *Quentell*, 74 N. Y., 601; *City Nat. Bk.* v. *Phelps*, 86 id., 484, 490; *Mason* v. *Pritchard*, 12 East., 226; *Westhead* v. *Sproson*, 6 H. & N., 728; *Harriss* v. *Fawcett*, L. R. 15 Eq. Cas., 311; *Offord* v. *Davies*, 31 L. R. C. B., 319, 12 C. B. N. S., 748, 757; *Coulthart* v. *Clementson*, L. R. 5 Q. B. D., 42; *Lloyds* v. *Harper*, L. R. 16 Ch. Div. 290, 314, 319; *Brown* v. *Batchelor*, 1 N. & H., 255, 263.

III. The plaintiffs are not entitled to contribution from the estate of Samuel S. Cowles. There is no just and equitable ground for it. There was no common burden. The right of contribution is an equity which exists whenever one person has borne a common burden. Where there is no common burden there can be no right of contribution. Bispham's Equity, §§ 328, 330, 331; *Munson* v. *Drakely*, 40 Conn., 560; *Tobias* v. *Rogers*, 13 N. Y., 59; *Wells* v. *Miller*, 66 id., 255; *Kramph's Exrs.* v. *Hatz's Exrs.*, 52 Pa. St., 525; *Lowndes* v. *Pinckney*, 1 Rich. Eq. (S. C.), 155; 1 Brandt on Sureties, 402, 397, 415; *Russell* v. *Failor*, 1 Ohio St., 327; *Stockmeyer* v. *Oertling*, 35 La. An., 467; *Ledoux* v. *Durrive*, 10 id., 7; *Turner's Admr.* v. *Thom*, 89 Va., 745; *Skrainka* v. *Rohan*, 18 Mo. App., 340, 343; *Briggs* v. *Hinton*, 14 Tenn., 233; *Cochran* v. *Walker's Exrs.*, 82 Ky., 220; De Colyar on Guarantors and Sureties, 343, 344; *Johnson* v. *Harvey*, 84 N. Y. 365; *Camp* v. *Bostwick*, 20 Ohio St., 337; Adams' Equity, 267; *Aspinwall* v. *Sacchi*, 57 N. Y., 335; *Stirling* v. *Forrester*, 3 Bli., 590.

IV. No action for contribution can be maintained against Mary C. Hardy, or the administrator of Horace Cowles. There never was any joint relation or obligation between them and the plaintiff to the bank. They were strangers to the guaranty.

V. The plaintiff's right of contribution against the estate of Horace Cowles, if any ever existed, is absolutely barred by failure to exhibit it to the representative of that estate within four months after it accrued. Hence it must be barred as to the estate of Samuel S. Cowles. General Statutes, § 581; *Cone* v. *Dunham*, 59 Conn., 161; *Gay's Appeal from Probate*, 61 id., 445.

VI. There can be no judgment in this case, personal or otherwise, against the representative of Horace Cowles, or against Mary C. Hardy. The remedy, if the plaintiffs have a right, is a judgment against the personal representative of Samuel S. Cowles only. *Hawley* v. *Botsford*, 27 Conn., 80; *Bacon* v. *Thorpe*, ibid., 251; *Davis* v. *Weed*, 44 id., 569; *Davis* v. *Van Sands*, 45 id., 600; *Griswold* v. *Bigelow*, 6 id.,

258; *Seymour* v. *Seymour*, 22 id., 272; *Pitkin* v. *Pitkin*, 7 id., 306, 314.

VII. There is a misjoinder of plaintiffs. The fact that the plaintiff Wadsworth voluntarily paid to the executors of William Gay one-half of the judgment, does not entitle him, together with William Gay or his representatives, to maintain an action against every joint party for contribution. If Wadsworth paid voluntarily any part of the money due from the estate of Samuel S. Cowles, he cannot recover it. He should have paid his share, but not the share of other persons liable to contribution. *Graves* v. *Smith*, 4 Tex. App., 537.

Henry C. Robinson, for Susan Ward, Admx.

I. The estate of Augustus Ward is not liable at all to a claim for contribution. *Exchange Bank* v. *Gay*, 57 Conn. 224. It must be evident, then, from the construction given by this court to this transaction, that the fundamental elements of the conditions of contribution are lacking in this case. The fundamental principles of contribution are familiar. The right to contribution is "based on equality of *burdens* and *benefits*." DeColyar on Guaranties, 339. This is the definition in the leading case of *Deering* v. *Winchelsea*, 2 B. & P. "It is enforceable if there is no circumstance rendering the equities between them otherwise than equal." Bishop on Contracts, § 216. This underlying principle is recognized in all cases.

Applying this principle to the case at bar, how can Mr. Ward's estate be interested in a credit given to a corporation to enable it to carry on its business in which the estate has no interest at all? So far as the notes outstanding at the death of Mr. Ward have been paid, there can be no reasonable claim of equality of burdens and benefits between his estate, no longer a stockholder, and the members of the corporation. Nor can the claim be successfully made that there was equality in reference to the notes that were renewed. A renewal of a debt of a corporation for which a guarantor is liable is a payment, unless it is renewed by his consent.

The limitation of time for presenting claims against Ward's estate, of which Gay, Wadsworth, and the bank had express notice, is obligatory upon these parties, although technically the cause of action in the present case did not arise until the date of contribution. Aside from the immediate force of statutes of limitations, equity will allow the enforcement of no claim which has been marked by laches, and that without any regard to statutory limitations. *Halstead* v. *Grinnon*, 152 U. S., 412, 416, and citations.

The death of Mr. Ward terminated his responsibity under the contract. An essential element of this contract is the right of the guarantors at any time to withdraw from its toils, as to indebtedness incurred subsequently to such withdrawal. *Offord* v. *Davies*, 12 C. B. N. S., 748; *Jordan* v. *Dobbins*, 122 Mass., 168; *Coulthart* v. *Clementson*, L. R. 5 Q. B. Div., 46. The death of the guarantor acts *per se* as a discharge, and terminates his liability upon the contract for subsequent indebtedness. *Coulthart* v. *Clemenston*, *supra*; *Harriss* v. *Fawcett*, L. R. 15 Eq. 311, L. R. 8 Ch., 866; *Jordan* v. *Dobbins*, *supra*; *Hyland* v. *Habich*, 150 Mass., 112, 6 L. R. A., 383; *In re Sherry*, L. R. 25 Ch. Div., 705; Smith Merc. Law, 467; Williams on Executors, 1869; 9 Amer. & Eng. Ency. of Law, 83, 84: *Bank* v. *Hunt*, 16 R. I., 148: *Bank* v. *Waterman*, 30 Ill. App., 535. Notice to the bank of his death was notice of a discontinuance of his guaranty; and with the discontinuance of the guaranty, the giving of new credit by renewals discharged him from all obligation on account of such indebtedness. The well-established principle of law that indulgence to a principal, by extension of time or otherwise, releases the surety, is here applicable; and even if the notes, whose payment was guaranteed, had remained in the bank as overdue paper, which does not appear to be the case, the Ward estate would have been entitled to their immediate collection against a then solvent corporation, and *a fortiori* is released by repeated renewals after Ward's death and until that corporation becomes insolvent. DeColyar on Suretyship, § 433; 9 Amer. & Eng. Ency. of Law, 83, 84, and citations; *Adams* v. *Way*, 32 Conn., 172.

II. If Mr. Ward's estate can be compelled to answer in this cause, it is only to the extent of one-thirtieth part of six-elevenths of the judgment for damages recovered by the bank; that is to say, one-thirtieth of six-elevenths of $11,520.82.

That his estate cannot be compelled to contribute to costs and expenses in a suit of which he had no notice, is settled by the case of *Chapin* v. *Smith*, 52 Conn., 263–64.

It is a familiar principle that, if it be arranged by contract that each surety shall be answerable only for a given portion of one sum of money, there is no right of contribution among the co-sureties beyond that amount. *Pendlebury* v. *Walker*, 4 Y. & C., 424, 441; *North* v. *Brace*, 30 Conn., 60; *Deering* v. *Earl of Winchelsea*, 2 B. & Pul., 270; 1 Leading Cases in Equity, H. & W., notes, 96, and cases cited; *Craythorne* v. *Swinburne*, 14 Vesey, 164; 1 Parsons on Contracts, 32; Burge on Suretyship. 385; Story, Equity Juris., § 498; *Andrews* v. *Calender*, 13 Pick., 484; DeColyar on Suretyship, 343, 344; Pomeroy's Equity Juris., § 1418; *Armitage* v. *Pulver*, 37 N. Y. 494; Brandt on Suretyship, § 252.

The case of *Security Ins. Co.* v. *St. Paul Ins. Co.*, 50 Conn., 233, stands upon entirely different priuciples, because the facts are essentially different. The relations of the parties there were common. In this case there is no common relation between the plaintiffs and the defendant Ward.

WHEELER, GEORGE W., J. This case comes before us for our advice, on a reservation upon an agreed statement of facts, and with a stipulation, entered into by all the parties to the record, that all questions arising upon the pleadings or upon the agreed facts may be finally determined by this court.

On January 8th, 1872, the stockholders of the Delaney and Munson Manufacturing Company, located at Farmington, Connecticut, executed and delivered to the National Exchange Bank of Hartford, a contract of continuing guaranty in the form of a bond, the terms of which appear at length in the opinion of this court in the case of *National Exchange*

Bank v. *Gay*, 57 Conn., 224, 231, brought against one of the guarantors upon the bond.

This bond guaranteed to the bank "the full, prompt and ultimate payment" of all commercial paper which the bank may "have discounted or may hereafter discount . . . to an amount not to exceed $15,000 in all at any one time." It provided that upon notice to the bank by one or all of the guarantors upon such instrument, such guarantor or guarantors should not be holden upon said bond for any liability created by such company subsequent to the giving of such notice. From the date of the bond to February 9th, 1888, the bank discounted commercial paper of said company, upon which date the company failed. On January 21st, 1889, the bank recovered judgment against the executors of Gay, one of the guarantors upon the bond, for the sum of over $11,000, which sum, together with the expenses of the suit, the executors paid. Subsequently Wadsworth, another guarantor upon the bond, voluntarily paid to the executors of Gay one half of said amounts.

The present action is brought by the executors of Gay and of Wadsworth, against the administratrix of Augustus Ward, a guarantor upon the bond; William Potts, administrator upon the estate of Samuel S. Cowles, a guarantor upon the bond; Horace Cowles, a son of said Samuel S. Cowles, and Mary C. Hardy, a purchaser from a distributee of the estate of Horace Cowles.

Said Ward died April 6th, 1883; his estate was duly settled and distribution made December 8th, 1883. Said Samuel S. Cowles died in 1873; his estate was duly settled and distribution made June 7th, 1873, a part being distributed to his son, Horace Cowles, who died in 1876; his estate was duly settled and distribution made September 25th, 1876. A part of the estate inherited by Horace Cowles from his father, Samuel S. Cowles, was purchased by Mary C. Hardy from a distributee of the estate of Horace Cowles, and owned by her when she was made a party to this action.

All of the discounts existing February 9th, 1888, which the estate of Gay and Wadsworth paid, were made by the

bank long subsequent to the death of Samuel S. Cowles, and none were renewals of discounts made in his lifetime. Five thousand dollars of said $11,000, were discounts made by the bank after having notice of Ward's death, and $6,000 of said $11,000 were renewals of paper made after notice of Ward's death, but of paper originally discounted prior to Ward's death. The bank, Gay, and Wadsworth, had immediate notice of the death of said Samuel S. Cowles and of Ward. The said Manufacturing Company was solvent at the time of the death of said Samuel S. Cowles and of Ward.

The stockholders of the Delaney and Munson Manufacturing Company, by pledging their individual credit to the National Exchange Bank, secured funds, through discounts made by the bank, with which to conduct its business. "To avoid the inconvenience of indorsements by several individuals upon each of a large number of original notes and the renewals thereof, the obligors made one comprehensive continuing contract of indorsement in the form of a guaranty under their respective hands and seals." *Exchange National Bank* v. *Gay*, *supra*.

The bond constituted a contract of continuing guaranty upon the part of its obligors or guarantors, of payment of all paper discounted by the bank up to the limit of the amount named in the bond. No consideration passed at the execution of the bond. Each discount, when made upon the credit of the guaranty, constituted a consideration, separable and divisible. No obligation arose and no liability was created until a discount was made upon the credit of the guaranty. The bond was framed to meet the contingency of the long continuation of discounts by the bank, and the extension and renewal of discounts made upon the security of its guaranty.

Upon the nature of this guaranty this court expressed itself, in the case we quoted from above, as follows: "To guarantee 'full and prompt' payment would meet the case of a note, on usual bank time, actually to be paid in full at maturity. To guarantee, in addition to 'full and prompt' payment, the 'ultimate' payment, can have no other mean-

ing than that the obligor should continue bound to the end of all substitutions, renewals and extensions."

The bank was under no compulsion to discount the company's paper; it might, at its option, refuse to continue discounting it; when it made the discounts the guaranty of the bond attached. Each guarantor upon the bond might, upon notice in writing to the bank, terminate all liability thereafter arising under the bond. Unless the terms of the guaranty forbid, the law writes in the contract of continuing guaranty a like power to revoke the guaranty upon notice. *Coulthart* v. *Clemenston*, L. R. 5 Q. B. Div., 42; *Jordan* v. *Dobbins*, 122 Mass., 168; *Agawam Bank* v. *Strever* 18 N. Y., 502.

The effect of the death of a guarantor upon a continuing guaranty has been determined differently in different jurisdictions. In Massachusetts death is held to work a revocation of the guaranty. The court in construing a continuing guaranty of the sale of goods, in the case of *Jordan* v. *Dobbins*, *supra*, said: "Death terminates the power of the deceased to act, and revokes any authority or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may depend upon future contingencies. But it is not held for a liability which is created after his death, by the exercise of a power or authority which he might at any time revoke." See also, *Hyland* v. *Habich*, 150 Mass., 112.

In England death does not work a revocation of the continuing guaranty. The case of *Coulthart* v. *Clementson*, *supra*, was an action brought by a bank upon a continuing guaranty against the executor of a deceased guarantor. The court said: "A guaranty like the present is not a mere mandate or authority revoked *ipso facto* by the death of the guarantor."

These two cases illustrate the two views held by courts of different jurisdictions. We prefer to adopt the latter view. To adopt the Massachusetts doctrine would impose upon the guarantee the burden of knowing at all times whether or not the guarantors are in life. There could be no safety in rely-

ing upon the credit of the guarantor, unless at the moment of reliance the guarantee knew the guarantor to be in life. The practical difficulties in the way of a guaranty so construed, would prevent credit being given upon it and curtail a useful method of commercial business. Further, a guaranty of this nature is intended to continue until revoked by act of the parties or its equivalent.

But when the guarantee has knowledge of the death of the guarantor, such knowledge works a revocation of the guaranty. The guarantee no longer relies upon the credit of the deceased guarantor. Each advance made by the guarantee constitutes a fresh consideration; and when made, an irrevocable promise or guaranty on the part of the living guarantors. Each advance thereafter made is upon the credit of the living, not of the dead guarantor. Were this not so —unless it be held that the representatives of the deceased may upon notice terminate the guaranty—the guaranty terminable at the option of the guarantor during life becomes, upon his death, never ending. The limitation which the law gives the living, is denied the dead. Estates must remain unsettled, devises of property be withheld so long as the guaranty may last, and the representatives of the deceased guarantor be powerless to save his estate from a loss which neither he nor they authorized or received benefit for. Such a result justifies and impels a court in reading into the guaranty a limitation of termination of the guaranty, upon notice of the death of the guarantor, as well as upon notice from the living guarantor. Any notice of death which brings that fact within the knowledge of the guarantee, is a proper and sufficient notice.

In the case of *Coulthart* v. *Clementson*, *supra*, the court said: "It is now established by authority that such continuing guaranties can be withdrawn on notice during the lifetime of the guarantor, and a limitation to that effect must be read, so to speak, into the contract. But what is to happen on his death? Is the guaranty irrevocable and to go on forever? It would be absurd to refuse to read into the lines of the contract in order to protect the dead man's

estate a limitation which is read into it to protect him while he is alive. . . . But if the executor has no option of the sort, then, in my opinion, the notice of the death of the testator and of the existence of a will is constructive notice of the determination as to future advances of the guarantee. The bank from that moment are aware that the person who could during his lifetime have discontinued the guaranty by notice cannot any longer be a giver of notices; that his estate has passed to others, who have trusts to fulfil, and it is easy for them to ascertain what those trusts are. If these trusts do not enable the executor to continue the guaranty then the bank has constructive notice that the guaranty is withdrawn." *Nat. Eagle Bank* v. *Hunt, Adm'r*, 16 R. I., 148; *Harriss* v. *Fawcett*, L. R. 15 Eq. Cas., 311.

The authorities uniformly hold, either that death, *ipso facto*, or notice of death, revokes a continuing guaranty. The fact that the instrument is under seal cannot change its nature or construction. *Jordan* v. *Dobbins*, 122 Mass., 168; *Offord* v. *Davies*, 12 C. B. N. S., 748. A similiar doctrine holds that notice of the dissolution of a copartnership revokes a continuing guaranty made by the copartnership. *City Nat'l Bank of Poughkeepsie* v. *Phelps*, 86 N. Y., 484.

The application of these principles to the case in hand is this: All of the discounts, for which recovery was had against Gay's estate and payment made by Gay's executors and Wadsworth, were made after notice of the death of Samuel S. Cowles; his representatives are therefore freed from all liability for such discounts. Liability, if any, for discounts so made upon the credit of the guaranty, could only accrue against the estate of Samuel S. Cowles, and could in no view of the case be maintained against the estate of Horace Cowles, or Mary Hardy.

Five thousand dollars of the said discounts were made after notice of the death of Augustus Ward; his representatives are therefore freed from all liability for such discounts. The remaining discounts, $6,000, were originally made before the death of Augustus Ward; his death, with notice, did not relieve his estate from liability for such discounts. For

all discounts made prior to his death, whether original discounts or renewals or extensions thereof, his estate is liable upon his death.

The duty of the bank upon this bond, if it desired to hold the estate of Ward liable, was to enforce its claim upon the paper existent at Ward's death, against his estate. Instead of this the bank renewed and extended its discounts, taking new paper for the old, without the knowledge or acquiescence of the representatives of Ward. Thereafter the bank must look to the remaining guarantors upon the bond; it waived its right to enforce payment from the estate of Ward, when it accepted paper in renewal of the old. Each renewal of the old paper constituted payment of the old paper, so far as Ward's estate was concerned. Each renewal so made had, for its security, the guaranty of the living guarantors upon the bond, who had not notified the bank of the termination of their liability upon the guaranty.

The conclusion arrived at is just to the bank, for it can cease, upon notice of the death of a guarantor, to renew paper then discounted, and can enforce its payment against the estate of the deceased guarantor. It is just to the remaining guarantors who can, upon notice of the death of a guarantor, terminate their liability and, if compelled to pay that liability, by appropriate remedy compel the estate of the deceased guarantor to contribute his proportion to the liability incurred. For all liability arising before notice of the death of the guarantor, the remaining guarantors can provide by the terms of the guaranty.

In the case at hand all the guarantors upon this bond had notice of the death of both Samuel S. Cowles and Augustus Ward, and made no attempt to terminate their liability upon the bond, and no effort to compel the estate of either to help meet the liability existing; but thereafter, without the knowledge, consent, or acquiescence of the representatives of Cowles or Ward, renewed the old paper through a long series of years, and increased their own liability by fresh discounts.

A renewal, of paper made before the death of a guarantor, upon the credit of a bond guaranteeing payment of such paper,

made after notice of said death to the guarantee, terminates the liability of such guarantor after said notice.

The precise question at issue was determined in accordance with the conclusions we reach, in the case of *National Eagle Bank* v. *Hunt*, 16 R. I., 148, 153. In its opinion the court said: "The guaranties in the case at bar come within the second class above considered. They were, therefore, upon the authorities cited, terminated by the death of the guarantor and notice of it to the plaintiff, as to all subsequent transactions. As, however, the note described in the declaration had been discounted, and the net proceeds had been paid to the maker prior to the death of the guarantor, the plaintiff would have been entitled to recover but for the fact, set up in the pleas, that after notice of the death of the guarantor it extended the time of payment for a further period by taking a new note from the principal debtor and receiving the interest thereon in advance, without the consent of the defendant, and without any reservation of his right assented to by the principal, to insist upon immediate payment by the principal, and, in default of such payment, to pay the debt himself, and proceed at once against the principal. That such action on the part of the plaintiff was sufficient to release the estate of the guarantor, and the defendant as his representative, from liability, is too well established to need the citation of authority."

The question whether a guaranty will be revoked by notice of death, when by the terms of the guaranty the guarantor could not in life have revoked the guaranty, is not before us, and we express no opinion upon this point.

The claim that because the bond of guaranty in this case bound the guarantors to the "full, prompt and ultimate payment" of all paper discounted after the execution of such bond, therefore the guaranty covers discounts made before the death, and the renewals of such discounts made after the death of the guarantor, cannot be sustained. The guaranty here applies to paper discounted, and to the renewal or extension of such discounts, before the decease of a guarantor. Otherwise a continuing liability existed against the estate of

the deceased guarantor so long as the renewals were made. Such a result was not intended by the parties to the bond. They did not intend to continue a liability after the death of a guarantor, for an indefinite period, which he and they could terminate at any time during his life. A contract of guaranty is to be construed so as to promote the use and convenience of commercial intercourse. *Davis* v. *Wells*, 104 U. S., 159, 169. And its language is not to be extended by any strained construction, for the purpose of enlarging the guarantor's liability. *Hall* v. *Rand*, 8 Conn. 560, 573. But its construction is to be according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety. *Lee* v. *Dick*, 10 Pet. 482, 493; *Evansville Nat'l Bank* v. *Kaufmann et al*, 93 N. Y., 273, 281. These established rules of construction accord with the construction we give to the guaranty before us.

We deem it unnecessary to discuss other questions argued before us, since the questions considered are decisive of the case.

We have not overlooked the fact that there has been a misjoinder of parties defendant. The estate of Horace Cowles and Mary Hardy were strangers to the guaranty. The representatives of Samuel S. Cowles are alone liable upon his obligations.

There is, as well, a misjoinder of parties plaintiff. Mr. Wadsworth voluntarily paid one half of the amount recovered against the estate of Gay; he cannot now maintain with Gay's representatives an action to compel payment to them, of the share of other guarantors paid by him for them.

The Superior Court is advised to render judgment in favor of the defendants.

In this opinion the other judges concurred.

SARGENT AND COMPANY *vs.* THEODORE A. TUTTLE, COLLECTOR.

Third Judicial District, Bridgeport, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The law is well settled that an assessment upon property specially benefited by a local improvement, is a tax.

Unless imposed by statute a tax carries no interest directly, nor indirectly by way of penalty for its non-payment.

The city of New Haven had no power in 1873, either by charter or by public statute, nor has it since had the power, to collect interest on an assessment for special benefits on account of a local public improvement; notwithstanding an ordinance of the city, existing in 1873, provided for the payment of interest where liens for such assessment had been duly filed. Such assessment, although a tax, is not an ordinary tax within the meaning of that term as used in the provisions of the General Statutes (Revision of 1866, Title 64, Chap. 2), which authorized the collection of interest on unpaid taxes.

Section 2704 of the General Statutes, passed in 1883, concerning municipal assessments of benefits for public improvement, provides that "neither the principal of such assessment nor any interest thereon shall be collectible" until the work is completed and that fact recorded. *Held* that while this statute recognized by implication the right to collect interest in certain cases, it did not create such right, but rather limited and restrained it in the instances where it already had been conferred and still existed.

[Argued October 22d—decided December 16th, 1895.]

ACTION to have certain liens on real estate adjudged invalid, and to recover damages for failure to discharge the same on demand; brought to the Superior Court in New Haven County and reserved by that court, *Prentice, J.*, upon the facts found, for the advice of this court. *Judgment advised for plaintiff.*

The case is sufficiently stated in the opinion.

John K. Beach, for the plaintiff.

I. The judgment of the Superior Court is conclusive of all existing demands for interest arising out of the assessments, prior to the judgment. The jurisdiction of the Superior Court was not limited to determining the legality of the

assessments, but extended to an equitable settlement of the whole dispute. It follows that the rights of the parties are not to be tested by the original assessments of 1873, but by the judgment of the Superior Court, dated November 29th, 1892. So regarded, the case is plain. The city was bound to disclose its whole claim, and the judgment is conclusive of everything which ought to have been litigated. *Clapp* v. *Hartford*, 25 Conn., 220; *Sargent & Co.* v. *N. H. Steamboat Co.*, 65 id., 116.

II. Interest does not run in general, upon taxes and assessments. *Camden* v. *Allen*, 2 Dutcher, (N. J.) 398; *Shaw* v. *Peckett*, 26 Vt., 482; *Belvidere* v. *Warren R. R. Co.*, 5 Vroom (N. J.), 193; *Brennert* v. *Farrier*, 18 id., 75; *Eaton Bank* v. *Commonwealth*, 10 Barr (Penn.), 452; *Commonwealth* v. *The Standard Oil Co.*, 101 Pa. St., 149; *People* v. *The New York Gold and Stock Telegraph Co.*, 98 N. Y., 67; *Danforth* v. *Williams*, 9 Mass., 324; *Lane County* v. *Oregon*, 7 Wall., 71; *Merriwether* v. *Garrett*, 102 U. S., 513. The foregoing authorities not only establish the proposition that a tax, including an assessment of special benefits within that term, is not an interest-bearing obligation, but they also point out the reason for the rule.

An assessment is a tax. *Nichols* v. *Bridgeport*, 23 Conn., 189, 207; *R. R. Co.* v. *Bridgeport*, 36 Conn., 255. The latter case simply decides that the word "tax" as used in General Statutes, refers to general taxation, and does not include assessments which are special and local taxes. The right to collect assessments is not a consequence of the benefit conferred. It is an exercise of the power of taxation, and the existence of a benefit is simply the touchstone by which the class to be taxed is identified.

The charter and by-laws of the city of New Haven do not provide for the exaction of interest on assessments appealed, during the pendency of the appeal. The only provisions of the by-laws of New Haven relating to the collection of assessments which made any reference whatsoever to interest, are §§ 13 and 14 of the by-laws of 1870. If the assessments in question did not become "payable" until finally deter-

mined by the Superior Court, then the liens in question, which were filed during the pendency of the appeal, were without authority of the by-laws. By the plain language of § 10 of the by-laws relating to assessments, page 97 of the edition of 1870, the assessments appealed from are not payable until finally determined by the Superior Court. In reading this section it is to be noted that the by-laws of the city of New Haven make a sharp distinction between assessments unappealed, and assessments appealed from. It is very doubtful, however, whether the city, under its charter, had the right to enact any by-law imposing interest on assessments for public improvements.

William H. Ely, for the defendant.

I. The laying of this assessment is not a tax, in the usual acceptance of the term, but is an assessment for a local and special benefit to private property; while a tax is an assessment for a public or general use, in which the payee has no direct or immediate interest. *Buffalo City Cemetery*, v. *Buffalo*, 46 N. Y., 506; *Bridgeport* v. *R. R. Co.*, 36 Conn., 255. In this case the city has expended money for the benefit of plaintiff's property, and has increased its value.

II. The plaintiff has had the sole benefit of this expenditure and increased value, but declines to pay the interest, although he has had in addition to the benefit of the expenditure on the part of the city, the use of the money which he should have paid in 1873. *Haverhill Bridge Proprs.* v. *County Commissioners*, 103 Mass., 128; *People* v. *Myers*, 138 N. Y. 590. There are decisions in New Jersey which it is claimed are opposed to the claim of New Haven; but they proceed on the theory that assessments for sewers and local improvements are taxes, and are a construction of Special Acts, rather than decisions on the principles involved in this case. Every theory on which interest can be allowed in any case argues in favor of the allowance of interest from the date the lien was filed, if not from the day the assessment became payable by order of the Common Council. "Interest is given on money demands as damages for delay in payment, being just

compensation to the plaintiff for a default on the part of his debtor." *Redfield* v. *Iron Company*, 110 U. S., 176. The assessment was legally made after a full hearing by the proper tribunal, and should have the same effect and be governed by the rules governing judgments, so far as interest is concerned. *Strusburgh* v. *Mayor of New York*, 45, N. Y. Superior Court, 508.

TORRANCE, J. This is an action under § 3040 of the General Statutes, to have certain liens upon real estate adjudged invalid. The case comes to this court by reservation upon a statement of facts, of which the following is the substance:—

Prior to December 13th, 1873, four assessments of benefits, amounting in all to nearly $2,000, were laid under the charter of the city of New Haven, against certain real estate of the plaintiff in said city, on account of the construction of a public sewer. These assessments were legally laid, and would, if unappealed from, have become payable on December 13th, 1873; but prior to that day the plaintiff, under the charter, took an appeal from said assessments to the Superior Court. On February 11th, 1874, and while said appeal was pending, four certificates of lien, on account of said assessments against said real estate, were filed in the town clerk's office in New Haven, for the purpose of continuing the liens upon said real estate, under § 37 of the then city charter. Said appeal was finally determined in the Superior Court on the 29th of November, 1892, and the assessments in question were by that tribunal confirmed, with costs against the present plaintiff. Afterwards, in March 1893, the plaintiff paid to the proper officer of said city, the amount of the four assessments, with interest only from November 29th, 1892, which amount was tendered and received without prejudice to the rights of either party. On receipt of this money the defendant discharged two of the liens, but refused and still refuses to discharge the other two. This refusal was and is based on the claim that the assessments in question carried interest, either from Decem-

ber 13th, 1873, or at least from the time the certificates of lien were filed in 1874. If this claim is correct, the defendant is justified in his refusal to discharge the liens. On the other hand the plaintiff claims that interest was due only from the date of the final determination of the appeal in the Superior Court in 1892; and if this claim is correct, it is found that the plaintiff "tendered to the tax collector all that was due on said assessments on March 23rd, 1893." If, then, the plaintiff's claim is correct, judgment must be advised for it; otherwise for the defendant.

Passing the first point made in the plaintiff's brief, his claim is based upon three propositions: first, that these assessments were really taxes; second, that as taxes, interest as such, or by way of penalty upon them, cannot be collected, unless the power to do so is conferred by law; and third, that no such power was so conferred upon any one with reference to the assessments in question. If these propositions are true, and we think they are, the plaintiff's claim must be sustained.

That assessments, like those in question here, upon specific property specially benefited by a local public improvement, for the purpose of paying the expense of that improvement, are taxes, is too well settled to require extended argument. Such assessments are enforced proportional contributions of a somewhat special kind, made *in invitum*, by virtue of legislative authority conferred upon the municipality for that purpose, upon such terms and conditions as the legislature within constitutional limits sees fit to impose. The power thus conferred is essentially a power to tax; its exercise in the manner prescribed is a mode of taxation; and the sums raised by such exercise are taxes, and are always treated as such. Such assessments are not liable to set-off, nor attachment, as debts; and they can be collected summarily by the tax collector, in like manner as ordinary taxes, if the legislature sees fit to authorize such method, without the aid of courts and without the delay incident thereto. Assessments of benefits caused by the layout or alteration of highways may, by statute, "be collected in the same manner as town taxes are

collected"; General Statutes, § 2705; and the assessments of benefits under the charter of New Haven, like those in question, were treated by the legislature as taxes, and were made collectible by the tax collector in the same manner as any other tax. Charter of 1869, § 50. It is true, provision is also made in the charter for collecting such assessments by proceedings in the nature of a foreclosure of a tax lien; but this does not alter the nature of the sum to be collected; the proceeding by way of foreclosure was in effect only another method which the tax collector was authorized to employ to collect the tax. But the decision of this court in *Nichols* v. *Bridgeport*, 23 Conn., 189, approved in *Bridgeport* v. *R. R. Co.*, 36 id., 255, is so conclusive upon this first point in favor of the plaintiff, as to render unnecessary further argument or citation of authority.

The second proposition, to the effect that a tax carries no interest as such, nor by way of penalty for non-payment, unless the law so provides, is, we also think, a correct statement of the law. Most of the cases in which interest may be recovered under our law, in the absence of any statute regulating the matter, are enumerated in *Selleck* v. *French*, 1 Conn., 32, and clearly assessments of this kind do not come within any of the classes of cases there enumerated. It will, we think, also be found true that whenever taxes have carried interest, either as such, or by way of penalty, it has been by virtue of some statutory provision to that effect. And this is as it should be. At best a tax is a burden, a necessary one it is true, but none the less a burden, imposed on the taxpayer without reference to his consent; and it seems reasonable to hold that any increase of that burden by way of penalty or otherwise, should be expressly made by the power which imposes it; and that until the legislative will to increase the burden by the addition of interest has been clearly expressed, interest should not be allowed. This conclusion, which on principle seems reasonable, is supported more or less strongly by the following authorities: *City of Camden* v. *Allen*, 26 N. J. L., 398; *Town of Belvidere* v. *R. R. Co.*, 5 Vr., 193; *Brennert* v. *Farrier*, 47 N. J. L., 75;

Danforth v. *Williams*, 9 Mass., 324; *Shaw* v. *Peckett*, 26 Vt., 482; *Perry* v. *Washburn*, 20 Cal., 318; *People* v. *Gold and Stock Tel. Co.*, 98 N. Y., 67; *Western Union Tel. Co.* v. *State*, 55 Tex., 314; Cooley on Taxation, 300, note 4.

We think the above rule thus applied in the case of taxes as ordinarily laid, is applicable to the kind of taxes here in question; and that unless some public statute, or the city charter, expressly or by clear implication, authorized the collection of interest as claimed by the defendant upon the assessments in question, it was not collectible.

The remaining question then, is whether such authority was conferred upon any one, either by some public statute or by the city charter.

At the time these assessments were made in 1873, and ever since, interest was and has been collectible on overdue ordinary taxes in New Haven, under the provisions contained in Title 64, Chap. 2 of the General Statutes of 1866, which are still in force in that city (see General Statutes, 1875, p. 552; Charter of 1869, § 50; Charter of 1881, § 14; and Charter of 1890, § 14); but it is not claimed, nor can it reasonably be claimed, that the aforesaid provisions are applicable to the assessments here in question; for those provisions clearly relate solely and only to ordinary taxes laid in the ordinary way by the city or town of New Haven, or school districts therein; and although we hold an assessment of benefits to be a tax, it is clearly not a tax of the kind specified in those provisions.

Section 2704 of the General Statutes (1888) provides that when assessments of benefits shall be laid by any municipality upon property specially benefited by any public work or improvement, and a certificate of lien therefor has been filed, "neither the principal of such assessment nor any *interest* thereon shall be collectible by such municipality," until the work is completed and the fact of such completion duly recorded.

It may be said that this statute recognizes, by implication at least, the right to collect interest upon such assessments where a lien has been filed; and with proper limitations this

may be conceded; for we think it does recognize such right, but only in cases where the right already exists; it does not create, nor was it intended to create, such right. That statute was passed in 1883, ten years after these assessments were made, and its plain and obvious purpose was, not to confer power to collect interest on such assessments where it did not already exist, but to prevent municipalities from collecting any part of the assessed benefits, until such benefits had been conferred by the completion of the public work.

We have failed to find any other public statute relating to this matter; and perhaps we ought to say that counsel for defendant did not claim that there was any such public statute, but rested his contention solely upon the provisions of the city charter.

After a somewhat careful examination of the charter of 1869 (the one in force in 1873), and of the charters of 1881 and 1890, we can find no power conferred, either expressly or by fair implication, to collect the interest here claimed by the defendant. In short we know of no statute, public or private, which conferred this power with reference to these assessments. It is true, that a by-law of the city, existing in 1873, and in substantially the same form ever since, provides for the payment of interest upon liens of this kind from the date of the certificate of lien; but no provision in the charter has been found, or pointed out to us, which gave the Common Council power to make a by-law exacting interest in such a case; and in the absence of such provision, the by-law can, in this respect, have no force; and indeed upon the argument counsel for the defendant made no claim under the by-law.

For the reasons given we think the defendant was not entitled to interest upon these assessments for the period between the dates of the certificates of lien and November 29th, 1892, and that the claim of the plaintiff upon this point must be sustained.

The plaintiff also claimed that, even assuming that interest was collectible by law upon assessments unappealed from after they became payable under the provisions of the char-

ter and by-laws of the city, the appealed assessments here in question did not, under those provisions, become due and payable till November 29th, 1892. In the view already taken of this case, we deem it unnecessary to consider or decide the questions involved in this claim.

The Superior Court is advised to render judgment for the plaintiff.

In this opinion the other judges concurred.

BOROUGH OF ANSONIA *vs.* JOHN P. STUDLEY, JUDGE.

Third Judicial District, Bridgeport, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The Superior Court has the power, in proper cases, to issue a writ of mandamus to the Court of Common Pleas.

A trial judge is under no legal obligation to make a finding of facts for the purpose of an appeal, when the defeated party has, by non-compliance with the orders and rules of court or by neglect and long continued delay, waived or lost his right to a finding; and the determination of that question is a matter within the jurisdiction of the trial judge, whose decision thereon cannot be reversed by writ of mandamus.

A writ of mandamus is not issuable as a matter of strict right. If the relief sought is, in the opinion of the trial court, inequitable, the application should be denied.

[Argued October 22d—decided December 16th, 1895.]

APPLICATION for a writ of mandamus, brought to the Superior Court in New Haven County and tried to the court, *Prentice, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiff for alleged errors in the rulings of the court. *No error.*

The defendant has been for several years, and still is, the judge of the Court of Common Pleas for the County of New Haven. In February, 1893, an action was tried in said court before the defendant, as such judge, with a jury, in which one Albert B. Manley was plaintiff, and the borough of Ansonia was the defendant. A verdict was rendered therein in favor of the said Manley. The present case was an appli-

cation to the Superior Court praying that a writ of peremptory mandamus be issued commanding and requiring the defendant, as such judge, to prepare and file with the clerk of said Court of Common Pleas, a finding of facts setting forth the rulings and questions which it is claimed were made in the trial of said cause, in order to enable the now plaintiff to carry such rulings and questions by appeal to the Supreme Court of Errors. It is alleged that a proper demand was made upon the defendant, as such judge, for a finding, and that he had refused to make it. An alternative writ was issued, to which the defendant made return denying the material allegations therein, and averring that the plaintiff by its conduct had waived all right to have a finding from the defendant, and the plaintiff replied thereto. Afterwards a hearing was had on the issue so joined, and it was found in favor of the defendant; thereupon the application was dismissed, and the peremptory writ refused. From that judgment the plaintiff appealed to this court.

Edwin B. Gager, for the appellant (plaintiff).

I. Mandamus lies to compel an inferior tribunal to perform an official duty to which a party is clearly entitled and which is refused to him, when no other remedy is effectual and appropriate. *Seymour* v. *Ely*, 37 Conn., 105. This was true even prior to the enactment in 1821 of the present statute (§ 1294) conferring the power in express terms. *Meacham* v. *Austin*, 5 Day, 233 (1811). See also prevailing argument of Mr. Reeve in *Strong's Case*, Kirby, 345; *Bassett* v. *Atwater*, 65 Conn., 355.

II. The Superior Court has the power by writ of mandamus to compel the Court of Common Pleas, or a judge of that court, to act. High on Extr. Legal Rem., § 1; Spelling, Extr. Relief, § 1363. The Court of Common Pleas is an inferior court as compared with the Superior Court. The Constitution explicitly declares this. Constitution, Art. V., § 1. The terms "superior" and "inferior" must of necessity refer to relative rank under the Constitution and laws of the given State. Our Constitution is explicit in its lan-

guage. If the Court of Common Pleas is not an inferior court, then the Act creating it is unconstitutional. *State* v. *Daniels*, 66 Mo., 193; *Ex Parte Lothrop*, 118 U. S. 113; *Am. Ins. Co.* v. *Cantu*, 1 Pet., 511; *Ferris* v. *Higley*, 20 Wall., 375.

III. The borough of Ansonia has a clear legal right to have a finding of facts in the case tried before Judge Studley. It was the plain legal duty of Judge Studley to make the necessary finding and file it with the clerk of the court. The duty was imposed by § 1132 of the General Statutes. The judge who tried the cause, and he alone must by law, make and file this finding. No act of his can release him. An appeal to the Supreme Court of Errors was the end sought. No one but Judge Studley could make this finding; no appeal could be taken without the finding.

IV. The relator has not been deprived of this right by laches.

The maxim *qui sentit commodum, sentire debet et onus*, clearly applies. After the petitioner had filed its proposed finding, March 15th, 1893, it was under no further legal obligation to do anything till the judge had filed his finding with the clerk. Whatever communications took place between counsel and the judge after that date were for the personal accommodation and assistance of the judge, and had no effect on the absolute right of the petitioner, who has always insisted that a finding should be made. The judge always recognized the right of the petitioner to a finding, until his decision in Dec., 1894, made without notice to the petitioner. If the limitation of twenty days for filing the substitute finding had any legal validity, it was under the general power of the judge, and he had the same power to waive the twenty day limit that he had to make it. The judge's conduct and letters were a most emphatic waiver of the limit, and were in fact an indefinite extension of the time. And therefore the statutory duty imposed on Judge Studley to make and file the finding, still exists.

The recent utterances of our court, as well as the generally received opinion, regard a petition for mandamus as essentially a civil action, and the same rules must necessa-

rily apply between the parties as in other actions. *Bassett* v. *Atwater*, 65 Conn., 355; *Brainard* v. *Staub*, 61 id., 570; *Gilman* v. *Bassett*, 33 id., 298. If there ever was any limitation it was made by the judge personally, and not by virtue of a statute or rule, and he has waived it as fully as one would be deemed to have waived the statute of limitations by analogous conduct. *Taylor* v. *Gillette*, 52 id., 516; *Kelley* v. *Brown*, 32 id., 108; *Ives* v. *Finch*, 22 id., 144; *Hatstat* v. *Blakeslee*, 41 id., 301; *Orcutt's Appeal*, 61 id., 378. "In determining what will constitute unreasonable delay, regard should be had to circumstances which justify the delay, to the nature of the case and the relief demanded, and to the question whether the rights of the defendant or other person have been prejudiced by such delay." *Chinn* v. *Trustees*, 32 Ohio St., 236. Quoted and adopted in *People* v. *Common Council*, 78 N. Y., 56.

V. The act which it is asked that Judge Studley be compelled to perform, viz: prepare a finding under the provisions of § 1132 of the General Statutes, is a proper act to be enforced by writ of mandamus. It is the common and well recognized case of a purely ministerial duty. *Smith* v. *Moore*, 38 Conn., 110, 111; *Taylor* v. *Gillette*, 52 id., 216; Exhaustive note to *Dane* v. *Derby*, 89 Am. Dec., 740; *Carpenter* v. *County Commissioners*, 21 Pick., 259; *Am. Casualty Ins. Co.* v. *Fyler*, 60 Conn., 448; 2 Spelling Extr. Relief, § 1406; *People* v. *Pearson*, 2 Scam. (Ill.), 189, 33 Am. Dec., 445; *Sikes* v. *Ransom*, 6 Johns., 279.

VI. The relator had a clear right under the circumstances disclosed in the record to ask the defendant to substitute a copy in place of the orignal requests to charge, which were lost. The question whether the copy presented was correct, could only be ascertained upon inquiry. The relators had the right to have that inquiry made. The defendant refused such right. As to the rights of the relator in this respect, see the following authorities: *Frink* v. *Frink*, 43 N. H., 508, 80 Am. Dec., 189; *Hollister* v. *Judges*, 8 Ohio St., 201, 70 Am. Dec., 100; *Commonwealth* v. *Roark*, 8 Cush., 210; *Eaton* v. *Hall*, 5 Metc., 287.

E. P. Arvine and *William S. Pardee*, for the appellee (defendant).

I. Can the Superior Court issue a mandamus to the Court of Common Pleas?

Section 1294 of the General Statutes does not, in terms, give the Superior Court power to issue writs of mandamus to other courts, and if it has such power, it must result from the common law. According to common law, a superior court may issue a mandamus to an inferior and subordinate court, in cases where the inferior court acts ministerially.

Is the Court of Common Pleas an inferior or subordinate court? What is an inferior court? "A court the proceedings or determinations of which are subject to the supervision or review of another court of general jurisdiction in the same State." Century Dic., Court. Inferior courts: "those which are subordinate to other courts; also those of a very limited jurisdiction." Bouvier's Law Dic., Court. Mandamus may be issued to "subordinate courts." *Worden* v. *Richmond*, 98 Am. Dec., 373. It will not be pretended that the Court of Common Pleas is in any way subject to the supervision of the Superior Court, or that it is a court subordinate to that court. None of our courts are courts of general jurisdiction, in the sense that the English courts were. *Raymond* v. *Bill*, 18 Conn., 88. The County Court was held to be a court of general jurisdiction. *Perry* v. *Hyde*, 10 Conn., 329. The Court of Common Pleas has a larger jurisdiction than the County Court had. A wholly unprecedented interference with the Court of Common Pleas is asked from the Superior Court. It is not pretended that the Court of Common Pleas is in any way subordinate to the Superior Court, or that there is any statute granting to the Superior Court supervision over the Court of Common Pleas. Nor is any argument made to show that the Court of Common Pleas is an inferior court within the meaning of the common law. The maxim, "no wrong without a remedy," means no legal wrong without a remedy. A judge who has discretionary power may decide erroneously, but this is certainly not a legal wrong.

Suppose the defendant in this case had been a judge of the Superior Court, would there have been any remedy?

II. Assuming that the Court of Common Pleas is a subordinate court, its orders and its decisions upon these orders are not subject to review by mandamus in the Superior Court. High on Ex. Rem., §§ 156, 176. The authorities cited by the plaintiff show that this power is only exercised against inferior tribunals or ministerial officers, when there is no discretion involved in the action which is the subject of mandamus. The following leading cases in Connecticut hold the same doctrine. *Colt* v. *Roberts*, 28 Conn., 330; *Freeman* v. *Selectmen of New Haven*, 34 id., 406; *Seymour* v. *Ely*, 37 id., 103; *Pond* v. *Parrott*, 42 id., 13; *State* v. *Ousatonic Water Co.*, 51 id., 137; *Am. Casualty Ins. Co.* v. *Fyler*, 60 id., 448.

The question then is, was the decision of Judge Studley not to make a finding, one involving discretion, or the finding of a fact within his province? In deciding the questions presented to him, or any of them, he must have acted judicially. "The judge before whom the cause was tried has the power to determine the accuracy of the bill of exceptions, and whether it correctly recites the points made and opinions excepted to; and the exercise of this power is beyond control by mandamus." 14 Amer. & Eng. Ency. of Law, 123, 124; *Spalding* v. *Gates*, 7 Wis., 693; High on Ex. Rem., §§ 151, 154, 158, 163, 168, 170, 174. The case at bar is a much clearer one of discretion on the part of the defendant than that presented in *Ins. Co.* v. *Fyler*, 60 Conn., 448.

III. Assuming that the Superior Court has jurisdiction over the controversy in this case, there is no error in the judgment of the court below. It is manifest that the question of laches is of no importance in the case, provided the relator lost its right of appeal by not filing the new finding within the twenty days limited by Judge Studley. The finding filed by the relator in March, 1893, was withdrawn. This finding of the court below is one of fact from the evidence, and cannot be reviewed here. From the time counsel withdrew the old finding there was none left in the case. Both the statute in reference to extending the time for ap-

peal, and the rule of court with reference to an extension of time for filing a finding, provide that such extensions shall be granted only upon due cause shown. General Statutes, § 1131; Rules of Court, p. 39, Rule 17, § 3. It would seem quite as doubtful whether an extension could have been made for an indeterminate time. At most, the letter of Judge Studley, of January 30th, could only have been regarded as a suggestion as to what the court might do, if the finding was filed within a reasonable time. It is immaterial how Judge Studley came to write the letter. If he did not intend it as an extension of the time, it cannot operate as such. That he did not intend this letter as an extension of time, appears from the finding.

The finding of the court below that the relator, after the receipt of Judge Studley's letter, was guilty of laches from January 31st to September 11th, 1894, is one of fact, and is not a legal conclusion. *Farrell* v. *Waterbury Horse R. R. Company*, 60 Conn., 236. The agreement of counsel could not extend the time for filing the finding. *Woodruff* v. *Fellows*, 35 Conn., 105. Manifestly only the judge can extend the time for filing a finding, and the agreement of the parties, whether communicated or not, cannot be substituted for his authority.

ANDREWS, C. J. At the very outset we are challenged by the defendant's counsel with the question: "Can the Superior Court issue a mandamus to the Court of Common Pleas?"

"A writ of mandamus, is a command issuing from a superior court, to some inferior court of judicature, corporation, or public officer, requiring them to do some particular act, therein specified, which appertains to their office and duty." 1 Swift's Dig. 563. Our General Statutes, § 1294, says: "The Superior Court, Court of Common Pleas, and District Court, may issue writs of *mandamus* in cases within their jurisdiction, respectively, in which such writs may by law be granted, and proceed therein, and render judgment according to the course of the common law."

The defendant's counsel argue that the Court of Common

Pleas is not inferior to the Superior Court in such a sense as is intended by the definition of mandamus, and they cite various authorities. It is certainly true that the power to issue the writ of peremptory mandamus, implies that the court or other party to whom it is issued, is so far inferior to the court issuing it as to be in duty bound to obey its command, when properly issued. Whether inferior or not in other respects, is immaterial.

The Constitution declares that "The judicial power of the State shall be vested in a Supreme Court of Errors, a Superior Court, and such inferior courts as the General Assembly shall, from time to time, ordain and establish." Under this provision the General Assembly has no power to ordain and establish any court which is not inferior to the Superior Court. At the time the constitution was adopted, the Superior Court as a court of law, was, and ever since has been, a court of general jurisdiction. It has jurisdiction of all matters cognizable by any court of law, of which the exclusive jurisdiction is not given to some other court. The fact that no other court has the exclusive jurisdiction in any matter, is sufficient to give the Superior Court jurisdiction over that matter. General Statutes, Revision of 1808, page 205; *State ex rel. Morris* v. *Bulkeley*, 61 Conn., 287, 374. The Court of Common Pleas in New Haven County was first established by the General Assembly in 1869; and we are of opinion that it is so far inferior to the Superior Court, that a writ of mandamus may be issued by that court to the Court of Common Pleas, which it would be the duty of the latter court to obey.

There is in the record sent up to us, a somewhat extended finding of facts, which sets forth the evidence and the facts of the case as they were presented in the Superior Court, at the close of which that court says: "I find upon the facts aforesaid, that counsel for the said borough, by their conduct aforesaid during the period from January 31st, 1894, to September 11th, 1894, were guilty of gross laches, and that by reason thereof, if for no other reason, they waived and lost

all right to pursue their appeal in said case, and all right to claim or have a finding of facts therein from the defendant."

The first reason of appeal is that "the court erred in finding, upon the facts set forth, that counsel for said borough by their conduct as set forth in the finding during the period from January 31st, 1894, to September 11th, 1894, were guilty of gross laches, and that by reason thereof, if for no other reason, they and said borough waived and lost all right to pursue said appeal in said cause, and all right to have and claim a finding of facts therein from *Judge Studley*."

The other reasons of appeal are only variations of this one; they present no other or different question of law.

Whether or not this is such "a special assignment of errors, in which the precise matters of error, or defect in the proceedings of the court below, relied on as ground of reversal are set forth," as to require this court to consider it, we do not decide. The point was not raised.

It is shown by the finding of facts in the present case, that after the verdict was rendered in the case of Manley v. Ansonia, counsel for Ansonia gave notice of their intention to appeal to the Supreme Court of Errors, and filed within the proper time a proposed finding of facts. They also filed with *Judge Studley* a motion for a new trial, on the ground that the verdict was against the evidence in the cause. Both matters were pending at the same time, and interviews between counsel and *Judge Studley* were had on different occasions, in respect to one or both of them. As the result of one of such interviews, one of the counsel for Ansonia, with the consent and approval of the judge, withdrew from the clerk of that court the said proposed finding, which had been filed by them as aforesaid, and took it away with him, upon the arrangement made with *Judge Studley*, that he and his associate counsel should prepare and file a new finding in substitution therefor, in conformity to suggestions which had previously been made by the judge. They were given twenty days within which to file such substitute proposed finding. This appears to have been sometime in November, 1893. The finding then goes on to state with considerable minuteness the acts and conduct of the counsel respecting such with-

drawal, and the preparation of the proposed substitute therefor, as well as the remarks and the letters of *Judge Studley* on the same matter, from that time forward to a day which appears to have been in November, 1894, when *Judge Studley*, having ascertained that no extension of time for the filing of a substitute proposed finding had been given, and that no order in relation thereto had been made either by himself or by his associate *Judge Hotchkiss*, and that no substitute proposed finding had been filed, determined that said borough was not entitled to have a finding from him, and decided not to prepare one.

For the purposes of the present case it is conceded that up to November, 1893, it was the duty of *Judge Studley* to prepare a finding in said case of Manley v. Ansonia, such as would enable the borough to present by appeal to the Supreme Court of Errors, the questions of law that had been made by counsel on the trial of that case. And, of course, it must be conceded, that it would be possible for the counsel for Ansonia, by their conduct, to release *Judge Studley* from that duty; such as non-compliance with the rules, disobedience to the orders of court, or the like; or by an open abandonment of the appeal; or by long continued delay; or any other conduct such as to afford satisfactory evidence of a waiver of all right to appeal.

The whole contention of the plaintiff in the Superior Court was, as it has been here, that although the said proposed finding was removed from the manual custody of the clerk of the Court of Common Pleas, yet such removal made as it was, under the circumstances set forth in the finding, did not affect the duty of *Judge Studley* in the premises at all, but that his duty to prepare a finding in the case is, and always has been, precisely the same as if the original proposed finding had at all times remained in the hands of the clerk. On the other hand, the contention made in behalf of the present defendant is, that said removal of the proposed finding by counsel for Ansonia was, under the circumstances set forth in the finding, an abandonment by them of their intention, or a waiver of their right, to appeal to the Supreme Court, and that he was thereafter under no duty to prepare a finding.

Which one of these contentions ought to prevail, was an ultimate fact to be decided upon the evidential facts in the case. One of these evidential facts was the intention with which the proposed finding was withdrawn from the hands of the clerk—the intention of *Judge Studley*, as well as the intention of counsel for Ansonia—as shown by their conduct then and afterwards. The Superior Court has decided on the facts, that the said borough had waived and lost all right to have or claim a finding in said case from the defendant, and denied the application for a peremptory mandamus.

It seems to us that a case for mandamus is not shown. *Judge Studley*, upon the evidence, came to the conclusion which he did; other persons, upon the same evidence, might have come to a different conclusion. Even if the Superior Court believed that *Judge Studley* was wrong, his decision could not be reversed by a writ of mandamus. It was a matter within his jurisdiction, and one in respect to which his judgment had been exercised.

A mandamus can never be issued to compel a judge to decide otherwise than according to the dictates of his own judgment. *State ex rel. Pinkerman* v. *Police Commissioners*, 64 Conn., 517; *United States* v. *Lawrence*, 3 Dallas, 42; *Ex parte Crane*, 5 Peters, 190; *Amer. Cas. Ins. Co.* v. *Fyler*, 60 Conn., 448. If the conduct of the borough of Ansonia and its counsel had been such as to make it inequitable, in the judgment of the Superior Court, that they should have the relief sought, the peremptory writ was properly denied. *Chesboro* v. *Babcock*, 59 Conn., 213; *Belcher* v. *Treat*, 61 Me., 577; *People ex rel. Land Co.* v. *Jeroloman*, 139 N. Y., 14; *Taylor* v. *McPheters*, 111 Mass., 351; *Life & Fire Ins. Co.* v. *Wilson*, 8 Pet., 291; *Reeside* v. *Walker*, 11 Howard, 272, 289; *People* v. *Ferris*, 76 N. Y., 326; *People* v. *Campbell*, 27 id., 496; *Matter of Sage*, 70 id., 220; Spelling on Ex. Rem., § 1371.

There is no error.

In this opinion the other judges concurred.

E. CLINTON TERRY'S APPEAL FROM PROBATE.

First Judicial District, Hartford, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN AND HAMERSLEY, Js.

When a Court of Probate approves of the executor named in a will, and commits to him the administration of his testator's estate, such executor is entitled to the sole and exclusive administration of such estate. By such action the court has, for the time being and while that condition of things remains unchanged, exhausted its jurisdiction in respect to that subject, and cannot appoint an administrator with the will annexed.

[Argued October 3d, 1895—decided January 6th, 1896.]

APPEAL from certain orders and decrees of the Court of Probate for the district of Plymouth, taken to the Superior Court in Litchfield County and thence transferred by consent of the parties to the Superior Court in Hartford County, and tried to the court, *Thayer, J.;* facts found and judgment rendered in favor of the appellant, E. Clinton Terry, and appeal by the appellee, James Terry, for alleged errors in the rulings of the court. *No error.*

Henry Stoddard, for the appellant, James Terry.

I. The decree granting administration with the will annexed to James Terry, was within the jurisdiction of the Court of Probate. The two facts necessary to give the court jurisdiction are conceded, and they are: first, the death of the testator, and second, his residence in the district of Plymouth at the time of his death. *Bolton et al.* v. *Schriever et al.*, 135 N. Y., 65; 1 Woerner's Am. Law of Administration, § 145; *Hall* v. *Pierson*, 63 Conn., 332; *Shelton* v. *Hadlock*, 62 id., 151; *Gallup* v. *Smith*, 59 id., 361.

II. The decree of the Court of Probate, in granting administration with the will annexed to the defendant, was not erroneous. 1 Sw. Dig., 447; *Woodhouse* v. *Phelps*, 51 Conn., 523; *Rhodes* v. *Seymour*, 37 id., 7; *Pease* v. *Phelps*, 10 id., 68; *Pratt* v. *Stewart*, 49 id., 34; 1 Swift's System, 423.

III. Every presumption supports the jurisdiction and the judgment in this case, and it is supported both by presumptions of fact and the presumption of law. *Stone* v. *Hawkins*, 56 Conn., 115.

IV. The decree of the Court of Probate, passed on the 22d day of April, 1871, cannot be attacked collaterally. *Dickinson* v. *Hayes*, 31 Conn., 417; *Mix's Appeal*, 35 id., 122; *Kelly* v. *Johnson*, 38 id., 269; *Emery* v. *Hildreth*, 2 Gray, 231; 2 Black on Judgments, § 639.

William W. Hyde, for the appellee, E. Clinton Terry.

I. The order of the Court of Probate appointing James Terry administrator, with the will annexed, was absolutely null and void. 1 Swift's Digest, 443, 444; 1 Williams on Exrs., 6 Am. Ed., 256 (top page, 295), 461 (top page, 527); *Ayres* v. *Ward*, 16 Conn., 296; 2 Williams on Exrs., 6th Am. Ed., 911 (top page, 980); 2 Woerner Amer. Law of Adm., § 346, p. 733, and cases cited; 1 id., §§ 171, 179, 245; *Marcy* v. *Marcy*, 32 Conn., 308. The statutes of this State do not in any way alter the general rule, but on the contrary, expressly recognize and reaffirm it. General Statutes, §§ 549, 569, 554; *Smith's Appeal*, 61 Conn., 420; *Culver's Appeal*, 48 id., 165; *Finn* v. *Hempsted*, 24 Ark., 111; *Holyoke* v. *Haskins*, 5 Pick., 20.

II. E. C. Terry has a perfect right to raise the question of the validity of the order of April 22d, 1871, on this appeal. *Sears* v. *Terry*, 26 Conn., 273; *First Nat. Bank* v. *Balcom*, 35 id., 351; *Culver's Appeal*, *supra*; *Bent's Appeal*, 35 Conn., 523; *Shelton* v. *Hadlock*, 62 id., 143; *People's Sav. Bank* v. *Wilcox*, 15 R. I., 258.

III. James Terry, never having been legally appointed, cannot derive any authority to act as administrator from the acts of the other parties in interest, nor from his own assumption of the position. Whoever relies on an appointment from a Court of Probate, must prove the facts necessary to give it jurisdiction. *Sears* v. *Terry*, 26 Conn., 273; *First Nat. Bank* v. *Balcom*, 35 id., 351.

TORRANCE, J. The facts in this case, upon which the decision of the principal question in it depends, are in substance the following:—

In April, 1871, James Terry, a resident of the town of Plymouth in this State, died, leaving a will in which he had appointed Allen and Adams to be his executors, but Adams had died before the testator. Shortly after Terry's decease the will was duly presented for probate in the Court of Probate for the district of Plymouth, and on the 22d of April, 1871, was duly proved and approved as the last will of the deceased. The record of that court, after reciting the approval of the will proceeds as follows:—

"And on the same day, Rollin D. H. Allen, named in said will as one of the executors thereof, and James Terry of said Plymouth, to whom this court hereby grants administration with the will annexed, Joseph H. Adams, one of the executors named in said will having deceased in the lifetime of the testator, appeared in court, accepted said trust, and gave bonds with sufficient surety in the sum of twenty thousand dollars, which were accepted and approved by said court." The administrator thus appointed was a son of the testator, and he "was never appointed administrator of said estate otherwise than by said order of April 22nd, 1871." Allen never resigned his trust "and was never removed from his position as such executor until his death" in December, 1893.

In all the steps taken in the settlement of the estate these two joined, the one acting as executor and the other as administrator with the will annexed, and the final administration account signed by both in their respective capacities, was accepted and approved in March, 1873. After this nothing further was done by either with reference to the estate down to the time of Allen's death in 1893.

In October and November, 1894, James Terry, claiming and representing himself to the Court of Probate in Plymouth, to be the administrator of his father's estate, obtained, as such administrator, from said court certain orders respecting the settlement of said estate. From these orders, E.

Clinton Terry, a son of the testator, took an appeal to the Superior Court, chiefly on the ground that James Terry was not the administrator with the will annexed, because the order of April 22d, 1871, appointing him to that office, was void and of no effect. The Superior Court took Mr. E. Clinton Terry's view of this matter, and thereupon rendered judgment reversing the orders appealed from; and from that judgment James Terry brings the present appeal.

If the probate decree of April 22d, 1871, so far as it relates to the appointment of an administrator with the will annexed, is void, that is, destitute of any legal effect whatever, the judgment below must stand. On the other hand if that decree, in the respect indicated, was merely erroneous, that is valid until set aside on a proper appeal, then the judgment below should be set aside; for the decree in question would in that case be protected from collateral attack under § 436 of the General Statutes.

Counsel for the present appellant claim that the decree is not even erroneous; but in this we think they are mistaken. Under the circumstances disclosed by the record, where an executor capable of service, appears in court, accepts the trust, is approved by the court and duly qualifies, it is by law the duty of the court to commit the administration of the estate to him; *Smith's Appeal from Probate*, 61 Conn., 420, 427; and under such circumstances, we think it is equally the duty of that court, under the statute, to commit such administration solely and exclusively to him; for he is the person to whom alone, while he remains capable, qualified and in the performance of his duties, the law and the will give all the rights and upon whom they impose all the duties pertaining to such administration.

The important question then is whether the decree in question, in the respect above indicated, is void, or merely erroneous in the sense above explained; and this question relates to the jurisdiction of the Court of Probate.

It is conceded, as it must be in this case, that two of the important facts necessary to give the Court of Probate jurisdiction, existed; namely, the death of the testator, and his

residence within the district of Plymouth at the time of his death.

The existence of these two facts unquestionably gave the Court of Probate power to approve or disapprove of the will, and to grant the administration of the estate to some person. After it had approved of the will, we think it had jurisdiction of the question whether it would approve of the executor named in the will and permit him to administer upon the estate, or would reject him, and appoint an administrator with the will annexed, and commit the administration to him, as for want of an executor. We say the Court of Probate had jurisdiction of those questions, that is, had the power to hear, and to determine them one way or the other; but we do not say that it had the power, under all circumstances, to decide these questions as it saw fit; for in exercising its jurisdiction it must obey the law, or its determination will be at least erroneous.

Want of jurisdiction is one thing, and an erroneous exercise of an admitted jurisdiction is quite another; although the line that separates the one from the other is not always a plain one. *Smith's Appeal from Probate*, *supra*, affords a fair illustration of the distinction here suggested. In that case the Court of Probate refused to approve of the executor named in a will, and appointed an administrator with the will annexed. This court held that the Court of Probate erred in this because, under the circumstances of that case, the law made it the duty of that court to approve of the executor. In that case the Court of Probate clearly had the power to hear and to determine the question whether it would permit the executor to administer the estate, or would refuse to do so, and appoint an administrator with the will annexed; for the statute made it the duty of the court to appoint such an administrator under certain circumstances, and this gave it the right to determine whether or not those circumstances existed; but in the exercise of that jurisdiction — in its determination of the question — it erred because it decided contrary to law.

As before stated, we think the Plymouth Court of Pro-

late in 1871 had the power to hear and to determine the question whether it would permit the executor to administer the estate, or would refuse to do so and appoint an administrator with the will annexed. In the exercise of that jurisdiction, however, while it could, under certain circumstances, refuse to permit the executor to administer, and might in such case appoint an administrator with the will annexed, under no circumstances could it, as in the case at bar, commit the entire administration of the same estate at the same time to the executor and also to an administrator with the will annexed, thus giving to each in severalty the entire and exclusive power to administer; for the title of each to the property would be thus derived from different sources, the one from the will and the other from the law and the grant of administration; *Marcy* v. *Marcy*, 32 Conn., 308; the one would be the appointee of the testator to whom he had confided the entire administration, and the other the appointee of the Court of Probate, to whom the law had confided the entire administration; from the very nature of the case their titles would be exclusive of each other; and the rights and powers of each over the same estate at the same time would be, as respects the other, exclusive and opposed.

If, then, a Court of Probate upon one day approves a will, and approves of the executor, and he accepts the trust and qualifies and enters upon, and continues in, the performance of the duties of his office, can it upon a subsequent day, while this condition of things remains the same, appoint an administrator with the will annexed, and commit the sole and exclusive administration of the same estate to him? We think not. We think the court under such circumstances would have no jurisdiction to grant the entire general administration to another, and that the attempt to do so would be a nullity. In such a case the jurisdiction of the court over the question of committing the administration to any one, would have been already exercised in favor of the executor, and thereby for the time being exhausted; and so long as that condition of things remained unchanged, it was a legal impossibility for the Court of Probate to clothe another person

at the same time with the powers which the will and the law had already given to and continued in the executor. *Griffith* v. *Frazier*, 8 Cranch, 9. But this in effect is just what the Court of Probate attempted to do in 1871. It in effect committed the entire administration solely and exclusively to the executor, for this was the legal effect of its action with respect to him. When the Court of Probate, by its action with respect to the executor, had committed the entire administration to him it had exercised, and, for the time being, had exhausted, so to speak, its jurisdiction to commit the administration to some one, for it thereby had committed it entirely to him. It had jurisdiction to refuse administration to the executor and to commit it to an administrator, in the sense before explained; but having thus committed it to the executor, it could not in the same breath commit the same thing to another, and so clothe two separate individuals with exclusive legal ownership in severalty over the same property at the same time.

For these reasons we think the appointment of, and grant of administration to, James Terry in 1871, were void and of no legal effect, and might be shown to be such in a collateral proceeding.

There is no error.

In this opinion the other judges concurred.

THE STATE OF CONNECTICUT *vs.* ALANSON WASHBURN ET AL.

Second Judicial District, Norwich, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

An investment by a conservator of his ward's funds in promissory notes secured by a mortgage of land in another State and guaranteed by a corporation, is not one recognized, either by statute or common law, as belonging to the class of investments generally appropriate for trust funds. To justify such use of the funds the conservator must prove not only good faith, but due diligence on his part in ascertaining by

specific inquiries the pecuniary responsibility of the maker of the notes, the value of the land mortgaged to secure them, and the credit and responsibility of the corporation which guaranteed them. In the absence of personal knowledge on his part, it is not due diligence for him to accept and purchase the securities, upon the bald assertion of the broker who had them for sale, that they were perfectly safe.

The general rule of equity which warns a trustee not to sell, without sufficient reason, a trust fund received by him and properly secured, applies with peculiar force to a conservator who receives the estate of his ward safely invested in securities expressly authorized by statute. If under such circumstances he makes a change of investment, without an order of the Court of Probate, he assumes, in an action on his bond, the burden of proving a reasonable cause for the change; and failing in such proof he may properly be held liable, irrespective of his good faith in the transaction.

Damages in such case, where the ward has exercised his right of rejecting the unauthorized investment, should be the value of the securities at the time of the unlawful sale, together with the amount of dividends which they would have produced if no change had been made, less any interest on the rejected investment received and used for the benefit of the ward; interest will not be compounded when the conservator acted in good faith.

Evidence that others in the neighborhood, of ordinary prudence and discretion in financial matters, about the same time, but not in the presence of the conservator, purchased some of the same securities as an investment for themselves, is irrelevant to show due diligence on the part of the conservator.

[Argued October 15th, 1895—decided January 6th, 1896.]

SUIT on a probate bond given for the faithful discharge by the defendant Washburn, of his duties as conservator of the estate of one Richard D. Rose; brought to the Superior Court in Tolland County where the case was, by agreement of the parties, referred to the Hon. Dwight Loomis, State Referee, to find and report the facts. The court, *Prentice, J.*, accepted the report of the State Referee and, with consent of the parties, reserved the questions of law arising thereon for the consideration and advice of this court. *Judgment advised for plaintiff, after a further finding as to the amount of damages.*

The pleadings admitted the execution of the bond, and that the defendant Washburn, described in the bond as conservator of Richard D. Rose, received as such conservator, and as belonging to the estate of his ward, money in savings

banks in this State to the amount of $3,648.61, and that said Washburn invested a portion of these funds in seven promissory notes of $500 each (known as the "Barton bonds"), secured by mortgage on land situate without the State.

The material issues of fact raised by the pleadings were: Did Washburn, in his management of the funds invested in the savings banks, act with ordinary and reasonable prudence and discretion; the amount of money withdrawn from the savings banks and invested in the Barton bonds; the amount of the damages?

As to the facts in issue, the referee reported in substance as follows:—

The money in savings banks received by the defendant Washburn, was believed to be invested in safe and sound banks, which were paying dividends at the rate of four per cent per annum.

Prior to August 19th, 1884, Washburn bought of Samuel Bingham four of the Barton notes; two of which were dated July 15th, 1884, secured by mortgage on eighty acres of land in Indiana, and guaranteed by the Continental Life Insurance Company, and two of which were part of an issue of twenty-four notes of $500 each, dated July 8th, 1884, secured by mortgage of the same date from Barton to said Bingham, of a piece of land in the city of Indianapolis, Indiana, and guaranteed by the Continental Life Insurance Company. Prior to October 15th, 1886, Washburn bought of Bingham three more notes of the issue of July 8th, 1884.

At the time of the purchase, Barton was financially irresponsible. The land securing the notes did not equal in value half their amount. The solvency of the Continental Life Insurance Company had been publicly questioned in an investigation authorized by the General Assembly, and it was in fact hovering on the verge of bankruptcy, although its annual reports to the insurance commissioner showed a solvent condition, and the State authorities permitted it to do business as a solvent company until 1887, when it went into the hands of a receiver; it will pay a small dividend on its liabilities. The notes endorsed in blank by Barton, had

been delivered to Bingham; he was in fact a trustee, but this did not appear on the face of the deed or notes; he received a commission from the insurance company, but this was unknown to Washburn, who had long known Bingham and regarded him as a man of strict integrity and of good judgment in financial matters, and for a long time previous had had dealings with him in business affairs. Bingham was generally regarded by the people of the vicinity, and by those who had frequent transactions with him, as an honest man and of good judgment in financial matters.

Before purchasing, Washburn told Bingham he wished to purchase some good securities in behalf of another, and wanted the investment perfectly safe. Thereupon Bingham recommended the notes in question, saying they were good as gold; that the guaranty of the Continental Life Insurance Company made them doubly safe, and that his wife and wife's sister had already purchased some of them. While the negotiations were pending, another person in the presence of Washburn bought some of the notes.

Washburn bought the notes in good faith, believing they were exceptionally good and safe and that the purchase was for the benefit of his ward. He made no inquiry of Bingham as to his, Bingham's, interest in the notes. He knew that Barton was maker of the notes, but made no inquiry of Bingham or others as to his financial reponsibility. He knew that the notes purported to be secured by mortgage of land in Indiana, but made no inquiry of Bingham or others as to its value. He made no inquiry of Bingham, nor of any one else, as to the credit and responsibility of the Continental Life Insurance Company, and was not aware that its credit or solvency had been called in question.

Upon the principal fact, of the exercise of ordinary and reasonable prudence and discretion, the State Referee made a conditional finding as follows: —

"If the court shall find that it was not the legal duty of the defendant Washburn, as conservator, under the circumstances herein found, to make further inquiry of other persons than Bingham relative to the securities for the investment,

then I find that in making the investment in the notes in question, he exercised in behalf of his ward ordinary and reasonable prudence and discretion, and is not liable in this action. But if the court shall hold that it was the legal duty of said conservator, under the circumstances, to make inquiry of other and disinterested persons relative to the safety of the proposed investment, then I find that ordinary diligence in making inquiry of disinterested persons would have elicited information sufficient to deter a person of ordinary prudence and discretion from making the investment; and in such case I find that said conservator did not use ordinary and reasonable care and discretion in making said investment, and is therefore liable in this action."

The referee also submits, as a question of law, the rule of damages to be applied to this case; "also the question of the amount of damages to be computed from the data contained herein." The report does not find the amount of money invested in the Barton notes; nor the dates when the money was withdrawn from the savings banks for the purchase of the same.

The report states that the defendant offered evidence to prove that at the same time, but not in the presence of Washburn, other men of the neighborhood, of ordinary prudence and discretion in financial matters, purchased some of the same Barton bonds as an investment for themselves; that the evidence was received by agreement, subject to exception and the opinion of the court; and that the evidence proved the facts to be as offered to be proved by the defendant, if the court should be of opinion it was admissible.

Charles E. Perkins and *Elliot B. Sumner*, for the plaintiff.

Evidence to prove that men of ordinary prudence bought similar notes of Bingham about the same time, was clearly inadmissible. The duty of the conservator was not performed by merely telling Bingham he wanted a sound security, and taking anything he offered him without inquiry, and with no reason for changing the safe investment then existing. *DeWolf* v. *Sprague Co.*, 49 Conn., 282; *Clark* v. *Beers*, 61

id., 87. If the investment is perfectly safe, and the trustee for no good reason changes it to another where it is lost, he becomes responsible. 1 Perry on Trusts, § 466; Hill on Trustees, s. p. 382; 3 Lewin on Trusts, 324. *Kellaway* v. *Johnson*, 5 Beav., 319. Moreover, the conservator was guilty of great negligence in making this change of investment. *Ormiston* v. *Olcott*, 84 N. Y., 339; *King* v. *Talbot*, 40 id., 90; *Hun* v. *Cary et al.*, 82 id., 65; *Rae* v. *Meek*, L. R. 14 Ch. 558; *Budge* v. *Gummow*, L. R. 7 Ch. 721; *Brown* v. *French*, 125 Mass., 410; *Tuttle* v. *Gilmore*, 36 N. J. Eq., 617; *Bowker* v. *Pierce*, 130 id., 262. The plaintiff claims the right to reject this unauthorized and improper change of investment, and that the conservator should account for the moneys he received as if they had remained where they were when he improperly removed them. *King* v. *Talbot*, 40 N. Y., 76, 90; 1 Perry on Trusts, §§ 466, 472; *Dickinson's Appeal*, 152 Mass., 184; Hill on Trustees, s. p. 381; *Harding* v. *Larned*, 4 Allen, 426.

John L. Hunter, for the defendants.

Washburn was under no statutory obligation in relation to this investment. *Clark* v. *Beers*, 61 Conn., 87; *Harvard College* v. *Amory*, 9 Pick., 446; Perry on Trusts (4th ed.), § 452; 2 Amer. & Eng. Ency. of Law, 827, 831, 842; *Lovell* v. *Minott*, 20 Pick., 116; *Kinmonth* v. *Brigham*, 5 Allen, 270; *Clark* v. *Garfield*, 8 id., 427: *Brown* v. *French.*, 125 Mass., 410; *Bowker* v. *Pierce*, 130 id., 262; *Hunt, Appellant*, 141 id., 518; *Lamar* v. *Micou*, 112 U. S., 465; *Fahnestock's Appeal*, 104 Pa. St., 46. It may not be difficult now to see that the investment which he made was not a wise one; "but in judging his acts we should put ourselves in his position at the time." *Bowker* v. *Pierce et al.*, 130 Mass., 264; *Purdy* v. *Lynch*, 145 N. Y., 475; *Ormiston* v. *Olcott*, 84 N. Y., 347. The evidence that others bought these securities was clearly admissible for the purpose for which it was offered, and it was the most satisfactory evidence which could be offered for that purpose. As to damages, the plaintiff cannot ask anything more of a man who has confessedly acted in good

faith, and for what he believed the best interest of the plaintiff, than what he, the plaintiff, has actually lost by the change of investment.

HAMERSLEY, J. The State Referee finds that the defendant did not use ordinary and reasonable care and discretion in the purchase of the Barton bonds, if it was "the legal duty of the defendant Washburn, as conservator, under the circumstances herein found, to make further inquiry of other persons than Bingham (from whom the purchase was made), relative to the securities for the investment."

There is no rule of law prescribing the sources of information a trustee must exhaust before investing his trust funds; it is possible his legal duty may be performed by inquiring of a single person, even if that person is the vendor in the contemplated purchase. The finding of the referee is not contingent on this plain proposition, but upon the legal duty of the defendant to make further inquiry "under the circumstances found." It appears that no inquiry was made of Bingham, the vendor, except the general inquiry for a perfectly safe investment; so that the real contingency on which the finding is made, is whether, under the circumstances found, the law authorized the conservator to invest the funds of his ward in sole reliance on the general opinion given by the vendor, in whose integrity and good judgment in financial matters the conservator had confidence and had reasonable ground for confidence; or, to state the question a little differently, whether it was the legal duty of the conservator, before investing his ward's money in promissory notes secured by mortgage of land in another State and guaranteed by a corporation, to use, in the absence of adequate personal knowledge, ordinary diligence in making some specific inquiries of some one in respect to the pecuniary responsibility of the maker of the notes, the value of the land mortgaged to secure them, and the credit and responsibility of the corporation which guaranteed them.

There can be but one answer to this question. The contemplated investment was not one recognized by either

statute or common law as belonging to the class of investments generally appropriate for trust funds. In view of the inherent objections to such investments, of the familiar rules of equity which regard them with distrust, and of the careful exclusion of such mortgages from the broad range of permissible trust investments mentioned in the General Statutes (§ 495), we think that loans on promissory notes secured by mortgage of land in other States, and the purchase of such notes, cannot be regarded as *prima facie* a proper investment of trust funds; and that a trustee must justify such use of his funds by proof not only of good faith, but of due diligence on his part in ascertaining the safety of the particular investment. *Clark* v. *Beers*, 61 Conn., 87, 89; *Mattocks* v. *Moulton*, 84 Me., 545; *Dickinson, Appellant*, 152 Mass., 184.

The referee finds that the only precaution taken by Washburn was to ask Bingham, who offered to sell him the securities, if they were perfectly safe. He made no specific inquiries of Bingham, and no inquiries of any one else. It does not appear that he had any personal knowledge of the securities on which he could base his own judgment. The burden was on him to prove such knowledge, and the referee does not find it; on the contrary, the finding that Washburn knew the notes were made by Barton and purported to be secured by mortgage of land in Indiana, and was not aware that the credit of the insurance company had been called in question, but made no inquiry of any one as to responsibility, value or credit,—is, in effect, a finding that Washburn had no personal knowledge which could justify his action. The fact that he was willing to risk his own money in the purchase of such securities from Bingham on his bald assertion that they were perfectly safe, and the knowledge that his neighbors, prudent or otherwise, invested their own money in the same way, did not justify him in so risking trust funds, without the use of any diligence in ascertaining the particular facts necessary to the exercise of that sound discretion which the law demanded of him.

The referee also finds that when Washburn received as conservator the estate of his ward, the funds in question

were invested in savings banks in this State believed to be safe and sound, and that without an order of the Court of Probate he changed this investment, and failed to prove any cause for such change. The powers, rights and duties of a conservator, are such only as are to be found in the statute. *Norton* v. *Strong*, 1 Conn., 65, 70. Formerly the statute authorized a conservator "to take care of and oversee such idiots, etc., . . . and their estates for their support"; and it was held that a conservator had not power to lease the real estate of his ward; that it was the intent of the legislature "to procure an income from the use of the idiot's estate, by its superintendency and oversight; and this trust was to be committed exclusively to the conservator. His power was wholly confined within these boundaries." *Treat* v. *Peck*, 5 Conn., 280, 285. In subsequent Revisions this language has been changed, and as now expressed the conservator "shall manage all such estate and apply so much of the net income thereof as may be required, and, if necessary, any part of the principal of the estate, to support him and his family, and to pay his debts, and may sue for and collect all debts due to him." General Statutes, § 478. In *Palmer* v. *Cheseboro*, 55 Conn., 114, 115, it was held that the words "to manage" such "estate," enlarged the power given by the words "to take care of and oversee" such estate, sufficiently to authorize the conservator to lease his ward's land for a reasonable time. The statute (§ 479), authorizes the Court of Probate on finding reasonable cause, to order a sale of the real estate of the ward; and makes it the duty of the conservator to invest "such part of the avails of the estate sold as may not be required for the immediate support of such incapable person or the payment of his debts, in other real estate, to be conveyed to such incapable person, or to invest the same as trust funds may be lawfully invested." A conservator may keep his ward's estate invested in the securities received by him, unless otherwise ordered by the Court of Probate, and be exempt from any liability by reason of depreciation of such securities. General Statutes, § 496.

We think the general rule of equity which warns a trustee not to sell without sufficient reason the trust fund received by him standing on proper security, applies with peculiar force to a conservator who receives the estate of his ward safely invested in a manner expressly authorized by statute. If under such circumstances, without an order of the Court of Probate, he makes a change of investment, the burden is on him, in an action on his bond, to prove a reasonable cause for the change; and unless he proves such cause, he may be held liable.

As the report of the referee shows that the defendant received as conservator the estate of his ward safely invested in a manner expressly authorized by statute, that he changed this investment without an order of the Court of Probate and without any cause, for one comparatively worthless, which was *prima facie* a questionable investment for trust funds, and that he exercised no diligence in ascertaining the facts he ought to know before making such investment, —the liability of the defendant in this action is the necessary legal conclusion from the facts found. And the good faith of the defendant, in such management of his ward's estate, cannot relieve him from this liability.

As to the rule of damages: The right of a *cestui que trust* to reject an unauthorized investment, is well settled. The plaintiff claims that right. The damages therefore should cover the amount withdrawn from the savings banks and invested in the Barton bonds, and a sum equal to the intervening dividends, *i. e.*, interest at the rate of four per cent, less any interest on the Barton bonds the defendant may have received and used for the benefit of his ward. The claim that interest should be computed with annual rests, cannot be sustained. There must be a gross breach of trust, to justify compounding interest. It is found that the defendant acted in good faith.

The evidence received subject to objection was plainly immaterial, if not irrelevant.

The report of the referee is incomplete in not finding the amount of damages, and the case should be recommitted in

order that such fact may be found, unless the parties shall agree upon the amount without a recommittal.

The Superior Court is advised: To recommit the case in order that the State Referee may find the amount of money drawn by Washburn from the savings banks and invested in the Barton bonds; the amount of interest thereon at four per cent from the date of such withdrawal; and the amount of interest on the Barton bonds received by Washburn and used for the benefit of his ward; unless these amounts shall be agreed upon by the parties. And upon these facts being established, either by the report of the referee or by the stipulation of the parties, to render judgment for the plaintiff for a sum equal to the money drawn by the defendant Washburn from the savings banks and invested in the Barton bonds, with interest at the rate of four per centum, less the amount of interest on the Barton bonds received by said Washburn and used for the benefit of his ward.

In this opinion the other judges concurred.

CENTRAL RAILWAY AND ELECTRIC COMPANY'S APPEAL.

*Third Judicial District, Bridgeport, October Term, 1895. ANDREWS, C. J., TORRANCE, BALDWIN, HAMERSLEY and GEORGE W. WHEELER, Js.

Under the provisions of the Street Railway Act of 1893 (Chap. 169), the only "modifications" which the municipal authorities can lawfully make in the plan presented by the street railway company, are such as legitimately affect one or more of the particulars which the statute requires to be specified in the plan. No change can properly be deemed a modal one, which deprives the plan of its essential qualities, or which imposes conditions wholly foreign.

Conditions which the municipal authorities have no power to impose, they cannot require a street railway company to accept and perform, as a condition of their approval of the plan presented.

A street railway company authorized by the General Assembly to extend its tracks in certain streets of a city, may be required by the municipal authorities to pay annually to the city a just and reasonable compen-

* Transferred from first judicial district.

sation for the increased expense of maintaining and repairing such streets, occasioned by the location and use of such tracks, the amount of which may in certain cases be measured by a fixed percentage of the company's gross receipts. But a city has no right to exact payments which are based on the increased expense to the city occasioned by the operation of the company's entire railway system, the greater portion of which is already in use, and which has been constructed in compliance with previous orders of the municipal authorities and upon conditions which it had formally accepted. If the payments demanded are computed upon the latter basis, a requirement that the company shall render annual reports of its gross receipts, cannot be justified.

The exaction of reasonable compensation by the city is not an exercise of the taxing or licensing power, but rather an equitable method of enabling the municipality to protect itself from a loss which would otherwise ensue from the location of the railway tracks in its streets.

Chapter 221 of the Public Acts of 1895, giving to the railroad commissioners the sole and exclusive jurisdiction in respect to fenders upon street railway cars, and repealing all inconsistent Acts, resolutions and by-laws, repealed § 23 of the revised charter of the city of New Britain which vested powers of a similar character in the municipal authorities.

The city authorities may properly require a street railway company to agree, as one of the conditions of the city's approval of its proposed extension, that its location upon a portion of one of the specified streets shall not be the occasion of the abandonment of its tracks already laid down upon another section of that street, and that the residents of that locality shall be given fair and suitable service with regular trips as often as once in twenty minutes.

Under § 3 of the Act of 1893, neither the municipal authorities, nor a judge of the Superior Court on appeal, can permit the statutory width of the traveled portion of the highway to be curtailed by the railway location. The jurisdiction of such a judge to grant such permission, is confined to an original proceeding brought before him for that purpose.

If the requirements demanded by the municipal authorities are within the range of "modifications" authorized by the statute, the question whether they are in fact "equitable" or not, is one for the determination of the judge, whose decision is "final and conclusive upon the parties."

The State, by its legislative department, can grant the right to a street railway company to lay its tracks in the city streets and use the same for an electric railway, without the consent of the municipality. Whether it could confer such franchise without providing for adequate compensation to the municipality, and to the owners of the fee in the soil, *quære*.

The appellant, under the Act of 1895 (Chap. 283), appealed from the action of the municipal authorities upon its plan of street railway extension, to a judge of the Superior Court, who confirmed the doings of the city; thereupon the appellant appealed to this court, where the appellee moved to erase the cause from the docket, on the ground that the

Act of 1895 made the decision of such judge "final and conclusive upon the parties." *Held*:—

1. That in view of the right of appeal expressly given by § 1137 of the General Statutes to a party aggrieved by any decision or ruling upon questions of law made by a judge in a matter within his jurisdiction, the Act of 1895 must be construed as making the order of the trial judge "final and conclusive" in respect to such matters only as the statute confided to his determination, and upon which the parties were duly heard; but that his action in matters not within his jurisdiction was *coram non judice*, and properly reviewable on appeal.
2. That the statutory power given the trial judge to make such orders as were by him deemed "equitable in the premises," did not confer unlimited jurisdiction. The extent of such jurisdiction and whether the orders made fall within it, are questions of law inherent in the judgment of the trial judge.

TORRANCE and HAMERSLEY, Js., *dissenting*.

[Argued October 23d, 1895—decided January 6th, 1896.]

APPEAL from an order and decision of the mayor and common council of the city of New Britain, upon the application of the appellant to extend its tracks through certain streets of the said city; taken to the *Hon. Augustus H. Fenn*, a judge of the Superior Court, who, after a full hearing, approved and confirmed the order and decision of the municipal authorities; and appeal by the appellant to this court for alleged errors in the rulings of said judge.

In this court the appellee filed a motion to erase the cause from the docket, upon the ground that no appeal lay from the decision of a judge of the Superior Court in cases of this character. By agreement of the parties and leave of the court, the motion and appeal were heard together. *Judgment affirmed in part, and in part erroneous; cause remanded to be proceeded with in accordance with opinion.*

The order approved the plan submitted with the application, subject to, and as modified by, the following conditions: (1) that all work done and materials used must be satisfactory to the street committee of the common council; (2) that whenever the tracks were so laid as to change the grade of the street, the company must bring the street to the proper grade, to the satisfaction of the same committee; (3) that before any work was begun, or the approval or "permit" should take effect, the company should execute

an agreement with the city to pay it, on the first day of March following the close of the third year after the additional tracks were laid, one per cent of its gross receipts for that year, and annually thereafter, in like manner, two per cent of such receipts for the year next preceding such payment, so long as it should use any of the streets of the city for railway purposes; and to save the city harmless, during said period, from all loss or damage, including that occasioned by electric currents to underground pipes, which the city might suffer by reason of the operation of the railway in any of its streets; and to equip its cars, within one year, with fenders satisfactory to the street committee, and change them for other fenders from time to time as improvements in the construction of fenders might seem to the committee to require, and maintain at all times fenders satisfactory to said committee, and for any omission so to do to pay the city ten dollars each week for each car in service which was not so equipped; (4) that "the permission" granted, should become void if the extension were not completed within twelve months; (5) that the directors of the company should report under oath, annually, after the close of the third year following the completion of the extension, the amount of its gross receipts for fares within the city limits, during the year preceding, and pay the precentages required by the agreement; (6) that the location of all poles, wires, and fixtures should be changed at any time by the company to such places as the street committee might determine, on sixty days' notice from them in writing; (7) that the company should within sixty days deliver to the mayor "an acceptance of this permit, under the conditions herein set forth;" and (8) that the existing tracks "from Chestnut street through South Stanley street to Pleasant street, and through Pleasant street to Fairview, shall continue to be operated so long as the said company shall have rights in any city streets, and that fair and suitable service in accordance with an established time-card shall be given to the residents of that section, and that such time-card shall provide for the running of cars at least once every twenty minutes."

George E. Terry and *Frank L. Hungerford*, with whom were *John W. Alling* and *George D. Watrous*, for the appellant (plaintiff).

The language "final and conclusive" in the Act of 1895, means final and conclusive in the usual and ordinary sense; that is to say, that the judgment referred to shall finally settle and set at rest the matters litigated, subject only to the contingency that proper rules and principles of law have been applied to the subject-matter of the controversy. These words are not aimed at § 1137 of the General Statutes, but at the rights of the contending parties under chapter 169 of the Public Acts of 1893. It should require clear and unambiguous language to deprive this court of jurisdiction to review pure questions of law. *Styles* v. *Tyler*, 64 Conn., 454; *People* v. *Board of Supervisors*, 103 N. Y., 547; 23 Amer. & Eng. Ency. of Law, 477, 478; *People* v. *Durick*, 20 Cal., 24. Manifestly the orders of the court or judge must be within the scope of the power conferred by the Acts of 1893 and 1895. If they are made pursuant to the authority conferred by those Acts, there may be an exercise of judicial discretion; but if they are wholly unauthorized, they are not only illegal, but are inequitable also within the meaning of the law. *Ex parte Willcocks*, 7 Cowen, 402.

The conditions imposed by the mayor and common council, and the ratification and approval thereof by the appellate court, were wholly unauthorized by law. The three streets referred to in the plan presented, are streets in which the appellant had already been authorized to lay additional tracks by the General Assembly. The only questions left for the city authorities to pass upon, were questions of detail of construction, as pointed out in § 2 of the Act of 1893. That the legislature may authorize the use of streets for street railway purposes without the consent of the municipal authorities, is fully settled. 1 Dillon on Municipal Corporations, 4th Ed., § 71; Booth's Street Railway Law, § 13; Lewis, Eminent Domain, § 125.

The Acts of 1893 and 1895 are not unconstitutional and void for the reason that they authorize the taking of the prop-

erty of the city without just compensation. Booth's Street Ry. Law, § 83. *Williams* v. *City Electric Street Railway*, 41 Fed. Rep., 556; *Halsey* v. *Street Railway Co.*, 47 N. J. Ch., 380; *Taggart* v. *Newport St. Ry. Co.*, 16 R. I., 668; *Lockhart et al.* v. *Craig St. Ry. Co. et al.*, 139 Pa. St., 419; *West Jersey Ry. Co.* v. *Camden-Gloucester Ry. Co.*, 52 N. J. Eq., 31; *Cumberland Tel. Co.* v. *Railroad Co.*, 93 Tenn., 492; *Patterson Ry. Co.* v. *Grundy*, 57 N. J. Ch., 213; *Green* v. *City and Suburban Ry. Co.*, 78 Md., 294: *Chicago B. & T. R. Co.* v. *West Chicago St. Ry. Co.*, 40 North Eastern, 1008; *Chicago, etc., Terminal Ry. Co.* v. *Whitney H. & E. St. Ry. Co.*, 38 N. E., 604; *Rafferty* v. *Central Traction Co.*, 23 Atl. Rep., 884; *Limburger* v. *San Antonio Rapid Transit St. Ry. Co.*, 30 S. W. Rep., 533; *Attorney-General* v. *Metropolitan Ry. Co.*, 125 Mass., 515; *Elliot* v. *Fair Haven & Westville Ry. Co.*, 32 Conn., 579; *People* v. *Kerr*, 27 N. Y., 188; *Mahady* v. *Bushwick Ry. Co.*, 91 id., 148; *Story* v. *Elevated Ry. Co.*, 90 id., 129; *Detroit St. Ry. Co.* v. *Mills*, 48 North Western Rep., 1007; *Briggs* v. *Lewiston*, 79 Me., 361; *Harrisburg City Pass. Ry. Co.* v. *Harrisburg*, 24 Atl. Rep., 56; Crosswell on Electricity, § 105 *et seq.* and cases cited. The grant of the right to use electricity as a motive power, coupled with certain conditions, and the performance of those conditions on the part of the railway company, constituted a contract between it and the city, which cannot now be impaired by the imposition of a new condition affecting the system already constructed and in operation before the present extension was contemplated. Booth's Street Railway Law, § 29; 22 Cook on Corporations, § 92; *City of New York* v. *Third Ave. Ry. Co.*, 32 N. Y., 42; *New York* v. *Second Ave. Ry. Co.*, ibid., 261.

The imposition of the condition respecting fenders was objectionable and illegal, because by chapter 221 of the Pub. Acts of 1895, approved June 26, 1895, it was provided that the railroad commissioners should have sole and exclusive jurisdiction with respect to ordering fenders upon street railway cars; and all Acts and parts of Acts, resolutions, and by-laws inconsistent with said Act, were thereby repealed.

William F. Henney and *Henry C. Gussman*, for the appellee (defendant).

The motion to erase should be allowed. The Act under which the proceedings were had, not only fails to provide for an appeal, but expressly forbids it. Public Acts, 1895, § 1, p. 631. The statute of 1895 under which the proceedings below were had, is the exercise of governmental functions in the regulation of electric railway traffic; its methods must, in the nature of things, be in some degree summary; the public as well as the private interests demand that the matter involved should be disposed of with reasonable dispatch. The Street Railway Act of 1895 is invalid. The city's interest in the streets is property; it cannot be taken without compensation. *Stevenson's Appeal*, 6 Atl. Rep., 266 (Pa.); 2 Foote & Everett on Incor. Companies, 2201, 2202; Tiedeman on Municipal Corporations, 306 (*a*); *Brooklyn S. T. Co.* v. *Brooklyn*, 78 N. Y., 524; *Healey* v. *New Haven*, 47 Conn., 314; *Taylor v. Public Hall Co.*, 35 id., 431.

A street railway chartered to carry persons and property, is a new servitude upon the street, for which compensation must be made. Elliott, Roads and Streets, 557; Booth, Street Railway Law, 2, note 2; *Williams* v. *City Electric St. Ry. Co.*, 41 Fed. Rep., 556; *Elliott* v. *Fair Haven R. R. Co.*, 32 Conn., 587. The conditions complained of are lawful. The exaction of compensation as one of the conditions for the grant, is perfectly lawful. *Pacific R. R. Co.* v. *Leavenworth City*, 1 Dill., 393; *Allerton* v. *Chicago*, 6 Fed. Rep., 555; *Citizens H. Railway Co.* v. *Belleville*, 47 Ill. App., 388; *St. L. Van and Terre Haute R. R. v. Capps*, 72 Ill., 188; *Union Depot R. R.* v. *Southern R. R.*, 4 Am. R. R. and Corporation Cases, 622; *Sioux City St. Ry. Co.* v. *Sioux City*, 138 U. S., 98; *Chicago M. G. L. & F. Co.* v. *Town of Lake*, 140 Ill., 42; *Abraham* v. *Myers*, 29 Abb. N. C., 384–396; *Allegheny* v. *Milville, Ætna & Sharpsburg St. Ry. Co.*, 159 Pa., 411. The city may exact a bonus for the *use of streets*. Booth, Street Railway Law, § 284, and note, also §§ 285, 286, 287; Elliott on Roads and Streets, 562, and authorities

cited. The city has a right to exact a license fee under its power of police regulation. Booth, Street Railway Law, §§ 280–283; *Allerton* v. *Chicago*, 6 Fed. Rep., 555. The condition as to fenders is sustained by a private act amending the charter of New Britain and conferring jurisdiction in such matters upon the mayor and common council. Special Laws, 1895, p. 359, § 23. The conditions impair the obligation of no contract. Each new grant is upon new terms and conditions. The city government may change any prior order. This is a new permit over unoccupied territory. The percentage of gross receipts is merely the measure of the amount of indemnity for additional wear and tear of streets. The conditions imposed are reasonable. The condition which is objectionable to the company is that which requires payment of a percentage of the gross receipts. The court finds this requirement is but reasonable compensation for the continuing damage to the city streets. The condition which relates to the continued operation of the railway through South Stanley and Pleasant streets, is certainly reasonable, and if reasonable, is lawful. *Citizens H. R. R.* v. *City of Belleville*, 47 Ill. App., 388; *Abraham* v. *Myers*, 29 Abb. N. C. 396.

BALDWIN, J. The petitioner's appeal to this court is founded upon § 1137 of the General Statutes. This provides that "when jurisdiction of any matter or proceeding is or shall be vested in a judge of the Superior Court, or in a judge of any Court of Common Pleas, or of the District Court, any party to such matter or proceeding who feels aggrieved by any of the decisions or rulings of such judge upon any questions of law arising therein may appeal from the final judgment of said judge in such matter or proceeding in the manner hereinbefore provided for an appeal from the judgments of said courts respectively, to the Supreme Court of Errors next to be held in the judicial district or county where the parties or any of them reside; but in cases of appeal from the appraisal of damages in laying out any street or in making any improvement or public work in any

city, village, or borough, upon paying to the person or persons entitled thereto damages appraised therefor, or upon depositing the same in the manner provided by law; and in cases where no damages shall be appraised, such city, village, or borough, may immediately proceed to lay out and open such street, or make and complete such improvement or public work, in the same manner as if no appeal had been taken; and in proceedings on writs of *habeas corpus*, the judge may, at his discretion, decline to order a stay of execution."

The Act of 1893 (Public Acts of 1893, p. 308), under which the proceedings which came before *Judge Fenn* were commenced, provides that whenever any street railway company has or shall be given the right to construct a railway or to lay additional tracks in any city, before it shall proceed to do so, it shall present to the mayor and court of common council a plan showing the highways or streets "in and through which it proposes to lay its tracks, the location of the same as to grade and to the center line of said streets or highways, such change or changes, if any, as are proposed to be made in any street or highway, the kind and quality of track to be used and the method of laying the same, the motive power to be used in propelling its cars, and the method and manner of applying the same." Thereupon the mayor and court of common council, after giving public notice, shall hear all persons interested, and may then "accept and adopt such plan, or make such modifications therein, as to them shall seem proper," and no such company shall construct such railway or lay any additional tracks except in accordance with a plan so approved.

From any order or decision of a mayor and common council made under the Act of 1893, an Act passed in 1895 (Public Acts of 1895, p. 630) gives the company a right of appeal "to the Superior Court, or any judge thereof;" and it is further provided that "said court or judge shall make such orders in reference to said matters appealed from as may by it or him be deemed equitable in the premises, and the decision of said court or judge shall be final and conclu-

sive upon the parties;" and that such appeals "shall have precedence of all other civil actions in respect to the order of trial, except" those brought by or on behalf of the State, respecting matters of a public nature.

The city of New Britain has filed in this court a motion to erase the appeal from the docket, mainly on the ground that the Act of 1895 expressly made the order of *Judge Fenn* "final and conclusive upon the parties."

The final judgment of every legal tribunal is conclusive upon the parties, so far as it is within its jurisdiction, and so long as it remains in force and unreversed. No judgment, order or decision pronounced by one assuming to act under authority of law, but who is in truth acting outside of the jurisdiction which the law has given him, can possess any validity. The government of this State is one of laws, and not of men. This principle is enforced throughout our system of remedial justice by the perpetual establishment by the people, when they framed the Constitution, of a Supreme Court of Errors, and by the statutes which give to it appellate jurisdiction as to errors of law over every other court, without regard to the character or amount of the matter in controversy, and extending even to criminal prosecutions where the law has been misapplied in favor of the accused.

A judge of the Superior Court is not a court, and statutes granting appeals from final judgments of courts have no application to his decisions, in matters committed to his determination as such judge. However erroneous such decisions might be, there was no direct mode of review prior to 1864, and to remedy this defect of justice, General Statutes, § 1137, was then enacted. *Trinity College* v. *Hartford*, 32 Conn., 452, 466, note; *Clapp* v. *Hartford*, 35 id., 66, 220. Its terms plainly embrace a proceeding like the present, and they must govern it, unless it be regarded as excepted from their operation by the provision in the Act of 1895 as to the "final and conclusive" effect of the order of the court or judge. In our opinion these statutes are not inconsistent with each other. The order of *Judge Fenn* was final and conclusive upon the parties as respects all matters which the law con-

fided to his determination, and upon which they were duly heard. No injunction, for instance, would lie to forbid, as inequitable, what he, within those limits, had decided to be "equitable in the premises." But if he exceeded his jurisdiction in any particular, whatever he thus did beyond the authority given him by law, was *coram non judice*, and the proper subject of review by appeal. *Beard's Appeal from County Commissioners*, 64 Conn., 526, 534; *Hopson's Appeal from County Commissioners*, 65 id., 140; *Lawton* v. *Commissioners of Highways*, 2 Caines, 179, 181; *People* v. *Wilson*, 119 N. Y., 515, 23 No. East. Rep., 1064; *Ex parte Bradlaugh*, L. R. 3 Q. B. Div., 509.

Any other construction of the Act of 1895 would render possible unseemly conflicts between the different tribunals of the commonwealth. For a defect of jurisdiction in an order made by the Superior Court or a judge of that court, in a proceeding under its provisions, it is clear that there must be some judicial remedy, and that if any, other than by way of appeal, exists, the proper place in which to seek it would be the Superior Court, itself. Could an injunction be sought there from one judge against the enforcement of the order of another? Could he be asked as a chancellor to enjoin the execution of an order made by himself, when sitting as an appellate tribunal to revise the proceedings of the authorities of a municipality? We cannot impute to the General Assembly an intention to compel or permit a resort to remedies of this description, in the face of a statute giving in plain terms a right of direct appeal to this court, as to which the only claim made by the appellees is that, so far as it affects the case in hand, it has been repealed by implication.

A remedy equivalent to such an appeal is afforded under the practice existing in many of our sister States by the common law writ of *certiorari*. It issues to revise the proceedings of municipal corporations, and, when issued, the controversy between the parties in interest becomes one of a judicial nature. 2 Dillon on Municipal Corporations, §§ 925–928. The fact that this writ has never been used in this State is an additional reason why statutes granting

an appeal from such proceedings should not be too narrowly construed. *Williams* v. *Hartford & New Haven R. R. Co.*, 13 Conn., 110, 118; *Grelle* v. *Pinney*, 62 id., 478, 488.

The right of appeal given by General Statutes, § 1137, cannot be treated as repealed by implication, as respects such a proceeding as that now before us, unless the right of appeal for error in law from all judgments of the Superior Court, given by General Statutes, § 1129, has been similarly restricted. To hold this would be to reverse the rule that repeals by implication are not favored and will never be presumed, where both the new and the old statute may well stand together.

The appellee also contends that it was not necessary for *Judge Fenn* to decide any questions of law in coming to the conclusion stated in his order; as that, under the statute, must have been determined by his opinion that the conditions imposed by the mayor and common council were "equitable in the premises." Nothing can be deemed equitable, within the meaning of a statute conferring jurisdiction to grant equitable relief, which does not come within the limits of the jurisdiction granted; and what those limits are is a question of law inherent in the judgment rendered.

The motion to erase is therefore denied.

The finding shows that the railway company, prior to June 5th, 1895, had constructed, under legislative authority, and agreeably to conditions imposed by the mayor and common council of New Britain (to certain of which, affecting one of its lines, it had agreed in writing, under its corporate seal), a railway in the principal streets of that city, and extending in one direction to Plainville, and in another to Berlin, all of which was in operation. On that day, having been given by the General Assembly power to lay additional tracks in some thirty other streets, including three known as Chestnut, East, and Jubilee streets, it presented to the mayor and common council a plan, showing the particulars required by § 2 of chapter 169 of the Public Acts of 1893. After due hearing, the mayor and common council approved the plan, subject to and as modified by certain conditions. From

this order of conditional approval the company took the appeal to *Judge Fenn* which is now before us for review, and he has found that the conditions imposed were "just, reasonable, legal, and equitable," confirmed the order, and made it in all parts his own.

The first reason of appeal is that there was error in holding that the company's right to lay tracks on the streets in question, and to use such tracks for the purpose of an electric railway, was dependent upon the consent of the city authorities. No such ruling was made by the judge of the Superior Court.

That franchise the company received by the express terms of its charter. The State, acting through its legislative department, can grant such a right, without consulting the municipality; and in the present instance the grant was so made. *New York, New Haven & Hartford R. R. Co.* v. *Bridgeport Traction Co.*, 65 Conn., 410, 430, 432. The finding states that a large portion of these streets was conveyed to the city for public use, and that the fee in each belongs to the adjoining proprietors. Whether the General Assembly could confer this franchise without providing adequate compensation to the municipality and to the owners of the fee in the soil, is a question not raised by this appeal, and upon which we express no opinion.

Before the company could proceed to lay tracks in any of these streets, it was bound to present a plan of location and construction to the city authorities for their approval, and they were authorized by the Street Railway Act of 1893, to "accept and adopt such plan, or make such modifications therein as to them shall seem proper." (Public Acts of 1893, p. 308, § 2). They were also given, by § 3 of this Act, exclusive direction over the placing, material, quality, and finish of any street railway tracks, wires, fixtures, or structures, including their relocation or removal, and of changes in grade for the purpose of any public improvement. All such orders are to be executed at the expense of the company, except changes of grade made after the location of its tracks, in which case the municipality is to pay the expenses of

regrading, and the company that of readjusting the tracks to the new grade. Section 6 of the Act requires every company to keep the street in repair between its tracks and for a space of two feet on each side of them, to the satisfaction of the municipal authorities; but the latter cannot order it to make use of any better material for such parts of the street, except for the space of one foot outside of each rail, than is used for the rest of the street, unless this "was required in the order permitting the original location and layout of such railway on such street." By § 11, any orders made under § 2 or § 3 may be revised and changed by the municipal authorities, subject to a right of appeal, in favor of the company, to the Superior Court or a judge thereof, in case the execution of the original order had been already begun.

In view of these various provisions, the "modifications" of a plan of location and construction authorized by § 2, must be deemed to be limited to those legitimately affecting one or more of the particulars which the statute requires to be specified in the plan.

To modify, is ordinarily to change the mode in which a subject is dealt with, rather than to change the subject itself. No change can properly be deemed a modal one which deprives that which is changed of any of its essential qualities, or adds anything which is wholly foreign.

The plan which the law required the company to submit for the approval of the city, was to specify the streets over which the tracks were to be laid, the particular location and grade of the tracks, their kind and quality and how they were to be laid, the changes, if any, to be made in the street, the motive power to be used, and the method and manner of applying it. The location of a railway upon a highway is a different thing from the right to make such a location, and presupposes a prior grant of that right. The location definitely appropriates a particular portion of the highway for railroad use, establishes the grade at which the tracks are to be laid upon it, and may make extensive changes in the course, character, or use of the remaining portions. As to any of these matters the city had a power of modification.

It had like power as to the kind and quality of tracks, the method of laying them, the motive power to be used, and the method and manner of its application. It would be, for instance, merely a modal change to vary a plan for applying electric power by means of an overhead trolley, by requiring the substitution of an underground circuit, or of a storage battery upon the car. The essential feature of the plan would be the use of electric power. The method and manner of its application, whether by rows of high poles, with a network of connecting wires, or in ways that affect the ordinary uses of the highway less directly, are left to the regulation of the local authorities.

So far as the conditions imposed in the order of the mayor and common council were within their authority as thus defined, they were valid, and no farther, except as they may be justified by §§ 3, 6 and 11 of the statute in question, or other provisions of law or charter. These latter sections may be the basis of separate orders, after the approval of a plan of location and construction; but they may also support the introduction of appropriate conditions to limit such an approval.

The rule by which the legislature intended that the exercise of the authority thus granted should be governed, is indicated by the terms of § 1 of the Act of 1895, under which the appeal to *Judge Fenn* was taken. It is the rule of equity. If a plan submitted under the Act of 1893 should not be acted upon within sixty days, and so, under the second section of that Act, may be deemed in law to be wholly rejected, this first section of the Act of 1895 gives the company a right of appeal, and provides that the court or judge, upon such an appeal, "shall have the same powers with reference to said plan and the acceptance or modification thereof that said municipal authorities would have had" under the provisions of the Act of 1893, "and may make all such orders with reference thereto as may be deemed equitable." An appeal from an acceptance of the plan, with modifications, is evidently meant to place the appellate tribunal in the same position. It fulfills, as respects the plan in question, the func-

tions of the mayor and common council of the city. It has the discretion with which they were originally invested. *Town of Fairfield's Appeal from Railroad Commissioners*, 57 Conn., 167. The provision that it may make such orders in reference to the matters appealed from as may "be deemed equitable in the premises," necessarily implies that if it appears that the original order of the municipal authorities was equitable in the premises, it should be affirmed.

The basis of the judgment appealed from, was not that the existence of a right to lay tracks on the streets in question could be regarded as dependent on the consent of the municipal authorities, but that the exercise of the right in a particular way was so dependent.

Of the eight conditions imposed by the city, the validity of only four is directly challenged by the reasons of appeal. These are those relating to the annual payment of a percentage of the entire gross receipts of the company, the use of fenders satisfactory to the street committee, and the continued operation of cars on the tracks already laid through South Stanley and Pleasant streets.

The first of these conditions was expressed as follows: "Before this approval shall take effect, and before any work shall be begun under this permit, the said Central Railway & Electric Company shall execute and deliver to the mayor an agreement with the city of New Britain to pay into the treasury of said city the sum of one per cent. (1%) of its gross receipts for the third year after the completion of said lines to the points before mentioned, and two per cent. (2%) for the fourth and each following year, so long as the company or its successors shall use the public streets of this city, or any of them, for street railway purposes. The payments above provided for shall be made annually on or before the first day of March in each year. The said agreement shall also contain an undertaking on the part of the railway company to save the city harmless from all loss and damage by reason of the use of electrical currents for the purposes of its railway, and also a clause relating to fenders, as herein set forth."

It is found by *Judge Fenn* that the first payment thus required would amount to $285, and the subsequent annual payments to $570, each; and that the laying of the additional tracks, "and the operation of an electric road throughout the city, will occasion continuously large expenses on the part of the city for repairs to the roadbed and for the maintenance of the streets through which the railway company operates in a reasonably safe and proper condition, and that the percentage of its receipts required from the railroad company by the city is only a just and equitable compensation for the expenses thus to be incurred."

The extension of the company's railway over new streets necessarily involved changes in the mode of their use by the public, provision for which might fairly be deemed germane to that part of the plan presented which the statute required to state "such change or changes, if any, as are proposed to be made in any street or highway." A change of use may be as important a subject of consideration as a change of grade or of line. In deciding whether to approve a railway location, all the natural consequences of the construction and operation of the road upon it must be taken into account. An electric railway in a city street must throw the main course of ordinary travel upon those parts of the highway which are not covered by its tracks. Such parts, being thus subjected to greater wear, and exposed to danger from ruts or broken pavements, must often be improved or reconstructed, in order to be adequate to support the increase of burden, and this increase will be largely determined by the amount of business for which the tracks are used, and so, to a great degree proportioned to the gross receipts which such business yields. The finding shows that the company is now running passenger trains, consisting of a motor car with one or two trail cars attached, upon those streets in which its tracks are laid, and that the proposed extension, if operated in the same manner, would be a serious inconvenience to public travel. It shows also that the plan calls for an excavation to a depth of not less than six feet, for a considerable distance on that part of Chestnut street upon which the

new tracks were to be laid; and that this would compel the city to build a retaining wall and put up a guard rail to protect travel.

The city, as has been stated, held title by conveyance to an easement in a large portion of these three streets, in trust for the public use. The common council had power by charter (§ 23) to regulate the location of any public work upon highways, and was charged with the duty of constructing, grading and repairing all the city streets. It was thus made in respect to them the general guardian of the public interests, and was protecting these, in protecting itself. *Stamford* v. *Stamford Horse R. R. Co.*, 56 Conn., 381, 395.

As to the reparation and maintenance of so much of any highway as is embraced within their rails, and a further space of two feet on each side of them, the liability of street railway companies is definitely regulated by § 6 of the Act of 1893; but this does not affect the power of the municipal authorities to make suitable provision, under the other sections of the statute, and by virtue of the general control over the city streets with which they are invested by charter, against loss to themselves, or inconvenience to the public, from changes affecting other parts of the highway, which are incident to the location and use of the tracks.

Municipal corporations possess not only the powers expressly granted, and those which may be necessarily implied in or incident to these, but also all which are indispensable to the attainment and maintenance of their declared objects and purposes. One of the main objects and purposes of our towns and cities generally, and of the city of New Britain in particular (charter, § 23), is the maintenance of all highways within their territorial limits in safe and proper condition, and the provision of means for the payment of the expenses thus occasioned. It is indispensable to the attainment of this object that all unlawful encroachments or erections upon highways should be restrained, and all lawful changes in them carefully regulated in the public interest. In the case of steam railroads the legislature has committed this regulative power over their location to the railroad

commissioners. In the case of street railways, the Act of 1893, coupled with their ordinary powers over highways, gives it, though in somewhat different terms, to the municipalities whose interests are directly affected; and gives it in order that they may protect those interests fully, promptly, and effectually.

In the case before us, however, the terms of the city order, read in connection with the finding, leave it, to say the least, very questionable whether the annual payments were not required as a compensation for annual expenses that would be chargeable to the city in consequence of the operation of the entire railway system of the company, the greater part of which was already in use, and had been constructed in compliance with previous orders of the city, imposing conditions which the company had accepted by a formal covenant. The imposition of any such condition in this proceeding would be beyond the authority vested in the mayor and common council. They could guard against an increase of municipal burdens from the changes in three more of the city streets which it was proposed to make; but an increase already occasioned by the location in other streets was a matter entirely foreign to the plan presented for their consideration, and which they had no right to make the subject of any new condition or agreement.

It is not impossible that the city authorities acted upon the view that the mileage of the tracks that it was planned to lay in Chestnut, East, and Jubilee streets, would bear such a proportion to the total mileage of the company's railway system, that the specified percentages of the entire gross receipts from the operation of that system (measuring as they must, to a large extent, the business done upon it, from time to time), would be only a fair equivalent for the new expenses to which the city would be annually subjected, in the maintenance and reparation of these three streets, when the railway should be in use upon them. If it were clear that the order meant this, or if a fixed sum had been assessed as such an equivalent, we should think there was no error. The most natural construction of the finding, however, would

seem to be that which makes it uphold the imposition of this condition on the ground that it would provide a just compensation for such expenses as the city might thereafter incur for the maintenance of all the streets through which cars are run. On such a basis, it cannot be vindicated; and if the finding means anything else, it is not expressed with sufficient certainty to support the judgment. Upon this point, therefore, there is error.

The question whether the city might hereafter, by some other appropriate proceeding, compel the company to pay all damages to the city that may arise in the future from the continued operation of its road in all or any of the city streets, is not before us, upon this appeal, and as to that we express no opinion.

Another undertaking demanded of the company was to keep its cars at all times equipped with such fenders as the street committee might approve, under a prescribed penalty. The revised city charter (Special Acts of 1895, p. 359, § 23), which went into effect June 5th, 1895, gave the mayor, aldermen and councilmen, constituting a body known as the common council of the city, power to make such orders as it might see fit, to provide for the placing and maintenance of fenders on electric cars. On June 26th, 1895, a Public Act was passed and went into immediate effect, authorizing the railroad commissioners, whenever they should deem it necessary for public safety that fenders should be placed upon the cars operated upon any street railway, to order them, after due notice to the company operating the cars and hearing, and on like notice and hearing to "modify or revoke any orders made in reference thereto;" giving them "sole and exclusive jurisdiction with respect to ordering such fenders upon any street railway car or cars;" and repealing all inconsistent acts, resolutions and by-laws. The express provision for the instant repeal of all resolutions and by-laws inconsistent with this grant of jurisdiction to the railroad commissioners, was manifestly intended to rescind all inconsistent provisions in any municipal charters or by-laws which were then in force. The field was to be swept clear for the

selection by a board of State officers of the style of fender best adapted to secure public safety, in the case of each particular road on which that board might deem their use to be necessary. *Cullen* v. *New York, New Haven & Hartford R. R. Co.*, 66 Conn., 211, 223.

The condition in question was imposed in July, 1895, and required the appellant to stipulate to keep its cars at all times equipped with such fenders as should be satisfactory to the street committee. Had it done so, and after its cars were so equipped, had the railroad commissioners ordered the substitution of fenders of a different style, the company would have been bound in obedience to the law to violate its contract. Should the street committee of the common council require one style of fender, and the selectmen of Plainville or of Berlin, into each of which towns the company's railways extend, require another, it would be necessary either to change cars or to stop and shift the fenders on every trip, upon crossing the city line. It was to prevent the possibility of such conflicts of obligation, that the jurisdiction of the railroad commissioners over this subject was made sole and exclusive. Any existing provisions of charters or by-laws to the contrary were repealed: any future municipal legislation to the contrary was forbidden.

The city authorities might properly have qualified their approval of the plan by making it a condition precedent that the company should not commence the operation of its road in the streets in question until the railroad commissioners, upon its application, or otherwise, had designated a suitable fender to be placed upon its cars, and their order had been complied with. This would have merely guarded against danger to the public during such interval as might else chance to elapse before the attention of the railroad commissioners was called to the new condition of things by which it was occasioned. The course adopted, however, was substantially an attempt to substitute the discretion of the street committee for that of the railroad commissioners, and there was error in affirming that part of the order of the mayor

and common council. *In re Kings County Elevated R. R. Co.*, 105 N. Y., 97, 13 Northeastern Rep., 18.

The fifth condition, which required an annual report of the company's entire gross receipts, could only be supported in connection with the third condition, already considered, and upon the state of facts presented by the finding both must fall together; although each might have been sustained, had it appeared from the finding to have been adopted as a means of providing a suitable compensation for any increase of municipal burdens resulting from the execution of the company's plan.

The seventh condition calls on the company for a written acceptance of the "permit," and all its provisions. In respect to this, as well as to the requirement of a written agreement to perform the various conditions, there was error in upholding the action of the city authorities; not because there was any objection to exacting written proof of the assent of the company to any proper modifications of the plan, but because some of the modifications which were made in this instance were not proper ones, and compliance with this condition would have waived or prejudiced its right to object to these thereafter.

Whether the eighth condition was a proper modification of the plan is a question not free from difficulty. The plan contemplated a location of new tracks on Chestnut street. This condition provided that such a location should not be the occasion of the abandonment of tracks already laid from Chestnut street to Fairview street; but that those residing in that part of the city should be given a fair and suitable service, according to an established time-card, with trips as often as once in every twenty minutes.

The general Street Railway Act of 1893 (Public Acts of 1893, p. 307) began by repealing provisions regulating the location of horse railway tracks, which had been upon the statute book since 1865. These had given the proper authorities in any city power to permit and regulate the use, within its limits, of any motive power, except steam, for drawing passenger cars on such railroads, and forbade the laying of

any horse railway tracks upon a city highway, except in such manner as they might prescribe, subject only to an appeal by the company to the Superior Court. The mode of procedure, which has been substituted for this, is described in terms the true meaning and effect of which are open to serious question; but as between these two corporations, one claiming that the powers granted by the Act of 1893 should be liberally interpreted, and the other contending for a stricter construction, we think the doubt as to how far they may extend, in cases such as that now before us, should be resolved in favor of the city. Municipal corporations are created solely for the public good, and are appropriate agencies to protect the public interests. Railway companies also serve the public; but they serve them with a view to the profit of their shareholders. *Bradley* v. *New York & New Haven R. R. Co.*, 21 Conn., 294, 306; *New York & New England R. R. Company's Appeal*, 58 id., 532, 540.

It is certainly possible that to discontinue or diminish the use of the tracks already laid from Chestnut street through South Stanley street to Pleasant street and thence through Pleasant street to Fairview street, might throw more travel upon the new tracks which it was proposed to lay on Chestnut street, between Stanley and East streets, and thus impose an additional burden upon that highway. A street may suffice to accommodate ordinary public travel, notwithstanding a street railway may run over it, if the cars pass at such intervals that the space between the rails can generally be used for the passage of other vehicles. If, however, one car or train follows another in rapid succession, that part of the road over which they run may be practically monopolized, while the rest of it may be inadequate to satisfy the public wants.

It has been the general policy of the State, throughout its history, to accord to its various municipal corporations a large authority in the regulation of their local affairs. The amount of travel for which any particular highway can be safely or conveniently used, can ordinarily be best determined by those to whom its establishment and maintenance

have been entrusted. *New Haven and Fairfield Counties* v. *Milford*, 64 Conn., 568, 574. All this is entitled to considerable weight in determining the true scope and meaning of the Act of 1893, and we think that under its provisions the condition in question can fairly be regarded as germane to the new mode in which Chestnut street was to be used.

The company had previously made a location through Chestnut street, as far as Stanley street, for the purpose, in part at least, as it must be presumed, of reaching Fairview street, through South Stanley and Pleasant streets. Its franchise to lay tracks upon Chestnut street conferred no absolute right to occupy the whole of it for that purpose. What particular part it was to use was to be determined ultimately by the city authorities, in passing upon such plans of location and construction as it might submit. It submitted a plan which located the railway through Chestnut street as far as Stanley street, and no farther. From that point the tracks diverged, to give a means of access to Fairview street. The approval of this plan by the city authorities must have been somewhat influenced by this fact. The principle that a power once exercised is exhausted, forbids a railway company which has once made a location of its road to change it, unless statutory provision is made to the contrary. The Street Railway Act of 1893, by § 3, gave the mayor and common council of every city exclusive direction over the relocating or removal of any tracks or railway fixtures permanently located on any of the city streets, and provided in § 5 that if any street railway company, after the location and construction of its railway in any such street, should cease to operate it, the mayor and common council might order its operation to be resumed, under pain of a forfeiture of all right under such location.

In view of these provisions of the statute, we think that the city authorities of New Britain had the right, in deciding whether or not to approve the extension of the appellant's line through a particular part of Chestnut street, to consider what effect such a location might have upon the use of its tracks already laid in another part of this street. The action

which they took may have been essential for the protection of interests dependent upon the maintenance of reasonable service through Pleasant street, over tracks for which those on Chestnut street served as a line of approach, and on account of the connection with which the location of those on Chestnut street had been originally approved.

It is enough to support the validity of this condition that it came within the class of those which might be imposed on the company, if the circumstances of the case made it equitable. Whether it was in fact equitable was a matter as to which the action of *Judge Fenn* was "final and conclusive" upon the parties.

The case does not call for a decision as to any of the points of constitutional law which the appeal seeks to raise. Such compensation as the city might exact as a condition of its approval of the location, it could properly claim to enable it to meet the new expenses to which it was found that it would be subjected by the construction and use of the additional tracks,—expenses which it would be obliged to meet, not as owner of the streets nor as a representative of individuals having a proprietary interest, but as the party bound by law to maintain them in safe and proper condition.

The provision for the payment of such compensation was not an exercise of a power to tax nor of a power to license and to charge a license fee.

The State had licensed the company to place its tracks in the streets in question, and the city had no function to discharge in that respect, except as to the mode in which the license should be executed. The State had also laid such taxes upon the company as it deemed proper, and had provided that these should "be in lieu of all other taxes on its franchises, funded and floating debt, and railroad property." General Statutes, § 3920; Public Acts of 1893, chapter 209, p. 362. But the State, in granting to the company the right to make a definite location, under specified conditions, upon the streets of New Britain, had required it to obtain from the mayor and common council what § 6 of the Act of 1893 designates as an "order permitting" the particular location

selected, and which might, with reference to certain points, permit it only on equitable terms. To ask for equitable compensation for injuries occasioned by the location is something very different from laying a tax, or charging a license fee. There can be no obligation to pay, unless the tracks are laid; and it will then be merely a contractual obligation, voluntarily assumed, to make good a loss that would otherwise ensue to the municipality from their location. *New Haven* v. *New Haven & Derby R. R. Co.*, 62 Conn., 252, 255. The city gains nothing. It simply seeks to protect itself from loss.

One of the provisions of the Street Railway Act (§ 3) is that except in case of bridges, terminals, curves, turn-outs and switches, "the wrought part of any street or highway made suitable for travel shall nowhere be of a width less than eight feet on each side of the street railway tracks, measuring from the outer rails where the said tracks are located in the center of the street or highway, and not less than twelve feet in width, measuring from the rail nearest the wrought part of the highway, where said street railway track or tracks are located on the side of the street or highway, unless permission is obtained from the Superior Court or a judge thereof." The finding of *Judge Fenn*, as to the proposed location in Chestnut, Jubilee and East streets, is that "the space between the tracks, as projected by the plan, and the outer edge of the traveled part of the highway over the greater part of these streets, would be less than the width prescribed by statute."

Error has not been assigned because of the affirmance by *Judge Fenn* of an order which approved, in these respects, a plan that transgressed the limitations of the statute, but we feel bound to notice it, as it is apparent on the record, and concerns a matter of great importance to the public interests.

No permission by municipal authorities, nor any order obtained from a judge of the Superior Court in the exercise of functions similar to theirs, upon an appeal, could make such a location anything but an unlawful incumbrance on the highway. The general powers over its streets which the city of New Britain possessed by its charter were controlled, in

this respect, by the express provisions of the Act of 1893; and no judge of the Superior Court could permit the width of the traveled parts of the streets to be curtailed, as the plan proposed, except upon an original proceeding brought before him for that purpose.

There is error in so much of the judgment appealed from as relates to the requirement of annual payments by the appellant of a percentage of its entire gross receipts, and of annual returns of the amount of such receipts; and to the use of fenders; and to the execution, within a certain period, of a written acceptance, of those, indiscriminately with other provisions, and of a written agreement to fulfill them; and to the approval of a location on any part of any street which leaves the wrought part of the highway of less than the width required by § 3 of the Street Railway Act of 1893; and the residue of said judgment is affirmed, and the cause remanded to *Judge Fenn* for further proceedings, in conformity with this opinion, including the limitation of a reasonable time, should he deem it proper, within which, in case the tracks are laid on Chestnut, Jubilee, and East streets, such conditions as he may impose shall be performed.

In this opinion ANDREWS, C. J., and GEORGE W. WHEELER, J., concurred.

TORRANCE, J. With respect to that branch of the case relating to the motion to erase, I dissent from the majority opinion and agree with JUDGE HAMERSLEY, substantially for the reasons stated by him in his dissenting opinion. With respect to the other branch of the case, while agreeing with the majority of the court that there was error, I dissent from some of the conclusions reached, and will here indicate the points of dissent and, very briefly, the reasons therefor.

Upon this part of the case the question is not what powers, with respect to the location, construction and operation of street railways, the local authorities ought to possess, but it is simply what powers of this kind do they possess. With the former question this court has nothing to do. From a

careful review of all the legislation on this subject up to date, it seems to me that whatever powers of this kind the local authorities now possess, are to be found, substantially, in chapter 169 of the Public Acts of 1893.

The first section of that Act repeals the then existing provisions of law in relation to this matter as embodied in §§ 3595, 3596 and 3597 of the General Statutes. The Act then goes on with great minuteness of detail to confer certain limited and defined powers upon the local authorities with respect to the location, construction and operation of street railways. These powers are quite extensive, they cover a wide variety of matters, and they are conferred expressly and specifically. The provisions of the Act, by § 17, operate as an amendment to the charters of all then existing street railways, and of all then existing municipal corporations; all such railway companies, and all municipal corporations thereafter chartered, are expressly made subject to its provisions; and all Acts or parts of Acts inconsistent with its provisions are repealed.

The legislature in 1893, thus in effect wiped out all prior legislation upon this matter and began anew to expressly and specifically confer certain powers upon the local authorities with respect to street railways. Under such circumstances I think the maxim, *expressio unius est exclusio alterius* is peculiarly applicable; and that the local authorities possess no powers over the location, construction and operation of street railways, other than those conferred upon them expressly, or by necessary implication, by the Act of 1893.

Under this view of the law, I think that neither the common council, nor the special appellate tribunal, had any power to impose upon the railway company the burden of paying anything whatever for the exercise of its right to lay additional tracks in the streets. Such a power is nowhere expressly conferred, nor does it exist by any necessary implication from the powers so conferred. On the contrary, I think that by a fair implication the existence of any such power is negatived.

In the first place, the legislature has expressly and specifi-

cally prescribed the share of the burden of maintaining the streets and highways which the railway company shall bear as a condition to the exercise of its chartered powers; and this I think fairly excludes the existence of a power in the local authorities to increase that burden. Surely, if the legislature had intended to give the local authorities power to impose a greater burden, it would have said so in plain words somewhere, and would not have left the matter to doubtful construction; it would have said so in such a way that the local authorities would have known their duty in the premises, without the aid of this court, and would thus have been able to perform that duty long before the year 1896.

In the second place, the power in question is essentially a power to tax the railway company for highway purposes; and as the State reserves to itself the power to tax the company, and has said that the taxes so paid shall be in lieu of all other taxes, this fairly negatives the existence of any such power in the common council. Nor do I agree that if such a power to tax existed in the local authorities, they could impose it in the way and manner in which the majority opinion says they may impose it. I dissent *in toto* from the conclusion of the majority of the court upon this point in the case.

I further think that neither the common council, nor the appellate tribunal, had any power to make it a condition precedent to the approval of the "plan" presented by the railway company, that it should not abandon any part of its tracks already laid, or should run its cars according to any time-table the council might see fit to impose; for this I think is the effect of the decision. Such a power is not expressly conferred, it does not exist by any fair implication from those conferred, and the fact that so many powers were expressly conferred by one and the same Act, without mentioning the one in question, affords a just ground for concluding that the legislature did not intend to confer that power.

Furthermore, this Act was intended to apply to inter-town

street railways, and it is not reasonable to suppose that the legislature intended to leave this matter to the conflicting decisions of the different local authorities, without other limitation than what they might deem to be equitable.

Lastly, I think the matters which the majority opinion treats as "modifications" of the "plan," were not modifications of the plan at all, within the meaning of section two of the Act in question. They were by the common council correctly called "conditions and limitations" precedent to the approval of the plan, and such they unquestionably are. The requirement that the company should pay the city a certain sum annually, or should agree not to abandon certain parts of its existing lines, or to run its cars upon other parts of its lines at least once every twenty minutes, or enter into a written contract with the city to do some or all of these things, are clearly not modifications of the "plan" presented to the common council under section two. The fact is, the "plan" presented was acceptable to the common council, and they approved of it, but this was done conditionally, and the conditions related to matters foreign to the plan and foreign to any modification of the plan.

If the powers already given to the local authorities in this matter are not sufficiently ample, the remedy is with the legislature and it can be easily applied. The courts can only administer the law as they find it.

Upon the points indicated, and for the reasons thus briefly stated, I dissent from the majority opinion.

HAMERSLEY, J. The Central Railway and Electric Company petitioned the common council of the city of New Britain for its acceptance and adoption of a plan submitted for the location of its tracks in three of the city streets, and for the construction of the tracks so located. The common council passed a series of votes by which the plan, substantially as submitted, was accepted and adopted, *provided* the company should first agree to perform certain conditions relating to compensation to the city for damages that would be occasioned by the layout and operation of the road, to the

protection of the traveling public by the use of fenders, and to furnishing a fair service on other portions of the company's road; and should deliver to the mayor within sixty days "an acceptance of this permit under the conditions herein set forth."

The form of these votes is irregular. They contain some slight modifications of the plan submitted, immaterial to the questions before the court, and apparently treat the conditions set forth as modifications of the plan. But the inaccuracy of form does not change the legal effect of the votes. They were not modifications of the plan, but were an offer to accept and adopt the plan as submitted, if the company within the time fixed would accept the permission for such location and plan of construction, under the conditions mentioned.

The company appealed from this action of the common council, to "Augustus H. Fenn, one of the judges of the Superior Court," pursuant to chapter 283 of the Public Acts of 1895. The appellate tribunal found that an approval of the action appealed from "is by me deemed equitable in the premises," and therefore ordered that said action be approved. The railroad company appealed to this court; and the city of New Britain has filed a motion that the case may be erased from the docket. The questions arising on the motion and on the appeal were argued at the same time.

I think the motion to erase should be granted. The question involves many difficulties, owing to the complex nature of the Act of 1893 "Concerning Street Railways" (Public Acts, p. 307), pursuant to which the application to the common council for the adoption of the layout was made; as well as to the singular character of the Act of 1895, under which the appeal to *Judge Fenn* was taken. The language of the latter Act is very broad, and there is a serious complication, in that the Act purports to authorize any appeal under it to be taken to the Superior Court, as well as to any judge thereof. We have held that any duty of a *quasi* judicial character performed by a judge of the Superior Court, not in the exercise of the power of that court but by virtue of a

special statutory authority for that purpose, is the act of a special statutory tribunal which is not a court, and does not possess the general attributes of a court. *Trinity College* v. *Hartford*, 32 Conn., 452, 466, note; *Clapp* v. *Hartford*, 35 Conn., 66, 73, ibid., 220, 222; *La Croix* v. *County Com'rs*, 50 Conn., 321, 325. It is evident that there are duties that may be performed by such a special tribunal which cannot be imposed on the Superior Court, and that there are judicial functions exclusively pertaining to a court that cannot be given to such tribunal.

The Act says that whenever the local authorities shall make, pass, or render any decision, denial, order, or direction with respect to any matters relating to street railways (which may be within the respective jurisdictions of such officers), any street railway company affected thereby may appeal. This may include an order in respect to the location of a pole in the highway, the painting of such pole, or the color of the paint used; it may include any order in the exercise or performance of municipal power or duty within a large portion of the field of municipal administration, and the exercise of these administrative functions is transferred at the request of any street railway company affected thereby, from the officers of the municipality to the Superior Court or any judge thereof. If the legislature should enact that whenever any public corporation, board, or officer, shall make any decision, denial, order, or direction relative to the official powers or duties belonging to them respectively, any person affected thereby may appeal to the Superior Court, and upon such appeal said court shall execute the powers of said officers in such manner as it shall deem equitable, —such law would differ in degree, but possibly not in kind, from the Act of 1895; and would seem to be in contravention of the express command of the Constitution: "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." Before exercising any jurisdiction in an

appeal taken under the Act of 1895, I should feel bound to carefully consider its construction and legal effect. But in the view I take, the exercise of such jurisdiction is not required in this case, and it is therefore sufficient to note the nature of the questions involved, without an expression of any opinion.

Assuming, then, for present purposes, that the railroad company could appeal to a judge of the Superior Court, is there an appeal from his decision to this court? It must be remembered that this special tribunal is not a court, and has none of the attributes of a court, except such as are conferred by statute. It is no more a court than if it consisted of the Governor or the Speaker of the House of Representatives. The ordinary way of correcting errors committed by such a tribunal is through the action of a Superior Court, from whose judgment appeal might be taken to this court. The statute authorizing the direct intervention of this court was intended to save circuity of procedure, and was doubtless largely induced by the consideration that the tribunal is in fact held by a judge of the Superior Court. But such procedure is unusual, is open to the objection that an appeal direct to this court from a tribunal that is not a court is in the nature of an original rather than an appellate proceeding, and should not be extended by implication. The powers of this special tribunal upon an appeal from the action of the common council of New Britain are to be found only in the language of the statute creating it a tribunal for that purpose. They are, to try such appeal and to "make such orders in reference to said matters appealed from as may by . . . . him be deemed equitable in the premises, and the decision of said . . . . judge shall be final and conclusive upon the parties;" and in case of an appeal like the present one, from the action of the common council under the provisions of § 2 of the Act of 1893, to exercise "the same powers with reference to said plan and the acceptance or modification thereof that said municipal authorities would have had under the provisions of said Act, and to make all such orders with reference thereto as may be deemed equit-

able." When we consider that the action of the common council appealed from, is clearly administrative action for the protection of the public and municipal interests; that such action cannot become binding without the assent of the railway company; that the appeal is not for the purpose of obtaining a final judgment on any judicial or *quasi* judicial controversy between parties, but simply for the purpose of asking the special tribunal to exercise the same administrative powers which the council has exercised or refused to exercise, and to make such orders in respect thereto as it may deem equitable; that the statute expressly declares that the decision as to what orders are equitable in the premises shall be final and conclusive on the parties;—we can entertain no doubt but that the action of the special tribunal in the exercise of the powers conferred by the statute, is the same in nature and as final in effect as similar action taken by the common council before the Act of 1895 was passed.

The Act of 1893 gave the common council administrative power; the Act of 1895 transferred, upon the application of the railroad company, the exercise of this power to a special tribunal; the nature and extent of the power is not changed by such transfer, and it was the clear intent of the legislature that the decision of the special tribunal, in the exercise of the power transferred to it as an appellate common council, should be final and conclusive between the parties. When the legislature, in General Statutes, § 58, provided that the decision of a Superior Court judge on a contested election case should be "conclusive," it expressly provided that the natural meaning of the word should not affect the right of appeal on questions of law. But the very nature of the power conferred in this case is such that questions of law which may be the subject of appeal, cannot arise. The action of the special tribunal, as well as of the common council within the jurisdiction conferred, is governed by a discretion which is not the subject of appeal.

The appellant feels the force of this consideration, and contends that if the orders of the judge "are made pursuant

to the authority conferred by those Acts, there may be an exercise of judicial discretion; but if they are wholly unauthorized, they are not only illegal but are inequitable also within the meaning of the law." If they are wholly unauthorized they are void; but it does not necessarily follow that an appeal lies to this court direct from such unauthorized action. While the judgment of a court which is void as *coram non judice*, may be the subject of appeal to this court, yet the void action or order of an administrative or *quasi* judicial body like the common council or special tribunal, cannot be the subject of appeal to this court, unless made appealable by statute. The only statutory provision is to be found in § 1137 of the General Statutes, which provides that when jurisdiction of any matter or proceeding is vested in a judge of the Superior Court, any party to such matter or proceeding who feels aggrieved by any of the decisions or rulings of such judge upon any question of law arising therein, may appeal from the final judgment of such judge in such matter or proceeding, in the manner provided for an appeal from the judgment of the Superior Court. This statute was enacted with special reference to the jurisdiction vested in such a special tribunal in respect to the condemnation of land, under a statute giving such tribunal for that purpose all the powers of the Superior Court, with power to render final judgment and issue execution. Its broad language covers the exercise of an analogous jurisdiction by such special tribunal authorized by statute, but it does not extend to the void acts of a person claiming to exercise the powers of a special tribunal which has not been created for that purpose; it does not extend to the action of such special tribunal, void or valid, which is not a final judgment in the exercise of jurisdiction of a proceeding in which a final judgment analogous to that of the Superior Court may be rendered. Whether or not it is competent for the legislature to vest in this court a general authority to directly intervene for the regulation of the action of administrative boards and officers, either by way of *certiorari* or appeal, the

novelty and impropriety of such intervention is evident, and it is not authorized by § 1137.

The action from which this appeal is taken is not in the legal sense a final judgment. The "order" cannot be enforced; the tribunal is not authorized to tax costs or to issue execution. It settles nothing. The common council passed votes that a particular location would be accepted and adopted if the company, within a certain time, would enter into an agreement to compensate the city for the losses involved in such a location. The special tribunal passed the same votes; it had the same powers as the common council and no more. This action does not fix the location, and is not binding on the appellant. We are asked to settle the law on a moot case, for the sole purpose of aiding the parties in future negotiations. No order that the council, or the special tribunal exercising the power of the council, can make under the provisions of § 2 of the Act of 1893, is in any legal sense a "final judgment." If the tribunal had made an order fixing the location of the road, so that the road when built must be built on that location, there might be some ground for claiming such an order to be analogous to a "final judgment." But the tribunal did not make such an order, and had no power to make such an order. Whether we confirm or set aside the action of the special tribunal, the company may in either case present a new plan to the council and may appeal from the action of the council thereon, as before. The statute is not mandatory on the common council, or the special tribunal exercising the power of the council, in that it expressly refrains from any attempt to control their discretion in the exercise of the granted power; and it does not subject the company to the power of either, in fixing a location. By its express terms, no location determined only by the council or by the company, is binding; and the question of location cannot be finally closed, "until the street railway company and local authorities shall agree upon the same." It may be claimed that the language of § 2 is defective and does not fully carry out the intent of the statute; or, it may be claimed that such language was used for the express purpose of enlarg-

ing the power of the city to protect by proper conditions the interests damaged or endangered by the construction and operation of the railroad; but whatever view may be taken of the purpose of the draftsman in framing this section, or of its legal effect in relation thereto, it is clear that the action authorized, whether exercised by the common council itself or vicariously by the special tribunal, is not a "final judgment" from which an appeal can be taken to this court under § 1137.

This conclusion excludes from consideration, not only the unsettled questions argued in respect to the powers of the legislature to authorize an appropriation of highways for this railroad without compensation, but also the question of the legality of the action of the common council, and of the special tribunal acting as a common council.

In my judgment any expression of opinion on these questions in this case, is *obiter*. But as a majority of the court has entertained jurisdiction of the appeal for the purpose of declaring the legality of the action of the common council in some particulars and of denying it in others, I feel bound to distinctly dissent from so much of the opinion of the majority as finds any error in the action of the common council specified in the reasons of appeal; and also from the main reason given for sustaining such portion of that action as is sustained.

It seems to me demonstrable that the vote of the common council requiring the company to enter into an agreement for making compensation for the increased expenses of the city to be caused by the operation of the railroad on the lay-out submitted, and for a continued and prescribed service on other parts of the road, is not a "modification" of the plan submitted, in respect to the particulars required by § 2 of the Act of 1893 to be specified in the plan; and can only be justified as legal by the *ratio decidendi* indicated in the opinion, that the conditions imposed by the council were justified by "other provisions of law or charter;" that the right to lay tracks on the streets in a particular way was "dependent on the consent of the municipal authorities";

that in deciding whether to approve a location "the natural consequences of the construction and operation of the road upon it (the highway) must be taken into account"; and that the municipality, by virtue of the control vested in it by charter over all the city streets, was "made in respect to them the general guardian of the public interests, and was protecting them in protecting itself."

The charter of New Britain invested the people of the place therein described with the local government thereof (Salk. 193), constituting them "one and the same body politic and corporate, . . . to have perpetual succession"; and "to hold and exercise such powers and privileges hitherto exercised by said city as are perpetuated herein, together with all the additional powers and privileges herein and hereby conferred."

Among the powers and privileges specially granted in the charter, to be exercised by the city through its court of common council, are the following: The "powers, under the restrictions otherwise provided in this Act, to make such orders or ordinances as it shall see fit" in relation to nuisances of all kinds in the said city; the licensing and regulating of public trucks and carriages; the regulation of the speed of animals, vehicles and electric cars within the city limits; the maintenance of fenders on electric cars; the sole and exclusive authority and control over all streets and highways and all parts of streets and highways; the excavation of streets and highways for public and private purposes, and the location of any work thereon, whether temporary or permanent, upon or under the surface thereof; the power of providing for taking land for public use not otherwise prescribed in this Act; the finances and property real and personal of the city; providing revenue for the payment of expenses of any kind and of all public works and improvements; and the doing of all things convenient for providing funds for all its lawful expenditures.

The legislation of 1893 in respect to street railways, in so far as it affects the rights and powers of the city of New Britain, must be read and construed in connection with the

charter establishing their rights and powers, which were reaffirmed in a public Act enacted at the same session of the legislature. That legislation must also be read and construed in connection with the following vital principles:

1. Cities and towns possess not only the powers specifically granted, and are subject not only to the liabilities specifically imposed; but they also possess the powers, and are subject to the liabilities, which are necessary to the full operation of those expressly mentioned or to the attainment and maintenance of their declared objects and purposes. There are certain implied powers inherent in a municipality, from the very fact of its creation with the specific powers and liabilities ordinarily belonging to a municipal corporation. This principle has been developed and established in a long line of cases, extending from 1750 to the present time. In *Farrel* v. *Derby*, 58 Conn., 234, 245, it was invoked to sustain the powers of a town to use its power of taxation, specifically given for other purposes, to raise funds for protecting the integrity of its territory from attack in the legislature. In the very recent case of *New Haven* v. *N. H. & D. R. R. Co.*, 62 Conn., 252, 255, it was invoked to sustain the right of a city to use its power of opposing before the railroad commissioners, an application by a railroad company for leave to make changes in its location, so as to obtain from the company an agreement to make compensation for municipal interests endangered by such location, as a condition of the withdrawal of its opposition to the application.

2. While the legislature represents the sovereignty of the State in legislating, in respect to all governmental powers, yet this power of legislation must be exercised subject to limitations expressed in the specific provisions and fundamental principles contained in the Constitution, and should be exercised in harmony with those settled methods of free government whose essential importance has been recognized as self-evident by the people of our own State. The principle of local self-government, *i. e.*, the control by each municipality of those local matters relating wholly or mainly to their own affairs, as distinguished from those matters affect-

ing the State at large, is recognized as an underlying principle so essential to free government under an American and especially the New England system, as to constitute a rule of legislative conduct, even if it can never be treated as strictly a limitation on legislative powers. *Caldwell* v. *Justices of Burke*, 4 Jones' Eq., 323; *People* v. *Hurlbut*, 24 Mich., 44, 66, 96; *People* v. *Detroit*, 28 id., 228.

In our own State the initial steps in the whole operation of government depend on the action of towns, whose existence as territorial and municipal corporations is, by express provision of the Constitution, protected from extinction unless by their own consent. *O'Flaherty* v. *Bridgeport*, 64 Conn., 159, 165. And it seems to me that in this State certainly, the principle of local self-government may fairly be regarded as at least effective to direct the action of the legislature, and potent to prevent this court, in a case of reasonable doubt, from preferring a construction that would give effect to legislation plainly obnoxious to the principle.

So read and construed, the legislation of 1893 must be held to grant to the railroad company the franchise for the occupation of the streets of the city of New Britain, only after an agreement between the company and the city in respect to a location; and cannot be held to abridge the right of the city to insist upon a reasonable agreement for the protection of its municipal interests before consenting to such occupation of its streets.

The opinion of the court contains the suggestion of such construction, as one ground for sustaining in part the action of the city council; it seems to me that it is the only tenable ground for sustaining such action, and that its logical application must sustain the whole of that action.

While I deem it necessary to state this ground of dissent, it does not seem appropriate to detail the line of argument and the authorities that have led me, after the most careful consideration, to such result. As I am satisfied this appeal is not properly before the court, I think the decision should have rested wholly on that ground; and that the case should have been erased from the docket.

THE PRESIDENT AND FELLOWS OF YALE COLLEGE ET AL. APPEAL FROM PROBATE.

Third Judicial District, Bridgeport, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, HAMERSLEY and THAYER, Js.

A testator gave the residue of his estate to trustees, directing them to distribute it in specific proportions and in trust, to certain named corporations which were to apply the income to charitable purposes designated in the will. Among these bequests was one to the State, "in trust, the income to be applied toward the maintenance of any institution for the care and relief of idiots, imbeciles or feeble-minded persons." A subsequent clause provided that if "any of the trusts should not be accepted, the amount intended therefor shall be proportionately distributed in augmentation of such as may be accepted." The State refused to accept the trust and the Court of Probate appointed a trustee in its place. *Held*, that as the intent to confer a direct benefit upon the State was apparent, and as no substitute trustee could possess the sovereign powers of the State in administering the trust, the gift must be regarded as one to the State, rather than one to the inmates of an institution such as the will described; and the refusal of the State to accept the trust left this portion of the residue to be distributed in augmentation of the other charitable trusts, as directed by the testator.

[Argued October 29th, 1895—decided January 6th, 1896.]

APPEAL from an order and decree of the Court of Probate for the District of New Haven, appointing a trustee under the will of Philip Marett, taken to the Superior Court in New Haven County and tried to the court, *Ralph Wheeler, J.*; facts found and case reserved for the consideration and advice of this court. *Judgment reversing the action of the Court of Probate advised.*

The portions of the will of Philip Marett, material to the case, are as follows:—

"Sixth. All the remainder and residue of my estate, real and personal, of which I may die seized or possessed, wherever situated, whether now belonging to me or hereafter acquired in any manner whatever, I give, devise and bequeath to my said wife, Martha B. Marett, and my son-in-law, Arthur N. Gifford, and their successors in the trust hereby created, to

be held by them in trust for the following uses, purposes and trusts and subject to the following limitations, namely: During the lives of both my wife and daughter the net income of such trust estate shall quarterly be equally divided, one half to be retained or paid to my said wife, and the other half to be paid to my said daughter personally, on her sole and separate receipt and for her exclusive use and benefit: should either my wife or daughter die before me, or if they both outlive me, then upon the death of either of them the whole net income shall belong to and be retained by or paid over to the survivor, as the case may be, so long as she may live; and after the death of such survivor all the remaining amount of the trust estate shall be disposed of as is hereinafter directed.

"Seventh. In regard to the final disposition of the trust estate, I give full power and authority to my said wife and my said daughter each severally to direct and appoint the disposal of twenty-five thousand dollars by any instruments or writings in the nature of a last will and testament, with or without a seal, executed in the presence of one or more witnesses, to take effect after the decease of the survivor of them and not before, so that no part of the net income shall be diverted during the life of either of them. Such instruments or writings shall be equally operative whether executed before or after my decease. The balance or remainder of such trust estate, including whatever may not be disposed of by my wife and daughter, or either of them, pursuant to the authority herein given, I hereby direct shall after the decease of the survivor of them be appropriated, distributed and disposed of as follows, namely:

"One-fifth part to The Connecticut Hospital Society in trust, the income to be applied to the support of free beds for the benefit of poor patients in said institution, giving preference to those incurably afflicted, if such are admissible.

"One-fifth part to the City of New Haven, to be held in trust by the proper authorities and the income to be applied through such agencies as they see fit for the supply of fuel

and other necessaries to deserving indigent persons, not paupers, preferring such as are aged or infirm.

"One-fifth part to the President and Fellows of Yale College in trust, the income to be applied to the support of scholarships or such other purposes in the academical department as they may judge expedient.

"One-tenth part to the New Haven Orphan Asylum, to be held in trust, and the income applied to the support of poor inmates therein.

"One-tenth part to the Saint Francis (Catholic) Orphan Asylum, to be held in trust, and the income to be applied to the support of poor inmates therein.

"One-tenth part to the City of New Haven, in trust, the income to be applied by the proper authorities for the purchase of books for the Young Men's Institute, or any public library which may exist in said city.

"One-tenth part to the State of Connecticut, in trust, the income to be applied toward the maintenance of any institution for the care and relief of idiots, imbeciles or feeble-minded persons.

"The appropriations specified above are to be made effective notwithstanding any deficiency or inaccuracy of description, so that my objects may not be defeated by any technicality or informality. Should any of the trusts not be accepted the amount intended therefor shall be proportionately distributed in augmentation of such as may be accepted. In the division of the trust estate the same need not be sold and converted into money, but may be divided at the discretion of the trustees, so as to approximate as near as may be convenient the intended proportions.

"Eighth. In case of vacancy at any time in the trusteeship by death, resignation, or otherwise, it shall be filled by an appointment to be made by my wife and daughter, or the survivor of them, and in default of such appointment it shall be made by the authority having jurisdiction of the case."

Henry T. Blake, for the surviving trustee of the estate of Philip Marett.

The refusal of the State to act as trustee did not work a failure of the bequest, whereby the other legatees take as alternative beneficiaries. *Dailey* v. *New Haven*, 60 Conn., 314; *Conklin* v. *Davis*, 63 id., 377–383; *Dexter* v. *Evans*, 63 id., 58; *Hayden* v. *Conn. Hospital*, 64 id., 320. The bequest itself is not void for uncertainty. *Dailey* v. *New Haven*, *supra*; *Woodruff* v. *Marsh*, 63 Conn., 125. The Court of Probate has jurisdiction to appoint a substitute trustee. *Dailey* v. *New Haven*, *supra*; *General Statutes*, § 491.

Henry Stoddard and *John W. Bristol*, for Yale College and Connecticut Hospital Society.

The trust imposed on the State by the will in question is void, and has therefore failed by operation of law.

(*a*) Because the trust for the maintenance of *any* institution of the described character is not confined to *charitable* institutions solely, but includes any institution whether charitable or otherwise, and is therefore not a charitable trust. *Stratton* v. *Physio-Medical College*, 149 Mass., 505–507; *Adye* v. *Smith*, 44 Conn., 60; *Thomson* v. *Granis*, 20 N. J. Eq., 489; *Swift* v. *Easton Ben. Soc.*, 73 Pa. St., 362; *Old South Soc.* v. *Crocker*, 119 Mass., 1; *Corke* v. *Manna*, 12 L. R. Eq. Cas., 575. (*b*) Because, as it is not a charitable trust, it cannot be upheld as a trust not charitable. *Holland* v. *Alcock*, 108 N. Y., 312; 1 Beach on Modern Equity, § 206; *Read* v. *Williams*, 125 N. Y., 566; *Pritchard v. Thompson*, 95 N. Y., 76; *Tilden* v. *Green*, 130 id., 29; *Bristol* v. *Bristol*, 53 Conn., 242, 257; *Fairfield* v. *Lawson*, 50 id., 501. Not being a charitable trust it offends the statute of perpetuities and is, therefore, void. *Coit* v. *Comstock*, 51 Conn., 352, 386; *Bolles* v. *Smith*, 39 id., 217, 222; *Bristol* v. *Bristol*, 53 id., 257, 258; *Leake* v. *Watson*, 60 id., 498; *Anthony* v. *Anthony*, 55 id., 256; *Alfred* v. *Marks*, 49 id., 473; *Rand* v. *Butler*, 48 id., 293; *Jocelyn* v. *Nott*, 44 id., 55; *Bates* v. *Bates*, 134 Mass., 110, 113, 114; *Green* v. *Hogan*, 153 id., 462, 465. But if the trust is not void, a discretionary and personal power of selection was confided by the testator to the State, and to the State alone; which cannot be exercised by another

trustee appointed in the place of the State by the Court of Probate. *Crum* v. *Bliss*, 47 Conn., 592, 603; *Fontain* v. *Ravenel*, 17 How., 369; *Pritchard* v. *Thompson*, 95 N. Y., 76; *Druid Park Heights Co.* v. *Oetinger*, 53 Md., 46; *Cole* v. *Wade*, 16 Ves., 27, 44; *Newman* v. *Warner*, 1 Sim., N. S., 457; *Walch* v. *Gladstone*, 14 id., 2; *Hubbard* v. *Lauet*, Ambler, 309; *Down* v. *Warrall*, 1 Myl. & K., 561; *Wilson* v. *Pennock*, 23 Pa. St., 238. The case of *Dailey* v. *New Haven*, 60 Conn., 314, is clearly distinguishable, as are also other cases cited by the other side. They were not cases where a personal and discretionary power of selection was confided in the trustees named, as in the case at bar. The Court of Probate had no power to pass the decree appealed from; because the decree is in substance and effect an exercise of the doctrine of *cy pres*, which if recognized at all by the laws of this State, has no application to trusts not charitable.

Lynde Harrison, for Rufus E. Holmes, trustee.

The claim made by the appellants in this case is precisely the same as one of the claims made by the defendants in the case of *Dailey* v. *New Haven*, 60 Conn., 314. The same will was before this court in that case, and the circumstances were almost precisely the same. Unless that case can be distinguished from the case at bar, it must control the decision in this case. In this case it is manifest that the real trust was not to benefit the State of Connecticut as trustee, but to benefit imbeciles, idiots and feeble-minded persons. By the expression, "should any of the trusts be not accepted," the testator had reference, not to the declination of a trustee, but rather to the refusal of an intended beneficiary. The Court of Probate had power to appoint Mr. Holmes as trustee, in place of the State. *Dailey* v. *New Haven*, 60 Conn., 326. If Mr. Holmes fails to execute the duties of his trust according to the terms of the will, a court of equity would interfere. *Goodrich's Appeal*, 57 Conn., 275, 285. A discretionary power in the execution of a trust may be implied. *New Haven Y. M. I.* v. *New Haven*, 60 Conn., 32, 40; *Storrs Agr. School* v. *Whitney*, 54 id., 342; *Bronson* v. *Strouse*, 57 id., 147; 3

Jarman on Wills, 704; *Clement* v. *Hyde*, 50 Vt., 715; *Pickering* v. *Shotwell*, 10 Pa. St., 23. The bequest in question is not void for uncertainty. *Perrin* v. *Cary*, 24 How., 465; *Kain* v. *Gibbonry*, 101 U. S., 362; *Russell* v. *Allen*, 107 id., 182; Bispham's Equity, § 116; *Russell* v. *Allen*, 107 U. S., 163–167; *Jones* v. *Habersham*, ibid., 174; *Brewster et al.* v. *McCall*, 15 Conn., 273, 292; *White* v. *Fiske*, 22 id., 30, 53; *Treat's Appeal*, 30 id., 113; *Hughes* v. *Dailey*, 49 id., 34; *Tappan's Appeal*, 52 id., 412; *Beardsley* v. *Selectmen of Bridgeport*, 53 id., 489; *King* v. *Grant*, 55 id., 166; *Camp* v. *Crocker*, 54 id., 21, 23; *Bristol* v. *Ontario Orphan Asylum*, 60 id., 472; *Coit* v. *Comstock*, 51 id., 352, 377; *Marsh* v. *Woodruff*, 63 id., 125. In its ancient English form, the *cy pres* principle has not been recognized here. In a modified form it has existed in this State for many years. *Hughes* v. *Dailey*, 49 Conn., 34; *White* v. *Fiske*, 22 id., 53; *Philadelphia* v. *Girard's Heirs*, 45 Pa. St., 9; *Burr* v. *Smith*, 7 Vt., 241; *Howard* v. *American Peace Society*, 49 Me., 302; *Derby* v. *Derby*, 4 R. I., 439; *Winslow* v. *Cummings*, 3 Cush., 358; *Bliss* v. *Am. Bible Society*, 2 Allen, 334; *Amer. Academy* v. *Harvard College*, 12 Gray, 582; *Academy* v. *Clemmons*, 50 Mo., 167; *Keifer* v. *German American Seminary*, 46 Mich., 636; *Gilman* v. *Hamilton*, 16 Ill., 225; *Moore* v. *Moore*, 4 Dana, Ky., 354; *Manners* v. *Phila. Library Co.*, 93 Pa. St., 165.

HAMERSLEY, J. The general intent of the testator is clearly expressed in the will. He intended that the whole of his property remaining after payment of a few legacies and the termination of life interests in his wife and daughter, should be divided between the seven corporations named, each to hold the sum distributed to it, in trust for the application of the income to the charitable object described; and in case any trustee named should not accept the trust confided to it, the amount intended for such trust should be proportionately distributed in augmentation of the other trusts. The intent to devote the whole residue to charitable purposes is expressed absolutely; the intent to devote a por-

tion to any of the specific purposes described, is expressed contingently on the acceptance of the trust by the trustee selected for that purpose. It is the duty of the court to give effect to such intention; because it is the plainly expressed will of the testator, and because gifts to charitable uses are highly favored, and may even call for a liberal construction if necessary to support such gift in accordance with the donor's intent.

In order that the general intent might more certainly be executed the testator, instead of giving a specific portion to each of the corporations selected, gives the whole residue to two trustees, providing for the appointment of successors in the case of vacancies in such trusteeship. He then directs these trustees, upon the termination of the life estates, to appropriate, distribute and dispose of the trust funds bequeathed and devised to them, as follows, namely: one fifth part to the Connecticut Hospital Society, in trust, etc.— naming each of the selected corporations and describing the charitable purpose to be carried out by it; he then instructs these two trustees that "the appropriations specified above are to be made effective notwithstanding any deficiency or inaccuracy of description, so that my objects may not be defeated by any technicality or informality"; and further directs them that "should any of the trusts not be accepted, the amount intended therefor shall be proportionately distributed in augmentation of such as may be accepted."

The will gave the residue of the testator's estate to the trustees, and directed them to appropriate and distribute one tenth part thereof "to the State of Connecticut, in trust, the income to be applied towards the maintenance of any institution for the care and relief of idiots, imbeciles or feeble-minded persons."

In pursuance of this direction, the trustees offered the one tenth part to the State, which refused to accept the trust. The will then directed them to distribute the amount intended for the trust declined by the State, proportionately in augmentation of the other trusts. This they did not do, but assumed that the decision in *Dailey* v. *New Haven*, 60 Conn.,

314, so settled the meaning of this will that it became their duty, on the refusal of the State to accept the trust, to apply to the Court of Probate for the appointment of a trustee in place of the State, and to distribute to the trustee so appointed the one tenth part declined by the State. This is an appeal from the order appointing a trustee upon such application.

If the trustees are right in their assumption, then the order of the Court of Probate should be affirmed by the Superior Court; and if they are wrong, the order should be set aside. And so the controlling contention between counsel upon the argument, related to the application to the case at bar of the decision in *Dailey* v. *New Haven*. The latter case was a suit brought to the Superior Court seeking an injunction against the common council of New Haven declining to receive the fund to be paid the city by the two trustees under the same will, in pursuance of the testator's direction that they should appropriate and distribute one fifth part of the trust estate given to them, "to the city of New Haven, to be held in trust by the proper authorities, and the income to be applied through such agencies as they see fit, for the supply of fuel and other necessaries to deserving indigent persons not paupers, preferring such as are aged or infirm." The complaint also asked the court, in case it should be held that the city had the power to decline the trust and in case the city should decline the trust, to take such fund into the care of the court, and to appoint a suitable trustee to receive the same from the trustees under the will. Upon a reservation this court advised the Superior Court to deny the injunction and, unless a trustee should be appointed by the Court of Probate to receive the fund intended for the "deserving indigent persons," to appoint such trustee.

This result was based upon the fundamental consideration that the city of New Haven had no legal power to support or aid "indigent deserving persons not paupers," and could not legally become trustee of the fund. The testator had in effect named no person to whom his trustees could deliver the charitable trust fund as directed. The case presented

was analogous to one where a devisor or donor in the instrument creating a trust, fails to appoint a trustee; the power of a court of equity is clear to supply the deficiency in case of such neglect, and it was held that the testator's direction to his trustees to distribute proportionately in augmentation of the other trusts the amount intended for any trust that might not be accepted, should not be applied to the particular trust before the court where the testator had failed to name a trustee who could accept; and that assuming the language to be equivocal and the intent doubtful, a reasonable construction that should give effect to the testator's charitable intent ought to be adopted; and his charitable intent towards the "indigent deserving persons," in the disposition of the one fifth part in question under the quandary induced by his failure to appoint a trustee, was more clearly indicated than his charitable intent in respect to that one fifth part towards the other selected beneficiaries.

The present case is entirely different. The testator has named a trustee competent to accept the trust. The State has power to accept a gift in trust to apply the income thereof towards the maintenance of some institution for the care and relief of idiots. The maintenance of such an institution, either directly under immediate State supervision, or indirectly through annual aid given to an existing institution, is a lawful exercise of governmental power and duty. This being so, it is immaterial to the disposition of this case, whether or not the language used in making the gift to the State would, if used in making a similar gift to an individual, support a valid gift for charitable use. A gift to the State in trust to apply the same in executing a lawful governmental function, is a valid gift. Whatever may be thought of the policy of accepting such gifts, there can be no doubt of the power of the State to accept or refuse. The State has refused to accept the trust in question; and the plain language, as well as the clear intent of the will, require the trustees to distribute the amount intended for such non-accepted trust proportionately in augmentation of the trusts that have been accepted. There is nothing equivocal in the

language; nothing doubtful as to the intent. There is no occasion for construction.

The appellee relies upon the following language used in the opinion in *Dailey* v. *New Haven* (p. 323), while arguing in support of the conclusion announced: "The testator evidently had in mind two classes of beneficiaries, one where the real purpose was to benefit the trustee, and one where the trustee had no independent duty towards the beneficiaries, and was considered only as a medium through which the benefit would be applied to them. That is to say, some of the trusts were in effect, and evidently so intended, gifts to the trustee. The question whether it would be of advantage to the trustee to accept or not was the only real question, and a refusal might properly end the matter. Certainly the bequest to the President and Fellows of Yale College, for the support of scholarships or such other purposes in the academical department as they may deem expedient, is of that nature. The direct benefit is to the college. By its very terms the trust is incapable of being administered by another. A refusal by the trustee named to accept, would end the matter, and make a case for the sensible application of the provision in the will regarding non-accepted trusts. But, as already suggested, in the clause under discussion the intent was to help only the beneficiaries. As the city had no corporate duty in respect to them, it could have been inserted only for their benefit, and it is almost certain that the testator did not intend to provide that in this case the charity should fail unless administered by the city."

It is claimed that if this language requires the clause now in question to be treated in the same manner as the clause then under discussion was treated, it was unnecessary to support the decision in that case, and cannot bind the appellants who were not parties to the former proceeding; and also that the use of such argument was admittedly induced by an oversight in reading the 8th article of the will as applicable to the corporate trustees mentioned in the 7th article. There is no occasion to discuss these claims, for we are satisfied the language quoted is not inconsistent with the conclusion now reached.

If we assume that the testator had in mind, in framing the 7th article of his will, two classes of beneficiaries, one represented by Yale College, and the other by the city of New Haven as trustee for deserving indigent persons; that a refusal to accept by a trustee named in the former class would make a case for the application of the provision regarding non-accepted trusts, and that a refusal to accept by a trustee named in the latter class would make a case for the administration of the trust by a court of equity and the appointment of another trustee—we think it clear that the State comes within the same class of beneficiaries as Yale College.

The discriminating tests of these classes are: 1. An intent to directly benefit the trustee, as distinguished from an intent to benefit specific beneficiaries without benefit to the trustee named, such trustee having no independent duty towards the beneficiaries and being only a medium through which the benefit would be applied to them. 2. The capacity of another to administer the trust committed by the testator to the trustee selected. An application of either of these tests places the State in the class illustrated by Yale College.

Whether we fancy the testator's mind was directed more especially to the general public benefit to be derived from maintaining some institution for the care and relief of idiots, or to the particular benefit to the individual idiots who might become its inmates, it is certain that his gift was calculated to directly benefit the State. The maintenance of such an institution is a legitimate subject of State expenditure, which might be reduced by the income derived from the testator's gift, just as truly as the income of the gift to Yale College might reduce its expenses for the support of scholarships or other purposes in the academical department. For many years the State has recognized its duty in respect to the maintenance of institutions for the care of imbeciles. It has invested more than $20,000 in such an institution, securing the application of the money to the object by a statutory mortgage. Special Laws, 1877, p. 120; id., 1893, p. 869. It has annually appropriated large sums for a similar purpose. The fact that when this will was executed an institu-

tion had been incorporated and was in operation in this State, is strongly suggestive that the testator, in directing this gift to be made to the State and not to the existing corporation, contemplated the use of this gift for the benefit of the State in the maintenance of such an institution under its own supervision.

It is also plain that the trust in the State is as truly personal in its nature as the trust in Yale College. The testator knew that the State was sovereign, possessing a power to execute the trust belonging to no one else. There was no institution to which he was willing to give this fund or intrust with the expenditure of its income. The selection he could not make he would suffer no other individual to make; other persons like himself would be confined to existing institutions, no one of which might be adapted to carry out his purpose. The State alone was not so limited; it could create an institution in default of an appropriate existing one. Therefore he directs his gift to be made to the State. The field of that trust is distinct from any that could be committed to an individual. The character impressed on the trust by the very fact of its committal to the State, prevents its administration by any one else. "By its very terms the trust is incapable of being administered by another. A refusal by the trustee named to accept would end the matter and make a case for the sensible application of the provision in the will regarding non-acceptance."

As we are satisfied that the refusal of the State to accept the trust does end the matter, and therefore by the express terms of the will the trustees must distribute the one tenth part remaining in their hands proportionately in augmentation of the other trusts, the questions argued as to the validity of such a gift to an individual trustee, and also the question as to whether, if the gift failed by operation of law, the one tenth part should be treated as intestate property, are excluded from our consideration.

The Superior Court is advised to render judgment that the order of the Court of Probate be reversed and set aside.

In this opinion the other judges concurred.

CHARLES E. JACKSON, EXECUTOR, *vs.* AIMEE E. ALSOP ET AL.

*Third Judicial District, Bridgeport, October Term, 1895. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Although the object sought in the construction of wills is the intent of the testator, it is nevertheless the intent as expressed in the language used. If that is not ambiguous, either as to the nature of the estate intended to be devised, or as to the person intended as the devisee, no extrinsic evidence is admissible to show a different and unexpressed meaning or intention upon the part of the testator.

A construction plainly required by the terms of a will, cannot be avoided because it leads to intestacy in whole or in part.

A testatrix, by the fourth clause of her will, gave to *A*, whom together with *B* she named as executors, certain real estate, to hold "to him and his heirs and assigns forever." By the fifth clause she gave to *A* and *B*, and to the survivor of them, the rest and residue of her estate, "having full confidence that they will make such use and disposition thereof" as would accord with her wishes. *B* subsequently dying, the testatrix made a codicil giving the rest and residue to *A*, "having full confidence" etc., as above; but in the event that *A* should not survive her, provided that "said rest and residue" should be divided among her lawful heirs according to the laws of this State. *A* died before the testatrix, and in a suit to construe the will it was *held*:—

1. That the expression "his heirs and assigns forever," following the devise to *A* in the fourth clause, did not, when read in connection with the codicil, create a substitutional devise in *A*'s children on his death before the testatrix; but was used merely as a limitation descriptive of the quality of the estate devised to *A*.
2. That by *A*'s death before that of the testatrix, the gift to him lapsed and became intestate estate.
3. That under the fifth or residuary clause, the legal heirs of the testatrix took *per stirpes* and not *per capita*.

[Argued October 30th, 1895—decided January 6th, 1896.]

SUIT to determine the construction of the will of Clara P. Alsop of Middletown, deceased; brought to the Superior Court in Middlesex County and reserved by that court, *Shumway, J.*, upon the facts found, for the consideration and advice of this court.

* Transferred from first judicial district.

The case is sufficiently stated in the opinion.

Henry E. Burton, for the plaintiff.

Charles E. Perkins, for Lucy C. and Charles R. Alsop.

Harrison Barber Freeman, for Elizabeth A. Hoppin, Henry Chauncey et al.

John W. Alling, with whom was *Nathaniel A. Prentiss* of N. Y., for Aimee E. Alsop, Joseph W. Alsop, 4th, et al.

William B. Greenough of Providence, for Charles A. and Clara A. Hoppin.

ANDREWS, C. J. This is a complaint brought to the Superior Court for a construction of the will of Clara P. Alsop, late of Middletown, who died on the 28th day of February, 1894, seized and possessed of an estate consisting of both real and personal property. Her will, duly executed to pass such estate, dated the 24th day of March, 1884, and codicils thereto, one dated May 4th, 1886, the other May 31st, 1887, was admitted to probate and is recorded in the proper records. In said will the plaintiff was named as the executor. He duly qualified and is now acting as such executor. The portions of said will necessary to be construed are as follows:—

"Fourth. I give and devise to my nephew, Joseph W. Alsop, aforesaid, my undivided one fourth interest in the real estate of my late father, Joseph W. Alsop, said real estate being the mansion house commonly known as No. 20 (twenty) Washington street in said city of Middletown, and also the dwelling-house now occupied by Dr. Edgerton, commonly known as No. 26 (twenty-six) Washington street aforesaid, together with all the lands connected with both of said houses; to have and to hold the said undivided fourth interest in said real estate to him the said nephew, Joseph W. Alsop, and his heirs and assigns forever."

The first codicil above referred to is immaterial; the second is as follows:—

"First. I do ratify and confirm said will as modified by said first codicil thereto, except so far as it may be inconsistent with this my second codicil.

"Second. As Frederick Chauncey, named in my said will, has died since the making thereof, I do hereby revoke the 'Fifth' item of said will, and I do substitute therefor, as follows, viz.:

"Fifth—All the rest and residue of my estate, of every name and description, whether real, personal or mixed, or whether in possession, reversion or remainder, I do give, devise and bequeath to Joseph W. Alsop, in said will named, having full confidence that he will make such use and disposition thereof as will be in accord with my wishes heretofore made known to him; and I do hereby appoint him my sole executor, and I direct that no probate bond be required of him. But if he do not survive me, then, and in such event, I give, devise and bequeath all the said rest and residue of my estate to be divided to and among my lawful heirs according to the laws of the State of Connecticut, and in such event also I appoint Charles E. Jackson, of Middletown aforesaid, to be my sole executor, but without any bonds being required of him."

Joseph W. Alsop, the devisee in said will and codicil, died in June, 1891, in the lifetime of the testatrix, leaving four children. The complaint prays for the answers to two questions: First, whether the devise in the fourth clause of said will to Joseph W. Alsop, lapsed by the death of said Joseph W. Alsop before the death of the testatrix. Second, whether under the residuary clause of said will the legal heirs of the testatrix are to take *per stirpes* or *per capita*. The Superior Court reserved the questions on the record for the advice of this court.

The general rule is that all devises are deemed to be lapsed, if the devisee dies in the lifetime of the testator. *Ballard* v. *Ballard*, 18 Pick., 41, 43. And when that happens, the

property devised falls into the residuum or becomes intestate estate, as the case may be. *Bill* v. *Payne*, 62 Conn., 140, 142.

If the devise in the fourth clause of the will is to Dr. Joseph W. Alsop and only him, it is conceded that it is lapsed. The contention is that there is a devise over,—a substitutionary devise to the children of Dr. Alsop; that the words at the close of the said fourth clause, to him the said nephew, Joseph W. Alsop, "and his heirs and assigns forever," when read in connection with the second codicil, is a devise to the children of Dr. Alsop in the event, which has happened, that he died before the testatrix. In support of this claim, certain parol evidence was offered at the hearing and received subject to objection. Whether or not the evidence was admissible is reserved for this court to determine. It seems to us that it was not admissible. In the interpretation of a will parol testimony may always be received to remove any ambiguity which may be found to exist in the words of description, either of the property intended to be devised, or as to the person intended to be the devisee. Here no such ambiguity is shown or claimed. The parol evidence was offered to show that the testatrix intended a different result from the one which the words of her will, taken in their primary sense, would indicate. In their primary sense these words are words of limitation only, calculated to describe the quantity of estate given to the devisee. They do not create a new estate in the heir of the devisee. The rule in respect to the admission of parol evidence to affect the interpretation of written instruments—a deed or a will—is very clearly stated by MR. JUSTICE COLERIDGE in the opinion he gave in *Shore* v. *Wilson*, 9 Cl. & Fin., 355, 525. He says: "It is unquestionable that the object of all exposition of written instruments must be to ascertain the expressed meaning or intention of the writer, the expressed meaning being equivalent to the intention; and I believe the authorities to be numerous and clear . . . . that where language is used in a deed which in its primary meaning is unambiguous, and in which that meaning is not excluded by the context, and is sensible with reference to the extrinsic circumstances

in which the writer was placed at the time of writing, such primary meaning must be taken, conclusively, to be that in which the writer used it; such meaning, in that case, conclusively states the writer's intention, and no evidence is receivable to show that in fact the writer used it in any other sense, or had any other intention. This rule, as I state it, requires perhaps two explanatory observations; the first, that if the language be technical or scientific, and is used in a matter relating to the art or science to which it belongs, its technical or scientific, must be considered its primary, meaning; the second, that by 'sensible with reference to the extrinsic circumstances' is not meant that the extrinsic circumstances make it more or less reasonable or probable is what the writer should have intended; it is enough if those circumstances do not exclude it, that is, deprive the words of all reasonable application according to such primary meaning. This rule thus explained implies that it is not allowable in the case supposed to adduce any evidence, however strong, to prove an unexpressed intention varying from that which the words used import. This may be open no doubt to the remark, that, although we profess to be exploring the intention of the writer, we may be led in many cases to decide contrary to what can scarcely be doubted to have been the intention, rejecting evidence which may be most satisfactory in the particular instance to prove it. The answer is, that interpreters have to deal with the written expression of the writer's intention, and courts of law to carry into effect what he has written, not what it may be surmised, on however plausible grounds, that he intended only to have written." See also *Avery* v. *Chappel*, 6 Conn., 270, 274; *Spencer* v. *Higgins*, 22 id., 521; Wigram on Wills (Extrinsic Evidence), Propositions II., V.; 1 Jarman on Wills, 708; *Kimball* v. *Story*, 108 Mass., 382, 385; *Hinckley* v. *Thatcher*, 139 id., 477.

But apart from the parol evidence, it is claimed that the will itself manifests an intent by the testatrix that the property named in the fourth clause shall go to the children of Dr. Alsop, he having died before her; that otherwise this property becomes intestate estate, and that the court will

make almost any presumption to prevent a partial intestacy. It is true that in construing a will the court always seeks to avoid intestacy, as to any part of the estate belonging to the testator, if it can be done consistently with the rules of law. *Tarrant* v. *Backus*, 63 Conn., 277, 281.

But even if partial intestacy does happen, that result cannot be permitted to nullify a rule of law when the language is free from doubt. *Bill* v. *Payne*, 62 Conn., 140, 142. To sustain the claim made in this respect, would require the word "and" in the phrase above indicated, to be read as meaning "or," the word "heirs" as meaning "children," and that the words "and assigns forever," be disregarded entirely as having no meaning at all in the will. There are, indeed, instances in which this court has read the word "and" as "or," and the converse; *Phelps* v. *Bates*, 54 Conn., 11; and the word "heir" as meaning "children." *Bond's Appeal*, 31 id., 183; *Anthony* v. *Anthony*, 55 id., 256. But a change of this kind can only be made when it is clearly required to carry out the intention of the testator as collected from the whole will. Where the word "assigns" is added to the word "heirs," it is almost impossible to read the whole phrase otherwise than as words of limitation, and not as intended to create an estate in any other person. 2 Redfield on Wills, 82; *Grafftey* v. *Humpage*, 1 Beavan, 46; *Holloway* v. *Clarkson*, 2 Hare, 521, 523.

The effect of the changes claimed in the will would be to prefer the children of Dr. J. W. Alsop over the other relatives of the testatrix in the same degree, and over some who are nearer in blood to her than these. It is very evident that the testatrix intended to prefer her nephew Dr. J. W. Alsop over all her other relatives; but he being dead, we search the will in vain for an expression indicating an intent to prefer his children, or any one of her remaining relatives, over any of the others in like degree.

Under the residuary clause the legal heirs of the testatrix are to take *per stirpes*, and not *per capita*. This is the rule in this jurisdiction, established by too many decisions to be in any doubt. 1 Swift's Dig., 115, 116; *Cook* v. *Catlin*, 25

Conn., 387; *Lyon* v. *Acker*, 33 id., 222; *Raymond* v. *Hillhouse*, 45 id., 467; *Heath* v. *Bancroft*, 49 id., 220; *Lockwood's Appeal*, 55 id., 157; *Geery* v. *Skelding*, 62 id., 499; *Pendleton* v. *Larrabee*, ibid., 393; *Conklin* v. *Davis*, 63 id., 377.

The Superior Court is advised that the devise in the fourth clause of the will lapsed by the death of the said Joseph W. Alsop before the death of the testatrix, and became intestate estate; and that under the residuary clause of said will the legal heirs of the testatrix take *per stirpes* and not *per capita*.

In this opinion the other judges concurred.

ALFRED CHAPIN *vs.* IRENE R. BABCOCK.

First Judicial District, Hartford, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN AND HAMERSLEY, Js.

A judgment against several persons in an action of tort is severable; and an appeal taken by one only of two defendants against whom such a judgment has been rendered by a justice of the peace, vacates the judgment only as to the one so appealing.

In the appellate court it is not essential to the plaintiff's recovery that he should prove the tortious acts were committed by the defendants jointly; it is enough if he prove the tort, whether several or joint, as against the defendant who appealed.

Where a substantial right is involved, a new trial will not be denied a party aggrieved, merely because the damages must be small.

[Submitted on briefs January 7th—decided February 7th, 1896.]

ACTION in the nature of trespass *de bonis*, brought originally before a justice of the peace, and thence by the defendant's appeal to the Court of Common Pleas in Hartford County, where the case was tried to the jury, before *Walsh, J.*, and verdict and judgment rendered for the defendant, from which the plaintiff appealed for alleged errors in the rulings and charge of the court. *Error, and judgment set aside.*

The case is sufficiently stated in the opinion.

Albert C. Bill and *Joseph P. Tuttle*, for the appellant (plaintiff).

J. Warren Johnson, for the appellee (defendant).

ANDREWS, C. J. This case was originally brought before a justice of the peace. The complaint alleged a cause of action in the nature of trespass *quare clausum fregit* and the carrying away of goods. Irene R. Babcock and James H. Babcock were named as defendants. The justice rendered judgment against both. From that judgment Irene R. Babcock appealed to the Court of Common Pleas in Hartford county. James H. Babcock did not appeal. In the Court of Common Pleas, Irene R. pleaded only the general issue. A trial was had thereon to the jury, and a verdict was given in her favor. The plaintiff now has appealed to this court.

Upon the trial to the jury the plaintiff claimed and asked the court to hold, that the appeal by Irene R. Babcock vacated the justice judgment as to both herself and James H. Babcock. The court did not so rule, but instructed the jury that the appeal by Irene R. vacated the said judgment only as against herself; and that the said justice judgment remained in force as against the said James H. Babcock. We think this ruling was correct.

A judgment against several persons in an action of tort is severable. The liability of tort feasors is several as well as joint; as well after judgment as it is before a suit is brought. Freeman on Judgments, § 236; *Morgan* v. *Chester*, 4 Conn., 387; *Sheldon* v. *Kibbe*, 3 id., 214; *Atwater* v. *Tupper*, 45 id., 144. Of course the satisfaction of such a judgment by any one of those against whom it was rendered, would be a discharge as to all.

The Court of Common Pleas held also that the plaintiff must prove, in order to recover, that the acts for which damages were claimed were such as both Irene R. Babcock and James H. Babcock were jointly liable for. This was error. In the Court of Common Pleas the case stood as though Irene R. was the only defendant named in the com-

plaint, or as though it had not been served on James H. Clearly she would be liable for any trespass, several or joint, upon the premises, or to the property named in the complaint, committed by her, and any such trespass might be proved against her. 1 Swift's Dig., 532.

It is urged that a new trial ought not to be granted because the damages will be small. Small damages, however, and nominal damages, do not mean the same thing. Where there is a real right involved the damages, even if very small, are substantial and not nominal. To deprive a party of these, by refusing him a new trial because they must be small, would be to do him a great injustice. *Michael* v. *Curtis*, 60 Conn., 363, 369.

There is error and the judgment is set aside.

In this opinion the other judges concurred.

ROGER WELLES, TRUSTEE, *vs.* HENRY SCHROEDER.

First Judicial District, Hartford, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The determination as to what costs shall be taxed in favor of a garnishee who is cited in to disclose and found not indebted, is, in the absence of a controlling statute or rule of court, a matter of discretion, and not subject to review by this court on appeal.

[Argued January 8th—decided February 7th, 1896.]

ACTION upon the common counts to recover for goods sold and delivered, brought to the City Court of Hartford and tried to the court, *Stanton, Acting Judge;* facts found and judgment rendered for the plaintiff.

At the time of the service of the writ, Timothy E. Steele, Esq., of Hartford, was factorized and cited in to disclose. Upon the trial the plaintiff, before judgment, insisted upon a disclosure from the garnishee, whereupon a hearing upon disclosure was made by the court, who found that said gar-

nishee was not indebted to the defendant and did not have effects of the defendant in his hands at the time of service, and rendered judgment in favor of the garnishee to recover his costs, limited however to the fees of two witnesses. The garnishee claimed he was entitled to all costs usually allowed a prevailing party, and appealed from the judgment in this respect. In this court (Supreme Court of Errors) the appellee (plaintiff) filed a plea in abatement to which the appellant demurred. *Demurrer overruled; plea in abatement sustained, and appeal dismissed.*

Lewis Sperry and *Timothy E. Steele*, for the appellant (garnishee).

Roger Welles, for the appellee (plaintiff).

HAMERSLEY, J. Section 1237 of the General Statutes enacts: "Where in any suit by foreign attachment, any garnishee, having been cited in to disclose . . . . shall appear, the court may examine him upon oath as to whether, at the time of the service of the foreign attachment, he had effects of the defendant in his hands, or was indebted to him, and may hear any other proper evidence respecting the same; and if it appears that such garnishee had not effects of the defendant in his possession, or was not indebted to him, he shall recover judgment for his costs"; and if the plaintiff "withdraws his suit, or fails to recover judgment against the defendant, such garnishee shall be entitled to judgment for his costs."

It has been uniformly held that the finding of the court upon a disclosure by the garnishee, authorized by that statute, is not a judgment; that the hearing does not amount to the trial of a cause; and that the result is not binding either upon the plaintiff or the garnishee. "It is an informal proceeding, regulated by statute, which is merely preliminary to the bringing of a *scire facias*," upon which alone the rights of the parties can be determined. *Bacon Academy* v. *De Wolf*, 26 Conn., 602; *Tweedy* v. *Nichols*, 27 id., 518, 519.

The appellant, "as garnishee" in an action tried by the City Court of the city of Hartford, has appealed to this court "from the judgment of said court in the matter of costs." The reasons of appeal assign as errors: first, the omission of the court, in taxing "his costs" for which it rendered judgment in favor of the garnishee, to include the fees allowed by § 3720 of the General Statutes to the prevailing party in any civil action, viz, $10 for all proceedings before trial, and $15 for the trial of an issue of law or fact; second, an erroneous ruling by the court upon the disclosure.

The plaintiff claims that such appeal is unauthorized by law, and has filed a plea in abatement on that ground; to which plea the appellant has demurred.

The appeal is void. So far as it rests upon a claim of error in the taxation of costs, the appeal is in the nature of a motion in error governed by the principles which controlled such motion prior to the consolidation, under one appeal, of the motion for a new trial and the motion in error; *White et al.* v. *Howd*, 66 Conn., 264; and by express terms of the statute, it only lies "when a final judgment is rendered or decree passed in any cause in which a party may be entitled to a writ of error." General Statutes, § 1129. A writ of error may lie where the record discloses that the costs included in the judgment were not taxed in accordance with the rule prescribed by law; but it does not lie where no rule of taxation is so prescribed.

In statutory proceedings as to which there is no provision of law or statute absolutely giving costs to the prevailing party, or as to which, if a judgment for costs is authorized, no specific costs are prescribed, and to which the statute regulating the costs taxable to a party who succeeds in a civil cause does not apply, the taxation of costs is a matter of discretion. *Smith* v. *Scofield*, 19 Conn., 534; *Canfield* v. *Bostwick*, 22 id., 270; *Dutton* v. *Tracy*, 4 id., 79, 95.

The disclosure by a garnishee prior to the issue of a *scire facias*, is a special statutory proceeding; and since it was first authorized, about 1821, down to 1876 no statute provided any rule for taxation of costs on such proceeding. The stat-

ute fixing the fees of the prevailing party in a civil action did not apply. The taxation of such costs was a matter of discretion, until the judges of the Supreme Court of Errors, in the exercise of their power to establish rules of practice, adopted a rule defining the costs to be taxed to a garnishee. This rule was binding on all courts subject to the rules of practice. In 1876 a statute was passed providing that a garnishee should "recover his costs as a party defendant," and so fixed the rule of taxation. Public Acts of 1876, p. 89. In 1882 this law was repealed. Public Acts of 1882, p. 198. In 1881 the law prescribing the fees of parties to civil actions was repealed, and the present law on that subject enacted. Public Acts of 1881, p. 53. By the Acts of 1876 and 1881, the rule of court regulating the taxation of a garnishee's costs was made inoperative. By the revision of the rules of practice made by the judges in 1889, the rule in reference to a garnishee's costs was rescinded, and no rule on the subject has since been made. So that since 1889 certainly, there has been no statute and no rule of court prescribing any rule of taxation in respect to this proceeding; it follows that the taxation of the garnishee's costs is not reviewable on a writ of error. This question was settled in *Dutton* v. *Tracy*, *supra*. The statute had vested in a court held by two justices, jurisdiction over proceedings against forcible entry and detainer, and directed the court to tax costs for the prevailing party and issue execution therefor; but, as in the present case, there was no statute prescribing the costs taxable in such special proceeding. A judgment under this statute included costs claimed to be illegal. Upon a writ of error to the Superior Court and a reservation for the advice of this court, it was held that the taxation of costs was not reviewable, because "there having been no rule of taxation prescribed, it necessarily was matter of discretion."

The other reason of appeal assigned by the appellant, viz., error in a ruling of the court during the disclosure, needs no comment. Any appeal from the finding of the court on such informal proceeding, is unauthorized by law. *Robinson* v.

Mason, 27 Conn., 270; *Tweedy* v. *Nichols*, *supra*. Counsel for the appellant properly refrained from pressing this ground of appeal in argument.

The demurrer is overruled, the plea in abatement sustained, and the appeal dismissed.

In this opinion the other judges concurred.

JOHN SKELLY ET UX. *vs.* THE MONTVILLE STREET RAILWAY COMPANY.

* First Judicial District, Hartford, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The Street Railway Act of 1893 (Public Acts of 1893, p. 307), which prohibits any street railway from extending its tracks from one town to another so as to parallel a steam railroad until it shall have applied for and obtained a judicial finding that public convenience and necessity require the construction of such extension, applies to an extension authorized by a subsequent amendment to a street railway charter, unless an intention to except such extension from the operation of the general Act clearly appears in the amendment.

[Submitted on briefs January 10th—decided February 7th, 1896.]

SUIT for an injunction to restrain the defendant from constructing and maintaining its street railway in the public highways, so as to parallel a certain steam railway, until it should have obtained from the Superior Court or a judge thereof, a finding that public convenience and necessity required such construction; brought to the Superior Court in New London County and reserved by that court, *Prentice*, *J.*, upon the defendant's demurrer to the complaint, for the advice of this court. *Judgment overruling demurrer advised.*

The complaint, after reciting the incorporation of the defendant under a special charter granted by the legislature in 1889, proceeds as follows:—

* Transferred from second judicial district.

"2. The General Assembly of the State of Connecticut, at its January session, 1895, passed an Act amending the charter of said company, which amendment had been accepted by said company and a certificate of acceptance filed with the Secretary of State, and said amendment is as follows: 'Section 2. Said company is hereby authorized to lay down, construct, keep and maintain the tracks of said company with the necessary turnouts, switches and side tracks and run its cars over the same through the street known as the Norwich and New London turnpike road to such a point in a southerly direction in the town of Waterford and to such a point in a northerly direction in the town of Montville as may be determined by the selectmen of the respective towns. . . Section 4. Said company shall have the same right to lay down, construct, keep and maintain its tracks and necessary turnouts and to run its cars over the same in the town of Norwich as far northerly as the city line of the city of Norwich, with the approval of the selectmen of the town of Norwich, that The Norwich Street Railway Company now has; *provided*, said Norwich Street Railway Company shall release its said rights to said Montville Street Railway Company, and said release shall be recorded in the town of Norwich.'

"3. The Norwich Street Railway Company at the time of the approval of said amendment to the charter of the Montville Street Railway Company had the right to lay down, construct and maintain its tracks and necessary turnouts and switches and to run its cars over the same from the said city line of said city in said public highway as far southerly as the boundary line between the town of Norwich and the town of Montville.

"4. The said Norwich Street Railway Company has released all its rights to the said Montville Street Railway Company, which release has been recorded in the town records of the town of Norwich."

The complaint then alleged compliance with the provisions of the foregoing amendments, and the approval by the selectmen of the plans submitted, and continued as follows:—

"11. Said street railway will parallel the said New London

Northern Railroad Company's steam railway the whole distance between the city of Norwich and the city of New London at a distance therefrom varying from one quarter of a mile to a mile and one half.

"12. The plaintiff Mary E. Skelly, is the owner of a tract of land on the easterly side of said public highway in the town of Norwich and the land covered by said public highway to the center line thereof, subject to the right of the public as a public highway, in which it is proposed by said Montville Street Railway Company to lay down, construct and maintain its tracks as aforesaid from the town of Norwich to and into the town of Montville, and to build a turnout in said street on land owned by her as aforesaid, to the great damage of said plaintiff and for which she has no adequate remedy at law."

The defendant demurred to the complaint, upon the ground that the amendments to its charter were passed and took effect after the passage of the Act of 1893, and that by virtue of such amendments the defendant had the right to construct its track from the city of Norwich to the town of New London in the highway mentioned in the complaint, without making any application to the Superior Court or a judge thereof, to ascertain whether public convenience and necessity required the construction of a street railway which would parallel a steam railway.

At the request of the parties, the Superior Court reserved the questions of law arising upon the pleadings, for the consideration and advice of this court.

Joseph T. Fanning, for the plaintiffs.

Soloman Lucas, for the defendant.

HAMERSLEY, J. One question only is presented by the demurrer: Do the amendments to the defendant's charter, passed since the Act of 1893 (Public Acts of 1893, p. 307), except the defendant from the operation of § 8 of that Act? This section forbids the extension of a street railroad from

one town to any other town in the public highway, so as to parallel any steam railroad, (unless authorized by special charter prior to January 1st, 1893,) until the Superior Court, upon application in the prescribed form, has found that public convenience and necessity require the construction of such street railway. The Act took effect on its passage, June 1st. The first amendment to the defendant's charter was passed by the same legislature, and took effect June 21st. Section 2 of that amendment provided: "Said company is hereby authorized to lay down, construct, keep, and maintain the tracks of said company . . . . and run its cars over the same through the street known as the Norwich and New London turnpike road, to such a point in a southerly direction in the town of Waterford, and in a northerly direction in the town of Montville, as may be determined by the selectmen of the respective towns." The towns of Waterford and Montville separate the town of New London from the town of Norwich.

We think this amendment did not repeal the general Act passed June 1st, by excepting the defendant from its operation. Section 8 of that Act, by its terms, did not apply to the extension of railways in pursuance of authority by special charter granted prior to January 1st, 1893; reference to the acts of that session shows that no authority to construct such railways was granted between January 1st and June 1st, 1893, when the Act took effect; unless the Act applied to railways whose construction should be authorized subsequent to its passage, it was wholly inoperative. The Act must, therefore, be held to enact that no street railway whose extension is hereafter authorized by special charter, shall be extended from one town to another so as to parallel a steam railroad, until application has been made as provided. The provisions of any subsequent special charter, or amendment to such charter (for the word charter as used includes both), may repeal this Act; but every subsequent charter is passed and accepted and must be construed, in view of the existence of the general law enacted with reference to such charters. The maxim that later statutes abrogate prior con-

trary statutes, does not justify a repeal by implication unless the later statute is couched in negative terms, or its provisions are so clearly repugnant to the former Act that it necessarily implies a negative. "If both statutes can be reconciled, they must stand and have a concurrent operation." *Goodman* v. *Jewett*, 24 Conn., 588, 589; *Norwich* v. *Story*, 25 id., 44, 47; *Kallahan* v. *Osborne*, 37 id., 488, 490. Here there is no repealing clause; the charter amendment does not in terms negative the general Act; and only by a strained construction can any repugnancy be discovered between the two. In order that the Act of 1893 may operate at all, the legislature must grant the franchise to extend the railway, and must to that extent pass upon the question of public convenience and necessity; but the franchise is granted subject to a *quasi* judicial finding on that question in view of the existence of a parallel steam railroad.

The provisions of the amendment modifying the franchise granted, by leaving the limits of the authorized extension to be determined by the selectmen of the respective towns, have no natural and no real application to the finding required by the general Act. They simply give the selectmen of each town the power to determine how much of the town highway may be occupied by the railroad. The exercise of this power depends on the discretion of the selectmen, and not on any finding as to public convenience and necessity, either generally or in view of an existing parallel road. It is a limitation, not an extension of the granted franchise.

The other amendment to the defendant's charter, passed in 1895, has no different effect. That amendment includes provisions authorizing the defendant to extend its road northerly in the town of Norwich to the city of Norwich, with the approval of the selectmen of Norwich, and upon obtaining a release of the rights then belonging to the Norwich Street Railway Company. The provisions of § 2 of the amendment of 1893, which had not been acted on by the defendant, are repeated in the amendment of 1895, and have the same meaning.

The amendment of 1895 gave the defendant powers in

addition to, but closely connected with, those given it by the amendment of 1893; it was natural in giving these powers that the provisions of 1893 should be incorporated in the new amendment, and the old amendment be repealed. We see no force in the defendant's suggestion that such action might indicate an intent to repeal the general Act; but if so, the intent has not been expressed.

The fact that the legislature of 1895 granted some special charters for street railways containing a clause that the charter was subject to the general laws relating to street railways, and others without that clause, has no significance. All such charters were granted subject to § 8 of the Act of 1893, unless the terms of the charter or special provisions repugnant to the operation of the general law expressed an exception.

The Superior Court is advised to overrule the demurrer.

In this opinion the other judges concurred.

RICHARD DUNDON ET AL. *vs.* THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The power to require a railroad company to station a flagman at a highway crossing is vested in the railroad commissioners. If a railroad company sees fit, of its own volition, to station a flagman at such a crossing, the question whether his absence from his post during the passage of a train constituted negligence upon the part of the railroad company, is one of fact to be determined by the trier upon all the circumstances in the case.

While a traveler on the highway has the right to rely, to a certain extent, upon an unobstructed passage over a railroad crossing, in the absence of a flagman who was customarily there during the passing of trains, yet the question whether such traveler was guilty of contributory negligence in attempting to cross in the absence of the flagman, is a question of fact for the decision of the trier upon all the evidence in the case.

[Argued January 22d—decided February 7th, 1896.]

ACTION to recover damages for an injury to the plaintiffs' horse and cart, alleged to have been caused by the negligence of the defendant at a highway crossing; brought to the Court of Common Pleas in Fairfield County, and heard in damages to the court, *Curtis, J.*; facts found and judgment rendered for the plaintiffs to recover nominal damages only, and appeal by the plaintiffs for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

Stiles Judson, Jr., for the appellants (plaintiffs).

William D. Bishop, Jr., for the appellee (defendant).

FENN, J. The court below, after default, and upon a hearing in damages, found the following facts:—

On February 8th, 1895, the railroad tracks of the defendant crossed at grade a certain highway known as Burr road in the city of Bridgeport. On said day a certain other highway crossing next east of said Burr road, and known as Fairfield avenue crossing, was impassable to travel on the highway on account of certain work being done thereat, under order of the railroad commissioners, for the purpose of separating the grades at that point. On said day and for some time prior thereto, during the progress of the work, the travel was and had been diverted from said Fairfield avenue crossing to said Burr road crossing, resulting in considerable travel passing daily over said Burr road crossing. During the period in which the travel was so diverted over the Burr road crossing, the defendant maintained a flagman at said crossing for the purpose of warning travelers on the highway of the approach of trains, and for signaling approaching trains, whether or not the crossing was safe for them, and said flagman was on duty upon said day. The defendant maintained said flagman at said crossing of its own volition, and not in pursuance of any order of the railroad commissioners of this State.

On the day in question, one Collett, a driver in the employ of the plaintiffs, was leading the plaintiffs' horse, which was attached to a coal-cart loaded with coal, over said Burr road, and was approaching said grade crossing from the south, the railroad tracks at that place running east and west. As said Collett approached said crossing, a regular daily train from the east was due at said crossing. Collett had frequently crossed over said Burr road crossing and was perfectly familiar with it, and knew that a flagman was stationed there, and was accustomed to rely wholly upon the flagman to warn him of the approach of a train. As he was approaching said crossing, at about one o'clock in the afternoon on said day, the wind was blowing and it was also snowing, but there was an unobstructed view up and down the tracks in both directions for a distance on the highway of several hundred feet before he reached said crossing; and at any point in this several hundred feet, a train could have been easily seen for a long distance up and down the tracks. Said Collett, in approaching said crossing, was leading his horse in such a manner that the horse's head was between him and the approaching train. When he had arrived within about twenty-five feet from said crossing he stopped and looked to see whether the flagman was upon the crossing displaying the usual signal of the approach of the train. The flagman was absent. Collett, relying upon his absence as an assurance of safety, led his horse upon the crossing, taking no other precautions whatever to acquaint himself of the approach of the train, which could easily have been seen by him if he had looked in its direction, in ample time for him to have avoided the collision which occurred, as hereinafter stated. As Collett drove upon the tracks the flagman, who then for the first time appeared, shouted to him from the north side of said tracks to warn him of the approaching train, and said Collett drew his horse to the left as quickly as possible after said warning, but too late to avoid the collision, the train striking and demolishing the cart, scattering the coal and injuring the horse so as render it perfectly useless. The flagman came upon said crossing too late to warn

said Collett of the approach of said train. The plaintiffs' property was damaged thereby to the amount of $242.

The court found, upon the foregoing facts, that the defendant was not guilty of negligence, and that the plaintiffs' servant was guilty of contributory negligence.

The plaintiffs claimed that the failure of the flagman to appear upon said crossing in time to warn the plaintiffs' servant, was negligence on the part of the defendant and the proximate cause of the damage sustained; and furthermore, that the failure of the said driver to look in the direction of said approaching train, and his relying solely upon said flagman, did not constitute, under the facts of this case, contributory negligence. These claims the court overruled and rendered judgment for nominal damages only. The plaintiffs thereupon appealed to this court.

The first inquiry which offers itself to us, upon the examination of the record is, does the finding upon the matter of negligence, as relates to the conduct, either of the plaintiffs or the defendant, present any question which, upon the application of the rules laid down in *Farrell* v. *Waterbury Horse R. R. Co.*, 60 Conn., 239, 257, and recognized in many subsequent decisions of this court, we are at liberty to consider. In other words, were the inferences or conclusions of the court below based upon the special circumstances of the case, where the only standard of duty is the indefinite and varying one of the conduct of a reasonable and prudent man under like circumstances, where therefore not only the extent of performance but also the measure of duty, must be ascertained as facts; or did such inferences or conclusions embrace or involve the imposition of some duty upon the plaintiffs, not imposed by law, or the discharge of the defendant from some duty which the law required.

The plaintiffs claim such improper imposition and discharge; that "the failure of the flagman to appear upon said crossing in time to warn the plaintiffs' servant, was negligence on the part of the defendant and the proximate cause of the damage sustained; and furthermore, that the failure of said driver to look in the direction of said approaching

train, and his relying solely upon said flagman, did not constitute, under the facts in this case, contributory negligence."

In reference to the first of these claims it appears, as we have seen, that "the defendant maintained said flagman at said crossing of its own volition, and not in pursuance of any order of the railroad commissioners of this State." In *Dyson* v. *N. Y. & N. E. R. R. Co.*, 57 Conn., 9, 22, this court said: "Nor do we think the defendant was guilty of negligence in not providing at the crossing additional signals to those required by statute. In this State the legislature has assumed the regulation of this matter by providing specifically what signals shall be given of the approach of trains to crossings, and by instructing the railroad commissioners to require other signals at crossings when they shall deem them necessary for the protection of the public. This legislation is exhaustive and defines the whole duty of railroad companies in the matter to which it relates." It is indeed true that the foregoing statement should be read in the light of, and regarded as consistent with, what this court said later in *Bates* v. *N. Y. & N. E. R. R. Co.*, 60 Conn., 259, to the effect, and as stated in the head-note, that in exceptional cases "where the highest degree of diligence may justly be required, a literal compliance with the statute may not be enough." But it is the province of the trial court to determine whether the case before it presents the exceptional features which call for the application of the additional requirement, as demanded by common prudence and the test of the conduct of the man of such prudence.

This brings us to the main ground of the plaintiffs' contention, namely, that the defendant had by its act in establishing a flagman at this crossing, recognized the obligation and assumed the duty of providing such safeguard, and that therefore it was incumbent upon it to faithfully discharge such duty. In support of this contention the plaintiffs cite many cases in other jurisdictions, to the language used in two of which, as quoted in the plaintiffs' brief, we will refer. In *Kissenger* v. *R. R. Co.*, 56 N. Y., 538, 543, the court said:

"Although it is not negligent for a railroad company to omit to keep a flagman, yet if one is employed at a particular crossing, his neglect to perform the usual and ordinary functions of the place may be sufficient to charge the company." In *Burns* v. *Rolling Mill Co.*, 65 Wis., 312, 315, it was said: "When the company had usually kept a flagman at that crossing, those approaching it might well think that no train was near it if no flagman or his signal was seen. The traveler might in this way be lured into danger, when, if no flagman had ever been kept there, he would not have looked for such a signal, but would have looked and listened for other signs of an approaching train."

There is nothing in the language above quoted that we cannot approve and fully indorse. But there is also nothing in such language inconsistent with the view that in such cases there is no fixed rule of law, no exact standard of duty, to be declared by the court, to regulate and control the function and province of a jury, in determining the questions of negligence and contributory negligence. We say the province of the jury, but, as stated in *Farrell* v. *Waterbury Horse R. R. Co.*, *supra* (p. 253), "whether the trier (of the questions of fact) is one man or twelve men makes no difference. If the case is such that the trier and not the law must determine whether the conduct in question is, or is not, that of the prudent man, the conclusion of the single trier upon this point is just as binding and final as that of twelve men." In the case above referred to, as cited by the plaintiffs, *Burns* v. *Rolling Mill Co.* (p. 315), the court said: "It was certainly much more proper to submit to the jury in this case the questions whether the company had ordinarily kept a flagman at this place to the knowledge of the plaintiff, and whether he had not been withdrawn, and whether such withdrawal of the flagman on the evening of the accident was not negligence." The court below decided upon all these matters as being questions of fact, not of law. We think such court was correct in so regarding them, and we do not consider ourselves at liberty to review its conclusions.

The finding of the court that the plaintiffs' servant was

guilty of contributory negligence, was also clearly one of fact. In saying this we recognize fully the correctness of the plaintiffs' claim, that the failure of the flagman whom the plaintiffs' servant knew was stationed upon said crossing and upon whom he was accustomed to rely to warn him of an approaching train, to appear, directly and naturally tended to throw the plaintiffs' servant off his guard and to render him less vigilant than he otherwise would have been. This consideration should have had a material influence with the trial court when passing upon the question of contributory negligence. But we have no reason to judge that it did not. In *Tyler* v. *Old Colony R. R.*, 157 Mass., 336, 340, the court well stated what we hold to be the rule: "If it is customary to have one at a crossing, and he is absent, a traveler has a right to rely to some extent on this fact; but this does not excuse his not looking at all to see if a train is coming, when there are no obstacles to prevent his seeing if he looks." Applying this rule to the facts found, we think not only is the conclusion of the trial court justifiable, but that no other result was possible.

There is no error.

In this opinion the other judges concurred.

JOSIAH J. WHITE ET AL. *vs.* THE TOWN OF PORTLAND.

First Judicial District, Hartford, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Section 3844 of the General Statutes provides that the estate of a deceased person, not distributed or finally disposed of by the Court of Probate, may be set for taxation in the name of such estate; while § 3845 directs that where one person is entitled to the ultimate enjoyment of land and another to its life use, the land shall be set in the list of the party in the immediate possession or use thereof, except when it is specially provided otherwise. *Held* that real estate owned by and in possession of a tenant by the curtesy, should be listed in his name for taxation, even though at the time of the assessment the estate of his deceased wife was in process of settlement in the Court of Probate.

It is the duty of a tenant by the curtesy to pay all taxes upon the real estate owned by him as such tenant, which are lawfully laid after the death of his wife and during his tenancy; his interest only, can be taken or subjected to a lien therefor, and he alone is personally liable for such taxes.

Under such circumstances, if the real estate is claimed to have been improperly assessed or assessed in excess of its market value, the tenant by the curtesy alone is interested; and if the remainder-man unites with the life tenant in an appeal from the action of the board of relief, there is a misjoinder of parties which may be taken advantage of on demurrer.

Section 888 of the General Statutes provides that no action shall be defeated by the misjoinder of parties, but that parties misjoined may be dropped by order of court at any stage of the cause, as it may deem the interests of justice to require. *Held* that while the statute gave this power to the court, it was ordinarily to be exercised only on the request of the party and upon proper amendment of the pleadings; that the court could not compel the plaintiffs to drop the party misjoined, amend the complaint and continue the case; and that if they neglected or refused to avail themselves of their right in this respect, the court was justified in dismissing the action as against them both.

[Argued January 7th—decided February 21st, 1896.]

APPEAL from the doings of the assessors and board of relief of the defendant town, taken to the Superior Court in Middlesex County and tried to the court, *Robinson, J.*, upon the defendant's demurrer to the plaintiffs' reasons of appeal; the court sustained the demurrer and rendered judgment for the defendant, and the plaintiffs appealed for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

William L. Bennett, for the appellant, (plaintiffs).

John R. Buck and *John M. Murdoch*, for the appellee (defendant).

TORRANCE, J. This is an application for relief, under § 3860 of the General Statutes, from the doings of the board of relief of the town of Portland. The town demurred to the application, the Superior Court sustained the demurrer and dismissed the case, and from that judgment the plaintiffs took the present appeal.

From the facts alleged in the application, which are in effect admitted by the demurrer, it appears that the tax assessment in question was made in 1893 upon certain real estate, which the assessors of Portland set in the list of the "estate of Eliza T. White"; that she died intestate in October, 1891; that one of the plaintiffs, Josiah J. White, is the husband of the deceased Eliza T. White, claiming an interest in the whole of said real estate as tenant by the curtesy; and the other, Frederick Hall White, is her only child and sole heir, claiming as such heir the remainder in said real estate.

The application further alleged, in substance, that said real estate had been improperly assessed, and assessed greatly in excess of its true market value; that application had been properly made to the board of relief for redress, which had been refused, and that the applicants were aggrieved by such action of said board.

Among the causes of demurrer was one for misjoinder of parties, and as that appears to have been well taken, and to be decisive of the present appeal, the discussion will be confined chiefly to that point.

This question arises principally upon the first paragraph of the application, which reads as follows: "That said Josiah J. White is the husband of the late Eliza T. White, who died intestate on the 23d day of October, 1891, leaving said Josiah J. White as tenant by the curtesy, and said Frederick Hall White as sole heir to the remainder, of certain real estate hereinafter mentioned and set forth, which said real estate is located and situate in the town of Portland, in said Middlesex County."

The defendant demurred, "because it is not alleged and does not appear that said J. J. White and Frederick Hall White are either tenants in common or joint tenants of the property set in the list of the estate of Eliza T. White."

The plaintiffs claim that the above paragraph of the application sufficiently shows that at the time of the acts complained of, Josiah J. White was tenant by the curtesy of all of said real estate and was in possession thereof as such ten-

ant, and that Frederick Hall White was the sole owner of the remainder interest therein; and that from this it follows that they can together bring this application.

If, for the purposes of discussion, the first part of this claim is conceded, it by no means necessarily follows that the plaintiffs can join in this proceeding. If under the circumstances disclosed by the record, it was the duty of the tenant by the curtesy to pay all taxes that might be assessed upon the real estate in question; if said taxes could only be collected from him, and only his property and estate could be taken, or subjected to a lien, therefor; and if the other plaintiff and his property could under no circumstances be made liable for such taxes, then it would follow that Frederick Hall White has no interest whatever in this proceeding, and is a mere stranger to the matters complained of; and that this is his true relation to the case appears to be quite clear.

As tenant for life, it was the duty of Josiah J. White to pay all taxes that might be laid upon this real estate after the death of his wife, and during his tenancy. "It may be laid down as a duty uniformly incumbent upon a tenant for life, to pay all taxes assessed upon the land during his life." 1 Washburn, Real Property, p. 126; Tiedeman, Real Property, § 68. "Tenants by curtesy hold their estates subject to the duties, limitations, and obligations, which attach to those of ordinary tenants for life." 1 Washburn, Real Property, p. 183.

Section 3845 of the Revised Statutes of this State provides that when, as in this case, the real estate is, as claimed by the plaintiffs, in possession of a tenant for life, and another person is entitled to the "ultimate enjoyment" of it, "such estate shall be set in the list" of the tenant for life in possession, "except when it is specially provided otherwise."

In this case it was the duty of the assessors, under this section, when they made out the list in question, to set said real estate in the list of Josiah J. White, and not in the name of the estate of Eliza T. White.

It is true, that § 3844 of the General Statutes provides

that the estate of any deceased person not distributed or finally disposed of by the Court of Probate, may be set in the list in the name of such estate, or of the administrator or executor; and § 577 provides that the executors and administrators of deceased persons during the settlement of the estate, shall have the possession, care and control of the real estate; but neither of these sections has any application to a case like the present, even if we assume that the estate of Eliza T. White was in process of settlement at the time of this assessment.

Section 577, by its own terms, is not applicable to real estate the life use in which belongs to a tenant by the curtesy; *Staples' Appeal from Probate*, 52 Conn., 421; and where the life tenant is thus in possession of the real estate, § 3844 is not applicable because of the express provisions of § 3845. Sections 577, 3844, and 3845 must be construed together, and when so construed, it is evident that the first two have no application in a case like the present.

Furthermore, from the fact that the real estate in question must be set in the list of the life tenant, it follows that he alone would be personally liable for the tax, and not the remainder-man; all the ordinary means for collecting a tax by levy and sale of property, or by taking the body, could only be employed in such case against the life tenant.

Moreover, the statutory lien for such a tax would rest only upon the estate of the life tenant, and not upon the estate of the remainder-man; for such is the express provision of § 3890 of the General Statutes imposing such a lien, which reads as follows: "The estate of any person in any portion of real estate which is by law set in his list for taxation, shall be subject to a lien for that part of his taxes which is laid upon the valuation of said real estate as found in said list when finally completed." This clearly imposes a lien for the taxes only upon such estate as the party has in the land, and not upon an estate which another may have in the same land.

It thus appears that it is the exclusive duty of the tenant by the curtesy to pay all taxes legally assessed upon the real

estate in question; that he alone is personally liable therefor; that only his property can be taken or subjected to a lien therefor; and that consequently the remainder-man has no right or interest which can be injuriously affected by any such assessment.

Clearly then, the plaintiffs have no such common or joint interest in the relief sought as will entitle them to join; for the remainder-man appears to have no interest whatever in obtaining such relief, and hence there was a misjoinder of parties.

"The *remedy* or redress, which the law affords in any given case, for the violation or deprivation of a legal right, belongs exclusively to him or them, *whose* right has been violated, or is withheld. If then, the right of action is in *one* person only, another may not be joined with him, as plaintiff in the action. For he whose sole right is violated, cannot by joining another person in his complaint, make the defendant liable to a *stranger*." Gould on Pleadings, § 52, p. 183. The principle here stated is fully recognized by the Practice Act and is still operative. *State of Conn.* v. *Wright*, 50 Conn., 580, 581; *Patterson* v. *Kellogg*, 53 id., 38.

The effect, however, of a misjoinder of this kind, under the Practice Act, is not necessarily fatal to the suit, as it generally was at common law; for § 888 of the General Statutes provides that "no action shall be defeated by the nonjoinder or misjoinder of parties;" and that new parties may be added, and parties misjoined dropped, by order of the court at any stage of the cause.

Counsel for the plaintiffs in his brief makes the point that under this section, "either misjoinder is not a cause of demurrer but a defect to be reached by motion; or if demurrable, the judgment should run against that party who is misjoined, while the cause of the party properly in court should be saved." The claim is, in effect, that the court below erred in holding that this misjoinder could be reached by demurrer, and in rendering judgment against both plaintiffs.

The fact that neither of these claims is stated in the

reasons of appeal, makes it unnecessary to decide them; but as they involve questions of some importance frequently arising in practice, it is deemed advisable to state briefly the views of this court upon them here.

In this State, prior to the adoption of the Practice Act, a demurrer would lie for misjoinder of plaintiffs, where such misjoinder appeared upon the face of declaration; Gould on Pleading, § 109, p. 256, and the Practice Act has, neither in terms nor by necessary implication, made any change in this respect. Whatever, then, may be the practice elsewhere, in this State a fault of the kind here in question may be reached by a demurrer.

With reference to the form of the judgment, the plaintiffs' real claim appears to be that it was the duty of the court of its own motion, and without, or independently of, any action or request of the plaintiffs, or even against their objection and protest, to drop the party misjoined, cause the application to be amended, and allow the case to proceed. Power is undoubtedly vested in the court to do all this, but this power ordinarily is to be exercised only at the request of the party, and not by the court of its own mere motion. It is the duty of the party, if he desires to have the party misjoined dropped, and the action to proceed, to request the appropriate action of the court, and to amend his application accordingly. The court cannot compel him to drop the party misjoined, and amend his complaint and go on with his case; it can only give him an opportunity to do so; but if he neglects or refuses to avail himself of the opportunity, the court is under no duty to force him to do so. In such case the court is justified in dismissing the action. When this is done the action is not "defeated" on account of the misjoinder, but because the party neglects or refuses to avail himself of the right which the statute gives him to avoid the misjoinder.

In the case at bar it nowhere appears that the plaintiffs wished to amend as to misjoinder, or to go on with the action after such amendment, or that the court prevented them from so doing. The case, then, was "defeated" be-

cause one of the plaintiffs did not avail himself of his rights under the statute, and the judgment properly ran against both.

In the view taken of the effect of the misjoinder in this case, it is unnecessary to discuss or decide the other errors assigned.

There is no error.

In this opinion the other judges concurred.

MINERAL SPRINGS MANUFACTURING COMPANY *vs.* JOHN MCCARTHY.

First Judicial District, Hartford, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

While the nature and relative location of the tracts of land over and to which a right of passway is granted, as well as other circumstances attending the grant, may properly be regarded by the court in determining the purposes for which the way may be used by the grantee, yet such evidence cannot control the unambiguous language of the grant, nor impair or qualify the right of the grantee in his use of an unrestricted right of way clearly given by the terms of the instrument.

The deed creating the passway in question declared that it should be used by the grantees, under whom the defendant claimed, in common with others in passing from the premises to the highway, and was "not to be incumbered in any way or by any person whatever," except a slight projection of the grantees' doorsteps. *Held* that in view of this explicit provision the plaintiff, who had subsequently purchased the remaining land of the grantor over which this passway ran, had no right to erect and maintain bars across such way.

The plaintiff erected the bars under a claim of right which the defendant denied, and the bars were several times erected by the plaintiff and torn down by the defendant. *Held* that a finding by the trial court to the effect that the plaintiff had not, by such interrupted maintenance, acquired the right to forever maintain the bars, was a conclusion of fact, and fully justified by the subordinate facts detailed in the finding.

[Argued January 7th—decided February 21st, 1896.]

SUIT for an injunction to restrain the defendant from removing bars and gates across a certain passway; brought to

the Superior Court in Tolland County and tried to the court, *Shumway, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiff for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

William W. Hyde and *Jeremiah M. Sheehan*, for the appellant (plaintiff).

The maintenance of said bars across the passageway is not an incumbrance within the meaning of the language in the deed from Fuller to the Cockrans of June 22, 1860. *Allan* v. *Gomme*, 11 Ad. & El., 759; *Skull* v. *Glenister*, 16 C. B. N. S., 81; *United Land Co.* v. *Great Eastern Ry. Co.*, L. R. 10 Ch. App., 586; *Atkins* v. *Boardman*, 2 Met., 457; Goddard's Law of Easements, 331; Washburn on Easements (3d Ed.), 264, 265; Cooley on Torts (2d Ed.), 437 (*371); Tiedeman on Real Property, § 608; *Maxwell* v. *McAtee*, 9 B. Mon., 20; *Garland* v. *Furber*, 47 N. H., 301; *Meth. Prot. Church* v. *Laws*, 7 Ohio C. C., 211; *Frazier* v. *Myer*, 132 Ind., 71; *Whaley* v. *Jarrett*, 69 Wis., 613; *Brill* v. *Brill*, 108 N. Y., 511; *Bean* v. *Coleman*, 44 N. H., 539, 543; *Baker* v. *Frick*, 45 Md., 337; *Green* v. *Goff*, 44 Ill. App., 589; *Connery* v. *Brooke*, 73 Pa. St., 80.

Having maintained the bars for a period of thirty years under a claim of right without interference on the part of the Corkrans, the plaintiff has the right to continue them in the same way it has always done. 1 Amer. & Eng. Ency. of Law, 228; *Sherwood* v. *Burr*, 4 Day, 244, 251; *School District* v. *Lynch*, 33 Conn., 330. The defendant has no right in the way as the owner of the lot on which he built, except such as arises from necessity in the use of said lot as a garden. *Collins* v. *Prentice*, 15 Conn., 39; *Pierce* v. *Selleck*, 18 id., 321; *McDonald* v. *Lindall*, 3 Rawle, 492; *Gayford* v. *Moffatt*, L. R. 4 Ch. App., 133; *Wimbleton*, etc., v. *Dixon*, L. R. 1 Ch. Div., 362, 368; Goddard's Law of Easements, 315 *et seq.* This is a case where a court of equity should interfere by injunction. *Johnson* v. *Kier*, 3 Pittsburg, 204; *Wahle* v.

Reinbach, 76 Ill., 322; *Burlington* v. *Schwarzman*, 52 Conn., 181; *Hawley* v. *Beardsley*, 47 id., 571.

Joel H. Reed and *Clitus H. King*, for the appellee (defendant).

The grant of way is expressed in general terms, and the plaintiff's claim that it should be limited to garden purposes only, is unreasonable and is not supported by the authorities. *Henning* v. *Burnett*, 8 Ex., 187; *Bakeman* v. *Talbot*, 31 N. Y., 369. The bars are an incumbrance within the meaning of the grant. *Patten* v. *Western Carolina Educational Co.*, 101 N. Car., 108. At all events, the defendant could not be required to keep up the bars, unless they were necessary and convenient for the defendant's use. *Bean* v. *Coleman*, 44 N. H., 539; Washburn on Easements (4th Ed.), 255. And that question is one of fact and not found by the trial court. *Brill* v. *Brill*, 15 Atl. Rep., 754. The case presented is not one for an injunction. 2 Swift's Dig., 156; Washburn on Easements, 750; 10 Amer. & Eng. Ency. of Law, 779, 780; *Eastman* v. *Amoskeag Mfg. Co.*, 47 N. H., 71; *Whittlesey* v. *H. P. & F. R. R. Co.*, 23 Conn., 421; *Hines* v. *Stephens*, 33 id., 497; *Hawley* v. *Beardsley*, 47 id., 571; *Smith* v. *King*, 61 id., 511; *Goodwin* v. *N. Y., N. H. & H. R. R. Co.*, 43 id., 494; *Blaine* v. *Brady*, 64 Md., 373.

FENN, J. The plaintiff, in its complaint, claimed an injunction to restrain the defendant, who was the owner of land adjacent to a farm belonging to the plaintiff and claimed a right of way over the plaintiff's land to his own, from permanently removing a certain gate and bars across said way, and from interfering with the plaintiff in the maintenance of said bars and gate over said passageway. The Superior Court found the issues for the defendant, and the plaintiff appealed.

The first five reasons—and the principal ones—assigned for the appeal, may be considered together. These are, in effect, that the court erred in holding that the grant of passageway in a deed from John Fuller, the plaintiff's

grantor, to Jeremiah and Mary Cockran, the defendant's predecessors in title, "was not to be construed with special reference to the nature, condition, and use of the subject-matter of the grant at the time the deed was executed and the obvious purposes which the parties had in view in creating said passageway." The plaintiff asserts that, construing the said deed with such reference to surrounding conditions and circumstances, it should have been held to have been the purpose of the parties to establish only a right of passageway for the Cockrans across the pasture of the plaintiff to the garden spot of the Cockrans; that the maintenance of the barway and bars across said passageway was not an incumbrance of such way, within the meaning of the said conveyance, and that the plaintiff had a right to maintain them.

The facts found by the court, material to the presentation of the above claims, are substantially these :—On June 22d, 1860, John Fuller, being the owner of all the land in question, now belonging to both the plaintiff and the defendant, conveyed to Jeremiah and Mary Cockran two certain separate pieces of said land, together with a certain right of passage. The first described piece was declared to be conveyed "together with the dwelling-house and the east half of a wood-house thereon standing." After describing the other piece, the deed provided that the said Jeremiah and Mary Cockran and their heirs and assigns forever, were to have the privilege of a passageway fourteen feet wide, from said last mentioned piece of land, beginning at a described point and running on the north side of said first described piece of land till it intersected with the highway at a defined point. The deed added: "Said passageway to be used in common with others to go to and from the premises from the highway with teams or otherwise; not to be incumbered in any way or by any person whatever, except the door-steps may come one and a half feet into the said passageway." At the time of said deed, the door-steps of the house on said first described tract of land did extend into said passageway about one and a half feet.

In 1863, said Fuller conveyed, without referring to any

right of passageway, a certain other piece of land adjacent to the second piece of land described in said first deed. These two pieces of land—the second piece in the first deed, and the adjacent piece in the second deed—were conveyed to said Cockrans by said Fuller to be used by them as a garden spot, although not so expressed in the deeds. Such land was, in fact, so used down to the year 1894.

The said John Fuller conveyed the balance of his land, subject to the above described passageway, to the plaintiff on the 29th day of February, 1864. In said deed to the plaintiff, after describing said passageway, it was provided that the same "is to be at all times kept open and in common, for said Cockran and all the world to go to and from said highway to place of residence of said Cockran." At the time when said deed of June 22d, 1860, was executed and delivered, there was a wall running north and south between the first and second pieces of land described in said deed, and about one hundred and fifty feet east of the garden spot, with a bar-way with bars therein, through which bar-way the passageway mentioned in said deed, which ran easterly and westerly, passed. All the land of the plaintiff west of said wall and surrounding the land of said Cockrans, situated west of said wall, namely, that used as a garden spot, has, during all the time since the deed of June 22d, 1860, referred to, been used by the plaintiff and its grantor for a pasture. The land east of said wall has ever since the same time, been used as sites for dwellings, for gardens, and for lawns and grass land. The defendant, who is the son of said Mary Cockran, became by descent and distribution in March, 1894, the owner of a part of that piece of land herein referred to as the garden spot. After becoming such owner, he erected a dwelling-house thereon. Since coming into possession of the premises he has claimed the right to remove said bars and to prevent the plaintiff from keeping them up, and he has torn said bars down, claiming the right to do so. The removal of the bars deprives the plaintiff of the use of the premises west of the wall as a pasture, unless the same is fenced.

We think the plaintiff is right in its contention that the language of the grant in question, so far as the same is ambiguous and uncertain, should be construed with reference to the circumstances surrounding such grant; and that the nature, condition and use of the subject-matter thereof, at the time the deed was executed, should be regarded. But while this is true, it is also certain that neither the court below was required, nor are we permitted, to make, under the guise of construction, a new and different contract in lieu of that entered into by the parties themselves. The fact, therefore, that the second described piece of land in the deed of 1860, and the piece most distant from the highway, was needed by the Cockrans for a garden spot, and was sold to them by Fuller with that knowledge, and also the further fact that the land now belonging to the plaintiff west of the wall, was pasture, has little or no significance; since the grantor in his conveyance did not see fit to make any reference whatever to such facts, or any qualification, limitation, restriction or provision relating thereto, or by reason thereof. On the contrary, it would seem that the language used was purposely made so broad and comprehensive as to negative any imputation or presumption of an intent by the parties to qualify what the plaintiff in its brief refers to as "the most arbitrary construction possible."

While the passageway extends from the highway to the garden spot, past the then existing dwelling-house on the first described piece of land in the deed of 1860, to which the language in the subsequent deed from Fuller to the plaintiff, in 1864, refers, providing that it (the passageway) "shall at all times be kept open for said Cockran and all the world to go to and from,"—the said deed of 1860 makes no difference or discrimination between portions of said passageway. It is to be used "in common with others to go to and from the premises from the highway, with teams or otherwise." Moreover, the grant of the right of way, of which the sentence quoted is a part, is attached to, follows and is a part of the description of said second piece of land, or garden spot, in the deed. Surely, the plaintiff goes

pretty far when, thirty-five years after the deed was made, it asks us, upon an appeal, in a suit claiming nothing except an injunction against certain acts, as before indicated, to construe the deed of 1860 from Fuller to the Cockrans, in view of the language in the deed of 1864 from said Fuller to the plaintiff, in this wise: "From the highway to Cockran's house, the passage was to be a public way to all intents and purposes. West of the wall, however, it never occurred to Fuller that there was or ever would be any claim that the passageway was to be kept open to the public, as is now set up. In the original grant, the word 'premises' is used, and the fact that one lot was where Cockran lived, while the other was nothing but a garden spot, naturally led Fuller to overlook the fact that language sufficient to give free access to the dwelling might later be used to found a claim that would, if sustained, deprive him of his pasture. Hence, he did not mention the bars." It may at least be truly said, that none of the cases cited by the plaintiff go as far as would be requisite in order to support this claim.

But it is said that in this case the question is, what was meant by the words "not to be incumbered." Concerning this, we agree that "there is no absolute iron clad meaning to be given to the phrase." We think, however, that in view of the unqualified language employed throughout the grant of this right of way, making, as we have seen, no discrimination between different portions of it; locating a passageway to be used in common, then providing that it was "not to be incumbered in any way, or by any person whatever;" then making as the sole expressed exception, the grant of a privilege to the grantees to so incumber by doorsteps,—we are not at liberty to override the rule that would make this exception of one, even if less peculiar and suggestive than it is, operate as an exclusion of all others, and to hold either that the bars and gate-way were not an incumbrance, though the facts which would show what inconvenience their continuance might cause, do not appear; or to hold that, being an incumbrance, they were not intended to be covered by the expression used.

Another reason of appeal assigned by the plaintiff is to the effect that the court erred in refusing to hold that the plaintiff had, by its maintenance of said bar-way and bars across said passageway, under a claim of right, acquired the right to forever maintain the same. This claim, however, is disposed of by the finding of the court, as a conclusion of fact, that no such right has been acquired; which conclusion is fully justified and supported by the subordinate facts which are recited in the finding.

We do not regard it necessary to consider the further questions argued, as to whether or not the complaint presented a case which if proved, would have entitled the plaintiff to the relief claimed—the remedy of injunction; whether the defendant had the right, if he had desired, to have had the issues of fact determined by a jury, and to what extent the judgment might have been vindicated by the discretion vested in the trial court in cases of this character.

There is no error.

In this opinion the other judges concurred.

THE STATE *vs.* ALANSON L. SANFORD ET AL.

First Judicial District, Hartford, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Chapter 331 of the Public Acts of 1895 provides that any person convicted of a first violation of the liquor law shall be fined not less than $10 nor more than $200; and for a second and all subsequent convictions shall be punished by said fine, or by imprisonment not less than ten days nor more than six months, or by such fine and imprisonment both. The Act further provided that these penalties should be in lieu of those hitherto prescribed by law. *Held* that inasmuch as the punishment provided by the first clause of the Act for a first violation, was greater than that previously prescribed, and would thus be *ex post facto* if applied to offenses committed before it went into effect, the entire Act must be construed as applicable only to offenses committed after the Act took effect, and to convictions secured for such offenses only;

especially in view of General Statutes § 1 which provides that the repeal of a law shall not affect any punishment or penalty previously incurred.

[Argued January 7th—decided February 21st, 1896.]

CRIMINAL prosecution for a second violation by the defendants of the laws relating to the sale of spirituous and intoxicating liquors, brought to the Superior Court in Hartford County and tried to the jury before *Prentice, J.;* verdict and judgment of guilty, and appeal by the defendants for alleged errors in the rulings and charge of the court. *Error in part.*

The information contained three counts, the third of which alleged that in March, 1895, the defendants were convicted before a justice of the peace of having on February 28th, 1895, kept a place in Bristol in which it was reputed that spirituous and intoxicating liquors were kept for sale, without having a license therefor; that on September 2d, 1895, at Bristol, they sold spirituous and intoxicating liquors without having a license therefor; and that such sale was a second violation of the liquor laws within the meaning of § 1, Chap. 331 of the Public Acts of 1895. Upon the trial in the Superior Court, the court (*Prentice, J.*), against the defendants' objection, admitted in evidence the record of the former conviction which was alleged, and instructed the jury that the offense charged in the third count would constitute a second offense, within the meaning of the statute. The jury having returned a general verdict of guilty, the defendants claimed that no penalty of imprisonment could be imposed under the third count, but the court ruled otherwise, and sentenced them to imprisonment upon that count, after fining them on each of the others; from which judgment they prosecuted this appeal.

Benedict M. Holden, for the appellants (accused).

The trial court erred in imposing a penalty of imprisonment under the third count. The Act of 1895 cannot apply to a case where the former conviction was prior to the passage of the Act. General Statutes, § 1. The construction

contended for by the State, renders the statute of 1895 *ex post facto*, as to offenses committed before it took effect. *Calder* v. *Bull*, 3 Dall., 386; *Kring* v. *State of Missouri*, 107 U. S., 221.

Arthur F. Eggleston, State's Attorney, and *Epaphroditus Peck*, for the appellee (the State).

All reason and all authority agree that punishing more severely a second offense involves no punishment for the prior offense. The second offense alone is punished, but the court, in inflicting the penalty, is authorized to take into account the previous bad record of the prisoner. The view stated herein has been taken in every case in which the question has arisen. *Commonwealth* v. *Marchand*, 155 Mass., 8; *Commonwealth* v. *Graves*, 155 id., 163; *Ross's Case*, 2 Pick., 165; *Commonwealth* v. *Phillips*, 11 id., 58; *Commonwealth* v. *Blackburn*, 50 Ohio St., 428, 437, 36 N. E., 18; *Rand* v. *Com.*, 9 Gratt., 739, 743; *Ex parte Gutierrez*, 45 Cal., 429, 432.

BALDWIN, J. The defendants were sentenced under a statute which went into effect on August 1st, 1895 (Public Acts of 1895, p. 670, Chap. 331), the first section of which reads as follows:—

"Every person convicted for a first violation of any of the provisions of the laws relating to the sale of spirituous and intoxicating liquors shall be punished by a fine of not less than ten nor more than two hundred dollars; for a second and all subsequent convictions such person shall be punished by said fine, or by imprisonment not less than ten days nor more than six months, or by such fine and imprisonment both."

They had been convicted in March, 1895, of keeping a place in which it was reputed that spirituous and intoxicating liquors were kept for sale. The punishment for this offense at that time (General Statutes, § 3088), whether for a first or a second offense, was a fine of not more than $30.

We have no occasion to inquire whether, as is contended by the appellants, a statute would properly be condemned as

ex post facto which imposed a heavier penalty upon a conviction for an offense committed after its passage, in case the defendant had previously been convicted of a similar offense committed before its passage.

The Act of 1895, construed strictly, as every penal statute must be, and in the light of General Statutes, § 1, which declares that the repeal of a law shall not affect any punishment or penalty previously incurred, can have merely a prospective effect, notwithstanding the provision in § 4 that "the penalties provided in section one shall be in lieu of penalties now provided by law." The punishments provided by the first clause of § 1 for "every person convicted of a first violation" of the liquor laws, being greater than those previously prescribed, the statute would be clearly *ex post facto*, if § 4 were the rule of punishment for offenses committed before it went into effect. It is not to be presumed that the legislature intended to adopt a measure so plainly contrary to the Constitution of the United States. The words quoted must therefor be understood as applicable only to every person thereafter convicted of a first violation thereafter committed; and the "second and all subsequent convictions," referred to in the second clause, seem to us to mean convictions following one secured under the provisions of the first clause. This view is confirmed by the provisions of the second section, which, after authorizing the court, "upon a first conviction," to certify that in its opinion the license should not be revoked, proceeds to declare that it shall be revoked "for any subsequent conviction." It cannot be doubted that this language was intended to apply only to successive convictions under the new law.

There was error in the sentence upon the third count, and so much of the judgment as was predicated upon that count is set aside, and a new trial ordered upon that count only.

In this opinion the other judges concurred.

THE STATE *vs.* MALCOLM R. GRISWOLD.

First Judicial District, Hartford, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Immediately after the arrest of the defendant on a charge of arson, police officers went to his place of business in the burned building, and with the permission and assistance of his servant and agent in charge, but without any search warrant, searched for and removed an envelope containing two photographs which, by reason of the testimony given by sundry witnesses, formed a piece of incriminatory evidence pertinent and admissible against him. This envelope with its contents was offered in evidence by the State, in connection with the testimony of said witnesses. The accused objected to its admission because of the manner in which it had been found and taken from his office; claiming that the seizure was in violation of § 8 of Art. 1 of the State Constitution, and that its admission would be to compel him to give evidence against himself contrary to § 9 of the same article. The trial court found that the accused was bound by the consent given by his agent, that the search of his premises was not unreasonable, and that the taking was not a seizure, and overruled the objection and admitted the evidence. *Held* that even upon the assumption that the act of the police officers was a trespass, the constitutional provisions referred to did not render the evidence in question inadmissible.

Evidence otherwise pertinent and admissible will not be rejected because it was taken from the possession of the accused by a trespass.

One accused of crime, who chooses to testify in his own behalf, subjects himself to the same rules and tests as are applied to other witnesses; and the extent to which he may be cross-examined, where such inquiry tends to show that he has been guilty of willful falsehood in his direct examination, is largely within the discretion of the trial court.

Experts called to testify as to their opinion of the hand-writing of disputed documents when compared with admitted or proved standards, cannot be cross-examined as to other writings of unknown authorship, not pertinent to the case, merely to test their ability as experts.

[Argued January 9th—decided February 21st, 1896.]

INFORMATION for arson, brought to the Superior Court in Hartford County and tried to the jury before *Prentice, J.;* verdict and judgment of guilty, and appeal by the accused for alleged errors in the rulings and charge of the court. *No error.*

The defendant was tried for the crime of arson at the June criminal term of the Superior Court in Hartford county,

when the jury disagreed. He was again tried at the September criminal term, and was convicted. He then appealed to this court.

The finding of facts, so much of it as is necessary to present the questions made, is as follows:—

Upon the trial the State offered as a witness Dr. F. C. Jackson, who testified, among other things, that he was, and for many years had been, chief of the letter-carriers of the Hartford post-office; that between September, 1892, and November 15th, 1894, when he established an office of his own as a practicing dentist, his hours of absence from official duty were passed as a student and practitioner in the office of the accused, who was a practicing dentist in Hartford; that during all that period and down to the time of the latter's arrest, he, the accused, hired and had a box, No. 1003, in the Hartford post-office, which box was used by him the accused, in the conduct of a clandestine correspondence with a Mrs. Drake; that said box was hired under the assumed name of R. M. Thane; that about March 1st, 1893, the accused wrote in the presence of the witness, in a disguised hand, and signed Mrs. R. M. Thane, an order to the post-office authorities, directing that all letters received for the addresses of "Mrs. Mary L. Warden," or "Alleen E. Belton," be placed in said box, and gave said order to the witness to be duly filed at the post-office, which the witness did on the said March 1st; that said order continued in force until after March 15th last; that said names were names assumed by the accused for the purpose of this correspondence with Mrs. Drake, and that they represented him and no other person; that shortly after the witness entered the accused's office the latter gave the witness a key to said box and requested him, as he went to and fro, to get and bring to the accused all mail appearing therein; that witness did so thereafter and down to said March 15th.

Said witness further testified that the accused had at his office—being a portion of the burned premises described in the information—two pictures of Mrs. Drake; one a cabinet photograph and the other a tin-type, which he kept in a

closet behind a partition; that the accused had shown the witness these pictures upon one or two occasions; that upon one occasion the accused had told him to save them in the event of a fire; that upon a later occasion, *i. e.*, in August, 1894, the accused had told him that he, the accused, was about to go upon a trip to Old Point Comfort with Mrs. Drake, and that if anything happened to him so that he didn't come back, to get the two pictures and put them out of the way; and that the accused went away and was gone about ten days; that early in the morning following the fire, being March 15th, last, the witness met the accused in front of the burned building; that during the conversation the accused told the witness that there was a letter containing some cards in the box, and asked him to get it and keep it until he, the accused, called for it; that the witness, upon arriving at the post-office, found in said box a letter addressed to "Mrs. R. M. Thane, P. O. Box 1003, Hartford, Conn.," and bearing two stamps and the post-mark, "Hartford, Conn., Mar. 14, 10 P. M., '95," signifying the time it was mailed; that the envelope of this letter was about the size and shape of a cabinet photograph, and that the external face was a piece of brown paper pasted over the whole surface of an old envelope which had been addressed to the accused; that the witness kept this letter at his office until Sunday the 17th, when the accused, being at the witness' office, was asked by the witness if he had saved the photographs of Mrs. Drake from the fire, and he replied that they were what was in the letter the witness had; that on Friday the 22d (the witness having meanwhile, as the result of events which had transpired, turned over to the authorities the information in his possession) he, for the purposes of the prosecution, handed the letter which had remained in his possession and was in the same condition in which it had been received, and unopened, to Mr. Calhoun, the prosecuting officer of the city; that upon Saturday, the 23d, the letter, still apparently in the same condition, was returned by Mr. Calhoun to the witness with instructions to return it to the accused if he should ask for it, for the purpose of seeing

what he would do with it; that upon Sunday, the 24th, the accused came to the witness' office and made a detailed confession of the crime charged in the information, and in connection therewith a statement of his movements and whereabouts during the evening preceding the fire.

The first portion of this alleged confession, with its introduction, was testified to by Jackson in the following language:—

"Dr. Griswold took his inventory out of his pocket and began looking it over. I said, 'Doctor, I think you are taking a great deal of risk to swear to all that stuff which you know was not there.' He said, 'I am taking no risk at all, because such stuff as was saved I put into the inventory at a fair value, and such stuff as I didn't have I can say was burned up and went down that hole.' 'But,' I says, 'Doctor, they are liable to suspect you of setting the fire if you swear to all that.' He said, 'They can't suspect me, because I went home at half-past nine that night, and the fire didn't break out until half-past twelve; I can prove that by Gallivan, who went with me as far as Windsor street, and Mr. Mahon, who crossed over and spoke with me, and by my wife, who will testify I was home by ten o'clock.' I says, 'Doctor, did you go directly home from your office?' He says, 'Yes, I did.' I said, 'Didn't you go to the post-office?' He said, 'No, I did not.' I said, 'When did you mail the letter containing the photographs of Mrs. Drake?' He said, 'I mailed them the next morning after the fire.' I said, 'Doctor, you are mistaken, that envelope is post-marked 10 P. M. the night of the fire.' He started and turned pale, and he could not speak for a few moments; when he did speak he said, 'Well, Jack, I may as well own up to you, I am in your hands; that letter was a loop-hole that I never thought of, and for the first time I have realized the truth of the old saying that women, rum, and fast horses are the ruination of many a man.'"

Said witness further testified that at the conclusion of this interview of the 24th, the accused asked for the letter, and that it was then, pursuant to the instructions of Mr. Calhoun

and for the purposes previously stated, returned to him with the suggestion or advice that he had better burn it, to which the accused replied that he would do so; and that said envelope was then unmutilated and in apparently the same condition in which it was taken from the post-office, and had the superscription, stamps, and post-office marks thereon, and in no way effaced.

Officers Umberfield and O'Malley were also sworn as witnesses, and testified that immediately after the accused's arrest, which was made upon the street about noon, Wednesday the 27th, they were, without knowledge of the accused and without a warrant of search, dispatched by the chief of police with instructions to search the accused's then office, to discover what might be there of an incriminating character, and went; that when they reached the office, which was open, they entered and found one Butler in apparent charge, and told him who they were and their errand; that they asked him if he was in charge of the office, that he replied that he was, and that he told them to go ahead; that they then made a search of the office, Butler at times assisting and aiding them; that they found, among other things, this envelope upon a shelf in a closet, concealed under some books; that it was still unopened, but in other respects the same as it was in court, to wit, with the post-marks and stamps removed and the face of the envelope and address partially mutilated. The State offered the envelope and the two inclosed pictures in evidence. Counsel for the accused objected to their admission, upon the ground that the seizure of them by the police and their production in evidence was in violation of the constitutional guaranty that the people shall be secure in their persons, houses, papers, and possessions, from unreasonable searches or seizures; and in violation of the further constitutional provision that an accused person shall not be compelled to give evidence against himself.

Counsel for the accused then asked that the court, before ruling, permit them to put the accused upon the stand for the purpose of showing that said Butler was not, in fact, in

charge of said office at the time of said search. Dr. Griswold thereupon was examined by his counsel, and cross-examined upon the subject. The court found upon the evidence that said Butler, who was a student in the accused's office, was in charge of it at said time, and admitted said envelope and pictures. Counsel for the accused excepted.

The accused having denied when upon the witness stand that he had directed said envelope containing the pictures to himself under the assumed name of Mrs. R. M. Thane, and that he hired or had said post-office box 1003 for himself under the assumed name of R. M. Thane, and that the letters directed to R. M. Thane or Mrs. R. M. Thane, post-office box 1003, and which were placed in said box, were intended for him, or were taken therefrom by him or delivered to him for himself, and that he had anything to do with said box except to forward the mail therein to Mr. or Mrs. R. M. Thane, and sometimes to send letters to Mrs. Drake; and having denied that he had ever gone under the assumed name of R. M. Thane or Mrs. R. M. Thane, or used said names or either of them; and having testified that there were such persons as R. M. Thane or Mrs. R. M. Thane, although he did not know where they were and never knew where they lived, and that these persons were the ones for whom said box was rented and to whom the mail thereto was forwarded; and having testified that said envelope containing said pictures was addressed by him to the address of Mrs. R. M. Thane, and thus directly deposited by him in the post-office at the request of Mrs. Drake, who had a key to said box, and that said envelope and contents were intended for her and were to be taken from said box by her, —the attorney for the State upon cross-examination, for the purpose of proving that the testimony of the accused that he hadn't assumed the name of Mr. or Mrs. R. M. Thane, and that he hadn't directed said envelope to himself under the assumed name of Mrs. R. M. Thane, was false; and for the purpose of identifying him as R. M. Thane, and for the purpose of disproving the testimony of the accused that there were such persons other than himself, as R. M. Thane or

Mrs. R. M. Thane, and as being pertinent to the examination which had preceded, asked the accused the following questions, to some of which counsel for the accused objected, upon the ground that they were irrelevant and immaterial. The court admitted the questions and the accused excepted.

This portion of the cross-examination was as follows:—"Q. (By Mr. Eggleston) You say that name is not your name—Mrs. R. M. Thane or R. M. Thane is not your name? Ans. I say that is not meant for me.

"Q. And not the name under which you went and have been? Ans. Yes, sir, I say so.

"Q. Haven't you traveled under the name of R. M. Thane and wife? Ans. I do not know as that has anything to do with the trial.

"Q. Haven't you traveled under the name of R. M. Thane and wife? Ans. I want to know whether I am being tried for fornication or arson?"

"The Court.—Answer the question that is put to you."

"Q. You have traveled, yourself, under the name of R. M. Thane? Ans. Yes, sir, I have.

"Q. Traveled under the name of R. M. Thane and wife with a woman that was not your wife? Ans. I have; yes, sir.

"Q. How did you happen to take this name if it was not yours? Ans. It was convenient to use it.

"Q. It was convenient to use it? Ans. Yes, sir.

"Q. You went to Old Point Comfort under it, didn't you? Ans. I did, sir.

"Q. Went on the steamer *Yorktown?* Ans. I did.

"Q. Hired a stateroom under the name of R. M. Thane and wife?" Objected to as irrelevant and immaterial, overruled and exception taken.

"Q. You say you went to Old Point Comfort. What month did you go in?" Objected to; overruled; exception.

"Ans. I went in the month of August, 1894.

"Q. Who went with you as Mrs. R. M. Thane?" Objected to; overruled; exception.

"Q. Who was it? Ans. I do not know her name; I picked her up in New York.

"Q. Where did you pick her up?" Objected to, overruled; exception. Ans. I cannot tell you where I picked her up; it was on the street.

"Q. Didn't you say that you didn't remember at the last trial?" Objected to; overruled, and exception. Ans. (No answer.)

"Q. Under what name did you travel? Ans. Under the name of R. M. Thane and wife.

"Q. Didn't you say at the last trial you didn't remember? Ans. Possibly I said so.

"Q. What hotel did you put up at?" Objected to, overruled; exception. "Ans. Sherwood House.

"Q. Didn't you say at the last trial you didn't remember? Ans. Possibly.

"Q. Don't you know you put up at the Hotel Sherwood, and wasn't your answer, I don't remember? Ans. I don't recollect what I did say at the last trial.

"Q. How did you register?" Objected to; overruled; exception. Ans. (No answer.)

"Q. What boat did you go on?" Objected to; overruled; exception. "Ans. I don't believe I can remember the name.

"Q. You said before, I don't remember? Ans. I don't believe I do.

"Q. You went up the Potomac to Washington, didn't you?" Objected to; overruled; exception. "Ans. Yes, sir, I went up the Potomac to Washington.

"Q. You said before you didn't remember, didn't you? Ans. I do not recollect what I did say before.

"Q. Didn't I ask you if you went up the Potomac to Washington, and your answer was, I don't remember? Ans. Possibly.

"Q. Did you go to Washington?" Objected to; overruled; exception. "Ans. I did so.

"Q. Didn't you say before, I don't remember. Ans. I don't recollect what I did say before; possibly.

"Q. The question came, 'Don't remember whether you

did or not?' And your answer was, 'No, sir.' Remember that? Ans. I don't recall what I did say before.

"Q. What hotel did you stop at in Washington?" Objected to; overruled; exception. "Ans. (No answer.)

"Q. All the way around on that trip you traveled under the name of R. M. Thane and wife, didn't you? Ans. No, sir, I didn't. I put up at the hotels as M. R. Griswold and wife.

"Q. What hotel did you say you put up at in Washington?" Objected to; overruled; exception. "Ans. At the Oxford.

"Q. When you left on that trip you bought two tickets here in Hartford?" Objected to; overruled; exception. "Ans. I did not."

"Q. You took two orders here for tickets; they were delivered to you in New York?" Objected to; overruled; exception. "Ans. I did.

"Q. And you sent down from here for a stateroom for R. M. Thane and wife?" Objected to; overruled; exception. "Ans. I did.

"Q. And you and this woman occupied this stateroom as R. M. Thane and wife; that is true, is it not? Ans. No, sir, I didn't. I was sick all night and on deck.

"Q. Between Old Point Comfort and Washington you occupied the same stateroom with this woman, didn't you, as R. M. Thane and wife?" Objected to.

"The Court.—I think I will let you pass that question. That might involve another matter."

"Q. Did you occupy the same room at the hotel with this woman that you went off with, with the name of R. M. Thane and wife?" Objected to; sustained.

"The Court.—You may inquire as to his registration and their conduct."

"Q. How did you register at the Oxford at Washington?" Objected to; overruled; exception. "Ans. M. R. Griswold and wife.

"Q. The woman wasn't your wife, you said?" Objected to; overruled; exception. Ans. (No Answer.)

"Q. She wasn't you wife, was she? Ans. No, sir, she was not my wife."

As a part of the defense and for the purpose of showing that said witness Jackson had testified from improper motives, the accused introduced an anonymous letter, which he testified to having received by mail shortly before the first trial of the accused in June last, and of which he claimed Jackson was the writer. To prove that the letter was in the handwriting of Jackson, the accused introduced as an expert in handwriting one Mr. Carvalho of New York, and presented to him certain admitted specimens of the handwriting of Jackson, which were laid in by the accused to be used as standards with which to compare the handwriting of said anonymous letter.

Upon the rebuttal, and for the purpose of rebutting the evidence of Mr. Carvalho that the writer of said standards and of said anonymous letter were one and the same person, the State introduced Messrs. Ames of New York and Fairbanks of Boston as witnesses, both of whom testified that they had for many years given a special study to the subject of handwriting and of the comparisons of handwritings, and had during their experience examined hundreds of cases of disputed handwriting for the purpose of giving their opinions in court as to the genuineness of such writings. These witnesses, having qualified as experts upon handwriting, were allowed by the court to testify as such experts. They testified that they had made a careful examination of said standards of comparison and of said anonymous letter, and a critical comparison of said letter with said standards, and that in their opinion the writer of said standards did not write and could not have written said anonymous letter. Said opinions of said experts were based solely upon the comparison of said anonymous letter with said standards.

The accused having denied that he wrote the post-office order hereinbefore described, and having denied all knowledge of it, the State put in evidence admitted specimens of the handwriting of the accused, to be used as standards of comparison with which to compare the handwriting of said post-

office order, and asked said experts, Ames and Fairbanks, upon rebuttal, for their opinion, from such comparison, as to whether the handwriting of the post-office order was or was not that of the writer of the standards. Said experts testified that they had previously examined said standards of comparison and also said post-office order, and compared them, and each gave it as his opinion from such comparison that the writer of said standards wrote the post-office order.

Upon the cross-examination of the witness Fairbanks, counsel for the accused asked him, among other things, the following question: —

"Q. Now I want to call your attention to one other matter, and I shall ask you but a question or two about the post-office order (showing the witness two pages in defendant's Exhibit 'M'). In connection with the post-office order, I ask you whether you will say to the jury that the man who wrote these two pages didn't write the post-office order? Ans. I have never seen this book."

The cross-examination then proceeded as follows: —

"Q. For the purpose of testing your accuracy as an expert, and also for the purpose of calling your attention to the handwriting of the man whom we claim did write the post-office order, I show you pages marked A9 and A10 in defendant's Exhibit 'M,' and ask you to say whether in your judgment the same man who wrote those pages did not write the post-office order?" Objected to, excluded, and exception noted.

"Q. Now for the same purpose of testing your accuracy and ability as an expert in handwriting, I hand you a collection of slips of handwriting, marked for identification 'A7,' and ask you to examine them and tell me how many different handwritings you find there?" Objected to, excluded, and exception taken.

"Q. For the same purpose as before I show you a collection of slips of paper containing handwritings, marked for identification 'A8,' and ask you to tell me whether or not they were all written by the same person, or by different persons, and if by different persons, how many?" Objected to, excluded, and exception taken.

The finding concludes as follows: — "Defendant's Exhibit M was a memorandum book, two pages of which were in evidence. These two pages, being neither 'A9' nor 'A10,' were testified to by a witness Church, as having been written by him. The remaining matter in the book did not relate to the case (as counsel stated) and was not in evidence. Concerning this matter said witness Church testified that it was not written by him. By whom it was written was not in evidence.

"The claim that the post-office order was written by the writer of pages 'A9' and 'A10' in said Exhibit M, and the claim that Gallivan wrote the post-office order, were ones not made at any other time during the trial and never suggested save in said question to said Fairbanks, and in the discussion to the court, at that time.

"The accused had denied that he wrote the order, but had presented no evidence as to who did. Gallivan, who was named in the discussion as the writer thereof, had testified for the accused, but had not testified that he wrote said order.

"The collections of slips of paper referred to as Exhibits 'A7' and 'A8,' for identification, were papers prepared for the occasion, and then first produced, and were not in evidence. No evidence had been given as to what they were, or whose handwriting they were in. No claim was made that they were pertinent to the case, save as they might be for the purpose of testing the ability of the witness, or that they were written by either Jackson or Griswold."

The defendant assigned three reasons of appeal:

1st. That the envelope and inventory seized by the officers of police were improperly admitted in evidence, because said seizure and production in evidence were in violation of the eighth and ninth sections of article 1 of the Constitution of this State. 2d. That the several questions stated in the finding of facts as having been asked of the defendant concerning his trip to Old Point Comfort, were inadmissible, because they were immaterial and irrelevant and calculated to prejudice the jury. 3d. That the questions asked by him of the

two experts—Ames and Fairbanks—to test their competency, were improperly excluded.

William C. Case and *Henry D. Mildeberger*, for the appellant (the accused).

The taking of the envelope and its contents by the policemen, constituted an unreasonable search and seizure, and in effect compelled the defendant to give evidence against himself, in violation of constitutional provisions. *Boyd* v. *United States*, 116 U. S., 616. The cases relied upon by the State do not touch the case at bar. Undoubtedly concealed weapons, liquors held for illegal sale, poisons, counterfeit money, burglar's tools, etc. may be seized and used in evidence; but these things are not "papers." Ordronaux, Const. Legis., 245, 246. The court erred in allowing the questions put to the defendant about his trip to Old Point Comfort. Arson at Hartford in 1895 and adultery at Old Point Comfort in 1894, are distinct and remote, both in time, surroundings, and character. *People* v. *Sharp*, 107 N. Y., 427; *Coleman* v. *People*, 55 id., 90; *State* v. *Jackson*, 132 Mass., 20, 21; *State* v. *Lapage*, 57 N. H., 245; *People* v. *Brown*, 72 N. Y., 573, 574; *State* v. *Pinkerton*, 79 Mich., 117; *State* v. *Carson*, 66 Me., 116; *Hayward* v. *People*, 96 Ill., 502; *Gifford* v. *People*, 87 id., 214; *Clark* v. *State*, 87 Ala., 480. The questions asked of the experts in handwriting were improperly excluded. They were put for the avowed purpose of discrediting their accuracy as experts. 7 Amer. & Eng. Ency. of Law, 514, and cases cited; 1 Wharton on Evidence (3d Ed.), 710.

Arthur F. Eggleston, State's Attorney, and *J. Gilbert Calhoun*, for the appellee (the State).

The alleged "unreasonable seizure" was not even a trespass. It was made with the consent and even with the assistance of the agent of the accused. It is immaterial that the agent exceeded his authority. *Hitchcock* v. *Holmes*, 43 Conn., 528. But even if the articles were obtained by a trespass, they still will not be rejected by the court, if they are

otherwise competent evidence. *Commonwealth* v. *Dana*, 2 Met., 337; *State* v. *Flynn*, 36 N. H., 70; *Giudrat* v. *People*, 138 Ill., 111; *Siebert* v. *People*, 143 id., 583; *Spies* v. *People*, 122 id., 1; *Commonwealth* v. *Brown*, 121 Mass., 81; *Chastang* v. *State*, 3 So. Rep., 304 (Ala.); *State* v. *Hoyt*, 47 Conn., 540; *Painter* v. *People*, 147 Ill., 466. The questions asked by the accused of the two experts—Ames and Fairbanks—to test their competency, were properly excluded. No reason can be suggested why the cross-examination of an expert should not be confined as much to the examination in chief as that of any other witness. *Odiorne* v. *Winkley*, 2 Gall., 53. The question, however, so far as handwriting is concerned, has already been raised and decided in the case of *Tyler* v. *Todd*, 36 Conn., 222. See also *Bacon* v. *Williams*, 13 Gray, 527; *Van Wyck* v. *McIntosh*, 14 N. Y., 447; *Bank* v. *Mudgett*, 44 id., 523; *Massey* v. *Farmers Nat. Bank*, 104 Ill., 332; *Howard* v. *Patrick*, 43 Mich., 128. The questions asked of the defendant concerning his trip to Old Point Comfort were admissible. *Norfolk* v. *Gaylord*, 28 Conn., 312; *Conners* v. *People*, 50 N. Y., 242; *Commonwealth* v. *Nichols*, 114 Mass., 286. But even if some of the questions were immaterial, it was within the discretion of the court to admit or reject them. *Steene* v. *Aylesworth*, 18 Conn., 251; *Chapman* v. *Loomis*, 36 id., 460; *Mahew* v. *Thayer*, 8 Gray, 176.

ANDREWS, C. J. The defendant was tried to the jury upon an information charging him with the crime of arson, and in another count with setting fire to the same building with the intent to defraud an insurance company. Among other testimony, the State offered evidence of certain acts done by the accused showing preparation for the fire, as well as his subsequent conduct apparently influenced by the fact that he had set the fire or had known that it was going to happen. To illustrate and explain this conduct, the State offered in evidence a small package consisting of the envelope with the marks upon it, and its contents, which are described in the finding. It is admitted—and the fact is so—that this package was in its nature pertinent and admissible to be laid

before the jury, and in connection with it the other testimony in the case became highly incriminatory evidence against the accused. His counsel objected to its being shown in evidence. The counsel said this article ought not to be exhibited in evidence to the jury, because of the manner in which it was found in the room of the accused and taken therefrom by the police officers; that such taking and production in evidence was in violation of the eighth and ninth sections of article 1 of the Constitution of this State. When this objection was made the trial judge excused the jury, and in their absence proceeded himself to hear the evidence upon the question so raised. The accused testified and was cross-examined. Other witnesses were also heard, and upon the evidence so taken, the judge found that the office of the accused, at the time when this envelope was found by the police officers and taken away by them, was in the care and possession of one Butler, as the servant and agent of the accused; and that said Butler gave permission to the officers to enter the office, to make the said search therein, assisted them in making the search and consented to the taking away by them of the said articles. The judge thereupon admitted them to be laid in evidence before the jury.

This finding is, in effect, a decision that the search was not an unreasonable one, and that there was no "seizure" of anything; and that the accused must be holden to have consented to the taking away by the officers of the said articles. The evidence upon which this finding was made is not before us, and we are not able to review the finding, even if for any cause it was desirable to do so.

Counsel for the accused argue that this finding, although it shows that Butler was in charge of the defendant's office at the time, does not show that he was the agent of the defendant for the purpose of admitting the police officers and consenting to the search and to the taking away of the said articles. We must assume, notwithstanding this argument, that the precise objection made in this court was made in the Superior Court and decided adversely to the defendant; otherwise the defendant has no standing to be heard here.

This finding of the Superior Court might, perhaps, be treated as decisive of the first reason of appeal, because it shows that there has been no violation of the Constitution of this State, or of the United States.

We do not, however, place our decision on this ground alone. A constitution is that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised; and its provisions are the rule of conduct for those branches of the government which exercise the sovereign power. Both the sections cited by the defendant, have reference to the security of the citizen as to his possessions and as to his person. The eighth section forbids the legislature to enact any statute, and the courts from passing any rule, which would authorize any unreasonable search or seizure of the goods of a citizen. And the ninth forbids any legislation or rule of court which would compel any one accused of a crime to give evidence against himself. In this respect neither of the sections so cited have any application to this case. The act of the police was not directed, nor is it sought to be justified, by any statute or by any rule of any court. The theory of the defendant is that that act was a trespass. For the present purposes that theory may be granted to be the true one. And what then? The police officers would be liable in a proper action to pay to the defendant all damage they had done him. But that consequence does not affect the question now before us. It does, however, show that the eighth section of article 1 has no bearing upon the facts of this case. Indeed the defendant hardly claims that the eighth section alone affects his objection. But he does claim that a search or a seizure may be so made, that the production in evidence of any of his goods or possessions taken, is to compel the accused to furnish evidence against himself; and in that way to become a violation of the ninth section of the first article of the Constitution. This might be the result where the private papers of a suspected person were seized in order to be read to the jury as incriminating evidence against him. To reach this result the word "papers" in the eighth section of article 1 must be

taken to mean writings,—not pieces of paper as mere inanimate goods, but papers on which are written or printed words that may be shown in evidence as the words of the suspected man. In this sense a search or seizure of the "papers" of a citizen might be unreasonable, because it might lead to a violation of the provisions of the ninth section. In *Boyd* v. *The U. S.*, 116 U. S., 616, an Act of Congress was held to be unconstitutional, because it required the party to produce his books, invoices and papers, and because the "entries" in the books, invoices and papers so produced, were to be made evidence against him. See also Ordronaux, Const. Legislation, 247; 1 Hare's Amer. Const. Law, 531. It was against the seizure of "papers," using that word in the sense just mentioned, that the vigor of LORD CAMDEN'S opinion in *Entinck* v. *Carrington*, 19 How. St. Tr., 1029, was directed.

The package here shown to the jury was an envelope with certain inclosures,—a simple piece of the defendant's personal property; having of itself no voice or meaning so far as his guilt or innocence was concerned, any more than if it had been a lump of clay, or a block of senseless wood. It made no statement. It gave no evidence. Its presence or absence on the trial, if it had stood alone, would have signified nothing. It was his conduct in respect to this piece of property, both before and after the fire, his extreme solicitude to save it from destruction, which was incriminating. This conduct was detailed to the jury by sundry witnesses, and to their testimony no objection was made. We think no constitutional provision was violated by permitting the jury to see the envelope. And even if it had been taken from the possession of the defendant by a trespass, as he claims, that would have been no valid objection to its admissibility. 1 Greenleaf's Ev., § 254 a; Wharton's Crim. Ev., § 678; *Commonwealth* v. *Dana*, 2 Met., 329; *Legatt* v. *Tollervey*, 14 East, 302; *Jordan* v. *Lewis*, ibid., 305 (n.); Phillips on Evidence, p. 426; *State* v. *Jones*, 54 Mo., 478; *State* v. *Garrett*, 71 N. Car., 85; *State* v. *Flynn*, 36 N. H., 64, 70; *Commonwealth* v. *Tibbetts*, 157 Mass., 519, 521; *Commonwealth* v.

Brown, 121 id., 69, 81; *Commonwealth* v. *Welch*, 163 id., 372; *Commonwealth* v. *Brelsford*, 161 id., 61; *Chastang* v. *The State*, 83 Ala., 29; *Spicer* v. *The State*, 69 id., 159; *Sampson* v. *The State*, 54 id., 241; *Siebert* v. *People*, 143 Ill., 571; *Gindrat* v. *People*, 138 id., 103, 111; *Painter* v. *People*, 147 id., 444, 466.

The defendant further insists that the trial court erred in permitting certain questions to be asked of him on cross-examination, concerning his trip to Old Point Comfort. The statute of this State permits any person on trial for a criminal offense, at his own option to testify. The defendant chose to avail himself of this privilege. By so doing he subjected himself to the same rules, and was called upon to submit to the same tests, which could by law be applied to other witnesses. Having availed himself of the privilege of the statute, he assumed the burden necessarily incident to the position. Having elected to become a witness in his own behalf, he occupied for the time being the position of any other witness, with all its duties and obligations. *State* v. *Green*, 35 Conn., 203; *State* v. *Ober*, 52 N. H., 459; *Commonwealth* v. *Smith*, 163 Mass., 411, 431; *Commonwealth* v. *Mullen*, 97 id., 545; *McGarry* v. *The People*, 2 Lans., 227; *Connors* v. *The People*, 50 N. Y., 240.

All cross-examination is intended to afford the jury or the court a test by which to weigh the testimony that the witness has given. In this case the cross-examination of the defendant tended to show that he had made a willfully untrue statement in his direct examination. It was proper that the questions should go far enough to make it entirely clear whether there had been such an untrue statement or not. We think it was fairly within the discretion of the court to permit the questions to which objection was made; not because they tended to show adultery in another State, but because they tended to show perjury on the trial then in progress.

The questions asked in cross-examination of the witnesses Ames and Fairbanks were properly excluded, and for the reason assigned by the trial court: that they would raise a

collateral issue. Take one instance to illustrate all: The witness Fairbanks was shown a collection of slips of paper, on each of which there was handwriting, and he was asked, "How many handwritings do you find there?" These pieces of paper had not been in the case; the writing on them was not admitted or claimed to be that of the defendant or of the witness Jackson. Any possible answer that the witness might have given to the question would have been utterly meaningless, unless other evidence was admitted to show that the answer was incorrect. And then the door would be opened to an unlimited inquiry, collateral to the question on which the jury was to pass. 1 Greenl. Ev. § 449; *Tyler* v. *Todd*, 36 Conn., 218, 222; *Bacon* v. *Williams*, 13 Gray, 525; *Odiorne* v. *Winkley*, 2 Gall., 51, 53.

There is no error.

In this opinion FENN and HAMERSLEY, Js., concurred.

BALDWIN, J. (concurring in the result). I concur in the foregoing opinion, except with respect to its treatment of the point of constitutional law, which would have arisen, had not the defendant, by his authorized agent, consented to the search of his rooms and the seizure of his papers and effects.

The Constitution of Connecticut was ordained, as its preamble declares, in order more effectually to define, secure, and perpetuate the liberties, rights, and privileges which its people had derived from their ancestors, and among the "great and essential principles of liberty and free government" which they thought it necessary to include in their Declaration of Rights, is that defined in its eighth section, in the following terms:

"The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

This constitutes one of the fundamental conditions under

which the powers of government in this State can be exercised by those in authority. *State* v. *Conlon*, 65 Conn., 478, 489. The language in which it is expressed was probably adopted from that in the Declaration of Rights of the Constitution of Mississippi (Art. 1, § 9, 2 Poole's Charters and Constitutions, 1055), which had been framed in the preceding year, and is somewhat more precise and explicit than that of the fourth amendment to the Constitution of the United States. To determine what searches and seizures are to be deemed unreasonable, we must look back to events, then not far distant, in the history of the English people. Few judicial precedents had been more familiar in the American colonies than those furnished by the decisions of LORD MANSFIELD and LORD CAMDEN, which denied the validity of general search warrants. In one of these, the court had said that "papers are often the dearest property a man can have," and that "the law never forces evidence from the party in whose power it is." *Entinck* v. *Carrington*, 2 Wils., 275, 291, 292. That case was the leading authority upon which, in 1814, this court relied in holding that the magistrate who signed and the officer who served a general warrant to search for certain stolen goods in any suspected place in the town of Wilton, and to arrest all persons suspected of the theft, were both liable as trespassers to a person arrested. *Grumon* v. *Raymond*, 1 Conn., 40. It is not, says JUDGE COOLEY, "allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction. . . . The fourth amendment to the Constitution of the United States, found also in many State constitutions, would clearly preclude the seizure of one's papers in order to obtain evidence against him; and the spirit of the fifth amendment—that no person shall be compelled in a criminal case to give evidence against himself—would also forbid such seizure." Cooley's Const. Lim. (6th Ed.), p. 370.

It does not seem to me that the prohibitions of the eighth

section of our Declarations of Rights can be properly read as applying only to acts of legislation or rules of court. The powers of the State are distributed (Const., Art. II.) between three separate magistracies, to one of which are confided those which are executive. The supreme executive power is vested in the Governor (Art. IV.), and among the inferior executive offices for which provision is made is that of sheriff (Art. IV., § 20). The police officers appointed by our different municipal corporations are, as fully as the sheriff of the county, officers of the law, charged with the execution of a trust confided to them for and by authority of the State. *State ex rel. Rylands* v. *Pinkerman*, 63 Conn., 176, 182. They represent its sovereignty, within their proper sphere of action. They are its immediate agents for the detection and arrest of offenders against its laws. The English precedents which established the doctrine upon which these constitutional guaranties are based, grew out of arrests and seizures made under warrants issued by direction of executive officers of the government, and not resting upon any statute or rule of court. It is from that quarter, it appears to me, more than from any other, that danger is to be anticipated. The common law was ready to supply a remedy for any unreasonable search or seizure, by an action of trespass against the individuals who made it. Our Declaration of Rights would be meaningless if it did not seek to do more than this. Its guaranties were designed to protect the citizen against the State, that is, against any and every officer claiming to act under its authority; and to do so in a way that would repress the wrongful act most efficiently. Upon the trial of a civil action between private individuals, either can introduce any relevant paper in evidence, notwithstanding he may have obtained it in a manner not warranted by law. *Legatt* v. *Tollervey*, 14 East, 302; *Jordan* v. *Lewis*, ibid., 306. If the constitutional guaranty now under consideration is to be liberally interpreted in favor of the citizen, it would be difficult to apply the principle of such decisions to criminal prosecutions, supported by proof of papers illegally seized for that purpose, in the defendant's house, by public officers

acting professedly as such, without seeming to allow the State to profit by its own wrong.

What was taken by the policemen from the defendant's rooms was a large envelope, containing a photograph and a tintype. Evidence was introduced by the State tending to show that it had been originally addressed by the defendant to "Mrs. R. M. Thane, P. O. Box 1003, Hartford, Conn.," and put in the mail by him at about 10 P. M. on the night of the fire, in order to preserve it from being burned; that this box No. 1003 was hired by him under the assumed name of R. M. Thane; that the envelope was taken by his agent, at his request, from the box the next morning, and afterwards given to him at his request; that it then bore a post-mark of 10 P. M., March 14; that his attention was then called to the fact of this date and the proof it afforded of his having mailed it before that hour; and that when it was found, on the day of his arrest, in a closet, concealed under some books, the address had been partially mutilated and the postage stamps and post-mark removed. It seems to me that this envelope was one of the papers as well as one of the possessions of the defendant, and that it spoke loudly against him.

Whether its seizure would have been, under the circumstances, unreasonable, in the absence of authority from the defendant's agent, I consider it unnecessary for us to determine, in view of the fact that such authority existed. It presents a question of the utmost gravity, in its bearing, on the one hand, upon the methods of detecting crime, and on the other, upon the liberty of the individual and the inviolability of home. Lieber's Civil Liberty and Self Government, 63. It would seem to me wiser to postpone any decision upon this subject, until a case arises which imperatively requires it.

In this opinion TORRANCE, J., concurred.

CHARLES S. DAVIDSON *vs.* MICHAEL E. HANNON ET AL.

First Judicial District, Hartford, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN AND HAMERSLEY, Js.

A photographic lens owned and used by a photographer in his business, is an "implement of his trade" within the meaning of that expression as used in § 1164 of the General Statutes; and as such is exempt from attachment and execution.

[Argued January 15th—decided February 21st, 1896.]

ACTION of replevin, brought to the Court of Common Pleas in Hartford County and tried to the court, *Calhoun, J.*; facts found and judgment rendered for the defendants, and appeal by the plaintiff for alleged errors in the rulings of the court. *Error, judgment reversed.*

The case is sufficiently stated in the opinion.

Lucius F. Robinson, for the appellant (plaintiff).

The photographic lens was exempt from attachment and execution, as a tool of the debtor's trade. *Atwood* v. *De-Forest*, 19 Conn., 513; *Seeley* v. *Gwillim*, 40 id., 106; *Patten* v. *Smith*, 4 id., 450; *Watson* v. *Elliott*, 7 Gray, 70; *Howard* v. *Williams*, 19 Mass., 80; *Wallace* v. *Bartlett*, 108 id., 52; *Barker* v. *Willis*, 123 id., 194; *Goddard* v. *Chaffee*, 84 id., 395; *Maxon* v. *Perratt*, 17 Mich., 352; *Robinson's Case*, 3 Abbott's Pr., 466; *Allen* v. *Thompson*, 45 Ver., 472; *Amend* v. *Murphy*, 69 Ill., 337. The court will give a liberal construction to such an exemption, which is based upon considerations of public policy and humanity. *Montague* v. *Richardson*, 24 Conn., 338; *Hitchcock* v. *Holmes*, 43 id., 528; *Price* v. *The Society for Savings*, 64 id., 362; 7 Amer. & Eng. Ency. of Law, 130, 137, and citations; Freeman on Executions, § 226.

Arthur Perkins, for the appellees (defendants).

The photographic lens was not an "implement of the debtor's trade," within the meaning of § 1164 of the General Statutes, and consequently was not exempt from attachment.

Patten v. *Smith*, 4 Conn., 450; *Atwood* v. *DeForest* 19 id., 513; *Seeley* v. *Gwillim*, 40 id., 106; *Enscoe* v. *Dunn*, 44 id., 93; *Wallace* v. *Bartlett*, 108 Mass., 52; *Story* v. *Walker*, 11 Lea, 515. The cases relied on to establish the rule of liberal construction are those relating to that portion of the statute that exempts "necessary apparel and bedding, and household furniture necessary for supporting life," such as *Montague* v. *Richardson*, 24 Conn., 338; *Weed* v. *Dayton*, 40 id., 106, and others. In these cases the court says that too strict a construction should not be given *as to the articles* intended to be covered by the statute.

FENN, J. This is an action of replevin to recover property attached. The only question necessary for us to decide upon this appeal is, whether the court below erred in holding such property was not exempt from attachment and execution, under that clause of General Statutes, § 1164, which exempts "implements of the debtor's trade."

The property in question is a photographic lens. It belonged to one Peters, for whose debt it was attached. He was a photographer, with a place of business in Hartford. He had mortgaged his photographic apparatus and materials, including this lens, to the plaintiff. This mortgage was duly recorded. The plaintiff never had, before the attachment, the possession of said lens, nor the right to the possession of it, except as such mortgagee. Sometime after said mortgage and before said attachment, said Peters gave up his place of business and stored his photographic apparatus at his residence in Hartford. He there fitted up a room in his barn for the purpose, and continued up to the time of the attachment to take photographs for friends and neighbors for pay, when the opportunity offered. A lens similar to the one in question, was a useful and necessary implement to Peters in his photographic work.

The statute in question is ancient, though it has been varied somewhat from time to time, both in form and in substance. Several of its provisions have come before this court for consideration, and generally, it may be said, that in the

decisions a liberal construction in favor of the debtor has been adopted. A single reference will be sufficient to illustrate this, as shown in cases referring to other clauses than the one now before us.

In *Hitchcock* v. *Holmes*, 43 Conn., 528, the words "household furniture necessary for supporting life," were construed. It was said: "No fixed or precise definition can be given to the word *necessary* as used in the statute; the facts in each case must control its interpretation. Of course it was susceptible of being confined within very narrow limits; for we know, as a matter of fact, that many families exist, although they are enabled to use very few of the articles to be found in an ordinary household, and these in their rudest forms. But a proper regard for plain legislative intent requires us to use it in a broader, more liberal and more humane sense; to pass beyond what is strictly indispensable, and include articles which to the common understanding suggest ideas of comfort and convenience."

The cases in this State which more directly relate to the clause of the statute now in question, are *Patten* v. *Smith*, 4 Conn., 450; *Atwood* v. *DeForest*, 19 id., 513; *Seeley* v. *Gwillim*, 40 id., 106, and *Enscoe* v. *Dunn*, 44 id., 93. We will briefly refer to each. In *Patten* v. *Smith*, *supra*, the question was as to the meaning of the word "tools," in the phrase then used in the statute, "necessary apparel, bedding, *tools*, arms or implements of his household, necessary for upholding his life." It was held that an apparatus for printing, consisting of a printing-press, cases, types, etc., might be *tools* within the meaning of that statute. The court said that printing was unquestionably a mechanical employment; that the statute concerned the public good, which had a deep interest in the prosperity of mechanical employments, and should be construed liberally; that in relation to the natural description of the goods, of which an exemption is demanded, the exposition of the law ought to be liberal.

In *Atwood* v. *DeForest*, *supra*, the words now under consideration, "implements of the debtor's trade," which had been inserted into the statute in 1821 and have since con-

tinued there, were construed. The question in that case was whether the debtor was a mechanic or a manufacturer; whether the articles claimed to be exempt were tools, or machinery. The work carried on was that of making spectacles. It was held that the articles employed were not exempt; not because spectacle making was not mechanical, not a trade, but because the facts showed the parties were manufacturers, and "that they were not spectacle-makers within the meaning of the statute." The court in defining *trade*, said: "By the word *trade*, as used in this statute, we suppose is meant *the business of a mechanic*, strictly speaking; as the business of a carpenter, blacksmith, silversmith, printer, or the like; and that it was not intended to include the business of a manufacturer, any more than it was intended to extend to the business of a merchant or farmer." It is evident that the court did not intend by the use of such language as we have quoted—especially when used for the purpose and in the connection in which it appears—to give a strict or narrow meaning to the word "mechanic," but only to show that distinction to which we have referred and upon which the decision rests. Concerning this the court adds: "If it be said, that the distinction between a mechanic and a manufacturer, is not as precise as is desirable; and that there is difficulty in determining to which class certain individuals belong; especially, in cases where men are engaged in both the business of a mechanic, as well as that of a manufacturer; the answer is, the difficulty is not in the distinction itself; that seems to be precise enough; but it is in the application of the distinction to particular facts; and that is a difficulty common to the application of most of the rules of law; and in doubtful cases, it can only be solved, by the finding of a jury."

In *Seeley* v. *Gwillim*, *supra*, a similar question as to the distinction between a mechanic and a manufacturer, between machinery and tools, arose. In that case it appeared that a debtor carried on the business of book-binding and manufacturing blank-books, working himself and employing four hands. Certain of the articles were held to be exempt, and

others not. The rule applied is thus stated: "His" (the debtor) "being a manufacturer does not prevent the statute from operating to exempt the implements of his trade, so far as they are used by him in person. On the other hand, the fact that he is carrying on a trade will not extend the provisions of the statute to articles employed by him as a manufacturer merely."

In *Enscoe* v. *Dunn*, *supra*, it was held that the horses and carts of a person engaged in the business of carting coal, are not protected from attachment as tools of a debtor's trade. This, it was stated, could not "be said to be the 'business of a mechanic,' either by definitions from the books, or by the common understanding and speech of men." Surely this, as it seems to us, is evident enough.

The rules adopted, the principles established, by the cases in the construction of this statute, are binding upon us at the present time. The fact that the language in question has continued unchanged in the statute for three quarters of a century, indicates conclusively that such language, so liberally construed as it has been by the courts, declares the public policy of the State in relation to the matter. If this be doubted, the remedy of those who thus question lies in an appeal to that body which enacted, and has been content to continue, the law. We think that to such vocations as those of carpenter, blacksmith, silversmith, printer, book-binder, spectacle-maker, which have been recognized and declared by this court to be trades—so clearly so as not to require the statement of any reason or explanation why—there is no reason why the vocation of a photographer, carried on as it was by Peters, as stated in the finding, should not be added. Certainly he was not a manufacturer, as that word has been defined by this court. If his business, carried on in any possible way, could be held to be a trade, we think it should be so held upon the facts before us. He depended, in the conduct of his craft, upon the labor of his hands. It does not appear, nor, taking judicial notice of matters in the realm of common observation and knowledge, are we led to think that he required for his work either a

liberal or an extensive education. In all probability some at least, and perhaps all, of the other vocations referred to above as recognized trades, would require more special knowledge, apprenticeship, and training, for their successful exercise, than this work of photography as ordinarily carried on, and presumably in this case. We conclude, therefore, that the court below erred in holding the article in question was not exempt.

There is error in the judgment complained of, and it is reversed.

In this opinion the other judges concurred; except HAMERSLEY, J., who dissented.

STATE BANK, ADMINISTRATOR, *vs.* CHARLES E. BLISS ET AL.

First Judicial District, Hartford, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The provision of § 1114 of the General Statutes that no question may be reserved for the advice of the Supreme Court of Errors "without the consent of all parties to the record," includes only such parties as choose to appear in the trial court.

A joint will disposing of property owned in common, out of which the debts of each testator, and also legacies to third persons exceeding in amount the value of the estate of either testator, are to be paid, the residue being given to the surviving testator, with a provision that the instrument is not to be offered for probate until after the death of both testators, presents a scheme of disposition which it is legally impossible to effectuate upon the death of one only of the joint testators; and consequently his estate, after the payment of debts and charges, must be held and distributed as intestate estate, notwithstanding the fact that the will was duly proved without objection or appeal by the surviving testator.

[Argued January 15th—decided February 21st, 1896.]

SUIT to determine the validity and construction of certain clauses in the joint will of Emily Spencer, deceased, and Jane A. Spencer; brought to the Superior Court in Hartford County by the State Bank, as administrator with the will

annexed, and reserved by that court, *Ralph Wheeler*, *J.*, upon the facts found, for the advice of this court.

The material portions of the will were as follows:—"Be it known to all persons, that we, Emily Spencer and Jane A. Spencer, both of East Hartford, in the county of Hartford, in the State of Connecticut, being of lawful age, of sound and disposing mind, memory and judgment, and under no improper influence or restraint, do hereby make, publish and declare this to be our joint last will and testament, hereby revoking all previous wills and codicils by us made. We give, devise and bequeath our estate and property, real and personal, as follows, that is to say: After the payment of our just debts and funeral expenses, 1. We give, devise and bequeath to Delia C. Bliss, wife of Edmund A. Bliss of Manchester, Ct. and her heirs, five thousand dollars ($5,000)." A number of other pecuniary bequests to different relatives followed, amounting in all (with that above mentioned) to $39,500. One of these, to a Mrs. Crane, provided that should she die "before the proving of this will," it should go to her daughter, Alice Pennell. The will then proceeded as follows:—"3. We give, devise and bequeath to Charles E. Bliss, hereafter appointed executor of this will, all the residue and remainder of our estates, both real and personal, to him and to his heirs forever. 4. We give, devise and bequeath to

5. If I, Emily Spencer, shall die before my sister Jane A. Spencer, it is my will that all the residue of my estate, both real, personal and mixed, shall go in fee simple absolute to said Jane A. Spencer and her heirs forever. 6. If I, Jane A. Spencer, shall die before my sister, Emily Spencer, it is my will that all the residue of my estate, both real, personal and mixed, shall go to my sister Emily, in fee simple, to her and her heirs forever. 7. If we shall both die together, or within twenty-four hours of each other, it is then our joint will that all the rest, residue and remainder of our respective estates be distributed according to the statute of distributions of the State of Connecticut. 8. It is our joint will that this

instrument and testament shall not be offered for probate until the death of the last testatrix. We appoint Charles E. Bliss, Esq., of the town of Manchester, county of Hartford, and State of Connecticut, executor, without bonds, of this our last will and testament. In witness whereof, we have signed, sealed, published and declared this instrument as our last will and testament, at said East Hartford, on the 10th day of March, A. D., 1892.

"EMILY SPENCER, (L. S.)

"JANE A. SPENCER, (L. S.)"

Emily Spencer died in 1894, and the will was thereupon duly admitted to probate as her will. Charles E. Bliss declined to act as executor, and the plaintiff was appointed administrator, with the will annexed.

The sisters, at the date of the will and at the time of the death of Emily, were owners in common of certain real estate, and had equal equitable interests in certain personal estate which for convenience stood in the name of Emily. At her death such real estate was worth $6,500, and such personal estate, which consisted largely of stocks and bonds, was worth $58,000. Under a decree of the Superior Court in another action previously brought by Jane A. Spencer against the plaintiff, as administrator of her sister's estate, the latter had conveyed to her the half of all this property, which equitably belonged to her. Emily Spencer had no property other than the remaining half, the value of which was less than the total amount of the legacies given by the will.

John R. Buck and *John H. Buck*, for the plaintiff.

E. Henry Hyde, Jr., for Louise Hart.

Sidney E. Clarke, for George H. Foster.

John H. Light, for Elizabeth Spencer Crane and Sarah Spencer Ellis.

BALDWIN, J. The reservation by which this action comes before us was made with the consent of all the parties appearing in the cause. Several of the defendants named in the complaint, and served with process, have entered no appearance, and among them is Jane A. Spencer, the sole heir at law.

The General Statutes, § 1114, provide that no reservation for the advice of this court, in cases tried before other courts, shall be made "without the consent of all parties to the record in such cases." We think that this limitation of jurisdiction, first introduced into our statutes in 1879, refers only to the consent of such of the parties to the record as choose to appear in the trial court. Under a literal construction of the statute, such as to make it require the consent of every person who was made a party, the privilege of resorting to this court for its advice might often be defeated by the failure to obtain the consent of some defendant whose neglect to enter an appearance was due simply to the fact that his interest was too trivial to justify the expense of his active participation in the suit.

The will in question describes itself as a joint will, and by its terms was not to be offered for probate until after the death of both the sisters. Such a direction was plainly contrary to the declared policy of our law, which makes careful provision that every will shall be propounded for probate as soon as may be after the testator's decease. General Statutes, §§ 544, 547, 568. If it be of any legal effect, its insertion may have given the survivor and sole heir at law a right to object to the probate of the instrument, when it was in fact presented to the Court of Probate, shortly after the death of Emily Spencer, as the will of the latter. *Schumaker* v. *Schmidt*, 44 Ala., 454, 467; 1 Redfield on Wills, 182. No such objection, however, appears to have been made, nor did she take any appeal from the decree of probate. It must, therefore, stand as the will of Emily Spencer, duly executed.

But while its validity as a will, sufficient in respect to the form of the instrument and the mode of its execution to pass

the real and personal estate of Emily Spencer, has thus been established by the adjudication of the Court of Probate, this same provision as to the time for proving it has a material effect in determining whether the terms in which it is expressed are such as to constitute a valid disposition of that estate. She plainly did not intend that any of the pecuniary legacies which it gave should be paid until after the death both of herself and of her sister. As she directed that the will should not be proved until then, she must have known that the funds out of which they were to be satisfied, consisting in part, at least, of her estate as administered upon before the Court of Probate, would not exist until then; nor would there be any executor clothed with authority to discharge them. The probate of her will, earlier than she designed, cannot give any different meaning to the words which she has employed to dispose of her property.

This same provision, however, had it been complied with, and were it to be held valid, if it would not have deprived her sister of the benefit of the residuary bequest in her favor, would certainly have seriously affected the character of the interest which it gave her. If upon a probate subsequent to the death of the latter, the bequest could have been held, by relation, to have become vested at the death of Emily, the use and profits during the period between those deaths could not have been actually received by Jane under the will of Emily, without a violation of our probate law; nor could she have conveyed a title to any of the property which an ordinary purchaser would be ready to accept, since the residue could not be ascertained, until the prior legacies were paid, as well as the debts of each testatrix.

In the case of *Walker* v. *Walker*, 14 Ohio St., 157, a joint will was offered for probate after the death of both testators, which, after providing for the payment of the debts and funeral expenses of each, contained certain reciprocal gifts by each to the other, and then disposed of their residuary estate by specific devises, general legacies, and a residuary bequest. The court held that such an instrument was not the proper

subject of probate as the will of both or either of the testators, and suggested that a contrary decision might lead to questions such as these:—"One of the testators may survive the other for half a century. When is the will to be proved and to thus become practically operative? On the death of both testators? If so, how is the estate of the first decedent to be administered in the meantime, and what is to become of debts and legacies? If it is to be proved on the death of the first decedent, how are the legacies to be paid? If they remain in abeyance until after the death of both testators, what, in the meantime is to be done with that portion of the property of the decedent which is ultimately to be devoted to their payment? If, on the other hand, they are to be paid in part at once, in what proportion is the property of the first decedent to contribute for that purpose?"

A will operates as a conveyance by way of appointment. That now before us purports to dispose by a joint act of two separate estates, consisting of property held in common. The order of disposition is particularly described. First, the debts and funeral expenses of each testatrix are to be paid; next, pecuniary legacies to the amount of nearly $40,000 are provided for; and then each makes the other her residuary legatee and devisee, unless their deaths should be simultaneous or within twenty-four hours of each other, in which event the residue is to go as a common fund to their next of kin.

Most of the questions so forcibly put by the court in *Walker* v. *Walker* are thus distinctly presented to us for decision.

It is impossible now to determine what debts the surviving sister may owe at the time of her decease; but these as well as those of Emily must be ascertained and paid before any of the legacies can be satisfied. If these legacies are to be viewed as given solely by the testatrix who was the first to die, their satisfaction will be impossible, for they amount to more than her whole estate. If, on the other hand, only half of each legacy is to come out of Emily's estate, that half

cannot be paid so long as Jane survives, without disregarding the plain intent of the will that no payments shall be made under its provisions until after the decease of both sisters, since then only was the will to be presented for probate and the estates placed in course of administration. Such a postponement, however, could not legitimately increase, meanwhile, the income of the survivor, for she was to share only in the residue remaining after the particular legacies were satisfied; nor could that be until after the payment of such debts as she herself might owe at her decease, —necessarily an unknown quantity until that event occurred. When, again, did the particular legacies vest? As to one of them, that to Mrs. Crane, it was especially provided that it should not vest until the will was proved, a date which, in the contemplation of the testatrix, could not be reached during the life of Jane. But if any of the other legatees had died after Emily and before Jane, whatever might be their rights in Emily's estate, could they have had any claim upon that of Jane, who survived them?

The will is partly a joint and partly a mutual one. Each testatrix executed it as the will of both and in order to accomplish a common purpose. Its form would indicate that it was originally drafted as a joint will, only, and that the reciprocal provisions and contingent residuary gift to their next of kin, found in the clauses numbered from 5 to 8, were subsequently inserted. A will strictly mutual is in legal effect nothing but the individual will of that one of the testators who may die first. *Lewis* v. *Scofield*, 26 Conn., 452. To give such a construction to the will now under consideration would do violence to its terms. It purports to be a joint act; it creates a common fund out of which the debts of each and her funeral expenses are to be met, and legacies to third parties paid; and it provides against its probate until both the makers are dead, after making each the residuary legatee of the other. This scheme is one which it is impossible to carry out, and its various parts are so related to each other that all must fall together.

The Superior Court is advised that the estate of Emily Spencer which may remain after the payment of debts and charges, should be distributed as intestate estate.

In this opinion the other judges concurred.

In Re Waddell-Entz Company, Receivership.

Third Judicial District, New Haven, January Term, 1896. Andrews, C. J., Torrance, Fenn, Baldwin and Hamersley, Js.

The term "collateral security" necessarily implies the transfer to the creditor of an interest in or lien on property, or an obligation which furnishes a security in addition to the responsibility of the debtor; but the execution and delivery by the debtor of additional unsecured evidences of his own indebtedness, does not in any legal sense constitute collateral security.

In the distribution of the assets of an insolvent corporation in the hands of a receiver, a creditor is entitled to a dividend computed on the actual amount of his debt, only. The fact that he holds other unsecured obligations of the corporation as "collateral security," does not entitle him to a dividend computed upon his actual debt plus the amount of these obligations; nor does a sale of such obligations by the creditor to himself, enlarge his rights in this respect.

Such obligations might constitute a debt against the insolvent corporation for their face value, if transferred by valid assignment to an innocent purchaser; but a sale by the creditor to himself after notice of the insolvency of the corporation and the appointment of a receiver, does not give him the standing of an innocent third party.

Section 590 of the General Statutes provides that a secured creditor of an insolvent debtor whose estate is in settlement in the Court of Probate, shall be allowed a dividend only on the excess of his claim above the value of the security, unless he elects to relinquish such security. *Held* that this rule was equitable and just, and equally applicable to a secured creditor of an insolvent corporation, in the distribution of its assets by a receiver.

[Argued January 24th—decided February 21st, 1896.]

Application by the receiver of the Waddell-Entz Company for instructions as to his duty in respect to the payment of a dividend upon certain claims presented; brought to the Superior Court in Fairfield County and reserved by that court, *Elmer, J.*, upon a finding of facts, for the consideration and advice of this court.

The trial court made the following finding of facts:—

"The receiver of the above mentioned company was appointed in this action on February 10th, 1894, and an order subsequently made limited the time for presentation of claims against it to the receiver. Within the time so limited, to wit, on May 9th and June 4th, 1894, by writings, copies of which are annexed and marked Exhibits 'A' and 'B,' William A. Procter presented a claim against said company for a note, a copy of which is annexed and marked Exhibit 'C,' and ten (10) coupon obligations for $1,000 each, a copy of one of which is hereto annexed and marked Exhibit 'D.' Said ten (10) coupon obligations aforesaid are the 'collateral security' referred to in said note as deposited with it. After default upon the coupon dated May 1st, on said obligations, the said William Procter elected to have the principal sum due, in accordance with the provisions of said obligations, and gave the notice required for that purpose. On the 28th day of May, 1894, said Procter having previously demanded payment of the note of $4,500, purchased said coupon obligations of himself at private sale, for $50, (which was then as much as could have been obtained for them at any public sale), and gave credit for the sum upon his claim, as appears by Exhibit 'B.' Said William A. Procter was a stockholder in said The Waddell-Entz Company at the time that he loaned said $4,500 to said company and took its note therefor. Said coupon obligations hereinbefore referred to as Exhibit 'D,' were issued by vote of the directors of said company, which authorized their issue to the amount of $500,000, but in fact only 106 were issued, 81 of which were sold by the directors for the benefit of the company (of which 13 were sold to said Procter, Nos. 32 to 44, and about which no question arises), and the other 26 used as 'collateral security' so-called, in connection with various loans, 10 of which were given to the said Procter, and the balance as follows:—

"To John Crosby Brown, who loaned the company $2,500 on January 5th, 1893, taking its demand note therefor, similar to the Procter note, 6 of the coupon obligations were

given as stated above. Said note of $2,500 and the 6 coupon obligations amounting to $6,000, are presented by Brown as a claim against said company, and for a dividend upon the same.

"To Mrs. Margaret B. Smith, who loaned the company $750, October 28th, 1893, taking a demand note therefor similar to the Procter and Brown notes, 2 of the coupon obligations were given; and the $750 note, as well as the 2 coupon obligations, amounting to $2,000 more, have been presented as a claim to the receiver.

"No steps were taken either by J. C. Brown or Mrs. Smith, under the provisions of their demand notes, for the sale or other disposition of the coupon obligations.

"The remaining 8 of the said 26 coupon obligations of The Waddell-Entz Company, were given by said company to Messrs. Knauth, Nachod & Kuhne, bankers of New York, whose claim arises under the following circumstances:—

"Said bankers, who were at the time stockholders in said company, loaned the company from time to time various sums of money, which amounted, before said receivership occurred, to about $6,500, for the security of which certain foreign letters patent and contracts were pledged by the company. Said bankers also, on October 25th, 1893, loaned the company $3,500, taking a demand note therefor, similar to the other demand notes already described, and in connection therewith 8 of the coupon obligations of said The Waddell-Entz Company. An action was brought to the Superior Court in Fairfield County in 1895 by said bankers, after they had presented their whole claim to the receiver, to foreclose the letters patent and contract rights given to secure said open account, and in June, 1895, a judgment of foreclosure was entered and a sale made thereunder, upon which sale the sum of $5,000 was realized and paid over to the said firm of bankers, and a deficiency judgment entered for the sum of $7,336, being the amount due out of the original indebtedness of $12,336, which was made up of both what was due on open account and the demand note of $3,500 and

interest. Said bankers now present as a claim against said company, and ask for a dividend upon the total indebtedness of $12,336, making no deduction of the $5,000 received through the avails of the foreclosure sale; and also claim the benefit of any ruling the court may make upon the coupon obligations which they hold in the same way in which J. C. Brown and Mrs. Smith still hold their coupon obligations.

"The claims presented to the receiver within the time limited therefor, amount in the whole to about $100,000, and the assets in the hands of the receiver which can be used for the application of a dividend, to about $10,000. The receiver, preparatory to paying the final dividend upon the lawful claims against the company, asks the instruction of this court upon the following points:—

"*First:* As to whether the said Procter, on the facts as aforesaid, is entitled to a dividend upon his claim as presented; or whether he is entitled to a dividend only upon the original indebtedness of $4,500, and the 13 coupon obligations numbered 32–44.

"*Second:* As to whether the said J. C. Brown and Mrs. Smith are entitled to dividends upon both their demand notes and the coupon obligations presented in connection therewith, or only upon the amount of said demand notes.

"*Third:* Knauth, Nachod & Kuhne's claim is that they should have a dividend upon $12,336, being the amount of the judgment before the moneys realized upon the sale under that judgment were credited, and also a dividend upon the 8 coupon obligations given under the circumstances above narrated.

"The receiver claims that Knauth, Nachod & Kuhne's dividend should be paid upon the following basis: (a) Apply the money realized from the sale of the foreign patents to the payment of the amount of the open account, which these particular patents were given to secure, and pay a dividend upon the balance; (b) also pay a dividend upon the amount of the demand note and interest, disregard entirely the 8 coupon obligations given as collateral, so-called, for that particular note."

EXHIBIT "A."

W. A. PROCTER,

United Bank Building,

CINCINNATI, May 9th, 1894.

MR. MONTGOMERY WADDELL,
Receiver of the Waddell-Entz Co.,
No. 203 Broadway, New York City.

Dear Sir:—Having seen notice that all claims against the Waddell-Entz Co. must be presented within three months after the 17th day of February, 1894, I hereby notify you that I am the holder of thirteen coupon notes of the Company and that thirteen coupons of thirty dollars each, due May 1st, 1894, have not been paid; also, that I hold a demand note for forty-five hundred dollars, given by the Company, October 12th, 1893, bearing six per cent. interest, and that no payment of principal or interest has been made thereon. I present this, as my claim, against you, as Receiver.

Please acknowledge receipt of same in enclosed envelope.

Yours Resp'y,
WM. A. PROCTER.
Per THOS. C. SHIPLEY, Att'y.

CINCINNATI, O., May 9, 1894.

The WADDELL-ENTZ CO. (Montgomery Waddell, Receiver),
To WILLIAM A. PROCTER,

(13) Thirteen coupons ($30.00 each), due May 1st, 1894, ...	$ 390.00
Demand note of October 12, 1893, for . .	4,500.00
6% interest on $4500 from Oct. 12, '93,	

EXHIBIT "B."

W. A. PROCTER.

United Bank Building,

CINCINNATI, June 4th, 1894.

MR. MONTGOMERY WADDELL,
Receiver of The Waddell-Entz Co.,
Bridgeport, Conn.

Dear Sir: The claims held by me against the Waddell-Entz Co. are as follows:

Thirteen (13) 5-year 6% Stock Option Gold Notes ($1,000 each) numbered 32 to 44 inclusive, .		$13,000.00
13 coupons for interest on above notes due May 1, '94, ...		390.00
Demand note, dated Oct. 12, 1893, (copy herewith, ...	$4,500.00	
With 6% interest to May 28, '94, (228 days)	171.00	
	$4,671.00	
Less received from sale of collateral,	50.00	
		4,621.00
Ten (10) 5-year 6% Stock Option Gold Notes, numbered 51 to 60 inclusive . .		10,000.00
10 coupons for interest of above notes, due May 1, '94, ...		300.00
		$28,311.00

I have presented to you my claim before, but I send this notification as there has been a change made by my purchasing the ten notes which I held as collateral to secure the $4,500.00 note. Yours resp'y,

WM. A. PROCTER.

EXHIBIT "C."

$4,500.00. NEW YORK, N. Y., October 12, 1893.

On demand, we promise to pay William A. Procter, or order, for value received, four thousand, five hundred dollars, having deposited with him as collateral security for the payment of this and any other liability or liabilities of ours to said William A. Procter, due or to become due, or that may be hereafter contracted, the property named on the back hereof, with full power and authority to him or his assigns, in case of the non-payment of this or any other liability above mentioned, or any part thereof, to sell, assign and deliver the whole or any part of such securities, and such other security subsequently submitted in lieu thereof or in addi-

tion thereto, at any brokers' board, or at public or private sale, at their option, without advertisement or notices to us, and with the right on his part to become purchaser thereof at such sale or sales, freed and discharged of any equity of redemption, and after deducting all legal and other costs and expenses of such sale or sales, to apply the residue of the proceeds thereof to the payment of this and any other liability above mentioned, as said William A. Procter shall deem proper, returning the overplus to the undersigned. In case of deficiency we promise to pay the same to William A. Procter or his order. This note bears interest at the rate of 6% payable semi-annually.

THE WADDELL-ENTZ COMPANY.
ALFRED A. WHITMAN, Treasurer.
PERCIVAL KNAUTH, President.

[Endorsement.]

Ten (10) 6% 5-year Stock Option Gold Notes, Nos. 51–60 of The Waddell-Entz Co., with November, 1893, coupons.

Oct. 30, '93, November coupons returned for cancellation.

CINCINNATI, O., May 24, 1894.

Pay to the order of Warner Ells for my account.

WILLIAM A. PROCTER.

NEW YORK, May 28, 1894.

Credited by sale of collateral ($50) fifty dollars.

WILLIAM A. PROCTER.
per WARNER ELLS,
Att'y in fact.

EXHIBIT "D."

$1000. $1000.

No. 51.

THE WADDELL-ENTZ COMPANY.

Five Year Six Per Cent. Stock-Option Gold Note.

For value received, The Waddell-Entz Company, a corporation under the laws of West Virginia, promises to pay to bearer in five years from the first day of May, A. D. 1893,

at its office in the City of New York, the sum of One Thousand Dollars in the gold coined money of the United States of the present standard of weight and fineness, together with interest thereon, payable semi annually on the first days of May and November in each year until paid, at the rate of six per centum per annum. This note is one of a series of five hundred notes, amounting in the aggregate to the sum of five hundred thousand dollars, each for the sum of one thousand dollars, and numbered from 1 to 500, both numbers inclusive. Said company agrees that the holder may surrender this note on any coupon day prior to maturity and receive in exchange therefor forty shares of the stock of The Waddell-Entz Company in Trustees Certificates as now issued, which said stock shall carry all accrued dividends then earned but not actually paid thereon prior to such surrender, and further, that no dividend shall be declared upon the stock of the Company so long as any of said notes shall be outstanding until a sinking fund for said notes shall have been created which shall have received previously a sum equal to the amount of each said dividend. The principal of this note will in case of default in payment of interest thereon become thirty days thereafter due and payable, if the holder so elect and serve written notice thereof upon the Company.

Witness the corporate seal of The Waddell-Entz Company and the hands of its President and Treasurer thereunto lawfully authorized by resolution of the Board of Directors of said Corporation, this first day of May, A. D. 1893.

THE WADDELL-ENTZ COMPANY.

CORPORATE SEAL.

By P. KNAUTH, President.
ALFRED A. WHITMAN, Treasurer.

The Waddell-Entz Company will pay to bearer Thirty Dollars, $30 coupon 1

at its office in the city of New York on the first day of Nov. 1893, being six months interest on its note. No. 51.

ALFRED A. WHITMAN,
Treasurer.

Morris W. Seymour and *Howard H. Knapp*, for the receiver.

A creditor cannot recover a dividend based upon a sum in excess of his actual debt. *People* v. *Remington*, 54 Hun, 480; affirmed, 121 N. Y., 675; *Third Nat. Bank* v. *Eastern R. R. Co.*, 122 Mass., 240; *Merchants' Bank* v. *E. R. R. Co.*, 124 id., 518; Gluck & Becker, Receivers of Corp., 412; Colebrook on Collateral Securities, 123; *Jessup* v. *City Bank of Racine*, 14 Wis., 359. Procter's sale of the alleged collateral to himself, did not in any respect alter his situation, or give him the rights of a *bona fide* purchaser of such obligations. As Knauth, Nachod & Kuhne were secured in part, at least, they should be allowed a dividend only on the excess of their claim above the value of their security. The case of *Findlay* v. *Hosmer*, 2 Conn., 350, relied upon by them, was decided in 1817, long before the passage of our insolvent law, which states the present policy of our State in regard to the payment of secured creditors. General Statutes, § 590; *New Haven Wire Co. Cases*, 57 Conn., 387; *Nowell's Appeal*, 51 id., 111; *Third Nat. Bank* v. *Lanahan*, 66 Md., 462. See also *Amory* v. *Francis*, 16 Mass., 306; *Farnum* v. *Boutelle*, 13 Met., 159; *Merchants' Nat. Bank* v. *Eastern R. R. Co.*, *supra*; *State Bank* v. *Receivers of Bank of New Brunswick*, 2 Green's Ch. (N. J.), 266; *Corrigan* v. *Trenton Delaware Falls Co.*, 3 Halstd. Chanc. (N. J.), 489; *Fish & Green* v. *Potts*, 4 Halst., Ch., 277; *Wurtz* v. *Hart*, 13 Ia., 515; *Wheat* v. *Dingle*, 32 S. C., 473; *In re Frasch*, 5 Wash., 344, 34 Pac. Rep., 755; *Greenwood* v. *Taylor*, 1 Russ. & My., 185; *Brocklehurst* v. *Jessop*, 7 Simons, 438.

John H. Perry and *George E. Hill*, for the claimant William A. Procter.

The three cases relied upon by the receiver are not strictly in point. The case of *Bank* v. *Eastern R. R. Co.*, 122 Mass., 240, was brought under a special statute, and the judgment therein was controlled *solely by the terms of that Act*. The ordinary rules of law upon which we stand were not the basis of that decision at all.

The case of *Royal Bank of Liverpool* v. *Grand Junction R. R. & D. Co.*, 100 Mass., 444, holds unequivocally in cases precisely like ours in principle, that the creditor may collect both upon the collateral and the principal obligation *pari passu* up to the full amount of his indebtedness.

The New York case, *People* v. *Remington*, 54 Hun, 480, seems also to be controlled by a statute of that State. The last of the three cases upon which the receiver relies, is *Jessup* v. *City Bank*, 14 Wis., 359. The reasoning in that case rests upon the idea that the creditor could not recover more than the amount of his actual debt. We make no such claim as that. We shall obtain, if our claim is allowed, but a small fraction of the original indebtedness.

Upon principle and authority we are entitled to a dividend upon the balance due on our note and also upon the collateral bonds, inasmuch as the original debt will not then be paid in full. *In re Binghamton Gen. Elec. Co.*, 143 N. Y., 261; *Findlay* v. *Hosmer*, 2 Conn., 350; *People* v. *Remington*, 121 N. Y., 328; *Lewis* v. *United States*, 92 U. S., 618; *Story, Eq. Jur.*, §§ 524, 640; *Allen* v. *Danielson*, 15 R. I., 440; *West* v. *Bank of Rockland*, 19 Vt., 403; *Moses* v. *Ranlet*, 2 N. H., 488; *Kellock's Case*, L. R. 3 Ch. App., 769.

Antonio Knauth, of New York, filed a brief in behalf of the claimants, John C. Brown and Margaret B. Smith.

HAMERSLEY, J. When the law takes possession of the property of an insolvent debtor, that property becomes a trust fund to be divided among such creditors as may present their claims in the prescribed manner; and the respective interests of the creditors in the fund are, as between themselves, of an equitable nature, to be determined on a basis of equality. This is true of the property of an insolvent corporation when it is taken possession of by a receiver under the statute providing for the winding up of a corporation, as truly as when it is taken possession of by a trustee under the statute regulating insolvent estates. *New Haven Wire Co. Cases*, 57 Conn., 352, 387.

The questions submitted by this reservation present little

difficulty when it is remembered that the real question is, not what remedies each creditor may have had against the solvent corporation, but simply what is the amount of actual debt due from the insolvent estate to him; such debt and such only can be proved, as the basis for an equitable distribution of the trust fund.

A consideration of the disputed claims of William A. Procter and Knauth, Nachod & Kühne, will dispose of all the others.

Procter's claim (aside from the thirteen bonds Nos. 32 to 44, about which no question arises) is based on a loan to the Waddell-Entz Company of $4,500. As evidence of the debt he received a demand note for that amount (Ex. "C"); he also received ten notes or bonds (in the form of Ex. "D") for $1,000 each, and claims that the debt on which he is entitled to a proportionate dividend from the trust fund is $14,500. If he had received a demand note for $14,500, or if he had received 145 notes under seal for $100 each, it would hardly be claimed that he could prove more than his actual debt of $4,500; whatever advantages possession of evidences of debt in such form might secure to him in enforcing his rights against his debtor, the possession of such advantages does not alter the fact that his real debt is $4,500, and that fact must control his right to a dividend from the insolvent estate. The amount of his debt is not altered because in the demand note the ten bonds delivered to him are called "collateral security." They are not collateral security for the payment of the original debt. The demand note itself is in a sense a security dependent for its value on the credit and property of the borrower; another note or fifty other notes furnish a similar security; they might aid the creditor in enforcing speedy payment by the debtor, but in case of insolvency it is the actual debt and not the multiplication of evidences of debt that defines the creditor's interest in the trust fund. "Collateral security" necessarily implies the transfer to the creditor of an interest in some property or lien on property, or obligation which furnishes a security in addition to the responsibility of the

debtor. The law regulating this subject rests on the assumption of such transfer to the creditor of property in some form, on which property he relies for security, and which he is entitled to apply instead of resorting to the debtor's own property towards the satisfaction of his debt, by virtue of a contract implied or express as the case may be, but collateral to the contract of indebtedness. A debtor's additional promises to pay cannot, from the very nature of the case, be treated as collateral security for his debt, unless such additional promises are themselves secured by a lien on property or by the obligations of third persons; under such circumstances they may be treated as collateral security so far as is necessary to obtain the benefit of the lien or obligation. This self-evident proposition has rarely been discussed in reported cases. The principle, however, has been clearly stated by the courts of New York and Massachusetts. *People* v. *Remington*, 54 Hun, 480, affirmed, 121 N. Y., 675; *Third Nat. Bank* v. *Eastern R. R. Co.*, 122 Mass., 240; see also 124 id., 518. In the case of *In re Litchfield Bank*, 28 Conn., 575, it was apparently conceded by all parties that the currency of a State bank, pledged as security for the payment of its promissory notes, is pledged as money; the case turned on a claim of tort in selling the money so pledged, and the question now at issue was not considered.

The amount of Mr. Procter's debt is not altered by the sale from himself to himself of the bonds. Such bonds were not "collateral security" for the demand note, and their sale to himself or others would not be governed by the law peculiar to the disposition of such security. Whether or not they might constitute a debt for their face value in the hands of a third party who had purchased them from Procter, would depend upon the circumstances of such purchase. Their standing, in such case, as a debt against the insolvent estate, would not depend on their sale as "collateral security," but on their valid assignment to an innocent third party. Mr. Procter by purchasing these bonds from himself, after he had been advised of the insolvency of the com-

pany and the appointment of a receiver, and after he had presented his debt of $4,500, did not put himself in the position of, nor in a position analogous to that of, an innocent third party.

One claim of Knauth, Nachod & Kuhne raises a different question, although its solution is largely controlled by the same principle, *i. e.*, the equality of the creditors in respect to their equitable interests in the trust fund. These claimants held collateral security for their debt; they have sold that security through proper legal proceedings, and have received the proceeds. The fact that they themselves were purchasers at the sale is immaterial. They now insist that for the purposes of a division of the trust fund, the amount or value of the proceeds received by them from the sale of their security cannot be deducted from the original amount of their debt.

It is undoubtedly true that a creditor holding collateral security may, in case of non-payment of the debt, pursue all his remedies at the same time, or either one before having recourse to the other. He is not bound to apply the collateral security before enforcing his direct remedy. He has a legal property interest in the security as well as in the debt; to deprive him of either might be in the nature of a violation of the obligation of a contract; his rights, however, are limited to the satisfaction of his debt, and if he gains more, a trust arises which equity will enforce. But when the debtor is insolvent, and his property is taken into the custody of the law as a trust fund to be distributed among the creditors on the basis of equality under direction of a court exercising equity powers, the right of a secured creditor to a share of that fund stands on the same footing as the right of every other creditor who presents a claim; and the amount upon which he is entitled to a dividend must be determined on the same principles. He cannot be deprived without consent, of the property which he holds as security, he cannot be deprived of his right to sue the debtor for any unpaid balance (unless by force of a discharge in insolvency or bankruptcy); but his share of the trust fund must be

determined by the same rule which determines the share of every other creditor, and that is a rule of equity for securing equality of treatment. Whether this rule of equity will permit a secured creditor to proceed against the fund in the hands of the trustee, as he might have proceeded against his debtor, without applying his collateral security to the reduction of his claim, and so to receive a dividend from the property of the insolvent, sequestered by operation of law for the equal benefit of all creditors, on that portion of his debt which the property of the debtor, sequestered by his own act for that special purpose, has paid or will pay in full,—is a question as to which courts in different jurisdictions have differed. The cases are reviewed in *People* v. *Remington*, 121 N. Y., 328. It may be doubtful whether in this State, prior to the Act of 1853 relating to insolvent debtors, this question had been conclusively settled, although *Findlay* v. *Hosmer*, 2 Conn., 350, and some subsequent cases, indicate an approval of the rule contended for by counsel for Knauth, Nachod & Kuhne. It is unnecessary, however, to discuss the question, for we are satisfied that legislation on that subject has settled the doubt in favor of a different rule.

The insolvent Act of 1853 contained a provision (now found in § 590 of the General Statutes) requiring a secured creditor who presented his claim against the estate, to elect between the surrender of such security and a dividend from such estate only upon the excess of such claim above the value of such security. In *Mechanics' & Farmers' Bank, Appeal from Probate*, 31 Conn., 63, 70, it was held that this statute placed all the property of the insolvent in the custody of the law, to be disposed of according to law; that the creditor has no vested interest in such property; and that the statute was "strictly remedial, providing for the appropriation of the debtor's property, on principles of equity and justice among all his creditors." The provision in relation to secured creditors was extended to insolvent estates of deceased persons; so that this equitable rule applied to the distribution by law of all insolvent estates, including insolvent corporations. In 1869 a law was passed for the winding

up of corporations, and under that law the property of the insolvent corporation could be taken possession of for division among all creditors in equal proportions, by a receiver appointed by the Superior Court as a court of equity, as well as by a trustee appointed by the Court of Probate under the insolvent Act. *New Haven Wire Co. Cases, supra.* The present proceeding is brought under this Act, which is still in force substantially unchanged. General Statutes, § 1942. The Act confers on the court full equity powers to make such orders as to the doings of the receiver "and as to the payment of debts and distribution of the effects of said corporation, as may be just and comformable to law." We think the property of an insolvent corporation is in the custody of the law to the same extent and for the same purposes when transferred to a receiver under § 1942, as when transferred to a trustee under the insolvent Act, and that the principle of the rule in respect to the participation of secured creditors in the distribution of such property, which is obligatory in the latter case, ought to be applied in the former. This is just and required by the insolvent Act.

The Superior Court is advised:—

First: William A. Procter is entitled to a dividend only on the original indebtedness of $4,500 and the thirteen coupon obligations numbered 32–44.

Second: John C. Brown and Mrs. Smith are entitled to dividends only upon the amount of their demand notes.

Third: Knauth, Nachod & Kuhne are entitled to a dividend on the excess of their claim of $12,336 above the amount received by them from the sale of their collateral security. They are not entitled to a dividend upon the eight coupon obligations.

In this opinion the other judges concurred.

ALICE HARTY *vs.* THOMAS MALLOY.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

In a bastardy proceeding, evidence of acts of illicit intercourse between the parties several months before the act which is claimed to have resulted in the plaintiff's pregnancy, is admissible in behalf of the plaintiff, as tending to show a habit of sexual intercourse and the probability of its renewal upon opportunity. But evidence that the plaintiff consented to such intercourse only after a promise of marriage by the defendant, is irrelevant and inadmissible.

Evidence that the plaintiff, both before and after the birth of her child, stated on several occasions to different persons that the defendant was the father, is admissible, independent of the plaintiff's discovery at the time of travail. But the admissibility of these statements does not necessarily render everything admissible that was said or done on such occasions; nor does such evidence become admissible on the re-direct examination of the plaintiff, merely because on her cross-examination the defendant inquired as to the precise language of the statement, and the date of the conversation.

The defendant requested the court to charge the jury that inasmuch as it did not appear, nor was it claimed, that the birth of the child which occurred March 9th, 1895, was premature, the act of intercourse resulting in pregnancy must have occurred in June, 1894; and as no claim was made of any intercourse between February and July, 1894, the defendant was entitled to a verdict. *Held* that this was a request to charge upon a matter of fact and as such was properly refused.

Burial expenses of the child do not fall within "expense of lying-in, and of nursing the child," as used in § 1208 of the General Statutes. The allowance to a neighbor and to the plaintiff's sister, each of whom assisted in nursing the plaintiff may, under certain circumstances, be included in the lying-in expenses.

[Argued January 28th—decided February 21st, 1896.]

BASTARDY complaint, brought originally before a justice of the peace in the town of New Haven, by whom the defendant was bound over to the Court of Common Pleas for New Haven County, and tried to the jury, before *Hotchkiss, J.*; verdict of guilty and judgment for the plaintiff to recover the sum of $171.75, and appeal by the defendant for alleged errors in the rulings and charge of the court. *Error, new trial granted.*

The case is sufficiently stated in the opinion.

Samuel C. Morehouse, for the appellant (defendant).

The court erred in admitting testimony concerning the improper relations between the parties in January and February, 1894. These relations were not claimed, and confessedly could not be claimed, to have resulted in the conception of this child. It is a different case from that of *Norfolk* v. *Gaylord*, 28 Conn., 309. The admission of evidence that these acts in January and February were only committed after a promise of marriage had been made to her by the defendant, was error. *State* v. *Lenihan*, 88 Iowa, 670. The court erred in admitting the plaintiff's statements of the paternity of the child to others. General Statutes, § 1207; 1 Sw. Dig. 46; *Benton* v. *Starr*, 58 Conn., 289. It was essential that she should have been put to her discovery in the hour of her travail. *Booth* v. *Hart*, 43 Conn., 484, 485; *Chaplin* v. *Hartshorne*, 6 id., 44; *Hitchcock* v. *Grant*, 1 Root, 107; *Warner* v. *Willey*, 2 id., 492; *Leonard* v. *Bolton*, 148 Mass., 66; *Ray* v. *Coffin*, 123 id., 365. The burial expenses of the child were improperly allowed. *Penfield* v. *Norton*, 1 Root, 345. This is a bastardy case and not one for seduction or loss of services. Equally erroneous was the allowance to the plaintiff, a minor, of the wages of Mamie Harty, her sister, lost by being at home. The services of the neighbor stand on a somewhat different footing, but they were voluntary, and there was no contract in law which could be enforced for their recovery by the neighbor.

Tilton E. Doolittle and *John A. Doolittle*, for the appellee (plaintiff).

The alleged errors are immaterial and no new trial should be granted. General Statutes, § 1135; *Gilbert* v. *Walker*, 64 Conn., 397; *Scofield* v. *Lockwood*, 35 id., 429. Acts of previous intercourse, and all the circumstances attending them, are admissible as tending to prove the act of intercourse by which the defendant became the father of the child. The plaintiff's declarations as to the paternity of the

child are admissible. *Benton* v. *Starr*, 58 Conn., 285; *Booth* v. *Hart*, 43 id., 480; *Robbins* v. *Smith*, 47 id., 182. The evidence of the plaintiff's pain and suffering was admissible. *Booth* v. *Hart*, *supra*. It is immaterial whether the plaintiff was put to her discovery in time of travail, or not. All the expenses allowed are incident to the maternity and birth of that child. The burial expenses were as necessary as any other expenses; even if erroneously allowed, no new trial should be granted; simply one half the sum should be deducted.

FENN, J. This is a bastardy proceeding brought by the mother, and tried to the jury in the Court of Common Pleas for New Haven county. The plaintiff obtained a verdict in her behalf, and judgment was rendered thereon by the court. The errors assigned upon appeal relate largely to the action of the court in relation to the admission of evidence. These we will first consider.

Upon the trial it was admitted that the defendant, at the time of the occurrence mentioned in the complaint, was a minor just under the age of sixteen years, and resided with his parents in West Haven in the town of Orange; that the plaintiff was unmarried, and lived with her parents in the city of New Haven; that on March 9th, 1895, the plaintiff gave birth to a male illegitimate child, who lived only a few days. The plaintiff introduced no evidence to show that such child was not a fully developed child, or a child the birth of which was premature.

The plaintiff offered evidence and claimed to have proved that on the evening of the 4th of July, 1894, an act of sexual intercourse took place between her and the defendant, and that her pregnancy resulted therefrom. The plaintiff also offered, against the objection of the defendant, evidence in chief, of two acts of sexual intercourse between herself and the defendant—one in January, and one in February, 1894. It was admitted by the plaintiff that there were no other such acts, except these two, between herself and the

defendant previous to said 4th of July, 1894. The court admitted the evidence, the defendant duly excepting.

We think this ruling of the court, though going closely to the verge of the law, must be sustained, upon the authority of *Norfolk* v. *Gaylord*, 28 Conn., 309, and upon the reasons and grounds therein stated.

But the court, in this connection, went further and, against the exception and objection of the defendant, allowed the plaintiff to offer evidence that she had, in January and February, 1894, consented to such intercourse only after a promise of marriage made by the defendant to her. This was clearly error. The introduction of such evidence would doubtless tend to assist the plaintiff in her effort to obtain a verdict from the jury; but it would do so, not because it aided to establish the truth of the principal matter in dispute, but because it would incite sympathy in her favor, and prejudice against the defendant. Efforts to introduce, in jury trials, evidence only desirable for such reason, should not meet with especial favor from this court.

It was not claimed that the plaintiff was put to the discovery of the paternity of her child at the time of her travail; but in explanation, apparently, of why she was not, evidence was, against the objection and exception of the defendant, offered and received, that at the time of her parturition, and a day or two after, she was unconscious and in such a condition that she was unable to converse, and that she was given anæsthetics to relieve her of pain, so that she might have a comfortable delivery. In all probability the admission of this evidence did the defendant no especial injury, but we are unable to discover its relevancy. In connection with it, evidence, also excepted to, was offered, that about a week after delivery the plaintiff stated to the doctor, when taking certificate of birth, that the defendant was the father of her child; and that she also stated to her father, mother and sister, both before and after birth of the child, when asked by them who was the father of the child, that Thomas Malloy, the defendant, was. Regarding the above statements, no claim appears to have been presented that they

were made as near to the time of her delivery as, by reason of her condition, she was able intelligently to, and did, converse. The importance of such fact, if it had existed and appeared, we do not determine. As the case stands these statements, and others to which we will next allude, were admissible, independent of discovery at the time of travail, or they were not admissible at all.

The plaintiff also offered evidence in chief, admitted by the court against the objection of the defendant, both of herself and of several members of the family, and of others, that at various times between the 4th of July, 1894, and the birth of her child on the 9th day of March, 1895, she had stated to them that the defendant was the father of her unborn child. Except as limited by what we shall hereafter state as to particular matters, we think the views held and expressed by this court in several cases, justify these rulings of the court below. *Booth* v. *Hart*, 43 Conn., 480; *Robbins* v. *Smith*, 47 id., 182; *Benton* v. *Starr*, 58 id., 285. But the principles of these decisions will not justify the entire action of the court below, in reference to this class of evidence.

It further appears that the plaintiff testified that she told the father of the defendant that his son was the father of her child. Thereupon defendant's counsel, upon cross-examination, asked the plaintiff, "What did you tell Mr. Malloy?" Counsel endeavored to, and did, confine his questions and the witness' answers, as to the interview, exclusively to that limit,—that is, the plaintiff's statement to the father of the defendant, and the date of the conversation. On redirect, plaintiff's counsel claimed the entire conversation, and the court, against the objection of the defendant, allowed it to be given by the plaintiff. She stated that the defendant's father gave her a dollar and told her to go down to a drug store and buy pills, "a box of Hooker's pills;" that she went, got them, came back and showed them to Mr. Malloy; that he told her they would bring her round right; asked her how many the prescription said to take; she replied three; "well," he says, "you never mind, three isn't enough, you take seven or eight."

Another objection made by the defendant was that here was the conversation of two interviews, all admitted because the defendant asked for the specific language used by the plaintiff in making her statement to the father of the defendant, that his son was the father of her unborn child. Surely, the defendant's counsel objected faithfully, but his only relief was that to his objection counsel for plaintiff interjected, "We have heard that over and over again." Then the court said: "I think having admitted that first interview—you having called for the whole conversation at the first interview—that the conversation at a subsequent interview on the same subject is admissible." Certainly the record shows that all the conversation at the first interview was not called for, or desired by the defendant; and neither the said ground stated for the ruling, nor the ruling itself, if it had such a basis, was correct.

There was also error in the action of the court in admitting a letter from the plaintiff to the defendant's father; but as this action was based upon and in extension of the other ruling to which we have just referred,—as was also the evidence of one Condon as to what the defendant's father said and did when he received the letter,—and as such action arose under peculiar circumstances, which can hardly exist upon another trial, it is unnecessary to go into the details which would be essential in order to make the matter plain to those who are not familiar with the case.

The defendant has also assigned as error in his reasons of appeal, the refusal of the court to charge the jury as desired by him in his second and third requests, to the effect that as it did not appear, nor was claimed, that the birth of the child was premature, the act causing pregnancy must have occurred early in June, 1894; and that, as it was not claimed that the defendant had any intercourse with the plaintiff between February, 1894, and July 4th of that year, upon the facts the verdict should be for the defendant. The court held this to be a request to charge the jury upon a question of fact, and declined. This action we think correct.

Error is also assigned in the action of the court in the per-

formance of its statutory duty, under General Statutes, § 1208, in ascertaining "the expense of lying-in, and of nursing the child." The only item, the including of which in the bill, upon the finding, appears to us clearly erroneous, is that of $25 for burial expenses. It may be a matter for regret that the language of the statute is not broad enough to justify this; but we cannot hold that it is. The only other items objected to, are the allowance to a neighbor who assisted in the nursing, and to the plaintiff's sister who assisted for a period of three weeks. The question raised as to these items may be a close one, but under all the circumstances detailed we think the action of the court correct.

There is error, and a new trial is granted.

In this opinion the other judges concurred.

KATE CARNEY ET AL. *vs.* CHARLES B. WILKINSON.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

It is *prima facie* a sufficient ground for the rejection of the report of a committee appointed by the Superior Court to erect and establish lost and uncertain bounds, that the committee employed the agent and surveyor of one of the parties to assist in fixing the location of such bound.

Whether a finding by the trial court that the assistance given by such surveyor had no influence on the judgment of the committee, would heal the impropriety, *quære.*

The surveyor, whose employment is authorized by § 2975 of the General Statutes to assist the committee in reaching its conclusion, should be as disinterested in respect to his duties as the committee itself.

[Argued January 29th—decided February 21st, 1896.]

WRIT of error brought to the Supreme Court of Errors at its January Term, 1896, at New Haven, to review a judgment of the Superior Court (*Ralph Wheeler, J.*) rendered in favor of the defendant in error, upon his application to re-

store and establish lost and uncertain bounds between the lands of the parties. *Error and judgment of reversal.*

The action in the Superior Court was brought under § 2975 of the General Statutes. A committee appointed by the court made a report fixing and establishing a lost bound. The defendant in the action remonstrated against the acceptance of the report. The court sustained a demurrer to the remonstrance, and rendered judgment of confirmation.

Among the errors assigned in the writ of error were the following: In sustaining the plaintiffs' demurrer to the defendant's remonstrance; in overruling the remonstrance of the defendant; in accepting the report of the committee.

James P. Platt and *Cornelius J. Danaher*, for the plaintiffs in error.

George A. Fay, for the defendant in error.

HAMERSLEY, J. Some questions of interest, and not free from doubt, involving the meaning and effect of the statute under which the original complaint was brought, were discussed in argument; they arise, however, on this writ of error, with such limitations, that any consideration of their merits which does not extend beyond the issue directly involved, must be unsatisfactory; and as there is a fatal error apparent on the face of the record, we confine the decision to that error.

The statute (§ 2975 of the General Statutes) provides for an appointment by the court to which a complaint for the establishment of lost and uncertain bounds is brought, of "a committee of not more than three disinterested freeholders, who . . . . shall inquire into the facts, and erect and establish such lost and uncertain bounds, and may employ a surveyor to assist therein; and shall report the facts and their doings to the court." It then provides that the court may confirm said doings, and that certified copies of the report and decree of confirmation shall be recorded in the land records, and that "the bounds, so erected and established, shall be the bounds between said proprietors."

It is clear that upon proof of material misconduct on the part of the committee in erecting and establishing such bounds, the court must reject their report. Even when the report of a committee of a similar character is held to be conclusive as the judgment of a special statutory tribunal, their report may be set aside for "misconduct on the part of the committee, or irregularity in their proceedings." *Suffield* v. *East Granby*, 52 Conn., 175, 180.

In the present case the committee reported: "I find that the land records of the town contain boundaries and descriptions which enable a surveyor, with some assistance from the recollection of living witnesses, to fix the location of the disputed bound with reasonable certainty. I therefore proceed to fix the location of said bound and establish it as follows." The defendants in the complaint remonstrated against the acceptance of the report, and said that the report ought to be rejected because (in addition to other matters alleged) "the conduct of the committee was improper in this, that he employed the agent and surveyor of the plaintiff to fix and restore said pretended boundary." The plaintiff in the complaint, did not demur specially to this ground of remonstrance nor to the manner of stating the ground, but demurred specially to other grounds, and generally, "because said remonstrance is uncertain and informal and argumentative in that it does not allege any specific facts why said report should not be accepted, save that the committee did not decide correctly upon the facts before him." The court below sustained the demurrer, overruled the remonstrance and confirmed the action of the committee.

It is immaterial whether or not the allegation of the remonstrance was in fact true. Its truth is admitted by the demurrer. In sustaining the demurrer and rendering judgment notwithstanding the admitted truth of the allegation, the Superior Court held that such action by any committee is not in law *prima facie* improper, and cannot be sufficient ground for rejecting a report. This is error, fatal to the validity of the judgment. It is essential that the conclusions of such committees should be as free from all improper influences as the

verdicts of juries. The surveyor, whose employment is authorized by statute to assist the committee in reaching its conclusion, should be as disinterested in respect to his duties as the committee itself. It appears from the record that the conclusion of the committee was based on conditions, *i. e.*, boundaries and descriptions contained in the land records, "which enable a surveyor, with some assistance from the recollection of living witnesses, to fix the location of the disputed bound." And so it appears that the assistance of the surveyor employed by the committee was a necessary factor in the process of deduction which must determine its judgment. The employment for such purpose of a person who was then the "agent and surveyor" of a party interested in respect to the very question at issue, is in law irregular and improper. It well may be that upon a hearing on the allegation of the remonstrance, the court might have been satisfied and have found that the assistance of the surveyor had no influence on the judgment of the committee; whether such finding would heal the error is a question not before us. The trial court has held that the law does not regard the introduction of such interested assistance into the deliberations of a *quasi* jury, as legally improper. A judgment whose validity depends on the correctness of that ruling cannot stand. The practical effect of such a rule of law would tend to impair confidence in legal tribunals and to endanger the purity of trials. *Harris* v. *Woodstock*, 27 Conn., 567, 572; *Pond* v. *Milford*, 35 id., 32, 35; *Beardsley* v. *Washington*, 39 id., 265, 268; *Greene* v. *East Haddam*, 51 id., 547, 555.

Judgment for the plaintiffs in error.

In this opinion the other judges concurred.

WALTER SCOTT *vs.* CHARLES R. SPIEGEL, SHERIFF.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

In the procedure authorized by chapter 326 of the Public Acts of 1895 in proceedings on *habeas corpus* where a mittimus signed by a justice of the peace is made part of the return, the regular rules of pleading, so far as applicable, must be observed. Accordingly the petitioner cannot deny the truth of the facts alleged in the return, and at the same time demur or otherwise question their legal sufficiency.

A justice of the peace may, within a reasonable time after a lawful conviction and sentence, issue a mittimus to carry into effect the judgment, even though his court has then been adjourned without day.

It is not within the power of the Supreme Court of Errors to revise or change questions of pure fact found by the trial court from the evidence.

[Submitted on briefs January 30th—decided February 21st, 1896.]

PETITION for a writ of *habeas corpus*, brought to the Superior Court at Waterbury in New Haven County, and tried by the court, *George W. Wheeler, J.*, upon the petitioner's reply to the respondent's return; facts found and judgment rendered for the respondent, and appeal by the petitioner for alleged errors in the rulings of the court. *No error.*

The plaintiff made an application to the Superior Court in New Haven County, alleging that he was unlawfully detained and imprisoned in the common jail by the defendant, who is the sheriff of that county and the keeper of the jail; and prayed for a writ of *habeas corpus*. The court issued the writ. The defendant thereupon produced the plaintiff in court, and assigned in his return upon the writ as the reason for his holding the plaintiff in custody, two mittimuses issued by a justice of the peace in said county, by virtue of which the plaintiff had been committed to said jail. To this return the plaintiff made answer as follows:—

"1. On the 9th day of November, 1895, the said Walter Scott was arrested upon two warrants signed by Henry Beadle, Esq., justice of the peace, residing in the town of Cheshire, Connecticut, upon two complaints dated Novem-

ber 8th, 1895, and signed by Charles H. Sawyer, prosecuting agent for New Haven County, in which complaints it was alleged that the said Walter Scott did keep a place in which it was reputed that spirituous and intoxicating liquors had been sold and were kept for sale and exchange, without having been duly licensed therefor; and that said Walter Scott did sell and exchange spirituous and intoxicating liquors without having a license therefor; and that said Walter Scott did keep certain spirituous and intoxicating liquors with intent to sell the same without having a license therefor. Said Scott was arrested by one Shadrack McClair, an agent of the Law and Order League of Connecticut, and immediately brought before Henry Beadle, Esq., justice of the peace, residing in said town of Cheshire.

"2. Said justice of the peace immediately proceeded to the trial of said cases, and found said Scott guilty in each case, in manner and form as alleged in said complaints, and thereupon ordered that said Walter Scott pay a fine of seventy-five ($75) dollars and costs on one complaint, and one hundred ($100) dollars and costs on the other complaint, and that he stand committed until judgment be complied with.

"3. Immediately thereupon the said Walter Scott promised and agreed with the said justice of the peace that he would pay the total amount of said fines and costs to the said justice of the peace on or before the 18th day of November, 1895.

"4. After said justice court had rendered judgment and pronounced sentence and the said Scott had made the promise and agreement aforesaid, said court issued no mittimus and took no further action in either of said cases, but immediately adjourned *sine die*.

"5. Said Scott did not give any bonds, and was never ordered to give bonds for his appearance, in either of said cases at any time in the proceedings, or either of them. Said Scott was not remanded into the custody of any officer at the time of said adjournment, and did not move for an appeal in either of said cases. Immediately upon said adjournment the said justice of the peace and the said Sha-

drack McClair permitted the said Walter Scott to depart from the place in which said court had been held, and the said justice, and the said McClair and said Scott, each went about his usual business.

"6. On the 18th day of November, 1895, before two o'clock in the afternoon, the said justice of the peace prepared and issued two mittimuses referred to in the return, and placed the same in the hands of Joseph R. Warren, a deputy sheriff for New Haven County, and thereupon said deputy sheriff, on the 19th day of November, 1895, arrested the said Walter Scott, and committed him to the jail in New Haven.

"7. The said Walter Scott is a hotel keeper, residing in the town of Cheshire, and during all the time between the 9th and 19th days of November, aforesaid, was publicly attending to his business in said town, and frequently saw and met said justice of the peace and the said Shadrack McClair, but he was permitted to go free, and at no time was placed under arrest or restraint of any kind, until he was arrested upon the mittimuses aforesaid."

To this answer the defendant rejoined in this way: "The respondent denies paragraphs 3, 4, 5, and 7 of the reply to the return, and says said reply is insufficient."

The court found the issue for the defendant, and rendered judgment that the writ be denied; from which judgment the plaintiff has appealed to this court. The trial court thereupon made a finding of facts, the material parts of which are as follows:—

"1. On the 9th day of November, 1895, the petitioner, Walter Scott, was duly convicted in a justice court of certain crimes, as more fully appears in the judgment files in said cases, and sentenced to pay two fines, viz: one of $75 and costs, and one of $100 and costs, and that he stand committed until judgment be complied with. 2. It is admitted that the jurisdiction of the justice was complete, that all the proceeding to and including the sentences were regular, and the sentences lawful. 3. After the sentences had been pronounced, Scott said to the justice that he had not the money to pay the judgments, but thought he could borrow it. The

justice told him he could pay the fines and costs in ten days, and in the meantime be placed in the custody of some one. 4. Immediately thereupon Scott, by permission of the justice, left the court room to find some one to go security for him. He returned in a few minutes with one Keeler; thereupon the justice placed Scott in Keeler's hands, saying that Keeler must have Scott present on the 18th of November, 1895, and he would hold Keeler responsible for the appearance of Scott on the said day, if the fines and costs were not paid before. 5. Scott said he would pay said fines and costs within the time fixed by the justice. 6. After the justice had spoken as before detailed to Keeler, Scott left the justice court and went about his usual vocations, meeting the said justice and the officer who arrested him in said cases, at various times before the 18th of November. During all of said time he was permitted to go free without restraint of any kind, until detained upon the mittimuses hereinafter referred to. 7. The said justice issued no mittimuses until the 18th of November, and took no further action in said cases until said day. 8. Scott gave no bonds for his appearance in either of said cases, and was not required to give bond, and was not remanded into the custody of any officer at any time, and did not move for an appeal in either of said cases. 9. On November 18th, 1895, before two o'clock in the afternoon, the said justice issued two mittimuses, as set forth in the return herein, and placed the same in the hands of Joseph R. Warren, a deputy sheriff for New Haven County, and thereupon said Warren arrested said Scott and committed him to the county jail at New Haven. 10. Scott thereupon brought his petition for a writ of *habeas corpus*, which writ was duly issued and the parties thereto duly heard upon the pleadings as on file. 11. The petitioner claimed upon argument: (*a*) That the said mittimuses were defective, (1) in not setting up the record of his conviction, (2) in not setting up the place of his conviction; (3) in not setting up any facts to show that the offenses were committed in New Haven County. (*b*) That one of the mittimuses did not set forth any cause of action, and was void. (*c*) That the justice had accepted

Scott's promise to pay, in full satisfaction of the sentences imposed, and therefore the sentences had been performed. (*d*) That the justice had no power to commit Scott after his court had adjourned *sine die* and Scott had been permitted to go at large. (*e*) That Scott having been permitted to go at large, such permission operated as a discharge, and therefore he could not be subsequently recommitted. 12. I find as a fact that the justice did not accept Scott's promise to pay, in satisfaction of the sentences imposed by him. 13. I find as a fact that Scott did not promise the justice to pay said penalties in case he was allowed to go at large for ten days, or any other time. 14. The judgment files were offered in evidence by the petitioner, and were in all particulars conceded to be regular."

The plaintiff assigned as reasons of appeal the following: "The court erred and mistook the law in the following particulars: 1. In ruling that the plaintiff had waived his right to attack the mittimuses set up in the return, because he had not specially pleaded the defects therein. 2. In not ruling that both the mittimuses set up in the return were void. 3. In holding that if the mittimuses were defective the court, having before it the record of conviction, regular and lawful, had authority to remand the plaintiff until opportunity had been had to recommit him in proper form. 4. In holding that if the mittimuses were void the court ought not to release the prisoner, but should remand him, when his conviction was legal, and his sentence had not been performed. 5. In holding that the arrangement between the plaintiff and the justice in regard to the payment of the fine and costs, and the plaintiff's release thereupon, did not operate to discharge the plaintiff from liability to committment under his sentence. 6. In holding that the justice, after this arrangement had been made, had authority to issue these mittimuses before the time which he had agreed upon with the plaintiff in which the plaintiff might pay his fines, had expired. 7. In holding that the justice had any power to issue these mittimuses ten days after he had adjourned his court *sine die*, and had permitted the plaintiff to go at large in the manner

described in the finding. 8. In holding that the justice had any power to place Scott 'in Keeler's hands,' or that the arrangement with Keeler could be anything but an obligation by him to pay the plaintiff's fines and costs, if the plaintiff failed to do so within the time fixed.

"The court erred and mistook the facts in the particulars described in the plaintiff's exceptions, viz: 1. In finding that it was admitted that the proceedings set out in the judgment files were regular. 2. In finding that the justice placed the plaintiff 'in Keeler's hands,' and held him responsible for the plaintiff's appearance before the justice on the 18th of November, 1895. 3. In finding that the justice did not accept the plaintiff's offer to pay his fines within a time fixed, as a satisfaction of his sentences. 4. In finding that Scott did not make the promise so to do within a time fixed, in case he was allowed to go at large. He therefore prays for such relief as is provided by law in the premises."

Lucien F. Burpee and *Cornelius J. Danaher*, for the appellant (petitioner).

It was not necessary to file a special plea setting up the defects apparent on the face of the mittimuses. 1 Bac. Abr., tit. Bail, 589; 4 T. R., 757; 4 Burr., 2539; 1 Haw. P. C., Chap. 19; Spelling on Ex. Rel., §§ 1152, 1317; *State* v. *Blaisdell*, 57 N. W. Rep. (Minn.), 206, 794; *In re Bion*, 59 Conn., 372. Where a return is not traversed, it is to be treated as if demurred to by the relator. *In re Wilburn*, 59 Wis., 25; Wharton on Cr. Pr. and Pl., § 991; Church on Habeas Corpus, § 166 ff. A demurrer to the petition or return, although sometimes allowed, is not a proper method of testing the sufficiency. *Cunningham* v. *Thomas*, 35 Ind., 171; *Hovey* v. *Morris*, 7 Blackf., 559; *In re Douglas*, 3 Ad. & Ell., Q. B., 825. In this State pleadings in the usual form are not required in *habeas corpus*. General Statutes, § 905. Chapter 326 of the Public Acts of 1895 makes no provision for any pleading to test the sufficiency of a return which is defective on its face. The mittimuses were void. The one marked No. 2 is found by the court below to be

fatally defective. It does not recite the commission of any offense known to the law. 2 Swift's Dig., 568; Gen. Stat., § 3392; 1 Shar. Bl., § 137. The objection raised to the mittimus marked No. 1, was that it did not state where or when either of the offenses alleged was committed, and therefore it did not appear that the justice who tried these cases had jurisdiction, or that the New Haven jail was the proper place of confinement, or that the keeper of said jail was the proper legal custodian of the offender. General Statutes, §§ 687, 1692, 3358; *In re Brainerd*, 56 Vt., 495, 496; Hurd on Habeas Corpus, 332; 2 Swift's Digest, 794; Conn. Civil Officer, 230, 249. Such defects cannot be deemed mere irregularities. Bacon's Abr., Habeas Corpus, § 10; *Ex parte Burford*, 3 Cranch, 448; Alderson on Judicial Writs, 607, 608, 610; 1 Bl. Com., 337; 4 id., 256; *In the matter of Hayward*, 1 Sandf. (3 N. Y. Supr. Ct.), 701; *In the matter of Fetter*, 23 N. J. Law, 311; *Ex parte Zeehandelaur*, 71 Cal., 238; *Adams* v. *Vose*, 1 Gray, 59. Restraint upon process that is void is not better than restraint without process. *Barney* v. *Barker*, 56 Vt., 14; *In re Brainerd*, 56 id., 495; *In re McLaughlin*, 58 id., 136; *Ex parte Garvey*, 7 Colo., 384. Whatever facts are necessary to justify the detention, must be set forth in the return. *In re Brainerd*, 56 Vt., 495; *Yates' Case*, 44 Johns., 317; *In re Mowry*, 12 Wis., 52; *Randall* v. *Bridge*, 2 Mass., 549. The arrangement between the petitioner and the justice satisfied the sentences. A transaction of that kind was sustained in *Stonington* v. *Powers*, 37 Conn., 439. How is the delay of ten days which was granted to the petitioner to be regarded? There certainly was not a suspension of sentence; sentence was passed promptly after trial. There was, in the opinion of the Superior Court, a suspension of the execution of sentence. That court regarded it as definite in time, and therefore within the discretion of the justice. But, having legally suspended the execution of sentence for a definite time, the court had no power to issue its mittimus before the time of suspension had expired. On a similar state of facts, CHIEF JUSTICE HINMAN discharged the petitioner in two writs of

habeas corpus. The cases were appealed to this court, and appear in the printed record for the September term, 1867. *In re George W. Rogers*. See also *People* v. *Allen*, 53 Ill., 61; *Weaver* v. *People*, 33 Mich., 395; *People* v. *Felker*, 61 id., 110; *Ex parte Kearney*, 55 Cal., 212; *In re Webb*, 89 Wis., 354; *McLaughlin* v. *Etchison*, 127 Ind., 476. The cases of *People* v. *Baker*, 89 N. Y., 461, and *Gano* v. *Hall*, 42 id., 67, are based upon facts radically different, and ought to have little weight in this case.

E. P. Arvine and *Charles H. Sawyer*, for the appellee (respondent).

The plaintiff waived the defects of the mittimuses, if there were any. It is absurd to say that the record must be set out in the warrant of commitment. If the mittimus states the nature of the offense of which the prisoner is convicted, and it appears that he was convicted by a magistrate or court, the cause of commitment is sufficiently declared. It will be presumed that the court had jurisdiction, and that it was held at the proper place. The form universally used in this State is that of the mittimuses before the court. 2 Sw. Dig., 794. The defects complained of are at most mere irregularities, for which a writ of *habeas corpus* cannot be sustained. *Ex parte Gardner Tracey*, 25 Vt., 93; *In re Blair*, 4 Wis., 521; *Petition of Crandall*, 34 id., 177. A *habeas corpus* cannot take the place of a writ of error. *In re Bion*, 59 Conn., 391; *Sennott's Case*, 146 Mass., 493; *Ex parte Shaw*, 7 Ohio St., 81. Even if the warrants of commitment were void, the court should not discharge the prisoner, if the judgments on which they were issued were valid. *People* v. *Baker*, 89 N. Y., 465; *Sennott's Case*, 146 Mass., 469; 9 Amer. & Eng. Ency. of Law, 203; Spelling, Ex. Rem., § 1217, note 1, and cases there cited; *Schwabler* v. *The Sheriff*, 22 Pa., 18, 19; *Ex parte Gibson*, 31 Cal., 619. Even if the justice had agreed to accept the prisoner's promise to pay as payment, he had no authority to do so, and his action could not be binding on either the State or the town. *Gano* v. *Hall*, 42 N. Y., 70. The case of *Stonington* v. *Powers*, 37 Conn., 429,

is clearly distinguishable, and does not go to the extent of petitioner's claim. The petitioner is equitably estopped from complaining of the action of the court, which he himself requested. *McLaughlin* v. *Etcheson*, 127 Ind., 474. The mittimus is of the nature of an execution, and may be issued at any time. 12 Amer. & Eng. Ency. of Law, 412; *In re Shaw*, 31 Minn., 44; *McLaughlin* v. *Etcheson*, *supra*; *Gano* v. *Hall*, *supra*; *Clark* v. *Cleveland*, 6 Hill, 344; *Arnold* v. *Steeves*, 10 Wend., 515; 2 Sw. Dig., 416; *People* v. *Allen*, 115 Ill., 63; Abbott's Trial Brief, Criminal Cases, § 861; *Conly* v. *Anderson*, 112 Mass., 60; *Young* v. *Makepeace*, 103 id., 54; *Taylor* v. *Taylor*, 36 Conn., 252; *People* v. *Son*, 12 Wend., 344; *Schuamble* v. *The Sheriff*, 10 Harris (Pa.), 18.

ANDREWS, C. J. The Superior Court made certain findings of fact, to which exception is made by the plaintiff. The evidence upon which these findings were made, is certified up in the record. As these were questions of pure fact depending upon the consideration of evidence, we do not understand it is within our power to revise or change them. If, however, it was open to this court to do so, we should be of opinion that the evidence was sufficient to support the conclusions.

We agree with the Superior Court, that the only questions properly in the case were such as were presented by the plaintiff's answer to the defendant's return. In the first volume of Swift's Digest, side page 569, it is stated that in cases of *habeas corpus*, by the common law, the "truth of the return cannot be contested, and there is no remedy for the party aggrieved, but an action on the case for the false return, or by information, or indictment in the name of the public." To the same effect are the authorities cited by the plaintiff on this part of his brief. And Swift's Digest at the page above noted, adds: "As the remedy by the common law is very imperfect, it has been supplied in this State by statute." In 1815 the legislature of this State had provided for pleadings and procedure in cases of *habeas corpus*, by an enactment, one section of which has been continued

without change in every Revision to this time. It is now § 1271 of the Revision of 1888. That section declares that: "When any statements contained in such a return shall be contested, such court or judge may hear testimony, and examine and decide upon the truth, as well as the sufficiency of the return, and render such judgment as to the law and justice shall appertain." Since that statute, it has been permissible in cases of *habeas corpus* for the applicant to demur to the return, to deny it, or to confess and avoid its effect by setting up other facts. A writ of this kind could not, of course, be made to perform the office of a writ of error. Since the passage of that statute, the parties to these writs have been accustomed, whenever they saw fit to do so, to use the liberty of pleading indicated by the quoted section. *Hill* v. *Goodrich*, 32 Conn., 588; *Macready* v. *Wilcox*, 33 id., 321; *In re Bion*, 59 id., 372; *Yudkin* v. *Gates*, 60 id., 426; *Whalen* v. *Olmstead*, 61 id., 263. Whatever doubt there was, if any, as to the propriety of such procedure in cases of *habeas corpus*, must now be removed by the Act of 1895, Chap. 326, p. 667, which expressly provides for any kind of pleadings in any case where a mittimus signed by a justice of the peace is made part of the return. And when pleadings are allowed, the rules which govern pleadings, so far as they are applicable, must be observed, and the effect of the pleadings on the question upon which the court is to decide, must be held to have its full force. One of these rules is such that a demurrer to the return and an answer raising an issue of fact, cannot be pending at the same time. *Hoadley* v. *Smith*, 36 Conn., 371, 372; *Hotchkiss* v. *Hoy*, 41 id., 568; *Brainard* v. *Staub*, 61 id., 570. Another is, that the plaintiff, having presented an issue of fact upon the return, cannot raise any question as to its legal sufficiency. *Adams* v. *Way*, 32 Conn., 160; *Morehouse* v. *Northrop*, 33 id., 380, 387; *Hoadley* v. *Smith*, *supra*; *Healey* v. *New Haven*, 49 id., 394.

Applying these rules to this case, and regarding the questions of fact as settled, the only remaining question presented by the return is whether or not the justice of the peace had

power to issue the mittimuses ten days after the plaintiff had been sentenced; the justice court at which he had been convicted having meantime been adjourned without day. It is found that all the proceedings before the justice up to and including the sentences, were regular and lawful. So that the question is: Did such delay operate to deprive the justice of power to issue the mittimuses? Stated in another way the question might be: Did that delay operate to exempt the plaintiff from being compelled to comply with these lawful sentences which had been pronounced against him?

"A justice of the peace is a judicial and ministerial officer. He performs judicial duty in the trial of causes, and ministerial duty in recording his judgments. He is both judge and clerk of his courts. His duties as recording officer are similar in every respect to those performed by clerks of the higher courts. The only difference in the cases consists in the sources of knowledge that they have of the judgments that have been rendered which they are required to record. . . . . But differences in the sources of knowledge, in this respect, make no difference in the character of the duties they perform." *Smith* v. *Moore*, 38 Conn., 105, 109. It is very likely true, that when the justice court was adjourned without day the judicial officer could no longer act. But the ministerial officer remained, and might do any act which such an officer could lawfully do. As clerk of his own court this justice of the peace had powers entirely analogous to the powers which the clerks of the higher courts have. A mittimus after conviction is, in criminal cases, similar to an execution after judgment in a civil case. It is final process. It is the carrying into effect the judgment of the court. The clerk of the Superior Court has power to issue a mittimus after the term of court has adjourned, to carry into effect an order made by the court while in session. *Taintor* v. *Taylor*, 36 Conn., 242. A clerk of the Superior Court can issue an execution in a civil suit at any time while the judgment remains unsatisfied. A justice of the peace may in like manner, as the clerk of his own court, issue an execution on any judgment which he has rendered, or an *alias* or *pluries* execu-

tion, at any time so long as the judgment remains in force and he continues in office. In respect to the power of a court to issue a mittimus at a date subsequent to the sentence, Swift's Digest, vol. 2, side page 416, says: "So where the defendant is present when the verdict or judgment is rendered against him, though the court should not order him into custody, and he is suffered to go at large, yet they may at any time afterwards issue a warrant to commit him for the non-payment of the fine and costs; for the defendant is taken into or retained in custody solely for the purpose of enforcing the payment of the fine and costs. When that is not necessary the court may at discretion permit him to go at large, and can then as well issue a warrant against him for the fine and costs as if he were in actual custody." This language is intended doubtless to apply to the higher criminal courts. Whether the same rule would apply to a justice court to the same extent, we need not decide. But we have no doubt that a justice of the peace may, within any reasonable time after conviction and sentence, issue a mittimus to carry into effect his judgment, even though his court has been adjourned without day; *Taintor* v. *Taylor*, *supra*; *Gano* v. *Hall*, 42 N. Y., 67; 12 *Amer. & Eng. Ency. of Law*, 42; and that the time here allowed was not unreasonable.

It should be added that if the mittimuses in the case are in fact defective in form—as the conviction and sentences in the case were regular and lawful—they may, and should, be amended by the justice so as to be made faultless.

There is no error.

In this opinion the other judges concurred.

LE GRAND N. DENSLOW *vs.* GEORGE M. GUNN, JUDGE.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, HAMERSLEY and HALL, Js.

A non-resident presented his written application to the Superior Court while in session, praying for an alternative writ of mandamus, upon which the court entered a rule to show cause why such a writ should not issue. The respondent appeared and moved to quash the application, for want of a bond or recognizance for costs. *Held* that the proceeding, at least at that stage of its progress, did not come within the terms of § 896 of the General Statutes requiring security from a non-resident plaintiff for costs; and that the motion was therefore premature. If the parties consent to treat the application as though it were in all respects the alternative writ, the respondent by voluntarily appearing and submitting to the jurisdiction must be held to have waived the requirement of a bond for costs.

Section 459 of the General Statutes provides that before any Court of Probate shall appoint a guardian of a minor having a parent, it shall require personal notice to be given the parent, in such manner as it shall deem proper; but if the parent resides out of this State, or the place of his residence be unknown, such notice shall be given as the Court of Probate may order. *Held* that the notice required to be given to a non-resident parent, under the latter clause, was a notice to the parent, as such; and that a mere public notice published in a newspaper and posted on a sign-post in the probate district in this State, did not comply with the terms of the statute and constitute legal notice to the parent, in the absence of proof that such notice reached the parent.

[Argued February 4th—decided February 21st, 1896.]

APPLICATION for a writ of mandamus requiring the respondent to allow an appeal from the Court of Probate of the District of Milford, brought to the Superior Court in New Haven County and tried to the court, *Prentice, J.*, upon the petitioner's demurrer to the return; the court sustained the demurrer and thereafter judgment was rendered for the petitioner, and the respondent appealed for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

William B. Stoddard and *Edward H. Rogers*, for the appellant (respondent).

The plaintiff, being a non-resident, should have entered into a recognizance to the defendant for costs. General Statutes, § 896. This proceeding is a civil action within the meaning of this section of the statute. It was an "action at law" prior to the passage of the Practice Act. *State* v. *New Haven & Northampton Co.*, 41 Conn., 134, 137; *Brainard* v. *Staub*, 61 id., 575; *Fleet* v. *Lockwood*, 17 id., 233, 237. The successful party in mandamus is entitled to recover his costs. General Statutes, § 1295. The applicant is a "plaintiff." *Canaan* v. *Greenwoods Turnpike Co.*, 1 Conn., 9. The failure to give this bond for prosecution makes the process invalid. *Moore* v. *Rankin*, 51 Conn., 326. The defendant's motion to quash was the proper, and, indeed, the only remedy. *Amer. Casualty Ins. Co.* v. *Fyler*, 60 Conn., 448, 459; *State's Attorney* v. *Selectmen of Branford*, 59 id., 402, 413; *Fuller* v. *Plainfield Academic School*, 6 id., 532, 544; Moses on Mandamus, 202. The plaintiff was bound to take his appeal within one month from the date of the decree or order appointing the guardian. A State has the right to determine the status of one of its citizens towards a non-resident, which is binding within the State, though made without service of process or personal notice to the non-resident. *Gibbs, Appellant*, 154 Mass., 378; *Pennoyer* v. *Neff*, 95 U. S., 714, 734. The notice which was given was a proper notice. Wade on the Law of Notice, § 1056. If the notice was a proper notice, the statute makes it a legal notice, when given as directed by the court. General Statutes, § 447, makes any proper notice a legal notice. The plaintiff does not allege or claim that he did not have actual notice of the application, and the time and place of trial; but his sole contention is that the notice which was given was not a legal notice, and that he was not bound by it. In *Potwine's Appeal*, 31 Conn., 381, this court held that as it did not appear that the notice given was not effective, although not strictly correct, the plaintiff was not entitled to a rehearing. "Notice" does not necessarily

mean actual notice. *Crane* v. *Camp*, 12 Conn., 464, 469. *Hurlbut* v. *Thomas*, 55 id., 181.

Edwin A. Smith, for the appellee (petitioner).

The importance of notice to parents is conceded in General Statutes, §§ 459, 641, 642, and it would seem that had the applicant been a resident of this State, and the place of his residence known, the notice under consideration would not have been a legal notice in any sense. It is hardly to be considered that the legislature intended to regard the parent who was a non-resident of the State, or whose residence was unknown, with so little favor as to make any notice which the Court of Probate might order a legal notice to limit his right of appeal. The notice actually given was the notice prescribed by § 446. It simply enabled the court to take jurisdiction and to proceed to a hearing and the appointment of a guardian. In so far it was a legal notice; but it was not the legal notice contemplated by § 642 in regard to appeals by persons not inhabitants of this State and not present at the time of "making such order, denial or decree." Section 447 should be read in connection with § 642, in order to arrive at the true meaning of the phrase "legal notice," as used in the latter. The case does not abate by reason of the change in the individual who holds the office of judge of probate. *State's Attorney* v. *Selectmen of Branford*, 59 Conn., 402, 409; *Thomson* v. *United States*, 103 U. S., 480, 483, 484; *Linsley* v. *Auditor of Kentucky*, 3 Bush, 231, 235; *Clark* v. *McKenzie*, 7 id., 523, 531; *State* v. *Gates*, 22 Wis., 210, 214; *State* v. *Puckett*, *County Judge*, 7 Lea (Tenn.), 709, 710; *Hardee* v. *Gibbs*, *Auditor*, 50 Miss., 802. The want of a bond was no ground for quashing the application. Costs in all the proceedings for mandamus, unless controlled by statute, rest in the discretion of the court. Moses on Mandamus, 234; Stephens' Nisi Prius, § 2332. Section 1295 of the General Statutes was not intended to control the discretion of the court in this particular.

FENN, J. The appellee Denslow, on October 11th, 1894, made a written motion to the Superior Court, then in session at New Haven, to issue a writ of mandamus requiring George M. Gunn, judge of the Court of Probate for the district of Milford, to allow an appeal to said Denslow from an order of said court appointing a guardian over the minor son of said Denslow, or to signify cause to the contrary to said Superior Court. No alternative writ issued, but instead thereof a rule was ordered to be entered to show why such writ should not issue upon such motion. Thereupon the appellant came into court and moved to quash, on the ground that said "motion and writ of mandamus is prayed for by said petitioner Le Grand N. Denslow, who is described in said process as, and is in fact, a resident of Los Angeles, State of California, and not an inhabitant of this State, and that no bond or recognizance to the adverse party with surety to prosecute his action to effect was taken or given in this action." This motion was denied by the court. The appellant then made return, stating that on August 30th, 1893, Mary A. Smith, the grandmother of said minor Edwin P. Denslow, petitioned said Court of Probate for the appointment of a guardian over said Edwin P. Denslow; that on said 30th day of August, 1893, the said Le Grand N. Denslow was not a resident of the State of Connecticut, and that his place of residence was unknown; that in pursuance of an order of said court, said petition was assigned for a hearing on the 16th day of September, 1893, at ten o'clock in the forenoon, and that in pursuance of an order of said court notice of the pendency of said petition and the time and place of hearing was given by publishing a notice thereof two times in the Milford Sentinel, a paper having a circulation in said district, and posting a like notice on the sign-post in said Milford, which notice contained a copy of said petition and the order of said court fixing said 16th day of September, 1893, for a hearing on said petition; that said Le Grand N. Denslow had legal notice of said proceedings, by reason of said published notice, before said 16th day of September, 1893; that on said 16th day of September, 1893, a

guardian was appointed by said court over said Edwin P. Denslow, as alleged in said motion, and no appeal was taken or attempted to be taken from said order or decree until the 15th day of September, 1894. A demurrer to this return was sustained by the court, and a peremptory writ of mandamus directed to issue.

Two questions are presented to us upon this appeal: *first*, did the court err in denying the appellant's motion to quash; *second*, did the court err in holding that the facts stated in the return did not show such notice to the appellee as required him to appeal within one month from the order and appointment by the Court of Probate.

Concerning the first of these questions, it is the claim of the appellant that the proceeding by mandamus is a civil action, within the meaning of § 896 of the General Statutes. That statute provides that "if the plaintiff in any civil action be not an inhabitant of this State, or if it do not appear to the authority signing the process that he is able to pay the costs of the action, should judgment be rendered against him, he shall, before such process is signed, enter into a recognizance to the adverse party with some substantial inhabitant of this State as surety, or some substantial inhabitant of this State shall enter into a recognizance to the adverse party, that the plaintiff shall prosecute his action to effect, and answer all damages in case he make not his plea good."

If the claim thus stated presents a question of some difficulty, it also, as we think, presents one which was not properly before the court below, and is therefore not before us on this appeal. At the time the motion to quash was filed and denied, the conditions referred to in the statute did not exist. There was no "authority signing the process," for there was no process, *mesne* or final; no writ, alternative or peremptory. There was only a motion or application for such writ. It is true indeed, that upon this, a rule was entered to show cause, but it was cause why the alternative, not the peremptory, writ should issue; that is, to show cause why the act should not be done, or an order issue to do it,

or again show cause. This surely was nothing more than notice of the pendency of an application or motion. If, under the provisions of § 896 of the General Statutes, a bond or recognizance was requisite, the one to take it would be the authority signing or directing the issue of the alternative writ. Objection for want of such action, taken to preliminary proceedings and previous to time or opportunity for action, is premature. It is true, indeed, that the proceedings in this case were similar to those in *American Casualty Ins. Co.* v. *Fyler*, 60 Conn., 448, 458. The application was treated as the alternative writ. But this was informal. It was done after, and not before, the motion to quash had been filed and passed upon. And it could not have been done, and clearly the court below would not have undertaken to have it done, except in the way stated in the case just referred to,—"by the consent of all the parties." If, after such consent, it be admitted that the application became, to all intents and purposes whatever, the same as an alternative writ, and the appellant had thereupon renewed his motion to quash, it could not have prevailed; for, if otherwise well taken—a question which, as we have said, we do not regard as before us, and do not intend to decide—the defect in the process would have been waived by the consent given by "voluntarily appearing and submitting to the jurisdiction of the court." *Morse* v. *Rankin*, 51 Conn., 326.

In reference to the remaining question, General Statutes, § 459, provides: "Before any Court of Probate shall appoint a guardian of a minor, having a parent or parents, it shall require personal notice to be given such parent or parents, in such manner as it shall deem proper; but if any parent shall reside out of this State, or the place of his residence be unknown, such notice shall be given as the Court of Probate may order." The appellee resided out of the State and the place of his residence was unknown. He was not present at the time of the hearing. If he had legal notice to be present, under General Statutes, § 642, his appeal should have been taken within one month; if he did not have such notice, then he was entitled to twelve months, acted in time, and his

appeal should, as held by the Superior Court, have been allowed.

There is another section (General Statutes, § 446) which provides how notice shall be given "whenever in any proceeding in, or matter pending before, a Court of Probate, public notice is required." Doubtless the notice given was sufficient to comply with the requirements of this last section, in cases to which it applies. But it does not apply to this case. Here, no public notice was necessary; notice to the appellee as a parent, was required. True, under the circumstances which existed, such notice might be given as the Court of Probate might order, and be legal. The question now is, does the return show that such notice was ever ordered, or given at all. It seems to us, as it did to the court below, that it does not. Notice was published in a newspaper having a circulation in Milford, and put upon the sign-post there. The appellee could not have been bound by such notice, if he had possessed a known residence in this State. It would not be as likely to reach him, in fact, if he resided elsewhere and away. Notice so given might indeed reach him, and might be so given and be legal, whether it did or not. But we think in order that the latter statement should be true, it should be a fact, and should appear, that the object sought in giving the notice was to reach the appellee; that looking towards that result the court directed and gave notice,—not to the public, adapted best to reach the broadest public, yet irrespective of any superior rights of the parent to have such notice—but to the parent, irrespective of the public not concerned or required to be notified at all. In other words, we think that with an eye and purpose single to notify a party absent and whose place of residence was unknown, a different form or mode of notice more likely to accomplish its object, would probably and certainly might possibly, be adopted by a judge of probate, than if he merely undertook to give a proper public notice, including the parent as one of that class only. We think the statute in question contemplates, requires and provides for this. Because

it does not appear that the appellant did what we thus hold essential, we think the court below ruled correctly.

There is no error.

In this opinion the other judges concurred.

BUCKLEY BURR *vs.* WILLIAM A. BOOTH, DEPUTY SHERIFF.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Section 526 of the General Statutes authorizes the Court of Probate to examine under oath an insolvent debtor whose estate is in settlement in such court, and provides that such "examination shall be in writing, shall be signed by said debtor, and shall be filed with said court." A later clause provides that "if such debtor shall refuse to appear and submit to an examination, when required so to do, as above provided, the court may commit him to prison, for not longer than five days, and until the cost of such commitment be paid." *Held* that inasmuch as the statute did not clearly authorize the court to imprison for a refusal to sign the examination, the court did not possess that power.

[Argued February 5th—decided February 21st, 1896.]

PETITION for writ of *habeas corpus*, brought to the Court of Common Pleas in New Haven County and tried to the court, upon the respondent's demurrer to the petitioner's answer to the return; the court, *Hotchkiss, J.*, sustained the demurrer and rendered judgment for the respondent, and the petitioner appealed for alleged errors in the rulings of the court. *Error, and judgment reversed.*

The case is sufficiently stated in the opinion.

Henry G. Newton and *Henry F. Hall*, for the appellant (petitioner).

Charles S. Hamilton and *Charles A. Harrison*, for the appellee (respondent).

ANDREWS, C. J. Upon the application of the plaintiff alleging that he was deprived of his liberty without law or right, by the defendant, a deputy sheriff of New Haven County, the Court of Common Pleas of that county issued a writ of *habeas corpus* commanding such officer to produce the plaintiff in court, together with the cause of his detention. The defendant produced the plaintiff, and made return on the writ as follows:—

"In obedience to the within writ and by virtue of the same, I have brought the body of the within named Buckley Burr to this court room of the Court of Common Pleas for New Haven County, where I have him, the said Buckley Burr, in court; and for the cause of his detention by me I assign and state that on the 24th day of December, 1895, there was put into my hands for service a mittimus in the words and figures following: To W. A. Booth, Deputy Sheriff for New Haven County, Greeting: Whereas, at a Probate Court for the District of Wallingford, holden this day before me, wherein Buckley Burr, an assigning insolvent debtor, was cited before said court for an examination on oath on all matters relating to the disposal on condition of his property, to his trade and dealing with others, and his accounts concerning the same, to all debts due or claimed from him, and all other matters concerning his property and estate, and the due settlement thereof according to law, under section 526 of the General Statutes of 1888: said Buckley Burr having been summoned by said court, appeared before said court and was duly examined under oath concerning his affairs as hereinbefore mentioned, and at the close of said examination, which said examination was in writing, being by said court required and demanded to sign said written examination, wilfully and contemptuously neglects and refuses to sign such examination, wherefore, you are hereby commanded to take the said Buckley Burr and him commit to the keeper of the jail at New Haven in and for the County of New Haven, who is hereby required to receive the said Buckley Burr into his custody, and him safely keep within said jail for the term of five (5) days, and until the said costs of such commitment be paid,

or he be otherwise legally discharged. Hereof you are not to fail but due service make, and leave with said keeper this mittimus. Dated at Wallingford, this twenty-fourth day of December, A. D. 1895. John A. Martin, Judge of the Court of Probate for the District of Wallingford.

"And that by virtue of said mittimus I have taken the body of the said Buckley Burr for the purpose of delivering him to the keeper of the jail at New Haven, in and for the County of New Haven, in accordance with the direction of said mittimus. I therefore assign the premises aforesaid as the cause of the detention by me of the said Buckley Burr."

To this return the plaintiff demurred: "Because it appears upon the face of the mittimus therein set out, that the judge of probate had no jurisdiction to commit the plaintiff to jail, or to issue the said mittimus for the cause therein stated." This demurrer was overruled. Answer was then made to the return, to which the plaintiff demurred. The court sustained this demurrer, held the return sufficient, dismissed the writ, and remanded the plaintiff to the custody of the defendant. From this judgment the plaintiff appealed, and assigned as error that the court erred in overruling his demurrer to the defendant's return.

The only authority the Court of Probate had to issue the said mittimus, must be found in § 526 of the General Statutes. There is no other authority suggested. That section provides that Courts of Probate may "require any debtor whose estate is in settlement before them to attend and submit to an examination on oath upon all matters relating to the disposal or condition of his property . . .; which examination shall be in writing, shall be signed by said debtor, and shall be filed with said court." Then, after various other provisions, the section says: "If such debtor shall refuse to appear and submit to an examination, when required so to do, as above provided, the court may commit him to prison, for not longer than five days, and until the cost of such commitment be paid."

It appeared by the said mittimus that the plaintiff was an assigning insolvent debtor, whose estate was in settlement

before the said Court of Probate; that he had been cited to appear before said court for an examination, pursuant to the provisions of the said statute; that he attended and was duly examined on oath, which examination was in writing, and that "being by said court required and demanded to sign said written examination, wilfully and contemptuously neglects and refuses to sign such examination."

The plaintiff insists that he cannot be imprisoned for refusing to sign his examination; that he had done all those things which the Court of Probate could require him to do on pain of imprisonment; that he had appeared when required, and had submitted to the examination. He says the word "examination," in the last clause of the said statute, does not include the act of signing, but is complete when all the questions have been asked and answered under oath, and have been put in writing. And he says all this was done, and that the Court of Probate treated this as the complete examination, as is manifest by the mittimus itself, which recites that he, the plaintiff, was cited to appear before said court for an examination; that he did appear and was duly examined under oath, and at the close of said examination, which "examination" was in writing, being required to sign said "examination," refused to sign said "examination."

On the other hand, it is claimed in behalf of the defendant that the examination provided for in said section includes the signing, and would be incomplete without the signature, and would be valueless; that the words of this last clause of the statute, "when required so to do, as above provided," mean that the insolvent must sign when required so to do, just as much as he must appear or must be examined when required; and that the penalty of imprisonment is attached to a refusal to sign, as fully as it is to a refusal to do either of the other things.

We have no occasion to decide between these arguments. We are convinced that the statute does not authorize the court to imprison for a refusal to sign the examination; and the fact that there is a doubt in this respect is conclusive

against the power to imprison. No one should be sent to jail unless there is a clear warrant of law for so doing. There is nothing in respect to which the law is more jealous than of the personal liberty of each citizen. The reasoning of this court in *Noyes* v. *Byxbee*, 45 Conn., 382, is decisive of the present case. See also *Cole* v. *Egan*, 52 Conn., 219.

There is error, and the judgment of the Court of Common Pleas is reversed.

In this opinion the other judges concurred.

ROBERT GREENTHAL *vs.* LINCOLN, SEYMS AND COMPANY, ET AL.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

A transfer of property made in violation either of the insolvent law or of the statute against fraudulent conveyances, is not absolutely void but only voidable. In the former case it can be avoided only by proceedings in insolvency and for the benefit of the insolvent estate; in the latter only at the instance of creditors or those who represent them.

If a creditor attaches the property and takes it from the possession of the fraudulent vendee, he can justify, when sued by the latter, only by averring and proving that he was a creditor of the fraudulent vendor and attached the property as his; and mere proof of these facts without any averment thereof in the answer, is insufficient to support a judgment in favor of the defendant.

Under the Practice Act, as fully as at common law, all pleadings must set up the material facts on which the pleader relies.

A judgment based upon facts found by the trial court but not involved in the issue raised by the pleadings, is erroneous and cannot be upheld. A failure to demur, or to object to the evidence offered to prove the facts found, does not preclude the losing party from asserting and taking advantage of the error on appeal.

[Argued February 5th—decided February 21st, 1896.]

ACTION to recover damages for the conversion of a stock of merchandise, brought to the District Court of Waterbury and thence by the defendants' appeal to the Superior Court

in New Haven County, and tried to the court, *George W. Wheeler, J.;* facts found and judgment rendered for the defendants, and appeal by the plaintiff for alleged errors in the rulings of the court. *Error, new trial granted.*

A general denial was pleaded, and afterwards an amended answer setting up that on March 1st, 1895, one Henry Greenberg owned the goods and was hopelessly insolvent, as the plaintiff well knew; that he thereupon transferred them to the plaintiff with a view to insolvency and with the frandulent purpose of concealing his property from his creditors, and to keep it out of their reach; all which the plaintiff well knew; that the plaintiff was a New York lawyer and a son-in-law of Greenberg, and by said transfer fraudulently intended to aid him in keeping said goods out of the reach of his creditors; and that on April 1st, 1895, Greenberg had been thrown into insolvency before the proper Court of Probate, and one Porter I. Wood appointed trustee of his insolvent estate. The plaintiff replied that he had no knowledge or information sufficient to form a belief as to the alleged insolvency proceedings in the Court of Probate, and traversed the other allegations of the amended answer.

The finding of facts made by the Superior Court showed that Greenberg, on March 2d, 1895, being the owner of the goods and hopelessly insolvent, conveyed them with a view to insolvency, by a proper bill of sale, reciting a consideration of a "valuable sum in dollars," but in fact not made in good faith nor in the regular course of business, to the plaintiff, who took possession about midnight. Just before the transfer, Greenberg had purchased, with intent to defraud his creditors, all the goods for which he could obtain credit, and in some unknown way had disposed of a large part of them, for which he had never paid. The transfer to the plaintiff was made to cheat and defraud his creditors and to conceal his property from them. The plaintiff received it knowing all these facts, and in order to aid Greenberg in carrying out his fraudulent scheme. The plaintiff never acquired title to the goods, or right to their possession. On March 6th, the defendants, being creditors of Greenberg,

attached the goods as his property; and this action was brought against them for a conversion, on March 16th. On April 1st, Greenberg was duly adjudged to be an insolvent debtor, in the proper Court of Probate, and Porter I. Wood was duly appointed trustee in insolvency of his estate.

The plaintiff appealed to this court, assigning for error that the finding that he had no title to the goods was inconsistent with the finding that they were transferred to him by bill of sale and possession taken; that the finding that the defendants were attaching creditors was outside of the issue; and that it did not appear that the trustee in insolvency had taken any steps to set aside the transfer.

James E. Russell, for the appellant (plaintiff).

The court finds that "on March 6th, 1895, the defendants, Lincoln, Seyms & Co., being creditors of Greenberg, attached said goods as the property of said Greenberg." No such defense is presented by the pleadings. A judgment upon it is therefore of no force; it is entirely aside from the issues raised in the record. Practice Act, Rule 4, § 6; Bliss, Code Pleading, §§ 327–352; *Powers* v. *Mulvey*, 51 Conn., 432; *Atwood* v. *Welton*, 57 id., 514; *Duluth National Bank* v. *Knoxville Fire Ins. Co.*, 85 Tenn., 76; *Everts* v. *Agnes*, 4 Wis., 343. That portion of the finding which relates to facts which were not within the issue, must be treated as a nullity. *Gaylord* v. *Couch*, 5 Day, 230; *Sanford* v. *Thorp*, 45 Conn., 241; *Rorer Iron Works* v. *Trout*, 83 Vir., 397; *Boone* v. *Chiles*, 10 Pet., 177. It cannot be said that the plaintiff did not make this point in the court below. He did not know that the court would find a number of facts, or a single material fact, not alleged by either the one side or the other. *Atwood* v. *Welton*, *supra*. The effect of the fraudulent conveyance to Greenthal was to clothe him with the title; and this title as to all the world, except the creditors of Greenberg, was good. General Statutes, § 2528; Pollock on Torts, 300; *Benton* v. *Jones*, 8 Conn., 186; *Chapin* v. *Pease*, 10 id., 69; *Owen* v. *Dixon*, 17 id., 492; *Birdsey* v. *City Fire Ins. Co.*, 26 id., 165; *Darcy* v. *Ryan*, 44 id., 518; *Gilligan* v.

Lord, 51 id., 562. If not fraudulent or prejudicial to creditors, then under the settled law there can be no question as to the insolvent's right to transfer. *Barbour* v. *Conn. Mut. Life Ins. Co.*, 61 Conn., 240; 1 Sw. Dig., 443. It does not appear by the pleadings, or by the finding of the court, that the trustee on the insolvent estate of Greenberg seeks to set aside the transfer in question. Though appointed trustee, our insolvent law imposes no absolute obligation upon him to spend money in solving the validity of the transfer in question. *Filley* v. *King*, 49 Conn., 211.

J. Gilbert Calhoun, for the appellees (defendants).

The court finds that Greenberg made a transfer, and that the transfer was void under § 501 of the General Statutes. As between Greenberg and Greenthal the transfer may have been effectual, but this is not an action between Greenberg and Greenthal; it is between Greenthal and a creditor of Greenberg's, and when the court finds that Greenthal has obtained no title which he can maintain against these defendants, it finds thereby that the defendants are persons whose debt or duty is affected by the transfer. As to them, the statute deprives the plaintiff of the title he might otherwise have obtained. When a material fact is found from more detailed or subordinate facts, not as a conclusion of law, but as a conclusion of fact, only the main or resulting fact should be set forth in the finding. *Gilbert* v. *Walker*, 64 Conn., 390; *Curtis* v. *Bradley*, 65 id., 99. In an action of trover for conversion the defendant has the right, under the general issue, to prove title in a third person. *Belden* v. *Allen*, 61 Conn., 173. It was therefore entirely competent for the defendants, under their answer of general denial, to prove that the plaintiff had been a party to a fraudulent conveyance, which, as against them, gave him no title at all; to prove that they were creditors of the fraudulent vendor and thus entitled to the protection of the statute, and that, in attaching the property as that of their debtor, they were not liable for conversion. The defendants added a special answer, setting up the details of the fraudulent conveyance under which

the plaintiff claimed his title. They did not, however, say in the special answer that they were creditors of the fraudulent vendor; but this was unnecessary. *Lord* v. *Russell*, 64 Conn., 87. The plaintiff certainly could not have been misled by this omission. It was an early interpretation of our Practice Act that all formal and technical objections be made known as early as practicable, and be disposed of before the trial of a case upon its merits. *Trowbridge* v. *True*, 52 Conn., 197; *Donaghue* v. *Gaffy*, 53 id., 52. As the plaintiff chose not to demur to the defendant's special answer, but to go to trial upon the merits of the case, and as he chose to make no formal objection to the introduction of evidence proving that the defendants were creditors of Greenberg, he is barred from raising the question now. *Powers* v. *Mulvey*, 51 Conn., 433; *Santo* v. *Maynard*, 57 id., 161; *Merwin* v. *Richardson*, 52 id., 233. It is suggested, on the authority of *Atwood* v. *Welton*, 57 Conn., 514, that this was new matter; but the question there decided was as to an entirely new defense, the relation of the parties having materially changed. In the case at bar there has been no new defense, only perhaps it was more fully presented at the trial than in the pleadings.

BALDWIN, J. By General Statutes, §§ 501, 504, all transfers of property by any person in failing circumstances, with a view to insolvency, shall be void, which are not in writing for the benefit of all his creditors, and lodged for record in the proper Court of Probate; but no transfer otherwise valid is to be thus made void, unless proceedings in insolvency are instituted in such court within sixty days. Section 2528 further provides that all fraudulent conveyances or contracts "made or contrived with intent to avoid any debt or duty belonging to others, shall, notwithstanding any pretended consideration therefor, be void as against those persons only, their heirs, executors, administrators, or assigns, to whom such debt or duty belongs."

The effect of these statutes is to make such a conveyance as that under which the plaintiff claims, not absolutely void, but only voidable. A transfer of the kind described in § 501

is only voidable by proceedings in insolvency and for the benefit of the insolvent estate; one of the kind described in § 2528 is voidable only at the instance of creditors or those who may represent them.

The answer originally put in by the defendants was a general denial, but when they subsequently filed what they termed an "amended answer," which purported to be in itself a complete answer to the whole complaint, it took the place of the general denial and operated as a withdrawal of that defense.

A general denial is only permissible under the Practice Act when it is intended in good faith to controvert all the allegations of the complaint. General Statutes, § 874. The defendants' amended answer did not deny and therefore admitted most of the plaintiff's averments. Practice Book, p. 16, Rule IV., § 4.

Our statutes formerly gave the defendant a right to plead, by special leave of the court, as many several matters by distinct pleas as he should think necessary for his defense. General Statutes, Rev. of 1875, p. 424, § 11. This provision was expressly repealed by the Practice Act. Practice Book, p. 8, § 29; General Statutes, Rev. of 1888, § 1015. Had it been retained in force, one of the main purposes of the new system of pleading would have been frustrated. The Practice Act distinctly adandoned the professed aim of the common law to bring every legal controversy to an issue upon some single, certain, and material point. *Craft Refrigerating Machine Co.* v. *Quinnipiac Brewing Co.*, 63 Conn., 551, 560. Instead of this, it was provided that no issue need be joined on a demurrer, and that the denial of any material allegation should constitute an issue of fact. Practice Book, p. 17, § 12. (Any number of issues might be raised by answer, but it must be in one and the same answer though the defenses were separate.) The object of the change was, in large part, to secure from the pleader admissions of the truth of whatever he knew to be true or (having knowledge or information sufficient to form a belief) did not believe to be untrue, in the material allegations of the adverse party. Prac-

tice Book, pp. 16, 17, Rule IV., §§ 4, 5, 7. There are few complaints in which all that is averred can be honestly denied. That in the present action was no exception to the rule, and the defendants, therefore, could not properly stand upon a general denial. They had taken the goods, and taken them forcibly from the plaintiff's possession. The only questions were those of the lawfulness of his possession, and so of his title, when challenged by the creditors of his assignor. The amended answer was framed with this view, and such an amendment necessarily waived and superseded the general denial. It was, however, apparently based upon the erroneous theory that a conveyance within the terms of § 501 was *ipso facto* avoided, if insolvency proceedings were taken within sixty days after it was made. This not being the law, the defendants, who did not deny that they had forcibly taken the goods from the plaintiff's possession, could only justify by showing that they were creditors of the assignor, and had attached the goods as his property. But if such facts were to be proved, it was necessary that they should be pleaded. Under the Practice Act, as fully as at common law, all pleadings must set up the material facts on which the pleader relies. General Statutes, §§ 874, 880; Practice Book, p. 16, Rule IV., § 6.

The finding of the Superior Court that the defendants were attaching creditors, being without the issue, cannot support the judgment.

It is contended by the defendants that by failing to demur to their answer, or to object to the evidence of the attachment and of the debt upon which it was founded, the plaintiff opened the door for the proof of those facts and cannot now be heard to complain of the effect which the court gave to them. There is no such rule of practice, nor could there be without subverting those principles on which the science of pleading rests. Every motion in arrest, or writ of error, grounded on the insufficiency of the pleadings to support a judgment, would be open to a similar objection. *Todd* v. *Munson*, 53 Conn., 579. The verity of records and the conclusiveness of judgments alike require that the facts deter-

mined should be those only which are within the issues joined.

The defendants' answer was not a defective statement of title which a verdict or judgment might cure. It was not even a statement of a defective title. No title whatever was stated, and for aught that appeared in their pleadings, they might have been mere marauders, who seized and carried off the plaintiff's goods without claim of right.

There is error, and a new trial is ordered.

In this opinion the other judges concurred.

JOHN H. WHITING'S APPEAL FROM PROBATE.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

By the 6th clause of her will a testatrix gave one half the residue of her estate to the children of *W* in fee, and the net income thereof to *W* during his life on the express condition that *W* should pay her or her executor $6,000, which sum the will declared was due from *W* for certain securities he had received from the testatrix and converted to his own use. The same clause also provided that this $6,000 should be treated as part of the estate given to *W* for life, and to his children on his decease. Subsequently an agreement was executed by the testatrix and *W*, which the latter claimed operated as an acknowledgment by the testatrix of the settlement of said indebtedness, and freed the bequest to him of all conditions. Still later the executrix made a codicil in which she ratified and confirmed the provisions of her will and revoked all instruments of a testamentary nature theretofore made. *W* did not pay the $6,000 either to the testatrix or to her executor, and the residuary estate was accordingly divided among the legatees other than *W*, and the latter appealed from the decree accepting such distribution. *Held*:—

1. That the re-publication of the will, in the codicil, gave to clause six the force and effect of a new will as of the date of the codicil, and that *W* must pay the $6,000 given to his children as a part of the estate of the testatrix, or surrender the life estate bequeathed to him on that condition.
2. That whether *W* was or was not in fact indebted to the testatrix at the time the codicil was made, was immaterial. Whatever the fact might

be, the testatrix had a legal right to make the gift upon the assumption that *W* was indebted, and if he desired to accept and take the benefit of the gift he could not contest the conditions upon which it was made, nor introduce the agreement in evidence to alter the clearly expressed meaning of the will.

[Argued February 6th—decided February 21st, 1896.]

APPEAL from certain orders and decrees of the Court of Probate for the District of New Haven, ascertaining the residuary legatees under the will of Mary A. Beers, deceased, and ordering distribution among them, and accepting the distribution made under said order, taken to the Superior Court in New Haven County and tried to the court, *Hall, J.;* facts found and judgment rendered for the appellees, and appeal by the appellant for alleged errors in the rulings of the court. *No error.*

Upon the settlement of the administration account, the Court of Probate ordered the residuary personal estate remaining in the hands of the executors to be distributed among William E. Downes, trustee, and the children of John H. Whiting. The distribution included, in the estate distributed to the children of John H. Whiting, a debt of $6,000 due from said Whiting; this distribution was accepted by the court and ordered on record. John H. Whiting alleged that he was aggrieved by these orders, and appealed to the Superior Court. The sixth clause of the will of Mrs. Beers, dated May 2d, 1891, was as follows:

"All the rest and residue of my estate, both real and personal, I give, bequeath and devise to William E. Downes, of New Haven, Connecticut, in trust, however, to hold, invest, reinvest, change and shift investments and reinvestments, to collect the income, and, except in the contingency hereinafter mentioned, to pay over one half of the net income yearly to my grandson, John H. Whiting, during his life, and upon his death to deliver one-half of my said residuary estate to the children of said John H. Whiting, issue of his marriage with Adeline Blake, share and share alike; and I give and bequeath said one-half of my said residuary estate to his said children, and to those who legally represent them, subject to the provisions of

this my last will; and to pay over one-half of the net income of my said residuary estate to Jennie Downes Whiting, my granddaughter by marriage with my grandson, William W. Whiting, during her life, and upon her death to deliver the one-half of my said residuary estate to the children of said Jennie Downes Whiting by her said husband, William W. Whiting, share and share alike; and I give and bequeath, subject to the life use of their mother, said one-half of my said residuary estate to her said children and to those who legally represent them.

"My grandson, John H. Whiting, has received from me securities of The Air Line Railroad Company, in value about six thousand dollars ($6,000), which I understand he has sold and has taken the proceeds. For the purposes of this will I estimate the value of said securities to be six thousand dollars ($6,000). That six thousand dollars belongs to me, and my will is that it be treated and reckoned as part of my estate, and is to be at all times regarded and treated as part of the estate given by this will to said John H. Whiting for life, and to said children at his death, both in ascertaining the amount of net income to be paid over, and the amount of property to be divided at the termination of the life estate. The gift of one-half of the net income to John H. Whiting during his life is upon the express condition that said John H. Whiting pay the said sum of six thousand dollars hereinbefore referred to to me in my lifetime, or to my executor or administrator upon demand made after my death. And in case said John H. Whiting fails or omits to pay said sum of six thousand dollars, as above provided, the gift to him is thereupon hereby revoked. And in that contingency one-half of my said residuary estate, counting and reckoning said six thousand dollars as part and parcel of such one-half, I give and bequeath absolutely to the said children of said John H. Whiting by his said first wife, share and share alike, and to those who legally represent said children, absolutely, and in fee simple."

A codicil to this will, dated May 7th, 1892, was as follows:—
"I, Mary Ann Beers, of the city of New Haven, having made

and executed my last will and testament, dated the second day of May, A. D. 1891, and having made and executed a codicil thereto, dated the twenty-seventh day of July, A. D. 1891, do hereby make, publish and declare this further codicil to and as a part of my said last will.

"First. I hereby revoke any will and codicil, and every instrument of a testamentary nature whatever, made or executed since the twenty-seventh day of July, A. D. 1891, if any such exists, and I hereby reaffirm, establish, and declare the last will and testament executed by me, and dated May second, A. D. 1891, as modified by the codicil thereto, dated the twenty-seventh day of July, A. D. 1891, to be my last will and testament; and I hereby ratify and confirm the provisions of said will and said codicil thereto.

"Second. I nominate and appoint Hobart L. Hotchkiss, of New Haven, to be a co-executor of my said last will.

"In witness whereof I have hereunto subscribed my name and affixed my seal, the seventh day of May, A. D. 1892.

"MARY ANN BEERS [L. S.]"

The appellant's reasons of appeal alleged an executed agreement between Mrs. Beers and the appellant, dated October 1st, 1891, as sufficient reason for setting aside the orders of distribution. Upon the trial the Superior Court excluded the evidence of this agreement, and the appellant excepted. The appeal to this court is from the judgment affirming the orders of the Court of Probate; and seeks a new trial on account of error in excluding this evidence. The other facts are sufficiently stated in the opinion.

Henry G. Newton, for the appellant (plaintiff).

The question here is as to the admissibility of the evidence. The question of its sufficiency would have been a question of fact for the court below to decide if it had been received. Suppose the agreement had contained these added words: "And the execution of this agreement shall be a fulfillment of the condition attached to the gift to said John H. Whiting in the will of said Beers." Would it not then have been

a fulfillment? If Mrs. Beers preferred to keep the precise terms of the will secret, and to execute an instrument which would be a fulfillment of the condition, had she not a right to do so? The statements of Mrs. Beers that Mr. Whiting owed her nothing, very strongly corroborate the view that this agreement was intended to extinguish the indebtedness provided for in the will, and to be a payment of the amount therein specified in the lifetime of Mrs. Beers. The execution of this agreement would amount to an estoppel as against Mrs. Beers. What will operate as an estoppel against Mrs. Beers, will also estop her representatives and those claiming under her. The depositions prove that subsequent to the execution of all the wills and codicils, Mrs. Beers repeatedly declared that whatever the appellant had received from her was a free gift, and were, therefore, admissible to show a substantial compliance with this provision of the will. In so far as the $6,000 is treated in the will as an advancement, the cases show that the advancement may be turned into a gift. In so far as it is treated as a debt, it is clear that the debt may be discharged by a separate agreement. *Sherwood* v. *Smith*, 23 Conn., 515; *Clark* v. *Warner*, 6 id., 355. The Court of Probate has no power to decree a forfeiture. *Treat* v. *Treat*, 35 Conn., 210, 215. It was the duty of the court to order the fund to be delivered to the trustee, not to order distribution. The trustee would then decide to whom to pay the income, and any one aggrieved could bring a suit for relief, or the trustee could ask for instructions, or bring an action in the nature of interpleader. *Treat* v. *Treat*, *supra*.

John W. Bristol and *Samuel A. York*, for the appellees (defendants).

The original will, having been re-established by a codicil executed subsequent to the date of the alleged agreement, must speak from that date, and could not thereafter be revoked in any other way than that pointed out by § 642 of the General Statutes. The person claiming a beneficial interest under a will cannot set up any claim which would

prevent the will from having its full operation. 1 Jar. on Wills, 415; *Hyde* v. *Baldwin*, 17 Pick., 303; *Smith* v. *Smith*, 14 Gray, 532; *Watson* v. *Watson*, 128 Mass., 152–154; *Hapgood* v. *Houghton*, 22 Pick., 480; *Ward* v. *Ward*, 15 id., 526. The alleged agreement was a mere matter of contract between the testatrix and the appellant, and the Court of Probate could not be required to pass upon its validity and effect, for it has no authority in a question of this nature. *Homer's Appeal from Probate*, 35 Conn., 114; *Treat* v. *Treat*, 35 id., 213; *Hewitt's Appeal from Probate*, 53 id., 24; *Dickinson's Appeal from Probate*, 54 id., 224; *Mallory's Appeal from Probate*, 62 id., 218; *Hall* v. *Pierson*, 63 id., 332. The testimony offered by the appellant in the Superior Court was manifestly irrelevant. It was an attempt to make a new or different will for the testatrix, by showing her declarations made to various parties regarding her feelings toward the appellant, and what her desires or intentions were regarding him. Nor was the testimony offered and given, that she had waived the provisions of her will, either by the written agreement, or any partial performance of it, by the appellant, competent. It does not appear upon the record that the appellant had any interest in the residuary estate of Mary Ann Beers, and the Superior Court should therefore have granted the motion to erase, and dismissed this appeal. The will specifically says that Whiting shall take nothing unless he pays back the $6,000 which he had misappropriated, and there is nowhere any allegation that said payment was ever made. *Swan* v. *Wheeler*, 4 Day, 137; *Norton's Appeal*, 46 Conn., 527; *Saunders* v. *Denison*, 20 id., 521; *Denning's Appeal*, 34 id., 201; *Campbell's Appeal*, 64 id., 277; *Olmstead's Appeal*, 43 id., 110.

HAMERSLEY, J. Upon the settlement of the administration account, it became the duty of the Court of Probate to make an order for the distribution of the residuary personal estate in the hands of the executor. The will of Mrs. Beers gave one half of that estate to the children of John H. Whiting, to be paid over to them upon the settlement of the estate,

unless said Whiting should pay, either to the testatrix during her life or to her executor upon demand after her death, the sum of $6,000 (assumed by the will to be due from Whiting to the testatrix); in which event said one half of the residuary estate was to be paid to William E. Downes, to be held in trust during Whiting's life, and then to be delivered to said children. If in fact the $6,000 had been paid, the estate must be distributed to Downes, trustee; and if it had not been paid the distribution must be to the children of Whiting. The determination of this fact of payment is a necessary incident to the exercise of the power of distribution vested in the Court of Probate; no question of forfeiture of vested rights, or title to property such as has been held to be without the jurisdiction of a court of Probate, was involved. *Hall* v. *Pierson*, 63 Conn., 332, 344.

Upon the trial in the Superior Court the appellant offered certain evidence which the court ruled to be inadmissible. Such ruling is the only error assigned in the appeal to this court. The evidence consisted of a memorandum of agreement between the appellant and Mrs. Beers, as explained by the testimony of Whiting and others. The "reasons of appeal" filed in the Superior Court set up this memorandum and the allegations of the fulfillment of its conditions by Whiting, as the only ground for the appeal from the orders of the Court of Probate. The questions thus presented to the Superior Court were: Have the conditions of the memorandum of agreement been carried out by Whiting? Is this agreement, together with such execution on his part, a payment of the $6,000 as required by the will?

The record shows that the evidence excluded constituted the appellant's whole case. The appellees objected to its admission. Under these circumstances it was agreed by counsel that the evidence should be received, and that afterwards the objections to its admissibility might be renewed and the court then rule upon the same. Accordingly the memorandum was read to the court, the appellant was sworn as a witness, examined and cross-examined, and after the whole case of the appellant had been thus heard, the appel-

lees renewed their objections to the evidence, and the court excluded the same. No ground of objection was specified by the appellees, and no reason for exclusion is stated by the court. The appellant's claim in behalf of the admissibility of the evidence is stated in paragraph 9½ of the finding. It is that the evidence "tended to show and did show a sufficient compliance with the condition of said will to enable appellant to hold the property therein given to him." The court overruled this claim, and held that all the testimony did not show a compliance on the part of the appellant with the condition of the will. The appellant then rested, the appellees offered no evidence, and the court rendered judgment that the appeal be dismissed and that the orders of the Court of Probate be affirmed.

If the admissibility of this testimony had depended on its relevancy to the fact of a settlement between the appellant and the testatrix of his indebtedness to her for the proceeds of the Air Line securities mentioned in the will, it might have been admissible. But its admissibility did not depend on the tendency or sufficiency of the evidence to prove a settlement as claimed by the appellant.

If such settlement were made, it was made some six months prior to the execution of the second codicil of the will, and that codicil was made in view of and with plain reference to the alleged settlement. This is apparent from the record. The will was executed May 2d, 1891. It bequeaths specific sums to three legatees, gives the whole residue, one half to William E. Downes in trust to pay the net income to her granddaughter by marriage, Jennie Downes Whiting, and upon her death to deliver said one half to the children of said Jennie Whiting; and the other half (specially including in that half, as property bequeathed, a debt of $6,000 due from Whiting to the estate) to the children of her grandson John H. Whiting (the appellant). (But if said Whiting shall pay the sum of $6,000—in the manner above stated—then the one half, including the sums so paid, is to go to said Downes in trust to pay the net income to Whiting during his life, and upon his death to deliver the same to his children, in pur-

suance of the bequest to them.) The will appoints William E. Downes executor.

The first codicil is executed July 27th, 1891; it changes one of the three legacies and republishes the will. October 21st, 1891, the following paper is executed: "Memorandum of agreement made this 21st day of October, 1891, between Mary Ann Beers and John Whiting, both of New Haven. Whereas, the said John H. Whiting has received from the said Mary Ann Beers the sum of nine thousand dollars, upon which he promises to pay interest to her at the rate of four per cent. so long as she lives, payable quarterly; and it is understood and agreed that if the said John H. Whiting survive her the said principal sum shall be a free gift from the said Mary Ann Beers, and not in any way charged to or accounted for by him, the said John H. Whiting, and that if she, the said Mary Ann Beers, shall survive him the same shall be paid back to her, and not otherwise: Now therefore, to secure such payment it is agreed that he, the said John H. Whiting, shall place in the hands of Henry Stoddard, Esq., an insurance policy for said sum of nine thousand dollars upon the life of said Whiting and a note for said sum of nine thousand dollars, to be held by him, the said Stoddard, until the death of one or the other of the parties hereto, and to be by him then delivered unto the survivor. Mary Ann Beers. John H. Whiting."

May 7th, 1892, the second codicil was executed. It revokes "any will and codicil, and every instrument of a testamentary nature whatever, made or executed since the 27th day of July, A. D. 1891, if any such exists," and then says: "I hereby re-affirm, establish, and declare the last will and testament executed by me, and dated May 2d, A. D 1891, as modified by the codicil thereto, dated the 27th of July, A. D. 1891, to be my last will and testament; and I hereby ratify and confirm the provisions of said will and said codicil thereto."

The last codicil executed October 7th, 1892, refers only to two of the legacies ratifying the provisions of the will and codicil.

Republication of a will brings it to date and makes it speak at that time in respect to matters which have arisen between its first execution and the republication. *Giddings, Executor*, v. *Giddings*, 65 Conn., 160. It has often been held that a codicil which recognizes the existence of a former will operates as a republication. But in this case the republication is direct. The intent of the testatrix is expressed with unmistakable precision. Since the former will was made she had executed a document which might be claimed as giving to Whiting, in case he survived her, the fund of $6,000 which by the will was bequeathed to his children. She revokes this "instrument of a testamentary nature," and declares the former will "to be my last will and testament," and ratifies and confirms "the provisions of said will."

If the testatrix on May 7th, 1892, had executed a new will in which she had referred to the provisions of the former will in relation to Whiting and his children, and to the agreement of October 21st, 1891, and then disposed of her estate by the same language used in her former will, the effect of such new will would be the same as is that of the codicil which she did execute on that day; and the intent of the testatrix to give the $6,000 which on that day (May 7th, 1892) she declares she understood to be due her from Whiting, to her great-grandchildren, and to give Whiting the income of that fund and of other property upon his payment to herself or her executor of the sum of $6,000, would be no more clearly expressed.

It is patent and admitted that if Whiting did owe Mrs. Beers $6,000, as stated in her codicil of May 7th, 1892, he has not paid it since that time. The evidence excluded by the Superior Court was not offered, and could not have been received, for the purpose of altering the clearly expressed meaning of the will; it could only be relevant for the purpose of showing that Whiting was not indebted to the testatrix as stated in her will. In other words, the appellant undertook to prove that the fund of $6,000 given by the testatrix to her great-grandchildren, coupled with a gift to him

in view of such disposition of the fund, was not in fact the property of the testatrix, but was the property of himself. And for such purpose the testimony was wholly irrelevant. If it proved the appellant's contention, it also proved that he was entitled to take nothing under the will, and that the order of distribution must stand.

Where a will bequeaths property of the testator to a legatee, coupled with a bequest of other property to another, such legatee in setting up any right or claim of his own to such other property, surrenders all interest in the property so bequeathed to him. This rule springs from manifest principles of equity, *i. e.*, maxims of honesty, is firmly settled, and is good in law as well as in equity. *Carter's Appeal*, 59 Conn., 576, 587; *Hall* v. *Pierson*, 63 id., 332, 345; 3 Bac. Abr., 314; *Watson* v. *Watson*, 128 Mass., 152.

In *Cooper* v. *Cooper*, L. R. 6 Ch. App., 15, the facts were somewhat analogous to the facts in this case, and the court says: "She (the testatrix) attempts and purports to give by her will that which was not hers but her children's. It does not appear to me in any wise material by what previous titles it had become the children's. At her death they are found to be the true owners of property disposed of by her, and at the same time they are found to be named as objects of her testamentary bounty. That seems to me to state the requisites, and the only requisites for raising the obligation to elect."

In this case the appellant set up in the Superior Court his own claim to the $6,000 fund the testratrix had bequeathed to his children; it was immaterial whether this claim was well founded or not; he could not enforce it without losing his beneficial interest under the will; and so the evidence offered by him that it was well founded, could not affect the validity of the orders of the Court of Probate, and the appellant cannot complain of its rejection. Whether John H. Whiting can now elect to carry out the provisions of the will and to pay the $6,000 he has refused to pay upon demand, is a question not involved in this proceeding and not considered.

There is no error in the judgment of the Superior Court, and new trial is denied.

In this opinion ANDREWS, C. J., TORRANCE and FENN, Js., concurred.

BALDWIN, J. (concurring in the judgment). The reasons of appeal filed in the Superior Court, after describing the agreement between Mrs. Beers and the appellant of November 21st, 1891, a copy of which was annexed as Exhibit B, stated that the appellant "duly paid the interest to said Mary Ann Beers specified in said Exhibit B." No other allegation was made of his fulfillment of the terms of the agreement.

Under these pleadings, proof that payment of interest had been waived was inadmissible. The only question presented was whether it had been actually made. The exclusion of the evidence offered by the appellant being thus fully justified, while I concur in the affirmance of the judgment of the Superior Court, I deem it unnecessary to express an opinion as to the effect of the republication of the will after the execution of the agreement.

BURTON MANSFIELD, TRUSTEE *vs.* WILLIAM R. SHELTON ET AL.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

A testator gave the residue of his estate to his wife "to be used and appropriated by her, so much as she may wish for her happiness, without any restrictions or limitations whatever; and upon the decease of my wife and after the payment of all her debts and the settlement of her estate, I give whatever of property or estate of such residue and remainder shall remain undisposed of," to *C* in trust for the children of *S* during their lives. The will further provided for the disposition of the fee in case *S* should die childless, but not otherwise. *S* died

leaving two children. In a suit to determine the validity and construction of the will it was *held*:—

1. That the wife took a life estate only.
2. That the disposition made in the will of the property left at her decease, was valid, as was also the trust created for the benefit of the children of *S.*
3. That under the circumstances as they existed, the fee was not disposed of, and consequently the said property vested as intestate estate in the heirs at law of the testator.

[Argued February 6th—decided March 6th, 1896.]

SUIT to determine the validity and construction of the will of Charles Shelton, late of the city of New Haven, deceased; brought to the Superior Court in New Haven County and reserved by that court, *Shumway, J.*, for the consideration and advice of this court.

The case is sufficiently stated in the opinion.

William L. Bennett, for A. Louise Woolson, William R. Shelton, and the executor of the will of Caroline M. Shelton, deceased.

J. Frederic Kernochan of New York, and *Samuel H. Fisher*, for Grace Martin, William Buddington, Z. Grenell, Inez Grenell, and Julia Pierson.

FENN, J. This is a case reserved by the Superior Court for the advice of this court. The questions presented relate to the construction and legal effect of provisions contained in the last will and testament of Charles Shelton, who died about June 4th, 1888, seized and possessed of an estate consisting of real and personal property, of the value of about $33,000.

That portion of the will of Chares Shelton material to the present inquiry is as follows:—

"All the rest and residue of my estate, both real and personal and wherever situated, I give, devise and bequeath to my said wife, to be used and appropriated by her, as much as she may wish for her happiness, without any restrictions

or limitations whatsoever; and upon the decease of my said wife and after the payment of all her debts and the settlement of her estate I give, devise and bequeath whatever of property or estate of such residue and remainder shall remain undisposed of at the decease of my said wife to Edward A. Cornwall, of Cheshire, of said New Haven County, in trust, to keep and hold the same, or invest the same, as said trustee shall deem to the best advantage, for the use and benefit of the children of the present wife of my nephew Charles W. Shelton, and of the survivor or survivors of such children, so long as they shall live, or any one or more of them; and that such trustee pay and deliver to such surviving children, in equal portions to each, from time to time, and at least as often as once in each year, the net avails of the income of said estate, so given to him in trust, as aforesaid, upon the annual settlement of his trust account with the Court of Probate; provided nevertheless, that in the event of the decease of my said wife, my said sister, Grace A. Budington, shall, upon the finding of the judge of probate in which my estate shall be pending for settlement, be found to be in needy and in necessitous circumstances, then, upon such finding and decree of such Court of Probate, I give and bequeath to the said trustee one-third of such residue of said estate so given to my said wife, for the use of my sister during her life, and the remaining two-thirds of the same to be held for the use and benefit of the children of my said nephew's wife, the income of which one-third shall be paid to my said sister annually, so long as she shall live; and upon her decease the whole of said income is to be paid, as aforesaid, to said children and the survivor of them. But if my said nephew shall die without leaving issue surviving him by his present wife, then such part or portion of said residue or remainder of my estate as shall remain undisposed of at the decease of my wife I give, devise and bequeath to my brother, William R. Shelton, and my said sister, and to their heirs forever, to be equally divided between them, share and share alike; and in the event of the death of my brother before the decease of my wife the portion of said

residue so given to my said wife which would thus belong to him, if living, I give, devise and bequeath to his wife, Anna L. Shelton, and her heirs forever."

Soon after the death of the testator, his will was duly probated in the Court of Probate for the district of New Haven, and the widow, Caroline M. Shelton, who was named as executrix, duly qualified as such. In July, 1889, she returned her account with the estate, and the same was accepted by the Court of Probate. After the due settlement of the estate and the payment of the legacies bequeathed by his will, she possessed and enjoyed the residue thereof until her death, which occurred June 28th, 1894. Edward A. Cornwall, the trustee named in said will, having died before the decease of Charles Shelton, the said Caroline M. Shelton on the 14th day of February, 1893, was duly appointed by the Court of Probate for the district of New Haven, trustee under the said will in the place of the said Edward A. Cornwall, deceased, and duly qualified as such trustee. The plaintiff, who is the present trustee under the will of said Charles Shelton in the place of said Caroline M. Shelton, deceased, has received and is possessed of real and personal property of the value of about $23,000, being the rest and residue of the property of the said Charles Shelton, undisposed of by the said Caroline M. Shelton in her lifetime under the will of her husband, said Charles Shelton, deceased.

The first and only difficult question presented is stated thus in the complaint: "Whether under said will of Charles Shelton the rest and residue of his estate, devised and bequeathed to his wife, as therein set out, became her property and estate in fee, or whether she took therein an estate for life only; and whether or not the disposition attempted to be made of whatever property or estate of such residue and remainder as should remain undisposed of at the decease of said Caroline M. Shelton, and the settlement of her estate, is valid by way of executory devise."

The more recent cases in this State which merit consideration in the present examination, are *Sheldon* v. *Rose*, 41 Conn., 371; *Lewis* v. *Palmer*, 46 id., 454, 455; *Glover* v.

Stillson, 56 id., 316; *Peckham* v. *Lego*, 57 id., 553; *Hull* v. *Holloway*, 58 id., 210; *Methodist Church* v. *Harris*, 62 id., 93, and *Sill* v. *White*, ibid., 430. These decisions are in harmony, and consistent with each other, and they establish certain rules or principles as the settled law of this State, which may be stated thus:—

First. If the primary gift conveys and vests in the first taker an absolute interest in personal, or an absolute fee simple in real property, it exhausts the entire estate, so that there can be no valid remainder.

Second. A life estate expressly created will not be converted into a fee, absolute or qualified, or into any other form of estate greater than a life estate, merely by reason of there being coupled with it a power of disposition, however general or extensive.

Third. An express gift in fee will not be reduced to a life estate by mere implication from a subsequent gift over, but may be by subsequent language clearly indicating intent and equivalent to a positive provision.

Fourth. Except as restrained by the foregoing limitations —indeed in some instances apparently impinging upon them —the question as to whether the primary gift is in fee, so as to exhaust the entire estate, is in each case to be decided upon a careful examination of the entire will, aided by legitimate extrinsic evidence, to ascertain the actual intent of the testator; which intent, when so discovered and made obvious, is controlling.

In illustration of the scope, limitations and application of the foregoing rules, a reference to language used by this court in some of the cases cited will be appropriate. In *Sheldon* v. *Rose*, *supra*, the testator gave his wife, in case of her remarriage, "only one half of the property, . . . which shall go to her for her support during her natural life." The will contained no residuary clause, and there was no specific disposition of any possible remainder, after the death of the wife. This court held the wife had an estate for life only, and not in fee, and so the estate became intestate when the wife's interest terminated. In reaching this conclusion the

court, by CARPENTER, J., said: "It is not clear that the testator intended to give her an absolute estate, while the language used seems to indicate a contrary intention. . . . We have come to the conclusion that the testator did not intend to give an estate in fee." The opposite result in *Methodist Church* v. *Harris*, *supra*, is based on the same grounds. In that case the testator gave property to his wife, "and to her heirs forever," with a *proviso* that, "whatever of the same, if any, she may leave not used by her for her support and comfort, I give and bequeath." The court, by CARPENTER, J., said: "The intention to give a fee is clear; and we discover in the subsequent words no evidence of an intention to revoke the gift. It is a bald attempt to limit a fee upon a fee, which the law will not allow." In *Lewis* v. *Palmer*, *supra*, the language of the devise was: "I give to my sister *S* the use of all the rest of my real estate during her natural life, and for her to dispose of as she may think proper, right or just." This court by CARPENTER, J., said: "We find no case where a life estate created by express words is enlarged to a fee by the power of sale. There are cases where there is an apparent life estate with power of disposal, but without any disposition of the remainder, in which it is held that the devisee takes a fee. There are other cases where there is a devise of an estate generally, with an express power to sell, in which it is held that the devise over of the remainder is void for repugnancy. But we think none of the cases go so far as to disregard the obvious and acknowledged intention of the testator. All seem to regard that when discovered as conclusive. Courts differ widely as to what the intention is, and oftentimes different courts" (might he not have said the same court?) "will draw different conclusions from similar language, and sometimes even from language precisely identical. But usually there will be found something in the will, or something omitted, or something in the situation and circumstances of the estate and the parties interested, to account for these apparent differences; and most of them, it is believed, may in that way be reconciled." In *Glover* v. *Stillson*, *supra*, this court

by CARPENTER, J., said: "We now come to the main question—does the second clause give a life estate or a fee? There are two methods of construing wills: one is to ascertain the intention of the testator and give effect to that so far as it is consistent with the policy of the law. Within those limits all artificial rules of construction must yield to the intent. The other is to apply legal rules and construe the language used accordingly. In the latter case it cannot be denied that the intention of the testator is often defeated. This case affords an excellent illustration. We are asked to say as matter of law that the power of sale enlarges an express life estate to a fee. If we do so what becomes of the intention of the testator? His intention to give pecuniary legacies to the parties named and the residue to the orphan asylum, is just as certain and, we may add, just as provident, as the intention to provide for his sisters; and that intention, by the construction contended for, is wholly defeated. The power of sale may, in doubtful cases, aid in ascertaining the intention; but to give it an artificial and technical force and thereby defeat the manifest intention of the testator, is wholly inadmissible." In *Peckham* v. *Lego*, *supra*, this court by LOOMIS, J., quotes the above language from *Glover* v. *Stillson*, and adds: "These utterances we think are in accord with the decided preponderance of judicial authority in the United States." Similar, and perhaps even stronger expressions are used in *Hull* v. *Halloway*, and in *Sill* v. *White*, *supra*.

The leading case of *Smith* v. *Bell*, 6 Pet. (U. S.), 68, opinion by CHIEF JUSTICE MARSHALL; *Brant* v. *Virginia Coal & Iron Co. et al.*, 93 U. S., 326, 334; and *Giles* v. *Little*, 104 U. S., 291, 296, have been frequently cited by this court, and are among the almost numberless decisions in accord with the foregoing doctrines. In the light, and with the assistance of these established principles, let us approach the question presented in this case.

In the language of the clause before us, there is no express gift of a life estate, as in many of the cases cited, or of a fee, as in *Methodist Church* v. *Harris*, *supra*. Such

arbitrary and technical rules therefore, as have been in some jurisdictions, indeed in very many cases, applied to such expressions, are not relevant here. The testator at the outset gave his residuary estate to his wife; whether in fee or for life, he did not say. True, had he stopped there and the will contained nothing further, the effect would have been to give his wife a fee in the realty, and an absolute estate in the personal property. But this would have been because his intention to do this would be clearly manifest. If there was anything else in the will indicative of the testator's intent concerning the matter, it would require consideration and be given full weight. The testator did not stop here. He continued, "to be used and appropriated by her." This also would indicate an intention, if this were all, that the gift be absolute; but he added "as much as she may wish for her happiness, without any restrictions or limitations whatsoever." This essentially modifies the preceding words and, taking the entire language down to this point, contained in and forming a part only of a single sentence, shows the purpose of the testator was that all of his residuary estate should go into the hands of his wife, not as an absolute estate—not "to her and her heirs forever," as was the case, and expressly stated in *Methodist Church* v. *Harris*, *supra*—but for life, the limit beyond which her earthly happiness could not extend, with full power of disposition, for the promotion of such happiness, of *as much* of the estate as she might wish for that purpose; which it is evident the testator believed would not be all, as, in fact, it was not. Had the testator stopped here, the case would we think be stronger in support of the claim that only a life estate was intended to be given to his wife, though coupled with a power of disposition, than in *Sheldon* v. *Rose*, *supra*. Certainly it could not have been said, as in *Methodist Church* v. *Harris*, *supra*, that the intention to give a fee was clear.

But we have not even yet considered the most significant part of the testator's language. He continues: "And upon the decease of my said wife and after the payment of all her debts and the settlement of her estate I give, devise and bequeath whatever of property or estate of such residue and

remainder shall remain undisposed of at the decease of my said wife, to Edward A. Cornwall, of Cheshire, of said New Haven County, in trust," adding somewhat lengthy and elaborate trust provisions for the benefit of those unprovided for in any other portion of the will, who were apparently natural objects of the testator's bounty,—provisions which can have no operation except in case that some of the residuary estate of the testator remained undisposed of under the previous part of the residuary clause, and by the wife acting within the scope of its limitations.

Here then, following the gift to the wife, and introductory to the trust provision, in the residuary clause was language also very unlike the language of the will construed in *Methodist Church* v. *Harris*, *supra*. Here was no *proviso* concerning whatever property, if any, might be left. No doubt seems to have existed in the mind of the testator concerning this. There were no children to be provided for. The wife was to have full provision for herself, but limited to herself. Even her debts, if any, were to be confined to such as she herself might contract for things necessary or desired for her personal happiness, and, as ascertained upon the settlement of her estate, were to be paid; but then, whatever remained of the residuary estate of the testator was to go as his, not her, gift, devise and bequest, and to those who were his, and not necessarily her, natural objects of bounty. Our conclusion is that only a life estate vested by virtue of the will in the widow of the testator, and that the subsequent provisions of the residuary clause are valid and operative.

The recent case of *Chase* v. *Ladd*, 153 Mass., 126, involved the construction of language so similar to that, but stronger in support of the claim that it created an absolute estate than that before us, with the same result which we have reached, that we deem a reference fitting, as indicating the views of a sister jurisdiction in which such questions, as shown by a long line of decisions, have received unusual examination. In this case the testator gave and devised all his property to his wife, "to her own use and behoof forever," but provided that if any of such property should not be expended for her support and maintenance during her lifetime,

it should be disposed of in the manner designated in the will. It was held that the language used did not vest the property in the wife absolutely, but merely conferred upon her a right to use it for her support, and if necessary for that purpose, to dispose of it during her life, leaving whatever she had not so disposed of to vest after her death in other persons as provided in the will. The same result was reached in *Kent* v. *Morrison*, 153 Mass., 137, where the language was: "I give, devise, and bequeath to my beloved wife, Mehitable Kent, all the estate, both real and personal, that I die seized and possessed of, giving her full power to sell and convey the same by deed (part or all of it), and the proceeds thereof are to be used for her comfort, and otherwise as she may think proper."

The other questions presented in the case may be directly answered. They do not require discussion. As bearing upon them, however, it should be stated that it appears that Grace A. Budington, the sister of said Charles Shelton, named in his said will, died before the decease of the said Caroline M. Shelton. Charles W. Shelton, named in said will, has died, leaving two children parties to this suit. The mother of said children was, at the time said will was made, and at the time of the death of said Charles Shelton, the wife of said Charles W. Shelton.

The Superior Court is advised:—

First. That the wife of Charles Shelton took under his will a life estate only, not an absolute property or fee simple; and that the disposition made in such will of whatever property or estate of the residue and remainder which remained undisposed of at the decease of Caroline M. Shelton and the settlement of her estate, is valid.

Second. The trust created by said will for the benefit of the children of Charles W. Shelton is valid.

Third. The fee of said property, in the contingency which has happened, was not disposed of, and it vested as intestate estate in the heirs at law of said Charles Shelton.

In this opinion the other judges concurred, except HAMERSLEY, J., who dissented.

THE ROGERS SILVER PLATE COMPANY *vs.* ERWIN M. JENNINGS ET AL.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The defendants having failed to keep their agreement to purchase within a specified time $50,000 worth of goods manufactured by the plaintiff, the parties met to examine and adjust their accounts. At this interview the defendants presented an account which was not acceptable to the plaintiff and, in the absence of the latter's books, a contract was signed whereby the plaintiff, in consideration of $2,400 in cash then paid to it by the defendants, and the latter's promise to settle any errors that might thereafter be found to exist in two classes of items, released the defendants from all liability incurred by them under the former contract, and acknowledged the "receipt of all claims and demands to date" except those above referred to. *Held* that in view of this release the plaintiff could not recover damages for a violation of the earlier agreement, but was entitled to a judgment for the aggregate amount of the errors found by the trial court to exist in the two classes of items specified in and excepted from such release. (*One judge dissenting.*)

The trial court erroneously included in the judgment damages for the defendants' breach of the contract to purchase. *Held* that the judgment, being for one entire sum, was not divisible or severable, and must therefore be set aside *in toto*; but that such reversal did not open up the cause beyond the exigencies of the case.

[Argued January 21st—decided March 26th, 1896.]

ACTION to recover damages for breach of contract, also for goods sold and delivered; brought to the Superior Court in Fairfield County and referred by consent of the parties to the *Hon. John D. Park*, *State Referee*, to hear and report the facts; the court, *Robinson*, *J.*, accepted the report of the State Referee and rendered judgment in favor of the plaintiff for $5,210.90 and costs, and the defendants appealed for alleged errors in the rulings of the court. *Error, judgment set aside and cause remanded.*

The case is sufficiently stated in the opinion.

Daniel Davenport, for the appellants (defendants).

By virtue of the receipt given by the plaintiff to the de-

fendants on January 19th, 1892, the plaintiff surrendered to the defendants every claim arising under the contract of June 18th, 1891; except the right to be paid for merchandise previously shipped, which might have been erroneously omitted in the statement of defendants, and for the difference in correction of prices claimed by the defendants. This paper upon its face contains conclusive evidence that this surrender was founded upon a valuable and sufficient consideration. There is not a word in it to the effect that the defendants were settling a liquidated debt by the payment of a less sum than was due. The facts, instead of establishing that the release was not founded on a sufficient consideration, show precisely the opposite. The plaintiff disposed of its goods and its uncertain claim for damages, and took in return $2,402.75; and the promise of the defendants to settle, when adjusted, (which might have been the next day) for possible errors in account not due until a future date. According to all the authorities this was receiving a sufficient legal consideration. Immediate payment of part of the debt due in the future, is a sufficient consideration to support a release of the balance. The court also erred in allowing the plaintiff $3,313.18 with interest thereon, as damages for the failure of the defendants to take the full amount of the goods required by the contract of June 18th, 1891. The finding did not show that the plaintiff had lost any profit, but only what its usual profits were in such cases. This formed too uncertain a basis for a recovery of profits. *Allen* v. *Jarvis*, 20 Conn., 49; *Ferris* v. *Comstock*, 33 id., 515; 2 Benj. on Sales (4th Amer. Ed.), § 977.

John W. Alling and *James E. Walsh*, for the appellee (plaintiff).

The instrument of January 19th, 1892, was not a release but merely *a contract to release;* and is no longer binding, because (1) the consideration has failed; (2) the defendants have been guilty of a breach of said contract; and (3) because the consideration for said contract to release was a condition precedent to the release of the defendants, and that

condition has never been performed. *Cook* v. *Mix*, 11 Conn., 432; Clark on Contracts, 184, 204–208; *Warren* v. *Skinner*, 20 Conn., 558; *Foakes* v. *Beer*, 9 App. Cases, 605. The agreement on the part of the defendants certainly required that they at least make an honest effort to adjust the errors and differences. The finding shows clearly that they not only refused to do this, but also that they absolutely refused to make the least offer of performance and totally disregarded their agreement to "settle when adjusted the difference and errors." This breach was such that the plaintiff is discharged from performing its agreement to release the defendants. 3 Amer. & Eng. Ency. of Law, 915–924; *Ellen* v. *Topp*, 6 Ex., 424; 2 Smith Leading Cases, 25; *Love* v. *Van Every*, 91 Mo., 575; *Ala. Gold Life Ins. Co.* v. *Garmany*, 74 Ga., 51; *Poussard* v. *Spiers*, L. R. 1 Q. B. D., 410; *Spaulding* v. *Rosa*, 71 N. Y., 40; *Leonard* v. *Dyer*, 26 Conn., 172. The defendants must first fully perform their part of the agreement before they can call upon the plaintiff to perform. The rule of damages in an action for the non-acceptance of property sold and contracted for, is the amount of the actual injury sustained by the plaintiff in consequence of such non-acceptance, including gains prevented as well as losses sustained. *Allen* v. *Jarvis*, 20 Conn., 48; *Hunt* v. *Oregon Pac. R. R. Co.*, 13 Sawy., 516; *Masterson* v. *Brooklyn*, 7 Hill, 61; *Taylor* v. *Bradley*, 39 N. Y., 129; *Danolds* v. *State*, 89 N. Y., 36; *Cameron* v. *White*, 74 Wis., 425; *Taylor Mfg. Co.* v. *Hatcher*, 39 Fed. Rep., 440; *Lynch* v. *Sellers*, 41 La. Ann., 375; *Cresent Mfg. Co.* v. *N. O. Nelson Mfg. Co.*, 100 Mo., 325.

TORRANCE, J. This is an action to recover money claimed to be due as the balance of an account, and also damages for the breach of a written contract; and the complaint contains the common counts, and a special count setting up the contract.

The case was tried before one of the State referees, who reported the facts found to the Superior Court. The defendants remonstrated against the acceptance of the report; the

plaintiff demurred to the remonstrance; the court sustained the demurrer, accepted the report, rendered judgment for the plaintiff, and from that judgment the defendants took the present appeal.

The questions upon this appeal relate mainly to the effect given by the court below to certain facts found by the referee; and the substance of so much of his report as bears upon those questions may be stated as follows: —

By the terms of the written contract made between the plaintiff and defendants, dated June 18th, 1891, and set up in the complaint, the plaintiff appointed the defendants as its sole agent for the sale of all goods manufactured by it, for the period of six months beginning July 1st, 1891; and in consideration thereof the defendants agreed to purchase of it, in the manner prescribed by the contract, goods which it manufactured or dealt in, "to the net amount of fifty thousand dollars ($50,000) or more, at prices designated by said Rogers Silver Plate Company, f. o. b. Danbury, Conn.;" the plaintiff was to make "fair and equitable prices, and fill all orders promptly, reasonable allowance being made from time of receipt of order or construction of goods;" all purchases of each month were to be paid for in cash, or by note at thirty or sixty days with acceptable indorser, "on the first day of the second month following;" the plaintiff was to furnish at least four lines of samples packed in trunks "for use in traveling and displaying said goods" by the defendants; and "all other expenses pertaining to the sale or delivery of said goods" were to be borne by the defendants.

Under this contract the defendants, during the six months therein designated, instead of taking $50,000 worth of goods as agreed, took only a little over $33,000 worth; and at the end of the contract period there appears to have been some dispute between the parties as to the amount of the balance due to the plaintiff, upon the goods which the defendants had received under the contract.

Under these circumstances, and as the result of correspondence between them, the parties came together at Bridgeport on the 19th of January, 1892, in an attempt to adjust and

settle the matters in dispute between them. At this interview the defendants presented a document, annexed to the report of the referee, marked Exhibit 36, "as the correct statement of their account with the plaintiff." The plaintiff's books of account were then in Danbury, "and they had there at Bridgeport no means of their own to ascertain whether defendants' said account was correct or not." Exhibit 36 is headed "Final Settlement Jan. 19th, 1892." It contained, among other things, the following statement:

"ROGERS SILVER PLATE CO.

Total credits as per bills rend.,		$30,027.17
Cherub Wgts.,		1,331.25
Syracuse Watch Co.,		847.21
Boots, 1 gro. 7¾ doz., Shoes, 4 "		74.18
Three trunks,		150.00
		$32,429.81

	Dr.	
Five trunks and repairs,	$ 318.00	
Mdse. ret'd,	413.40	
Broken, etc.,	15.87	
Correct's on a/c, etc.,	124.05	
Bill rend. twice,	16.10	
Dis. on a/c,	560.00	
Cash,	28,000.00	
		$29,447.42
		$2,982.39
Less correct's in prices,		579.64
		$2,402.75"

It also contained itemized statements of the above "Dr." charges of "Mdse. ret'd," "Broken, etc.," "Correct's on a/c, etc.," and "Correct's in prices."

As the result of that interview, "the plaintiff executed and delivered to the defendants a document of which the following is a copy, to wit:

"BRIDGEPORT, CONN., Jan. 19th, 1892.

"In consideration of the payment of Jennings Bros., of the sum of $2,402.75 in cash, and the agreement by them to settle when adjusted, any errors that may exist in amount credited for merchandise shipped, and any difference in correction in prices claimed by them, amounting to $579.64, upon goods furnished under contract dated June 18th, 1891, we agree to release the said Jenning Bros., from all liability resulting from or obligation incurred by said contract, and we agree to deliver this day to said Jennings Bros. F. O. B. cars, at Danbury City, 887½ doz. cherub paper weights, made as heretofore agreed upon, also (1) one gross, 7¾ dozen boots, and (4) four gross shoes, made as heretofore agreed upon, and we hereby acknowledge receipt of all claims and demands, to date, not above excepted. Rogers Silver Plate Co. N. B. Rogers, President."

The report of the referee then proceeds as follows:—

"The defendants paid the plaintiff the sum specified in the said document, and the plaintiff delivered to the defendants the articles therein described, and the parties separated. Soon after the return of the plaintiff to Danbury, on an examination of its books of account, it found that there were errors in the amount credited the plaintiff by the defendants in the said document 'Exhibit 36,' which amount credited the plaintiff is referred to in the said document of release, as follows, to wit: 'And the agreement by them to settle, when adjusted, any errors that may exist in amount credited for merchandise shipped.' The errors in this regard amounted to the sum of five hundred and thirty-two dollars and sixteen cents ($532.16). They also found there were errors in the sum of five hundred seventy-nine dollars, sixty-four cents ($579.64), which the defendants debited the plaintiff in the said document, 'Exhibit 36,' and called in the same "corrections in prices," which amount is referred to in the said document of release, as follows, to wit: 'And any difference in correction in prices, claimed by them, (the defendants) amounting to $579.64, upon goods furnished under contract dated June 18th, 1891.'

The errors, in the said sum of $579.64, amounted to the sum of three hundred and sixty-one dollars and eleven cents ($361.11).

"Soon after the discovery of these errors, the plaintiff sent the defendants a true statement of its account, correcting therein the errors described, and called upon the defendants to agree with it in adjusting the said errors. The defendants refused, and continued to refuse up to the bringing of this suit, to make any adjustment with the plaintiff of these errors described, or to make any settlement with the plaintiff differing in any respect whatsoever from the one of January 19th, 1892, as shown by 'Exhibit 36,' although a reasonable time for so doing had long elapsed when this suit was brought."

The errors thus discovered by the plaintiff in the account, after the Bridgeport interview ($532.16 and $361.11), amounted to $893.37. The referee finds that this last amount, aside from any question as to the effect of the writing of January 19th, 1892, represents the balance of account in favor of the plaintiff on the 1st of January, 1892; that this balance "became due and interest bearing" on the 1st of February, 1892; and that the defendants were owing the plaintiff, "under said contract, on the 1st of January, A. D. 1895, principal and interest, the sum of one thousand and forty-nine dollars, fifty-nine cents ($1,049.59)." He further finds that for goods bought by the defendants from the plaintiff after January 19th, 1892, the defendants owed plaintiff, principal and interest, on January 1st, 1895, the sum of $108.07, "thus making the entire indebtedness of the defendants to the plaintiff, on the 1st day of January, A. D. 1895, the sum of one thousand, one hundred and fifty-eight dollars, thirty-six cents ($1,158.36)."

The report then proceeds: "The undersigned therefore finds the issue in this part of the case in favor of the plaintiff, so far as the questions of fact are concerned, and if the Superior Court shall be of the opinion on these facts, that the law is so that the plaintiffs can recover the amount due under the contract of June 18th, 1891, notwithstanding the

said document of January 19th, 1892, given by the plaintiff to the defendants, then the undersigned finds that the plaintiff recover of the defendants the sum of one thousand, one hundred fifty-eight dollars, thirty-six cents ($1,158.36), with the interest thereon after the 1st day of January, 1895; but if the court shall be of the contrary opinion, then the undersigned finds that the plaintiff recover of the defendants the sum of hundred eight dollars, seventy-seven cents ($108.77), with the interest thereon from the 1st day of January, A. D. 1895."

Upon the matter of the damages recoverable under the special count, the referee found in substance as follows: The defendants took under the contract goods only to the amount of $33,334.08, thus leaving a balance of $16,665.92 which they failed to take. When the contract period terminated the plaintiff had on hand $10,000 worth of these goods ready to be delivered to the defendants had they called for them; and it "could and would have had the entire amount manufactured, called for by the said contract, if the defendants had given it orders to that extent. The plaintiff's usual profit in the sale of goods manufactured by it, of the kinds of those sold to the defendants, had been twenty per centum on the amount of the sales, and it is highly probable, if the defendants had fulfilled their contract and purchased the last named amount of the plaintiff, the plaintiff's profit on the same would have been twenty per centum, making its profit equal to the sum of three thousand, three hundred thirty-three dollars and eighteen cents ($3,333.18) on the sale; and the undersigned so finds."

The $10,000 worth of goods on hand December 31st, 1891, as aforesaid, were afterwards "sold and disposed of by the plaintiff, at the best price it could obtain, which was less than the cost of manufacturing the same."

Upon these facts with reference to damages under the special count, the referee found conditionally in substance as follows: If the court should be of opinion, upon the facts found, that the plaintiff could not recover any damages under the special count, then the referee found "the

issue in this part of the case in favor of the defendants;" if it should be of opinion that plaintiff could recover only nominal damages under this count, $10 is found to be nominal damages; and if it should be of opinion that plaintiff could recover "real damages" under this count, then it was found that the plaintiff was entitled to recover either twenty per cent of $10,000 or of $16,665.92, as the court might determine.

The foregoing statement from the report of the referee presents the principal material facts in the case; and the controlling question relates to the operation and effect of the writing of January 19th, 1892.

After the report had been accepted, the parties were heard by the court "as to what judgment should be rendered" thereon; and at this hearing the defendants made certain claims which the court overruled. Among the claims thus overruled were two, the substance of which may be stated as follows: first, the writing of January 19th, 1892, on the facts found, "operated as and was a release of all the claims arising under the contract of June 18th, 1891," except as to two items, namely, "errors in account credited for merchandise shipped" and "differences in correction of prices;" and as to these, the only remedy open to the plaintiff after January 19th, 1892, "was the institution of a suit for the adjustment of these items;" second, that upon the facts found, damages for the breach of the contract of June 18th, 1891, arising from the failure of the defendants to take the full $50,000 worth of goods, could not be recovered in this action.

The court found that the plaintiff was entitled to recover, under the common counts, the sum of $1,189.42, and under the special count the sum of $4,221.48, and rendered judgment for the plaintiff for the sum of $5,210.90 and its costs.

In holding that the plaintiff was entitled to recover any damages under the special count, the court clearly erred. The fair inference from the facts found is that the writing of January 19th, 1892, was a valid binding agreement; and if so the plaintiff was not entitled to recover such damages.

No claim is made that it was executed or obtained by fraud or mistake, or surprise of any kind; and the only claims made respecting its binding force are, in substance, that it was made without consideration or upon one that failed, or was upon condition which has not been performed; and these claims are not true.

The consideration stated in the writing itself is the payment of the $2,402.75 in cash, and the agreement "to settle when adjusted any errors that may exist" in respect to two of the items of the account. The fair inference from the writing itself and the facts found, is that this money was not due and payable on the 19th of January, 1892, but at some future day; and that its payment in cash then and there was the real consideration for the writing. The agreement to settle for the errors, if any, in two of the items in the account, was not, as the plaintiff seems to suppose, an agreement to settle for those errors as the plaintiff might subsequently claim them to be; but it was, if taken literally, an agreement to settle for them as they might be subsequently found to exist to the satisfaction of both parties, or at least by some competent judicial tribunal; in other words, it was in effect an agreement that the plaintiff should not be bound as to these two items, by the statement of them made by the defendants in "Exhibit 36." As the cash was paid as agreed, and the agreement asked for was made, the writing in question was made upon a legal consideration which has not failed in any respect, and of which the plaintiff has had the full benefit. The claim that the writing was given upon condition that the defendants should settle for the errors in the two items aforesaid as the plaintiff might subsequently claim them to exist, is equally without foundation.

The writing in question, then, is a valid agreement, and by its express terms it releases the defendants "from all liability resulting from, or obligation incurred by," the contract of June 18th, 1891, so far as special damages under the special count are concerned; and acknowledges "receipt of all claims and demands, to date," save those expressly excepted in and by the writing itself. It was thus a complete answer

to any claim for special damages under the special count, and the court below erred in holding otherwise. In sustaining the demurrer to the remonstrance and in accepting the report, the court below committed no error; and in view of the result reached by this court it is not deemed necessary to consider the other assignments of error.

While it thus appears that the plaintiff is not entitled to the sum found to be due to it by the court under the special count, it also appears that the plaintiff is entitled, upon the facts stated in the report, to the other sum which the court below found to be due to it under what is termed in the judgment the first count in the complaint, and that finding is not affected by the error in the other finding of the court. If the judgment below could be regarded as divisible or severable in this respect, it might be reversed in part only; but the judgment is for one entire sum, to wit: $5,210.90, and it must be reversed *in toto*, that the amount for which judgment can be rendered upon the report may be legally assessed. The reversal will not open the cause below beyond the exigencies of the case, and will be retrospective so far, and so far only, as the proceedings upon the record appear to have been impugned by the judgment of reversal.

There is error, the judgment of the Superior Court is set aside, and the cause is remanded to that court to be proceeded with in accordance with the views herein expressed.

In this opinion FENN, BALDWIN and HAMERSLEY, JS., concurred; ANDREWS, C. J., dissented as respects the effect given to the release, under the finding of the State Referee.

GEORGE J. UNDERWOOD *vs.* COUNTY COMMISSIONERS.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN AND HAMERSLEY, Js.

Chapter 117 of the Public Acts of 1889, which provides that the county commissioners may grant liquor licenses in towns where such licenses "can legally be granted," does not constitute them a judicial tribunal, or by implication authorize them to try and determine, upon evidence other than the town records, the validity of a vote upon the question of license or no license.

[Argued January 28th—decided March 26th, 1896.]

APPLICATION for a writ of mandamus requiring the defendants to inquire and determine whether the town of Westport was a town in which spirituous and intoxicating liquors might be sold; brought to the Superior Court in Fairfield County and reserved by that court, *Elmer, J.*, upon an agreed statement of facts, for the consideration and advice of this court. *Judgment denying application advised.*

The case is sufficiently stated in the opinion.

Stiles Judson, Jr., for the petitioner.

The Act of 1895 prohibits the casting or counting of any ballot contained in an envelope on which the initials only, of the envelope booth-tenders, have been indorsed; and this ballot law should be rigorously upheld. *Talcott* v. *Philbrick*, 59 Conn., 478; *Fields* v. *Osborne*, 60 id., 549; *Phelan* v. *Walsh*, 62 id., 292; 2 Amer. & Eng. Ency. of Law, 622. The writ of mandamus is the appropriate remedy. High's Ex. Legal Remedies, 4; *State* v. *State Board of Canvassers*, 36 Wis., 504; *Morgan* v. *County of Pratt*, 24 Kan., 71; *Com'rs* v. *Hunt*, 33 Ohio St., 169; *U. S.* v. *Com'rs*, 1 Iowa, 49; *Schultz* v. *McLeary*, 63 Tex., 93; *Cicotte* v. *County*, 59 Mich., 509; *State* v. *Board of Freeholders*, 35 N. J. L., 219; *Hull* v. *Supervisors*, 19 John., 259; *Cochran* v. *Miller*, 74 Ala., 50; *Dane* v. *Derby*, 89 Am. Dec., 739. And when the right to exercise a discre-

tion is abused, a mandamus will lie. *Village of Glencoe* v. *The People*, 78 Ill., 590; *Virginia* v. *Rives*, 100 U. S., 313; *Pfister* v. *Board of Com'rs*, 82 Ind., 384; *Com'rs* v. *Board of Public Works*, 39 Ohio St., 633; *Nelson* v. *Edwards*, 55 Tex., 389; *Gulick* v. *New*, 14 Ind., 93; *Daniels* v. *Miller*, 8 Colo., 542; *State* v. *Lewis*, 10 Ohio St., 128; *Mobile* v. *Cleveland*, 76 Ala., 321; *Citizens Bank* v. *Wright*, 6 Ohio St., 327; *Gilchrist* v. *Collector*, 5 Hughes, 1. No possible harm can result from the construction contended for. Any final decision that the respondents may arrive at, is subject to review by the Superior Court, and ultimately by this court.

Allan W. Paige, for the respondents.

There is no law giving county commissioners jurisdiction to pass upon the legality or illegality of a license vote, nor can this court confer such powers by judicial decree. *State* v. *Staub*, 61 Conn., 567; *State ex rel. N. York and N. Eng. R. R. Co.* v. *Asylum St. Bridge Com.*, 63 id., 97; *Seymour* v. *Ely*, 37 id., 106; 11 Amer. & Eng. Ency. of Law, 648. The respondents have no power to disregard the vote of the town on the question of license. Until set aside or modified by the courts, the result of the vote on license must be taken as conclusive; and that result is evidenced conclusively by the town clerk's record. *People* v. *Zeyst*, 23 N. Y., 140; *Taylor* v. *Henry*, 2 Pick., 397; *Andrews* v. *Boylston*, 110 Mass., 214; *Halleck* v. *Boylston*, 117 id., 469; *Gilbert* v. *New Haven*, 40 Conn., 102; *Mayhew* v. *District of Gay Head*, 13 Allen, 129, 134; *Eddy* v. *Wilson*, 43 Vt., 362; *Stephenson* v. *Bay City*, 26 Mich., 44; *Third School District* v. *Stoughton*, 12 Met., 105. In refusing to pass upon the validity of the license vote, the respondents were in the exercise of discretionary powers, to control which mandamus will not lie. *Amer. Casualty Ins. Co.* v. *Fyler*, 60 Conn., 460; *State* v. *Staub*, *supra*; *State ex rel.* v. *Asylum St. Bridge Com.*, *supra*; *Colby* v. *Webster*, 59 Conn., 362; *Batten* v. *Dunning*, 49 id., 479; 2 Spelling on Ext. Relief, §§ 1384, 1433. The petitioner's remedy was by appeal from the refusal of the commissioners to grant him a license. *Peck*

v. *Booth*, 42 Conn., 271; *Hopson's Appeal*, 65, id. 145. The right of appeal is a bar to the writ of mandamus. 2 Spelling on Ex. Relief, § 1445; *State* v. *Com'rs of Baltimore*, 46 Md., 621; *Wolf* v. *Supervisors of Sheboygan County*, 29 Wis., 79. Mandamus is never the proper remedy for trying collateral questions. 2 Spelling on Ex. Relief, §§ 1386, 1440; *Brainard* v. *Staub*, 61 Conn., 570, 576; *State* v. *Cooper*, 101 N. Car. 684; *Sudbury* v. *Hurd*, 103 Mass., 543; *McGregor* v. *Balch*, 14 Vt., 436; 6 Amer. & Eng. Ency. of Law, 378. In the absence of a remedy provided by statute courts are powerless to interfere. *Caldwell* v. *Barrett*, 73 Ga., 604. The Public Acts of 1895, Chap. 267, § 7, expressly provides that in the election of persons to office, ballots contained in envelopes not indorsed with the names of the booth tenders shall be rejected. But in balloting on licenses, the Public Acts of 1895, Chap. 308, nowhere provides that ballots contained in envelopes not so indorsed shall be rejected. The duties of envelope booth-tenders under both Acts are the same; but the serious results of neglect of a technical duty are not the same. *Phelan* v. *Walsh*, 62 Conn., 296.

TORRANCE, J. This case comes here by way of reservation upon the questions raised by the plaintiff's demurrer to the return made by the respondents to the alternative writ of mandamus; and the parties have stipulated upon the record that the return shall be "treated and considered as an agreed finding of facts in the case."

The substance of the facts agreed upon may be stated as follows:—

In October, 1894, the legal voters of the town of Westport voted in favor of "license;" while at the annual town meeting in October, 1895, they voted, if the vote is a legal one, in favor of "no license." Unless annulled by the vote of 1895, the vote of 1894 remained in full force. The vote of 1895, however, was taken by ballots contained in envelopes which were not marked by the envelope booth-tenders "with their respective names, but only with their respective initials." The ballots so contained in said envelopes were counted by

the counters appointed and sworn to count the same. And they, under their hands, delivered to the moderator a certificate in duplicate, stating that 257 votes had been cast in favor of license, and 378 votes had been cast in opposition to license. The moderator, before the adjournment of said meeting, publicly declared the result of said count, and he forthwith indorsed on said certificate in writing, signed by him, that said certificate showed the result of the official count on the ballot for "license" and "no license." One of said certificates he placed in the ballot box and sealed it up with the ballots cast and returned to that box; the other, on that or the next day, he deposited in the office of the town clerk of Westport. The record of the result of that vote made by the town clerk of Westport upon the town records, is as follows: "License—Yes, 257; License—No, 378."

In October 1895, but some time after this vote upon the license question, the plaintiff in due form made application to the respondents for a license to sell spirituous and intoxicating liquors in Westport; and they refused to act upon his application on the ground that Westport was then a "no license" town, as shown by its records, and they had no power to inquire or to determine whether the aforesaid ballots cast upon the question of "license" and "no license," were or were not valid legal ballots. The plaintiff "is a suitable person to sell such liquors," and the "place" described in his application is a suitable place for the sale of such liquors.

These are the controlling facts in the case, and upon them the plaintiff asks that a writ of mandamus shall issue to the respondents requiring them not only to exercise the ordinary duties of their office with respect to his application for a license, but also "to enquire and determine whether at said meeting held on the first Monday of October, 1895, at said Westport, said town in fact legally voted against the granting of licenses in said town, and is a town in which spirituous and intoxicating liquors may be sold."

The sole objection made by the plaintiff to the validity of the ballots in question, is the fact that they were contained

in envelopes marked with the initials, instead of the names, of the booth-tenders; and this it is claimed is contrary to the provisions of chapter 308 of the Public Acts of 1895.

The plaintiff claims that it is the duty of the respondents to try and determine the validity of the town vote, in a case like the present, just as a court would try the question in a contested election case under the provisions of a statute; and he bases his right to the writ of mandamus mainly upon that claim. If, therefore, it can be shown that no such duty is imposed on the county commissioners, the right to the writ fails.

If such a duty is imposed by law upon the county commissioners, it must be imposed by some statute, either by express words or by clear implication; for the commissioners are a special statutory tribunal, and such powers and duties as they have are conferred and imposed by statute. No claim is made that the duty in question is imposed upon them in express terms by any statute, but the claim is that it exists by implication; and this claim appears to rest mainly upon the statutory language which is here quoted, namely: "The county commissioners of each county may license . . . . suitable persons to sell or exchange spirituous and intoxicating liquors, in suitable places in those towns within their respective counties in which such licenses can be legally granted." General Statutes, § 3053, as amended by Chap. 117 of the Public Acts of 1889. The argument seems to be that inasmuch as the commissioners can grant licenses only in towns in which such licenses "can be legally granted," this by implication imposes upon them the duty of determining judicially, as a court might, whether the vote of a town for or against license in a given case, was or was not a legal, valid vote. That the language relied upon will not bear such a construction, appears evident from the language itself as well as from the character of the tribunal on which it is claimed the duty is laid, and the nature of the questions to be determined.

The language relied upon occurs in a statute the main purpose of which is to confer and impose upon the commissioners

the power and the duty to grant licenses, and the mode of exercising the power and of performing the duty is specifically pointed out; and the power and the duty are administrative and not judicial in their nature. If the legislature in this statute had intended to confer and impose upon the commissioners the judicial power and duty which the plaintiff contends for, it is reasonable to suppose that it would have defined the power and duty, and provided the mode in which they should be exercised and performed; and it has done nothing of this kind. The phrase in the statute "in those towns in their respective counties in which such licenses can be legally granted," is really equivalent to the words, "towns which have not voted against license;" and the phrase is used as descriptive of the class of towns in which licenses may be granted, and not as descriptive of a judicial duty imposed on the commissioners.

The county commissioners are not judicial but administrative tribunals, and their powers and duties are almost exclusively administrative and not judicial; *Groton and Ledyard* v. *Hurlburt*, 22 Conn., 178; *Hopson's Appeal*, 65 id., 140; and the intent of the legislature to impose upon them the duty here claimed ought not to be inferred from language of doubtful import, or which is fairly susceptible of a different construction.

The questions involved in determining, upon evidence extrinsic to the records of the town, whether a certain vote of the town was or was not a valid legal vote, are judicial questions, depending upon the construction of statutes, largely; and they are often difficult and intricate questions, which can only be fully and effectively settled by a tribunal possessing full judicial powers. The effective performance of such a duty requires a settled mode of procedure, upon written statement or complaint setting up the facts to be investigated, the power to compel witnesses to appear and give testimony, and the power to open and examine ballot boxes if necessary.

On the whole, from the language of the statute, as well as from the nature of this statutory tribunal and the nature of the questions which the plaintiff asks it to determine, it is

clear that the duty in question is not imposed upon the county commissioners. In the performance of their duties they were not bound to look beyond the records of the town, in order to determine whether they would or would not grant licenses therein; and the town records in this case justified them in refusing to consider the plaintiff's application for a license.

In coming to the conclusion that the duty contended for by the plaintiff is not imposed on the county commissioners, it is assumed, without deciding the matter either way, that the ballots in question here, were, as claimed by the plaintiff, illegal and ought not to have been counted. The plaintiff says that unless the county commissioners can pass upon the validity of the vote in question, there is no way in which its validity can be determined; that question however is not before this court now, and no opinion is expressed upon it.

The Superior Court is advised to deny the application for a peremptory writ of mandamus.

In this opinion the other judges concurred.

William A. Beers et Ux. *vs.* The Boston and Albany Railroad Company.

Third Judicial District, New Haven, January Term, 1896. Andrews, C. J., Torrance, Fenn, Baldwin and Hamersley, Js.

If a common carrier of passengers receives personal luggage which it supposes to be that of a passenger, but which in fact is not, without any express contract, and under circumstances which exclude any implied contract, it assumes no duty to the owner except to abstain from acts of willful, wanton, or intentional injury to the property while in its possession.

A man acts at his peril, but he is never liable as a wrong-doer for omissions, except in consequence of some duty voluntarily undertaken.

The plaintiffs caused two trunks to be checked at Saratoga for transportation to Albany by the Delaware and Hudson Railroad and thence to to New Haven over the lines of the defendant and the N. Y., N. H. & H. Railroad, but did not themselves intend to go by that route, but by a rival line over which they had bought tickets entitling them to transportation, and so informed the person who gave them the checks, who

was not the servant or agent of any of the railroads over which the trunks were checked. The plaintiffs acted in good faith, and were told by the person who gave them the checks that they had the right to have their trunks go by the route indicated on the checks. The defendant was bound by a contract with the D. and H. Company to receive the personal luggage of passengers who held tickets entitling them to pass over both roads between Saratoga and Springfield, and was led by the checks to suppose that the trunks were luggage of that character, and as such took them into its possession. While the trunks were being transported in a car over the defendant's line between Albany and Springfield, the train broke through a bridge, which had become defective through the gross negligence of the defendant, and the trunks and their contents were ruined. *Held* that the defendant was not liable for the loss.

[Argued January 29th—decided March 26th, 1896.]

ACTION to recover damages for two trunks alleged to have been delivered to the defendant as a common carrier and to have been lost through its negligence; brought to the Superior Court in New Haven County and tried to the Court, *Hall, J.*, upon defendant's demurrer to the plaintiffs' reply; the court sustained the demurrer and rendered judgment for the defendant, and the plaintiffs appealed for alleged errors in the rulings of the court. *No error.*

The complaint contained two counts. The first alleged (1) that the defendant was a common carrier between Albany and Springfield; (2) that pursuant to a contract between it and the Delaware & Hudson River Railroad Co., a common carrier between Saratoga and Albany, and the New York, New Haven & Hartford Railroad Co., a common carrier between Springfield and New Haven, the defendant had long been in the habit of receiving baggage from the Delaware & Hudson River Railroad Co. at Albany, and transporting it to Springfield, and there delivering it to the New York, New Haven & Hartford Railroad Co., whenever such baggage was so checked as to indicate that it was to be so carried and delivered; (3) that the defendant received at Albany, pursuant to said contracts, two trunks of the plaintiffs with checks, one marked "New Haven and Saratoga—1010—via B. & A. & N. Y., N. H. & H.," and the other marked in a similar manner, but with another number;

which initials meant the Boston & Albany Railroad Co., and the New York, New Haven & Hartford Railroad Co., and indicated that said checks were issued pursuant to said contracts, as in fact they were, and that said trunks were to be transported to Springfield over the defendant's railroad and delivered to the New York, New Haven & Hartford Railroad Co., to be thence transported by it to New Haven; (4) that in consideration of the receipt of said trunks, and of said contracts, the defendant assumed control of them and engaged as such common carrier to transport them to Springfield, and there to deliver them to the New York, New Haven & Hartford Railroad Co.; and (5) that the defendant, by its gross negligence, suffered said trunks to be destroyed, and never delivered them to the New York, New Haven & Hartford Railroad Co., or the plaintiffs.

The second count, after repeating (1) the first three paragraphs of the first count, added (2) that the defendant as such common carrier received two trunks of the plaintiffs from the Delaware & Hudson River Railroad Company, at Albany, with the direction from it that they were to be safely transported to Springfield, and there delivered to the New York, New Haven & Hartford Railroad Co. for further transportation to New Haven, said trunks being properly checked and marked for such destination, as the defendant well knew, and the defendant deposited them in one of its cars for such transportation over its railroad; (3) that the defendant made up a train containing said car and started it for Springfield, in order to reach which it had to pass over a certain bridge; (4) that said bridge was then, and had long been, being repaired by the defendant, and consequently was, and long had been, in a defective and unsafe condition, so that it could not sustain the weight and force of a train, and when this train reached it, was, by the gross negligence of the defendant, in that condition, and wholly deserted by the defendant and its agents and servants, so that there was no one there to warn the conductor or engineer of its condition, or to signal the train to stop, by reason whereof it went on the bridge at full speed, and the

bridge broke down, carrying the car with it into a stream below, whereby the trunks and their contents were ruined.

The answer set up that the plaintiffs bought tickets from Saratoga to New Haven over a route which was a rival to that of which the defendant's railroad formed a part, and comprised a steamboat line on the Hudson River between Albany and New York; that without paying any consideration therefor, they caused their trunks to be checked over the route of which the defendant's railroad formed a part, to New Haven by way of Albany and Springfield, and received checks indicating that their trunks were to be so transported; that the trunks bearing said checks were delivered to the Delaware & Hudson Canal Co., at Saratoga, and were by it delivered at Albany to the defendant, to be transported to Springfield and there delivered to the New York, New Haven & Hartford Railroad Co., for transportation to New Haven; and the defendant received them, supposing from the checks that they belonged to passengers who had bought tickets over its railroad; that the only contract between it and the Delaware & Hudson Canal Co., was one providing for the transportation of passengers who had bought such tickets; and that the plaintiffs had neither bought nor held any such tickets, nor did they become passengers on the defendant's road, or enter into any contract with the defendant for the transportation of said trunks; and that the trunks were destroyed without any willfulness, malice or intentional wrong, or anything equivalent or amounting thereto, on the part of the defendant.

The reply stated that, when the plaintiffs checked the trunks, they were informed by the person who had the checks in his possession, that they had the right, by virtue of their tickets, to have the trunks checked in this way, over the defendant's railroad from Albany to Springfield; and they caused them to be so checked, supposing that he had the authority to make such statement and so to check said trunks, and relying upon and believing such statement; and were guilty of no fraud or intentional wrong, but acted in good faith.

The defendant filed a demurrer to the reply, which was sustained; and the plaintiffs declining to amend their pleadings, judgment was rendered for the defendant, from which this appeal was prosecuted.

E. P. Arvine and *Lyman E. Munson*, for the appellants (plaintiffs).

The first of several connecting carriers, bound together by a through traffic agreement, is the agent of the others, and the others are bound by the acts of its employees, performed within the general scope of their authority. *Hartan* v. *Eastern R. Co.*, 114 Mass., 44; *Penn. R. Co.* v. *Swarzenburger*, 45 Pa. St., 208. The road actually carrying the baggage at the time of injury is the principal, and is answerable in suit brought directly against it by the owner of the baggage. *Harp* v. *Grand Era*, 1 Woods (U. S.), 184; *Chicago & R. I. R. Co.* v. *Fahey*, 52 Ill., 81; *Packard* v. *Taylor*, 35 Ark., 402; *Conkey* v. *Milwaukee & St. P. R. Co.*, 31 Wis., 619; *Halliday* v. *St. Louis, K. C. & N. R. Co.*, 74 Mo., 159; *Young* v. *Penn. R. Co.*, 115 Pa. St., 112; *Penn. R. Co.* v. *Connell*, 112 Ill., 292. It is immaterial that the Delaware & Hudson Canal Company had express authority to check the baggage of those only, who had purchased tickets. They and their employees were clothed with apparent power, and the defendant cannot expect the public to scrutinize their credentials. *Gelvin* v. *Kansas City, St. J. & C. B. R. Co.*, 21 Mo. App., 273; *Deeming* v. *Grand Trunk R. Co.*, 48 N. H., 455; *Pruitt* v. *Hannibal & St. J. R. Co.*, 62 Mo., 527; *Harrison* v. *Missouri Pac. R. Co.*, 74 Mo., 364; *Lake Shore & Mich. So. R. Co.* v. *Foote*, 104 Ind., 293; *Jacobs* v. *Tutt*, 33 Fed. Rep., 412; *Hannibal & St. J. R. Co.* v. *Swift*, 12 Wall., 262; *Ouimit* v. *Henshaw*, 35 Vt., 605; *Smith* v. *Railroad*, 27 N. H., 86. An authority to check baggage is to be inferred from the possession of checks. *Illinois Cen. R. Co.* v. *Copeland*, 24 Ill., 332; *Isaacson* v. *N. Y. C. & H. R. Co.*, 94 N. Y., 278, 285. The defendant is liable as a bailee by virtue of the receipt of the baggage. The liability of a bailee does not necessarily arise out of contract, but is often imposed by

law. Schouler on Bailments and Carriers (2d Ed.), §§ 9, 28, 668; *Nolton* v. *R. R. Co.*, 15 N. Y., 444; note to *Waterbury* v. *N. Y. C. & H. R. Co.*, 17 Fed. Rep., 674; *Smith* v. *R. R. Co.*, 27 N. H., 86; *Rumsey* v. *N. E. Ry. Co.*, 14 C. B. N. S., 641; *Wilson* v. *Grand Trunk R. Co.*, 56 Me., 160, 57 Me., 138; *Graffam* v. *Boston & Me. R. Co.*, 67 Me., 234; *The Elvira Harbeck*, 2 Blatch. (U. S.), 336; *Flaherty* v. *Greenman*, 7 Daly (N. Y.), 481; *Lemon* v. *Chansler*, 68 Mo., 340, 357; *Skelley* v. *Kahn*, 17 Ill., 170; *Flint & P. M. R. Co.* v. *Wier*, 37 Mich., 111; *Gray* v. *Mo. Riv. Packet Co.*, 64 Mo., 47; *McCauley* v. *Davidson*, 10 Minn., 418. The liability of a carrier is imposed by law. It exists although there has been no payment of fare or agreement to pay fare. *Buffet* v. *Troy & Boston R. Co.*, 40 N. Y., 168; *Gordon* v. *Grand Street & Newtown R. Co.*, 40 Barb. (N. Y.), 546; *Ross* v. *War Eagle*, 14 Iowa, 363; *Green* v. *Milwaukee & St. Paul R. Co.*, 41 Iowa, 410; *Woods* v. *Devin*, 13 Ill., 646. The defendant is liable for at least gross negligence, on the broad, general ground that it had the custody of the property. Schouler on Bailments and Carriers (2d Ed.), § 3; 4 Lawson's Rights, Remedies and Practice, § 1695; Story on Bailments (9th Ed.), § 59; *Phelps* v. *People*, 72 N. Y., 334, 358; *Newhall* v. *Paige*, 10 Gray (Mass.), 366; *Wilson* v. *C. & O. R. R. Co.*, 21 Gratt. (Va.), 654, 664. The principle was applied in *Fairfax* v. *Railroad*, 73 N. Y., 167; *Austin* v. *Railroad*, L. R. 2 Q. B. 442. Some cases hold that there is liability for gross negligence, even if the owner of baggage has been guilty of fraud. *Railroad* v. *Beggs*, 85 Ill., 80; *Collins* v. *Boston & Me. R. Co.*, 10 Cush. (Mass.), 506. The case of *Gardner* v. *N. H. & N. Co.*, 51 Conn., 143, is clearly distinguishable from the case at bar.

George D. Watrous and *Edward G. Buckland*, for the appellee (defendant).

The right of action in this case is governed by the law of the place where the accident occurred, viz, Massachusetts. Cooley on Torts, *471; *Le Forest* v. *Tolman*, 117 Mass., 109; Story, Confl. of Laws, § 307 d; *Mostyn* v. *Fabrigas*, 2 Sm.

Lead. Cas. (9th Am. Ed.),964; Addison, Torts, 28, 29; *Dennick* v. *R. R.*, 103 U. S., 18; *Dunlap* v. *Internat. Steamboat Co.*, 98 Mass., 371; *Wright* v. *B. & A. R. R.*, 142 id., 296; *Planz* v. *R. R. Co*, 157 id., 377. The mere fact that the man at Saratoga had checks in his possession, does not of itself constitute him the agent of the defendant even to check the baggage of its passengers; *a fortiori* it would not make him its agent to check trunks for persons who neither were, nor intended to become, its passengers. Wharton on Evidence, § 1316; Best on Evidence, § 357; *Short* v. *Lee*, 2 J. & W., 464; *Coon* v. *Gurley*, 49 Ind., 199; *First Nat. Bank* v. *Council Bluffs Water Co.*, 56 Hun, 412; *Morgan* v. *Farrel*, 58 Conn., 426. It does not appear that defendant misled the plaintiffs, or allowed them to be misled in any way. The good faith of the plaintiffs can only affect their remedy against the person who misled them. *Talcott* v. *W. R. Co.*, 66 Hun, 462. Where no duty is owed there can be no negligence. Cooley on Torts, *660; Shearman & Redfield, Neglig., § 8, and cases; *Nolan* v. *N. Y., N. H. & H. R. Co.*, 53 Conn., 461; *Farrell* v. *W. H. R. Co.*, 60 id., 246; *O'Neill* v. *East Windsor*, 63 id., 153. There is no special force in the allegation of "*gross*" negligence. *Railroad Co.* v. *Lockwood*, 17 Wall., 357; *Waterbury* v. *N. Y. C. & H. R. R. Co.*, 17 Fed. Rep. 675, note. In the absence of any duty created by a contractual relation with the plaintiff, the defendant owed only the absolute duty which binds every man to refrain from willful and wanton injury to the property of another. *Dunlap* v. *Internat. Steamboat Co.*, *supra*; *Wright* v. *B. & A. R. Co.*, *supra*; *Planz* v. *R. R. Co.*, *supra*; *Gardner* v. *Railroad*, 51 Conn., 143; Austin's Juris., 194; *T. W. & W. R. R.* v. *Beggs*, 85 Ill., 80; Lawson on Contracts, § 229; *Becher* v. *G. E. R. Co.*, 5 Q. B., 241; *Fairfax* v. *R. R.*, 5 J. & S. (N. Y.), 516; *Talcott* v. *W. R. Co.*, *supra*; *Blumenthal* v. *M. C. R.*, 79 Me., 550; *Belfast R. Co.* v. *Keyes*, 9 H. L. Cases, 573. When a person is deceived into taking a thing into his possession, no contract of bailment can arise unless he so elects after knowing the truth. Story on Bailments, §§ 59, 155, 372, 381; *Lloyd* v. *W. B. Ins. Bank*, 15 Pa. St. 172; Amos, Roman Civil Law, pp. 197, 199, 216.

The compensation for carrying baggage, as baggage, is included in the price paid for the ticket by the passenger. *Smith* v. *R. R.*, 44 N. H., 332, and cases; 3 Wood on Railroads, §§ 400, 403; *Hannibal R. R.* v. *Swift*. 12 Wall., 262, 274. It follows that if there is no contract to carry a passenger, there can be no contract to carry his baggage as baggage.

BALDWIN, J. If the defendant came under any obligation to make good the plaintiffs' loss, it must have been either by virtue of some contract between them, or of actionable negligence.

No such contract is alleged, unless one can be implied from the reception by the defendant, at Albany, of their luggage, so checked as to indicate that it was to be transported over its railroad to Springfield. It is not averred that the person from whom they obtained the checks was an agent of the defendant, or had any authority to act or speak in its behalf; nor even that he was an agent of the Delaware & Hudson Canal Company, with which the defendant was in contract relations. His statements, therefore, and the plaintiffs' reliance upon them, are of no importance except as evincing their good faith in the transaction. On the other hand, the effect of the reply was to admit that the defendant received the luggage, under the mistaken supposition that it belonged to passengers who had bought tickets over its road, and so that its transportation on its railroad had been duly paid for. Had trunks, marked as destined to Springfield, been received by the defendant without any particular contract or understanding in regard to their transportation, it would have assumed, simply from its position as a common carrier, an obligation to transport them safely, and have had a right to a proper compensation, when the service was performed. But an express contract existed between it and the Delaware & Hudson Canal Co., under which it was bound to receive the personal luggage of passengers who held tickets entitling them to pass over both roads between Saratoga and Springfield, and the defendant

was led by the checks to suppose that the trunks of the plaintiffs were luggage of that character. It did not, therefore, receive them under such circumstances as to create such an implied contract with their owners. An implied contract between two parties is only raised when the facts are such that an intent may fairly be inferred on their part to make such contract. Such an intent may be implied, although it be certain that it never actually existed, but not unless the parties are in such relations that each ought to have had it.

In the case at bar, the facts not only do not justify but absolutely exclude such an implication. The plaintiffs did not intend to pay the defendant for the transportation of the trunks. They supposed that they had already paid for this, in purchasing tickets to New Haven by way of the Hudson River. The defendant did not intend to make any charge for their transportation. It supposed that compensation for this had been made already, under and as an incident of an express contract, made in its behalf by the Delaware & Hudson Canal Co., for the transportation of the owners as passengers over its railroad.

The plaintiffs and the defendant were alike misled by appearances. It is one of those cases where a loss must be sustained by one or the other of two parties, who are equally innocent of wrong, but one of whom placed it in the power of a third person to do the act which caused the injury. The plaintiffs acted in good faith in accepting the checks in question from some one in Saratoga, and causing them to be placed on their trunks; but it was this that induced the Delaware & Hudson Canal Co. to deliver the luggage to the defendant, at Albany, and the defendant to receive it as belonging to those whose right it was to have it transported over its line to Springfield. The plaintiffs could not in this way force the defendant into a contract relation which it certainly would never have intentionally assumed.

The defendant, having taken the plaintiffs' property into its possession for transportation over a railroad which it operated as a common carrier, was not free from all respon-

sibility for its safe-keeping, notwithstanding it accepted its custody without any contract, express or implied.

It is admitted by the pleadings that not only did the defendant run the train, in which the property was, upon a bridge which was and long had been so defective that it could not sustain such a burden, but also that no one was stationed there to give any warning of the danger or signal the train to stop, and that the luggage was destroyed by reason of its gross negligence in these respects, but "with out any willfulness, malice, or intentional wrong, or anything equivalent or amounting thereto." The defendant did not receive the trunks in the capacity of a common carrier of goods for hire. They were delivered to it and accepted by it in the capacity of a common carrier of passengers for hire. In fact, there were no passengers to be carried, to whom they belonged, but this, whether then known or unknown to the defendant, would be no excuse for any willful or intentional injury to property actually in its possession. We think, however, that it was a sufficient excuse for the negligence which is confessed. Actionable negligence is the neglect of a duty. What duty did the defendant owe to the plaintiffs? Simply that of abstaining from anything amounting to willful or wanton injury to their property in its possession. *Gardner* v. *New Haven & Northampton Co.*, 51 Conn., 143, 150. That cannot be deemed a wanton exposure of it to destruction which consisted only in running a train of cars upon an unsafe bridge, by which its own property, as well as theirs, was involved in a common loss. "Negligence signifies a want of care in the performance of an act, by one having no positive intention to injure the person complaining of it." *Pitkin* v. *N. Y. & N. England Railroad Company*, 64 Conn., 482, 490. It is true that this definition might not exclude the liability, in some instances, of a principal on the ground of negligence, for damage consequent upon a direct act of violence or trespass on the part of servants; but this is not a case of that description. The gross negligence with which the defendant was chargeable consisted wholly of omissions. There was no willful

wrong, nor yet such reckless misconduct as can be deemed its equivalent.

Had the defendant voluntarily assumed the position of a depositary (taking this term in its strict meaning of a bailee without reward), it would not have been bound under the rules of the Roman law, which have become a part of the common law, to treat the plaintiffs' property with any more care than it gave to its own. *Coggs* v. *Bernard*, 2 Lord Raym. 909; Dig., 16, 3, *depositi vel contra*, 32. Good faith would have been the measure of its obligations. Dig., 16, 3, 20. He who intrusts his property to a careless man, if loss ensues, must lay it to the account of his own imprudence in putting it into such hands. Inst., 3, 15, *quibus modis re contrahitur obligatio*, 3.

But in the case before us, the elements of a bailment are wanting, for there was no contract express or implied between the parties. 2 Kent's Commentaries, *780. The defendant's obligations, not being contractual, were less than those attaching to bailees of any class. No man can have the care of another's property thrust upon him without his invitation or consent, in such a way as to raise a duty calling for the performance of positive acts of protection. He may be bound to refrain from acts of direct injury. This is a mere negation of wrongdoing. A man acts at his peril; but he is never liable for omissions, except in consequence of some duty voluntarily undertaken. Holmes on the Common Law, 82. Had the defendant willfully thrown the plaintiffs' trunks from the bridge into the stream below, a liability would have been incurred; but this would have been an act of violence, not an absence of care. Gross negligence is not actionable where not even slight care was due. *Dunlap* v. *International Steamship Co.*, 98 Mass., 371, 379. However blameworthy, it is still essentially different from intentional wrongdoing. *Magna negligentia culpa est; magna culpa, dolus est.* Dig. 50, 16, *de verborum significatione*, 226.

Had the checks indicated that the trunks were to be sent over the river route, their reception by the defendant for carriage over its route would have presented a very differ-

ent question. *Fairfax* v. *N. Y. C. & H. R. R. R. Co.*, 73 N. Y., 167, 170.

The ruling on the demurrer, with which the pleadings under the original complaint were closed, was in conformity to the views which we have expressed. It is therefore unnecessary to inquire whether, had there been error, it would not have been waived by filing a substituted complaint.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

HENRY CARSTESEN *vs.* THE TOWN OF STRATFORD ET AL.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN AND HAMERSLEY, Js.

The plaintiff's horse and carriage were injured during the night, by reason of the failure of the defendants to guard or light certain excavations made in the street by the defendant railway company in the construction of its tracks. The work was being done with the knowledge and approval of the selectmen of the defendant town and under their supervision, and one of the excavations which caused the accident was upon that part of the street which was then used and open to public travel. The driver knew that this work was going on and drove slowly and with due care. There were two other highways safe and equally convenient to his destination, but it did not appear that he was familiar with these streets. The horse and carriage went into the excavations, and in consequence the horse became frightened and unmanageable and ran away, colliding with a hitching post from 1000 to 1500 feet away, where he freed himself from the carriage and continued his flight over fences and through the fields. There was no evidence showing specific injury to the horse or carriage before the collision with the post, and the statutory notice given the plaintiff, described the excavations and piles of earth and stones alongside the tracks, as the place and cause of the injury. In a suit against the street railway company and the town to recover damages for the injury, it was *held*:—

1. That under the circumstances, the question whether the driver was guilty of contributory negligence in not taking one of the other safe and convenient streets leading to his destination, was one of fact for the determination of the trial court, and not subject to review on appeal.

2. That inasmuch as it fairly appeared from the finding that both of the excavations which caused the runaway were made in the work of construction authorized by and carried on under the supervision of the selectmen, the town could not escape liability on the ground that it had no express notice of the defective condition of the highway.
3. That it was clearly the duty of the town to guard against danger from the excavation in the traveled portion of the highway outside the railway location; and that under Chap. 169 of the Public Acts of 1893, it was the duty of the town, as well as that of the street railway company, to take reasonable precautions to warn travelers against dangers arising from an excavation within the railway lines.
4. That the proximate cause of the injury was the existence of the two unguarded holes in the highway, and that the injury was received at the place where this cause operated to produce the runaway; and the statutory notice of the injury was consequently sufficient in describing the "place of its occurrence."

It is not essential in all cases that there should be concert of action between two defendants in causing an injury, or a violation of some common duty resting upon them, in order to render them liable as joint wrong-doers. If the negligence of each in part directly caused the injury, both may be sued and held responsible.

[Argued February 6th—decided March 26th, 1896.]

ACTION to recover damages for injuries to a horse received through the alleged negligence of the defendants, brought to the Court of Common Pleas in Fairfield County and tried to the court, *Walsh, J.*; facts found and judgment rendered in favor of the plaintiff for $457 damages, and appeal by the defendants for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

Morris W. Seymour and *Howard H. Knapp*, for the Bridgeport Traction Company. *Stiles Judson, Jr.*, for the town of Stratford.

The place described in the statutory notice as the place of the injury, limited the plaintiff's right to recover to such damages as he could prove occurred at that point. It did not appear that any damages resulted from any injury at the place described, and hence no recovery could be had by the plaintiff. *Beiseigel* v. *Seymour*, 58 Conn., 52; *Gardiner* v. *New London*, 63 id., 267; *Larkin* v. *Boston*, 128 Mass., 521; *Shaw* v. *Waterbury*, 46 Conn., 264; *Tuttle* v. *Winchester*, 50 id., 500;

Fields v. *R. R.*, 54 id., 10; *Cloughesey* v. *Waterbury*, 51 id., 431. The court erred in holding the defendant town in any wise responsible. It had no actual notice, as the trial court finds, and there was no evidence from which constructive notice could be implied. One of the holes was made by the Traction Company acting by authority of the General Assembly, and it is doubtful whether the town could, even if it had had notice, have interfered with the manner in which this work was done. *Shalley* v. *Danbury St. Ry. Co.*, 64 Conn., 381. The Traction Company could not be made responsible for an injury caused by an excavation upon the part of the street maintained and kept open for public travel by the town. Section 9 of the Street Railway Act of 1893, does not permit the joinder of these defendants. It has no application to two independent and distinct *tort feasors* merely because the independent negligence of each has to some extent and in some measure contributed as a proximate cause toward an ultimate damage. In this case the plaintiff alleges the joint or concurrent negligence of the two defendants. He has absolutely failed to prove the negligence of the town, and having so failed cannot be permitted to recover judgment against the other defendant, against whom he has never made a charge of any separate negligence. *Taylor* v. *Yonkers*, 102 N. Y., 202; *Searles* v. *Railway Co.*, 101 id., 661; *Moore* v. *Abbott*, 32 Me., 46; *Moulton* v. *Sanford*, 51 id., 137; *Marble* v. *Worcester*, 4 Gray, 395; *Billings* v. *Worcester*, 102 Mass., 329. The plaintiff's failure to take the safe and equally convenient highway to his destination constituted contributory negligence as matter of law. *Derwart* v. *Loomer*, 21 Conn., 251; *Bill* v. *Smith*, 39 id., 210; *Wilson* v. *Charleston*, 8 Allen, 137; *Horton* v. *Ipswich*, 12 Cush., 488; *Parkhill* v. *Brighton*, 61 Iowa, 103; *McGinty* v. *Keokuk*, 96 Iowa, 725; *Centralia* v. *Krouse*, 64 Ill., 19; *Craig* v. *Sedalia*, 63 Mo., 417; *Masters* v. *Troy*, 50 Hun, 485.

Thomas N. Cullinan and *John Cullinan Jr.*, for the appellee (plaintiff).

The work of laying the railway tracks was being done by

the Bridgeport Traction Co., under the supervision of the selectmen of the town of Stratford. Whether the work was negligently done and whether the selectmen failed to exercise proper supervision, are purely questions of fact. Whether the selectmen acted as prudent men in supervising the performance of the work and in guarding from defects that portion of the highway for which they are responsible, is not a matter for the determination of this court. There is no fixed legal standard by which their conduct can be measured. The same reasoning is to be applied to the question of contributory negligence. *Fiske* v. *Forsyth Dyeing Co.*, 57 Conn., 118; *Farrell* v. *Waterbury Horse R. Co.*, 60 id., 239; *O'Neil* v. *East Windsor*, 63 id., 150; *Donovan* v. *Hartford St. Ry. Co.*, 65 id., 201; 1 Harris on Damages by Corporation, § 107. Under Chap. 169 of the Public Acts of 1893, the town was a joint party in the prosecution of the railway construction, and consequently was bound to have knowledge of the condition of the highway. *Russell* v. *Town of Columbia*, 74 Mo., 480; *Brooks* v. *Somerville*, 106 Mass., 274; *Savannah* v. *Donnelly*, 71 Ga., 258; *Cusick* v. *Norwich*, 40 Conn., 377; *Olson* v. *Worcester*, 142 Mass., 537; Jones on Neg. of Mun. Cor., §§ 188, 189; *Davis* v. *Guilford*, 55 Conn., 357; *Boucher* v. *New Haven*, 40 id., 460; Dillon on Mun. Cor., § 1025; 1 Harris on Damages by Corporations, § 105. There was no error in the finding that the driver of the horse was not guilty of contributory negligence. *Lutton* v. *Vernon*, 62 Conn., 12; Dillon on Mun. Cor., § 1007. It is not contributory negligence as a matter of law for a person who knows that a portion of a road is in a somewhat dangerous condition to pass over it instead of going around it. *Congdon* v. *Norwich*, 37 Conn., 420. The statutory notice given by the plaintiff to the defendants was legally sufficient as to the place of the injury. *Canterbury* v. *Boston*, 141 Mass., 217; *Bailey* v. *Everett*, 132 id., 441; *Lily* v. *Woodstock*, 59 Conn., 224; *Brown* v. *Southbury*, 53 id., 213; *Tuttle* v. *Winchester*, 50 id., 499.

TORRANCE, J. This is an action for an injury to the plaintiff's horse and wagon, claimed to have been caused by a defective highway.

The questions upon this appeal arise out of the facts found, and the substance of the finding may be stated as follows:— On the 24th of July, 1894, and for some considerable time prior thereto, the Bridgeport Traction Company was and had been engaged in building a street railway along the center line of a highway in Stratford called Stratford Avenue. This work was being done with the knowledge and approval of the selectmen of Stratford, and under their supervision. During the construction of the railway a part of Stratford Avenue alongside the line of construction was kept open for public travel. On the night of the 24th of July, 1894, there was, within the lines of the street railway on said avenue, an excavation about two feet wide, fourteen inches deep and ten or fifteen feet long "along the rail of said track, on the side used for the travel of vehicles;" and near by, upon that part of the avenue "which was then being used and kept open for public travel," was a hole two feet wide, three feet long, and about a foot deep. The night was so dark that these holes "could not be seen except by the aid of lamps;" there were no lights near them, and they "were not guarded or protected in any manner." The excavation along the railway track "appeared to be necessary in order properly to perform the work then being done by said traction company." It "did not appear upon the trial how long said holes had remained in the condition described, nor that the selectmen of the town of Stratford had actual knowledge of their existence." On the night in question, "the plaintiff's horse and wagon were being driven by a person who had hired the same," over Stratford Avenue along that part of it then open to public travel. The driver knew that the work of building the street railway was going on there, and he drove slowly and with care. There were two other highways in Stratford which he might have taken to reach his destination, and they were as convenient for that purpose as Stratford Avenue; "but it did not appear that he was familiar with said highways." While thus driving, and "without negligence" on his part, the horse and wagon went into the first of the above described excavations, and passing out of

the same "almost instantly" went into the second one above described. In consequence of this the horse became frightened and unmanageable "and ran away, passing over heaps of dirt and stone on said Stratford Avenue and Main Street, in said Stratford, placed there by said traction company, and on said Main Street, at a point distant from said holes from 1000 to 1500 feet, ran into a hitching-post on the side of said street, and became detached from said wagon, and continued his flight over some fences and through some fields." The horse was seriously injured, and the wagon and harness were badly broken; but "no evidence was presented showing specific injury to horse, or damage to wagon or harness before said horse ran into said post."

The statutory notice of the injury given by the plaintiff to the defendants described, as the cause of it, the excavations aforesaid, and the heaps of dirt, stone and other material on Stratford Avenue and Main Street. On the trial the defendant objected to evidence to show that the horse came in contact with the hitching-post, "upon the ground that the written notice of the place was of a different place, and because the cause of said injuries, as stated in said notice, was of a different nature, viz: that of falling into excavations upon said Stratford Avenue;" but the evidence was admitted, and the defendants excepted.

On the trial the defendants made certain claims of law which the court overruled. The errors of which the defendants complained may be summarized as follows: The court erred in holding: first, that the plaintiff was not guilty of contributory negligence; second, that the defendants were guilty of negligence; third, that the statutory notice was legally sufficient.

In support of the first claimed error, the defendants say that the driver knew that Stratford Avenue was torn up, and there were two other highways equally convenient for him which he might have taken; and upon these two facts they found their claim.

Under the circumstances, and upon the facts found, the question of contributory negligence is clearly one of fact,

and the finding of the court thereon cannot be reviewed here; but if it could be, the mere fact that the driver with the knowledge aforesaid did not take either of the other two safe and convenient roads, with which he was not familiar, would not constitute contributory negligence as matter of law. *Congdon* v. *Norwich*, 37 Conn., 414.

With reference to the second error, the claim is that the facts did not warrant the court as matter of law in finding either or both of the defendants guilty of negligence.

The town says it was not guilty on two grounds: first, because it had no notice actual or constructive of the defective condition of the highway; and second, because even if it can be charged with such notice, it was not responsible for that condition, inasmuch as it was caused by the other defendant under legislative authority, and the town had no right to interfere in the matter.

The finding disposes of the first of these claims adversely to the town, for it fairly shows that both of the excavations which caused the runaway were made in the process of constructing the railway, and this process was going forward, not only with the knowledge and approval of the selectmen, but under their supervision. Under the Act of 1893 (Chap. 169, Public Acts of 1893) it was the duty of the railway company to keep a certain portion of the highway in repair to the satisfaction of the selectmen; and for the purpose and to the extent of protecting from danger persons legitimately using the highway, it was the duty of selectmen, after the traction company began to occupy the highway for its purposes, to exercise a reasonable degree of supervision over a work which they had, in an important sense, authorized, which they knew was going forward daily, and which might at any time render the highway dangerous to such persons. There is nothing to show that the selectmen could not have discovered the defective condition of the highway by the use of reasonable diligence, and in the absence of a finding to that effect, they were justly chargeable with a knowledge which it was their duty to possess. *Cusick* v. *Norwich*, 40 Conn., 376; *Boucher* v. *New Haven*, ibid., 456; *Brooks* v.

Somerville, 106 Mass., 271, 274; *Russell* v. *Town of Columbia*, 74 Mo., 480.

The other claim, that even with such notice of the defects, it would not be liable in this action, inasmuch as they were caused by a third party over whom the town had no control, and who was authorized by its charter to do the acts complained of, cannot be sustained.

One of the excavations which caused the runaway was outside of the railway lines, and upon that part of the highway kept open for public travel which it was the duty of the town to keep in repair; and as to this, inasmuch as the town was chargeable with notice of it, clearly it was the duty of the town to reasonably guard against danger from it; and this duty it neglected to perform. And as to the excavation within the railway lines, of which the town is chargeable with notice also, we think the town under the Act of 1893 aforesaid was guilty of negligence, so far as this plaintiff in this action is concerned, in not taking reasonable precautions to warn him against danger from it. It was in consequence of getting into both excavations that the horse ran away. The existence of each, unguarded in any way, contributed to cause the runaway, which is found to have been the result of the combined effect of both excavations. The traction company, under the statute, was clearly responsible for the condition of that part of the road within its own lines; and, if it had been made sole defendant in this suit, the fact that the negligence of the town had contributed to cause the runaway, would have been no defense. "In general the negligence of third parties concurring with that of the defendant to produce an injury, is no defense; it could at most only render the third party liable to be sued also as a joint wrong-doer." Cooley on Torts, 684; *Ricker* v. *Freeman*, 50 N. H., 420; *Randolph* v. *O'Riordon*, 155 Mass., 331; *Tompkins* v. *Clay Street R. R. Co.*, 68 Cal., 163. The case at bar can fairly be regarded as one which could be brought under § 9 of the Act of 1893 aforesaid, against both the town and the traction company; and in this view of it the court was justified in finding that the town was negligent.

With respect to the negligence of the traction company the finding is equally conclusive. It made an excavation within its lines, which was necessary and proper enough for purposes of construction; it was one that might be dangerous to public travel; it was the duty of the company to guard travelers against such danger; it neglected that duty, and that negligence essentially contributed to the injury sustained by the plaintiff.

But the defendants object to this part of the finding, because they say the traction company and the town were not joint wrong-doers, and the traction company was not liable for the negligence of the town in failing to properly guard against danger on that part of the highway which it was the separate duty of the town to keep in repair. The argument seems to be that in order to make two parties responsible as joint wrong-doers, there must in all cases be some concert of action between them in causing the injury, or some common duty resting upon them which both have violated; but this is not necessarily so. "There are cases in which two or more persons have so acted, though not in concert or simultaneously, as to be liable as joint wrong-doers." Pollock on Torts, 381, 391. This principle was recognized and acted upon in *Clark* v. *Chambers*, L. R. 3 Q. B. Div., 327, and in many of the cases therein commented upon; also in *Ricker* v. *Freeman*, *supra*; *Ring* v. *Cohoes*, 77 N. Y., 83, and many others that might be cited. "If no fault can be attributed to the plaintiff, and there is negligence by the defendant and also by another independent person, both negligences partly directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrong-doer." *The Bernina*, L. R. 12 Prob. Div., 58, 61. "When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes." *Ring* v. *Cohoes*, 77 N. Y., 83. Upon the facts found we think the defendants must be regarded as parties whose "negligence in part directly" caused the runaway, and there-

fore the court did not err in finding the traction company guilty of negligence.

The remaining question relates to the sufficiency of the statutory notice given in this case; and the only objection to its legal sufficiency is that it does not sufficiently describe the *place* where the injury occurred. The plaintiff claims that the place of injury was that part of Stratford Avenue where the horse first began to be unmanageable; and no claim is made that the notice did not fully and accurately describe that place. The defendants seem to claim that the hitching-post was the place of the injury, because up to the time of collision with that, no harm had come to the plaintiff's property; or at least they claim that this last place formed part of the place of the injury which the plaintiff was bound to describe in his notice.

The statute (General Statutes, § 2673) requires written notice to be given of the injury, and among other things, of the "place of its occurrence." What then was the "injury" in this case? It was not the hurt done to the horse nor the harm done to the wagon and harness; these were the loss and damage resulting from the injury. "An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right;" *Parker* v. *Griswold*, 17 Conn., 288, 302; and the injury to the plaintiff in this case occurred at the place fully and accurately described in the notice, and not at the hitching-post or elsewhere.

For the purposes of this case it is sufficiently accurate to say that the proximate cause of the injury was the existence of the two unguarded holes in the road, and that the injury was received where this cause operated to produce the runaway; and the court did not err in holding the notice to be legally sufficient, and in admitting the testimony objected to.

There is no error.

In this opinion the other judges concurred.

CONNECTICUT TRUST AND SAFE DEPOSIT COMPANY, ADMINISTRATOR, *vs.* THE SECURITY COMPANY, ADMINISTRATOR.

First Judicial District, Hartford, March Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN AND HAMERSLEY, Js.

The slight changes in phraseology made from time to time in the statute of 1849 relating to a husband's trust estate in the personal property of his wife, have not altered its original meaning and purpose. Upon the death of the husband his interest terminates and the administrator of the wife, if she has previously died intestate, is entitled to the custody and possession of the property, in order that it may be duly administered under the direction and authority of the Court of Probate.

The delivery of the property by the personal representative of the husband to the wife's administrator, has no effect whatever upon the question as to who may be entitled by law to succeed to the property.

The express trust upon which this property is received and held by the husband is not changed because the property is invested by the husband in his own name or mingled with his own funds so that it cannot be identified. Accordingly it is not necessary to a recovery of its value that a claim therefor should be presented against the husband's estate within the time limited for the presentation of claims by the Court of Probate.

It appeared by the record that the husband, upon his wife's decease, was appointed administrator upon her estate, but that her property was not taken or held by him in that capacity, and that there was no actual administration of her estate prior to his death. *Held* that a suit by her administrator *de bonis non* against the personal representative of her deceased husband, to recover the value of the trust fund, was not in conflict with the claim of the defendant that such administrator could not maintain an action against his predecessor, except for effects in specie, or sue for a *devastavit* or for an accounting.

[Argued March 3d—decided March 26th, 1896.]

ACTION to recover damages for the wrongful refusal of the defendant to turn over to the plaintiff a certain sum of money alleged to belong to the estate of the plaintiff's intestate; brought to the Superior Court in Hartford County and tried to the court, *Ralph Wheeler, J.;* facts found and judgment rendered for the plaintiff, and appeal by the defendant for alleged errors in the rulings of the court. *No error.*

The case is suffciently stated in the opinion.

George G. Sill, for the appellant (defendant).

As matter of law Susan Welles had no title to this property in her lifetime, as the absolute title was in her husband as trustee; and as she died first, no title was at any time vested in her, and of consequence, none in her administrator. *Williams* v. *King*, 43 Conn., 569. The suit is barred by statute because not presented within the time limited by law. This cash is not assets of Susan Welles' estate in the hands of defendant, because it was money and was mingled with other moneys of her husband, and hence it became a mere money demand and should have been presented within the time limited by the Court of Probate. 2 Wœrner on Admin., § 305; *Atty. Gen.* v. *Brigham*, 142 Mass., 248; Schouler on Executors, 205; *Johnson* v. *Ames*, 11 Pick., 572; 2 Wood on Limitations, § 206; *Threthick* v. *Austin*, 4 Mason, 16. This statute of *non claim* has been too often construed to admit of any question now. 2 Wœrner on Admin., 846; *Cone* v. *Dunham*, 59 Conn., 145, and cases cited. Administrators may be dispensed with if all an administrator has to do is to distribute the estate. 2 Wœrner on Admin., § 566; General Statutes, §§ 629, 2799; *Griswold* v. *Penniman*, 2 Conn., 564; *Roorbach* v. *Lord*, 4 Conn., 347. An administrator *de bonis non* cannot sustain an action at law against his predecessors or his administrator for anything save unadministered effects existing in specie. 2 Wœrner on Admin., 745; *Am. Board of Comr.'s Appeal*, 27 Conn., 344–354; *U. S.* v. *Walker*, 109 U. S., 358; *Wilson* v. *Arrick*, 112 id., 83.

Henry C. Robinson, for the appellee (plaintiff).

The statute of non claim is immaterial. This action is against the administrator of the trustee of an express trust, and statutes of limitation do not run against express trusts. *Cone* v. *Dunham*, 59 Conn., 145. The plaintiff is not and does not represent a creditor of the dead husband. Gen. Stat., § 581; 2 Story Eq. Jur., 1520*a*; Hill on Trustees, 263; 2 Swift's Dig., 121; *Bacon* v. *Bacon*, 51 Conn., 19; *White School House* v. *Post*, 31 id., 240. Even if it were a claim within the

statute, its limitation could not and did not begin to run until the plaintiff's appointment as administrator of Mrs. Welles. *Hobart* v. *Turnpike Co.*, 15 Conn., 145; *Andrews* v. *R. R. Co.*, 34 id., 57; *Cone* v. *Dunham*, *supra*; *Gay's Appeal*, 61 Conn., 451. The claim that Mrs. Welles' estate vested in her heirs at law, and not in her administrator, is unsound. The vesting involved is not vesting in interest, but vesting in possession. All intestate estates vest in interest in the heirs at law, subject to the rights of creditors, but that interest is determinable only through an intermediate possession of an administrator of the intestate. Gen. Stat., §§ 2792, 628. It is plain that the original jurisdiction given to the Probate Court over estates of deceased persons is exclusive, and that court alone can ascertain who are heirs, and conflicting claims to intestate property must there be determined. *Searles* v. *Farnham*, 6 Conn., 128; *Pitkin* v. *Pitkin*, 7 id., 318; *Bailey* v. *Strong*, 8 id., 281; *Edmund* v. *Canfield*, 8 id., 91; *Beach* v. *Norton*, 9 id., 182; *Atwater* v. *Barnes*, 21 id., 237; *Brush* v. *Britton*, 36 id., 292. The wife's administrator alone can sue to recover this trust fund. *Taber* v. *Packwood*, 1 Day, 150; *Roorbach* v. *Lord*, 4 Conn., 347; *Roach* v. *Smith*, 5 id., 543; *Hawley* v. *Burgess*, 22 id., 284. The legal title to all the personal estate of a decedent vests at death in his legal representative, executor, or administrator. *Buckingham's Appeal*, 60 Conn., 159; *Woodhouse* v. *Phelps*, 57 id., 523; *Cornwall* v. *Todd*, 38 id., 443; *Clement* v. *Brainard*, 46 id., 181; *Hawley* v. *Burgess*, *supra*. The suggestion of laches is not well taken. There can be no laches against an express trust. 1 Pom. Eq., § 418. The court has found that there has been no laches in fact. The remedy sought is the proper one. 2 Perry on Trusts (3d Ed.), §§ 835-838 and citations; 2 Pomeroy's Eq., §§ 1049, 1080, and citations; General Statutes, § 495. The right of the plaintiff cannot be defeated because administration, while entirely proper, could have been avoided. Administration can only be omitted by consent of all parties who claim to be interested. Administration of Mrs. Welles' estate is necessary. The property involved is a chose in action. The trustee has mingled the trust fund with his own

funds. The amount is in dispute, and no one can force an adjudication of the amount except this administrator. The suggestion that an administrator *de bonis non* cannot sue his predecessor at law is insignificant. It meets no issue raised by the pleading, and is, of course, only a ground of demurrer, and cannot be raised here. Who may be ultimately entitled to receive this fund on distribution, is a question not before the court on this record.

FENN, J. The material facts in this case may be stated briefly. The plaintiff sues as administrator *de bonis non* of the estate of Susan M. Welles. The defendant is the administrator of the estate of her husband, Thomas G. Welles. They were married in 1873. She died in 1880 intestate, leaving two children, issue of the marriage. Both have since died, minors, intestate, and unmarried; one before, the other since, their father. Thomas G. Welles died in 1892. During the marriage he received personal property of the wife. He invested it in his own name. The trust fund, so invested, in property mingled with that of Thomas G. Welles, and not capable of being separately traced and identified, came into possession of the defendant, as administrator of his estate. The plaintiff demanded it in the form of a sum of money out of the property, equal to the trust fund. The defendant refused to deliver it. The plaintiff brought the present action at law. The Superior Court rendered judgment in his favor. The defendant appealed to this court.

The statute, as it stood in 1873, General Statutes 1866, p. 303, § 19, provided, as to the personal property of a married woman married since June 22d, 1849, that it should vest in the husband in trust for the wife, and upon the decease of the husband "shall vest in the wife, if living, or if she has deceased, in her devisees, legatees, or heirs at law, in the same manner as if she had always been a *feme sole*." The present statute, General Statutes, § 2792, is somewhat changed in phraseology. By it, the property vests in the husband in trust for the uses specified, "and upon his decease, the re-

mainder of such trust property shall vest in the wife, if living, otherwise as the wife may by will have directed, or in default of such will in those entitled by law to succeed to her intestate estate." We agree, however, with what the defendant has said in its brief: "Changes in the phraseology of the statute have not changed its original meaning and purpose." On the contrary, such changes make more clearly distinct and apparent what such original meaning and purpose was.

The same is also true of the Act passed in 1887, Chap. 40, now General Statutes, § 2795. Under the statute then, the vesting in the husband is of the legal estate, as trustee of an express trust, with no other ultimate property, right, or beneficial interest in himself, than such as is specifically given to him by such statute, namely, the receipt and enjoyment of the income during his life; and even this is subject to duties and charges imposed. Upon the husband's decease, his life trust estate, being his only estate in the property, determines. Nothing derived from him passes to those who represent him, or claim title under him. It vests in the wife, in law, in right of possession, as it was vested in equity in right of property. That is to say, it vests, divested of the trust, in the wife, if living, but if she be dead, then as she may by will have directed; but if, as in the present case, she has died intestate, it vests in those entitled by law to succeed to her intestate estate.

But who shall determine who are so entitled? General Statutes, § 628, expressly provides: "It shall be the duty of the Court of Probate to ascertain the heirs and distributees of every intestate estate." This, however, is but an affirmance and statutory declaration of the pre-existing law. But in order that the Court of Probate may do this, it is plainly essential that such an estate should be pending for settlement in said court, in the orderly and prescribed way. The prior duty provided by General Statutes, § 565, in every case where a person dies intestate, to grant administration, must have been performed. Then the administrator, so appointed, is entitled to the possession of the personal property

so that he may be enabled to administer it under the direction and by the authority of the Court of Probate. That was what the statute of 1866, in existence at the time of the marriage of Mrs. Welles, expressly stated, in providing that the property should vest, upon the death of the husband, after the prior decease of the wife, "in the same manner as if she had always been a *feme sole*." That is what the present statute means equally. In this case, an administrator of the wife has been appointed. He has demanded the property of the administrator of the husband. We agree with the court below, that it should have been delivered to him.

But the defendant insists that the object of this suit is, and its effect if successful, would be, when the time of distribution comes, to stamp the property with the title of the wife, and give color to the claim that it shall be distributed as her estate, to her collateral relatives, and not to the representatives of her sons who survived her, but are now dead. We think the defendant is unnecessarily apprehensive. But in view of the fear expressed, we will say, that no inference whatever can with justice to this court be drawn from our present action, in any subsequent proceeding, in the Court of Probate or elsewhere, concerning a matter, namely, who is entitled by law to succeed to this intestate estate, not before us, and not within our jurisdiction at this time to consider.

But besides the main question which we have examined, the defendant has presented other claims. It insists that the plaintiff is not entitled to recover, because it neglected to present its claim against the estate of Thomas G. Welles within the time limited by the Court of Probate for the presentation of claims against it as a solvent estate. The defendant admits what is clearly true—*Cone* v. *Dunham*, 59 Conn., 145—that here was an express trust at its inception, and that neither the statute of limitations or of *non claim*, applies to such a trust. But it asserts that the character of an express trust was lost when the funds themselves lost their identity. We cannot accede to this claim. The character of the trust upon which the property was received and held,

was not changed by the conduct of the trustee. The claim upon the defendant by the plaintiff, as for "money in the hands of Thomas G. Welles as statutory trustee," was correct in form. The property, in whatever shape, was so held. This is not a "mere money demand" in the sense in which the defendant uses that expression. It is a claim for trust assets, in the hands of the trustee of an express trust.

The defendant further says that the plaintiff was guilty of *laches* in delaying for more than eighteen months in applying for letters of administration. It is not claimed that this delay resulted in any injury to the defendant, who "had notice of the claim on the property, at an early day;" and in view of the finding of the court, no *laches* can be imputed in law, or held to have existed in fact.

The defendant also says: "An administrator *de bonis non* cannot maintain an action against his predecessor, or his administrator, except for effects in specie, nor can such administrator sue a preceding administrator of his intestate, for sums claimed to be due on a *devastavit* or for an accounting." If this be granted, the application to the case before us is not apparent. The finding shows that Thomas G. Welles, upon the death of his wife, was appointed administrator of her estate. But it also shows that her estate "was not taken and held by him, as administrator, and there was no actual administration of her estate in the Court of Probate before his decease." The present is not such an action, as the defendant asserts could not be maintained. It is a suit against the administrator of a person who, up to the time of his death, held personal property as the statutory trustee—not as the administrator of his wife—who had refused to deliver it upon demand, to her administrator, in order that it might be administered upon and finally disposed of according to law.

There is no error.

In this opinion the other judges concurred.

HUGH A. MCADAM *vs.* CENTRAL RAILWAY AND ELECTRIC COMPANY.

First Judicial District, Hartford, March Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN AND HAMERSLEY, Js.

The law casts upon a corporation authorized to use the public streets for the transmission of electric currents dangerous to life, the duty of exercising a very high degree of care in the construction and operation of its appliances; and of employing every reasonable precaution known to those skilled in the safe conduct and management of the business carried on by the corporation, to prevent injury to any person, including its own employees.

The determination of the trial court upon the issues of negligence and contributory negligence, is one of fact and final, unless it appears from the record that some erroneous standard of duty was applied in reaching such determination.

[Argued March 4th—decided March 26th, 1896.]

ACTION to recover damages for personal injuries sustained through the alleged negligence of the defendant, brought to the Superior Court in Hartford County and heard in damages to the court, *Ralph Wheeler, J.;* facts found and judgment rendered for the plaintiff to recover $1,200 damages, and appeal by the defendant for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

Frank L. Hungerford, for the appellant (defendant).

John P. Healy and *Frank E. Healy*, for the appellee (plaintiff).

HAMERSLEY, J. The defendant corporation maintained in the city of New Britain an electrical plant with two separate branches, one for operating an electric street railway under the overhead trolley plan, and the other for furnishing electric lights. The plaintiff was a lineman employed in the electric light department. It was a part of his duty, when

specially directed, to make some changes in the lines of the railway department. He had been specially directed to ascend a pole used in connection with the railway, for the purpose of removing a telephone wire fastened to the top of the pole and used by the defendant. Attached to this pole were span wires and support wires belonging to the railway plant. The span wires passed over the main trolley wire, and might become dangerous by contact with that wire, unless protected by artificial insulation. In the construction of the railway the wires were so arranged that occasional contact between the span wires and the trolley wire was likely to occur. The span wires were understood to be insulated from the main trolley wire by proper artificial insulation. Pursuant to his directions the plaintiff ascended the pole by a ladder to the height of about sixteen feet, with the expectation of climbing from that point to the top of the pole. Before leaving the ladder and for the purpose of steadying himself as he was about to ascend, he took hold with his left hand of an eyebolt connected with a support wire which ran from the pole to the next pole, and reached his right hand to take hold of an eyebolt to which was fastened a span wire. The support wire in some way made a ground connection. The span wire was not insulated, and was in contact with the trolley wire charged for use for railway purposes. As his right hand touched the eyebolt he received a severe shock, which caused him to fall to the ground, whereby he was injured. Several days prior to the accident the defendant had its attention called to a dangerous condition of the wires at this point, and it made no effort to discover the cause.

The court below found that the defendant was guilty of gross negligence, and that the plaintiff was not guilty of contributory negligence; and gave judgment for the plaintiff to recover substantial damages.

The reasons of appeal seem to be a summary of the defendant's argument upon the trial; and apparently the errors mainly relied on are the alleged erroneous conclusions reached by the court upon questions of fact. In his brief, however, the defendant claims that in finding gross negligence in the

construction of the defendant's wires, the court erred in measuring the legal duty of the defendant by an erroneous standard. The trolley wire as used by the defendant is charged with an agency of exceeding danger to life, and is capable of communicating such deadly quality to any wire or conductor of electricity that may come in contact with it. When the legislature authorizes a corporation to use such an agency in the public streets, the law implies a duty of using a very high decree of care in the construction and operation of the appliances for the use of that agency, requiring the corporation to employ every reasonable precaution known to those possessed of the knowledge and skill requisite for the safe treatment of such an agency, for providing against all dangers incident to its use, and holds it accountable for the injury of any person due to the neglect of that duty, whether the person injured is or is not one of its own employees. This standard of duty was correctly applied to the facts as found by the court below. The method of construction in connection with the failure to insulate the span wire, was a violation of the duty imposed on the defendant by law.

The defendant also claims in its brief that the court did not hold the plaintiff up to the degree of care fixed by law for persons engaged in hazardous undertakings. In so far as this claim implies that the court, while applying the legal standard of care for persons engaged in dangerous undertakings, erred in its finding from all the circumstances of this case that the plaintiff in fact did not neglect to use such care, it does not present a question which this court should review, and if it were open to review, the facts as detailed in the record would compel us to reach the same conclusion; in so far as the claim implies that the court did not recognize nor apply to the facts as found the legal standard of care, it is not consistent with the record,—the court made no ruling adverse to the defendant in respect to the standard of care required by law.

The finding gives a minute and clear recital of the circumstances of the accident. The conclusion of the court that the defendant was guilty of negligence was demanded by its

plain violation of a legal duty; and the finding shows that the conclusion that the plaintiff was not guilty of contributory negligence, was an inference from the special facts and circumstances peculiar to this case as found by the court from the evidence, and it does not appear from the finding, and is not assigned as error in the reasons of appeal, that in drawing such inference the court violated any rule or principle of law applicable to the facts as found. Such a conclusion cannot be reviewed in error; discussion of this point is barred by many recent decisions of this court.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

SAMUEL FRISBIE, ADMINISTRATOR, *vs.* EDWARD M. PRESTON ET AL.

First Judicial District, Hartford, March Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Section 588 of the General Statutes provides that a creditor of an insolvent estate who fails to present his claim within the time limited, shall be debarred of his claim unless he can show some estate not embraced in the inventory or accounted for by the executor or administrator, in which case he shall notify the latter, who shall make an additional inventory of such newly discovered estate and the Court of Probate shall thereon pass upon the claim and, if allowed, order so much of the avails of such newly discovered estate to be paid to him as will make him equal to the other creditors. *Held* that an administrator with the will annexed upon an insolvent estate, could not maintain a suit to set aside a voluntary conveyance of real estate made by his testator to the defendants, until the requirements of the statute had been complied with.

The additional inventory and the presentation and allowance of the claim, constitute the basis upon which all subsequent proceedings prescribed by the statute, or otherwise requisite, rest and depend. And if the complaint fails to aver that these steps have been taken, it is essentially defective and demurrable for that reason.

It is immaterial that the complaint avers that the land is needed to pay an indebtedness of the estate; for that fact can be made to appear in a legal way only by proper averments of a compliance with the statutory requisites.

Frisbie, Admr., v. Preston et al.

The complaint also averred that the person to whom the alleged debt was due, was entitled to a legacy of the same amount, which had been given by way of securing the debt, and prayed that upon this ground the deed to the defendants, if in fact delivered by the testator, might be set aside. *Held* that if the deed was delivered by the testator, the legacy would not be entitled to precedence over the voluntary conveyance thereby perfected in the defendants; that the plaintiff was not aided in his suit by the averments respecting the legacy, and that the demurrer to the complaint as a whole was properly sustained.

[Argued March 5th—decided March 26th, 1896.]

SUIT praying that a conveyance of certain real estate made by the plaintiff's intestate to the defendants might be adjudged void and set aside, and for other equitable relief; brought to the Superior Court in Hartford County and tried to the court, *Thayer, J.*, upon the defendants' demurrer to the complaint; the court sustained the demurrer in part and rendered judgment for the defendants, and the plaintiff appealed for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

John O'Neill, with whom was *Frank W. Etheridge*, for the appellant (plaintiff).

It was unnecessary for the plaintiff to allege a compliance with the provisions of § 588 of the General Statutes. *Minor* v. *Mead*, 3 Conn., 289; *Andruss* v. *Doolittle*, 11 id., 283; *Bassett* v. *McKenna*, 52 id., 438; *Booth* v. *Starr*, 5 Day, 419. One of the purposes of this bill is to remove the cloud from the title, and plainly a court of equity has this jurisdiction, irrespective of an inventory and order of sale by the Court of Probate. 1 Sw. Dig., t. p. 177; *Peasley* v. *Peasley*, 1 D. Chipman (Vt.), 331; *Martin* v. *Martin*, 1 Vt., 91; 2 Laws of Vermont (Thompson), 64; *McLean* v. *Johnson*, 43 Vt., 48. Courts of chancery as well as probate courts have jurisdiction to administer the estates of deceased persons. 1 Story's Eq. Jur., §§ 532, 550, 552. Another reason why the court should exercise its chancery powers is on the ground of mistake. Ellice Humiston believed her mortgage deed was good, and so believing, neglected to present her claim to commissioners.

Whether her mistake was one of fact or a mistake of law makes no difference, a court of chancery will aid her.

Theodore M. Maltbie, for appellees (defendants).

The administrator takes neither estate, title nor interest in the realty of his intestate. General Statutes, § 577, gives the administrator or executor possession of such real estate during the settlement of decedent's estate, and vests the income and products thereof in such representative. But under this statute the income of such real estate was not to be diverted from the heir or devisee, unless needed for the payment of debts. *Remington* v. *Amer. Bible Soc.*, 44 Conn., 512. If, under any circumstances, the administrator can institute proceedings to perfect the title or to set aside a conveyance by his decedent of real estate, he can only do so when in position to allege facts showing that he is duly authorized to appropriate the real estate, and that he has a right of action. He must allege the action of the Probate Court, the application for the order, the ground upon which it was asked, and the order itself. *Shelton* v. *Hadlock*, 62 Conn., 143. Under the circumstances of this case, it was necessary to allege that the property had been inventoried. General Statutes, §§ 578, 588. *Sackett* v. *Mead*, 1 Conn., 13; *Minor* v. *Mead*, 3 id., 289; *Williams* v. *Morehouse*, 9 id., 470; *Moore* v. *Holmes*, 32 id., 553; *Bassett* v. *McKenna*, 52 id., 437; *Beach* v. *Norton*, 9 id., 181. In the complaint, it is alleged that the conveyance to the defendants is voluntary. Such conveyance is valid, and the real estate is liable to be taken, if at all, only in the regular course of administration for the payment of debts duly allowed, and only so much thereof as is required for that purpose.

FENN, J. The sole plaintiff in the present action is, and is described as, the administrator with the will annexed on the estate of Eli D. Preston, late of Farmington, deceased. The defendants, seven in number, are alleged to claim interest in certain land by virtue of a deed of conveyance made, signed and acknowledged, by said Eli D. Preston in his life,

recorded on the land records of Farmington; which deed, it is further alleged, "was never delivered by the said Preston to the grantees named therein, and never became a completed conveyance, but the same was and is now null and void." A considerable part of the thirty-two paragraphs of the single count in the complaint is devoted to the statement of certain alleged obligations of the estate of said Eli D. Preston to his daughter-in-law, Ellice Preston, now by a subsequent marriage, Ellice Humiston, by reason of an indebtedness of $3,000 evidenced by a note for said sum and mortgage to secure the same on a portion of the land in question, and a legacy for the same amount, in the will. The relief claimed is: *First*, that the said deed of conveyance, which was made an exhibit, may be declared to be null void. *Second*, that "in the event that it shall be found that the deed . . . was delivered, then the plaintiff claims a decree that the land described in said mortgage deed shall stand charged with a mortgage, or an equitable incumbrance in favor of the plaintiff as such administrator, to the amount of three thousand dollars with the interest thereon; and that said mortgage or equitable incumbrance shall take precedence of the conveyance made to the defendants, or any of them. . . ." *Third*, such other relief as seems equitable. *Fourth*, "that said land described in said mortgage 'deed shall stand charged with the payment of three thousand dollars with the interest thereon in favor of the plaintiff for the use and benefit of the said Ellice Humiston."

The defendants on the same day, January 9th, 1896, filed a demurrer to the complaint and to the first, second and fourth prayers for relief, and also a motion to expunge certain paragraphs of the complaint as "immaterial and impertinent." The court, on the same day, January 31st, 1896, granted the motion to strike out, and sustained the demurrer as to the second and fourth claims for relief, and also the demurrer to the entire complaint, on the ground of demurrer —being the second ground—which reads as follows: "It is not alleged that said property has been inventoried as a part of the estate of Eli D. Preston, deceased, or that the Court

of Probate has ordered the sale of the same to satisfy debts or legacies."

The questions presented by the reasons of appeal relate to the correctness of these several rulings. In granting the motion to strike out, the court evidently regarded the allegations directed to be expunged as statements of evidence, not of ultimate, material or issuable facts. There can be no question as to the correctness of this view so far as most of the averments are concerned. The complaint, however, is so peculiar in its structure, that in order to decide regarding this ruling as to some of the statements, it seems material to enlarge the consideration to an extent which involves the correctness of the other rulings also. To illustrate: All the allegations in relation to the note and mortgage were striken out. With these absent, the complaint would contain no foundation for the second and fourth prayers for relief, the demurrer to which was sustained. Substantially the same may be said as to the statements regarding the legacy. These also were in effect expunged. If the retention of the allegations concerning either of these, or any other matters, would have made the complaint stronger to resist the final test of the demurrer to it as a whole, which was sustained, they should not have been expunged. If, on the other hand, the complaint as it originally stood was bad upon demurrer, these subordinate rulings were merged in the broader one and became immaterial. We will therefore come directly to the question which may be decisive of the whole matter.

Was the demurrer—treated as one to the entire complaint, with all its original allegations and prayers for relief—properly sustained? In considering this question we must from the outset, and throughout, keep in mind who the plaintiff is and in what capacity he sues, and is entitled alone to relief. We say this, because neither the complaint, nor the ingenious brief and able argument in support of its validity, appears to lead in the direction of such clear conception. Ellice Humiston (or Preston) is not a party to the record. So far as the claimed legacy is concerned, the will—made an exhibit—gave it to the plaintiff in trust, as executor of

such will. But the plaintiff avers that he declined to accept said trust as executor, and he nowhere alleges that he accepted any other trust, duty or obligation, except that of administrator of unadministered estate, in June, 1895, more than eight years after the death of the testator. He claims to be nothing else. He asserts nothing to show that he is anything else. He sues as nothing else than such administrator, and he is entitled to no relief except such as the complaint shows his right to, as such administrator.

Advancing then, from this starting point, the plaintiff claims that the facts alleged show him to be entitled to relief in some of the forms in which relief is demanded, on one or another of these grounds: that is to say, as based either upon the alleged indebtedness of the estate to Ellice Humiston, evidenced by the note and mortgage, or upon the legacy. The court below regarded the complaint as counting upon the indebtedness alone, and the rest as matters averred in explanation and support of such claim. But the plaintiff strongly protests against this view, and we will consider the case as broadly as he himself asserts it.

First, however, let us look at the matter of indebtedness. What appears in the complaint as bearing upon this? Eli D. Preston died March 16th, 1887. He was then indebted to Ellice Humiston in the sum of $3,000 for work and labor, a simple contract debt. On March 31st, 1887, the will of said Preston was probated. The plaintiff, therein named as executor, declined such appointment. Martin L. Parsons of Farmington was appointed administrator with the will annexed, accepted the appointment, gave bonds, and duly administered a portion of the estate—all, in fact, except the land now in question. On January 21st, 1890, said Parsons settled his administration account with said estate. In said account he charged himself with personal property and credits and choses in action only. The amount was $5,102.84. The credit amounted to precisely the same sum, exactly exhausting the estate. The largest item was, "By paid claims allowed, $4,014.09." Ellice Humiston presented no claim whatever against said estate, and nothing was allowed to or

paid to her out of said estate. The said estate was represented insolvent, and was and is in fact insolvent. The same was and is being settled as an insolvent estate. There is no other estate, except the land in question, to pay the said claim of said Ellice. The said land was not originally inventoried or claimed as any part of the estate of the deceased. And said land has never been administered upon as a part of said estate. On June 6th, 1895, said Martin L. Parsons resigned as administrator on said estate. His resignation was accepted. Afterwards, on July 6th, 1895, the plaintiff was duly appointed.

From the above facts it appears that Ellice Humiston, though a creditor of the deceased, has never become a creditor of his estate. The plaintiff, in his anxiety to subject the estate which he represents, to a liability in her behalf, states a reason thus: "The said Ellice did not present any claim against the estate of the deceased, because she believed her claim was secured by the said mortgage deed and note; and she continued to believe that the same was sufficient for her protection until after the time limited for presenting claims against said estate had expired." In reference to this, two principles enunciated by this court are significant. The first is stated by SEYMOUR, J., in *Cone* v. *Dunham*, 59 Conn., 145, 161. The other may be found in *Rhodes* v. *Seymour*, 36 id., 1, 7. The court, by BUTLER, J., said: "It is well settled by authoritative decisions in this State and elsewhere, that executors are agents or trustees only, whose duty it is to administer according to the will of the testator and according to law, and not to subject the estate by their admissions."

The provisions of General Statutes, § 588, are most specific, positive and absolute: "Every creditor of an insolvent estate who shall not exhibit his claim to the commissioners within the time limited, shall be debarred of his claim against said estate unless he can show some estate not embraced in the inventory or accounted for by the executor, administrator, or trustee." Here, then, is a creditor, the only existing one so far as the complaint indicates, whose claim is barred, unless, as asserted, there be "newly discovered estate." But

granting there is such estate, what does the statute then prescribe? "In which case he shall notify the executor," etc. Waiving this, which is not alleged, what next? "Who" (the executor, etc.) "shall make an additional inventory of such newly discovered estate." This is the prescribed initial step. The plaintiff, himself administrator, neither alleges in the complaint, in the first instance, that he has done this, or amends such complaint by so stating, after the court below has ruled it to be essential. Instead of this, he says in his reasons of appeal that such ruling is erroneous, and asks in his brief: "What purpose is served by inventorying this land? The administrator claims it. The defendants in their demurrer do not deny his right to it if needed to pay debts." We shall see presently that it is not shown to be needed to pay debts. But in answer to the question thus propounded by the plaintiff, one purpose served by the inventory would be that the direct and positive requirement of the statute to that effect would be complied with. If important to determine why such requirement was made, the decisions of this court, in other cases, supply abundant reasons. Such inventory is the basis and foundation upon which all the other proceedings prescribed by the statute, or requisite to be had, rest and depend. *Sacket* v. *Mead*, 1 Conn., 13, 19; *Minor* v. *Mead*, 3 id., 289; *Williams* v. *Morehouse*, 9 id., 470; *Beach* v. *Norton*, ibid., 182; *Andrus* v. *Doolittle*, 11 id., 283; *Moore* v. *Holmes*, 32 id., 553–558; *Blakeman* v. *Sherwood*, ibid., 324; *State* v. *French*, 60 id., 478. The plaintiff as administrator, until he made an inventory of the property in question, had no title or right to interfere with it, or to harass and vex those who have been in undisturbed possession of it under claim of record title derived from the deceased in his lifetime, during the entire settlement of the estate and for many years after. He says again in his brief, in treating this question, "One of the purposes of this bill is to remove the cloud from the title, and plainly, a court of equity has this jurisdiction." But "the jurisdiction of equity cannot be invoked to adjudicate upon the conflicting titles of parties to real estate. That would be to draw into courts of equity from the courts of law

the trial of ejectments. He who comes into a court of equity to get rid of a legal title which is alleged to cast a shadow over his own title, must show clearly the validity of his own title, and the invalidity of his opponent's. . . . The proper forum to try titles to land is a court of law, and this jurisdiction cannot be withdrawn at pleasure and transferred to a court of equity under pretense of removing clouds from titles." *Miles* v. *Strong*, 62 Conn., 95, 105.

For the validity of anything which may be called title or the equivalent for title in an administrator appointed for such purpose, and situated as the plaintiff is, to real estate held as this is, it is requisite that every provision of General Statutes, § 588, be complied with. First there must be an inventory; without this there can be nothing else. Then, of course, there must be more. The claim must be presented, not to the commissioners, whose duties are at an end; not to the administrator, who never had or has any duty, in passing upon the claim; but to the Court of Probate, which is required to decide upon it and allow what shall appear to be due the creditor. Thereupon an order is passed, as is further prescribed. Then, and then only, in a case like the present, does the condition of things exist which makes applicable to it, in its entirety, what was said by this court in *Bassett* v. *McKenna*, 52 Conn., 437, 438: "It is too late in Connecticut to question the right and the duty of an administrator to inventory property fraudulently conveyed by his intestate, when that property is needed for the payment of debts, and to institute all necessary proceedings to appropriate the property to that use." Then, and then only, does it appear that there is a debt to be paid, for which, therefore, property—the property in question—is needed, and that it is claimed by the estate as assets for that purpose. Then the administrator has title in the sense that he is entitled: that it is his right and duty to institute necessary proceedings to appropriate the property to that use. In the absence of the allegations referred to, and of anything in any sense equivalent thereto, the demurrer, as based upon this part of the claim, was properly sustained.

But, as we have seen, the plaintiff further contends that he is entitled to the relief demanded in his second and fourth prayers. Concerning the note and mortgage, the allegations in the complaint are to the effect that on October 27th, 1886, the said Eli D. Preston made a note to secure his alleged indebtedness of $3,000 to Ellice Humiston, and secured such note by a mortgage deed of a portion of the land now claimed; that this mortgage was recorded in Preston's lifetime, but that it was delivered to said Ellice by the scrivener who drew the deed, after the death of said Eli D. Preston. It is further stated that "on the 14th of June, 1894, the said Ellice Humiston, believing that the said note and mortgage were good and valid, brought an action before the Superior Court for Hartford County, on the first Tuesday in September, 1894, and such proceedings were had that on April 11th, 1895, said court adjudged said note and mortgage deed to be void, and the same were declared to be invalid and of no effect." It may be added that the case just referred to, brought by said Ellice Humiston against the present defendants, came upon appeal by the said Ellice before this court, which sustained the judgment of the Superior Court which embraced also a judgment against said Ellice upon a cross bill, supporting the defendants' claim that said mortgage constituted a cloud upon their title. Thus, in addition to the want of title in the then plaintiff, the validity of the defendants' title, a question necessarily involved, (*Miles* v. *Strong*, *supra*,) was decided in a suit in which said Ellice was a party. It is unnecessary to decide either question again for her benefit in a suit in which she is not a party. Besides, it is a matter in which the present plaintiff has, in the capacity in which he sues, no interest or concern. There is no error upon this point.

One ground remains: the plaintiff asserts the land is needed to constitute assets for the payment of the legacy. Much of what has already been said applies to this claim. But further, it does not appear, nor is it claimed, that Ellice Humiston can be at the same time a creditor and a legatee. It is asserted that she is one or the other. The legacy is

spoken of as having been provided to secure payment to her of the debt due from the testator. She has never claimed the legacy. She has sought to recover the debt by the attempted foreclosure of a part of the land in question. So far as it appears it may be for her interest still to insist upon the debt. The complaint prays for relief in the event that it shall be found that the deed to the defendants *was* delivered, though the complaint alleges that it was not. If delivered, the legacy would not be entitled to precedence over the voluntary conveyance thereby perfected. Apparently the former proceeding between Ellice Humiston and the defendants, which we have referred to, settled that question as against her. The plaintiff, then, has neither the color of right which would come from an inventory, a finding of the Court of Probate that the land is needed to pay the legacy, and an order of sale for that purpose; but instead, he is asking relief because property is needed to pay a legacy left by the will of one whose estate, he alleges, "was and is in fact insolvent, and was and is being settled as an insolvent estate." An estate made insolvent, perhaps, it may be said, by the claim, not abandoned, but pressed at least by him, of the very person as a creditor whom he is endeavoring with or without her assent to assist as a legatee; doing this at the same time, in the same action, by allegations relating to the inconsistent matters sometimes in different, and sometimes in the same, paragraphs of the single count of his complaint. Here, also, we think the court below did not err.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

TOWN OF ENFIELD *vs.* TOWN OF ELLINGTON.

First Judicial District, Hartford, March Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The certificate of a public officer under his official seal, as to the contents of a record in his custody, is not admissible as a copy of such record, or of the fact therein recited; even if such certificate is duly sworn to and otherwise properly authenticated.

The official registry lists of electors and the original check lists used in the elections, are competent evidence tending to prove the domicil of a person whose name appears thereon, and, if his name is checked on the latter lists, of the fact that he voted on such occasions. The case of *New Milford* v. *Sherman*, 21 Conn., 101, in so far as it is inconsistent with this doctrine, is overruled.

In determining whether ancient documents offered as and purporting to be original official records, are in fact such, their general appearance, the place where they were found and the length of time during which they were known to have been there, are all matters entitled to weight. The omission of the proper attestation may render it less easy to identify such documents, but does not destroy their character as records, when shown to be such by other proof.

The facts upon which the judgment of a trial court is founded cannot be retried in this court on appeal; and therefore the refusal of the trial court to certify, as part of the record, the evidence bearing on claims of fact which the finding states were not proven, and upon which certain questions of law, as alleged in the reasons of appeal, are predicated, is not ground for a new trial. (*Two judges dissenting.*)

[Argued March 3d—decided April 15th, 1896.]

ACTION to recover upon two counts for supplies furnished paupers alleged to belong to the defendant town, brought to the Court of Common Pleas in Hartford County and tried to the court, *Walsh, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiff for alleged errors in rulings upon evidence, and also in conclusions of fact, in view of the subordinate facts detailed in the finding, and because certain facts were alleged to have been found against the evidence. *Error in judgment upon the second count, and new trial granted upon that count only.*

The case is sufficiently stated in the opinion.

Charles H. Briscoe and *George B. Fowler*, for the appellant (plaintiff).

The court erred in finding that the residence of Bennett and Madison was interrupted, or that their absences from Ellington were such as to amount to a *legal interruption* of the continuity of residence. *Town of Salem* v. *Town of Lyme*, 29 Conn., 81; *Charter Oak Bank* v. *Reed*, 45 id., 395; Jacobs on Domicil, § 72; Wharton on Confl. of Laws, § 21; *City of Hartford* v. *Champion*, 58 Conn., 275. A residence once gained is presumed to continue until a new domicil or residence is acquired. *First Nat'l Bank* v. *Balcom*, 35 Conn,, 358, and cases there cited; *Easterly* v. *Goodwin*, 35 id., 286; *Clinton* v. *Westbrook*, 38 id., 12; *City of Hartford* v. *Champion*, *supra;* Jacobs on Domicil, § 122; *Chicopee* v. *Whateley*, 6 Allen, 508. No evidence was introduced to show a legal residence or settlement in any town, save Ellington. The public records and official registers were admissible as competent evidence of the facts contained, provided such facts were relevant to the issue. 1 Greenleaf's Ev., §§ 483, 484; Stephens' Dig. of Ev., § 34. These records were all originals, and the only anthentication necessary, therefore, was proof that they came from the proper repository. 1 Greenleaf's Ev., § 485; *Phelps* v. *Hunt*, 43 Conn., 198. It is firmly established that the exercise of political rights is one of the *criteria* of domicil, and admissible to prove it. Jacobs on Domicil, § 435; 5 Amer. & Eng. Ency. of Law, 871, and cases there cited; *Shelton* v. *Tiffin*, 6 How., 185; *Easterly* v. *Goodwin*, 35 Conn., 285; *Kellogg* v. *City of Oshkosh*, 14 Wis., 678; *Charter Oak Bank* v. *Reed*, 45 Conn., 395; *East Livermore* v. *Farmington*, 74 Me., 174; *Weld* v. *Boston*, 126 Mass., 169; *Harris* v. *Whitcomb et al.*, 4 Gray, 434; *Behrensmeyer* v. *Kiertz*, 135 Ill., 622. As to the authenticity of the lists of 1866 and 1867, the lack of signatures was not conclusive. *People* v. *Pease*, 27 N. Y., 472. Under § 5 of Chap. 100 of the Pub. Acts of 1895, the plaintiff was entitled to have the evidence bearing upon the facts claimed to have been proven, certified up as part of the record.

Charles Phelps, for the appellee (defendant).

The documents offered by the plaintiff were not shown to be the official records of Ellington; and even if they were, they would be inadmissible to prove Bennett's residence or settlement in that town. *New Milford* v. *Sherman*, 21 Conn., 112. The principle laid down in the case of *Bethany* v. *Oxford*, 15 Conn., 555, is in complete conformity with this doctrine; for there it is expressly stated that a person may have the right to vote in one town, and at the same time acquire a settlement in another. How then, can the fact that such a person was admitted as an elector in a given town, affect the question of his settlement? *Inhabitants of Ellsworth* v. *Inhabitants of Gouldsboro*, 55 Me., 95; *Tamworth* v. *Freedom*, 17 New Hamp., 279. The paper offered in evidence and purporting to be the discharge papers of Leonard E. Madison from the United States Army, did not appear to be either the original paper or a copy of the same; and was not admissible, even if it had been an original, or a certified copy. The trial court did not err in refusing to certify the evidence requested by the plaintiff in support of its bill of exceptions. *Styles* v. *Tyler*, 64 Conn., 432. Moreover the Act of 1895, although in force when the reasons of appeal were filed, was not operative when the trial court was called upon to make up its finding.

BALDWIN, J. It became important during the trial for the plaintiff to prove the date when Leonard E. Madison, who had been a soldier during the civil war in a Massachusetts regiment, was discharged from the service. For this purpose a certificate was offered in evidence, dated in 1884, from the Adjutant General of Massachusetts, under the seal of his department, that this name was borne upon the muster roll of a certain Massachusetts regiment, and which gave the date of enlistment and discharge, both being in the year 1865. This paper was properly excluded. It was not a copy of a record, but at most only an unsworn statement of certain of the contents of a record, and would have been inadmissible, even had it been properly authenticated.

The finding states that Artemas Bennett resided in Ellington during 1858, 1859, and 1862, and during part of each of the years 1860, 1861, 1863, 1865, 1866, and 1867, and that during some of the years intervening between 1860 and 1868 he voted there; but that he never had the continuous residence in the town for six years, which was necessary to give him a settlement. The plaintiff, in order to show that his residence there was continuous for six years, offered in evidence the original official registrars' lists of the electors of the town for 1861, 1862, 1863, and 1864, which were also used as check lists at the April elections in those years. Each of these contained Bennett's name, and it was checked on each to denote that he had voted. The plaintiff also offered, for the same purpose, papers which it claimed to be the official registrars' lists of electors for 1866 and 1867, on which his name also appeared, and had been checked. They were found among the papers of the town, but bore no official attestation or signatures, nor was there any other proof that they were part of the town files or records. The documents thus offered were all excluded.

The four original registrars' lists were competent evidence that Bennett was an elector and voted as such for four consecutive years. They were records of those facts, made by public officers in the course of their official duty, under a law which required such lists to be kept on file in the town clerk's office, and carefully preserved. Public Acts of 1860, p. 39, § 8. *Hyde* v. *Brush*, 34 Conn., 454. Neither registry as an elector, nor the exercise as such of the right of suffrage, is conclusive evidence of domicil; but it tends to prove it, and may be shown by record entries. The ruling of the trial court was doubtless based on the case of *New Milford* v. *Sherman*, 21 Conn., 101, 112; but the observation there made with respect to a similar question cannot be supported on principle.

The finding as to the papers offered as the lists of 1866 and 1867 is not entirely explicit. If they were found among the papers of the town, in the town clerk's office, under such circumstances as to indicate that they were the original lists,

left there on file, they should have been received, although bearing no official signatures or authentication. The omission of the proper attestation renders it less easy to identify the documents, but does not destroy their character as records, when shown to be such by other proof.

The same considerations apply to the ruling of the trial court in excluding a book found among the records of the town, which contained an entry, neither dated nor signed, of the admission of Bennett as an elector of the town on April 5th, 1858. If this book was an original record, it should have been received in evidence; and in determining whether it was such, its general appearance, the place where it was found, and the length of time during which it was known to have been there, were all matters entitled to weight. If the entries looked as if they had been made by public officials, contemporaneously with the facts which they recorded, the book would be supported by the ordinary presumptions attaching to ancient documents, which have been in existence for thirty years.

None of the other exceptions to rulings of the court in respect to the admission of evidence have sufficient foundation to justify their discussion.

There is nothing in the subordinate facts that are found, under either count, that is inconsistent with the ultimate conclusion that there had been no sufficient length of residence in the defendant town, by either of the paupers in question, to confer a settlement.

Final judgment in the Court of Common Pleas was rendered on July 3d, 1895, and a request was filed within two weeks for a special finding, upon which to base an appeal. The plaintiff asked for the incorporation in this finding of certain facts, which it claimed to have been proven, and among others, that Leonard E. Madison was born in Ellington, and not before 1849, that being a condition of things upon which a certain claim of law was predicated. A finding was subsequently made, in which these claims of fact were stated to be not proven, and the plaintiff then filed ex-

ceptions, and asked to have the evidence bearing upon them certified as a part of the record. This was refused.

In the opinion of a majority of the court, it was properly refused, because the facts on which the judgment of a trial court is founded, cannot be retried here on appeal. *Styles* v. *Tyler*, 64 Conn., 432; *Curtis* v. *Bradley*, 65 id., 99, 104. This being so, the failure of the Court of Common Pleas to certify the evidence is not ground for a new trial.

That no error was thus committed is also my own opinion; but only because the Act of 1893, upon which the appellant relied, did not contemplate a review on appeal of conflicting evidence upon any point as to which a result had been reached which was not "clearly against the weight of evidence," (Public Acts of 1893, p. 319, § 9); and that, if it was claimed that such was the case in regard to the fact in question, this should have been distinctly alleged in connection with the exceptions to the finding and the request to certify.

I concurred in the result reached by the court in *Styles* v. *Tyler*, and also in the position that the terms of the Act of 1893 were not such as to require us to determine, upon evidence spread upon the record, questions of pure fact settled by the trial court, and not connected with any questions of law as to the decision of which error was assigned. *Styles* v. *Tyler*, 64 Conn., 432, 466. I believe, however, that the legislature could and did by that statute require us to determine, upon such evidence, whether a fact material to the disposition of a question of law, on which error was assigned, had been found clearly against the weight of evidence.

It has been found that the interests of justice require that a power to set aside verdicts rendered against evidence should exist, not only in our courts of original jurisdiction, but in this court. The modern extension of the practice of trying issues of fact to the court, has greatly multiplied the instances in which it is possible that the trial judge may draw erroneous conclusions of fact from the evidence before him. Where this occurs, and the result is that a judgment is rendered which the law, on the facts actually existing, would not warrant, I do not perceive why the legislature may not

give a remedy by appeal to this tribunal. If the decision of twelve men may sometimes be plainly wrong, I see no reason why the opinion of one man may not be, also. Whether any remedy, offered in this court, is styled an appeal or a motion for a new trial, seems to me quite unimportant. *State* v. *Clerkin*, 58 Conn., 98, 102. The Supreme Court of Errors, as I read the Constitution (Art. V., § 2), is one the powers and jurisdiction of which were left to be defined by the General Assembly, and so subject to legislative enlargement or restriction, from time to time; provided only its character, indicated by its name, as the highest court in the State, and as a court of errors, is fully preserved.

If the General Assembly would have a right to give to this court power to set aside the entire judgment of an inferior court, because it was rendered on a finding of facts by the trial judge which was clearly against the weight of evidence, I think it had power to do less, that is, to enlarge the remedy by appeal for errors in law, by requiring us to review the evidence on which the material facts were found, from which were drawn the legal conclusions resulting in the judgment.

To hold otherwise seems to me to be, first, to read into our Constitution a provision which is not to be found there in terms, confining the powers of this court to the redress of errors in law, and then to give to this gloss a very broad interpretation, which in a corresponding degree narrows the functions of the legislative department of the government,—a department which has been thought to possess a jurisdiction more extensive than that usually accorded to that branch in the other States of the Union. *Starr* v. *Pease*, 8 Conn., 541; *Wheeler's Appeal*, 45 id., 306, 315.

For these reasons, while concurring in the judgment of the court in this case, I dissent from the ground on which is based our disposition of the objection made to the refusal of the Court of Common Pleas to certify the evidence as to the place and time of Madison's birth.

There is no error in respect to the first count; but so much of the judgment as respects the second count is set aside, and a new trial granted as to that count only.

In this opinion ANDREWS, C. J., TORRANCE and HAMERSLEY, Js., concurred, except as respects that portion in which the views of the writer, differing from the majority of the court, are expressed, as to the ground on which should be placed the disposition of the reason of appeal based on the refusal of the Court of Common Pleas to certify the evidence.

FENN, J., concurred in the opinion, and with the views of JUDGE BALDWIN in so far as they differed from those of the majority of the court.

ALFRED NEILSON *vs.* THE HARTFORD STREET RAILWAY COMPANY.

First Judicial District, Hartford, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN AND HAMERSLEY, Js.

While the statute permits the taking and use of a deposition under certain conditions, yet the oral testimony of the witness in open court is still regarded as the better evidence. Accordingly if the deponent is present at the trial and able to testify, his deposition is inadmissible, except under certain circumstances to contradict his oral testimony.

This court will not review, under Chap. 100 of the Public Acts of 1895, alleged errors of a trial judge in reaching specific conclusions of fact from the evidence, where such review is sought, not for the purpose of correcting the finding in order to present a question of law, but for the sole purpose of obtaining a new trial of the cause. The Act of 1895, equally with the similar Act of 1893, is only in aid of appeals for errors in law.

[Argued January 10th—decided April 15th, 1896.]

ACTION to recover damages for personal injury caused by the defendant's negligence; brought to the City Court of Hartford, and tried to the court, *McManus, J.*; facts found and judgment rendered for the plaintiff for $3,800 damages, and appeal by the defendant, mainly for alleged errors of fact upon the part of the trial judge. *No error.*

The case is sufficiently stated in the opinion.

E. Henry Hyde, Jr., for the appellant (defendant).

The Act of 1895 differs materially from the Act of 1893, and was evidently intended by the legislature to avoid the constitutional defects of the Act of 1893, in so far forth as it may have been intended to provide a method by which errors of fact committed by an inferior court could be rectified by this court. *Styles* v. *Tyler*, 64 Conn., 432. The Act of 1895 avoids any attempt to impose upon this court the duty of determining any question of fact, and of rendering final judgment thereon, but provides simply that if this court shall find that material facts have been found against the evidence, or without evidence, or that material facts have been proven and not found, it shall correct the error into which the inferior court may have fallen, by granting a new trial of the case. The legislature has the constitutional right, in defining the power and jurisdiction of courts, to impose upon this court the exercise of the power itself. *Wheeler's Appeal*, 45 Conn., 315. When a deposition is once taken for good cause and has thus become legal evidence, it continues to be legal evidence, notwithstanding that the original cause for taking the deposition does not exist at the time of the trial. The cases of *Larkin* v. *Avery*, 23 Conn., 324, and *Spear* v. *Coon*, 32 id., 292, may be claimed as authorities to support the ruling of the court in this case, but we submit that neither of the cases quite touch the point at issue.

Edward D. Robbins and *Andrew J. Broughel, Jr.*, for the appellee (plaintiff).

The decisions of this court upon the similar Act of 1893, established principles at variance with any such construction of chapter 100 of the Public Acts of 1895, as must be invoked to sustain the contentions of defendant's counsel. *Styles* v. *Tyler*, 64 Conn., 432; *Meriden Savings Bank* v. *Wellington*, ibid., 553. The ruling of the court upon the deposition of Bertha E. Hunter was correct. It has been held in many cases that a deposition cannot be used if the witness can be produced in court by the party desiring his testimony. *Larkin* v. *Avery*, 23 Conn., 304; *Spear* v. *Coon*,

32 id., 292; *Hayward* v. *Barron*, 38 N. H., 370; *Clough* v. *Bowman*, 15 id., 515; *Doe ex dem. Sergeant* v. *Adams*, 1 Tyler (Vt.), 197; *Weed* v. *Kellogg*, 6 McLean (U. S.), 44; *Dunn* v. *Dunn*, 11 Mich., 284; *Emlaw* v. *Emlaw*, 20 id., 11; *Boetge* v. *Landa*, 22 Tex., 105; *Chapman* v. *Kerr*, 80 Mo., 158; *Mobile Life Ins. Co.* v. *Walker*, 58 Ala., 290; *Brewer* v. *Beckwith*, 35 Miss., 467; *Commercial Bank of Columbus* v. *Whitehead*, 4 Ala., 637; *Goodwyn* v. *Lloyd*, 8 Porter, 237; *Fry* v. *Bennett*, 4 Duer, 247; *Browner* v. *Frauenthal*, 37 N. Y., 166.

TORRANCE, J. This is an action to recover damages for bodily injury claimed to have been caused by the negligence of the defendant.

The case was brought to the City Court of Hartford at its January term, 1895, and upon a default and hearing in damages judgment was rendered at the following October term for the plaintiff, for substantial damages.

Upon the trial the defendant offered in evidence the deposition of one Bertha E. Hunter, taken in February, 1895, because, as was alleged, the witness was about to depart from this State. When the deposition was thus offered the witness was present in court, having been summoned by the plaintiff; she was under no disability to testify, and no claim was made that she was hostile to the defendant. Under these circumstances the plaintiff objected to the admission of the deposition, and the court excluded it, but said the defendant might introduce it, if necessary or desirable to contradict the oral testimony of the witness. To this ruling the defendant excepted.

Under the provisions of chapter 100 of the Public Acts of 1895, the defendant incorporated in its request for a finding, certain facts which it claimed had been proved on the trial, and asked the court to make them a part of the finding. Subsequently the court made a finding of facts, but refused to find certain facts embodied in the request. The defendant duly excepted in writing to the finding, because of such refusal, and also because the court had found there-

in certain facts which the defendant claimed were not warranted by the evidence; and requested the court to certify to certain evidence bearing upon both points, which it claimed to be material, and this was done. From the judgment rendered, the defendant took the present appeal for the errors of law and of fact which it claimed the trial court had committed.

The reasons of appeal are thirty in number. The first three allege in substance that the court erred "in holding as a matter of law upon the facts *proved*," that the injury was due to the defendant's negligence, and that the plaintiff was entitled to substantial damages; the fourth and fifth relate to the action of the court in refusing to admit the deposition in evidence; while all the rest relate solely to claimed errors of the trial court in finding, or in refusing to find, certain specific facts.

Upon the argument here the question was mooted whether this appeal was properly taken under said Act of 1895, inasmuch as the action was pending when that Act took effect, and § 1 of the General Statutes provides that "the passage or repeal of an Act shall not affect any action then pending"; but there is no occasion to discuss or decide that question here, for if the Act of 1895 can be deemed applicable to the case, it affords no ground for any of the exceptions to the finding relating to questions of fact.

The only error of law which the defendant claims upon the finding as made by the court below, is the refusal to admit the deposition, and this action of the court, under the circumstances, was clearly right.

All the statutory provisions of this State relating to the taking and use of depositions in civil causes, impliedly recognize the existence of the common law rule that witnesses must be produced and examined orally before the court or jury; and those provisions were made to dispense with that rule only in certain specified cases, where, if it were enforced or insisted upon, testimony would be lost or great expense and inconvenience would have to be incurred in order to comply with the rule.

This common law rule is the general rule to be enforced by the court, unless the statutory conditions exist for dispensing with it, and the statutory requirements relating to depositions have been substantially complied with.

In the case at bar the deposition was taken solely because it was supposed the witness would be absent from the State at the time of the trial; but it turned out that she was present in court at the trial, and was capable of testifying orally had the defendant seen fit to call her as a witness. Under such circumstances the rule in this State and in many others under similar statutory provisions, is to exclude the deposition. The oral testimony of the witness in open court is still regarded as the better evidence, and the right to substitute for it a deposition, does not exist in a case like the one at bar. The rule in question is recognized expressly or by clear implication in the following cases in this State and elsewhere. *Larkin* v. *Avery*, 23 Conn., 304; *Spear* v. *Coon*, 32 id., 292; *Hayward* v. *Barron*, 38 N. H., 366, 370; *Dunn* v. *Dunn*, 11 Mich., 284; *Emlaw* v. *Emlaw*, 20 id., 11; *Chapman* v. *Kerr*, 80 Mo., 158.

This disposes of the only question of law presented for review upon this appeal, and leaves for consideration the question raised upon the record concerning the alleged errors of fact; and this involves the construction of chapter 100 of the Public Acts of 1895.

The errors alleged, upon this part of the case, are purely and simply errors of fact; that is, they are errors of a judge in reaching specific conclusions of fact from, and upon consideration of, the evidence in the case; and the review of these errors of fact is not sought for the purpose of correcting the finding in order to present the only question of law decided by the trial court adversely to the defendant, for that is sufficiently presented without such review; but it is sought solely for the purpose of obtaining a new trial of the cause.

The provisions of the repealed Act of 1893 (Chap. 174, Public Acts of 1893), with the exception of those which were contained in sections 4 and 9, are substantially embodied in

the Act of 1895. Section 4 of the Act of 1893 required the trial judge to indicate the paragraphs of the request for a finding which he found "proven" or "not proven"; the Act of 1895 contains no such provision. Moreover, there is a difference between the provisions contained in section 9 of the Act of 1895, and those which were contained in the corresponding section of the Act of 1893; and it is upon this difference that the defendant founds its claim to have the errors of fact reviewed upon this appeal.

Before considering the points of difference between the two statutes, it may be well to note briefly their points of resemblance. They are alike in limiting the right of appeal to this court upon questions of mere fact, to cases involving errors of law. If no claimed errors of law were presented by the record, an appeal for alleged errors of fact was not allowed by the terms of the Act of 1893; nor, except under the same limitation, is such an appeal allowed under the Act of 1895, as is manifest by the first section of both Acts. The provisions for making and perfecting the record to come before this court, are substantially the same in both Acts; except that, as before stated, the provisions of section 4 of the Act of 1893 are not contained in the present Act. The Act of 1893 did not require all the evidence in the case, nor even all the evidence bearing upon any fact or facts which the court found or refused to find, to be made a part of the record; but only such evidence as either party claimed to be material, and which the trial court allowed. (Section 6, Act of 1893.) The provisions of the Act of 1895 as to this matter, are substantially the same. (Sections 5, 6 and 7, Act of 1895.) The Act of 1893 (§ 7), in cases involving errors of law, in terms at least, allowed an appeal from specific facts which the court found or refused to find, however trivial and subordinate and however numerous; and did not necessarily require such appeal to be from the entire finding, nor from the main conclusion of fact reached by the trial court. This same provision is embodied in § 7 of the Act of 1895.

The points thus briefly noted are the main points of resemblance between the two Acts, and it remains to indicate

the main point of difference between them. This is found in the provisions of § 9 of the Act of 1895, as compared with § 9 of the Act of 1893. The two sections read as follows:

Act of 1893.	*Act of* 1895.
"The Supreme Court of Errors shall review all questions of fact raised by the appeal as well as all questions of law, and in all cases where no evidence has been improperly admitted or excluded in the trial court, shall determine the questions of fact and law and render final judgment thereon. In passing upon said questions of fact, said Supreme Court shall not reverse the finding of the trial court upon any question of fact, unless it find the conclusions of such trial court clearly against the weight of evidence."	"The Supreme Court of Errors shall review all questions of fact raised by such appeals, and if it appears that the finding of the court does not present the questions of law decided by the trial court, said Supreme Court shall correct such finding. And if the Supreme Court of Errors shall find that material facts have been found against the evidence or without evidence, or material facts have been proved and not found, the court shall grant a new trial."

On comparing these two sections, if the language of each is taken literally and each is read and construed without reference to the other parts of the respective Acts, the difference between them, speaking in a general way, seems to be this: The first required this court to review specific questions of fact and to determine them, for the purpose, in a certain contingency, of rendering final judgment in the cause; while the second requires this court to review and determine specific questions of fact for two purposes, namely, with a view to the correction of the record, and with a view to granting or refusing a new trial.

The only question of law presented by this appeal is that relating to the admission of the deposition, and none of the numerous exceptions in the finding bear in any respect upon

the facts which led the court to exclude it. They are not, therefore, exceptions which this court could consider under the Act of 1895, which is only in aid of appeals for errors in law.

There is no error in the judgment appealed from.

In this opinion the other judges concurred.

JORDAN, MARSH & CO. *vs.* JAMES T. PATTERSON ET AL.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

In the absence of fraud the interpretation and legal effect of written instruments expressed in clear, unambiguous terms, is a question of law for the court, not one of fact for the jury. Such interpretation is none the less a question of law because it may be aided by the use of intrinsic evidence showing the circumstances under which the instruments were written, and the practical construction placed thereon by the conduct and acts of the parties.

The plaintiffs, who had previously bought goods of the defendants, sent them fourteen separate orders for goods of their manufacture, each one specifying the quality and price of the garments ordered, the date on which they were to be delivered, and the time of payment. The defendants replied acknowledging and describing the orders received, expressed their thanks therefor, and subsequently delivered a portion of the garments to the plaintiffs, but thereafter declined and refused to manufacture and deliver the balance; and for this breach the plaintiffs sued them for damages. Upon the trial the defendants claimed that their letter did not constitute an acceptance of the orders, or at all events was an acceptance of some one only of the fourteen; that each order constituted a separate contract, and that the plaintiffs could recover only on one of the fourteen orders. *Held* that the trial court erred in not instructing the jury, as matter of law, that the defendants' letter constituted an acceptance of all the orders named in it.

For a breach of the vendor's agreement to deliver goods, the general rule is that the vendee is entitled to recover as damages the difference, at the time and place of delivery, between the contract price and the market price, if the latter exceeds the former. If there is no market where the vendee could have supplied himself with like goods, he is entitled to recover the actual damages which he has suffered.

If, by reason of special circumstances alleged in the complaint, larger dam-

ages are claimed by the vendee, either for profits prevented or losses sustained, they must ordinarily be confined to such as result from circumstances which may reasonably be supposed to have been in the contemplation of the parties when they made the contract. If at that time the vendor knew that the vendee had already contracted to sell a portion of the goods to others at a profit, the damages recoverable may fairly include such profits. If he knew that the vendee had ordered the goods to sell them thereafter at a profit, he is chargeable with knowledge of such profits as the market price, at the time of delivery, would have brought the vendee; and evidence of sales made by the vendee is admissible as tending to prove such market price. Under such circumstances the vendor is also liable for such damages as the vendee may have sustained by reason of the latter's inability to deliver the goods pursuant to his contracts of sub-sales; and the vendee in entitled to prove such damages.

Whether the circumstance from which the loss results or the gain is prevented, is or is not one which may be reasonably considered to have been in the contemplation of the parties at the time they made the contract, is, from the necessities of the case, a preliminary question for the decision of the trial judge, before evidence of losses suffered or gains prevented can be laid before the jury. If, however, the evidence is admitted, the jury should be instructed to disregard it if they reach a different conclusion upon the preliminary question.

One of the plaintiffs' traveling salesmen, sent out to sell by sample some of the goods which the defendants had contracted to make, was called to prove the sub-sales, and, among other questions, was asked if he knew by whom the goods were to be manufactured, and replied that he did through the plaintiffs' buyer. On objection this question and answer were excluded. *Held* that as the purpose of the inquiry was to show what the witness was to represent to the plaintiffs' customers as to the manufacture of the goods, the question and answer should have been admitted.

The plaintiffs' buyer was asked, respecting certain of the goods ordered of the defendants, at what price they would have been sold at retail. On objection the court excluded the question. *Held* that assuming the witness had knowledge of the market price at which such goods would have been sold, the question was proper and his answer would have been relevant.

[Argued January 21st—decided April 15th, 1896.]

ACTION to recover damages for the breach of a contract to manufacture and deliver goods, brought to the Superior Court in Fairfield County and tried to the jury before *Robinson, J.*; verdict and judgment for the plaintiffs, for $106.15 only, and appeal by them for alleged errors in the rulings and charge of the court. *Error, new trial granted.*

The case is sufficiently stated in the opinion.

John H. Perry and *George E. Hill*, for the appellants (plaintiffs).

The rulings and charge of the court upon the question of damages were erroneous and prejudicial to the plaintiffs. *Griffin* v. *Colver*, 16 N. Y., 489; *Devlin* v. *Mayor*, 63 id., 8; *Cohn* v. *Norton*, 57 Conn., 493; 1 Suth. on Damages, 134; *Elbinger* v. *Armstrong* L. R., 9 Q. B. Cases, 473; *Baxendale* v. *Railway Co.*, L. R. 10 Ex., 35; *Reggio* v. *Braggiotti*, 7 Cush., 166; *Randall* v. *Raper*, 96 E. C. L., 82; *Hubbard* v. *Rowell*, 51 Conn., 423; *Simpson* v. *L. & N. W. Ry. Co.*, L. R. 1 Q. B. Div., 274; *Cory* v. *Iron, W'k Co.*, L. R. 3 Q. B. Cas., 181; *Trigg* v. *Clay*, 88 Va., 330; *Loescher* v. *Deisterberg*, 26 Ill. App., 520; *McHose* v. *Flumer*, 73 Pa. St., 365; *Lewis* v. *Roundtree*, 79 N. C., 122; *Howard* v. *Stillwell Mfg. Co.*, 139 U. S., 206; *Wakeman* v. *Wheeler*, 101 N. Y., 205; *Richardson* v. *Chynowath*, 26 Wis., 659; *Bank Note Co.* v. *Commissioners*, 79 Va., 573; *Crawford* v. *Parsons*, 63 N. H., 438; *Dunlop* v. *Higgins*, 1 H. of L. Cas., 381; *Hassard-Short* v. *Hardison*, 114 N. C., 482; *Frazer* v. *Smith*, 60 Ill., 146; *Railway* v. *Hill*, 70 Texas, 51; *Harrow Spring Co.*, v. *Harrow Co.*, 90 Mich., 147; *Taylor Mfg. Co.* v. *Hatcher Mfg. Co.*, 39 Fed. Rep., 440. The court also erred in allowing the jury to say what the legal effect was of the plaintiffs' order and its acceptance by the defendants. This was a question for the court, not the jury. *Hotchkiss* v. *Higgins*, 52 Conn., 213; *Bailey* v. *R. R. Co.*, 17 Wall., 105.

Morris W. Seymour and *John C. Chamberlain*, with whom was *Howard H. Knapp*, for the appellees (defendants).

The charge of the court relative to a recovery of profits on the plaintiffs' sub-sales was correct. *Hadley* v. *Baxendale*, 9 Ex., 341; *Messmore* v. *Shot Co.*, 40 N. Y., 422; Wood's Mayne on Damages, § 41; Sedgwick on Damages (6th ed.), 313, and particularly note citing *Williams* v. *Reynolds*, 34 L. J. (N. S.) 2 Q. B. 221; *Booth* v. *Spuyten Duyvil R. R. Co.*, 60 N. Y., 488; *Wetmore* v. *Patterson*, 45

Mich., 439; *Coxburn* v. *Ashland*, 45 Wis., 619; *Peace River Phos. Co.* v. *Graffling*, 58 Fed. Rep., 550; *Howard* v. *Mfg. Co.*, 139 U. S., 199; *Pennypacker* v. *Jones*, 106 Pa. St., 237; *Howe Machine Co.* v. *Bryon*, 44 Iowa, 159; *Butler* v. *Moore*, 69 Ga., 780; *Union Refining Co.* v. *Barton*, 77 Ala., 148; *Sledge* v. *Reid*, 73 N. C., 440; *Thol* v. *Henderson*, 8 Q. B. D., 457; *Hamilton* v. *McGill*, 12 L. R. I., 186; *Young* v. *Curton*, 6 Southern Rep. (Ala.), 352; *Koch* v. *Godshow*, 12 Bushnell (Ky.), 318; *Denver R. R. Co.* v. *Hutchinson*, 31 Neb., 572; *Berry* v. *Dwinel*, 44 Me., 255; *Wetmore* v. *Patterson*, 45 Mich., 439; *McKinney* v. *McEwen*, 48 id., 106; *Citon* v. *McEonald*, 60 Am. Rep., 488; *Schooner Lively*, 1 Gal., 314–325; *Bush* v. *Canfield*, 2 Conn., 485; *Wells* v. *Abernethy*, 5 id., 222; *McAlpin* v. *Lee*, 12 id., 129; *West* v. *Pritchard*, 19 id., 212; *Hubbard* v. *Rowell*, 51 id., 423; *Simpson* v. *Waterproof Mfg. Co.*, 37 id., 520. But assuming that under certain circumstances loss of profits can be recovered, when the seller knew, or ought to have known, that the goods were purchased for the purpose of selling the same again, and that too for profits on sales made both before and after the date of the contract, this is true *only when similar goods cannot be purchased in the market. Culen* v. *Woodbury Glass Works*, 108 Pa. St., 220.

ANDREWS, C. J. This action was brought to recover damages for the non-performance of a contract. The plaintiffs are large dealers in dry goods at wholesale and by retail. The defendants are manufacturers of knit underwear. The complaint alleged, generally, that on the 16th day of March, 1892, the defendants agreed to manufacture for the plaintiffs a large number of knit undergarments of various styles and at agreed prices, amounting in the whole to nearly twelve thousand dozen, and to deliver the same at various times but all before the 1st day of December, 1892, for which the plaintiffs were to pay; that the plaintiffs contracted for these goods with the intent, as the defendants knew, to resell the same to other parties; that at the date of said contract they had bargained to sell a part of said garments to other persons

at a profit; that afterwards, and before the time when said goods were to be delivered, they bargained to sell the balance of the same to certain other persons at a profit; that the defendants delivered to the plaintiffs in pursuance of the said agreement, one hundred and sixty dozen of the said goods, but neglected and refused to deliver the remaining part; and claimed damages to the amount of $10,000.

The defendants' answer denied the making of the said contract alleged by the plaintiffs, and set up a different one —a conditional one—and they said that in performance of the contract so alleged by them they furnished the said one hundred and sixty dozen of said garments, but that the plaintiffs neglected to perform the conditions of said last mentioned contract on their part to be performed, and therefore they, the defendants, did not furnish any more of said goods. The answer also demanded pay for the goods the defendants had so furnished, and damages for the non-performance by the plaintiffs.

The finding of the court shows that there was evidence that the parties had had dealings with each other prior to the 10th day of February, 1892; that the plaintiffs had purchased of the defendants garments of their manufacture, some of which were then manufactured and some of which were to be thereafter manufactured and delivered, and which were in fact so manufactured and delivered, but that on said day there was no contract subsisting between them; that between the said 10th day of February, 1892, and the 16th day of March following, the plaintiffs sent to the defendants fourteen separate orders for goods of their manufacture, each one duly numbered and signed, specifying the number, quality, style and price of the goods ordered, and the date when they were to be delivered, as well as the date of payment; that on said 16th day of March, 1892, the defendants sent a letter to the plaintiffs as follows:—"Office of The Patterson Brothers Knitting Co. Ladies', Gents' and Children's Fine Knit Underwear. Bridgeport, Conn., March 16, 1892. Messrs. Jordan, Marsh & Co., Boston, Mass. Gentlemen. We are in receipt of the following contracts for which we thank you.

(Then followed a description of the fourteen orders above referred to by their numbers and amounts.) Yours Truly (Signed) H. B. Odell, Manager."

It is also found that the defendants delivered to the plaintiffs one hundred and sixty dozen of the goods mentioned in said orders. There was no claim made that Odell was not the duly authorized agent of the defendants; or at any rate, no claim that the question of his agency was not submitted to the jury with proper instructions. The case was tried on an issue closed to the jury and the plaintiffs had a verdict for an amount in damages which, they assert, is very much less than they are entitled to have, and they have appealed to this court alleging various errors in the trial court.

The plaintiffs claimed that the said orders and the letter of March 16th, 1892, constituted one contract as to all the goods named in all the orders; and that it was the contract on which this action was brought; that the letter was afterwards ratified and confirmed by the defendants themselves as an acceptance of all the orders and was so treated by them, because they delivered a portion of the goods under the orders generally.

The defendants, on their part, claimed that the letter of March 16th, 1892, was not an acceptance; that if an acceptance at all, it was an acceptance of only some one of the orders; that each of the orders stated a separate contract, and must be separately declared on; and as the complaint declared on one contract only, in no event could there be a recovery in this case on more than one of such orders.

Upon this part of the case the judge instructed the jury as follows: "It is for you to say what language the paper (*i. e.* the letter of March 16th, 1892) speaks, and what the intention was in the use of the language it contains; it is for you to say whether a person who sends such a paper as this to another under the circumstances here claimed, and then goes forward and begins to fill and does fill some of these very orders named in the paper so sent (if such be the facts), could fairly be said to have had no intention to speak the language of acceptance and promise in that paper; or had

no intention, by the language used, to accept and promise to fill the orders he named. These are matters for you to determine after a careful and serious examination of the evidence and claims on both sides."

The substance of this instruction was repeated by the judge twice or three times in the course of his charge, and at one time with language which apparently implied that the jury might select one of the separate orders, and if that was broken, render a verdict for damages only as to such particular contract. This was error.

There was no ambiguity or doubt as to the terms of the orders, or of the letter of March 16th, and there was no suggestion of any fraud. Under such circumstances it was for the judge and not for the jury to say what these writings meant. It was a question of law and not of fact. *Gibbs* v. *Gilead Eccl. Society*, 38 Conn., 153, 167; *Hotchkiss* v. *Higgins*, 52 Conn., 205, 213; 1 Starkie on Evidence, 429; 1 Greenleaf on Evidence, § 277. The orders and the letter were offered as proof of a contract between the parties. If a contract at all, it was a contract in writing. As such its interpretation—its legal effect—was a question of law for the judge. Nor was such interpretation the less a question of law, because the construction might have been aided by the use of extrinsic evidence, such as the business of the parties, their knowledge each of the business of the other, and their previous dealings, including as well what may be called the practical construction put upon the contract by the conduct and acts of the parties. The judge by the aid of all the undisputed facts in the case could put himself into the situation of the parties and look at the contract from their standpoint. But from whatever source light was thrown upon the contract, what its meaning was, what promises it made, what duties or obligations it imposed, was a question of law for the judge. It was, after all, the legal reading and interpretation of what was written. See *Smith* v. *Faulkner*, 12 Gray, 251, 254; *Brady* v. *Cassidy*, 104 N. Y., 147, 155; *Neilson* v. *Harford*, 8 M. & W., 805, 823.

In the light of the undisputed fact in this case, the trial

judge should have instructed the jury that the letter of March 16th, 1892, was an acceptance of all the orders named in it. And as there was but one contract claimed to exist between these parties, such instruction would, in effect, have directed them to exclude from their consideration the conditional contract claimed by the defendants.

The general intention of the law giving damages in an action for the breach of a contract like the one here in question, is to put the injured party, so far as it can be done by money, in the same position that he would have been in if the contract had been performed. In carrying out this general intention in any given case, it must be remembered that the altered position to be redressed must be one directly resulting from the breach. Any act or omission of the complaining party subsequent to the breach of the contract and not directly attributable to it, although it is an act or an omission which, except for the breach would not have taken place, is not a ground for damages. In an action like the present one, to recover damages against the vendor of goods for their non-delivery to the vendee, the general rule is that the plaintiff is entitled to recover in damages the difference at the time and place of delivery, between the price he had agreed to pay and the market price, if greater than the agreed price. Such difference is the normal damage which a vendee suffers in such a case. And if there are no special circumstances in the case, a plaintiff would, by the recovery of such difference, be put in the same position that he would have been in if the contract had been performed. This, of course, implies that there is a market for such goods where the plaintiff could have supplied himself. If there is no such market, then the plaintiff should recover the actual damages which he has suffered.

There may be, and often there are, special circumstances other than the want of a market, surrounding a contract for the sale and purchase of goods, by reason of which, in case of a breach, the loss to a vendee for their non-delivery, is increased. In such a case the damages to the vendee which he may recover must, speaking generally, be confined to such

as result from those circumstances which may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract. It must be remembered also, in attempting to carry out this general intention of the law in any given case, that any damages which the plaintiff by reasonable diligence on his part might have avoided, are not to be regarded as the proximate result of the defendant's acts.

In the present case the plaintiffs claimed that at the time of delivery there was no market in which they could procure such goods as the defendants were to deliver to them. This was a fact which might be proved by the testimony of any person who had knowledge on the subject. And if it was true, the plaintiffs could not, by any diligence on their part, have relieved themselves by such purchase from any portion of the damages which they suffered.

There were various special circumstances by reason of which the plaintiffs claimed to recover damages: One was that they contracted for the said goods for the purpose of reselling them. It is averred in the complaint—and there appears to have been evidence on the trial tending to prove such averments—that at the time the goods were contracted for the plaintiffs had bargained to sell a portion of the said garments to other parties at a profit; and that the defendants had knowledge of the sub-contracts. As to the profits on these sub-sales, the judge charged the jury that the plaintiffs were entitled to recover these as a part of their damages; because, as the judge correctly said, the existence of these sub-sales was known to the defendants at the time they contracted to furnish the goods, and the profits that were to be made must be considered as having been contemplated by them at that time.

It is also averred in the complaint that soon after the time the contract was made, the plaintiffs, relying on the same, began to sell the balance of said garments to other parties at a profit, of which sub-contracts they gave notice to the defendants a reasonable time before the date at which the goods were to be delivered. The judge charged the jury that these

profits should not be allowed; because, as he said, these sales cannot be considered to have been in the contemplation of the parties at the time they made their contract. As the judge stated it, this ruling was correct. Notice to the defendants after their contract was entered into, would not increase their liability. If these sub-sales could not reasonably be considered to have been in the contemplation of the parties *at the time they made* the contract, then the defendants could not be made liable for the special profits to be derived therefrom.

But there is an aspect of the question of the profits on these latter sub-sales—which seems not to have been very clearly presented—upon which the evidence of their terms might have been admissible. The defendants had knowledge that the plaintiffs contracted for these garments in order to resell them to others. They were chargeable with knowledge that the plaintiffs would make such profits as the market price of such goods would give them. If proof of the terms of these last mentioned sub-sales was offered for the purpose of showing what the market price of such goods was at the time they were to be delivered, then the evidence should have been received. The market value of any goods may be shown by actual sales in the way of ordinary business.

It was alleged in the complaint that by reason of the default of the defendants the plaintiffs had been obliged to pay large damages to their vendees for their failure to deliver to them the goods so bargained to them, and they offered evidence to prove such a payment to one of their vendees, which evidence was, on objection by the defendants, excluded. In respect to this item of damage the rule above stated furnished the proper test. In restoring an injured party to the same position he would have been in if the contract had not been broken, it is necessary to take into the account losses suffered, as much as profits prevented. And whenever the loss suffered, or the gain prevented, results directly from a circumstance which may reasonably be considered to have been in the contemplation of the parties when entering into the contract, the plaintiff should be allowed to prove such loss.

Whether the circumstance from which the loss results, or the gain is prevented, is or is not one which may be reasonably considered to have been in the contemplation of the parties, is, from the necessities of the case, an introductory one upon which the judge must in the first instance decide, before evidence either of losses suffered, or gains prevented, can be shown to the jury. When the admissibility of evidence depends upon a collateral fact, the judge must pass upon that fact in the first place, and then if he admits the evidence, instruct the jury to lay it out of their consideration if they should be of a different opinion as to the preliminary matter. The particular evidence excluded in this case was that of Edward J. Mitton, one of the plaintiffs, to the effect that the plaintiffs had paid to William Taylor & Sons, one of their vendees, the sum of $641 as damages. Both the objection to this evidence and the ruling upon it, seem to admit that this sub-contract was one of which the defendants had notice. The objection to it was that it was not admissible under any allegation in the complaint. But precisely this sort of loss was alleged in the complaint and denied in the answer, and unless other reasons existed for the exclusion of this testimony than the one claimed, it should have been received. If the sale to Taylor & Sons was one of those sales of which the defendants had notice at the time they made their contract with the plaintiffs, then the evidence was clearly admissible for the reason given by the trial judge when instructing the jury that the profits from these sales should be allowed.

For the purpose of proving the sub-sales, the plaintiffs offered the deposition of F. R. Chase, one of their traveling salesmen. In the early part of 1892 he was sent out by the plaintiffs to make sales by sample of some of the goods which the defendants were to manufacture. He was asked if he knew by whom these goods were to be manufactured. He said he did through Mr. Campbell, the plaintiffs' buyer. This question and answer were objected to by the defendants and ruled out. This objection seems to have been made on a total misapprehension of the object of the evidence.

The witness was stating what he was to represent to his customers as to the manufacture of the goods he was trying to sell them. Both question and answer should have been admitted. Whether or not the goods when they should be delivered corresponded with the sample and with this statement, would have been quite another question.

One Deland, a buyer for the plaintiffs, testified. He was asked respecting certain of the goods which the defendants had contracted to deliver to the plaintiffs: "At what price would these have been retailed?" On objection he was not permitted to answer. Assuming that Deland had knowledge of the market price at which such goods would have been sold, it is very obvious that his answer would have been relevant and should have been received.

The other questions made in the case, so far as they are material, would not be likely to arise on another trial.

There is error and a new trial is granted.

In this opinion the other judges concurred.

GEORGE MORGAN *vs.* CITY OF DANBURY.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The plaintiff, a riparian and mill proprietor, alleged that the defendant, without making him any compensation or attempting to acquire any of his rights, was discharging and threatened to continue to discharge in still greater quantity, waste matter, sewage, and other noxious, corrupt and impure substances from its sewers into the stream, so as to pollute it and seriously damage his land and mill privilege; that such discharge poisoned and corrupted the air of the neighborhood and endangered the health of the plaintiff, his workmen and others, and had already partly filled his dam with filth and prevented him from disposing of his land for building purposes; and prayed for an injunction against the continuance of the nuisance and to restrain the pollution of the waters of the stream. The trial court found these allegations to be true, that the plaintiff's injuries could not be adequately compensated in damages, and that the acts complained of constituted a public

nuisance, and granted an injunction restraining the defendant, after twenty months from the date of the decree, from discharging any sewage into the stream above the plaintiff's premises, and from polluting the waters by any such discharge. *Held*:—

1. That the terms of the injunction decree did not go beyond the prayer for relief, but were fully conformable to the claims stated in the complaint.
2. That the term "sewage" in the restraining order, must be construed in the sense in which it was evidently used by the parties in their pleadings; and that so construed it signified and was confined to the refuse and foul matter, solid or liquid, which was discharged by the sewers into the stream; including such fluid portions as, if apparently innoxious when so discharged, might become by combination with other substances found in the stream, the occasion of decomposition and consequent pollution.
3. That the right to deposit a thing in any place must always be dependent not only on the nature of the thing deposited, but on the nature of the place in question and the uses to which that has already been put; and that if the stream was, from whatever cause, in such a condition that the defendant's discharge of sewage there worked a nuisance, it had no right to use the stream for such purpose.

The defendant claimed that the clause of the injunction decree which forbid the discharge of any solid matter which, though not foul and noxious, might be a source of deposit of filth in the plaintiff's mill-pond, was too harsh a remedy, since it might result in throwing a very heavy pecuniary burden upon the city, while on the other hand money damages would adequately compensate the plaintiff for such injury. *Held* that the finding that the plaintiff's injuries were, and would be, such as could not be so compensated, was a sufficient answer to that objection; especially as the city had the power, by the exercise of the right of eminent domain given it by the legislature for such purpose, to use the stream as it pleased.

[Argued January 23d—decided April 15th, 1896.]

SUIT for an injunction to restrain the pollution of a certain stream of water known as Still River, and injury to a mill privilege by the discharge of sewage, brought to the Superior Court in Fairfield County and tried to the court, *George W. Wheeler, J.*; facts found and judgment rendered for the plaintiff, and appeal by the defendant for alleged errors in the rulings of the court, and in its injunction decree. *No error.*

The complaint alleged that the plaintiff was a riparian proprietor and had the right to have the stream flow through his land uncontaminated and uncorrupted by any injurious

or noxious substances; that since May 1st, 1889, the city of Danbury had unlawfully caused to flow into it, above his premises, large quantities of sewage and other noxious substances, thereby causing much thereof to become deposited on his land, so as to render the water noxious and filthy, and threatened to continue so to do, whereby he had been largely deprived of the use of the water and of his mill privilege, and exposed to unhealthy odors, and prevented from selling or disposing of his land, and his dam and water privilege had been partly filled up with filth, and encumbered, and placed in danger of destruction if the pollution continued; and that the city had done these acts without right or making him any compensation. The prayer was for an injunction against the continuance of said nuisance, and to restrain the pollution of the waters of said river temporarily and permanently.

The answer, as originally filed in 1893, denied the existence of any nuisance, and alleged that Still River had long been a non-potable stream and that the sewers were constructed in the performance of a governmental duty, and as the only practicable method of performing it. A supplemental answer filed in September, 1894, further alleged that the city had just completed the establishment of a sufficient deodorizing, disinfecting and purifying plant, on the outfall sewer, whereby its contents were rendered entirely harmless and no solid matter was permitted to pass into the river; that any decree that might be rendered should be based on the present state of things, and that it was ready to have a decree passed that it should so purify and disinfect its sewer that it should discharge no hurtful matter into the river, but should continue to deodorize and disinfect it by the same means now being used effectually, or means similar thereto.

The finding showed these facts: Still River is a small and sluggish stream, emptying into the Housatonic sixteen miles below the city of Danbury. The wash of some of the city streets naturally flows into it. The plaintiff owned a large tract of land, on part of which was a mill and mill-dam, situated on Still River a short distance below the city. Other

riparian proprietors applied for admission as co-plaintiffs, and were heard in aid of the complaint upon the trial (Gen. Stat., § 1288), but no formal order for their admission as parties was made.

Danbury is sewered on a water carriage system, devised by competent engineers. The sewage and surface water were to be taken through the same conduits. There was to be a general or outfall sewer with lateral branches. Catch-basins were to be provided to intercept the wash of the streets and receive the sediment from it. The first sewers were built in 1885, and were, in conformity with the plan, discharged directly into Still River where it passed through the center of the city; it being the design to defer the construction of the outfall sewer for discharging the sewage further down stream, until the discharge above became a nuisance. The plan also contemplated eventually, when purification became necessary, the carrying of the sewage still further down, for deposit upon filter beds. By 1890 the number of sewers had been increased so far that their discharge produced a nuisance, and the city, in 1891, began to construct the outfall sewer, and completed it in 1892. Its mouth was nearly a mile below the former point of discharge, and upon land belonging to the city. Most of the existing sewers were connected with the outfall sewer, and discharged through it, but three were still allowed to discharge directly into the river in the center of the city. Several new sewers, built since 1892, have been also connected with the outfall sewer, and more sewers are needed, which would, if built, have a similar connection. The city has a population of about 20,000. In 1892, the city bought a mill-pond below the mouth of the outfall sewer and above the Morgan tract, for use as a basin to retain the solid matter issuing from the sewer. In 1894, the mill-dam was carried away by a freshet, and has not been replaced. If rebuilt, it would retain a considerable portion of the sediment, except in times of unusually high water. Even while it stood, however, it did not prevent the filling up, to a material degree, of Morgan's pond, and another mill-pond above that, belonging to some of the intervenors.

During the warm season, for five months in the year, Still River has scarcely any flow. In the fall of 1894, its average flow in September, at the mouth of the outfall sewer, was only five times greater in volume than that from the sewer, being 110,000 gallons of sewage to 569,000 gallons of river water.

All the water stored in Morgan's pond passes, in the dry season, in the daytime, through a bulk-head less than three feet square. Of late years, the volume of water in the river has diminished. Up to 1875, the water at Morgan's pond was generally potable; in 1880 it became much discolored; in 1882 cattle drank it. Up to 1885, it was used for washing clothes. Morgan then used his mill as a cider mill, but the sediment in the stream compelled him to stop washing his barrels in it in 1887, and in 1891 the pollution of the stream forced him to abandon that business.

Since the outfall sewer was put in, the cattle on the farms for six miles below have refused to drink from the stream, and the pollution of the water has been materially increased, not only by harmless matter, but by organic or putrefactive substances. The discharge of crude sewage from the outfall sewer will, from June to October, each inclusive, annually, be dangerous to the health and injurious to the property of the riparian inhabitants from the mouth of the sewer to a point six miles below.

At least 7,000 people use the outfall sewer, and large quantities of sediment from factories and streets also find their way into it. The sediment is deposited along the course of the stream for miles, spoiling the meadow grass, and emitting foul odors in warm weather. The river water is filled with a fine, slimy substance. Particles of human excrement, discharged from the outfall sewer, lodge on the bottom and banks of the mill-ponds, and the river banks below, though few are observable to the eye.

The city employed the chemist of the State Board of Health, in 1894, as an expert to testify at the trial of this case, and he reported to it that the discharge of crude sewage ought not to be allowed from June to October, each inclu-

sive, in any year. The city thereupon began in good faith to examine into methods to remedy the nuisance, and having determined, on the advice of experts, to use the Woolf disinfecting system during said five months, annually, established in the fall of 1894 a plant for this purpose 800 feet below the mouth of the sewer. It consisted of large vats of brine, from which a solution, known as hyperchloride of sodium, was developed by electric currents. The sewer was extended under these vats, and the solution flowed into it to disinfect and deodorize its contents before they were discharged into the river. A wire screen and an apparatus with revolving knives were also provided to catch and break up the solid matter, coming through the sewer, but they did not prevent the discharge of many solid particles into the river. Nine thousand dollars was thus spent. The plant had not been in use long enough, at the time of the trial, to enable the court to determine definitely whether it would disinfect the sewage in the sewer, but the discharge of sediment would not be materially lessened. It would not disinfect or deodorize the sewage that was discharged into the river, so as materially to decrease its pollution, or prevent the nuisances previously described.

The best plan of disposing of the city sewage is that of intermittent filtration. The only objection urged against it on the trial was its expense, which would be from $120,000 to $150,000. It can be used in connection with the existing sewer system of the city. No filter beds could be constructed above the Morgan property, or less than two miles below the present mouth of the outfall sewer. There is no practical way of disposing of the city sewage by discharge into Still River above the Morgan property, whether it be disinfected or not. To adopt the filtration plan would render the Woolf plant useless.

Acids and coloring material of various kinds have been, for forty years, discharged into Still River from numerous factories in Danbury. These have not added greatly to the sediment in the stream, but have discolored it, since 1876, for miles. Prior to the construction of the city sewer system,

there were several private sewers in Danbury, which discharged refuse and sewage into Still River. The plaintiff Morgan was not chargeable with any laches. He was already somewhat injured before he brought his suit, and this injury increased pending the action, and will greatly increase in the future. His damages are insusceptible of ascertainment in an action at law, and he will suffer irreparable injury if the discharge of sewage is continued. He has received no compensation from the city, nor has it sought to acquire any of his rights.

No objection was offered to the evidence of injuries suffered by the intervenors. As matter of law, it was also found from the foregoing facts that such discharge was a public nuisance.

The injunction granted was one "against depositing or discharging, or permitting to be deposited or discharged, any sewage through its drains and sewers into the Still River (so called) in said Danbury, above the premises of the plaintiff, situated at Beaver Brook in said Danbury, and described in the complaint herein; and against polluting the waters of said river by depositing or discharging, or permitting to be deposited or discharged, sewage through its drains and sewers into said river above the premises of the plaintiff, from and after the first day of May, 1897."

Samuel Fessenden and *Lyman D. Brewster*, for the appellant (defendant).

In going beyond the prayer of the plaintiff, and prohibiting the defendant from "discharging any sewage into Still River above the premises of the plaintiff," the court below erred. The prayer of the complaint is "against the continuance of said nuisance, and to restrain the said pollution of the waters of said river temporarily and permanently." In the English cases the form usually is "against the discharge of sewage to the injury of the plaintiff," or "unless and until the same shall be sufficiently purified and deodorized." *Attorney General* v. *Halifax Corporation*, 17 W. R., 1088. Seton on Decrees (3d Ed.) adds: "The form of this order

has been often adopted in similar cases," citing, *North Stafford, etc.* v. *Tunstall Local Board*, 39 L. J. Ch., 131. Similar language is used in the judgments in *Attorney General* v. *Birmingham*, 4 Kay & J., 528; *Attorney General* v. *Leeds*, L. R. 5 Ch., 583; *Nuneaton Local Board* v. *Gen. Sewage Co.*, L. R. 20 Eq., 127; *Crossley* v. *Lightwater*, L. R. 2 Ch. 478, L. R. 3 Eq., 279. See also *City of Atlanta* v. *Warnock*, 18 S. E. Rep. 135, 23 L. R. A., 301, and *Minke* v. *Hopeman*, 87 Ill., 450. The plaintiff's relief is limited by the prayer in his bill. *Ellis* v. *Sisson*, 96 Ill., 105. The unusual stringency of the injunction is the more unwarrantable in that the defendant has, as soon as it found the danger limit was reached, erected a plant under the advice of the most skillful engineers and health officers, and offers in its supplemental answer to conform in the use of that plant to the order of the court. Wood on Nuisances, § 823; *Green* v. *Lake*, 54 Miss., 540; *Minke* v. *Hopeman*, 87 Ill., 450; *Sellers* v. *Penn. R. R. Co.*, 10 Phila. (Pa.), 319.

James H. McMahon and *Charles W. Murphy*, for the appellee (plaintiff).

The injunction is no broader or more liberal than is necessary to protect plaintiff from the injuries to which he is exposed by the conduct of defendant. It appeared upon the defendant's own showing before the court that it never had been demonstrated by actual experiment, or in any practical manner, that its plant would be effective; all defendant's claims were mere theories based on the testimony of experts, conflicting in its character; and the court having found that said plant *would not* and *could not* purify, etc., defendant is concluded thereby. There is no law which permits a defendant to expose such property rights as the plaintiff is found to possess, to such serious injury and destruction, and injure the health and comfort of this large community by its aggravating trespasses and nuisances, merely upon the plea that it would be put to great expense and trouble if compelled by said court to cease said nuisances. *Indianapolis Water Co.* v. *Amer. Straw Board Co.*, 57 Fed. Rep., 1004;

1 High on Injunctions (3d Ed.) § 746, and cases cited; *Pennington* v. *Brinsop-Hall Coal Co.*, L. R. 5 Ch. D., 770; *Attorney General* v. *Colney Hatch Asylum*, L. R. 4 Ch. 146. Equity will enjoin either jointly or separately, where the separate and concurrent acts of two or more occasion the injury. *Wood* v. *Sutcliff*, 2 Sim. N. S., 163; *Lockwood Co.* v. *Lawrence*, 77 Me., 297; *Woodruff* v. *North Bloomfield Gravel Co.*, 8 Sawyer, 629; *Coosley* v. *Lightower*, L. R. 3 Eq., 279; *Lambton* v. *Mellish*, and *Lambton* v. *Cox*, L. R. 8 Ch., 807; *Indianapolis Water Co.* v. *Amer. Straw Board Co.*, 57 Fed. 103. The discharge of sewage and other noxious matter into an inland stream, to the injury of a riparian proprietor below, has been held to be an unlawful invasion of the rights of said proprietor, remediable by injunction, by the courts of nearly every State, by the Federal courts, and by the courts of England. 1 High on Inj. (3d Ed.), § 810; 2 Beach on Inj., § 1094; 2 Wood on Nuisances (3d Ed.), § 777; *Goldsmith* v. *Tunbridge Wells Improvement Co.*, L. R. 1 Ch. App., 349; *Holsman* v. *Boiling Spring Bleaching Co.*, 1 McCart. (N. J. Eq.), 335; *Canfield* v. *Andrews*, 54 Vt. 1; *N. Y. C. & H. R. R. Co.* v. *Rochester*, 127 N. Y., 591; *Chapman* v. *Rochester*, 110 id. 273; *O'Brien* v. *St. Paul*, 18 Minn., 167; *Field* v. *West Orange*, 36 N. J. Eq., 118; *Danbury & Norwalk R. Co.* v. *Norwalk*, 37 Conn., 109; *Derks* v. *Commissioners*, 142 Ill., 197; *Gladfelter* v. *Walter*, 40 Md., 1; Gould on Waters (2d Ed.), §§ 544–546. By its own confession, the defendant intends, if permitted by the court, to continue to use said river as an open sewer, without any compensation to the plaintiff, and therefore without shadow of right. Such use is in utter contempt of the legal and constitutional rights of the plaintiff, and is a taking within the meaning of the law. *Winn* v. *Rutland*, 52 Vt., 481; *Harding* v. *Stamford Water Co.*, 41 Conn., 88; 2 Beach on Inj., § 1147; Cooley on Cons. Limitations, 551, 561.

BALDWIN, J. The defendant complains that the injunction granted by the Superior Court goes beyond the claim for relief in the complaint, because it forbids both the dis-

charge of sewage into Still River, and also the pollution of the river by any such discharge.

The complaint alleged that the city was discharging waste matter, sewage, and other noxious, corrupt, and impure substances, from its sewers, so as to pollute the river, and to cause much of such discharges to be deposited on the plaintiff's land and mill privilege; and that thereby he had been largely deprived of the use of a valuable mill and mill privilege, he and his workmen injuriously exposed to noxious odors, the air in the neighborhood corrupted and poisoned so as to endanger the health of himself and others, his mill-dam partly filled up with filth, the value of his property greatly diminished, and he disabled from disposing of his land for building purposes. It was also averred that the defendant intended greatly to increase the pollution of the river, and to cause much greater quantities of filth, poisonous and offensive matter to be deposited in the river, to his irreparable injury, and that by the acts of the defendant, unless restrained, his dam and mill-pond would be filled up with filth and sewage, and the value of his land destroyed. The relief claimed was an injunction "against the continuance of said nuisance, and to restrain the pollution of the waters of said river temporarily and permanently."

The nuisance thus complained of consisted, then, of discharging into a river, above the plaintiff's premises, certain substances of such a kind and in such a manner that the water came to him polluted, and a deposit was made upon his land and in his mill-pond, whereby noxious odors were created, dangerous to his health and that of others, his dam partly filled up by filth, and the use and value of his property largely taken away; injuries which the defendant intended to increase by enlarging its sewer system, and adding to the amount of the deposits made from the sewers in the river, the result of which would be to fill up his mill-pond with filth and sewage, and make his property valueless.

These allegations were denied, but have been found true; and there is nothing inconsistent with their truth in the special finding of facts. They stated that the deposits from

the sewers both filled up the plaintiff's mill-pond, and polluted the air he breathed and the waters that flowed over his property. These, though proceeding from the same act, produced separate injuries. A nuisance was created with a double aspect. That to the waters of the stream and the air above it, it was found, constituted a public nuisance, though it was one which also wrought a special and peculiar injury to the plaintiff. That from filling up the mill-pond constituted simply a private nuisance. *Haskell* v. *New Bedford*, 108 Mass., 208, 216; *Brayton* v. *Fall River*, 113 Mass., 218, 229. It was proper that the injunction should be so framed as to protect the plaintiff against every serious and irreparable injury which he might suffer by the continuance of the nuisance, and its terms are fully conformable to the claims stated in his complaint.

The defendant contends that the decree is too broad, in that it restrains the discharge into the river of any sewage, even if not of a noxious, or polluting character, or though entirely and permanently disinfected and purified.

The primary meaning of the term "sewage" is that which passes through a sewer. Century Dict.; Webster's International Dict. A secondary meaning is derived from the usual character of the contents of a sewer, and as used in that sense the word signifies the refuse and foul matter, solid or liquid, which it so carried off.

In the plaintiff's complaint the connection in which the term is employed is such as to indicate that it was intended to carry the secondary meaning. He avers that the city is causing to flow into the river "large quantities of acids, impure substances, waste matter, contents of privies and cesspools, sewage, and other noxious, corrupt, and impure substances, so as to render the waters of said river at said property filthy, noxious and unclean," and that it intends to "greatly and wrongfully increase the pollution and defilement of the waters of said river above the said property of plaintiff, by building new sewers and connecting and using them and also old sewers or conduits with divers drains, cesspools, sinks and privies, and discharging their contents into

said river, and thereby cause to be deposited much greater quantities of filth, poisonous and offensive matter, than there otherwise would be in said waters of said river, to the great and irreparable injury of plaintiff's said property, and the increase of the poison and unwholesomeness of the air in that neighborhood." These acts, he alleges, have already endangered his health and that of others, by the noxious and unhealthy odors arising from the impure condition of the waters of the river, and have caused his millpond to be partly filled up with filth; and will, if continued, as the city intends, cause the pond to be entirely filled up with filth and sewage.

This use, in closing the enumeration of certain kinds of substances discharged into the river, of the words "sewage, and other noxious, corrupt, and impure substances," indicates that the sewage of which he complained was itself something noxious, corrupt, and impure; and the solid matter which thus came to be deposited upon his property he describes as "filth." The supplemental answer, setting up the establishment of the Woolf disinfecting plant, avers that the discharges from the sewer have thereby been rendered "entirely harmless and free from any offensive qualities, and no solid matter is permitted to empty from said sewer into said stream, but the same is liquefied and clarified, and the plaintiff is relieved thereby of all danger in the future from the said sewer, and the condition of the said Still River below the said outfall sewer, is rendered more pure and free from offensive matter than it would be if no outfall sewer was permitted, inasmuch as the electrolized salt water used to purify and disinfect the said outfall sewer, has also a disinfecting and purifying effect on the whole stream into which said outfall sewer enters." These allegations were denied, and the issues upon them have been found for the plaintiff.

The decree must be read in the light of the issues joined. Its use of the term "sewage" was that which the parties had made of it in their pleadings. Under the first of its prohibitory clauses, the discharge of no sewage is enjoined which is not either, if fluid, foul and noxious, or, if solid, either foul and noxious, or such as may be a source of the deposit of filth

in the plaintiff's pond. It is not impossible that fluids discharged from the sewer, although colorless, sterilized, and apparently innoxious, may yet be such as, by combination with other substances found in the river, to become the occasion of decomposition and consequent pollution; and the second prohibition of the decree makes proper provision for such a contingency.

The defendant urges that it should not be made responsible for the acts of others, and that if its sewage is thoroughly disinfected, sterilized, and purified, before its discharge into the river, nothing further should be required, even though as it flows down the stream it may be brought into contact with other substances, in such a way as to work a nuisance. But the right to deposit a thing in any place must always be dependent not only on its own nature, but on the nature of the place in question, and the uses to which that has been already put. A lighted match may be safely thrown into a brook, under ordinary circumstances, but not, should it happen to be covered with oil from a leaky tank.

If different parties by several acts foul the same stream, each may be enjoined against the commission of the wrong, with which he is individually chargeable. *Chipman* v. *Palmer*, 77 N. Y., 51. It is not for the defendant to dictate the order in which the plaintiff shall sue those by whom Still River has been polluted; nor would it be in any better position, if the noxious substances placed in these waters by others were so deposited by prescriptive right. If the stream is, from whatever cause, in such a condition that to discharge its sewage there works a nuisance, the city has no right to use its waters for that purpose.

It is insisted, finally, that the first clause of the order of injunction, which forbids the discharge of any solid matter from the sewers, that, though not foul and noxious, might be a source of the deposit of filth in the plaintiff's pond, is too harsh a remedy, since for any diminution in the storage capacity of his pond he could be adequately compensated in money, while, on the other hand, this part of the decree may result in throwing a very heavy pecuniary burden upon the city.

It is a sufficient answer to this objection that the Superior Court has found that the plaintiff's injuries are and will be such as cannot be redressed by an action for damages. That such well might be the case is quite obvious.

The city had, and still has, power, by the exercise of the right of eminent domain which the legislature has confided to it for such purposes, to acquire a title, as against the plaintiff, to use the stream as it pleases. The injunction was not to take effect until nearly two years from its date. We find nothing in the record to indicate that the Superior Court did not exercise a wise judicial discretion in passing the decree.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

HIRAM JACOBS, TREASURER, *vs.* JOHN W. CURTISS.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN AND HAMERSLEY, Js.

An allegation in a complaint upon a joint and several bond that "the defendants bound themselves by a writing under seal," implies a delivery upon the part of each defendant, and is a sufficient averment thereof.

In an action upon a joint and several liquor license bond alleged to have been given by the defendant as surety and one *H* as principal, the defendant, without denying the allegations of the complaint, pleaded as a special defense that the bond was never executed by *H* nor by any one having authority to sign for him. *Held* that inasmuch as this defense was consistent with a knowledge upon the part of the defendant at the time he executed and delivered the bond as his own obligation, that *H* had not signed as principal, and that *H's* name had been signed without authority, it constituted no defense to the defendant upon his separate liability, and was therefore properly adjudged insufficient upon demurrer.

As a second special defense the defendant alleged that he had been requested by one *B* to sign his license bond, and did not notice at the time who was named as principal in the bond, or whose name *B* (who in fact signed *H's* name in the defendant's presence) had subscribed as principal, but believed that he was signing as surety the bond of *B*.

Held that as it was not alleged that the defendant was unable to read or in any way misled or prevented from ascertaining the exact and entire truth about the instrument he signed, his failure to learn the truth must be regarded as the result of his own culpable negligence, so far as the plaintiff, who had no notice or knowledge of these facts, was concerned; and that a demurrer upon these grounds was properly sustained.

[Argued January 30th—decided April 15th, 1896.]

ACTION to recover the amount of a liquor license bond, brought to the Court of Common Pleas in New Haven County and tried to the court, *Hotchkiss, J.*, upon the plaintiff's demurrer to the answer of the defendant; the court sustained the demurrer and thereafter rendered judgment for the plaintiff, and the defendant appealed for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

E. P. Arvine and *Charles C. Ford*, for the appellant (defendant).

The court erred in sustaining the demurrer to the second defense. By this defense it appears that the principal named in the bond did not sign it. There can be no obligation on the surety, unless there is an obligation on the part of the principal. Chitty on Contracts, 499; *Ferry* v. *Burchard*, 21 Conn., 603; *Booth* v. *Patrick*, 8 id., 108; *Eising* v. *Andrews*, 66 id., 64. An instrument like that in suit ordinarily is, and should be, executed by all the intended parties. It was for the plaintiff to show that although not thus executed, the defendant had consented to its delivery under such circumstances that it would bind him, even if it were inoperative and invalid as against the principal. *Adams* v. *Bean*, 12 Mass., 137; *Bean* v. *Parker*, 17 id., 591; *Wood* v. *Washburn*, 2 Pick., 24; *Russell* v. *Annable*, 109 Mass., 72; *Goodyear Dental Vulcanite Co.* v. *Bacon*, 151 id., 460; *Johnson* v. *Kimball Township*, 39 Mich., 189; *Bunn* v. *Jetmore*, 70 Mo., 228; *Martin* v. *Hornsby*, 55 Minn., 187; *Fletcher* v. *Austin*, 11 Vt., 447; *Sharp* v. *United States*, 4 Watts, 21; *Wells* v. *Dill*, 1 Mart., N. S., 592; *Hall* v. *Parker*, 37 Mich.,

590; *Hessell* v. *Johnson*, 63 id., 623; *Wild Cat Branch* v. *Ball*, 45 Ind., 213; *Allen* v. *Marney*, 65 id., 398; *Markland Co.* v. *Kimmel*, 87 id., 560; *People* v. *Hartley*, 21 Cal., 585; *Board of Ed. of Rapid City* v. *Sweeney*, 1 S. Dakota, 644; *Cornell* v. *People*, 37 Ill. App., 490; *Seeley* v. *People*, 27 Ill., 173. The court erred in sustaining the demurrer to the amendment to the third defense. It appears that Hammersley's name was signed without authority, and that the defendant was defrauded and deceived. Under these circumstances there was no completed contract when the bond was delivered to the county commissioners. There was no principal, and no liability was created against the surety, even though the obligee received it without notice of the imperfection or condition. *People* v. *Bostwick*, 32 N. Y., 445; *Bibb* v. *Reed*, 3 Ala., 88; *Gould* v. *Thomas*, 54 id., 414; *Simons* v. *Jones*, 6 How. (Miss.), 123; *Perry* v. *Patterson*, 5 Humph., 133; *Loren County* v. *Ferris*, 52 Mo., 75. The county commissioners must be held to have known that signing by the principal was a condition necessary both to its acceptance by them and its validity against the surety.

Frederick W. Holden and *Carlos H. Storrs*, for the appellee (plaintiff).

The court was correct in sustaining the demurrer to the second defense, and in holding that the fact that the bond declared upon was not executed by Hammersley, was no defense for the defendant Curtiss. If a bond on the face of it purports to be the joint bond of two or more, but is executed and delivered by one only, it is his several bond. *Wood* v. *Ogden*, 16 N. J. L., 453. A joint and several bond executed by the surety only, binds the surety, because it is a several obligation as soon as unconditionally delivered. *Loew* v. *Stocker*, 68 Pa. St., 227; *Krutz* v. *Forguer*, 94 Cal., 91. The liability of a surety signing a joint and several bond, instead of being joint, is several. *City of Los Angeles* v. *Mellus*, 59 Cal., 444. Where the liability of the principal in a bond is fixed by contract, or by operation of law, the failure of the principal to sign the bond does not effect the liability of the

sureties thereon. *Cockrell* v. *Davie*, 14 Mont., 131; *Krutz* v. *Forguer*, 94 Cal., 91; *People* v. *Stacy*, 74 Cal., 374; *Welch* v. *McKane*, 55 Conn., 30. A bond signed by surety and actually delivered without stipulation, cannot be avoided on the ground that it was signed on a condition, where it appears that the obligee had no notice of such condition, and was induced on faith of such bond to act to his prejudice. *Dair* v. *United States*, 16 Wall., 1; *Butler* v. *United States*, 21 id., 274; *City of Deering* v. *Moore*, 86 Me., 181. The defendant is estopped from disputing, not only the bond itself, but every fact which it recites. *Stow* v. *Wyse*, 7 Conn., 214; *Dair* v. *U. S.*, *supra*; *State* v. *Peck*, 53 Me., 284; *State* v. *Pepper*, 31 Ind., 76; *Millett* v. *Parker*, 2 Metc. (Ky.), 608; *Bond* v. *Storrs*, 13 Conn., 412; *Arthur* v. *Sherman*, (Wash.) 39 Pac. Rep., 670. It was the duty of the defendant, who had a full opportunity to know whether Barrows, on whose bond he was willing to sign as surety, was practicing a fraud upon him. *Smith* v. *Peoria County*, 59 Ill., 418; *Butler* v. *U. S.*, *supra*.

TORRANCE, J. This is a suit upon a joint and several bond given under the laws relating to the sale of intoxicating liquors, upon the issue of a license to Hammersley, the principal named in the bond.

The action was brought against Hammersley and his surety Curtiss, but no service was made upon Hammersley, because he could not be found, and Curtiss alone defends. The complaint sets out the bond and a breach of it, in the usual form.

The pleadings, as they now stand, consist of three special defenses; but one of these, the last one, alleging in substance that Hammersley had not been convicted of violating his license, may be laid out of the case; for it is clearly untenable, and was very properly abandoned upon the argument. The plaintiff demurred to the other two special defenses, the court below sustained the demurrer, and whether it erred in so doing is the question upon this appeal.

The first of these two special defenses is this: "The bond

described in said complaint was never signed or executed by said William Hammersley as principal, or by any one having authority to sign for him." To this the plaintiff demurred, "because said bond described in said complaint is a joint and several bond, and if the same was not signed by the said Hammersley, or by his authority or consent, it is no defense for the defendant" Curtiss.

The claim and argument of the defendant on this part of the case is this: The defendant, Curtiss, must be presumed to have signed this bond upon condition that Hammersley, the principal named therein, should sign it also, and the obligee to have received it with knowledge that unless so signed it would not take effect; it is of no consequence then whether the bond be joint or joint and several, for the question is whether any obligation at all was created, inasmuch as the condition on which Curtiss' liability depends was never performed.

This reasoning is inapplicable to this case as it now stands. The complaint alleges "that on the 20th day of March, 1894, the defendants bound themselves by a writing under seal, to pay to the plaintiff the sum of three hundred dollars," and then sets out the writing as an exhibit. From this exhibit it appears that the bond, upon its face, was complete, and was apparently executed by all the persons named in the body of it. Furthermore, the above allegation of the complaint is equivalent to an express allegation that Curtiss delivered the bond in its present condition, as and for his bond. The delivery of a bond, though essential to its validity, need not be expressly stated in the complaint. The allegation that the "defendants bound themselves by a writing under seal," is a sufficient averment of delivery, as that imports and implies delivery. "An allegation that J. S., on the 20th of November, by his writing of that date, acknowledged himself bound to J. N., is equivalent to a direct averment that the bond was delivered on that day." 1 Swift's Dig., s. p. 179. "The allegation in the complaint, that the undertaking was *executed* by the defendants, is a sufficient allegation, and, there being no denial in the answer, suffi-

cient proof of the complete execution, including the delivery, of the instrument, and no proof of its execution and delivery was necessary." *Robert* v. *Good*, 36 N. Y., 408, 410; *Martin* v. *Davis*, 2 Colo., 313; *The La Fayette Ins. Co.* v. *Rogers*, 30 Barb., 491; *State ex rel. Phillips* v. *Rush*, 77 Mo., 586.

In legal effect then the complaint alleges that Hammersley and Curtiss delivered this bond; and it further expressly alleges that a license was thereupon issued to Hammersley and that he committed a breach of the bond. The allegations of the complaint are not denied by Curtiss, and must therefore be taken as admitted. Practice Book, Rule IV., § 4, p. 16; *Lamphear* v. *Buckingham*, 33 Conn., 237.

Curtiss, thus admitting that both he and Hammersley delivered the bond as it is, now says, in effect, that Hammersley's signature to the bond is a forgery. But if Curtiss knew this when he himself delivered the bond, the fact that Hammersley did not sign is of no consequence. The bond is none the less Curtiss' several obligation. If he knew that Hammersley had not signed it as principal, but intending nevertheless to be himself bound as surety, executed the bond and delivered it as and for his bond, he may be held liable upon it. *Goodyear Dental Vulcanite Co.* v. *Bacon*, 148 Mass., 542. If he had no such knowledge at the time, it was a matter peculiarly within his own cognizance and he ought to have averred it in his special answer; for it is material. We cannot assume in his favor that he had no such knowledge. No fact can be assumed in favor of the party pleading, except it be directly averred, or arises by necessary inference; but on the contrary the construction shall be taken most strongly against him. *Griswold* v. *Mather*, 5 Conn., 435, 438; *Gaylord* v. *Payne*, 4 Conn., 190, 194.

So far then as the special answer now under consideration is concerned, the record, even taking the view most favorable to the defendant, shows that with knowledge that the principal had not signed, Curtiss delivered the bond as his own, intending thereby to bind himself. The demurrer to the special answer now in question was properly sustained.

The other special answer states, in substance, that one Barrows requested Curtiss to become surety upon a liquor license bond in which Barrows was to be principal; that he met Barrows at the office of the county commissioners for the purpose of executing such bond; that while there the bond in suit was made out by one of the commissioners and handed to Barrows; that Barrows instead of signing his own name as principal, signed that of Hammersley, in whose name as principal the bond was made out; that Curtiss did not know Hammersley, nor that he had applied for a license to sell liquor, nor had Curtiss agreed nor did he intend to become surety upon Hammersley's bond; that the representations made by Barrows were false and untrue, were made to deceive Curtiss, and did deceive and induce him to sign said bond; and that after seeing "Barrows writing upon said bond as aforesaid, said Curtiss signed his name to the same as surety, without taking any notice as to who the principal named in said bond was, or as to what name the said Barrows had written upon said bond as principal, believing that the representations made by Barrows aforesaid were true, and that the bond upon which he was putting his name as surety, was none other than that of said Sam. Barrows."

The plaintiff demurred to this answer on the ground, in substance, that it was not therein alleged that the plaintiff at the time when said bond was executed and delivered, had any notice or knowledge of any of the matters of fact set forth in the answer; and because it therein appeared that Curtiss before he executed and delivered said bond, had full opportunity to know, and ought to have known, that the principal named in the bond was Hammersley, and that the bond purported to be executed by Hammersley as principal.

The answer contains no allegation that Curtiss is an illiterate man unable to read the bond, nor that it was misread to him, nor that he was in any way prevented from ascertaining the exact and entire truth about the instrument he signed; and it must be taken as admitted, from his own statement, that he had the ability and a full opportunity to ascertain the truth. His failure to learn the truth was the

result of his own culpable negligence, so far as the plaintiff is concerned; and *quoad* the plaintiff, he must be taken to have known that Barrows signed Hammersley's name to the bond.

The record thus shows that Curtiss and Barrows delivered to the county commissioners a bond (upon which a license was at once issued), perfect upon its face, apparently duly executed by all whose names appear therein, and which purported to be signed and delivered by the several obligors and which was then and there delivered without stipulation, reservation, or condition of any kind; and this bond they delivered to an obligee who had no notice from the face of the bond, or otherwise, of any infirmity of any kind affecting the legal validity of the instrument. Under these circumstances we are of opinion that the facts set up in the answer constituted no defense to the action.

There is no error.

In this opinion the other judges concurred.

WILLIAM J. ATWATER *vs.* THE MORNING NEWS COMPANY.

Third Judicial District, New Haven, January Term, 1896. ANDREWS, C. J., TORRANCE, FENN, HAMERSLEY and HALL, Js.

In an action of libel where publication is admitted and justification is not pleaded, malice is the only issue of fact, and the question of privileged communication is included in that issue; although, since the adoption of the Practice Act, notice in the answer that the claim of privileged communication will be made, may be the better practice.

A privileged communication is inconsistent with the existence of malice, and requires both an occasion of privilege and the use of that occasion in good faith.

An occasion of privilege exists, if the admitted circumstances under which an alleged libel is published are such that the law recognizes a duty on the part of the defendant to make the communication; and this is a question of law for the court. Such occasion, however, is not used in good faith, if the communication is actuated by malice, and is not made for the purpose of performing that duty, but to injure the defendant; and this is a question of fact for the jury. In every case where there is substantial evidence of malice, the question of malice,

including that of privileged communication, is, under the instructions of the court, one of fact for the jury.

The burden of proof of malice is on the plaintiff and is discharged by proof of publication, unless the occasion is one of privilege; and in that case the plaintiff must satisfy the jury of malice in fact by a preponderance of evidence.

Unless the truth of the defamatory charge is pleaded in justification, the defendant cannot prove its truth, either in bar or in mitigation of damages. This rule has not been changed by the Practice Act, and does not prevent the reception of proper evidence of good faith and honest belief in the truth of the charge, although such evidence may also tend to prove the truth of the publication.

The defendant published in its newspaper an article charging the plaintiff, a member of the local board of public works, with illegal and disgraceful conduct in using his official position for his own pecuniary profit, and shielding himself from investigation and removal by means of a corrupt understanding with a majority of the board and certain aldermen of the city. Thereupon the plaintiff sued the defendant for libel. The defendant then published three other articles in its paper of a similar nature, the first of which impugned the plaintiff's private character, ridiculed him for instituting a vexatious libel suit, and attempted to prejudice the case with the public. The plaintiff subsequently filed three additional counts based upon these articles. *Held*:—

1. That the article first published charging the plaintiff with illegal and disgraceful conduct as a member of the board of public works, etc., was defamatory on its face.
2. That the article specified in the second count, published on the commencement by the plaintiff of an action of libel against the defendant, and charging the plaintiff with instituting a vexatious proceeding and attempting to prejudice the minds of the public against him as plaintiff in that cause, was not published on a privileged occasion.
3. That the articles specified in the third and fourth counts, giving information in respect to the official conduct of the plaintiff, with comments on that conduct, were published on a privileged occasion; but did not constitute privileged communications, because the trial court found upon the evidence that the fact of malice was established, and that the occasion of privilege was used for the purpose of malicious injury to the plaintiff.
4. That it was not material, after judgment, whether the fact of malice was supported by the evidence in chief of the plaintiff, or depended upon evidence subsequently introduced; as no such question had been raised during the trial.
5. That inasmuch as the record showed there was proper evidence of malice other than that furnished by the publications themselves, the conclusion of the trial court, upon all the evidence, that malice was proven, was one which could not be reviewed by this court.
6. That it was not necessary to support the judgment, that the trial court should find from the evidence that the libel was in fact false; since that fact was not in issue either by a plea of justification by the de-

fendant, or claim by the plaintiff that malice should be inferred from the falsity of the charge; and could not be put in issue merely by the defendant's claim that the communication was privileged.

As sources of information and as tending to prove its good faith, the defendant offered in evidence certain articles from another city newspaper. The court admitted such of the articles as the evidence showed had been brought to the attention of the writer of the alleged libel prior to its publication, but excluded the others. *Held* that the defendant was not injured by this ruling.

As relevant to the question of malice, the plaintiff was permitted to introduce evidence that prior to the publication of the alleged libel the firm of which he was the head, and by his direction, had withdrawn its advertising patronage from the defendant. It also appeared that such withdrawal was known to the defendant's editor-in-chief when he wrote the article complained of. *Held* that the evidence was properly admitted.

A general objection to the admission of a deposition is insufficient if parts of it are admissible; the objection should be specific.

The plaintiff introduced the city Year Book, showing that members of other city boards on whom no adverse comment was made, had furnished supplies to the city in much larger quantities and under similar conditions. *Held* that under the circumstances detailed in the finding, the admission of such evidence was not erroneous.

In so far as the Act of 1893 requires the Supreme Court of Errors to retry and determine the special facts upon which the judgment of the trial court depends, it is inconsistent with constitutional provisions and inoperative.

While the omission of the trial court to note on the margin of each paragraph of the request for a finding, whether the same was "proven" or "not proven," may be corrected on the appeal, in no case can such omission be ground for the reversal of the judgment.

[Argued February 4th—decided April 15th, 1896.]

ACTION for libel, brought to the Superior Court in New Haven County and tried to the court, *Prentice, J.*; facts found and judgment rendered for the plaintiff to recover $500 damages, and appeal by the defendant for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

Talcott H. Russell and *Roger S. Baldwin*, for the appellant (defendant).

The finding that the publications were made without sufficient occasion or excuse, is a proposition of law. In this case there is no conflict of testimony, strictly speaking; that is, no question of veracity between witnesses. *Briggs* v.

Garrett, 111 Pa. St., 404. The failure of the court to give weight to evidence, is an error of law. *Rowell* v. *Street R. R. Co.*, 64 Conn., 380. The matters contained in the articles complained of may in general be separated into two classes: 1st, specific statements of fact; 2d, reflections upon the plaintiff based upon such facts. This last class of remarks in regard to a public man occupying a public position, do not constitute the basis of a slander suit, and are privileged. Folkard's Starkie on Slander and Libel, §§ 266, 269, 310; Townshend on Libel and Slander (4th Ed.), § 241; *Ogden* v. *Mortimer*, 28 L. T. N. S., 472; *Miner* v. *Detroit Post and Tribune Co.*, 49 Mich., 364; *Seymour* v. *Butterworth*, 3 Fost. & F., 384; *Bays* v. *Hunt*, 60 Iowa, 251; *Sillars* v. *Collier*, 23 N. E. Rep., 723; *Donaghue* v. *Gaffy*, 53 Conn., 50; *Arnott* v. *Standard Assoc.*, 57 id., 86; *Dickson* v. *Phillips*, 51 N. Y. Sup. Ct., 162. Malice may be sometimes inferred from the defamatory statements themselves, but they must be inconsistent with bona fides and honesty of purpose. *Hart* v. *Gumpach*, L. R. 4 P. C., 439; quoted with approval in *Kent* v. *Bongartz*, 15 R. I., 72. The mere fact that the statements made are intemperate or excessive from over-excitement, will not defeat the claim of privilege. *Brow* v. *Hathaway*, 13 Allen (Mass.), 239, 242; *Wright* v. *Woodgate*, 2 Cromp., M. & R., 573; *Roward* v. *De Camp*, 96 Pa. St., 493. No malice was proved in this case. So far as the conclusion of malice is drawn from the tone of the writings exhibited, it presents a question of law. *Brow* v. *Hathaway*, *supra*. The court erred in ruling out evidence as to the truth of the charges. In doing so it overlooked entirely the distinction between the law as it existed prior to the Practice Act, and the law existing now under that Act. The old form of pleading in libel contained no specific statement of the falsity of the publication. The only distinct allegation was that of the publication. The complaint contained on p. 115, of forms under the Practice Act, has a specific statement that the publication was false and malicious. But it will be claimed that the law is settled against the defendant's contention, by the case of *Donaghue* v. *Gaffy*, 53 Conn., 52. This question was touched upon in the opinion of JUDGE LOOMIS in that case,

but it did not strictly arise, and his remarks are *obiter*. Malice cannot be implied or inferred from the fact of publishing defamatory words merely, as at common law. *Osborne* v. *Troup*, 60 Conn., 495; *Hotchkiss* v. *Porter*, 30 id., 421. Section 1116 of the Gen. Stat. has been declared, in the case of *Moore* v. *Stevenson*, 27 Conn., 14, and in the case of *Arnott* v. *Standard Association*, 57 id., 94, to have been passed for the protection of the press in the honest publication of news in good faith. In this case the court does not even find the alleged libelous matter false. In this respect the finding differs from that in any other case that the defendant has been able to find. *Osborne* v. *Troup*, 60 Conn., 495. Even without reference to the changes effected by the Practice Act, under the rules of the common law, the defendant would have been allowed to prove the truth of the charge under the general issue; and not only that, but the falsity of the charge itself would be a part of the plaintiff's case, without which he could not recover. *Briggs* v. *Garrett*, 111 Pa. St., 414, and cases cited therein. Newell on Defamation, Slander and Libel, p. 389; *Klinck* v. *Colby*, 46 N. Y., 427; *Kent* v. *Bongartz*, 15 R. I., 72; *Hastings* v. *Lusk*, 22 Wend., 410; *Fowles* v. *Bowen*, 30 N. Y., 24; *Ormsby* v. *Douglass*, 37 id., 477; *Hart* v. *Gumpach*, L. R. 4 P. C. Appeal Cas., 459; *Laughton* v. *The Bishop of Sodor & Man*, 4 P. C. Appeal Cas., 495; *Bromage* v. *Prosser*, 4 B. & C., 256; *Remington* v. *Congdon*, 2 Pick. (Mass.), 310; *Bradley* v. *Heath*, 12 id., 164; *Howland* v. *Flood*, 160 Mass., 509; *Blakeslee & Sons* v. *Carroll*, 64 Conn., 223. The question was whether the defendant corporation was chargeable with malice. The court directed its whole attention to the state of mind of Davenport. It would not admit evidence of articles in other papers which were kept on file in the office of the defendant. This evidence should have been admitted. It showed the existence of probable cause and of an occasion for the attack. If newspapers are privileged in expressing their opinions about the acts of a candidate, they must be privileged to discuss charges, and to state apparent facts which have become public property. *Express Printing Co.* v. *Copeland*, 64 Texas, 354.

Charles S. Hamilton, with whom was *William B. Stoddard*, for the appellee (plaintiff).

There is no error in the ruling of the court overruling the defendant's claim "that none of the publications complained of were defamatory." The ruling excluding the proof of the truth of the matter contained in the libelous publication, under the pleadings as they stand, was clearly right. The truth cannot be given in evidence unless specially pleaded, either as a defense or in mitigation of damages. *Donaghue* v. *Gaffy*, 53 Conn., 43; *Swift* v. *Dickerman*, 31 id., 285, 291. The ruling in reference to excluding the articles from the New Haven Register was correct. *Arnott* v. *Standard Asso.*, 57 Conn., 94; *Swift* v. *Dickerman*, *supra*. The ruling in reference to admitting the deposition of Edward I. Atwater was correct. Malice does not necessarily mean malignancy, hatred, or personal ill feeling. *Osborne* v. *Troup*, 60 Conn., 485, 492; *Wynne* v. *Parsons*, 57 id., 73, 75–8. It is malice if "only that the party doing it was actuated by improper and unjustifiable motives." *Wynne* v. *Parsons*, *supra*. The defendant was actuated by improper and unjustifiable motives. The ruling admitting proof of the supplies furnished the city by Charles W. Blakeslee & Sons, and The McLagon Foundry Company, was not irrelevant and immaterial, and the ruling admitting it was correct. The ruling excluding the question asked of Criddle was correct. As it appears that Criddle did not talk with Davenport upon the subject, what he had learned from persons whether "in official positions, or private persons," could be of no consequence. The ruling of *Judge Thayer* at a former term, expunging a portion of the defendant's answer, was clearly correct. This court will not attempt to decide pure questions of fact, or reverse a judgment on a question of fact under the law of 1893, under which this case is brought up. *Styles* v. *Tyler*, 64 Conn., 432, 442–61; *Dubuque* v. *Coman*, ibid., 480; *Meriden Sav. Bk.* v. *Wellington*, ibid., 553, 556; *Gilbert* v. *Walker*, ibid., 390, 391.

HAMERSLEY, J. The complaint contains four counts,

each charging the defendant with the publication of a libel concerning the plaintiff. The publications were made on May 15th, 1891, and on the following May 22d, May 25th, and June 23d. The last three counts were added by way of supplemental complaint, alleging that since the action was commenced, the defendant published concerning the plaintiff other libelous matter which "grew out of and was connected with the same libelous matter contained in the original complaint." The defendant's answer admits the publication, and denies the rest of the complaint; alleging that "the defendant published said several articles without any malice in fact against the plaintiff personally, but merely to give what it supposed to be current news, and to make what it supposed to be a just and fair criticism upon the conduct of the plaintiff referred to in his official capacity as a member of the board of public works."

The complaint alleges no special damage, and the answer contains no defense of justification. Publication being admitted, the questions for the trial court were: (1) Was the matter published *per se* defamatory? (2) Was it malicious, including the question of privileged communication? And (3), whether privileged or not, has the plaintiff proved malice in fact, under § 1116 of the General Statutes?

The last question will require no separate discussion, as it must be disposed of in the consideration of the second. As to the first question, it would hardly be claimed that the publications were not libelous with the meaning attributed to them by the innuendoes; and we think that the publications as recited in the complaint and admitted by the answer are, on their face, defamatory.

All the substantial errors claimed by the plaintiff relate to the disposition by the court below of the second question: were the publications privileged? This question, assuming the fact of the publication of defamatory matter, is practically the question of libel or no libel; hence it is necessarily involved in the general issue; and notice in the pleadings that it will be raised on the trial, while permissible, has never been held to be obligatory; although, since the adop-

tion of the Practice Act, such notice is perhaps the better practice. In truth, the fact of a publication being privileged, is the main fact on which most libel actions tried under the general issue depend, and the modern law of libel has been developed to a large extent in cases concerned with the question of privileged communications. It is perhaps unfortunate that the word "privilege" has been used in this connection. In a few instances considerations of public policy, deemed essential to the administration of government, exempt from liability to civil action the author of libelous utterances. Unless in those cases which the necessities of government take out of the domain of private wrongs, the law does not concede to any person under any circumstances the "privilege" of libeling another. Where a citizen is injured by means of a libel, his right to a remedy against the author is guaranteed by the Constitution, and cannot be taken away even by legislation. *Hotchkiss* v. *Porter*, 30 Conn., 414, 421.

The right to an action of libel (where special damages are not sought) depends on a publication of matter affecting the reputation of the plaintiff, of that character which is defined by law as necessarily causing actionable damage, made by the defendant in violation of a legal duty. The two main elements are: injury to the plaintiff and a wrongful act, *i. e.*, an act in violation of a legal duty by the defendant. The first element involves the definition of a defamatory publication, the second, of the duties imposed by law in respect to such publications. These duties are well settled; they are restrictive and permissive; the general duty which binds every one to absolutely refrain from the publication of defamatory matter, unless he possesses evidences of its truth so certain that he can successfully establish his charge in a court of justice; and the special duty to communicate such matter in good faith upon any subject in which one has an interest, or has, or honestly believes he has, a duty (including certain moral and social duties) to a person having a corresponding interest or duty. An act by which another must be injured, intentionally done in viola-

tion of legal duty, is in law maliciously done, and so it is held that the wrongful act of the defendant essential to actionable libel must be malicious; and this essential element of libel is briefly expressed in the rule—malice is the gist of the action of libel. Where the action is contested in respect to a defamatory publication as a violation of the general duty only, malice is proved by a legal presumption established by the fact of publication; where it is contested in respect to a violation of the special duty, malice must be proved by other evidence. But in either case the malice must be shown by the plaintiff, and in either case the malice consists in an intentional defamatory publication in violation of a legal duty. The claim of "privileged communication" therefore, is not a special defense, but a practical traverse of the plaintiff's allegations; and must be established by evidence overcoming the proof the plaintiff is obliged to furnish in every case, of the defendant's intention to mar his reputation in violation of legal duty.

The defendant claims that the communications were privileged, and that the trial court erred in finding and ruling otherwise. The special facts found by the court are: the plaintiff was one of six members of the board of public works of the city of New Haven; the action of a majority of the board of which the plaintiff was one, was in certain of the public prints and elsewhere called in question and much discussed; the defendant conducted a daily newspaper published in New Haven; the libel charged in each count was contained in extracts from the issue of this newspaper on the date alleged; the main defamatory matter common to all the counts, related to the conduct of the plaintiff as such public officer; the publications were made without sufficient occasion or excuse, recklessly, and in disregard of the plaintiff's rights and the consequences which might result to him therefrom, and for the purpose of injuring him in character and reputation. The court found the publications to be malicious, and rendered a general judgment for the plaintiff.

While the gist of the action of libel is malice, and malice is a fact to be found by the jury, it is nevertheless a fact

which may involve a question of a law. Where, as in the present case, the malice depends upon the contested existence both of legal duty and intention, the definition of duty is for the court, the finding of intention is for the jury. In other words, where the alleged libel is claimed to be a privileged communication, the court must decide whether upon the admitted circumstances the law recognizes a duty to make the communication, and the jury must find upon the evidence whether the communication was in fact made in good faith with intent to perform that duty. The legal character of the occasion is determined by the ruling of the court, the use of the occasion by the finding of the jury. *Haight* v. *Cornell*, 15 Conn., 74, 82; *Brow* v. *Hathaway*, 13 Allen, 239. But the ruling of the court cannot control the ultimate fact at issue, which depends upon good faith and intention that may be decisive of malice, notwithstanding the ruling that the occasion is privileged; and so, as a general proposition, it may be said that the question of whether a publication is a privileged communication, is one for the jury. *Klinck* v. *Colby et al.*, 46 N. Y., 427, 431.

We assume, as claimed by the defendant, that the trial court has found that some portion of the defamatory matter specified in each count is not a privileged communication. Of course, if any specification of libel is supported by the law and the facts found, the judgment on that count is good. *Hillhouse* v. *Dunning*, 6 Conn., 407.

Examining first the second count, the libel charged is as follows:—

"The thunderbolt fell yesterday. And what a thunderbolt! Commissioner Atwater, the immaculate 'Jerry,' bringing suit for libel! And all because The News had up and told the truth about 'Jerry' and his associates of the potent 'Big Four.' His name should be changed to 'Jerry' Bluff. Some interesting chapters of Commissioner Atwater's business life are embalmed in the records of the law courts. A bond has taken the place of 'Jerry' Bluff's attachment on The News corner lot, and it is again free and clear of all incumbrances. Try again, 'Jerry.' Does W. Jere Atwater

represent himself or the 'Big Four' in the threatened court proceedings? It is strong public opinion that the whole Four need justification."

The first four paragraphs were a portion of a news article containing an account of the commencement of this suit, the complaint in which then contained only the first count; the article giving at length the writ and complaint. The remaining paragraphs constituted editorial paragraphs by themselves.

The defamatory nature of this publication is too clear to call for discussion. It consists of an item of news, *i. e.*, the commencement of a civil action, and comments on the plaintiff and his action. The occasion of the publication was the institution of a private suit. The claim that the official acts of a public officer was the occasion, will not hold; it is inconsistent with any honest interpretation of the facts and the language used. Such an occasion is not privileged. There are few rights more important or more carefully protected by law, than the right of the citizen to appeal to a court of justice for redress of his alleged wrongs, and the right to an impartial hearing. Before a cause is finally heard all attempts to prejudice the minds of the public against persons concerned as parties, is forbidden. *Roach* v. *Read*, 2 Atk., 469. Comments in a newspaper reflecting on the plaintiff, and representing the proceedings as vexatious and unprincipled, are in violation of law and may be carried so for as to constitute an offense. *Littler* v. *Thomson*, 2 Beav., 129. There is no exception from this rule, either in law or morals, in favor of a newspaper that is itself the defendant. When a newspaper is sued for an alleged libel in commenting on a public man, such suit cannot operate as a muzzle. It may make such comments as are justified by the duty it owes the public, after as well as before the suit; but when it makes a suit against itself the occasion of a malicious attack on the plaintiff, impunging his private character, charging him with instituting a vexatious proceeding, attempting to prejudice the minds of the public against him as plaintiff in that cause, it plainly violates the law, and it would be a

strange anomaly to hold that a palpable violation of the law is the fulfillment of a legal duty. The libel alleged in the second count was not published on a privileged occasion. The same is true of one specification in the third count. So far as those counts are concerned the judgment is fully sustained.

So far as the judgment rests on the first and fourth counts, the defendant's claim is presented in a different form. The occasion was a privileged one, *i. e.*, information in respect to the conduct of a public officer affecting the performance of his duties, with reflections on that conduct, given by a newspaper to the public interested in a faithful execution of his office. The duty of the Press to give such information and to make such comment, is recognized by law, and its free and fearless performance will be protected by the court; but the very nature of this duty implies good faith. When information both defamatory and false is published of a public officer, accompanied with slanderous comments, and from a malicious motive, such publication, even if its falsity is unknown to the publisher, is not made in performance of any duty legal or moral. Reading the specifications in these counts in the light of all the circumstances shown in the record legitimately bearing on the meaning of the language used, they may be construed as charging that the plaintiff, being a member of the board of public works, himself furnished materials to the city, the use and price of which were subject to the control of the board, in conscious violation of the charter and ordinances; using his official position for his own pecuniary benefit, and shielding himself from investigation and removal from office through a corrupt understanding with a majority of the board and certain members of the board of aldermen.

The defendant insists that the matters complained of should be separated into two classes: first, statements of fact, *i. e.*, that as member of the board plaintiff was interested in transactions with the city and with the board, and with others, in such a way that he could control the business of the city and get pecuniary benefits therefrom; second, comments on the

plaintiff based on such facts. If we should hold that the specific statement of facts could be thus separated from the comments that characterize their meaning, we should still have to say that the publications are defamatory; and although published on a privileged occasion, the question of good faith and intention must be settled before they can be held to be privileged communications, and that question is a question of fact.

Confusion sometimes arises between an "occasion" of privilege, and a "privileged communication." There may be an occasion of privilege without a privileged communication, but not the latter without the former. This confusion may be avoided by remembering that these phrases are technical terms used in respect to the evidence by which malice in the defendant—the real issue of fact—is determined. Where the evidence establishes circumstances which the law says support a duty to make a statement of facts honestly believed to be true, or an honest comment on facts, such circumstances are called an occasion of privilege; and when the evidence goes further, and shows that on such occasion the defendant made the communication complained of in good faith with honest intent to perform that duty, it is said the evidence has established a privileged communication. But in all cases the simple question in issue is, was the damage suffered by the plaintiff caused by the malice of the defendant?

The publications in the first and fourth counts were made under circumstances which support a duty to make a communication characterized by the good faith which is essential to that duty, but the trial court has found from the evidence that the communications made by the defendant were not made in good faith, but recklessly, without sufficient excuse, and for the purpose of injuring the plaintiff in character and reputation. We are not now concerned with the nice questions of burden of proof and so-called shifting of that burden, which may occur in the trial of an action of libel. Such questions are not raised. The trial court has found upon the whole evidence that the fact of malice has

been established; that the occasion of privilege was not in fact used for the performance of the duty which the law recognizes on such occasion, but in violation of that duty, and for the purpose of malicious injury to the defendant. Upon such finding the only questions for this court to review are the claims of error in law in reaching the conclusions found.

The defendant claims that inasmuch as the pleadings disclose circumstances from which the court must rule that the occasion was one of privilege, and the publications specified do not contain intrinsic evidence of malice, and the plaintiff adduced no extrinsic evidence of malice, the failure of the court to render judgment for the defendant was an error in law. If this case had been tried to the jury on the first and fourth counts only, and upon the close of the plaintiff's evidence in chief the defendant had moved for a nonsuit, or as suggested in its brief, had filed a demurrer to the evidence, we are not prepared to say that it would not have been entitled to a judgment; the question may not be free from doubt, but it is not before us. The case was tried to the court on all the counts, and the claim that there was no evidence of malice was not made until after the evidence of the defendant was in and the case submitted on the law and all the evidence. While proof of malice is part of the plaintiff's case, his failure to furnish sufficient evidence may be remedied by the evidence of the defendant, and it then becomes the duty of the trier to decide whether upon all the evidence malice has been proven.

The defendant asks us to hold that upon all the evidence, malice in fact was not proven; but that is a question for the trial court. The only question this court can entertain is the claim that the trial court has found malice in the absence of all evidence except that furnished by the publications specified, and this claim is unsupported by the record. The other articles of the defendant's paper produced in evidence, the publications specified in the second and third counts, which would be, even if not contained in the complaint, proper evidence of malicious intent as to the other counts;

the testimony of Mr. Davenport, the president of the defendant corporation and editor-in-chief of the paper, in connection with other evidence; all support facts and inferences from facts tending to prove actual malice in publishing the matter specified in the first and fourth counts.

Such questions of fact must be settled in the trial court. *Osborne* v. *Troup*, 60 Conn., 485, 493; and we think the necessity for leaving such questions to a trial court is inherent in the law of libel. The administration of that law is concerned with two most important rights; the right of the individual to reparation for malicious injuries to his reputation, and the right of the people to liberty of speech, and of the press. The two rights are not inconsistent but interdependent. The individual has no right to demand reparation for those accidental injuries incident to organized society. Freedom of the press is the offspring of law, not of lawlessness, and its primary meaning excludes all notion of malicious injury. Indeed any true freedom of the press becomes impossible where malicious injuries are not forbidden and punished; and the strongest guaranty of that freedom lies in an impartial administration of the law which distinguishes the performance of a public or social duty from the infliction of a malicious injury. The maintenance of this distinction demands uniform principles of law defining the duty; and an exercise of the sound judgment of a trier of fact in reaching the vital conclusion of intent, dependent on evidence and circumstances changing with each case presented, and impossible to confine within the rigid rules of logic that constitute a legal principle. And so the law of libel wisely and necessarily leaves to the judge the declaration of the law—the same for all cases—defining the duty; and commits the question of the actual performance of the duty so defined, to the jury.

The defendant also claims that the judgment is erroneous because the court has not specially found the fact of the falsity of the libel. A malicious libel is presumed to be false, unless its truth is affirmatively proved by the defendant. But where the plaintiff relies upon the falsity to rebut evi-

dence of the defendant's good faith and lawful intention, he must then prove the falsity. So it has correctly been held that when the defendant's evidence tends to prove that the alleged libel was a privileged communication, the plaintiff cannot break the force of that evidence and establish actual malice by relying on the presumption of falsity; he must prove the defamatory charge to be false and that the defendant knew it was false. In the present case the defendant showed circumstances that constituted an occasion for a privileged communication, but he failed to show the good faith and honest purpose necessary to make the defamatory matter published on that occasion a privileged communication; on the contrary the court has found that the evidence, unaided by any presumption of falsity, affirmatively proves such actual malice in the defendant, and that the libel is not a privileged communication. In this there is no error. If the claim of the defendant goes so far as to insist that where the defendant has shown circumstances that furnish an occasion for a privileged communication, that then in addition to the burden of proving actual malice and the want of that good faith essential to every such communication, the plaintiff must also assume the burden of proving the falsity of the defamatory charge, the claim is contrary to the settled law of libel. The opinion of the court in *Edwards* v. *Chandler*, 14 Mich., 475, 476 (and in one or two of the cases cited by the defendant), seems to furnish excuse for this claim, but we can hardly think that such was the real intention of the learned judges who gave the opinions in those cases.

The defendant claims error in rulings of the trial court on questions of evidence; and chiefly in the refusal of the court to receive evidence of the truth of the defamatory charge, when offered by the defendant as a defense to the action. This ruling is stated in the finding as follows: "The defendant, as a part of its case, offered to prove that the matters contained in said several publications were true in fact, as a defense to this action. To this evidence the plaintiff objected, on the ground that the truth of the libelous matters was not pleaded; and thereupon the court ruled that the truth could

not be shown as a defense, unless the same was pleaded, but gave the defendant's counsel leave, without costs, to amend its pleadings so as to set up the truth as a defense, if it so desired. This defendant's counsel declined to do. The court thereupon and thereafter declined to receive all testimony offered to show the truth as a defense."

Unless the truth of the charge is pleaded in justification, the defendant is not permitted to prove the truth of the words, either for justification or for the mitigation of damages. Such principle is settled law, and in this State certainly is not open to discussion. *Swift* v. *Dickerman*, 31 Conn., 285, 291; *Donaghue* v. *Gaffy*, 53 Conn., 43, 51. The defendant may, indeed, offer evidence to prove his good faith, an honest belief in the truth of the utterance published, although such evidence may also tend to prove the truth of the charge. *Swift* v. *Dickerman*, *supra*. It is received in such case as, in effect, proof of probable cause, where the occasion of publishing offered *prima facie* evidence of an excuse for stating what may in fact be false, but is honestly believed to be true. *Bradley* v. *Heath*, 12 Pick, 163, 165. There is no claim that the court below failed to apply this rule; and it does not appear that any evidence fairly tending to establish probable cause, either for the purpose of proving a privileged communication, or in mitigation of damages, was rejected because it also tended to prove the truth.

The defendant however, insists that the rule requiring the truth to be specially pleaded in justification, is a rule of pleading which has been changed by the Practice Act; and that the rules of court in authorizing the use in an action of libel, of a complaint containing in a separate paragraph "said publication was false and malicious," give to a denial of that paragraph in the answer, the effect of putting the plaintiff to the proof of the falsity of the publication. This would practically nullify the presumption that a defamatory charge is false; a presumption clearly essential to any adequate protection under the law of libel. The universal principle underlying that law, and a careful study of its curious and complicated development in England, from the first statement

of the principle by Bracton (*de actionibus*, f. 140) to the present century, indicate that the necessity of pleading the truth in justification is more than a rule of pleading or of evidence, and is involved in the very nature of the cause of action; and that such justification is not a direct denial of the cause of action, but a collateral matter which, if established by the defendant, will bar the recovery that otherwise must follow the malicious injury, without questioning the truth or falsehood of the defamatory charge. At all events, it is clear that a law forbidding any recovery for injuries caused by a malicious libel, unless the person injured shall prove the falsity of the charge, would give immunity to a considerable class of dangerous libels, and radically change the existing law. The Practice Act has not produced such a change. The form cited by the defendant does not purport to state a new cause of action, but the same cause in a different way. In the ordinary action of libel claiming only general damages, the falsity of the libel is not a material fact on which the plaintiff relies in order to prove his case, and it has never been deemed necessary to allege it in the declaration. It has however, uniformly been used as descriptive of every libel. Malice is a material fact on which the plaintiff relies, and it has always been necessary that it should clearly appear from the declaration. Under the old practice the allegation of malice and the descriptive term of "false," have been used in alleging the publication; under the new practice the publication is separately alleged in order that it may be separately admitted or denied, and the allegation of malice with the old descriptive term of false, is made in a paragraph by itself. The truth becomes a material fact on which the pleader relies where the defendant intends to justify, and must then be alleged in proper form as a special defense; otherwise the falsity is not in issue. *Donaghue* v. *Gaffy*, *supra*.

The other claims of error in rulings on evidence do not call for special comment. The court admitted as evidence articles from a New Haven newspaper, claimed as sources of information on which the defendant relied to prove good

faith; and rejected evidence of other similar articles, because they were not brought to the attention of the defendant before the alleged publication. If the case had been tried to the jury, possibly a question might have arisen whether the whole evidence should not have been submitted to the jury; but as similar articles were properly admitted, and the court was satisfied and found that the evidence offered did not prove that these particular articles were seen by the defendant, it is difficult to see how the defendant was injured.

Portions of the deposition of Edward I. Atwater tended to prove the fact that prior to the alleged libel the firm of which the plaintiff was the head, and by his direction, withdrew its advertising patronage from the defendant. We cannot say that this fact, in connection with the fact also appearing in evidence, that such withdrawal was known to the editor-in-chief who was president and a stockholder of the defendant corporation, when he wrote the alleged libel, was not relevant to the fact of malice. The objection to the deposition was a general one; and a part of it being admissible, it would not have been proper for the court to exclude it, even if it contained other matters obnoxious to a specific objection. *Merriam* v. *H. & N. H. R. R. Co.*, 20 Conn., 354, 363.

The admission of the evidence contained in the city Year Book, showing that members of other city boards on whom no adverse comment was made, had furnished supplies to the city under circumstances similar to those claimed in respect to the plaintiff, and to an extent in comparison with which the supplies furnished by the plaintiff were trivial in amount, was not, under the circumstances detailed in the finding, erroneous.

The exclusion of the question asking the witness Criddle whether, subsequent to the publications, he had seen the testimony in the case of the Globe Sewer Co., was correct. The exclusion of a question to the same witness, whether persons from whom he had received information which he had not communicated to the editor-in-chief and whose names he did not know, were persons in official positions or private

persons, was not error. We have carefully considered all the objections made by the defendant, and are satisfied that no one furnishes ground for a new trial.

The court did not err in expunging paragraph five in the defendant's answer to the second count. It was plainly unnecessarily prolix, and a statement of evidence rather than of fact. It was not a justification—if so, it should have been stated as a separate defense—and its expunging could not injure the defendant. *Page* v. *Merwin*, 54 Conn., 426, 435.

The reasons of appeal assign seventy-two errors. Those properly relating to questions of law are disposed of by the views we have expressed. The other assignments do not state errors in respect to the rulings and decisions of the court upon questions of law arising in the trial, but grounds for an application to rectify the appeal.

By operation of § 1141 of the General Statutes, as extended and enlarged by the valid portions of the Act of 1893 (Public Acts of 1893, p. 318) the application authorized by that section for a correction of the appeal, may be contained in the appeal itself, and be determined on argument of the appeal, upon an inspection of the record, as well as upon any other inquiry which the provisions of that section may authorize. *Styles* v. *Tyler*, 64 Conn., 432, 461. The grounds for such application are not "reasons of appeal," and cannot ordinarily, if ever, furnish ground for reversal of judgment or for a new trial; although pending the adoption of rules of practice (which, as intimated in *Styles* v. *Tyler*, would be essential to the regulation of such application if the Act of 1893 remained unchanged), the improper intermingling of the grounds for an application to correct the appeal with the "reasons of appeal," has been overlooked.

Upon examination of the assignments of error which relate to the action of the judge in preparing the finding necessary to properly present the objections to testimony and his rulings, and a careful inspection of the whole record,—testing the errors claimed by the facts appearing in the record not included in the finding—we are satisfied that the finding, as prepared by the judge, presents these questions fairly and

with sufficient fullness; and that no correction which we could make would affect the nature of the questions presented, or our decision upon them.

The assignments which relate to the defendant's claim that the special facts on which the judgment is founded, are against the weight of evidence, and that the appeal should be corrected by altering the finding in this respect, demand consideration. The defendant in argument insists specially on his second reason of appeal and his seventh ground of appeal—*i. e.*, that the court erred in finding facts repugnant to the special facts claimed by the defendant to have been proved, and which the court found to be untrue. This claim goes to the root of the defendant's alleged grievance, and is in truth the substantial ground of his appeal. The defendant, in his request for a finding, asked the court to incorporate in the finding the following facts, which he claimed to be proved by the evidence: No personal malice existed against the plaintiff on the part of the defendant, or Mr. Davenport, its managing editor, who caused the article to be published (so far as related to proof of malice both parties treated Mr. Davenport as practically the defendant); no malice existed, unless it must necessarily be inferred from what is contained in the articles published; Davenport caused the articles to be published in the belief that the facts specified in respect to the plaintiff were true; in the belief that the plaintiff's acts charged were prejudicial to the city, in violation of law, and demanded his removal from office; in the belief that it was his duty to criticise said acts as the acts of a public officer and as items of news; such belief was based on investigations and careful inquiries in regard to the truth of the matters charged, and also on articles published in other journals; there was good reason to believe the charges to be true; there was no malice in fact.

The court did not find these facts from the evidence, but found facts entirely repugnant, as stated in the record. If we can re-try these facts, and should be of opinion that the facts as claimed by the defendant are clearly supported by the weight of evidence, we must find such facts, incorporate

them with the facts on which the judgment is founded, and reverse that judgment for a patent error in law.

The defendant does not make the broad claim that this court can re-try all facts found by the trial court; but that when the question of law involved depends on the special facts found, the Act of 1893 requires this court to re-try and adjudge such facts as incident to the review of the question of law; and that the re-trial of such facts is not inconsistent with the recent decisions of this court. Such a claim, essential to the determination of this appeal, requires us to restate the principle established in *Styles* v. *Tyler*, *supra* (p. 442). In that case we said: "In 1834, CHIEF JUSTICE DAGGETT in delivering the opinion of the court in *Weeden* v. *Hawes*, 10 Conn., 54,—JUDGE PETERS, a member of the Constitutional Convention of 1818 concurring, and JUDGE CHURCH, another member of that convention being then a member of the court, though not present when the case was decided—said that this court was a Court of Errors and had 'no constitutional power to decide a question of fact,' and in 1867 this court expressed the opinion that 'it was the intention of the framers of the Constitution that the Supreme Court of Errors should be a court for the correction of errors *in law*.' The language used clearly imports this, and such has been the understanding of the legislature, of the courts, and of the people of the State. *Dudley* v. *Deming*, 34 Conn., 169, 174. We did not in that case discuss the reasons for the opinion given, but we are now satisfied of its correctness after a careful re-examination of the provisions of the Constitution."

For this reason,—because the jurisdiction of this court as fixed by the Constitution relates to correction of errors in law and not to the re-trial of questions of fact,—we held "that the Act of 1893 does not require this court to determine upon evidence spread upon the record questions of pure fact settled by the trial court;" and for the same reason and in order to give some effect to an Act of the legislature, we held that "the Act as a whole fairly expresses a purpose, consistent with the jurisdiction of this court, in language not so inter-

woven with the uncertain and defective language as to make it impossible to give effect to that purpose." And that purpose was "to provide a further and additional remedy" for the correction of an appeal, to furnish "additional facilities for the application to this court for a correction of the appeal, as authorized by the General Statutes, § 1141."

The present claim is that the appeal raises a question of law, *i. e.*, is the judgment for the plaintiff a legal conclusion from the facts found? The defendant claims that the facts settled by the trial court are connected with this question of law, *i. e.*, upon the facts as found by the court the question must be decided one way, while upon the facts as found by the defendant it must be decided the other way; and that the Act of 1893 requires this court, as an incident to the correction of the appeal, to determine upon the evidence the questions of fact settled by the trial court, to substitute our findings of fact for those of the trial court, and then to reverse the judgment of the court below for errors in the application of law to facts it had not found.

It is patent that the real substance of such a proceeding is nothing but a re-trial of pure questions of fact settled by the final judgment of the Superior Court. Its actual nature cannot be changed by calling it a correction of the finding. A re-trial upon the testimony and the adjudication of essential facts on which a judgment is founded, by whatever name it may be called, is a trial of the facts in that cause, whether its effect be limited to ordering a new trial, or extends to the rendition of a final judgment on the facts so adjudicated; and is inconsistent with the primary distinction drawn by the Constitution, between the jurisdiction original and appellate of courts for the full trial and adjudication of causes, and the jurisdiction of a court of last resort for correcting errors in law which may have intervened in the course of a trial. Facts found by a trial court upon hearing and considering the testimony and upon which is founded a judgment complained of as not being the true voice of the law upon such facts, can only be re-tried in courts to which the Constitution commits a jurisdiction for the adjudication of

such questions. The Superior Court is the court of last resort for such purpose. When the jurisdiction of this court —the court of last resort for the determination of questions of law—is invoked to correct errors involved in such a judgment, the facts upon which the questions of law arise, must have been settled; the function peculiar to trial courts of adjudicating the facts as established by testimony, must have been exhausted; and the facts so settled as well as the judgment they support, are final, unless this court shall declare that the judgment is erroneous, *i. e.*, not the true conclusion of the law from the facts. Such a principle embedded in the Constitution should not be applied in any technical or narrow spirit, but broadly so as to give a reasonable effect to its essential purpose; and it cannot be evaded through any plan for accomplishing by a mere form of words the very evils it was adopted to prevent.

In accordance with the provisions of the Constitution establishing the jurisdiction of this court, and the contemporaneous construction of that instrument to be found in the legislation first enacted to carry out its provisions, and remaining unchallenged for a period of seventy-five years; with the uniform practice of this court since its organization; with its opinion clearly expressed in *Weeden* v. *Hawes*, and *Dudley* v. *Deming*, and its deliberate decision in *Styles* v. *Tyler*, we think the Act of 1893, in so far as it requires this court to determine such questions of fact, is inconsistent with constitutional provisions and inoperative.

The defendant's supplemental reason of appeal assigns as error, the failure of the court to note on the margin of each paragraph in the request for a finding, either "proven" or "not proven." While in a proper case the omission of the court to so mark each paragraph might be corrected, in no case could such omission be ground for reversal of the judgment. In *Ketchum et al.* v. *Packer*, 65 Conn., 544, 552, we stated that the words "found" and "not found" were equivalent to the statutory words, although their use could not be approved, and that a paragraph which could not be found proven as a whole, should be marked not proven. In *Styles*

v. *Tyler*, 64 Conn., 432, 462, we held that the record might show that the facts detailed in a request for the incorporation of facts, were found proven, although no note of "proven" was made; and it is also true that the record might show the facts to have been found not proven, without such note. In the present case the record shows sufficiently for the protection of the defendant's interests, what facts were found by the court to be proven or not proven; whatever may have been the cause of the omission.

As the Act of 1893 has been repealed since this appeal was taken, further comment on such matter of practice is unnecessary.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

Town of New Britain et al. *vs.* The Mariners Savings Bank.

First Judicial District, Hartford, March Term, 1896. Andrews, C. J., Torrance, Fenn, Baldwin and Hamersley, Js.

Where a special statutory method of collecting a tax is resorted to, the steps therein prescribed must be strictly followed.

Section 3896 of the General Statutes provides that the certificate continuing a tax lien shall describe "the amount of the tax." In a suit to foreclose a tax lien against one who had become the owner of the premises subsequent to the assessment of the tax, it was *held* that a certificate which stated a certain sum to be "the amount of said tax and interest on the same to date of this certificate," but furnished no data by which the correct amount of the tax itself could be ascertained, did not comply with the statute requirement.

[Argued March 3d—decided April 15th, 1896.]

Suit to foreclose certain tax liens, brought to the Court of Common Pleas in Hartford County, and reserved by that court, *Calhoun*, *J.*, upon the defendant's demurrer to the

complaint, for the consideration and advice of this court. *Judgment sustaining demurrer advised.*

The case is sufficiently stated in the opinion.

Joseph L. Barbour, for the defendant.

The validity of the certificates is the first thing to be considered. If they are invalid, there is no lien, and the Court of Common Pleas should be advised to render judgment on the demurrer for the defendant. The demurrer attacks the certificates on three grounds: *First*, because they do not specify the amount of taxes on the defendant's real estate—the "sixth piece." *Second*, because they claim a lien not only on the "sixth piece," but on five other pieces in which defendant has no interest, and claim a lien on all six pieces for the total amount of the taxes due on all. *Third*, because the correct amount of the taxes is not given in the certificates, as required by law. *Meyer* v. *Burritt*, 60 Conn., 121; *Albany Brewing Co.* v. *Meriden*, 48 id., 243. Section 3 of the Act of 1887, in effect, provides that no lien shall attach to any piece of real estate except for its own taxes. This court has so held in *Meyer* v. *Burritt*, *supra*, and in *Hellman* v. *Burritt*, 62 Conn., 438: "A tax lien on several pieces of land cannot be enforced as a lien upon one of them alone." But a glance at these certificates shows that the liens claimed are upon all six pieces of land for the taxes laid upon all said pieces. *Meyer* v. *Trubee*, 59 Conn., 425. Unless the exact amount of the tax due upon the "sixth piece" appears in the certificate, the lien is dead; the wording of the statute "*thereupon* such tax shall remain a lien upon such real estate," precluding the continuance unless said exact amount is given. But even if it be held that it is not necessary to state in the certificate the amount of tax due upon each separate piece of real estate, but that the stating of the aggregate tax suffices, still the certificates are fatally defective. The tax due July 1st, 1887, was $96.60. The date of the certificate is June 30th, 1888. Seven per cent interest on $96.60 for one year is $6.76, which, added to $96.60, is $103.36, instead of $106.38, as stated in the certificate. Did

the selectman compute interest at 9 per cent? Then his total should have been $105.29. And the city certificate shows similar discrepancies.

John Walsh, for the plaintiffs.

By the first two paragraphs of its demurrer the defendant claims that the tax due on each parcel of land should have been separately stated, and a lien claimed only on each parcel for the tax assessed against it; and by claiming the total tax against all the parcels of land, it makes the certificate void. As the statute stood prior to 1887, it indisputably authorized the imposition upon one piece of land of a lien for all taxes legally assessed against the owner thereof, not only upon that, but upon any other land or property belonging to him. *Albany Brewing Co.* v. *Meriden*, 48 Conn., 243. Chapter 110 of the Public Acts of 1887, changed the statute so that a lien can only be claimed on each parcel for its share. *Hellman* v. *Burritt*, 62 Conn., 438. The plaintiffs claimed that the certificates of lien in this case are governed by the statute as it stood prior to 1887, and interpreted in *Albany Brewing Co.* v. *Meriden*, *supra*. Chapter 110 of the Public Acts of 1887, was approved May 18th, 1887, and took effect June 1st, 1887; but by § 12, existing liens for taxes were not impaired by that Act. The taxes now in controversy, though due July 1st, 1887, were laid on the list of October 1st, 1886, and we claim that as the owners of estate on October 1st, 1886, were required to hand in a list of their property owned on that date, and an assessment was made upon such lists, the lien for taxes begins at that time. Prior to 1887 no date was mentioned for the commencement of a tax lien. No adjudication has ever been had in this State as to the date of the commencement of a tax lien. The date of the assessment has been decided to be the commencement of a tax in other States. *Cochran* v. *Guild*, 106 Mass., 29; *Holmes* v. *Taber*, 9 Allen, 246; *Hill* v. *Bacon*, 110 Mass., 387. If any such defect existed in the liens, the same has been removed, and the liens validated by § 5, Chap. 340 of the Public Acts of 1895. The third ground of demurrer is

because the certificates do not give the amount of the tax as required by law. The alleged illegality is that the amount of the tax should have been stated without adding the interest to that time. The interest upon the tax is also a lien upon the land, and the mere fact that by a strict reading of the statute, the interest ought not to have been included, should not invalidate the lien. A mechanic's lien was filed against certain land for $4,270.06, when there was, in fact, only due $1,544.56, and in the absence of fraud or intent to deceive, the lien was upheld. *Marston* v. *Kenyon*, 44 Conn., 355. The joinder of the plaintiffs is an absolute benefit to the defendant, avoiding a multiplicity of suits, and saving costs. The manner in which the title vests in the plaintiffs, if the defendant fails to redeem, is a matter which does not concern the defendant. *Ketchum* v. *Packer*, 65 Conn., 556.

ANDREWS, C. J. This is a complaint brought by the town and city of New Britain, to foreclose two tax liens laid on a piece of land in said town and city. The complaint is a joint one, as is permitted by § 3891 of the General Statutes. The controlling facts as set out in the complaint are these: —

On the 1st day of October, 1886, Waldo C. Camp owned six pieces of land in said town and city. Thereafter such proceedings were had by the taxing officers of said municipalities, that a tax was lawfully laid on all the said pieces against the said Camp; the town tax being $96.60 and the city tax $64.40. These became payable on the 1st day of July, 1887. On the 30th day of June, 1888, two certificates continuing the tax liens on said pieces of land, one in behalf of the town and one in behalf of the city, were entered and recorded on the land records of said town. These certificates described each of said pieces of land, and named the amount of the whole tax on them all. The town certificate described the town tax as $106.38, and the city certificate the city tax as $71.28. The certificates stated that these sums were the amount of the tax with interest thereon to the date of filing, and they also named the time when the taxes became due.

The defendant was the mortgagee of one of the pieces of land described in the said certificates, whose title became absolute by foreclosure on the 2d day of February, 1892.

The complaint avers that the proportional part of the whole tax laid on all said pieces, which was assessed on the one piece belonging to the defendant, was $39.24 town tax, and $26.10 city tax; and claimed a foreclosure.

The defendant demurred to the complaint because (among other reasons) "the amount of the tax" was not given in the certificate, as is required by law.

All the statutes which have authorized the continuance of a tax lien and the foreclosure of such a lien, have required that the certificate recorded in the town records should describe "the real estate, the amount of the tax and the time when it became payable." It appears in this case that the certificates did not in terms conform to this requirement; and there are no data given in the certificates by which the correct amount of the tax can be ascertained. The certificates state the time when the tax became payable, and purport to give, as one entire sum, the amount of the tax with the interest thereon from that time to the date of the certificates. The time between those two dates is one year. It may be true that where the amount—*i. e.* principal and interest added together—is given, as well as the time and the rate per cent, it is a very simple arithmetical proceeding to ascertain the principal. But there is no rate of interest mentioned in any statute as applicable to an unpaid tax, either 12 per cent, or 9 per cent, or 7 per cent, at which for one year the principal sum of $96.60 can be ascertained from the amount of $106.38 given in the town certificate, or $64.40 from the amount of $71.28 in the city certificate.

Municipalities have no powers of taxation other than those specifically given by the statutes. A valid tax can be collected only by complying with the provisions of these statutes. This rule must be applied with some rigor when a special method for the collection of the tax is resorted to. A lien upon real estate for a tax does not exist where the

statutory steps have not been strictly followed. Cooley on Taxation, 305; Dillon on Municipal Corporations (4th Ed.), § 820; *Louisville* v. *Bank of Kentucky*, 3 Met. (Ky.), 148; *Thames Mfg. Co.* v. *Lathrop*, 7 Conn., 550; *Hellman* v. *Burritt*, 62 id., 438; *Meyer* v. *Burritt*, 60 id., 117; *New London* v. *Miller*, ibid., 112. The defendant has the right to insist that the plaintiffs shall not take its land to pay to themselves the tax debt of another, unless the steps required by the statute have been exactly taken. *Morey* v. *Hoyt*, 65 Conn., 516.

The Court of Common Pleas is advised to sustain the demurrer.

In this opinion the other judges concurred.

OWEN R. HAVENS ET AL. *vs.* THE TOWN OF WETHERSFIELD.

First Judicial District, Hartford, March Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN AND HAMERSLEY, Js.

Section 2674 of the General Statutes provides in substance, that if the county commissioners, after due notice and hearing, shall find that a town has neglected to keep any public road within its limits in good and sufficient repair, they shall order the selectmen to cause such road to be repaired.

In a hearing under this statute in the Superior Court, upon an appeal from the action of the commissioners, the plaintiffs, without objection, introduced evidence to show that the part of the highway of which they complained was in a worse condition than any of the other highways of the town. To rebut this the defendant was permitted, against objection, to give evidence of the condition of those other highways. *Held* that if the plaintiffs' evidence was irrelevant, as they now claimed, the evidence of the defendant must be regarded simply as neutralizing that, and therefore as not legally injurious to the plaintiffs; but that it could not be said, as a matter of law, that the plaintiffs' evidence was irrelevant, as the question of sufficient repair and neglect was a relative one, the solution of which might be aided by comparing the condition of the road in question with that of others similarly situated.

The question whether the highway is in "good and sufficient repair" must ordinarily be one of fact and not of law, and is not reviewable in this court.

Whether a town, under this section of the General Statutes, can be compelled to macadamize a road, *quære*. The Superior Court was of the opinion that the county commissioners might require this in a proper case, if it was the only practicable method of accomplishing the object sought. *Held* that this view of the law was one of which the plaintiffs certainly could not complain.

[Argued March 3d—decided April 15th, 1896.]

APPEAL from an order of the County Commissioners of Hartford County adjudging that the town of Wethersfield had not neglected to keep a certain highway within its limits in good and sufficient repair; taken to the Superior Court in Hartford County and tried to the court, *Ralph Wheeler, J.*; facts found and judgment rendered in favor of the town, and appeal by the applicants for alleged errors in the rulings of the court. *No error.*

The case is sufficiently stated in the opinion.

William J. McConville and *Hugh O'Flaherty*, for the appellants (petitioners).

It is the duty of towns in this State to keep "in good and sufficient repair" all public highways within their respective limits at all times. *Beisiegel* v. *Town of Seymour*, 58 Conn., 50; § 2666, Rev. Statutes, 1888; 2 Dillon on Mun. Corp., § 683; Angell on Highways (2d Ed.), 299; 9 Amer. & Eng. Ency. of Law, 378; *Quincy* v. *Jones*, 76 Ill., 231. If a drain or other thing is necessary, it is the duty of the town to make or furnish it. Gen. Statutes, § 2683; *Beisiegel* v. *Town of Seymour*, *supra*. Macadamizing is a "repair" when it is the only practicable mode of keeping a public highway in a passable and safe condition. *New Haven* v. *Whitney*, 36 Conn., 376; *Todd* v. *Inhabitants of Rowley*, 8 Allen, 58; *Blood* v. *Bangor*, 66 Me., 154; *Congdon* v. *Norwich*, 37 Conn., 419; *Beisiegel* v. *Town of Seymour*, *supra*. The court erred in admitting testimony as to the condition of other roads than the road in dispute. 1 Rice on Evidence, 503, 504; *Shurtliff* v. *Parker*, 130 Mass., 293; *Alexander* v. *Kaiser*, 140 id., 221; *McLeal* v. *Fish*, 158 id., 472; *Phelps* v. *Hunt*, 43 Conn., 200; *Bassett* v. *Shares*, 63 id., 43; *Bray* v. *Loomer*, 61 id., 462. The court's conclusion from the facts found is unwar-

ranted, and the appellants are not bound by said erroneous conclusions. *Schoonmaker* v. *Albertson & Douglass Machine Co.*, 51 Conn., 387; *Hayden* v. *Allyn*, 55 id., 289; *Sessions* v. *Newport*, 23 Vt., 12; *Bailey* v. *Whitman*, 49 Conn., 80; Angell on Highways (2d Ed.), 299.

George P. McLean, for the appellee (respondent).

The court committed no error in permitting the appellee to contradict or rebut the testimony of the appellants as to the condition of other highways. *Barnes* v. *The State*, 20 Conn., 253. The question involved was purely a question of neglect on the part of the defendant town. There are cases where the law fixes the standard of duty, and in such the concluding facts, as found by the trial court, may be questioned. But in the case at bar, the question being, as the appellants state it, one of "reasonable repair" and "reasonable safety under the circumstances," this case comes within the rule laid down by this court in *O'Neil* v. *East Windsor*, 63 Conn., 153, 154. The practical difficulties in the path of the appellants are numerous and enormous. Can this court classify varieties of clay, and fix the depth of mud or frost to be allowed or prohibited? The depth of mud would depend upon the depth of frost, and both depend upon the weather. There is absolutely nothing in the character and condition of the highway complained of, that could not and would not be said of all clay or loam roads when the frost is coming out.

TORRANCE, J. Under § 2674 of the General Statutes, the plaintiffs brought a petition to the county commissioners of Hartford county, asking for an order to the selectmen of Wethersfield to repair a certain highway in that town. After due hearing the county commissioners found and adjudged that the town had not neglected to keep the highway in repair, and dismissed the complaint. The plaintiffs then appealed the matter to the Superior Court under the statute, and that court upon a review of the doings of the county commissioners, and after a full hearing of all the parties, also

found that the town had not neglected its duty in the premises, and ratified and affirmed the decision of the county commissioners; and from this decision of the court below the present appeal is taken.

The reasons of appeal are four in number, but the first two, concerning the admission of testimony, relate to one and the same matter, and really constitute but one reason of appeal.

On the trial in the Superior Court the plaintiffs, without objection, introduced evidence to show that the part of the highway of which they complained was in a worse condition than any of the other highways of the town. To contradict or rebut this evidence, the town was permitted, against the objection of the plaintiffs, to introduce testimony relative to the condition of those other highways. The plaintiffs now claim that the evidence which they thus offered of the condition of other highways was irrelevant, and therefore the evidence in rebuttal was irrelevant and should have been excluded on objection.

If this claim is conceded, the record does not show how the plaintiffs could have been legally harmed by the ruling of which they now complain; because from the record as it stands, the evidence objected to must be held to have simply neutralized the effect of the irrelevant evidence which the plaintiffs ought, if their claim is correct, to have withdrawn *Barnes* v. *The State*, 20 Conn., 254.

But upon this record as it stands we are unable to say that the testimony offered by the plaintiffs relating to the condition of other roads was irrelevant. In a proceeding of this kind the question whether a road is in good and sufficient repair, and whether a town has been guilty of neglect in allowing it to remain in a certain condition, is a relative one, the solution of which may be assisted by comparing the condition of the road in question with that of others similarly situated; at least we cannot lay it down as a general rule that testimony of this kind can never be relevant and admissible. The record fails to show that the testimony offered by the plaintiffs upon this point was irrelevant,

and thus fails to show that the ruling complained of was erroneous.

In the third reason of appeal the claim is made that the conclusion reached by the court, that the highway was in good and sufficient repair, was a conclusion of law which can be reviewed by this court. Upon the present record we think this claim cannot be sustained.

Section 2674 of the General Statutes, under which the petition was brought, provides in substance that when a town "shall neglect to keep any public road within such town in good and sufficient repair," the county commissioners, upon the proper statutory proceedings, finding such neglect, shall order the selectmen of the town to cause such road to be repaired. The principal question, therefore, to be determined upon a proceeding of this kind before the commissioners or the Superior Court, is whether the highway described in the petition is or is not in good and sufficient repair; and that question, from the nature of things, must ordinarily be a question of fact and not of law. *Congdon* v. *Norwich*, 37 Conn., 414, 418; *Howe* v. *Ridgefield*, 50 id., 592–596. In the case at bar the Superior Court found that the highway in question was "in good and sufficient repair." That conclusion seems to be reached from a great variety of subordinate facts and circumstances which are detailed in the finding. In reaching it, the record shows that the court sustained all the claims of law expressly made by the plaintiffs relative to the nature and extent of the duty imposed by law upon the town to make repairs upon the highway; and it nowhere appears that in reaching such conclusion the court committed any error of law with reference to the duty cast upon the town. Under these circumstances and upon this record, we are of opinion that the conclusion in question is one which cannot be reviewed by this court.

In its finding the court in substance says: that the muddy condition of this road in the spring-time, of which the plaintiffs complain, can be completely remedied only by a system of underdraining and macadamizing; and further, that "the macadamizing of a highway may seem to be rather in the

nature of an improvement than of repair simply." In the fourth and last reason of appeal the plaintiffs complain of the above remarks. Their claim seems to be that these remarks indicate that the court below held that it was not the duty of the town under any circumstances to macadamize the road; and they say this was an erroneous view of the law which materially affected the decision of the case. Whether, under the section upon which this proceeding was brought, a town can be compelled to macadamize a road, is a question not now before this court, and upon it no opinion is expressed. The court below, however, did not hold the opinion thus attributed to it; for in the record the court says: "When, however, macadamizing is the only practicable method of accomplishing the object sought, it would seem that there can be no good reason why, in a proper case, an order for it should not be made by the county commissioners." This view of the law is certainly one of which the plaintiffs have no reason to complain.

There is no error.

In this opinion the other judges concurred.

JOHN A. ROBINSON *vs.* JOHN W. CLAPP.

Third Judicial District, Bridgeport, April Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

A landowner who seeks to restrain an adjoining proprietor from interfering with a tree and well upon the boundary line, is not entitled to an injunction, or to any special consideration, merely because he offered to pay such sum for the adjoining premises as might be fixed by the appraisal of persons to be selected by the respective owners.

The adjoining proprietor intended to remove only so much of the tree as might be necessary in order to build his house up to the dividing line. *Held* that inasmuch as it appeared from the finding that the granting of the injunction would work a greater irreparable injury to such proprietor than the necessary cutting and consequent destruction of the tree would cause the plaintiff, the injunction was properly refused.

[Submitted on briefs April 22d—decided May 14th, 1896.]

SUIT for an injunction to restrain the defendant from cutting down a certain tree and from injuring a well, brought to the Court of Common Pleas in New Haven County and tried to the court, *Hotchkiss, J.*; facts found and judgment rendered for the defendant, and appeal by the plaintiff for alleged errors in the rulings of the court. This case is the same as that reported in 65 Conn., 365, in which a new trial was granted. *No error.*

The case is sufficiently stated in the opinion.

E. P. Arvine, for the appellant (plaintiff).

Henry G. Newton, for the appellee (defendant).

FENN, J. This is the case of *Robinson* v. *Clapp*, 65 Conn., 365. A new trial was then granted, and the case now comes before us again upon another finding, by plaintiff's appeal.

So far as such appeal appears to be only an effort for retrial of questions already decided by this court, it is unnecessary to consider it, for we see no occasion to alter the former opinion. Nor need we repeat, but only refer to such former decision, for the facts and the law as this court held it to be upon such facts.

The present finding does not differ very essentially from the previous one; but there are two variations which should be noticed. The plaintiff claims that he was entitled to the injunction prayed for, to restrain the defendant from interfering with the tree and well in question, and the free access of light and air to the windows of the plaintiff's house, because he had offered to buy the land in controversy. The finding however states that the defendant has repeatedly offered to sell to the plaintiff; that he claimed the price asked was in excess of the true value, and adds: "I do not find that the price so asked was in excess of its true value; and I find that the plaintiff has never offered or been willing to pay the defendant the true value of said land, in any manner other than by his offer to pay a sum for which it

should be appraised by parties to be selected by the plaintiff and defendant." It seems needless to say that the defendant is under no obligation, legal or equitable, to submit to any such ordeal, and that the plaintiff has shown nothing to entitle him to consideration on this ground, even if, as we in no way mean to intimate, in case the plaintiff has proved all he claimed, it would have had any relevancy or weight.

Concerning the tree, the finding is that the defendant intends to remove so much of said tree as is necessary to build his house up to the boundary line. In *Robinson* v. *Clapp*, *supra*, p. 380, we said in reference to this matter: "The injunction should not extend further than to restrain the defendant from cutting any portion of the trunk and any further cutting of the branches or of the roots than he might lawfully have done had the trunk stood wholly upon the plaintiff's land, but reaching to the defendant's line." The defendant in fact intends to cut away half the trunk and to clear away branches and roots to the dividing line, and the court below refused to enjoin such proposed action. As bearing upon this matter the court made the following finding: "If the trunk of said tree was not touched by the defendant, but the roots and branches were cut off up to the boundary line, the tree would probably die; but if it did not die, it would, after such branches were cut, be unsightly, and of no practical value to the plaintiff. If the branches and roots of said tree were so cut off upon the defendant's side of said line, and said house was so constructed by the defendant, the entire removal of said tree would be a benefit to the plaintiff and to his property." This finding was made upon evidence the admission of which was objected to, and exception taken. We think such evidence proper to be received, and that upon the facts found the action of the court was induced from, and warranted by, what we before suggested—*Robinson* v. *Clapp*, *supra*, 380—"It might perhaps fairly be urged that to prevent the defendant from removing that portion of the trunk of the tree upon his own land, thereby depriving him of the opportunity to build upon it as desired, would be likely to produce a greater irreparable

injury to the defendant than such removal and the consequent destruction of the life of the tree would cause the plaintiff, and that therefore the equitable remedy of injunction which is not adapted finally to adjust the rights of the parties should have been refused, and the contestants left to settle such rights in methods pertaining to the legal and not the chancery jurisdiction. We are inclined to think such elements of discretion enter into the matter that we ought not to disturb the conclusion of the trial court upon it." There is nothing in the additional facts found, regarding the well and concerning light, to differentiate the present appeal in those respects from the former one.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

STATE *vs.* ISAAC D. SMITH.

Third Judicial District, Bridgeport, April Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

The right to license the pursuit of a lawful business which, as usually carried on, does not endanger the public health or safety, and thus to limit the number of those who may engage in it, is one of the highest powers of sovereignty. When conferred upon a municipal corporation, the grant cannot be extended by any doubtful implication.

By charter the common council of the city of Bridgeport was authorized to make ordinances not repugnant to the laws of this State, relative (among other things) "to licensing cartmen, truckmen, hackmen, butchers, bakers, petty grocers or hucksters, and common victualers"; and by the concluding clause of the same section, to make ordinances relative "to any and all other subjects that shall be deemed necessary and proper for the protection and preservation of the health, property, and lives of the citizens." The common council passed an ordinance to prohibit within the city the sale of adulterated or impure milk, one clause of which required every one who sold any milk of any kind to first procure a license therefor, under a penalty of $50. In a criminal prosecution for a sale of milk without a license it was *held*:—

1. That in view of general statutory provisions, which in many respects covered the same matters referred to in the ordinance, but in a different way, and left the business of a milkman open to all on equal terms

throughout the State, so much of the ordinance as required a license from all who sold milk, without regard to whether they were petty grocers, hucksters, or common victualers, or not, went beyond the power specifically conferred by the charter, and was therefore void.

2. That the "general welfare" clause must be read with strict reference to what preceded it, and when so construed, did not justify the license requirement.

[Argued April 22d—decided May 14th, 1896.]

PROSECUTION for violation of an ordinance of the city of Bridgeport relating to the sale of milk without a license, brought to the City Court of Bridgeport and thence by the defendant's appeal to the Criminal Court of Common Pleas for Fairfield County and tried to the court, *Walsh, J.*, upon the defendant's demurrer to the information; the court overruled the demurrer and, upon the refusal of the accused to answer over, having found him guilty, imposed a fine of $50, from which judgment the defendant appealed to this court for alleged errors of the trial court in overruling his demurrer. *Error.*

The ordinance was as follows: "An Ordinance to Prohibit the Sale of Adulterated or Impure Milk in the City of Bridgeport.

"Be it ordained by the Common Council of the City of Bridgeport: Section 1. Any person who by himself, his servant or his agent, shall sell, exchange, or deliver or have in his possession, with intent to sell, exchange or deliver, or expose or offer for sale as pure milk, any milk from which the cream or any part thereof has been removed, or which has been watered, adulterated or changed in any respect by the addition of water or other substance, shall be liable to the penalties hereinafter provided in this ordinance.

"Section 2. Any person who by himself, his servant, or his agent, shall sell, exchange or deliver, any milk from which the cream or any part thereof has been removed, unless, in a conspicuous place above the center upon the outside of every vessel, can or package containing such milk, the words 'Skimmed Milk' are distinctly marked in Gothic letters, not less than one inch in length, shall be liable to the penalties hereinafter provided in this ordinance.

"Section 3. Any person who by himself, his servant, or his agent, shall sell, exchange or deliver, any skimmed milk containing less than eight and fifty one hundredths (8.50) per cent. of the milk solids, exclusive of butter fat, shall be liable to the penalties hereinafter provided in this ordinance.

"Section 4. Any person who by himself, his servant or his agent, shall sell or offer for sale, or who shall have in his possession, with intent to sell or offer for sale, any impure or adulterated or unwholesome milk, and every person who shall adulterate milk, or who shall keep cows for the production of milk, in a crowded or unhealthy condition, or feed the same on food that produces impure, diseased or unwholesome milk, or shall feed cows on distillery waste, usually called "swill," or upon any substance in the state of putrefaction or rottenness, or upon any substance of an unwholesome nature, shall be liable to the penalties provided in this ordinance.

"Section 5. The addition of water or any other substance or thing is hereby declared an adulteration, and milk that is obtained from animals that are fed on distillery waste, or upon any substance in a state of putrefaction or rottenness, or upon any substance of an unwholesome nature, or milk that has been exposed to or contaminated by the emanations, discharges or exhalations from persons sick with any contagious disease by which the health or life of any person may be endangered, or milk from tubercular cows, is hereby declared to be impure, unwholesome and adulterated.

"Section 6. In all prosecutions under this ordinance, any milk which shall be found, upon analysis by the chemist employed by the Board of Health, to contain more than 88 per cent. of water fluids, or to contain less than 12 per cent. of milk solids, or to contain less than eight and fifty one hundredths per cent. of milk solids, exclusive of butter fat, except during the months of May and June, when it must not contain less than 12 per cent. of milk solids, shall be deemed to be adulterated.

"Section 7. It shall be lawful for the Board of Health or any member thereof, or the health officer, the board's agents,

assistants or inspectors, to enter any premises or vehicle of any person who shall carry, keep, expose, or offer milk for sale, to inspect said milk and the premises from which said milk is derived, and if, upon inspection, he shall find any milk which has been adulterated, or from which the cream or any part thereof has been removed, or which is sold, offered or exposed for sale, or held in possession with intent to sell or offer for sale, in violation of any section of this ordinance, said health officer, agent, assistant or inspector, is empowered and directed to take samples of the same for analysis, and also to condemn the same as adulterated and impure.

"Section 8. No person shall expose or offer for sale any milk of any kind, unless he shall first obtain from the health officer a license therefor, for which the sum of two ($2) dollars shall be charged for the period of one year for each and every license. The license shall specify the time for which the same is issued, and the name of the licensee, the number of each license, which license number shall be placed on the outer side of all wagons or vehicles used in the conveyance and sale of milk, the figures to be not less than two (2) inches in height.

"Section 9. Any person who shall violate any of the foregoing sections of this ordinance shall forfeit and pay a penalty of fifty ($50) dollars for the first offense, and one hundred ($100) dollars for each subsequent offense. Upon conviction of a second offense, the license of such offender shall thereupon be revoked, in addition to the penalties hereinafter provided.

"Section 10. It shall be the duty of the health officer to keep a complete record of his proceedings and of all inspections, giving a full account of all inspections, including the names of each person, producer, firm or corporation owning the milk inspected, together with the farm or farmer from which milk is received, place of business, number of cows, and their breed, and the result of such analysis to be printed in the city papers willing to publish the same, with names of producers and dealers from whom milk has been received, showing to what extent the samples may appear to be adul-

terated or otherwise altered or deficient within the meaning of this ordinance.

"Section 11. All ordinances or parts of ordinances inconsistent herewith are hereby repealed."

Stiles Judson, Jr., for the appellant (defendant).

It will hardly be claimed that the ordinance in question is expressly authorized by the city charter. If sustainable at all it must be by virtue of the general provisions of that instrument relating to the health of the community, or derived from the charter as an implied police power necessary to give effect to some express provision therein. The authority however to enact a penal by-law, is one not to be inferred from language in any respect ambiguous or doubtful. Dillon's Munic. Corp., §§ 89–91; Beach Pub. Corp., 77; *Leonard* v. *Canton*, 35 Miss., 189; *Minturn* v. *Larne*, 23 How., 437; *Burritt* v. *City*, 42 Conn., 202; *Pratt* v. *Litchfield*, 62 id., 118; *Wallingford* v. *Hall*, 64 id., 431; *Thompson* v. *Lee Co.*, 3 Wall., 320; Sedg., Stat. and Const. Law, 423; *City* v. *Whitney*, 36 Conn., 373. The legislature having in its wisdom decided what occupations should thus be burdened, the city of Bridgeport cannot enlarge the scope of its licensing power, by resorting to the general welfare clauses of its charter. *Robinson* v. *Mayor*, 34 Am. Dec., 629; *City of St. Louis* v. *Laughlin*, 49 Mo., 559; *City of St. Joseph* v. *Porter*, 29 Mo. App., 609; *State* v. *Ferguson*, 33 N. H., 425; *Huesing* v. *City of Rock Island*, 128 Ill., 469; *Thomas* v. *Ry. Co.*, 101 U. S., 82; *City* v. *Hughes*, 15 Mich., 59; *Leonard* v. *City*, 35 Miss., 189; *City* v. *Scroggs*, 39 Iowa, 447; *Buttler's Appeal*, 73 Pa. St., 452; *Ordinary* v. *Retailers*, 42 Ga., 326; *Tuck* v. *Waldron*, 31 Ark., 465; *Harris* v. *Council*, 28 Ala., 577; *City of Cairo* v. *Bross*, 101 Ill., 477. And it is not sufficient that it is simply convenient to exercise the expressly granted power, it must be indispensable. *New London* v. *Brainard*, 22 Conn., 551; 2 Dillon Munic. Corp., 173. This ordinance, in all of its essential provisions, is in contravention of the laws of the State, and therefore invalid. By the provisions of Chap. 235 of the

Public Acts of 1895, which Act went into effect subsequent to the charter of the city of Bridgeport, it was determined that the standard of purity of all food products (the term "food" including "milk") should be fixed by the Connecticut Agricultural Experimental Station, when not fixed by statute. The ordinance in question attempts to fix another and quite different standard; one that the legislature of 1895 repudiated as impracticable and unjust. (See Pub. Acts 1895, Chap. 245, repealed by Pub. Acts 1895, Chap. 320.) In fact, the doctrine that a statute and an ordinance covering precisely the same subject, may be in operation concurrently, has been repudiated in this State. *Southport* v. *Ogden*, 23 Conn., 131; *State* v. *Welch*, 36 id., 217; *State* v. *Brady*, 41 id., 590. The ordinance is also vicious because under the guise of a sanitary measure, it seeks to wrest a revenue from those who bring this farm product into the city for sale. *Grumm* v. *Mayor*, 84 Ga., 365; *Commonwealth* v. *Stodder*, 2 Cush., 573. If the ordinance operates in restraint of legitimate trade, it is void. *Chaddock* v. *Day*, 4 L. R. A. 809. If the penalty is oppressive and unreasonable, the ordinance is rendered thereby invalid. 1 Dillon Munic. Corp., §§ 319, 320, 327, 321; Cooley, Const. Lim., 243.

John H. Light and *V. R. C. Giddings*, for the appellee (the State).

The license fee is required as a measure to pay for the expenses of inspection. *Amesbury* v. *Bowditch Mutual Fire Ins. Co.*, 6 Gray, 596; *State* v. *Wheeler*, 25 Conn., 290; 1 Dillon Mun. Cor. (4th Ed.), § 421. The courts will not interfere with the legitimate exercise by municipal bodies of their police powers by which the peace, health, comfort, and general welfare are secured or promoted. *Weil* v. *Ricard*, 24 N. J. Eq., 169; *Boehm* v. *Baltimore*, 61 Md., 259; *Littlefield* v. *State*, 42 Neb., 223. Where a business is beneficial or necessary, but yet liable to cause danger, under certain conditions, to the public health, it can be regulated and those engaged in it can be required to take out licenses and to submit to an inspection of their business. This is far differ-

ent from an attempt to prohibit such beneficial or necessary business. *Train* v. *Boston Disinfecting Co.*, 144 Mass., 528. A distinction is to be carefully observed between an ordinance like the one in question and ordinances which, under the guise of a license, in effect impose a tax. Such latter are void as attempted assumptions of legislative powers of taxation. *North Hudson Railway Co.* v. *Hoboken*, 41 N. J. Law, 71; *Mayer* v. *Avenue R. R. Co.*, 32 N. Y., 261; 2 Dillon on Munic. Corp. (4th Ed.), § 768; *State* v. *Osborne*, (Fla.) 25 L. R. A. 120. Statutes and ordinances to secure the purity of milk have been uniformly upheld as beneficial and necessary. *People ex rel.* v. *Mulholland*, 82 N. Y., 326; *Johnson* v. *Simonton*, 43 Cal., 242; *Littlefield* v. *State*, 42 Neb., 223; *State* v. *Lowrey*, (N. J.) 6 Central Rep., 870; *People* v. *West*, 106 N. Y., 293; *Com.* v. *Evans*, 132 Mass., 11; *State* v. *Campbell*, 64 N. H., 402; *Shivers* v. *Newton*, 45 N. J. Law, 469; *State* v. *Smyth*, 14 R. I., 100; *State* v. *Schlemmer*, 10 L. R. A., 135, and notes; *State* v. *Moore*, (N. C.) 22 L. R. A., 474, and notes. The general provision of the charter conferring power to pass by-laws, "relative to any and all other subjects that shall be deemed necessary and proper for the protection of the health, property and lives of the citizens," contains the authority to pass by-laws relative to the sale of milk and require licenses therefor. 1 Dill. Mun. Corp., 4th Ed., § 315, note 1, p. 393: *State* v. *Ferguson*, 33 N. H., 424; *Husen* v. *City of Rock Island*, 128 Ill., 465; *Clark* v. *South Bend*, 85 Ind., 277. Chapter 235 of the Public Acts of 1895 fixes no standard at all, and that claim of the defendant is wholly without foundation. The ordinance and the statute do not cover the same ground. The ordinance (§§ 3 and 6), fixes a standard of purity for milk to be sold in Bridgeport; the statute does not. *State* v. *Flint*, 63 Conn., 248.

BALDWIN, J. The charter of the city of Bridgeport, which went into effect July 1st, 1895, authorized the common council to make ordinances, not inconsistent with law, relative to commerce; to the inspection of produce brought

into the city for sale, and the election of inspectors for that purpose; to the sale or offering for sale of unwholesome produce of all kinds; to "licensing cartmen, truckmen, hackmen, butchers, bakers, petty grocers, or hucksters, and common victualers, under such restrictions and limitations as said common council may deem necessary and proper;" to the health of the city; and to "any and all other subjects that shall be deemed necessary and proper for the protection and preservation of the health, property, and lives of the citizens." Special Acts of 1895, p. 532, § 41.

In the General Statutes, §§ 2658 to 2664 are grouped under the heading of "Adulteration of Milk." A Public Act went into effect August 1st, 1895, to regulate the manufacture and sale of food products, which classes as food, under that description, "every article used for food and drink by man, horses, or cattle." Public Acts of 1895, p. 578, Chap. 235, § 2.

General Statutes, § 2661, prohibits the sale or offer for sale of impure or adulterated milk. Section 2660 forbids the sale of any milk from which any cream has been removed, except out of a can, vessel, or package, to which is affixed, not more than six inches from the top, a metallic tag stamped "Skimmed Milk," in letters not less than an inch in height. For any violation of these provisions the offender may be fined not more than seven dollars or imprisoned not more than thirty days, or both.

The Act of 1895 (§ 3) declares that any article of food shall be deemed adulterated if, among other things, any substance be mixed with it so as to lower or injuriously affect its quality or strength, or if any valuable constituent has been wholly or in part abstracted, or if it is in any part the product of a diseased animal; and that the Connecticut Agricultural Experiment Station shall make analyses of food products on sale which it is suspected may be adulterated, and "may adopt or fix standards of purity, quality, or strength, when such standards are not specified or fixed by statute," and when it finds by analysis that adulterated food products have been on sale within the State, shall notify

the grand juror or prosecuting attorney of the town in which they were found. The sale or offer for sale of adulterated food, by one who knows it to be adulterated, and does not disclose this to the purchaser, is made punishable by a fine of not more than $500, or imprisonment for not more than one year.

At the same session of the General Assembly, two days later, another statute was enacted, but repealed the following week (Public Acts of 1895, pp. 588, 664), which declared the term "adulterated milk," as used in the statute laws of the State, to have the following meaning: "1. milk containing more than eighty-eight per centum of water or fluids; 2. milk containing less than twelve per centum of milk solids; 3. milk containing less than three per centum of fats; 4. milk drawn from cows within fifteen days before or five days after parturition; 5. milk drawn from animals fed on distillery waste or on any substance in a state of fermentation or putrefaction or on any unhealthy food; 6. milk drawn from cows kept in a crowded or unhealthy condition; 7. milk from which any part of the cream has been removed; 8. milk which has been diluted with water or any other fluid, or to which has been added or into which has been introduced any foreign substance whatever; 9. all adulterated milk shall be deemed unclean, unhealthy, impure, and unwholesome."

It is impossible to compare the ordinance of the city of Bridgeport with these statutory provisions, without seeing that in many respects they cover the same ground, and cover it in a different way.

The ordinance (§ 6) defines precisely adulterated milk, and gives conclusive effect to an analysis made by the chemist employed by the local board of health. The General Assembly, in 1895, first adopting and then repealing a somewhat similar definition, finally left the matter largely in the hands of the Connecticut Agricultural Experiment Station.

The sale of skimmed milk, by the city ordinance, is to be from cans bearing the words "Skimmed Milk" conspicuously stamped upon the side; by § 2660 of the General Stat-

utes it is to be from cans bearing a metallic tag on which the same words are stamped.

The pecuniary penalties imposed by the ordinance cannot be less than $50, nor more than $100. Under the general laws, they may be considerably less, and for some offenses more, besides an additional liability to imprisonment.

The public statutes leave the business of a milkman open to all, on equal terms, throughout the State; only imposing certain regulations upon those who may undertake it, and enforcing them, when necessary, by proceedings of a criminal nature, resulting in a sentence proportioned to the gravity of the offense. The ordinance excludes every one who has not received a license from the local health officer, from participating in it, within the city of Bridgeport, under pain of a fixed pecuniary forfeiture, which, in case of a second offense is to be doubled and to entail a loss of the license previously granted. Of these differences between the provisions of the by-laws in question and the general statutes, that last mentioned, unless found to be warranted by the terms of the city charter, is decisive of the present case.

Under the Constitution of this State, even the General Assembly has not unrestricted power to provide for the grant or refusal of licenses, without which a citizen cannot engage in what is one of the common occupations of life. *State* v. *Conlon*, 65 Conn., 478. It has confided to the Common Council of Bridgeport the right to make ordinances, relative to licensing cartmen, truckmen, hackmen, butchers, bakers, petty grocers or hucksters, and common victualers. Petty grocers or hucksters and common victualers may, as part of their business, sell milk; but the ordinance in question relates to licenses for all who sell milk, without regard to whether they are petty grocers, hucksters or common victualers, or not. It therefore goes beyond the power specifically conferred, and the "general welfare" clause, with which § 41 of the charter concludes, must be read with strict reference to what precedes it. The right to license the pursuit of a lawful business, which, as usually carried on, does

not endanger the public health or safety, and thus to limit the number of those who may engage in it, is one of the highest powers of sovereignty. When conferred upon a municipal corporation, the grant cannot be extended by any doubtful implication.

After giving full force to all the provisions of § 41, we are brought to the conclusion that it is, at least, doubtful whether the charter authorized the licensing of milkmen. It therefore did not authorize it; and that part of the ordinance was void upon which the complaint in the case before us was based. *Crofut* v. *Danbury*, 65 Conn., 294.

There is error in the judgment appealed from.

In his opinion the other judges concurred.

GEORGE E. WHITTEN *vs.* CHARLES R. SPIEGEL, SHERIFF.

Third Judicial District, Bridgeport, April Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Under *habeas corpus* proceedings brought to the civil side of the Superior Court, the record of a former criminal term of that court showing that an indictment against the petitioner had been duly found and returned as "a true bill," cannot be contradicted by parol evidence that such indorsement of the indictment was a clerical mistake of the foreman and that the grand jury had in fact found the indictment not a true bill. Under such circumstances the record of the criminal court is conclusive, and the prisoner must resort, in the first instance at least, to the court the verity of whose record is called in question.

[Argued April 21st—decided April 23d, 1896.]

PETITION for a writ of *habeas corpus*, brought to the Superior Court in New Haven County and tried to the court, *Shumway, J.*; facts found and judgment rendered in favor of the respondent, and appeal by the petitioner for alleged errors in the rulings of the court. *No error.*

William H. Baker of Boston, and *Albert D. Penney*, for the appellant (petitioner).

A pretended indictment, to which none of the grand jurors

ever consented, or agreed to present as a true bill, is illegal and void, and gave the court no jurisdiction whatever. Const. of Conn., Art. 1, § 9; Gen. Stat., § 1599; *Ex parte Baine*, 121 U. S., 1; *Ex parte Wilson*, 114 id., 417; *Ex parte Swain*, 19 Tex. App., 323; *Ex parte Fairly*, 40 Fed. Rep., 56; *Ex parte Lange*, 18 Wall., 163; *Ex parte Parks*, 93 U. S., 18; *Bion's Appeal*, 59 Conn., 372; *Lott* v. *State*, 18 Tex. App., 627; *McNease* v. *State*, 19 id., 48; Church on Habeas Corpus, 2d Ed., § 250; *Elliott* v. *Peersol*, 1 Pet., 340; *Re Neilson*, 131 U. S., 176; *Ex parte Siebold*, 100 id., 371. The testimony of grand jurors is admissible to prove what verdict they actually agreed to present, when a wrong verdict or finding had been entered up and returned by mistake. *Izer* v. *State*, 26 Atl. Rep. (Md.), 282; *State* v. *Coffee*, 56 Conn., 399; *State* v. *Horton*, 63 N. C., 595; *Low's Case*, 4 Greenl. (Me.), 439; *Little* v. *Larabee*, 2 Me., 37; *Capen* v. *Stoughton*, 16 Gray, 364; *Dalrymple* v. *Williams*, 63 N. Y., 361. The indorsement of the indictment "a true bill" is but *prima facie* evidence of the grand jurors' finding, and can be rebutted by any legal proof. *State* v. *Horton*, 63 N. C., 595; *People* v. *Lawrence*, 21 Cal., 368; *White* v. *Conn*, 29 Gratt. (Va.), 824; *Parker* v. *State*, 29 S. W. Rep., 480.

William H. Williams, State's Attorney, for the appellee (respondent).

The indictment and the indorsement thereon is in due form and had become and was a record, importing absolute verity, and so long as the record remains, no defect in the evidence upon which it was founded, nor any irregularity in the proceedings, however great, can furnish any answer to it. *People* v. *Hurlbut*, 4 Denio, 133; *Wickwire* v. *The State*, 19 Conn., 487, 489; *In re Bion*, 59 Conn., 372; *In re Belt*, 159 U. S., 95. The testimony of the foreman and other members of the grand jury was properly excluded. The law upon this subject has long been well settled in this State. *State* v. *Fassett*, 16 Conn., 458; *Meade* v. *Smith*, ibid., 346; *Woodward* v. *Leavitt*, 107 Mass., 453–460. The recent case of *State* v. *Hamlin*, 47 Conn., 95, is identical with this; and

the case of *State* v. *Coffee*, 59 id., 399, does not modify the doctrine of the earlier cases.

PER CURIAM. The appellant was a prisoner in the custody of the Superior Court for New Haven County under an order, made at a term held for the transaction of criminal business, committing him for want of bail upon an indictment for murder in the second degree, to which he had pleaded, Not guilty. Such a term of the court is held quarterly, and one is now in progress. He has sought release from confinement by *habeas corpus* proceedings, brought to a term of the same court, held for the transaction of civil business; and the ground on which he relies, as set up in his pleadings, is that the foreman of the grand jury, by a clerical mistake, indorsed the indictment against him as a true bill, although in fact it had been found not to be a true bill.

This is an attempt to vary the records of a court of general jurisdiction by parol evidence, produced before another tribunal in a collateral proceeding. If such a mistake, as is set up, was made, and if the prisoner has a right to ask for its correction, it is obvious that he should resort, first at least, to the court the verity of whose records is called in question.

It is urged that he has been put to plead and held to trial for murder upon an indictment to which none of the grand jurors ever agreed; and therefore that the Superior Court had no jurisdiction to make the order of commitment. General Statutes, § 1599; Constitution of Connecticut, Art. I., § 9; Constitution of the United States, XIV., Amendment, § 1. The records of that court, however, show that an indictment was duly agreed to and presented, and are, in this proceeding, conclusive evidence that the cause against him was fully within its jurisdiction.

There is no error in the judgment appealed from.

THE PARISH OF CHRIST CHURCH *vs.* THE TRUSTEES OF DONATIONS AND BEQUESTS FOR CHURCH PURPOSES.

THE TRUSTEES OF DONATIONS AND BEQUESTS FOR CHURCH PURPOSES *vs.* THE PARISH OF CHRIST CHURCH.

Third Judicial District, Bridgeport, April Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

A trustee holding property lawfully and unconditionally conveyed to it in trust for a public charitable use, cannot reconvey such property to the grantor or donor, without a violation of its duty as such trustee.

The parish of Christ Church in New Haven, in order to obtain a sum of money given to it by Trinity Church upon that condition, conveyed a certain piece of land with its church edifice and rectory, to the Trustees of Donations and Bequests for Church Purposes, in trust for the sole use and benefit of the grantor, but without liability to debts or incumbrances of any kind, so long as the grantor should exist and be in union with the convention of the diocese of Connecticut and in communion with the Protestant Episcopal Church of the United States; and thereafter, in trust for the sole benefit and use of said Trinity Church, so long as it should remain in like communion; and then, to hold the property for such uses as would most nearly accomplish the object of the trust and promote the interests of the Protestant Episcopal Church generally. The trustee was authorized by charter to acquire and hold property given to it for the uses specified in the conveyance, and duly accepted the trust. Its charter also authorized it to sell or otherwise dispose of the property held by it in trust, with the consent of the Diocesan Convention; and this body, upon the petition of Christ and Trinity Churches, gave its consent to a reconveyance of the property by the trustee to Christ Church. Prior to such consent Trinity Church had released to Christ Church any interest it had in the property by virtue of the trust deed. Upon suits, one of which was brought by Christ Church to compel the Trustees of Donations and Bequests for Church Purposes to execute a deed of reconveyance, and the other by the trustee for advice as to its duty in the premises, it was *held*:—

1. That the claim of Christ Church that the trust deed, although absolute in form, was in fact a mortgage to secure the re-payment of a loan advanced by Trinity Church, was expressly contradicted by the finding and by the legal conclusion of the trial court based thereon.
2. That evidence of the statements and representations made by members of Christ Church parish at the meeting which authorized the execution of the trust deed, in support of the foregoing claim, was properly excluded by the trial court as irrelevant to any fact in issue.

3. That the objects for which the property was conveyed were charitable, and upon the acceptence of the deed the property became, by force of § 2951 of the General Statutes, a trust fund forever appropriated to the uses for which it had been granted.
4. That the limitation of one trust upon another, as specified in the deed, was not unlawful, there being but one trustee and but one charitable use.
5. That the release by Trinity Church, if of any effect whatever upon the trust, did not invalidate it; nor did it operate as a renunciation of the contingent interest of Trinity Church.
6. That the use specified in the trust deed was not so indefinite as to be void for uncertainty.
7. That the authority given the trustee by its charter, to sell or otherwise dispose of the estate held by it in trust, with the consent of the Diocesan Convention, related merely to a change in the form of the trust fund, and did not authorize a violation or termination of the specific trust contained in the trust deed.
8. That the trust was valid and continued under the protection of the law until its purposes had been accomplished, and could not be lawfully terminated by the agreement of the parties before the court.

[Argued April 29th—decided May 14th, 1896.]

THE first of the above named cases—*Parish of Christ Church* v. *Trustees of Donations and Bequests for Church Purposes*—a suit to compel the defendant to execute and deliver to the plaintiff a release deed of certain real estate, was brought to the Superior Court in New Haven County and tried to the court, *Hall, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiff for alleged errors in the rulings of the court. *No error.*

The second case—*Trustees of Donations and Bequests for Church Purposes* v. *Parish of Christ Church*—a suit by a trustee for advice as to the proper execution of its duties, was brought to the Superior Court in New Haven County, and reserved by that court, *Shumway, J.*, upon an agreed statement of facts, for the consideration and advice of this court. *Superior Court advised that the plaintiff cannot, upon the facts found, make an unconditional re-conveyance to the defendant of the property described in the trust deed, without a violation of its duty as trustee.*

In this court the two cases were presented and argued as one.

Prior to 1877, parishes of the Protestant Episcopal Church

were organized and incorporated under the general law, which provides (§ 2051) that such societies "shall hold and manage all property belonging to them, appropriated to the use and support of public worship, and may receive any grants or donations, and by voluntary agreement establish funds for the same object." The general law also prescribes, in detail, the regulations for membership, annual and special meetings, etc.

In 1863 "The Trustees of Donations and Bequests for Church Purposes" was chartered by a special Act of the General Assembly. 5 Private Acts, 562. Section 2 of this Act declares: "The object of this Act is to enable said Trustees to take, hold, manage and use such funds as they may acquire under the provisions of this Act, for the support of the institutions, parishes and missionary work of the Protestant Episcopal Church in the diocese of Connecticut, and for the promotion of any of its general interests, according to the doctrines, discipline, rites and usages of said church;" and further provides that "to this end said trustees are hereby empowered to take and hold any and all transfers, gifts, devises and bequests of real and personal estate which may be made to them on trust, condition or otherwise, and to execute and perform any and all conditions, uses, and trusts, which may be imposed thereon, or connected therewith, and to manage, invest, re-invest (and with the consent of the convention of the diocese) sell, demise, convey, or otherwise dispose of, said estate, and to appropriate and apply the net income thereof to any and all of the purposes and objects above declared; subject, however, in each and every case, to the specific trusts, directions, limitations or conditions contained in such transfer, gift, devise or bequest."

The charter further provides that the bishop of the diocese shall *ex officio* be "a member of said board of trustees and president thereof; that vacancies may be filled by the convention, which may also remove members for cause; and for an annual report to the convention of the doings of the board and concerning the property held by them." In 1873, § 2 of the charter was amended by the insertion of the words

which appear in parenthesis in the above quotation. 8 Private Acts, 626.

In 1877, a public Act provided specially for the organization and powers of parishes. Public Acts of 1877, p. 250. Sections 2075 and 2076 of the General Statutes are identical with sections 1 and 2 of this Act, and provide: (§ 2075) "All ecclesiastical societies which have been heretofore organized, and which may be hereafter organized in this State, in communion with the Protestant Episcopal Church in the United States of America, shall be known in the law as parishes as well as ecclesiastical societies, and shall have power to receive and hold by gift, grant, or purchase, all property, real or personal, that has been or may be conveyed thereto for maintaining religious worship according to the doctrine, discipline, and worship of said church, and for the support of the educational and charitable institutions of the same, and shall have and exercise all the ordinary powers of bodies corporate." (§ 2076) "The manner of conducting such parishes, the qualifications of membership of the parish, and the manner of acquiring and terminating such membership, the number of the officers of the parish, their powers and duties and the manner of their appointment; the time of holding the annual meeting of the parish, and the manner of notification thereof, and the manner of calling special meetings of the parish, shall be such as are provided and prescribed by the constitution, canons, and regulations of said Protestant Episcopal Church in this State." The Act of 1877 further provided that existing societies should continue to act under the existing law until the diocesan convention should prescribe regulations in pursuance of the authority granted in § 2 of the Act, and that the continuous corporate existence of the societies should not be affected by the Act.

The main facts found by the Superior Court are as follows:—"The Parish of Christ Church" is an ecclesiastical corporation in communion with the Protestant Episcopal Church in the United States, duly organized under the laws of this State. In 1885, Christ Church was the owner of the

land described in the deed of trust, on which stood their church building and rectory. At that time Christ Church decided to pay all its indebtedness and raised for that purpose by contribution $5,000, and then applied to "The Society of Trinity Church Parish" (the mother church) for $1,000 to make up the balance. With these sums, $5,000 raised by contribution and $1,000 from Trinity Church, the whole indebtedness was paid. The $1,000 appropriated by Trinity Church, was furnished upon condition that Christ Church should give the trust deed in question. Said sum was not regarded by either parish as a loan; it was not intended that it should be repaid, and it has not been repaid. On December 10th, 1885, Christ Church Parish duly passed the following vote: "At a special meeting of the society of Christ Church Parish of New Haven, legally warned and held at said church on Thursday, the tenth day of December, A. D. 1885, it was *voted:* That the Society of Christ Church Parish of New Haven convey to the Trustees of Donations and Bequests for Church Purposes, of the diocese of Connecticut, a corporation legally incorporated by the General Assembly of the State of Connecticut, all that certain piece of land with the church edifice and rectory building thereon standing, situated in the city of New Haven. . . . To have and to hold the said premises with all the privileges and appurtenances thereof to the said Trustees of Donations and Bequests, their successors and assigns forever, in trust, however, for the sole use and benefit of the Society of Christ Church Parish aforesaid, to be used, occupied and improved by said Society of Christ Church Parish in accordance with the constitution and canons of the Protestant Episcopal Church of the United States, under the control and management of the warden and vestry of said parish, without being subject to debts, liability or incumbrance of any kind, so long as said Society of Christ Church Parish shall exist in union with the convention of said diocese, and in communion with the Protestant Episcopal Church of the United States; and on its ceasing to be in union with said convention and in communion with said Protestant Episcopal Church, then to be used,

occupied, enjoyed and improved by the Society of Trinity Church Parish of said New Haven, so long as it shall exist in union with said convention, and in communion with said Protestant Episcopal Church; and on said Society of Trinity Church Parish ceasing to exist in union with said convention, and in communion with said Protestant Episcopal Church, then to have and to hold said premises for its, said corporation's (the Trustees of Donations and Bequests for Church Purposes), sole use, benefit and behoof, to hold and dispose of said property for such uses as will most nearly accomplish the object desired in the building of said Christ Church, and in the creation of this trust, and promote the interests of the Protestant Episcopal Church generally."

The vote also appointed and authorized an agent to execute and deliver, in behalf of the parish, a deed of the premises in accordance with the provisions of the vote, and to affix the corporate seal thereto. On December 22d, 1885, a deed of the land described in said vote, upon the trusts therein expressed, was executed and delivered by the agent appointed for that purpose. This deed was not given by Christ Church Parish as a mortgage, nor as security for a loan. There was no agreement or understanding between Christ Church Parish and the Trustees of Donations, or between that parish and Trinity Parish, respecting the purpose or character of the trust deed in question, other than that set forth in the deed itself. After delivery of said deed the Trustees of Donations, etc., duly passed the following vote: "Voted, that we accept in trust from Christ Church, New Haven, land with rectory building thereon, as described in their vote of December 10th, 1885." No consideration for said deed was paid by the grantee. From the time of receiving said deed the Trustees of Donations, etc. has held and now holds, in trust, in accordance with the terms of said deed and the terms of its charter, the property conveyed by the deed aforesaid. On April 26th, 1895, the Parish of Trinity Church executed and delivered to Christ Church Parish a quitclaim deed of the land in question, containing the following clause: "Hereby releasing and conveying to said

releasee whatever and all interest and estate said Society of Trinity Church Parish has or ought to have in and to the above described land under and by virtue of a certain deed from the Society of Christ Church Parish to The Trustees of Donations and Bequests for Church Purposes, of the diocese of Connecticut, bearing date December 22d, 1885."

On June 11th, 1895, the Diocesan Convention duly passed the following vote: "Resolved, that upon the petition of the Parish of Trinity Church and the Parish of Christ Church, both of New Haven, the consent of the Convention of the Diocese is hereby given that the title to the property of the Parish of Christ Church, New Haven, now held by the Trustees of Donations and Bequests for Church Purposes, be reconveyed to said Parish of Christ Church by said Trustees." On or about June 11th, 1895, Christ Church Parish made demand for a reconveyance of said title, but said Trustees of Donations, etc., declined to comply with said demand. Relying upon its belief and upon advice of counsel that when Trinity Church should release its claim, and said Convention of the Protestant Episcopal Church consented to release, Christ Church Parish would have a right to a quitclaim from The Trustees of Donations etc., said last named parish has built a new church on said property at a cost of $80,000, for the purpose of carrying on the work of the said Protestant Episcopal Church, in union with the Convention of the Diocese of Connecticut. The Trustees of Donations etc. is ready and willing to make a reconveyance to Christ Church Parish, if it may do so consistently with the duties of its trust. A copy of the constitution of the Protestant Episcopal Church in the Diocese of Connecticut was made part of the finding.

Upon the trial of the first case, for the purpose of proving that the trust deed was given by the plaintiff to the defendant upon the understanding that the same was a mortgage to secure the payment to said Parish of Trinity Church of said $1,000, and that a release deed would be executed by the defendant to the plaintiff upon payment of said sum of $1,000 to said parish, the plaintiff offered to prove the state-

ments and representations to that effect made by members of the plaintiff parish at the meeting of the 10th of December, 1885, and before the passage of the vote authorizing the conveyance in trust. To the admission of that evidence counsel for the defendant objected, and the court excluded the same; the plaintiff excepted to said ruling.

Charles H. Fowler and *Joseph B. Morse*, for the appellant (plaintiff).

The evidence of the understanding upon which the vote to convey was obtained, was admissible. *Ward* v. *Ward*, 59 Conn., 188, 198; *Douglas* v. *Chatham*, 41 id., 211, 235; *Wilson* v. *Waltersville School District*, 44 id., 157, 159; *Pacific Iron Works* v. *Newhall*, 34 id., 67; *Arbeiter* v. *Day*, 39 id., 155, 157; *Purcell* v. *Burns*, 39 id., 429, 433. This vote as recorded, is not the vote of the parish after legal warning of the object of the meeting. It is void for want of notice. The deed made upon that vote is a *nudum pactum*. *Bloomfield* v. *Charter Oak Nat. Bank*, 121 U. S. 121, 129; *Hayden* v. *Noyes*, 5 Conn., 391; *Williard* v. *Killingworth*, 8 id., 247; *Baldwin* v. *North Branford*, 32 id., 54; *Brooklyn Trust Co.* v. *Hebron*, 51 id., 22. We have the right to show that a deed absolute on its face is intended only as security by the parties in interest. *Reading* v. *Weston*, 8 Conn., 121; *Osgood* v. *The Thompson Bank*, 30 id., 34; *Sheldon* v. *Bradley*, 37 id., 324; *Mead's Appeal*, 46 id., 431; *Lounsbury* v. *Norton*, 59 id., 170. The beneficiaries have the same right to release a contingent interest to the tenant in possession, as they would have to release a present interest. *Smith* v. *Pendel*, 19 Conn., 107, 112; 1 Perry on Trusts, § 68; 2 Bl. Com., 234. "A use cannot be limited upon a use." The springing use in "the Protestant Episcopal Church generally" is so remote, so indefinite, and without consideration, that it is void. Wash. on Real Prop., § 8. Gilbert on Uses, 194 n. *Gilbertson* v. *Richards*, 5 H. & N., 454; *Franciscus* v. *Reigart*, 4 Watts, 118; *Jackson* v. *Meyers*, 3 Johns., 388; *Storrs Ag. Sch.* v. *Whitney*, 54 Conn., 342; *Adye* v. *Smith*, 44 id., 60, 66; *Bristol* v. *Bristol*, 53 id., 242, 254; *White* v. *Fisk*,

22 id., 54; *Conn.* v. *Bliss*, 47 id., 592, 603. Christ Church holds the use, seizin and possession forever. The third contingent use is destroyed by the release deed of Trinity Church. 2 Washburn, 5th Ed., 462, sd. p. 140, § 1; 3 Wood on Conv., 296; *Chudleigh's Case*, 1 Rep., 120, 130; Tiedeman on Real Property, 419; *Sargent* v. *Burdett*, 22 S. E. Rep., 667. The trustees now say they desire to reconvey "if they may do so consistently with their duties." It is their duty to reconvey upon demand, not to stand upon the order of doing it, but to do it at once.

Henry C. White and *Leonard M. Daggett*, for the appellee (defendant).

Is there now any duty, originally imposed upon the trustee by the acceptance of the trust deed, which duty requires for its complete performance that the legal title to the property in question continue to be held in trust? If there is no such duty, then the trustee may with propriety make the conveyance. But if any such duty still remains, and the purposes for which this trust deed was given have not been fully executed, the trustee is unwilling to make a reconveyance. The trustee has no desire to abandon or renounce duties voluntarily assumed, but to faithfully execute under the direction of the court its duties to the State, to Christ Church and to the Protestant Episcopal Church. The amendment to the charter is a mere limitation upon the original grant of power. It merely provided that trust property should not be sold until after the convention had given its consent. The convention derives no power from the amendment, to originate or compel action. Its consent does not relieve the trustee from responsibility for a proper exercise of its power. The amendment restricted the trustee's action. The vote of the convention removed the restriction. The intent of the deed was not only to protect the property against debt, but also to secure it to the permanent use of the church. There is not a word in the deed which looks toward the termination of the trust; not one which can be interpreted to mean that it will ever again be possible for the defendant to obtain the

unrestricted control of the property. When no power of revocation is reserved, a valid trust can only be terminated by either the fulfillment of all of its purposes, or by the consent of all parties in interest. 2 Perry on Trusts, § 920; *Bailey* v. *Lewis*, 3 Day, 450; *Langdon* v. *Congregational Society*, 12 Conn., 113; *Storrs Agricultural School* v. *Whitney*, 54 id., 342; *Thurston, Petitioner*, 154 Mass., 596; *Hildreth* v. *Eliot*, 8 Pick., 293; *Falk* v. *Turner*, 101 Mass., 494; *Viney* v. *Abbott*, 109 id., 300; *Sewall* v. *Roberts*, 115 id., 262; *Sargent* v. *Baldwin*, 60 Vt., 17; *Stone* v. *King*, 7 R. I., 358; *Gulick* v. *Gulick*, 39 N. J. Eq., 401. No power of revocation was reserved in the deed here in question, nor is it claimed that the trust was not validly and properly created. The deed from Christ Church created a valid trust for a charitable use. Gen. Stat., § 2951; *Goodrich's Appeal*, 57 Conn., 275; *Bishop's Fund* v. *Eagle Bank*, 7 id., 476. The trust cannot fail for uncertainty. The designation of the beneficiaries of the trust is clearly valid under the decisions of this court. The statement of the purposes to which the gift shall be applied by a corporation donee, if those purposes be within its corporate power, does not prevent such corporation from receiving the gift as beneficiary. *Atwater* v. *Russell* 49 Minn., 57; *Matter of Teed*, 59 Hun, 63, 69. A gift will be upheld which is (1) charitable in its nature and given to a defined class of beneficiaries from among whom some person or corporation is given a power of selection; or (2) given for a use which the law can see is charitable to a corporation empowered by the law of its incorporation to administer the trust expressed, or (3) given to a corporation whose objects are by the law of its incorporation charitable. *Coit* v. *Comstock*, 51 Conn., 352; *Goodrich's Appeal*, 57 id., 275; *Bristol* v. *Bristol*, 53 id., 242; *Camp* v. *Crocker*, 54 id., 21; *White* v. *Fisk*, 22 id., 31, 52. No person, corporation or convention, acting either alone or in conjunction with others, has power to divert this property from the charitable use expressed in in the trust deed. *Trustees of Union Baptist Ass'n* v. *Huhn et al.* (Texas, 1894), 26 S. W. Rep., 755. Application of the property to other uses than that expressed in the deed, is

forbidden by statute. Gen. Stat., § 2951; *Dailey* v. *New Haven*, 60 Conn., 314, 325; *People* v. *Powers*, 83 Hun (N. Y.), 449; *Russell* v. *Allen*, 107 U. S., 163. The Trustees of Donations, if they were so disposed, could not terminate this trust. *Storrs Agricultural Sch.* v. *Whitney*, *Goodrich's Appeal*, *Dailey* v. *New Haven*, *supra*; *Treat's Appeal*, 30 Conn., 113. The beneficial interest given by the trust deed to the Trustees of Donations and Bequests, was upon sufficient consideration and is not revocable. *Sprague* v. *Thurber*, 16 R. I., 454. There is no reversionary interest in the donor of a charitable trust, which gives to him or to his heirs an interest in its execution or non-execution. *Harvard College* v. *Society for Promoting Theological Education*, 3 Gray, 280; *Brown* v. *Meeting Street Baptist Society*, 9 R. I., 177; *Sanderson* v. *White*, 18 Pick., 328; *Dutch Church in Garden Street* v. *Mott*, 7 Paige Ch., 78, 82; *Commonwealth* v. *Pauline Home*, 141 Pa. St., 537; *Fuller* v. *Plainfield School*, 6 Conn., 532, 544, 545; *Am. Asylum* v. *Phœnix Bank*, 4 id., 172.

HAMERSLEY, J. The important question presented by these cases is contained in the prayer for relief in the action brought by the Trustees of Donations and Bequests for Church Purposes, namely: can the Trustees, etc., in view of the terms of its charter, the trust deed and the other facts found, make an unconditional reconveyance to the Parish of Christ Church, without a violation of its duty as trustee? The answer involves the consideration of three questions:—

1. Is the deed valid? It is claimed that an absolute deed was given upon an understanding between the parties to the deed, that it was in fact in the nature of a mortgage to secure the payment of a loan of $1,000. There are no facts to support this claim. It is distinctly found by the trial court that no such understanding existed; and the conclusion of the court that the deed was not given as a mortgage, nor as security for a loan, is the legal conclusion from the facts found. Counsel for Christ Church intimated in argument that the parish vote authorizing the deed, was passed at a meeting not legally warned for that purpose; but such inti-

mation was not admitted by the counsel for the Trustees, etc., to be true, and is a matter entirely outside the record. For the purposes of this decision the finding of the trial court that the vote, appearing by the parish records to have been passed at a meeting legally warned, was duly passed, must be held conclusive.

2. Is the trust created by the deed a valid trust? It is the settled policy of this State to so frame its legislation that each denomination of Christains may have an equal right to exercise "religious profession and worship," and to support and maintain its ministers, teachers and institutions, in accordance with its own practice, rules and discipline; and this policy is conformable to the provisions of our Constitution. The law authorized the parish of Christ Church to acquire all property appropriated to the support of public worship and of the educational and charitable institutions of the Protestant Episcopal Church in the United States, and by voluntary agreement to establish funds for the same object. The charter of the Trustees, etc., authorized that corporation to acquire by transfer, gift, or will, funds for the support of the institutions, parishes and missionary work of said church, and for the promotion of any of its general interests. The parish of Christ Church had the power to transfer the land on which its church edifice and rectory stood, to the Trustees, etc. The fact that such transfer was made in order to obtain a sum of money given on that condition, supplies an additional and valuable considertion for the transfer. The estate so transferred was for objects which are plainly charitable, and upon the acceptance of the deed of trust became, by force of the statute of charitable uses (§ 2951), a trust fund forever appropriated to the uses for which it had been granted.

It is claimed that because the grantor has directed that the benefit of the fund shall be received first by Christ Church Parish, then in a certain contingency by Trinity Parish, and then by other beneficiaries, the trust is invalid. The trust deed contemplates but one trustee, but one charitable use; two beneficiaries are named by the grantor, the subsequent beneficiaries, if any, are to be selected by the trustee. The

limitation of one trust upon another in such case is not unlawful. *Storrs Agricultural School* v. *Whitney*, 54 Conn., 342.

It is difficult to see how the release of Trinity Parish to Christ Church Parish, can have any effect upon the trust; it certainly cannot invalidate it. The interest is the right to use and occupy the land for public worship in accordance with the constitution and canons of the church, an interest —in the absence of authority in the trust deed—insusceptible of conveyance to another. This interest does not vest in possession until Christ Church Parish has ceased to exist in connection with the diocesan convention and in union with the church; and by the terms of the deed and the law of the State, Christ Church Parish cannot in that event be the recipient of any interest. The release of Trinity Parish is ineffectual to increase or alter the interest of Christ Church Parish; nor can it be treated as a renunciation of the contingent interest of Trinity Parish. If the occasion shall arise, Trinity Parish may claim and enjoy the beneficial use of the land, notwithstanding the release.

It is further claimed that the last use specified in the trust deed, *i. e.*, "such uses as will most nearly accomplish the object desired in the building of said Christ Church, and in the creation of this trust; and promote the interests of said Protestant Episcopal Church generally"—is too indefinite to be administered. We cannot now determine the particular construction which must be given to this language in case the trustee should ever be called upon to administer the trust. The facts in these cases do not call for such construction, and perhaps the parties before us are not sufficient to make it binding. The only question we can now consider is whether the language may fairly be so construed that the use is not void for uncertainty. On this question we entertain no doubt. By the terms of the deed and the law, the charitable use for which this estate is appropriated is the maintenance of the religious worship and the support of the charitable and educational institutions of the Protestant Episcopal Church in the United States; the successive beneficiaries named by the grantor are Christ Church Parish and

Trinity Parish; we think that the language may fairly be construed as authorizing the trustee, in case the beneficiaries named become incapable of receiving the benefit, to select, in accordance with its judgment, such beneficiaries from a well defined class of church corporations, as are lawfully capable of receiving the benefit. *Coit* v. *Comstock*, 51 Conn., 352, 377. Recent legislation has recognized to a limited extent the doctrine of *cy pres* in the administration of trusts created by deed (*Woodruff* v. *Marsh*, 63 Conn., 125, 136); but it is unnecessary, if it were competent, to invoke any aid from that doctrine in the present case.

3. Is the trust created by the deed terminated, and if not, can the trust be lawfully terminated by the agreement of the parties before the court?

The charter of the Trustees, etc., authorizes it to sell or otherwise dispose of the estate held by it in trust, with the consent of the diocesan convention; this power is limited by the specific directions that may be contained in the deed of trust, and relates to a change in the form of the trust fund; it does not authorize a violation or termination of the specific trust contained in the transfer of the estate. The vote of the diocesan convention of June 11th, 1895, did not direct and could not lawfully authorize the Trustees, etc., to violate the specific trusts created by the trust deed. It is not competent for the parties now before the court to terminate the trust. When a fund has once been devoted by unqualified deed or gift to a public charitable use, it comes under the protection of the law which says it shall forever remain to such use according to the true intent and meaning of the grantor; which intent and meaning must be settled by the law. The donor cannot withdraw the gift; the trustee cannot release the trust. *Langdon* v. *Congregational Society*, 12 Conn., 113; *Storrs Agricultural School* v. *Whitney*, *supra*. The Parish of Christ Church, considered merely as a corporation, is not the sole beneficiary of the trust; the beneficiaries include "each individual member of the society and their posterity, so far as they shall remain within the influ-

ence of the gospel as there dispensed." *Langdon* v. *Congregational Society, supra.*

Nor is there any ground for disposing of the estate as if the purpose of the trust had been accomplished. That purpose includes the preservation of the estate by the legal ownership of the Trustees, etc., "without being subject to debts, liability, or incumbrance of any kind so long as said Society of Christ Church Parish shall exist and be in union with the convention of said diocese and in communion with the Protestant Episcopal Church in the United States." Such a purpose is in support of the doctrine and usages of that church, which forbids the consecration of any house of worship until the building and ground on which it stands are fully paid for and free from any incumbrance, and requires the property to be secured from danger of alienation from those who are in communion with that church, and makes it unlawful for any corporate body authorized by law to hold such property, to incumber or alienate any consecrated church without the previous consent of the bishop and standing committee of the diocese. Dig. of Can., Title 1, Can. 26. The church in this State, as a constituent part of the church in the United States, acknowledges the authority of this canon, and it bears upon every parish in union with the diocesan convention. *Goodrich's Appeal from Probate*, 57 Conn., 275, 283. The Trustees, etc., was chartered for the express purpose (among others) of holding property for the support of parishes according to the doctrine and usages of the church, subject to the specific direction and conditions contained in the transfer of such property. Plainly this purpose of the trust, which the State, in pursuance of its policy to authorize each denomination of Christians to hold and use property appropriated to such charitable use in accordance with its own doctrines and usages, has authorized Christ Church Parish to create, and the Trustees, etc., to accept, has not been accomplished, and therefore the trust must continue under the protection of the law. The State has provided various agencies and given ample authority to the Protestant Episcopal Church, for acquiring and holding prop-

erty for the support of its institutions according to its doctrine and usages; but when in pursuance of such authority an estate has been appropriated to a public and charitable use under specific trusts, the State does not authorize the church, nor any of its agencies, to violate a settled public policy and destroy such trust. The limitations and conditions of a trust are within the control of the agencies of the church by which it may be created; but the created trust is under the protection of the State. It follows that the Trustees, etc., cannot, upon the facts found by the court in these cases, make an unconditional reconveyance of the land described in the trust deed to the Parish of Christ Church, without a violation of its duty as trustee.

The second prayer of relief in the action brought by the Trustees, etc., *i. e.*, "to advise the plaintiff in view of the premises, in what manner it shall discharge its duty so that it may properly and safely execute the trust aforesaid,"—asks relief to which the plaintiff is not entitled upon the facts found.

The views we have expressed dispose of all the questions raised by the appeal in the case of *Parish of Christ Church* v. *The Trustees, etc.*, except an error claimed in the exclusion of evidence. The finding states: "Upon the trial of said cause, for the purpose of proving that said deed (the trust deed) was given by plaintiff to defendant upon the understanding that the same was a mortgage to secure the payment to said Parish of Trinity Church of said $1,000, and that a release deed would be executed by the defendant to the plaintiff upon payment of said sum of $1,000 to said parish, the plaintiff offered to prove the statements and representations to that effect made by members of the plaintiff parish at the meeting of the 10th of December, 1885, and before the passage of the vote" authorizing the execution of the trust deed.

Such evidence was properly excluded by the court; it had no relevancy whatever to any fact in issue, and it does not appear that any evidence was given or offered in connection with which it might become relevant.

In *The Parish of Christ Church* v. *The Trustees of Donations and Bequests for Church Purposes*, there is no error in the judgment of the Superior Court.

In *The Trustees, etc.*, v. *The Parish, etc.*, the Superior Court is advised to render judgment that the plaintiff cannot, upon the facts found, make an unconditional reconveyance to the defendant of the property described in the deed of trust, without a violation of its duty as trustee.

In this opinion the other judges concurred.

THOMAS W. CORBETT *vs.* AGNES COCHRANE.

Third Judicial District, Bridgeport, April Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

In an action to recover rent, the defendant alleged in the first paragraph of her defense that she had occupied the premises under a "special agreement" between herself and the plaintiff. Subsequent paragraphs averred that at the time the premises were leased, the plaintiff promised and agreed to make certain repairs, that he had broken this agreement, and thereby the defendant's merchandise and household goods had been damaged to an amount greatly in excess of the rent due. The plaintiff admitted the truth of the first paragraph, but denied all the other allegations of the defense. Upon the trial it was substantially agreed that the lease was to be for a term of years, and that after the defendant had taken possession a lease for this term was presented to her which she failed to sign; but that she continued to occupy and pay the stipulated monthly rent (except that for the last month) for eighteen or twenty months. The trial court instructed the jury that inasmuch as the original agreement for a term of years was by parol, it could not be enforced, and the lease had become, by virtue of § 2967 of the General Statutes, one from month to month; and that any agreement of the plaintiff as to repairs would not extend beyond one month. *Held* that this instruction, which practically gave the case to the plaintiff, required the jury to try the cause upon an issue not embraced by the pleadings, and to sustain a claim of the plaintiff inconsistent with his own admission. *Held* also, that as the time the lease was to run was fixed by the parties, it could not be said to fall within the fair intent and meaning of the statute as a lease in which no termination was agreed upon, and that the charge was erroneous for this reason.

Where the lessee has taken possession under such a lease as existed in the

case at bar, it creates a tenancy at will, which by implication is held to be a tenancy from year to year; and in such case a contract made at the time of letting, between the lessor and tenant, may constitute throughout the tenant's possession a valid special agreement under which the occupancy is held.

To constitute a lease from month to month, under § 2907 of the General Statutes, three things are requisite: a parol lease, a monthly rent, and no agreed time for the termination of the lease.

[Submitted on briefs April 29th—decided May 14th, 1896.]

ACTION to recover rent, brought originally before a justice of the peace, and thence by the defendant's appeal to the Court of Common Pleas in New Haven County, and tried to the jury before *Hotchkiss, J.*; verdict and judgment for the plaintiff, and appeal by the defendant for alleged errors in the rulings and charge of the court. *Error, new trial granted.*

The case is sufficiently stated in the opinion.

Arthur C. Graves, for the appellant (defendant).

The court erred in charging the jury that if the contract for a lease and occupation of the premises was in parol reserving a monthly rent, and the time of the termination was not agreed upon, all the provisions, conditions and limitations of this parol lease expired with the parol lease at the end of the first month. *Bacon* v. *Brown*, 9 Conn., 334; *Strong* v. *Crosby*, 21 id., 398. A parol lease for a term of years being void by the statute of frauds, the tenancy, if continued beyond a year, becomes a tenancy from year to year. *Larkin* v. *Avery*, 23 Conn., 304, 316; *King* v. *Woodruff*, ibid., 56; *Lockwood* v. *Lockwood*, 22 Conn., 425; Taylor's Landlord and Tenant, § 56, and cases there cited; 1 Wash. on Real Prop., 602, 603; *People* v. *Darling*, 47 N. Y., 666. As long as the defendant did in fact remain in possession of the premises, and was allowed to so remain by the plaintiff, and as long as the plaintiff did not exercise his right to regain possession, she held under the same terms as those under which she entered.

Charles H. Fowler and *Grove J. Tuttle*, for the appellee (plaintiff).

The charge was correct. The defendant refused to sign a

lease as agreed upon. No other contract was made. There existed no contract whatever between the parties. A monthly rent was reserved and there was no evidence of renewal of a lease from month to month. General Statutes, § 2967. The parol lease expired with the month, and if the defendant refused to execute a lease and refused to make a new contract, either express or by implication, the plaintiff owed her no duty whatever. She occupied for the month only, and must pay for such use and occupation.

FENN, J. This action came to the Court of Common Pleas in New Haven county, by appeal from a justice of the peace. The complaint contains only the common counts. The bill of particulars embraces four items, which, with interest claimed, amount to $59.08. The first and principal charge is "1 mo. rent $50.00." Two defenses were filed: first, a general denial; second, a special answer, as follows:—

"Par. 1. On and for a long time prior to November 15th, 1893, the defendant, under a special agreement between her and the plaintiff, occupied the plaintiff's store and a living apartment over said store, as his tenant. Par. 2. Said store was occupied and used by the defendant as a millinery and ladies' furnishing store. Par. 3. At the time of leasing said premises by the plaintiff to the defendant, the plaintiff represented and maintained to the defendant that the said premises were in a good, tenantable and habitable condition, and agreed to keep them tenantable and habitable during their occupancy by the defendant. Par. 4. Said premises were not in good, tenantable and habitable condition at any time during the defendant's tenancy, in that the windows in said store were not properly and suitably built and kept in repair, so as to prevent the rain from entering within said windows, nor was the roof properly built and maintained in repair so as to prevent the rain and water from entering thereunder; nor was the furnace of said building so properly built, constructed and kept in repair as to prevent great quantities of smoke from issuing therefrom and filling the entire store and premises with smoke and dust. Par. 5. On divers days

between the 15th day of April, 1892, the date of the first occupancy of said premises by the defendant, and the 15th day of October, 1893, the defendant suffered great and extensive damage to her goods, wares, and merchandise, to wit: her household furniture and carpets in the apartments above the store of said premises, and likewise to the goods, stock and merchandise contained in the store of said premises, and all in consequence of the untenantable and uninhabitable condition of said premises, that is to say, by the leaking of the roof of said house and the leakage of the windows in said store of said premises, and likewise by the issuance of great volumes of smoke from the furnace of said building, all of which was to the damage of the defendant in the sum of $500. The defendant claims $500 damage."

The reply admitted paragraphs one and two of said special defense, and denied every other allegation thereof. Upon the issues thus raised the case was tried to the jury, which returned a verdict, accepted by the court, for substantially the full amount of the plaintiff's demand.

The defendant has assigned seventeen reasons for her appeal to this court; eleven in reference to the admission or exclusive of evidence, six in regard to the charge of the court to the jury. Most of these assignments appear to us clearly groundless; some however, have weight. But these latter, with a single exception, present questions so peculiar not alone to the present case, but to the unusual character of the trial had of such case—questions therefore neither of general interest, nor likely to arise again upon another trial of this action—that we deem it unnecessary to enter into a discussion of them; since upon the one ground, to which we have referred, and for the reason which we will proceed to indicate, a new trial should be granted.

The plaintiff claimed the item of $50, above referred to, was due him for one month's rent from October 15th to November 15th, 1893, of a certain store and a tenement over it, each having been rented to the defendant for $25 per month, and occupied by her; the tenement from March 15th, 1892, and the store from April 15th, 1892.

There was no dispute concerning such occupancy, the amount of rent agreed upon, or that it had all been paid until the last month, or that the rent for the last month had not been paid. The court in its charge to the jury said: "The most important question in the case is the question set up in the defendant's answer, claiming damages by reason of the plaintiff's failure to keep his agreement made at the time when the lease was a matter of conversation between the defendant and the plaintiff. Upon that question the defendant assumes the affirmative to prove her allegations." The court then added that she claimed to have proved them, and reviewed the evidence tending to that effect. The court then proceeded to say that it was stated, and the parties did not disagree, that the agreement as to the lease in this case was that it was to be for three or five years, or three years with the privilege of five; but that though a written lease was prepared by the plaintiff and presented to the defendant on one or more occasions after the defendant had entered into possession, the same was not signed, and as a monthly rent was reserved or agreed to be paid, it became a lease from month to month, liable to be terminated at the end of any month by either party; that under the law, in the absence of an express agreement, the landlord is not bound to make repairs, and no subsequent agreement will make him liable. The court added: "As I have already said, if the fact is so that she (the defendant) went in there under an agreement for a lease for three or five years, or three years with the privilege of five, that agreement could not be enforced, and it becomes a simple occupancy from month to month, liable to be terminated by either at their pleasure at the end of any month; and under those circumstances any agreement made by Mr. Corbett in regard to repairs, would only last as long as there is a valid lease between them, or a valid occupation, which would be for the term of one month. And if he made a subsequent agreement on condition that she would remain, that would be merely binding for the length of the legal lease, which would be for one month." Finally, upon this point, the court further charged the jury in the language of

the plaintiff's requests: "Upon the evidence, *first*, if the contract for a lease and occupation of the premises was in parol, reserving a monthly rent, and the time of its termination was not agreed upon, all the provisions, conditions and limitations of this parol lease expired with this parol lease at the end of the first month."

We think the court erred in thus charging the jury, for two reasons: *First*, it presented to them—and as substantially decisive of the case in the plaintiff's favor—an issue which could not properly arise under the pleadings, and, in effect, required the jury to find for the plaintiff, because the defendant had failed to prove what the reply to the special answer admitted. By referring to that answer—herein recited—it appears that the two admitted paragraphs expressly state the defendant's occupancy of the premises "on and for a long time previous to November 15th, 1893," was under, "a special agreement between her and the plaintiff." In subsequent paragraphs of the answer, referring to the time of leasing the premises, the alleged promises and representations of the plaintiff are averred as having then been made. The injury resulting to the defendant, for which she claims damage, is then stated as having taken place "between the 15th day of April, 1892, the date of the first occupancy of said premises by the defendant, and the 15th day of October, 1893." Every allegation in these paragraphs subsequent to the first two, is denied. But it is evident that such denial could not reasonably be understood as contesting that concerning which the court itself declared to the jury: "These facts, as I understand it, are not disputed by either party. They agree as to the dates when she took possession of both the tenement and the store, and when she vacated." This being so, the distinct question presented by the allegations and denial was this: There being an admitted valid special agreement under which the defendant entered into possession of the premises, and under which she occupied them throughout, by reason of which the plaintiff claimed and was admitted to be entitled to the agreed rent of $50 per month, concerning which the court also said: "To the

claim of the plaintiff for one month's rent—or that on the 15th day of November, 1893, one month's rent, amounting to $50, was due from the defendant—there doesn't seem to be any dispute;"—this, we repeat, being so, the question was, did the special agreement embrace the representation and promise stated? This the defendant clearly alleged, and sought by her evidence to prove. This the plaintiff as clearly denied in his reply, and contested by his evidence. To make the case, therefore, turn upon the want of binding effect of such promise upon the plaintiff, if in fact made; to tell the jury as the court did, that the defendant was bound to prove by a fair preponderance of evidence that the plaintiff did make this agreement prior to her taking possession, and then tell them that if, as admitted, the agreement was by parol, it only lasted "as long as there is a valid lease between them, or a valid occupation, which would be for the term of one month;" —to do this is to compel the jury to try the case upon an issue not embraced in the pleadings, to sustain a claim of the plaintiff inconsistent with his own admission. And if the law be as was stated, the charge for this reason was erroneous.

But it was, as we think, also erroneous for another reason. The finding shows, and the court said to the jury, that the parties agreed that the lease was to be for three years with the privilege of five. After the defendant entered into possession, a written lease was presented to her by the plaintiff, but was not signed. Then the only lease in fact was by parol, and a monthly rent was reserved or agreed to be paid. The court stating this, concluded, as we have seen, that by virtue of General Statutes, § 2967, it became a lease from month to month. But such is not the statute. To be a lease for a month only, three things must concur—the court refers to but two: the lease must be by parol, a monthly rent reserved, and the time of termination must not be agreed upon. The court made no reference to this last essential, except in the most incidental way in repeating one of plaintiff's requests. It seems to us that a lease running for a fixed time could not well be considered one which had no agreed time of termination, within the fair intent and meaning of the statute. Such

a lease as the present, where the lessee has taken possession under it, creates a tenancy at will, which by implication is held to be a tenancy from year to year; and it is sufficient for the purposes of this case to say, where such a tenancy exists, a contract made between the landlord and tenant, at the time of the letting, may constitute throughout the continuance of possession by the tenant, what the reply to the defendant's answer admitted to exist in this case, a valid special agreement under which such occupancy was held. *Larkin* v. *Avery et al.*, 23 Conn., 304.

There is error and a new trial is granted.

In this opinion the other judges concurred.

HERBERT P. WHEELER *vs.* FRANK L. THOMAS.

Third Judicial District, Bridgeport, April Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN AND HAMERSLEY, Js.

In an action to recover the balance of an account, the parties were at issue as to whether the defendant had verbally assigned and the plaintiff accepted a valid claim the defendant had against one *X*, in satisfaction of the accouut in suit. *Held* that *X*, who was called as a witness by the defendant, was properly allowed, on cross-examination, to give his recollection of the details of the conversation between himself and the plaintiff, when questioned by the latter concerning his alleged indebtedness to the defendant and the assignment of such debt to the plaintiff.

In reply to a question as to what the plaintiff said in such conversation, *X* replied that "he led me to infer" etc. *Held* that while this answer was erroneous in point of form, it was within the discretion of the trial court to allow it to stand, under the circumstances disclosed by the finding; and moreover could have done the defendant no possible harm.

On his direct examination the defendant was asked if the present action was brought without any demand upon or notice to him. On objection the question was excluded. *Held* no error.

The plaintiff was permitted to testify that subsequent to the alleged assignment to him of the *X* claim, he gave a written order on the defendant to one *S* for a portion of the claim in suit, and that this order was returned to him unpaid; that he afterwards saw the defendant and inquired why he had not paid the order, and that the defendant said

he thought he had paid it. *Held* that this evidence was admissible as tending to prove that the defendant had not paid the plaintiff by an assignment to him of the *X* claim.

The defendant, on his cross-examination, was asked if he had not heard *X* testify that he never owed him, the defendant, anything. *Held* that such question was not objectionable as requiring the witness to give a statement of *X*'s testimony, or put an interpretation upon it.

The defendant offered to show that *X*, since testifying that he was not indebted to the defendant, had made a contrary statement out of court. Upon objection the court excluded the evidence. *Held* that this ruling was proper, as the statement was hearsay and not admissible to prove the real state of the account between *X* and the defendant; and could not be used for the purpose of discrediting the defendant's own witness. While a party may show that a fact to which one of his own witnesses has testified is different from that stated by him, the rule is very strict that a party cannot directly discredit his own witness.

A trial judge may properly make fair and reasonable comments on the testimony, in his charge to the jury, and also instruct them that it is their duty to try to agree upon a verdict.

An objectionable remark of the trial judge to the jury should be read in connection with the context; and if not misleading or improper when so construed, will not be regarded as ground for a new trial.

[Argued April 21st—decided June 5th, 1896.]

ACTION to recover the balance of an account claimed to be due on a building contract, brought to the Court of Common Pleas in New Haven County and tried to the jury, before *Hotchkiss, J.;* verdict and judgment for the plaintiff, and appeal by the defendant for alleged errors in the rulings and charge of the court. *No error.*

In view of the length of the record and the unimportance of many of the questions therein raised, it is unnecessary to reproduce it here. The principal rulings passed upon by the court will be readily understood from the headnote in connection with the statement contained in the opinion.

Charles S. Hamilton, for the appellant (defendant).

George A. Tyler, for the appellee (plaintiff).

ANDREWS, C. J. The complaint in this action claimed to recover the balance due on a contract. The answer admitted the contract and the balance as stated in the complaint,

but alleged an accord and satisfaction, viz, that one Wallace W. Ward was on the 16th day of May, 1890, indebted to the defendant in a greater sum than the amount due on said contract, which debt the defendant on said day assigned to the plaintiff, and the plaintiff accepted the same in full payment and satisfaction of the balance due on said contract. This assignment and acceptance the plaintiff denied. There was a trial to the jury upon the issue so formed and the plaintiff had a verdict. The defendant has appealed.

It appears that the only witness before the jury, other than the parties themselves, was the said Ward, who was called by the defendant. The court finds that since the suit was brought, Mr. Ward had had a serious illness, had suffered a paralytic shock, and that his mind and memory were very greatly impaired.

There are ten reasons of appeal. Nine are from rulings in respect to the admission of evidence. And of these, the decision of the court upon the first, fourth, fifth, sixth and eighth, are so clearly correct that no comment is necessary.

The second and third reasons really present but one error. There was an error in point of form in the answer given by the witness Ward; but under the circumstances disclosed in the case it was within the discretion of the judge to allow the answer to stand. Besides, no possible harm could have been done to the defendant.

The seventh reason is that the judge erred in admitting certain testimony of the plaintiff concerning an order given by him upon the defendant to The J. Gibbs Smith Company. The evidence was admissible, because it tended to show that at that time the defendant made no claim that he had paid the plaintiff the balance due on the contract, by an assignment to him of the Ward debt. The evidence showed conduct by the defendant inconsistent with the claim he was making in court.

The ninth reason of appeal was this: The defendant had called Mr. Ward as a witness and he had testified to the state of the account between himself and the defendant. The defendant sought to show that Mr. Ward had, since

giving his testimony, made a statement out of court respecting that account entirely contrary to the testimony he had given. This was ruled out, and we think, properly. The evidence of what Mr. Ward had said out of court was offered to show the real state of the account between himself and the defendant. For that purpose it was not admissible. As to that fact it was hearsay. It was admissible, if at all, only for the purpose of discrediting Mr. Ward as a witness. The rule is very strict that a party may not directly discredit his own witness; although he may show a fact to which the witness has testified to be different from what the witness has stated.

The tenth reason is that the judge erred in various particulars in his charge to the jury. So far as these relate to comments on the testimony, they were fully warranted by many decisions of the court. *Setchel* v. *Keigwin*, 57 Conn., 473, and the cases there cited. *Butte Hardware Co.* v. *Wallace*, 59 Conn., 336.

It is strenuously argued that the judge misinstructed the jury in saying to them that there was no evidence that Ward knew that he owed the defendant the $319. The remark, taken by itself, would seem to be somewhat objectionable; but when read in connection with what the judge said before and after, it means that there was no evidence coming from Mr. Ward, who had been called as a witness before them by the defendant, that he knew that he owed the defendant the sum named. Read in this way the remark was perfectly proper. *Collins* v. *Richmond Stove Co.*, 60 Conn., 356. The advice to the jury that it was their duty to try to agree, was not erroneous. *State* v. *Smith*, 49 Conn., 376.

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *vs.* PATRICK HOGAN.

Third Judicial District, Bridgeport, April Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

A challenge to the array of jurors is an objection to the whole panel, and can be sustained only for a cause that affects all the members of the panel alike.

Section 2 of Chap. 189 of the Public Acts of 1895, permitting the Court of Common Pleas in New Haven County, under certain circumstances, to retain the jurors in attendance at one term, to try civil or criminal causes at the next succeeding term, is not repealed by the general jury law, Chap. 219 of the Public Acts of 1895.

The defendant was charged with keeping open a liquor saloon on Sunday. It appeared in evidence that the officers entered the premises by a cellar door and found the bar-keeper and another man in the cellar, also a glass half full of beer; that they went up a ladder through an open trap-door to the saloon above where they found the money-drawer with several dollars in it on the floor, and a pail of beer on ice; that the defendant's wife came into the saloon and took away the drawer and its contents and objected to the removal of the pail of beer by the officers. *Held* that her conduct and statements were admissible as tending to show that the saloon was being kept open at that time.

The State was permitted to show that a subpœna had been issued for the attendance of the bar-keeper as a witness, but that after diligent search he could not be found, and had left the State. *Held* no error; as the prosecutor was in a sense bound to produce the witness, or explain his absence. Withholding evidence which can be produced may give rise to a presumption of fact against the party withholding it.

In charging the jury, reasonable comments upon the testimony are within the discretion of the trial court.

[Submitted on briefs April 21st—decided June 5th, 1896.]

PROSECUTION for violation of the liquor law, brought originally to the City Court of Ansonia and thence by the defendant's appeal to the Criminal Court of Common Pleas for New Haven County, where the case was tried to the jury, before *Hotchkiss, J.*; verdict and judgment of guilty, and appeal by the accused for alleged errors in the rulings and charge of the court. *No error.*

The defendant was arraigned in the Criminal Court of Common Pleas on the 27th day of January, 1896, to answer

to an information charging him with keeping open on a Sunday a certain place in which intoxicating liquors had been sold and exposed for sale, exchanged and given away. Before he answered to the said information, his counsel interposed a challenge to the array of jurors, for the reason "that for this jury term of this honorable court only four jurors were drawn by the clerk of this court in the presence of the sheriff, or one of his deputies, or otherwise, from a suitable number of jury boxes, or in any other manner."

The finding shows that all the jurors on the panel at said term of court, except four, were retained from the preceding term of the civil side of the court, pursuant to § 2, chapter 189, of the Public Acts of 1895. The court overruled the challenge. The defendant thereupon pleaded not guilty. Said § 2 took effect June 20th, 1895, and is as follows: "Whenever a jury shall be in attendance upon said court, (*i. e.* the Court of Common Pleas for New Haven County) in either the criminal or civil side thereof, and the cases, civil or criminal, awaiting trial shall not be concluded at the close of the term for which said jury is summoned, such jury may be retained for the trial of causes, civil or criminal, at the next succeeding term of either side of said court." Terms of the Court of Common Pleas in New Haven County are holden on the third Monday of September, and the first Monday of January, March, May and November, for the transaction of civil business, and on the first Monday of each month for the transaction of criminal business.

The general jury law (Chapter 219 of the Public Acts of 1895,) went into effect the 26th day of June of that year. Its fifth section is this: "At some convenient time before each jury term of the Superior Court, Court of Common Pleas, or District Court, its clerk shall, in the presence of the sheriff or one of his deputies . . . . draw from a suitable number of the jury boxes eighteen jurors, unless a larger number shall be ordered by the court, to attend such court, and shall issue warrants directed to the sheriff of the county, his deputy, or to the constables of the towns where such jurors respectively reside, to summon such jurors to attend and serve at such court."

Upon the trial the State claimed to have proved that the saloon of the defendant was situated on the lower floor of a tenement on Main street in the city of Ansonia, and that the defendant resided with his wife and family in the same tenement over the saloon; that on Sunday the 18th day of August, 1895, the city sheriff of said city, with an assistant, went to said saloon, found the front and side doors locked, but that persons obtained ready admittance to said saloon through a back door; that the said officers went into the saloon through the said back door and found several persons there; among others a bar-keeper by the name of Baker and a man by the name of Hassett; that the wife of the defendant came in while they were there and took away the money drawer and the money amounting to seven or eight dollars, and had conversation with the said officers about the beer which was there and which the officers proposed to seize and carry away. The State also offered the testimony of a deputy sheriff, that he had had a lawful subpœna to summon the said bar-keeper Baker to be present at the trial, and that he had made vigilant search and inquiry for Baker, but had been unable to find him, and that he had departed the State. To this evidence the defendant objected, but the court admitted it. There was a verdict of guilty and the court sentenced the defendant. He now appeals to this court.

James P. Pigott and *Denis T. Walsh*, for the appellant (defendant).

George M. Gunn, Prosecuting Attorney, for the appellee (the State).

ANDREWS, C. J. A challenge to the array of jurors is an objection to the whole panel of jurors at once, and in order to be available it must be for a cause that affects all the jurors alike. 3 Bl. Com. 359; 2 Tidd's Practice, 779. The challenge here was bad on its face, in that it was for a reason which, by its own terms, did not attach to four of the jurors whom it prayed to have rejected. It was necessarily overruled.

But passing this, the challenge was properly denied for the other reason given. The argument by the defendant is that the Act, chapter 189 of the Public Acts of 1895, was repealed by the fifth section of the general jury law passed the same year. That Act, chapter 189, was a special Act having reference only to the Court of Common Pleas in New Haven County. The general jury Act—chapter 219 of the Public Acts of 1895—was a general Act. The rule is that a special statute is not ordinarily repealed by a later general one. *City of Hartford* v. *Hartford Theological Seminary*, 66 Conn., 475.

The testimony as to the conduct of the defendant's wife, and what she said to the officers, was admissible, and very significant as tending to show that the saloon was being kept open at that time.

The State's Attorney was in a sense bound to produce the bar-keeper, Baker, as a witness, or to explain his absence. Otherwise he would have been open to the charge of a neglect of duty by the holding back of the very witness who was in the best position to relate the true circumstances of the case. The holding back of evidence may be used as a presumption of fact against the party who holds back such evidence, in all cases when it could be produced. 2 Wharton's Evidence, § 1266; *Throckmorton* v. *Chapman*, 65 Conn., 441, 454; *Kirby* v. *Tallmadge*, 160 U. S., 379.

The comments made by the judge to the jury upon the evidence, were within the discretion of the court.

There is no error.

In this opinion the other judges concurred.

HENRY F. HALL *vs.* EUGENE S. APPEL.

Third Judicial District, Bridgeport, April Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN AND HAMERSLEY, Js.

The payee of a mortgage note for $500 payable in installments, agreed in writing to surrender the note to the maker on condition that he paid $400 within two months; and also on the same day orally agreed that the maker and mortgagor might cut and sell the wood on the mortgaged land, provided he would turn over "the avails" to the payee to be applied in part satisfaction of said sum of $400. The debtor cut and sold a portion of the wood for $150, and within the time limited tendered to the creditor $250 in cash and a written order for $150 on the purchaser of the wood, which the latter had previously indorsed "accepted." The creditor refused to accept the tender and brought a suit to foreclose the mortgage. *Held* that the oral agreement in relation to cutting and selling the wood and the disposition of the avails of such sale, was made merely to enable the debtor to raise part of the $400 in cash in this way, and did not change or qualify in any respect the written agreement as to payment; and that as payment of the $400 was a condition precedent to the surrender of the note, the tender made did not comply with the terms of that agreement.

The trial court did not find as a fact that the creditor expressly waived the performance of the condition, but only that the reasons given by him for his refusal to accept the tender, were not based upon any objection to the character of the money or of the order tendered. *Held* that inasmuch as the creditor was under no obligation to give any reasons for his refusal, the mere fact that he mentioned certain grounds of objection to the tender, was not of itself and as matter of law a waiver of other grounds not mentioned.

[Argued April 22d—decided June 5th, 1896.]

SUIT to foreclose a mortgage of real estate and for an injunction to restrain the defendant from cutting wood on the mortgaged premises; brought to the Court of Common Pleas in New Haven County and tried to the court, *Hotchkiss, J.;* facts found and judgment rendered for the defendant upon his cross-complaint, and appeal by the plaintiff for alleged errors in the rulings of the court. *Error and judgment set aside.*

The case is sufficiently stated in the opinion.

Henry G. Newton, for the appellant (plaintiff).

Joseph Sheldon, for the appellee (defendant).

TORRANCE, J. This is a complaint to foreclose a mortgage, and for a temporary injunction. In his defense, among other things, the defendant alleged in substance, that prior to the bringing of this suit the plaintiff had agreed with the defendant to surrender to him the note secured by said mortgage, on the payment of $400 within two months from the date of said agreement; that he had duly tendered said $400 to the plaintiff within the time agreed upon; that the plaintiff had refused to accept said tender and to surrender said note as agreed; that he was still ready and willing to pay said money to the plaintiff, or into court for the plaintiff's use; and upon the facts so set up in his cross-complaint, the defendant claimed a surrender of the note and a release of the mortgage, described in the complaint.

The motion to amend the record, made in this court by the defendant, was not granted. The matters sought to be added to the record, occurred long after this appeal was completed, and formed no part of the record proper to come here by way of appeal.

One of the important questions in the court below, was whether or not upon the facts found with reference to the tender aforesaid, said tender fulfilled the terms of the agreement under which it was made, and thus entitled the defendant to the surrender of the note as agreed. The controlling facts upon this part of the case may be stated as follows:

On the 1st of April, 1895, the plaintiff held the note and mortgage described in the complaint. The note, made by the defendant, dated April 21st, 1892, for the sum of $500, was payable on demand to the order of the plaintiff, with interest and taxes. The court finds that "at the time of the execution of said note, or within a few days thereafter, the defendant called the attention of the plaintiff to the fact of said note being payable on demand, and of his inability to meet the same, and his liability to have the same enforced at any time, and thereupon the plaintiff indorsed on the back of said note the following: "It is understood and

agreed that this note and interest shall be due and payable five dollars per month, with interest. H. F. Hall." The only payments made upon said note up to and including April 1st, 1895, were the following, which appear as indorsements thereon: "Received on the within note $23, August 6, 1892. Received on within, April 1, 1895, $50."

On the 1st of April, 1895, the plaintiff signed and delivered to the defendant a writing of the following tenor: "Wallingford, April 1, 1895. I hereby agree to release and surrender a note I hold of Eugene S. Appel, bearing date April 21st, 1892, for the sum of four hundred dollars ($400), provided the same is paid two months from date; otherwise, the balance of the note shall be due, without any deduction of the same if not paid in sixty days as agreed. Said note secured by mortgage." Afterwards, upon the same day, the parties orally agreed as follows: that the defendant might cut the wood upon the mortgaged land, "provided he would turn the avails over to the plaintiff, which avails the plaintiff agreed to accept in part satisfaction of said sum of four hundred dollars, so to be paid in satisfaction of said note." Thereafter the defendant cut a portion of said wood and sold it to a corporation for the price of $150. On the 6th of May, 1895, the defendant drew his order on said corporation for the price of said wood in favor of the plaintiff, in the following form: "Pay to Henry F. Hall or order, one hundred and fifty dollars ($150), and charge to my account." Said corporation duly accepted said order in writing upon its face. The court finds that said corporation was solvent, that the acceptance was a valid and binding one, and that the order would have been paid on presentation by the plaintiff. Within the two months' time agreed upon, the defendant tendered to the plaintiff, in performance of the written and oral agreements of April 1st, 1895, said accepted order and the sum of $250 in cash, and requested the surrender of the note and a release of the mortgage, but the plaintiff refused to accept the tender and refused to do as requested. The court finds that such refusal was "based on matters arising from another controversy, to which the defendant was a

party, and which the plaintiff desired the defendant to adjust; and that the said refusal was not based upon any objection to the character of the money or of the order." The court also finds that the "defendant undertook in good faith to carry out and has as aforesaid carried out his said agreement with the plaintiff, and that in equity and good conscience the plaintiff ought to have accepted the said money and order, and to have delivered up said mortgage note and released said mortgage."

Upon the facts found, the court below held the tender of the money and the order to be a good tender of the $400 under the written and oral agreements of April 1st, 1895; and in this we think the court erred. In reaching this conclusion we assume, for the purposes of the argument merely, that the agreements of April 1st, 1895, were made upon a legally sufficient consideration, as claimed by the defendant. As they are stated upon the record, these agreements of April 1st, 1895, are agreements on the part of the plaintiff alone; the defendant does not agree or promise to do anything. In the written one, the plaintiff agrees to give up the note on condition that the defendant pays $400 in cash within the time agreed upon; while in the oral one, made after the written one, but on the same day, the plaintiff agrees to accept the "avails" of the sales of wood to be made by defendant from the mortgaged land, "in part satisfaction of said sum of four hundred dollars, so to be paid in satisfaction of said note."

This subsequent oral agreement, in effect merely gave the defendant permission to lesson the value of the mortgage security by cutting and selling wood therefrom, on condition that he would turn over the "avails" of such sales—that is the money obtained therefrom—to the plaintiff. It was made merely to enable the defendant to raise part of the $400 in cash in this way; and the plaintiff agreed to accept the "avails"—that is the money—realized from such sales, as a part of the $400 in cash to be paid under the written agreement.

The oral agreement, then, does not change nor qualify the written agreement, in any respect; it in effect merely pro-

vides how part of the money to be paid under the written agreement, may be obtained. The payment of $400 in cash was thus a condition precedent to the surrender of the note. The plaintiff did not agree to accept an order of any kind whatever, in whole or in part payment; he agreed to accept cash and cash only. It may be conceded for the sake of argument, as claimed by the defendant, that in the present case a tender duly made in accordance with the terms of the written agreement, would be as effectual for the defendant as an actual payment; but this concession cannot avail the defendant unless his tender was so made; and clearly it was not. The $400 was neither paid nor tendered in cash at all; and so one of the essential conditions precedent to the surrender of the note was not performed, nor was there any effectual tender of performance.

Unless, then, the court below has found expressly or by necessary implication that the plaintiff waived performance of this condition, it erred in holding that the tender was sufficient. It is not found as a fact that the plaintiff expressly waived performance of this condition; nor does it necessarily follow as a conclusion of law from the facts found, that he did so. He gave certain reasons for his refusal, "which were not based upon any objection to the character of the money or the order;" but he was under no obligation to give any reasons for his refusal; and the mere fact that he mentioned certain grounds of objection to the tender is not of itself a waiver of other grounds not mentioned. If there was a waver in point of fact, the court should have found it expressly or impliedly; and not having done so, this court cannot say, as matter of law from the facts found upon this point, that there was any such waiver.

The conclusion reached upon this point in the case, renders it unnecessary to discuss or to decide the other errors assigned upon the appeal.

There is error in the judgment of the court below and it is set aside.

In this opinion the other judges concurred.

CHARLES R. HOYT *vs.* ROSA GUARNIERI.

Third Judicial District, Bridgeport, April Term, 1896. ANDREWS, C. J., TORRANCE, FENN, BALDWIN and HAMERSLEY, Js.

Section 671 of the General Statutes provides that when a justice of the peace shall not be re-elected, all process, actions, and matters which have been begun by, or brought before him, before the expiration of his term of office, may be proceeded with by him in the same manner as if he were still in office. *Held*:—

1. That for the purposes therein prescribed, this statute in legal effect extended the ordinary term of justices of the peace, and conferred jurisdiction upon them to proceed to final judgment and execution in cases which had been brought before them before their ordinary term of office expired.
2. That an action commenced February 28th and made returnable on March 16th, in which the writ and complaint was served and returned to the justice before March 4th, was one "brought before" the justice "before the expiration of his term of office," within the meaning of the foregoing statute.

[Argued April 23d—decided June 5th, 1896.]

ACTION of *scire facias* brought originally before a justice of the peace, and thence by the defendant's appeal to the Court of Common Pleas in Fairfield County, where the case was tried to the court, *Curtis J.*; facts found and judgment rendered for the defendant, and appeal by the plaintiff for alleged errors in the rulings of the court. *Error and judgment reversed.*

The opinion states the case.

Joseph A. Gray, for the appellant (plaintiff).

H. Whitmore Gregory, for the appellee (defendant).

TORRANCE, J. This is an action of *scire facias* against the defendant as garnishee. It was brought originally before a justice of the peace in Fairfield county, and came thence by appeal to the Court of Common Pleas of that county, where the judgment from which the present appeal is taken, was rendered in favor of the defendant.

The principal question upon this appeal relates to the construction of § 671 of the General Statutes, and the facts out of which the question arises are the following:—

The original writ, in which the present defendant was made garnishee, was issued and dated on the 28th of February, 1895, and was made returnable on the 16th of March, 1895, before a justice of the peace whose term of office (he not having been re-elected) expired on the 4th of March, 1895. The writ was duly served and returned to the justice before his term of office expired. Upon the return day neither the defendant in that suit, nor the present defendant as garnishee, appeared, and thereupon judgment was rendered in favor of the plaintiff, execution was at once issued, and all necessary steps taken to fix the liability of the garnishee. She, however, refused to pay, and thereupon the present proceeding was brought.

Upon the trial below, the principal question was whether the justice before whom the original suit was brought, had jurisdiction, under § 671 of the General Statutes, to render judgment therein and to issue execution after his term of office had expired. The court held that he had not, and for this reason alone rendered judgment for the defendant; and in this we think the court erred.

As originally passed in 1851, that section reads as follows: "That whenever any justice of the peace shall not be re-elected, all processes, suits and matters whatsoever, which shall have been begun by such justice of the peace, or which shall have been made returnable to him before the expiration of his office, may be proceeded with by said justice of the peace, to final judgment and execution, in the same manner as if the said justice had been re-elected and continued in office." Public Acts of 1851, Chap. 14. This enactment remained in this form down to 1875, when it was changed by the revisers substantially to its present form. Revision of 1875, p. 36, § 10. It now reads as follows: "When any justice of the peace shall not be re-elected, all processes, actions, and matters, which have been begun by, or brought before him, before the expiration of his term of office, may

be proceeded with by him in the same manner as if he were still in office." We are of opinion that this change of phraseology does not import any change of meaning, and therefore that the present Act must be construed as if no change in phraseology had been made. *Westfield Cemetery Asso.* v. *Danielson*, 62 Conn., 319. In effect then, this statute provides that all actions which shall have been brought before a justice of the peace, that is which shall have been made returnable to him, "before the expiration of his term of office," may be proceeded with by him "to final judgment and execution" in the same manner as if he had been re-elected and continued in office. The court below seems to have held that an action was not "brought before," or "made returnable to" a justice, for any purpose until the return day; but this we think is not so. For certain purposes an action may be said to be "pending before," "brought before," or "made returnable to," a justice, prior to the return day. For instance, § 674 of the General Statutes speaks of a case as "pending" before a justice for the purpose of trial by agreement of parties, before the designated day of trial; § 679 speaks of such an action as "pending" before the return day, for the purpose of making a motion to have a jury summoned; while in § 669 a process is spoken of prior to the return day, as one "made returnable" before a justice; and the same thing is done in § 686, where "all civil process returnable to a justice of the peace" is directed to be served at least six days inclusive before the sitting of the court. The statute in question is a remedial one, and to be an effectual remedy for the evils and inconveniences it was designed to meet, it should receive a liberal construction. We think the original action, upon which this *scire facias* proceeding is based, was, within the meaning of this statute, an action brought before the justice "before the expiration of his term of office," and therefore that he had jurisdiction to render judgment and to issue execution as he did. The construction contended for by the defendant is too narrow and would almost inevitably work harm and inconvenience; while it is

very difficult to see how any evil effects to any person can flow from the construction here put upon the statute.

Counsel for the defendant, in their brief, claim that even if the justice had jurisdiction to render the judgment in question, he had none to issue execution, because of the provisions of Chap. 37 of the Public Acts of 1889.

That Act applies we think only to judgments rendered by a justice before he "ceased to hold office;" it has no application to the present case, because the justice here, *quoad* the case in which he rendered judgment, had not "ceased to hold office." The tenth amendment to the Constitution of this State relating to the appointment of justices of the peace, provides that "the period for which they shall hold their offices, shall be prescribed by law." In effect, the section in question extends the term of justices of the peace with reference to cases falling within its provisions; it in effect prescribes by law the period for which they shall hold office, within the meaning of the Constitution.

There is error in the judgment complained of and it is reversed.

In this opinion the other judges concurred.

MEMORANDA OF CASES

NOT REPORTED IN FULL.

PATRICK HEENAN *vs.* BRIDGEPORT TRACTION CO.

Third Judicial District.

[Argued January 28th—decided February 21st, 1896.]

ACTION to recover damages for personal injuries sustained through the alleged negligence of the defendant, brought to the Court of Common Pleas in Fairfield County and heard in damages to the court, *Curtis, J.*; facts found and judgment rendered for the plaintiff for $350, and appeal by the defendant for alleged errors in the rulings of the court. *No error.*

Stiles Judson Jr., for the appellant (defendant).

James T. Lynch, for the appellee (plaintiff).

BY THE COURT. The questions presented by the record are whether the motorman was guilty of negligence in the matter of stopping the car, and whether the plaintiff was chargeable with contributory negligence. These questions were for the determination of the trial court, and its decision is conclusive. There is nothing in the finding or memorandum of decision to indicate that the trial court imposed on the motorman a higher degree of duty than the law requires. *No error. All concur.*

Opinion filed with the clerk of the Court of Common Pleas, Fairfield County.

APPENDIX.

OBITUARY SKETCH OF TILTON E. DOOLITTLE.*

TILTON EDWIN DOOLITTLE was a descendant of the seventh generation from Abraham Doolittle, who was a resident of Massachusetts soon after the settlement of Salem, and removed thence to New Haven prior to 1642, and became a householder there. He was one of the committee appointed to establish a new colony in Wallingford, and took up his residence in that place about the year 1669. During King Philip's War he was a member of the vigilance committee and held military rank among the defenders of the town. Often chosen as deputy from New Haven and afterwards from Wallingford, to the General Court, he was a man of repute, esteemed and respected by his fellow-townsmen.

Mr. Doolittle was born at Riverside, Connecticut, July 31st, 1825. His father, Ambrose E. Doolittle, and his grandfather, Benjamin Doolittle, were natives of Cheshire and farmers by occupation. His mother was Elizabeth A. Benham of Cheshire, Connecticut, a descendant from Joseph Benham who removed from New Haven to Wallingford in 1670.

He prepared for college at the Protestant Episcopal Academy in Cheshire, and in 1840 entered Trinity College, Hartford, and graduated there in 1844. He then entered the Yale Law School and graduated thence in 1846. He was admitted to the bar at Middletown in August, 1846, within a day or two of his twenty-first birthday.

Mr. Doolittle established his first law office in Cheshire where he remained until 1850. In 1848 he married Mary A. Cook, daughter of John Cook, of Wallingford. In 1850 he removed to Meriden and in 1858 to New Haven, where he thereafter resided. In 1861 he entered into partnership with Judge Samuel L. Bronson and was associated with him until 1870. In 1874 he formed a new partnership with Judge Henry Stoddard. In 1876 William L. Bennett was admitted to this firm, which was then known as Doolittle, Stoddard & Bennett. In 1882 Judge Stoddard left the firm to go upon the Superior Court bench. The business association between Mr. Doolittle and Mr. Bennett continued until the death of the former, having existed more than twenty-five years.

In the spring of 1859 Mr. Doolittle was appointed United States District Attorney by President Buchanan, in the place of Judge William D. Shipman who had been appointed judge of the United States District Court. He held this office until 1860. In 1866, 1867 and 1870 he

* Prepared by William L. Bennett, Esq., of the New Haven County bar, at the request of the Reporter.

represented New Haven in the lower house of the legislature. In 1874 he was again one of the representatives from New Haven, and was elected Speaker of the House. In 1879 he was appointed State's Attorney for New Haven County, succeeding the Hon. O. H. Platt. He held this office until January, 1896, when, at the opening of the January term of the Superior Court in New Haven County, he resigned. For more than a year before that time he had been aware that the work of his life, if not life itself, was nearing its end; and on the 21st day of March, 1896, after a few weeks' illness from which he seemed about to recover, he died suddenly and without pain.

At a largely attended bar-meeting called to take action upon Mr. Doolittle's death, Ex-Governor Charles R. Ingersoll, in presenting resolutions which were unanimously adopted, spoke substantially as follows: — "I confess that it is very difficult for me, here in this assemblage of the lawyers of New Haven County, to speak of Tilton E. Doolittle as no longer among living men. He has been for so many years a living, actual and vigorous presence in this court-room, at these tables, before this bench, and among the many busy men who daily come and go through the offices and halls of this building, that I cannot yet easily bring myself to think of him in any other association. It seems to me that he must still live as our courts live, so thoroughly has he been identified with them. Nor can it be necessary for me to tell any one here who Tilton E. Doolittle was. His personality was so individual that the youngest lawyer at this bar knew him as he actually was. He wore no mask. He never posed for what he was not. He never posed, indeed, for anything that he was. In all his ways, in all his moods, under all circumstances, he was simply himself, — he was Doolittle. I never knew a man more content to let the world put its own valuation upon his worth. This forcefulness of character was certainly born with him, but it was greatly strengthened by his career at this bar. He came into practice a half-century ago, and with the exception of a few months when he was out of the State, I do not think there has been a term of the Superior Court for this county at which he has not been present, and generally an active participant. Looking at that long career in all its aspects of a much varied and hardworking practice, so largely in the court-room, it is not easy to find the parallel in our State. And in this practice the individuality of which I have spoken was conspicuous. That voice even, so familiar to these walls, had its tone characteristic of him. His methods of trial, his vigor of attack, his skill of defense, his promptness to use every weapon of the thoroughly equipped lawyer which he was — were all manifested in a manner that was his own peculiarly, and impressed upon every one his strong personality. And he has gone through these fifty years of professional life with all the burdens and heat of conflict that are inseparable from it, with the respect and esteem and friendship of his fellow members of this bar.

"But it was not altogether in this court-room that these forceful traits of character were shown. There was a side of his character

which those who have known him as long as I have, and particularly in these latter years, have had frequent occasion to recognize. He had a most kindly nature, and it was quick to respond to any appeal to his sympathy or friendship. In his administration of that most responsible and important office which he has held with such marked ability for so many years — the State's Attorneyship for this county — he is to be remembered, not more for the zeal and vigor with which he has prosecuted crime in the courts, than for the wisdom, prudence, humanity and integrity with which he has discharged its great responsibilities outside the court-room."

Ex-Governor Henry B. Harrison, having recalled the names of many brilliant members of the bar at the time Mr. Doolittle began practice — Ralph I. Ingersoll, his brother Charles A. Ingersoll, Roger S. Baldwin, Dennis Kimberly, Clark Bissell, Henry Dutton and Alfred Blackman —"such a galaxy of great lawyers as had never been seen here before and has never been seen since," proceeded:

"In that school our friend began his professional life, and under the influences which a high-minded and honorable set of great men and great lawyers would necessarily exert upon him, in that school, under those influences, he got his training. The school and its influences would have been no use to him had he not possessed, as he did possess by nature, the instincts, the tastes, the moral character which fitted him to feel the influences, and all the influences of his environment there, and to absorb and assimilate all that was valuable in them.

"Well, in due time these men passed away. The young lawyer continued his course; I will not go over it; continued it always gaining strength by going, until he reached that place here which for many years has been by all of you unanimously accorded to him. He cared little for public life, although he repeatedly served the public well for short periods of time, by the mandate of his fellow-citizens. But the court-room was his place; he was a lawyer down to the quick; he delighted in the contest, the stress and strain and struggle of forensic life in such a place as this. He was here the hero of many battles; he enjoyed victory; always believing he was on the right side; never doubting that; but when defeat came, why, like every manly man, he took it in a manly way.

"And now he has died at last a veteran, as veterans always hope to die, in the very act of laying down his armor. Those who entered this bar contemporaneously with him are few in number. There are in this county only some six or eight of them still living. But they are in the place that nobody else fully occupies, for they stand at this end of his career and they are able to look back for fifty years during the whole of it to its beginning. And they see in that career not one act done by him unworthy of a high-minded and honorable and generous man. They part with him in sorrow; and so long as they shall live they will remember him with profound respect and sincere affection."

Ex-Judge Henry Stoddard also spoke and said, in part: "It will not, perhaps, be out of place for me to add a few words to what has been so

well said by Governors Ingersoll and Harrison. I knew Mr. Doolittle somewhat intimately after I came to the bar, and was his associate in business for several years. In consultation at the office his knowledge of law was intuitive, grounded of course upon a thorough study and appreciation of its fundamental principles; and even in the most intricate causes, arising but seldom in our practice, his unerring sagacity invariably went straight to the marrow of the controversy. In the trial of his causes he was both sagacious and bold in attack, and in defense prudent and wary, a most dangerous antagonist and a most powerful ally. In his examination of witnesses I may say that he was without a peer, and especially so in his cross-examinations. In the discharge of his public duties he was always actuated by the highest motives; and in the conduct of that great office which he recently laid down, it may truthfully be said that he not only discharged with entire faithfulness his duty to the public, but to the individual as well. For in the discharge of the duties of that office the public prosecutor owes a duty, not only to the public, but to the unfortunate and erring, and Mr. Doolittle never forgot to protect and assist the unfortunate, so far as it lay in his power to do so.

"While he always brought the highest degree of skill and a very large amount of labor to the trial of all his causes, yet there was one class of cases, or rather of clients, that called forth from Mr. Doolittle a more fervent application of all his powers of body and mind, than any other. I refer to those cases where the weak and the unfortunate applied to him for aid. In such cases he was unsparing of time and labor, and that without the hope of any reward other than the consciousness of having done his full duty by a client who could not otherwise repay him.

"As a friend, Mr. Doolittle was to the last degree open-hearted and generous, and I know that I express the common sentiment of those about me, who knew him so well, when I say that by this generation of lawyers their departed friend and associate will always be held in the most tender and grateful remembrance."

OBITUARY SKETCH OF JEREMIAH HALSEY.*

JEREMIAH HALSEY was born in Preston, Conn., February 8th, 1822. The son of Jeremiah S. and Sally Brewster Halsey, he was descended in the seventh generation from Thomas Halsey, one of the founders of Southampton, Long Island, the first English town in New York; and on the maternal side, from Elder William Brewster, the leader of the Mayflower Pilgrims. His grandfather, Jeremiah Halsey, a member of

* Prepared by W. A. Briscoe, Esq., of the New London County Bar, at the request of the Reporter.

the bar of Connecticut for nearly sixty years, was a distinguished officer of the Revolutionary War, one of the captors of Ticonderoga and the first commissioned naval commander of the United States.

In moral attributes, in mental characteristics and in personal appearance, Mr. Halsey bore the stamp of his illustrious Puritan ancestry. A lover of truth and justice for their own sake, of intellect broad, clear and penetrating, of temperament calm and self-controlled, lucid in expression and convincing in logic, deeply learned in the principles, practice and detail of his profession and gifted with a power of discrimination which made easy the practical application of them, he was as counselor, trier and advocate at once, unequaled at the bar of this State. Before court or jury he possessed that convincing power which character, candor, learning and thoroughness must always wield. As man and as lawyer he was of the highest type, and, acknowledged as such, his opinions and his arguments were ever attentively regarded.

Always of delicate constitution and hampered by defective eyesight, his early education was acquired at home, and only by the most persevering and often painful application. He was nevertheless a man of broad attainments and culture, and the enforced methods of his early instruction had cultivated in him a memory tenacious and accurate. In his youth he was compelled to seek a milder climate in the South, and at Hawkinsville, Georgia, he studied law and was there admitted to the bar on April 23d, 1845. Returning to Connecticut he was admitted to the bar of Windham County, December 11th, 1845, and in September, 1849, opened an office at Norwich in partnership with the late Samuel C. Morgan. From that time to within a few months of his death he continued in active practice at Norwich, interrupted only by a single absence of a year spent in travel and recuperation abroad. How long continued and uninterrupted that practice was, may be gathered from the fact that, with a single exception, every volume of the Connecticut Reports from 22 to 65 inclusive, contains cases in which Mr. Halsey's name appears as counsel. In 1870 he was admitted to the bar of the Supreme Court of the United States, and before that tribunal gained some of his most notable triumphs.

Always interested in public affairs, Mr. Halsey was not fond of office nor did he seek it. He represented Norwich in the General Assemblies of 1852, 1853, 1859 and 1860. From 1853, until his resignation in 1871, he was city attorney of Norwich, and from 1883 to 1888 corporation counsel. In 1873 Mr. Halsey was appointed by Governor Ingersoll, a member of the new State House Commission, authorized by resolution of the General Assembly of that year, and continued a member of that board until the completion of the new Capitol, devoting to the business of the commission the same careful attention to thoroughness and detail which he gave to his professional duties.

Unassuming and simple in manner, he was possessed of an unusual cheerfulness and sweetness of disposition which impressed all who came in contact with him. His charity was great and far reaching, and

he was intimately associated as director or adviser with all the principal educational and charitable institutions of his home city. A consistent christian and devoted churchman, he was for many years connected with Christ Church, Norwich, as member, vestry-man and warden. In 1882 Trinity College conferred upon him the degree of Doctor of Laws.

Mr. Halsey was married June 1st, 1854, to Elizabeth M. Fairchild of Reading, who survives him. During the later years of his life it was the custom of Mr. Halsey to spend the winter months in Washington, and it was in that city on February 9th, 1896, having just completed his seventy-fourth year, that he peacefully passed away, retaining to the end a mind unclouded and courage unimpaired.

At a meeting of the New London County Bar held February 28th, 1896, a committee presented for adoption resolutions commemorative of Mr. Halsey. In the eloquent and appreciative tribute paid to his memory by those of his brethren longest and most intimately associated with him, may fittingly be found the just and final estimate of his character and attainments.

THE RESOLUTIONS.

The bar of New London county, called together by the death of Jeremiah Halsey, desire to place upon record this tribute to their departed brother.

Mr. Halsey was a conspicuous example of the highest type of the lawyer. His acute and powerful intellect, directed and controlled by his innate sense of justice, and supplemented by habits of industry which carried his application to the business of his profession to the limit and perhaps beyond the limit of his physical strength, united to make him a master of the science and the practice of the law without a peer at the bar of this county. His superiority was too marked to admit of rivalry, and the modesty with which he wore his honors disarmed envy. His brethren were proud of his success and came to look upon his fame as one of the treasures of the bar.

He was equipped equally well for the duties of the court room and the office. His clear perception of legal principles, his power of lucid statement, his irresistible logic, his ability to disentangle and arrange the facts of a complicated case, made him a formidable trier of causes, while his sound judgment, his candor and hatred of unnecessary litigation made him the best of counselors. He was by nature a peacemaker. The prospect of a fee never tempted him to bring into court a case which could be fairly settled outside of it. The memory of his labors as a trial lawyer will be perpetuated in the records of our courts and the traditions of the bar, but much of his best work is known and will be known only by the clients who found him the wisest and most faithful of advisers.

Mr. Halsey's private virtues were in keeping with his qualities of mind. His integrity was such that he could not do a mean act or entertain a mean thought, and nothing aroused his indignation like dishonesty or

meanness in another. Joined to these qualities was a serenity of temper, a cheerfulness of disposition, a kindness of heart, which made his character one of remarkable symmetry. He was a great and good man. It is some consolation to his brethren in their grief at his loss, that he was not cut off in the midst of his career, but was permitted to round out a life of usefulness. His memory will be one of the cherished possessions of the bar.

In moving the adoption of the resolutions, Mr. John T. Wait spoke as follows:

"As chairman of the committee appointed by the members of the bar to prepare resolutions of respect to the memory of our deceased brother, Hon. Jeremiah Halsey, it is my special duty and privilege to present the same to the court and request that they be entered upon its records.

"In discharging this duty I cannot refrain from paying a brief tribute to the memory of the great man and the good man who has left us. From the time Mr. Halsey commenced practice in this county to the close of his life, the closest friendship has existed between us, and I can emphatically say that nothing ever occurred in our intimate association, personal or professional, that in the least marred my sincere love and high regard for him, or weakened my warm attachment to him.

"I can unhesitatingly declare that the bar of Connecticut never had in its organization a purer or more honorable member. Associating, as I have, with Mr. Halsey in all the walks of life, and especially in the practice of our profession, I have been deeply impressed by his nobility of character, his unquestioned integrity and his masterly knowledge of the law. I can hardly find language strong enough to picture the power of his mental and moral forces. The rich development of his faculties, an enlightened heart and an elevated spirit kept him growing stronger and stronger in the profession which he adorned, and in the love and respect of his brother members of the bar.

"In the practice of his profession he was eminent for his great ability and power, his unswerving integrity in the discharge of all professional duties, and his polished and courteous manner to all who approached him. In his private life he was loyal to every duty, to all the obligations of friendship, and obedient to every claim of good citizenship. In making these declarations I am confident that I only voice the sentiments of the entire body that I have the honor to represent in presenting these resolutions."

Address of the Hon. Augustus Brandegee.

The melancholy privilege of age assigns to me the duty of formally seconding these unanimous resolutions of the bar, and expressing the sentiments of his professional brethren at the loss of their great leader. The proprieties of the occasion do not permit any labored or extended review of his life, his character and abilities. But it is fitting that while still standing in the shadow of our great loss, we place upon the imperishable records of the court this last feeble tribute of our respect, admiration and love for our departed brother.

Obituary Sketch of Jeremiah Halsey.

Jeremiah Halsey was born at Preston on the 8th of February, 1822. He was admitted to the bar in 1845. He practiced continuously in all the courts of this State for just half a century, and died at Washington, D. C., on the 9th of February, 1896, in the ripeness of his fame, and the full maturity of his powers.

He was a great lawyer; great in every department of that profession which calls for the exercise of the highest and most varied powers of human intellect. Whether he stood before the learned judges or a jury, or an arbitrator, or a committee of the General Assembly or other tribunal upon whose decision the lives, the property and the rights of men depend, he was master of himself, his subject and his audience. In that wonderful system founded upon the principles of everlasting righteousness, wrought out by the wisdom of ages and sanctioned by the experience of mankind, at once the handmaid and the sure defense of human society, which men call law, he was easily "*primus inter pares.*" The principles of this system he had explored to their deepest foundations. His comprehensive and philosophical mind had sought out their reasons, their application, and their limitations. He knew how and when to apply them in their rigor and when to make them elastic enough to meet the requirements of an ever changing and ever advancing civilization. He was no mere "case lawyer," such as are the weaklings of our profession, whose sole equipment consists of a catalogue of authorities and whose ill digested citations only serve to "make confusion more confounded." He was not one of those who darken counsel with "profane and vain babblings," "striving," as saith an apostle, "about words to no profit, but to the subverting of hearers." He rightly divided the word of truth, seeming by an intuitive alchemy to know how to separate the dross from the pure gold, how to marshal, to reinforce, explain, apply, and, if needs be, to reconcile the authorities.

He loved the law. To him it was not a trade for hire, nor even a profession for furnishing one's daily bread. It was rather a sacred ministration. He looked upon it as that portion of the scheme of eternal justice committed to man by the Supreme Lawgiver for the advancement of the human race; a rule of righteousness to be administered here, as at once a preparation and a foretaste of the more perfect law of the Grand Assize, when we shall no longer see as through a glass darkly, but face to face. A judge was to him a representative of Him of whom it is written: "Justice and judgment are the habitation of His throne." A court room was a sacred temple, and while he ministered at the altar, he had no part or lot with those who in the outer courts "were changers of money and sellers of doves." And for this exalted part in the noblest of all professions, Providence had endowed him with great and peculiar gifts of intellect, temperament and character. And these fitted into and worked in harmonious action with one another, as in the most nicely adjusted piece of mechanism ever devised by the skill of man. His intellectual equipment was of the highest order. He possessed a mind strong, vigorous and acute, capa-

ble of close and continuous application, and of comprehending the most abstruse and complicated problems. Nothing seemed too high, nothing too deep, nothing so hidden or involved as to baffle or obscure that penetrating vision. When once he had grasped the underlying principle of a case, he followed that clue through all the Dædalian windings and turnings of the labyrinth to its logical results, as though guided by the fabled thread of Ariadne. He was not unmindful of the rule "*Stare decisis*," but he looked beyond the decision to the reasons and the philosophy of it, and if it had not these credentials he boldly challenged it, as not having entered by authority through the lawful door of the fold, but as a thief and robber that had climbed up some other way. To this clearness of vision there was added a lucidity of statement which has never been surpassed, in our time, by any member of the Connecticut bar. What he saw so clearly he had the faculty of so expressing that his hearers saw it as clearly as he did himself. This is a rare gift, and if it be not eloquence, is akin to it. It was a delight—in some tangled and complicated cause, rendered still more tangled and complicated by the efforts of others who had struggled hopelessly in the Serbonian bog—to listen to the pure, clean cut Anglo-Saxon, with which he extricated and unfolded the real issue and stripped it from all incumbrances. He rarely made excursions outside his argument by way of illustration, into general literature. But at times there came a flash of humor to irradiate and illume—as lightning sometimes comes from a clear sky as a warning of the approaching thunder.

In him was happily united to these qualities a temperament which acted with them in harmony and gave them full opportunity for exercise and development. He was calm, serene, self-poised, and equable, no matter how important the issue or how desperate the contest. Whether victory or defeat hung trembling in the balance—amid the smoke and confusion of the battle, amid "the thunder of the captains and the shoutings"—like the great Marlborough, he was imperturbable. He never lost his self-possession. He never failed to employ all his resources. He never retreated till the last man was brought up, and the last gun was fired, nor until all was lost save honor. And his fight was always in the open—a fair fight and no favors. There were no mines or counter-mines, no breaches of armistice, no firing upon flags of truce—"*Noblesse oblige*." The law and the testimony, truth and honor, right and justice, these and nothing more, and nothing less, were his watchwords.

It was these and such qualities as these that placed him in the front rank of our profession and caused his name to become a household word in our State, from the Bronx river to the Providence plantations. But he was more than these—was a pure, spotless, honest, simple, unaffected, truthful, just, honorable, white-souled gentleman. There was never one so conspicuous who bore his honors more unostentatiously. There was never one whose life had been spent in contest and in combat, more free from "envy, hatred, malice and all uncharitableness." He was not slothful in business, fervent in spirit, serving the Lord. "When the ear heard him it blessed him, and when the eye saw him, it gave witness to him."

Obituary Sketch of Jeremiah Halsey.

I may not on this public occasion draw aside the veil which covers our personal relations. But it may be permitted me to say that to me he was more than a Brother in Law. For forty years we have been associated in the battles of the bar, always together, except as I remember, on only two or three occasions. He was my inspirer, my guide, my counselor and my friend. "We took sweet counsel together and walked in the courts of law as friends." We have been together in many a hard fought battle, have sympathized in many a defeat, and have rejoiced together in many a well earned victory. It was assigned to me, as junior, to lead the "light brigade" and dash at the enemy with sound of trumpet and slashing broad sword. But I knew full well whether in attack or retreat, that behind me was drawn up the heavy artillery, and that my great commander stood there as fixed and immovable as "the rock of Chickamauga."

His personal appearance harmonized with the dispositions of his mind and character. He was tall and slim, with straight black hair, a pale intellectual countenance, the eye of an eagle, and that prominent nose which is the unfailing sign of indomitable will and forceful character. His manners though mild and affable were decorous and dignified, inviting friendship while repelling undue familiarity. There was an indescribable something about him which inspired confidence. As you passed him in the street you felt "that Goodness had come that way." One knew at his mere presence—here is a man to be trusted. And he was trusted—as a counselor by his clients, as a lawyer by his brethern, as a legislator by his constituents, as a neighbor by his fellow citizens, as a man by all men with whom he came in contact.

> "His life was gentle and the elements so mixed in him
> That nature might stand up to all the world and say—This was a Man."

Alas! Alas! The inexorable law of human existence, which spares not rich or poor, young or old, great or humble! "He hath given his honors to the world again, his blessed part to heaven, and sleeps in peace." He has gone "to join the innumerable caravan which ever moves to that mysterious realm, where each shall take his chamber in the silent halls of death." And so, for a season, we bid our brother "Farewell." He has fought a good fight. He has kept the faith. He has walked circumspectly amid the pitfalls of life. He has rejoiced not in iniquity, but has rejoiced in truth. He was first pure and then peaceable. He provided things honest in the sight of all men. He recompensed to no man evil for evil. He overcame evil with good; in all things showing himself a pattern of a perfect Christian gentleman.

And as we stood by his open grave, banked with flowers and watered by tears, as in the presence of the judges who honored him, the bar who admired him, and the great concourse of townspeople who loved him—and whom he loved—as we committed "earth to earth, ashes to ashes, and dust to dust," as we caught the solemn refrain of the church he loved so well—"This corruptible hath put on incorruption, And this mortal hath put on immortality,"—our hearts responded to the triumphant pæan, Yea—even so—it is well, "Death is swallowed up in victory."

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STATUTES REFERRED TO OR COMMENTED ON.

STATUTES REFERRED TO OR COMMENTED ON—*Continued.*

STATUTES REFERRED TO OR COMMENTED ON—*Continued.*

STREET RAILWAY COMPANIES.

1. Under the provisions of the Street Railway Act of 1893 (Chap. 169), the only "modifications" which the municipal authorities can lawfully make in the plan presented by the street railway company, are such as legitimately affect one or more of the particulars which the statute requires to be specified in the plan. No change can properly be deemed a modal one, which deprives the plan of its essential qualities, or which imposes conditions wholly foreign. *Central Railway & Electric Co.'s Appeal*, 197.
2. Conditions which the municipal authorities have no power to impose, they cannot require a street railway company to accept and perform, as a condition of their approval of the plan presented. *Ib.*
3. A street railway company authorized by the General Assembly to extend its tracks in certain streets of a city, may be required by the municipal authorities to pay annually to the city a just and reasonable compensation for the increased expense of maintaining and repairing such streets, occasioned by the location and use of

TABLE OF CASES CITED IN THE OPINIONS.

ERRATA.

Vol. 63, p. 39, 3d paragraph of headnote, 2d line, for "defendant" read plaintiff.

Vol. 67, p. 133, 5th line from bottom, for "WAITE, C. J." read FIELD, J.

p. 224, 4th line from top, for "166" read 169.

p. 339, 3d paragraph of headnote, 1st line, for "plaintiff" read defendant.

p. 388, 12th line from top, strike out the three words "codicil and this."

All errors in Vol. 67, noted above, have been corrected in the plates from which the bound volume is printed, and consequently appear only in the sheets first issued.