# CONNECTICUT REPORTS:

BEING REPORTS OF

## CASES ARGUED AND DETERMINED

IN THE

## SUPREME COURT OF ERRORS

OF THE

## STATE OF CONNECTICUT.

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**VOL. XLVIII.**

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BY JOHN HOOKER.

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1882.

Rec. June 27, 1882

# JUDGES

OF THE

# SUPREME COURT OF ERRORS

DURING THE TIME OF THE WITHIN DECISIONS.

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HON. JOHN DUANE PARK, CHIEF JUSTICE.

HON. ELISHA CARPENTER.

HON. DWIGHT WHITEFIELD PARDEE.

HON. DWIGHT LOOMIS.

HON. MILES TOBEY GRANGER.

The Statute Book referred to in this volume as the Revised Statutes or General Statutes, is the revision of 1875.

# TABLE OF THE CASES REPORTED.

## ERRATA.

P. 43, 8th line—for *effect* read *affect*.
" " 11th line from bottom—for *defendants* read *defendant*.
" 58, 9th line of head note—for *omission from* read *addition to*.
" 164, 12th line from bottom—for *Colegrove v. Rockwell* read *Case v. Spaulding*.
" 266, 14th line from bottom—for 31 read 32.
" 301, Case of Main v. Main—See note on p. 586 correcting error in opinion.
Vol. 47, p. 317, 6th line—for *overruled* read *sustained*.
" " " 347, 9th line—insert *not* between *might* and *enquire*.

# SUPREME COURT OF ERRORS

OF THE

## STATE OF CONNECTICUT.

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HELD AT NORWICH FOR THE COUNTY OF NEW LONDON.

ON THE FOURTH TUESDAY OF MARCH, 1880.

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Present,

PARK, C. J., CARPENTER, LOOMIS AND GRANGER, JS.

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JOHN MITCHELL AND OTHERS *vs.* JULIUS HOTCHKISS.

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The statute (Gen. Statutes, tit. 17, ch. 1, secs. 17, 18,) provides that, in the case of every corporation, certificates showing its condition shall be filed annually by the president and secretary with the town clerk, and that in case of neglect those officers shall be liable for all the debts of the corporation contracted during the period of such neglect. Held that the statute is a penal one, and that the liability thus imposed is of the nature of a penalty and not of a debt, and that therefore an action brought upon such a liability does not survive the death of the officer thus liable.

ACTION ON THE CASE, under the statute (Gen. Statutes, p. 280, sec. 18,) to recover of the defendant, president of a joint stock corporation, a debt due from the corporation; brought to the Court of Common Pleas of New London County.

The declaration alleged that the defendant, on the first day of July, 1875, was and ever since had been the president of the Star Tool Company, a joint stock corporation organized under the laws of this state and located in the town of Mid-

dletown in this state; that by the statutes of this state it became and was his duty as such president annually on or before the 15th day of August or of February next following said 1st day of July, 1875, to lodge with the town clerk of said town a certificate signed and sworn to by him as president and by the secretary of the corporation, showing the condition of the affairs of the corporation as near as the same could be ascertained on the first day of July or January next preceding, giving the amount of its capital stock paid in in cash and in other stock separately, the cash value of its real estate, the name and number of shares of each stockholder, the amount of its debts, and the cash value of its personal estate and of its credits; that the defendant had, from said first day of July, 1875, till the date of the writ (May 19, 1877,) intentionally neglected to lodge such a certificate with the town clerk of said town, and that none had been so filed; that said corporation on the 20th day of September, 1876, and during said period, contracted with the plaintiffs to pay and promised to pay them for value received the sum of three hundred and seventeen dollars, by its promissory note bearing date that day, payable to the order of the plaintiffs two months after its date, which note had never been paid by said corporation though duly demanded; and that by reason thereof, and by virtue of the statute in such case provided, the defendant had become and was liable to pay to the plaintiffs the amount due by said note, which he had refused to do, though often requested.

The suit was brought to the August term of the court in 1877. While it was pending the defendant died, and the plaintiffs cited in his executors, who appeared and pleaded in abatement that the action was for a personal act of wrong on the part of the said Hotchkiss in intentionally neglecting, as president of said corporation, to file with the town clerk the certificate required by law, by which he became liable to pay the debt of the plaintiffs, and that the action therefore abated by his death and could not be revived against his executors. To this plea the plaintiffs demurred.

The court (*Mather, J.*,) held the plea sufficient and ren-

dered judgment for the defendants. The plaintiffs brought the record before this court by a motion in error.

*S. Lucas*, for the plaintiffs.

When persons associate for the transaction of business, all are liable for the debts contracted in the prosecution of that business, unless by statute law they are exempt from personal liability. Hence when doing business as members of a corporation, the question whether they are exempt or not depends upon the terms of the charter of such corporation. By the laws of this state relating to joint stock corporations, which are the corporations' charter, while the stockholders are exempt from liability when they have paid for their stock in full and abstain from withdrawing any of the capital, still the law does not exempt the officers of such a corporation from the common law personal liability, unless they perform all the duties by law required of them. Gen. Statutes, p. 314, sec. 3.

Could any one question the liability of an executor of a deceased stockholder, to pay the debts of the corporation to the amount of the capital stock so improperly withdrawn, whether intentionally or not on the part of the testator? Still such a liability would not depend upon the fact that property had been received by the testator, but upon the fact that the law under which the testator and others, as stockholders of a corporation, had been doing business, provided that conditionally a limited personal liability should exist.

The same principle underlies and governs each case; that is to say, to avoid personal liability, officers and stockholders must comply with the provisions of the law which conditionally exempts them therefrom, and permits them as corporators to do business. The claim of the defendants that the statute is penal in its character, while true in a certain sense, is not true as contended for by them. The liability of an officer who has omitted to perform his duty does not relieve the corporation of its liability to the creditor. It gives the creditor an additional remedy, that is, additional security for his demand; and he can elect which of the remedies he will

pursue. Primarily as between the corporation and the president, however, it is the duty of the corporation to pay the debt. If it does not, and the president is obliged to pay it, he has a legal claim for the amount thus paid against the corporation. Hence the payment of a debt of a corporation by its president is not the payment of a penalty of the amount of such debt. If a penalty the president would have no claim against the corporation for the amount paid. If the president was only liable in case of the insolvency of the corporation, or if he was liable for past indebtedness, as is a trustee by the laws of New York, the defendants' claim would be more plausible. But the president's liability is not dependent upon any such contingency, nor is he liable for any other indebtedness than that contracted during the time he voluntarily omits to comply with the law. The sale of the plaintiff's property was to the corporation, but not on its credit exclusively, but on the faith and credit also of the personal liability of the testator. The liability of the defendants, upon which this action is grounded, is for the payment of the debt of the corporation incurred by it, for which, under the provisions of its charter, the testator became and was concurrently with the company, from the inception of the debt, personally liable. This liability voluntarily assumed, though direct, yet is in the nature of that of a surety, and his remedy is that of a surety in case he is compelled to pay the debt. Hence the liability of the defendants' testator was of such a character that it survived his death, and one for which a suit might have been brought originally against the present defendants. *Booth* v. *Northrop*, 27 Conn., 325; *Bailey* v. *Bussing*, 28 id., 455; *Dayton* v. *Lynes*, 30 id., 354; *Corning* v. *McCullough*, 1 Comst., 47.

*J. Halsey* and *S. A. Robinson*, for the defendant.

It would be unjust to permit this action to survive. The statute upon which it is based is a public act—a police regulation, to prevent deception and fraud; and for this purpose it imposes a penalty. A good government never punishes an innocent person for the guilty act of another. If this action

survives, the dead offender is not punished but his innocent representatives. It matters not whether the penalty be dollars or stripes; in neither case should the representatives suffer it. It is dollars in this case and our opponent therefore says it is a debt; but debt pre-supposes a contract, express or implied. Of course there is no express contract; and as clearly there can be no implied one. The rule as to survival of actions in this state is really the common law rule. Gen. Stat., p. 421, sec. 6. The common law rule is that actions of tort survive only when the offending party has gained some property by the wrongful act—as in trespass and asportation of goods, involving a wrongful conversion of chattels. If a testator had stolen goods and converted them to his own use, an action might survive against his executor to recover their value; but an action for treble damages, under our statute in such case, would not survive. The latter would be pure penalty, the former would be to recover out of the hands of the executor the property that never belonged to him or his testator and was wrongfully detained. The line is clearly drawn by the authorities between the torts that survive and those that do not. Wentw. Office of Executor, 14th ed., 255; Com. Dig. *Administration*, *B.* 15; 3 Black. Com., 302; 3 Wood. Lec., sec. 73; 1 Chitty Pl. (16th Am. ed.), 77; 2 Add. on Torts, 1127; 1 Wms. Saund., 216, note 1; 2 id., 252, note 7; *Holl* v. *Bradford*, 1 Sid., 88; *Weekes* v. *Trussell*, id., 181; *Moreton* v. *Hopkins*, 2 Keb., 502; *Hambly* v. *Trott*, Cowp., 371; *Powell* v. *Layton*, 2 Bos. & Pul. N. R., 370; *People* v. *Gibbs*, 9 Wend., 29; *Franklin* v. *Low*, 1 Johns., 396; *Cravath* v. *Plympton*, 13 Mass., 454; *Wilbur* v. *Gilmore*, 21 Pick., 252; *Wilder* v. *Aldrich*, 2 R. Isl., 518; *Hanna* v. *Pegg*, 1 Blackf., 181; *U. States* v. *Daniel*, 6 How., 11; *McEvers* v. *Pitkin*, 1 Root, 216; *Booth* v. *Northrop*, 27 Conn., 325; *Dayton* v. *Lynes*, 30 id., 354.

An application of the principles found in the foregoing authorities to the case at bar shows conclusively that the cause of action is not of such a character as to survive. The action arises, *ex delicto*, from a personal act of wrong of the testator, the plea must be "not guilty" of an intentional

neglect or refusal; from the wrongful act no benefit has accrued to the estate of the testator; no money or property of any kind have found their way into the assets of the testator as the direct result of the *delictum*. Judged by every test which the common law proposes as to torts, this cause of action comes within the class that die with the wrongdoer.

The fact that the statute is a penal one emphasizes our claim. Bouvier says a penal statute is one that "inflicts a penalty for the violation of some of its provisions;" and that "a penalty is a punishment inflicted by law—the term is mostly applied to pecuniary punishment." The statute in question imposes a duty to file a certificate of a certain character, and in case of *intentional* neglect or refusal the offender shall be liable to pay certain debts. Gen. Stat., p. 280, secs. 17 and 18. He is liable because he has intentionally, or what is the same, has *wilfully* neglected and refused to perform a duty imposed by law. The measure of the penalty is all the debts contracted by the company during the period of intentional neglect or refusal. The statute says the president "shall be liable," &c. Why liable? Because he has committed an offense which the statute forbids. The liability is created to punish, not a wrong to these plaintiffs, but his contemptuous disregard of the authority of the State. No contract relation or duty is created; to affirm that there is would be to declare the statute unconstitutional. The legislature has no power to make another man's debt my debt, except upon the theory of penalty. My property cannot be taken from me "without due process of law." Admit the element of penalty in this statute and the action upon it dies with the offender; eliminate the element of penalty and you declare the statute unconstitutional.

Look at the statute for a moment for further evidence of its penal character. The creditor's right to recover is not limited by his knowledge of the company's insolvency, nor by the knowledge that the certificate was absolutely false at the time the credit was given; neither could the delinquent officer set up in defence that the company was perfectly solvent and had abundance of property out of which to pay

these very debts. The question is simply this: Is the president guilty or not of a breach of the law? If he is guilty, then he must pay this debt, as a punishment for the intentional wrong.

As a further test, we see that the statute gives the delinquent officer no remedy over against the company for the debt which he pays, and at common law he has no such remedy. *Andrews* v. *Murray*, 33 Barb., 354; *Hill* v. *Frazier*, 22 Penn. St., 320; *Strong* v. *Sproul*, 4 Daly, 328. Why? Because the enforced payment is purely a punishment.

The authorities are abundant which pronounce similar statutes penal. In New York, *Garrison* v. *Howe*, 17 N. York, 458; *Merchants' Bank* v. *Bliss*, 35 id., 412; *Jones* v. *Barlow*, 62 id., 202; *Bank of California* v. *Collins*, 5 Hun, 209; *Shaler & Hall Quarry Co.* v. *Bliss*, 34 Barb., 309; *Reynolds* v. *Mason*, 54 How. Pr. R., 213; *Bird* v. *Hayden*, 1 Rob., 383; *McHarg* v. *Eastman*, 7 id., 137. In Massachusetts, *Halsey* v. *McLean*, 12 Allen, 438. In Ohio, *Lawler* v. *Burt*, 7 Ohio St., 340; *Sturges* v. *Burton*, 8 id., 215. In Maryland, *First Nat. Bank* v. *Price*, 33 Maryl., 487. In New Jersey, *Derrickson* v. *Smith*, 3 Dutch., 166. In Rhode Island, *Moies* v. *Sprague*, 9 R. Isl., 541. In Michigan, *Breitung* v. *Lindauer*, 37 Mich., 217. In Indiana, *Union Iron Co.* v. *Pierce*, 4 Biss., 327. In California, *Irvine* v. *McKeon*, 23 Cal., 472. And this very statute has recently been construed by the United States Supreme Court in the case of *Providence Steam Engine Co.* v. *Hubbard*, 101 U. S. Reps., 188, in which it was held to be a penal statute.

If the statute is penal the action upon it does not survive the death of the party incurring the penalty. See the authorities before referred to.

Loomis, J. This action was originally brought by the plaintiffs, as creditors of "The Star Tool Company," a joint stock corporation located at Middletown in this state, against Julius Hotchkiss, then in life but since deceased, to recover the amount of their debt contracted during the period that Hotchkiss as president of the corporation intentionally neg-

lected to comply with the statutory requirements as to filing with the town clerk of Middletown certain certificates showing the condition of the affairs of the corporation. For the purposes of this case it is conceded that Hotchkiss had by his neglect become liable under the statute referred to. But pending the suit and before trial he died leaving a will. The plaintiffs thereupon caused to be issued a scire facias, summoning his executors into court to show cause why they should not be made parties defendant to the suit. The executors appeared and filed a plea in abatement on the ground that the action, originally begun against Hotchkiss, did not upon his death survive against them. To this plea the plaintiffs demurred, but the court overruled the demurrer and dismissed the scire facias, and the question comes before this court for review by the plaintiffs' motion in error.

There is no statute controlling the question under consideration. The only provision is that found in the General Statutes, p. 421, sec. 6, that "if the defendant in any action shall die before final judgment, it shall not abate if it might originally have been prosecuted against his executor or administrator." To determine the question whether an action might originally have been brought to charge the estate of Hotchkiss with the statutory liability referred to incurred by him in his life time, we must invoke the aid of the common law.

The principles of the common law on this subject are embodied in the maxim—"*Actio personalis moritur cum personâ.*"

The executor represents the person of the testator, and in legal consequence may be said to continue his existence with respect to all his debts, covenants and contract obligations, which became due during his life or after his death, except such as depend on his personal skill, in which is always implied the condition that the contractor is not prevented from completing his contract by the act of God.

But all private as well as public wrongs and crimes are buried with the offender. The executor does not represent or stand in the place of the testator as to these, or as to any acts of malfeasance or misfeasance to the person or property

of another, unless some valuable fruits of such acts have been carried into the estate; and this in strictness constitutes no exception to the rule, for the executor in such case cannot be made liable for the tort of his testator, but only for the implied promise which the law raises and allows the injured party to put in the place of the wrong.

In the light of these principles we are called upon to determine the nature of the liability imposed by the statute in question.

By section 17, page 280, of the General Statutes, it is made the duty of the president and secretary of joint stock corporations annually, on or before the 15th day of February or of August, to make and lodge with the town clerk where the corporation is located, a certificate signed and sworn to by them, showing the condition of its affairs as nearly as the same can be ascertained on the first day of January or of July next preceding the time of making such certificate, stating the amount of paid capital, the cash value of its real and personal estate and credits, and the name, residence and number of shares of each stockholder.

Section 18, which creates the liability on which this action is founded, is in these words:—"Any president or secretary of such a corporation who shall intentionally neglect or refuse to comply with the provisions of the preceding section, shall be liable for all the debts of said corporation contracted during the period of such neglect."

We do not see how it is possible to construe this statute as creating or attempting to create any contract relation or duty between the creditors of a corporation and its president. The adoption of such a construction would suggest grave doubts as to the validity of the act which should attempt so arbitrarily to make a debtor out of a stranger to the debt, or in other words, to make the debt of one person the debt of another. There was no privity between Hotchkiss and the plaintiffs; they had no transaction with each other, and the former owed the latter no private duty from which a promise might be implied.

The argument for the plaintiffs seemed to be based princi-

pally upon the assumption that the officers of a corporation are under some original common law liability to pay all the debts contracted by it while they as officers are in default as to the performance of any of the duties prescribed by statute; that their exemption from personal liability under the corporate organization is not an absolute but only a conditional one.

This reasoning is fallacious. There may be cases where the organization is so defective that creditors need not recognise it as a corporate being at all, in which case the so-called officers or active agents in its business transactions may perhaps under some circumstances make themselves personally liable. But conceding the lawful organization and existence of the corporation, the existence of all its members, officers as well as stockholders, so far as its transactions are concerned, become merged in the artificial being, so that in contemplation of law they are utter strangers to those who deal with the corporation; and as stockholders and officers they are never liable except so far as the law makes them liable.

The theory of the plaintiffs' declaration also tends to confute the argument. The action does not profess to be predicated on any promise, original or collateral, express or implied, but is an action on the case founded on the statute. There is nothing in the record to suggest a possibility that the estate of the testator could in any way have been increased or benefited by the misfeasance or non-feasance complained of.

It seems clear that the duty to be performed was a public duty, required by public policy for the general welfare. In the language of Mr. Justice Clifford, in giving the opinion relative to the identical statute we are considering, in the case of *Providence Steam Engine Co.* v. *Hubbard*, 101 U. S. Rep., 188, the act was passed "by the state to enable the business public to ascertain the pecuniary standing of joint stock corporations."

The wilful neglect of the prescribed duty was a public wrong invoking the penalty of the statute; and the statute comes clearly within the definition of a penal one, as given

in 2 Bouvier's Law Dictionary, where it is defined as "a statute that inflicts a penalty for the violation of some of its provisions."

The Supreme Court of the United States in the case just referred to, after full discussion, unhesitatingly pronounced this statute a penal one, to be strictly construed as such, and if penal it necessarily follows that the action upon it will not survive the death of the person for whom the penalty was intended, and the executors are not liable. 3 Williams on Executors, 6th Am. ed., bottom page 1729; *Hambly* v. *Trott*, Cowp., 372; *United States* v. *Daniel*, 6 How., 11.

The view we have taken is well supported by numerous authorities from other jurisdictions.

In *Moies* v. *Sprague, Admr.*, 9 R. Isl., 541, an action was brought to charge the estate of Byron Sprague, deceased, with certain statutory liabilities incurred by the deceased as a stockholder, director and president of the Union Horse Shoe Company, upon certain promissory notes given by the company to the plaintiff or held by him. The third count was for a liability incurred by the decedent as president of the corporation under sections second and third of chapter 128 of the statutes of the state then in force. Section 2d required the president and directors to make a certificate within ten days after the last installment of capital should be paid in, stating the amount of capital so fixed and paid in, and lodge it with the town clerk for record. Section 3d provided that "if any of said officers shall refuse or neglect to perform the duties required of them as aforesaid, they shall be jointly and severally liable for all the debts of the company contracted after the expiration of said ten days and before the certificate shall be recorded as aforesaid." After full consideration it was decided, (Durfee, J., giving the opinion,) that the liability alleged, as founded upon the statute referred to, did not give a cause of action which survived the person affected by the liability or which constituted at law a valid claim against his estate. This statute is so similar to our own that it is impossible to make any distinction in principle between the third count in that case and the present action.

Under a statute of the state of New York, providing that "on failure of any company within twenty days from the first of January to make, publish and file an annual report, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made," it has been held repeatedly that the act was penal and could not be extended by construction to cases not fairly within its language. *Garrison* v. *Howe*, 17 N. York, 458; *Boughton* v. *Otis*, 21 N. York, 261; *Chambers* v. *Lewis*, 28 N. York, 454. In *Shaler & Hall Quarry Co.* v. *Bliss*, 34 Barb., 309, it was held that the liability of the trustees under the statute referred to was of the nature of a penalty or punishment for the omission of a duty. In *Bank of California* v. *Collins*, 5 Hun, 209, the trustees of the La Abra Silver Mining Company (a corporation) failed to publish an annual report as required, and suit was brought against them on the statute; one of the defendants died pending the action, and the question raised was whether it could be revived against his estate. And although the statutes of New York at the time provided for the survivorship of all actions for wrongs done to the property, rights or interests of another person, (except slander, libel, assault and battery, and false imprisonment, and actions on the case for injuries to the person of the plaintiff or to the person of a testator or intestate,) yet it was held that, as the action depended entirely upon the omission to file the annual report, the act had no relation to any right, property or interest of the plaintiff, and was not a wrong done to his property, but was only an act invoking a penalty for a violation of a duty to the public and not to any private person, and that it could not be revived against the estate of the deceased trustee.

In *Reynolds* v. *Mason*, 54 How. Pr. R., 213, the defendant was a trustee of the Mason Manufacturing Company, and had neglected to file annual reports, and an action was brought on the statute, 3 Edm. R. S., 733, sec. 12. The plaintiff died, and the administrator petitioned the court for leave to continue the suit in his name, but it was held to be a personal action to enforce a penalty, that did not survive.

In *Halsey* v. *McLean*, 12 Allen, 438, a creditor of a New York corporation brought a suit in Massachusetts against a trustee residing there, founded on the New York statute referred to. It was held that the suit could not be sustained because the statute was penal and had no extra-territorial operation.

In *Breitung* v. *Lindauer*, 37 Mich., 217, a statute provided that if the directors of certain corporations intentionally neglected to make certain annual reports of the condition of such corporations they should be liable for all the debts of the corporation contracted during the period of neglect, and the court held that the liability imposed was in the nature of a penalty, and could not be enforced after the repeal of the clause imposing it, even if incurred before.

Under a similar statute of Indiana the court in *Union Iron Co.* v. *Pierce*, 4 Biss., 327, came to the same conclusion, and held that a repeal of the statute after the commencement of a suit for a debt so contracted defeated the action.

In *Sturges et al.* v. *Burton et al.*, 8 Ohio St. R., 215, the directors of the Sandusky Bank were made by the charter personally liable to the creditors if the debts of the bank exceeded twice the capital paid in, and it was held to be a penalty to vindicate a violation of law.

In *Lawler et al.* v. *Burt*, 7 Ohio St. R., 340, an act prohibiting certain associations from issuing bank paper, and making the stockholders liable in their individual capacity for the whole amount of the paper so issued, was held to be a liability in tort in the nature of a penalty and not a liability in contract.

In *Irvine* v. *McKeon*, 23 Cal., 472, an act making the directors of a corporation liable for the excess of debts over the amount of capital stock paid in, was held to create a forfeiture or impose a penalty, and therefore to be strictly construed.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

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WILLARD RICHMOND *vs.* JACOB STAHLE.

The record of a judgment in a summary process for the recovery of leased premises by *A* against *B*, is conclusive evidence against *B* and his grantees that he was in possession at the time as the tenant of *A*.

And proof that he was in such possession up to the boundary line of the demised premises.

The possession of a tenant is the possession of the landlord.

The court below ruled out certain evidence offered by the defendant and he moved for a new trial. The plaintiff claimed that he had made such admissions on the trial that the exclusion of the evidence had done no harm to the defendant. Held that it must appear clearly in such a case that no harm has been done by the ruling, and that the admissions must have covered all that was important in the evidence rejected.

EJECTMENT; brought to the Superior Court in New London County, and tried to the jury before *Pardee, J.* Verdict for the plaintiff, and motion for a new trial by the defendant. The case is sufficiently stated in the opinion.

*S. Lucas* and *A. B. Crafts*, in support of the motion.

*A. C. Lippitt*, contra.

PARK, C. J. On the trial of this cause in the court below the defendant claimed, and offered evidence to prove, that his grantors and himself had been in the open, visible and exclusive possession of the premises in dispute from the first day of April, 1858, to the time of trial, claiming title. It appeared in evidence that during some portion of this time one of the plaintiff's grantors had occupied part of the premises in dispute, and in order to explain the occupancy and show that it was consistent with the exclusive possession of the premises by the defendant and his grantors, the defendant offered evidence to prove that such occupancy occurred while the grantor of the plaintiff was the tenant of the defendant; and in connection with other evidence bearing upon the subject, the defendant offered in evidence a copy of the record of an action of summary process brought by him against this grantor of the plaintiff, in which action judgment was rendered for him to recover possession of the

premises in dispute, and further showing that he was put into possession of the premises on the 13th day of March, 1877, by the officer serving the execution which issued thereon. The evidence was offered as conclusive proof of possession of the premises in dispute up to a certain line, during some portion of the time in controversy. The plaintiff objected to the admission of the evidence, and the court excluded it.

We think the court erred in this. The record of the proceedings in summary process was not offered to show title to the premises in the defendant, but to explain the occupancy of the premises by the grantor of the plaintiff. The defendant claimed title to the premises in dispute by adverse possession. He insisted that his grantors and himself had been in adverse possession since the first day of April, 1858, and that consequently they had established a good title to the same. It is necessary to the acquisition of title by adverse possession that the continuity of such possession should not have been broken during the requisite statutory period. If the continuity has been broken for even the shortest time the title fails. Hence it was all important for the defendant to show that the occupancy by the grantor of the plaintiff did not break the continuity of the defendant's adverse possession. This he attempted to do by the record of the proceedings in summary process, which showed that the grantor of the plaintiff who thus occupied the premises was the tenant of the defendant. Possession by a tenant is possession by the landlord; this is well established law. Hence if the defendant could establish this relation between himself and this grantor of the plaintiff, the continuity of his adverse possession of the premises would not be broken. The action of summary process cannot be maintained unless the relation of landlord and tenant exists between the parties; nor unless the tenant is holding over the term of his tenancy. It follows that as the action was maintained and went into judgment it was evidence of the existence of both these facts, and as such evidence it should have been received.

But it is said that the defendant offered the record as conclusive proof of possession of the premises by him up to a

certain line, during the period of tenancy. The line stated was doubtless the line found by the court in giving judgment in that action as the boundary of the demised premises, and up to which the grantor of the plaintiff had occupied as tenant during the period of tenancy. We think it is clear that the record was conclusive evidence of the existence of this fact, and should have been so received. The record was conclusive evidence of the relation of landlord and tenant between the parties, and of the possesion of the landlord by the possession of the tenant. It was also conclusive evidence of such possession up to the boundaries of the demised premises.

But it is said that the plaintiff admitted on the trial that his grantor had occupied the premises as tenant under a lease from the defendant, and that the defendant took possession of the premises on the 13th day of March, 1877; and that consequently the ruling of the court rejecting the offered evidence could have done the defendant no harm.

It appears that the proceedings in summary process were commenced on the 5th day of January, 1877; at which time therefore the tenancy must have already expired, and the tenant have been holding over his term. It further appears that the case was pending in court till the 13th day of March, 1877, when judgment was rendered and execution issued; from which it follows that during all this time the relation of landlord and tenant existed between the parties. It further appears by the execution and the officer's return upon it, that at the last mentioned date the tenant was ejected from the possession of the premises by due process of law, and the defendant lawfully restored to the actual possession.

It is easy to see that the admission of the plaintiff on the trial is not co-extensive with what the record would have proved. It is not stated in the admission when the plaintiff's grantor was tenant of the defendant, nor for how long a term. The admission would be satisfied with a tenancy at any time, and for the shortest period. It does not state how the defendant took possession. For aught that appears he might have done so by force, and might have been soon after

ejected by the plaintiff. We think it clear that the admission does not cure the error of the court on the ground that no injustice could have been done by the ruling. It must appear clearly that no such harm could have been done.

A new trial is advised.

In this opinion the other judges concurred.

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HENRY A. GALLUP *vs.* JOHN L. MANNING AND OTHERS.

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Service of a writ returnable to the February term of the court, 1879, was made in October, 1878, by a copy left with the defendant, which by mistake described the term as that of October, 1879. The officer's return was in all respects regular, and the plaintiffs, not knowing of the mistake, took judgment by default at the February term. Upon a bill in equity brought by the defendant to restrain the plaintiffs from collecting the judgment, it was found that the petitioner knew, when the service was made upon him, that the next term of the court was in February, and that he purposely failed to appear; also that he was justly indebted to the respondents to the amount of the judgment. Held that he had no claim for equitable relief.

BILL IN EQUITY for an injunction against the enforcement of a judgment at law; brought to the Court of Common Pleas of New London County, and heard before *Mather, J.* The court made the following finding of the facts:—

In October, 1878, the respondents, J. L. Manning & Company, brought an action of general assumpsit against Henry A. Gallup, the petitioner, by writ dated October 9th, 1878, demanding two hundred dollars damages, returnable to the Court of Common Pleas in New London County, then next to be holden at Norwich, on the first Tuesday of February, 1879. The officer to whom the writ was given for service, by virtue thereof attached certain real estate of Gallup, and also factorized one Stanton as a debtor of Gallup, and on the 13th day of October, 1878, left at Gallup's usual place of abode a paper attested by the officer as a true copy of the original writ, but in which, by mistake, he wrote the word

"October" instead of "February," so that it read—"and him summon to appear before the Court of Common Pleas, to be held at Norwich, within and for the county of New London, on the first Tuesday of October, A. D. 1879." The officer endorsed on the original writ a certificate of the legal service thereof, and returned the same to the clerk of the Court of Common Pleas, and it was entered in the docket of that court for the February term, 1879, but without being otherwise served on Gallup than as above shown, though it appeared from the endorsement of the officer to have been legally served. Gallup made no appearance by himself or by attorney in the case, and the plaintiffs in the suit not knowing of any defect in the service of the writ, judgment was rendered thereon by default, on the 28th day of February, 1879, being the 9th day of the term, for $149.10 debt, and $21.46 costs of suit, and execution was issued for the same. The plaintiffs, still supposing that the writ had been properly served, placed the execution in the hands of the same officer for service. In March, 1879, the officer made demand of Gallup for the sum due on the execution. Gallup said he would pay the debt, but would not pay the costs, claiming that there was a mistake in one of the copies left in service; but without explaining to the officer the nature of the mistake, of which the officer then had no knowledge. Gallup neglecting to pay the sum due on the execution, J. L. Manning & Co., on the 29th of May, 1879, placed a judgment lien on his real estate attached in the suit, and brought a petition to foreclose the same at the August term, 1879, of the Court of Common Pleas, but on the 14th of September, 1879, they were enjoined by temporary injunction from proceeding in the foreclosure, and the officer from perfecting the service of the execution. Before the commencement of the February term of the court, 1879, Gallup well knew that the term of the court next after the time when the copy was left at his usual place of abode was in February, and in December, 1878, he declared to outside parties that he knew the time of the court was in February, but as his copy read "October," he should not go near the court. At the time of the judgment Gallup was justly

indebted to J. L. Manning & Co. in a sum equal to the amount of the judgment debt.

Upon these facts the court dismissed the bill, and the petitioner brought the record before this court by a motion in error.

*J. Halsey* and *A. P. Tanner*, for the plaintiff in error.

1. The proceedings on the default were clearly irregular. The law requires that the defendant in a suit shall have lawful notice of it and a legal opportunity to appear and defend. *Grumon* v. *Raymond*, 1 Conn., 44; *Aldrich* v. *Kinney*, 4 id., 384; *Case* v. *Humphrey*, 6 id., 139; *Burgess* v. *Tweedy*, 16 id., 44; *Blakeslee* v. *Murphy*, 44 id., 193. But here it is not claimed that the plaintiff in error was served with legal notice, nor is it found that any notice was ever conveyed to him of the term of the court to which the suit was brought. There being no notice and no proper service of the process, the plaintiff in error was not properly before the court. It had not complete jurisdiction over the parties, and the judgment rendered could have no binding force unless the jurisdictional defect was waived. *Storrs* v. *Scott*, 8 Conn., 484; *Case* v. *Humphrey*, supra; *Sears* v. *Terry*, 26 id., 280; *Woodruff* v. *Bacon*, 34 id., 181; *Cook* v. *Morse*, 40 id., 551; *Blakesley* v. *Murphy*, supra.

2. There was no waiver of the irregularity in question. —(1.) Assuming that the general rules respecting waiver and applicable to questions other than jurisdictional are to govern here, still the conduct of the plaintiff in error is not thereby rendered conclusive of an intention to abandon his legal rights. To constitute an estoppel in pais under the ordinary rules there must be an actual knowledge of the right surrendered as well as of the facts upon which it rests, and a clear design to relinquish it. *Hoxie* v. *Home Ins. Co.*, 32 Conn., 40; *Taylor* v. *Ely*, 25 id., 260.—(2.) But these requisites are not found. There is no allegation that the plaintiff in error knew, nor was he bound to know, the term of the court in which the default was taken, nor that the suit was pending therein or returnable before that term. Yet, if con-

versant with the facts, it is not certain that he believed it his privilege to appear and take advantage of the mistake without conferring jurisdiction. *Austin* v. *Nichols*, 1 Root, 199; *Nichols* v. *Shaw*, id., 315; *Cook* v. *Mix*, 10 Conn., 565; *Thrall* v. *Lathrop*, 30 Verm., 307.—(3.) But conceding knowledge on all these points, still what is there in the conduct of the plaintiff in error, aside from his forbearance, that evinced an intention to waive existing rights. His declarations, even could they be regarded as facts instead of evidence of facts, did not mislead, for they were never communicated to the opposite party. Nothing therefore save the plaintiff's silence manifested a design to relinquish a known privilege. But a representation by silence to be culpable must have been made when it was the duty of the silent party to speak, and there must have been such a representation as a reasonable man would take to be true. It is not probable the defendants in error were led to suppose the plaintiff had concluded on the ninth day of the first term to abandon a privilege of which they at least were ignorant, yet if the waiver was not complete at the time judgment was rendered it has not accrued by lapse of time. *Taylor* v. *Ely*, supra; *Hoxie* v. *Home Ins. Co.*, supra; *Bucklin* v. *Beals*, 38 Verm., 653; *Titus* v. *Relyea*, 8 Abb. Pr. R., 177.—(4.) But the general principles of waiver do not apply in their full force to a jurisdictional objection like the one in question. The defect could only be waived by the party appearing and voluntarily pleading to the merits of the case or manifesting in some other way a design to pass the mistake. His failure to appear and take advantage of the defect was no waiver under the circumstances. He was not bound to appear, as perhaps he would have been had the defect been merely abatable. A jurisdictional defect is more serious than one abatable only. *Sherwood* v. *Stephenson*, 25 Conn., 442; *Fowler* v. *Bishop*, 32 id., 208; Note to *Kellogg* v. *Brown*, id., 111; *Woodruff* v. *Bacon*, 34 id., 181; *Cook* v. *Morse*, 40 id., 551; *Ewer* v. *Coffin*, 1 Cush., 23; *Clark* v. *Freeman*, 5 Verm., 122; *Abbott* v. *Dutton*, 44 id., 551; *Titus* v. *Relyea*, 8 Abb. Pr. R., 177; 1 Kent Com., 284, note.—(5.) Finally, no waiver has in fact been

found by the court. A question of waiver is one of intention, and as such is a question of fact to be determined in the finding of the court below, and not one to be inferred by the appellate court. The record in this case discloses for the most part evidence of facts of intention rather than the facts themselves, and in this respect is erroneous. *Fitch* v. *Woodruff & Beach Iron Works*, 29 Conn., 91; *Cook* v. *Tanner*, 40 id., 378, 382; *Stone* v. *Hills*, 45 id., 44.

3. An equitable defence need not be shown in a proceeding of this kind. This was not in effect a petition for a new trial. The judgment in question was irregular and void, and it matters not whether the plaintiff in error has merits or not. The finding on this point is mere surplusage. There is no presumption in favor of the judgment creditor. *Cogswell* v. *Vanderbergh*, 1 Caines, 156; *Depeyster* v. *Waine*, 2 id., 45; *Howell* v. *Deniston*, 3 id., 96; *Blakeslee* v. *Murphy*, 44 Conn., 195; *Hughes* v. *Wood*, 5 Duer, 603, note.

*S. Lucas*, for the defendants in error.

GRANGER, J. The petitioner seeks the interposition of a court of equity to relieve him from a judgment at law upon a debt which he justly owes the respondents—a debt which he ought to have paid without suit, and against which he does not pretend that he has any legal or equitable defense, and with regard to which it is found that, at the time the judgment complained of was rendered, he was justly indebted to the respondents in a sum equal to the amount of the judgment. But the petitioner's ground of complaint is, that the writ upon which the judgment was based was not legally served upon him, and that he had no legal notice to appear.

The defect in the service was a mere clerical error on the part of the officer who had the writ to serve. The court to which the writ was returnable was held in February, 1879, and the officer in the copy left in service by mistake wrote the word "October" instead of "February." But the writ itself was proper in all respects, and so far as it appeared by the officer's return was duly and legally served. The petitioner knew when the terms of court were held, and that the

officer had made a mistake. The writ was dated in October, 1878, and he knew that the next term of the court after the date of the writ, and after the copy was left with him in service, must have been in February, 1879, and could not have been in October, 1879. And in December, 1878, the petitioner, it is found, declared that he knew the time of the court to be in February, but as his copy read "October" he should not go near the court.

The principal object of serving writs as provided by law is to give the defendant notice of the time and place of holding the court, and if the legal steps are not pursued in the service of the process, the defendant has his remedy by plea in abatement, if he chooses to avail himself of the defect. But the whole service may be waived, and of course any particular defect in it. If in this case the defendant had appeared and neglected to plead the defective service in abatement, but gone to trial on the merits, it needs no argument to show that he would no longer have ground to complain of the defective service. Under the facts found here he does not stand any better in equity. It may not be strictly a waiver of his right to plead the defective service in abatement. But he has by his conduct placed himself upon utterly inequitable ground. He kept away from the court, with full knowledge of all the facts, for the purpose of allowing the plaintiffs in the suit to take a judgment against him, which he thought he could get set aside as invalid; and now when he comes into a court of equity and asks its aid to carry out his inequitable purpose, he comes with no claim whatever to equitable interference. An injunction is not his right, but the granting of it rests in the discretion of the court, and the court will never lend its aid to one who has a bare legal right and no equity.

But the petitioner shows no reason for setting aside the judgment. The court had, upon the face of the proceedings, full and complete jurisdiction of the parties and the cause, the writ appeared by the officer's endorsement to have been properly served and returned, and the default was entered on the ninth day of the term. No fault is to be imputed to the plaintiffs in the suit; they have taken no undue advantage of

the defendant, and the judgment represents only the actual debt which the petitioner owed and still owes to the respondents. That a small sum has been added to the debt in costs is wholly the fault of the petitioner.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

# SUPREME COURT OF ERRORS.

## HELD AT HARTFORD, FOR THE COUNTIES OF HARTFORD, WINDHAM, MIDDLESEX, AND TOLLAND,

ON THE FIRST TUESDAY OF MAY, 1880.

Present,

PARK, C. J. CARPENTER, PARDEE, LOOMIS, AND GRANGER, JS.

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JAMES M. BELDEN *vs.* JONAS P. CURTIS.

Where one of two joint contractors is sued alone, he can, as a general rule, take advantage of the non-joinder only by a plea in abatement, but if the non-joinder appears upon the face of the declaration or other pleadings of the plaintiff, he can take advantage of it by a motion in arrest of judgment.

But in the latter case all the facts which it would have been necessary for the defendant to set up in a plea in abatement must appear upon the face of the declaration or other pleadings.

A plea in abatement for the non-joinder of a joint contractor must also allege that such joint contractor is still living, and where this fact does not already appear upon the pleadings the defendant can not take advantage of the non-joinder by a motion in arrest.

And the allegations on this point will not be aided by construction, but will be strictly construed, like those of a plea in abatement.

A declaration in a suit against *C* alleged that *W* and *C* were indebted to the plaintiff as partners, and that afterwards *W* was duly declared a bankrupt and legally discharged from all his debts, including the debt in question, and that the plaintiff had now no legal right of action against him Whether *W* should have been made a joint defendant and left to plead his discharge *Quære.* The court inclined to the opinion that it was not necessary and that the declaration was sufficient.

But held that, however it might otherwise be, such a writ would be good under the statute (Gen. Statutes, tit. 19, ch. 12, sec. 1,) which provides that "a discharge to one of several joint debtors, purporting to discharge him only, shall not affect the claim of the creditor against the other joint debtors, but they may be sued for the same"

And held that if the declaration was defective in not averring with more particularity the bankrupt proceedings and the facts going to show the legality of the discharge, yet the defect was wholly one of form and cured by the verdict

ASSUMPSIT for goods sold; brought to the Superior Court in Hartford County, and tried to the court on the general issue before *Beardsley, J.*

The declaration, after alleging that the plaintiff was the owner of the claim, by assignment from William A. Andrews, in whose favor it originally accrued, proceeded as follows:—That on the first day of April, 1873, the defendant and William C. Williams were partners in business under the name and firm of Williams & Curtis, and as such partners were justly indebted to William A. Andrews of said New Britain, in the sum of six hundred dollars, for goods, wares and merchandise before that time sold and delivered by the said Andrews to the said firm of Williams & Curtis. And the plaintiff further declares and says, that afterwards, to wit, on the first day of August, 1875, the said William C. Williams was duly declared a bankrupt under and in accordance with the bankrupt laws of the United States, and complied with all the requirements of the said law, and was duly and legally discharged from all his debts, and especially from the debt hereinbefore described, and that the plaintiff has now, by virtue of said discharge, no legal right of action against said Williams, and can sustain a suit for said debt against said Curtis only.

To this count were added the common counts and an allegation of a promise by the defendant, in consideration of the indebtedness stated, to pay the plaintiff the several sums mentioned upon request, with an allegation of a breach of the promise.

The court found the issue for the plaintiff, and the defendant moved in arrest of judgment, assigning the following grounds for the motion:—1st. That the declaration shows upon its face that William C. Williams was a co-promisor with the defendant, and that he should have been joined with the defendant as a co-defendant in this suit.—2d. That it does not show what court discharged said Williams.—3d. That it does not aver that any court discharged him.—4th. That it does not show that any court of competent jurisdiction discharged him.—5th. That it does not set up the facts

necessary to confer jurisdiction upon any court that may have granted said Williams a discharge.—6th. That the declaration does not recite the alleged discharge.—7th. That it does not aver that the plaintiff ever had notice, or even reason to believe, that the said Williams would plead his alleged discharge, or attempt to get any benefit therefrom, if he were joined as a defendant.

The court overruled the motion and rendered judgment for the plaintiff, and the defendant brought the record before this court by a motion in error.

*C. E. Mitchell*, for the plaintiff in error.

This is an action against one of two joint promisors, the declaration averring that the other joint promisor has been discharged in bankruptcy from his debts, including the debt in question, and further averring "that the plaintiff has now by reason of said discharge no legal right of action against said Williams, and can sustain a suit for said debt against said Curtis only." The defendant by a motion in arrest challenges the correctness of this proposition, and the question is—will an action lie against one of two joint promisors, under the circumstances which appear upon the face of the proceedings.

1. When it appears that another person still living was a joint promisor with the defendant, a motion in arrest will be allowed. 1 Swift Dig., 184; 1 Chitty Plead., 54.

2. The bankruptcy of one of the joint promisors makes no difference. *Noke* v. *Ingham*, 1 Wils., 89; *Bovill* v. *Wood*, 2 Maule & Selw., 23; *Moravia* v. *Turner*, id., 444. "When there are several contracting parties and one has been bankrupt, the action should be brought jointly against the solvent partner or partners and the bankrupt, and if the latter should have obtained his certificate, and should plead it, a *nolle prosequi* may be entered against him. 1 Chitty Plead., 63.

3. A statute has been found necessary in England to enable the solvent partner to be sued alone. 2 Chitty Plead., 271, note *a*.

4. Under our law, nothing short of a statute should be

allowed to give the plaintiff the election to omit the bankrupt as a defendant, because—1st. The right to plead the discharge is a personal privilege. *Jenks* v. *Opp*, 43 Ind., 108; *Horner* v. *Spellman*, 78 Ill., 206.—2d. If the discharge is not pleaded, the judgment is good. *Jenks* v. *Opp*, 12 Nat. Bank. Reg., 19.—3d. If the bankrupt is guilty of gross laches in obtaining leave to plead, he waives his privilege. *Medbury* v. *Swan*, 8 Nat. Bank. Reg., 537; *Cross* v. *Hobson*, 2 Caines, 102; *Valkenberg* v. *Dederick*, 1 Johns. Cas., 133; *Monroe* v. *Upton*, 50 N. York, 593.—4th. The discharge will not avail unless the plea set forth a full copy of it. *Stoll* v. *Wilson*, 14 Nat. Bank. Reg., 571.—5th. And the discharge may in some cases be avoided, at least as to the particular debt sued upon.

*S. F. Jones* and *M. R. West*, for the defendant in error.

1. All matters of form are waived after judgment, and cannot be taken advantage of by motion in arrest. Gould's Pl., ch. 10, §§ 8–10.

2. The declaration alleges that William C. Williams was a resident of New Britain, Conn., and that he was after the creation of the plaintiff's debt and before the commencement of the suit duly declared a bankrupt, under and in accordance with the bankrupt laws of the United States, and that he complied with all the requirements of the bankrupt law, and was duly and legally discharged from all his debts, and especially from the plaintiff's debt, and that the plaintiff has in consequence no legal right of action against said Williams, and can sustain a suit for the debt against the defendant only If there is any defect in this statement of the facts with regard to the discharge it is one of form only and cannot now be taken advantage of.

3. It was not necessary to make Williams a party defendant. The declaration states the facts in the case and their legal effect, and under it every right of the defendant can be protected. In *Noke* v. *Ingham*, 1 Wils., 89, one defendant pleaded his bankruptcy; the plaintiff entered a *nolle prosequi* as to him; the court say the plea of bankruptcy does not

affect the debt, and is only a personal discharge, and likens it to a joint and several contract, and makes the solvent partner liable for the whole debt; and the declaration against one on a joint and several contract would be substantially like the plaintiff's declaration in this case. This is one of the oldest decisions (1745,) and the reasoning of the court in principle sustains the plaintiff's declaration. In *Bovill* v. *Wood*, 2 M. & Sel., 23, (1813,) the plaintiff took no notice of the bankrupt; the defendant pleaded in abatement the non-joinder of the bankrupt; the plaintiff replied his bankruptcy; the court sustained the defendant's plea, but the reasoning of one of the judges would sustain a declaration like the one before the court. The case of *Moravia* v. *Hunter*, 2 M. & Sel., 444, merely confirms the decision in *Noke* v. *Ingham*. The principle for which we contend is in accordance with our own statute and with our practice. Gen. Statutes, p. 441, sec. 1. If the law of England ever required that a joint debtor who has been duly discharged from all his debts should be made party defendant, it has been changed by 3 and 4 William 4th, ch. 42, sec. 9. It is enacted that to any plea in abatement in any court of law, of the non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate or under an act for the relief of insolvent debtors. 2 Chitty Pl., 271, note *n*, and page 317. This statute is remedial, and prevents assigning frivolous and technical objections. The principle on which it rests should be sustained by our courts. The plaintiff's declaration is in accordance with the decision of *Camp* v. *Gifford*, 7 Hill, 169. If the defendant prevails in his objection, it is purely on technical grounds, without merit, and opposed to the spirit of our present practice. It would be of no benefit to the defendant, and would compel the plaintiff to pay a bill of costs.

4. If the bankrupt should have been joined, the non-joinder, even where it appears on the face of the declaration, could have been taken advantage of only by plea in abatement. *Hawkins* v. *Ramsbottom*, 2 Taunt., 179.

GRANGER, J. The plaintiff, as assignee of one Andrews, brought the present action of assumpsit against the defendant, Curtis, declaring "that the defendant and one William C. Williams were, on the first day of April, 1873, partners in business under the firm name of Williams & Curtis, and as such were justly indebted to the said Andrews in the sum of six hundred dollars for goods theretofore sold by him to the firm, and that afterwards, and before the present suit was brought, the said Williams was duly declared a bankrupt under and in accordance with the bankrupt laws of the United States, and complied with all the requirements of said laws, and was duly and legally discharged from all his debts, and especially from the debt hereinbefore described, and that the plaintiff has now, by reason of said discharge, no legal right of action against said Williams, and can sustain a suit for said debt against said Curtis only." The common counts are then added for goods sold to the defendant and for an indebtedness upon an account stated, each to the amount of $600, and the declaration closes with the ordinary averment of a promise of the defendant, in consideration of the indebtednesses stated, to pay the several sums mentioned when thereto requested, and his neglect, on demand made, to pay the same.

The defendant pleaded the general issue, with notice of sundry matters not affecting the questions now made, and the court, to whom the case was tried, found the issue for the plaintiff, and adjudged that he recover $634.42 damages and his costs. The defendant upon this filed a motion in arrest of judgment, on the ground of the insufficiency of the declaration, assigning specially—1. That the declaration showed upon its face that William C. Williams was a co-promisor with the defendant, and that he should therefore have been joined as a co-defendant in the suit.—2. That the declaration did not recite the alleged discharge of Williams, nor show what court, or that any court of competent jurisdiction, had granted the discharge. The court overruled this motion, and the defendant has brought the record before us by a motion in error.

There being no finding of facts in the case it is impossible for us to see from the record that the court found the issue for the plaintiff on any particular count of the declaration. It may have been upon the count for goods sold to the defendant, or upon that for an indebtedness upon an account stated between the plaintiff and defendant, in either of which cases it is very clear that the bankrupt should not have been joined as a co-defendant. The defendant, if he had desired to free the case from the embarrassment of these counts, should have required the plaintiff to prove his allegations under them, and on their not being proved should have asked that the issue upon them be found in his favor.

And even without these counts, the declaration would stand as a statement of an indebtedness originally due from the defendant and Williams as partners, and that Williams had been discharged in bankruptcy, and that in consideration of this indebtedness the defendant personally had promised to pay the sum demanded. If the court upon such a declaration had found the issue for the plaintiff, it would be a finding that the defendant actually made such a promise, and if he made it there was certainly a sufficient consideration for it. If he had given his note upon such a consideration it would hardly be contended that the note was not a valid one. It would have been easy to avoid this difficulty. There being no implied promise growing out of that state of facts the defendant should have called on the court to find the issue in his favor unless the plaintiff should prove an express promise. We can not know that the plaintiff intended to allege merely an implied promise. An express promise is alleged precisely like an implied one, and unless the fact is brought upon the record by the pleadings or the finding, the court must always treat it as if it were an express promise.

We have no doubt however, and it seems to have been taken for granted in the argument, that the promise here alleged was intended to be an implied promise only, and we shall be evading the real question between the parties unless we so consider it.

In this view the case presents to us three questions.

1 Was it necessary that Williams the bankrupt should have been made a party defendant?

2. If it was necessary, can the question be made by a motion in arrest, the matter not having been pleaded in abatement?

3. If it was not necessary, is not the declaration still insufficient in not reciting the discharge and alleging more fully the facts going to show the legality of the discharge?

As the first of these questions is the most important we will leave that for final consideration, disposing of the others first.

And first, as to the adequacy of a motion in arrest. While it is a general rule that a non-joinder of a defendant must be pleaded in abatement, if advantage is to be taken of it at all, yet it seems to be laid down in the books that where the necessity of making the omitted party a defendant already appears on the pleadings the defendant is not compelled to plead the non-joinder in abatement, but may raise the question for the first time by a motion in arrest. The rule on this point is perhaps nowhere better stated than by Swift in his Digest, Vol. I., p. 184, where, after giving the general rule that if only a part of joint contractors are sued, they must plead the matter in abatement and show that the other joint contractors not sued are living, he adds—"unless it should appear from the face of the declaration or any other pleading of the plaintiff, that another party executed the contract with the defendant, who is still living. If both these facts are admitted by the plaintiff the court will arrest the judgment, because the plaintiff himself shows that another ought to have been joined, and it would be absurd to compel the defendant to plead facts which already have been admitted." If then we are to regard the matter that would have constituted the plea in abatement if one had been filed, as already set up in the declaration, we should feel compelled to hold, in accordance with the rule, that the defendant need not aver and prove it, but could take advantage of the plaintiff's own admission, and make it the ground of a motion in arrest of judgment.

But it is very clear that, to open this door for the defendant, the plaintiff must have alleged, and thus admitted, all that it would have been necessary for the defendant to have alleged in an ordinary plea in abatement. The rule that allows the defendant, after having gone to trial upon the merits, without hinting his intention to raise a question as to the necessity of making other parties defendants, and thus taking his chance for a verdict, and then, if he fails of that, falling back upon the liability of the writ to abatement—a question in its nature a preliminary one, and not regarded with favor even when formally raised by a plea in abatement—is one that the court will apply with reluctance, and will not extend beyond the strictest limits to which, without repudiating the rule, it can be confined. Applying the rule in this spirit we can not overlook the fact that the plaintiff in his declaration has not averred, and so has not admitted, that Williams the bankrupt co-debtor is still living. The nearest approach to an admission of this is in the allegation that the plaintiff "has now, by virtue of said discharge, no legal right of action against said Williams." There is here a fair implication that Williams is living, as if not living the plaintiff would not have to base his want of a legal cause of action against him upon his discharge. But we are to look at this averment, not for the purpose of finding its possible, or even its probable meaning, but for the purpose of seeing whether the admission is the full equivalent of the necessary averment and proof on such a point in a plea in abatement. Now in a plea in abatement for the non-joinder of a co-debtor it is absolutely necessary to aver in terms that such co-debtor is still living. Such are all the forms. 2 Swift Rev. Dig., 620; 2 Chitty Pl., 449. In the absence of this admission on the part of the plaintiff the defendant could take advantage of the non-joinder only by a plea in abatement, and can not do it by a motion in arrest of judgment.

But the defendant, in the next place, claims that, even if the non-joinder could not be taken advantage of by his motion in arrest, yet that he can by that motion raise the question of the sufficiency of the declaration in other respects, and par-

ticularly in its omission to recite the discharge of the bankrupt co-debtor, and to allege more fully the facts going to show the legality of the discharge. But this is clearly mere matter of form, that is good after verdict. The declaration alleges that Williams "was duly declared a bankrupt under and in accordance with the bankrupt laws of the United States, and complied with all the requirements of said laws, and was duly and legally discharged from all his debts, and especially from the debt hereinbefore described." Surely if this form of alleging the discharge is open to criticism at all, it is at the most a defective statement of good matter and not a case of material defect.

The final and principal question in the case we are not under the necessity of deciding, since we hold that it is not properly raised, but as it has been fully argued, and is one of some practical importance, we conclude to give our views upon it.

It is undoubtedly the common law rule, recognized by all the English authorities, that where a debt was originally due from two or more persons, one of whom has been discharged in bankruptcy, the creditor suing the non-bankrupt co-debtor or co-debtors, must also make the bankrupt a defendant, and on his pleading his discharge must enter a *nolle prosequi* as to him, and proceed with his action against the others, taking judgment against them only. The reason given for the rule is that the bankrupt defendant may not choose to plead his discharge, but to let judgment go against him, in which case the judgment would be a binding one, and the non-bankrupt defendants would have the benefit of it, if compelled to pay the amount, in being able to compel him to contribute. But this reason has no foundation in good sense. It is hardly conceivable that any bankrupt who cared enough for his debts to be at the expense and trouble of going through bankruptcy, would voluntarily waive the protection of his discharge, and allow a valid judgment to be taken against him for one of his former debts. If he would do this he would probably pay the debt without a suit, or if he wished to revive the debt while not able at present to pay it, he

would give his note for it and save his creditor the expense and trouble of a suit. And as to his liability for a contribution, he would be as ready to admit that by giving his note to his co-debtors for his share, or by allowing them to take judgment against him for the amount, as he would to lay the foundation for it by allowing a judgment to be taken by the principal creditor. Taking into consideration human nature and the ordinary principles of human action, the possibility that a discharged debtor will not avail himself of his discharge is one of the slenderest foundations conceivable for a practical rule of law. The absurdity of the rule is more strikingly shown when we consider that the bankrupt defendant, on appearing and pleading his discharge, and having a *nolle prosequi* entered as against him, is entitled to his costs, (*Camp* v. *Gifford*, 7 Hill, 169,) so that the plaintiff is at the expense and trouble of making the bankrupt a defendant and serving the process upon him, but is then compelled, when he comes into court and pleads his discharge, to pay him for his attendance and withdraw his case as to him, and take the only judgment that the law could from the first have expected him to take, against the non-bankrupt defendant or defendants alone. This, if it involved no trouble and no cost, would seem like one of those vain things that the law does not require; but it is worse than vain in that it involves both trouble and cost. The rule that requires all this is so much against good sense and reason that the British Parliament in 1833 wiped it out by the statute of 3d and 4th William 4th, ch. 42, sec. 9. That statute provides "that to any plea in abatement in any court of law of the non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under the act for the relief of insolvent debtors."

But we are not called upon to decide whether the common law rule, without substantial foundation in reason, ought by force of authority to be recognized and adopted in this state. If the case required us to determine this point, we think we should hold that, under our simple rules of pleading and practice, and in the prevailing disposition to discard techni-

calities, a declaration like the one in the present case is sufficient, and that it is not necessary that a co-debtor who has been discharged in bankruptcy should be made a defendant with his co-contractors.

We have remarked that it is not necessary that we decide this point. A statute, passed in 1865, (Gen. Statutes, p. 441, sec. 1,) provides that "a discharge to one of several joint debtors, purporting to discharge him only, shall not effect the claim of the creditor against the other joint debtors, but they may be sued for the same, and may set off any demand which could have been set off, had such suit been brought against all the original joint debtors." Here, while the provision that the discharge of one joint debtor shall not affect the claim of the creditor against the other, does not in terms provide and perhaps does not necessarily imply that the suit against such non-discharged debtor may be brought against him alone, yet the later part of the statute, in speaking of the right of set-off being the same as if the suit had been brought against all the original debtors, clearly implies that the suit intended against the non-discharged debtors is a suit against them alone, without making the discharged debtors parties defendants; and it is perhaps a fair implication of the first clause of the statute that if the claim upon the non-discharged debtors is to be in no manner affected, it is not merely in full force against them as a personal debt, but as a debt against them alone, and to be sued upon and enforced as if it were in its origin and in every respect a debt against them alone. At any rate we feel clear that the statute taken as a whole may be regarded as warranting the mode of proceeding adopted by the counsel for the plaintiff in this case.

There is no error in the judgment below, and it is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *vs.* THE HOUSATONIC RAILROAD COMPANY.

A statute provides for taxing railroads one per cent. upon a certain valuation of their franchise and property, with a provision that when only part of a railroad lies in this state the company owning such road shall pay one per cent. on such proportion of the valuation as the length of its road lying in this state bears to the entire length of the road. A corporation owning a railroad that ran from the southern line of this state to the Masachusetts line on the north, took a perpetual lease, upon a fixed rent, of two Massachusetts roads, one connecting at the state line with its own road, and the other with the latter at its northern terminus, and thereafter the two roads in Massachusetts were operated and maintained by the Connecticut corporation as if they were its own property and the three roads were one entire road. Held that the Connecticut corporation was not to be regarded as "owning" the Massachusetts roads within the meaning of the statute, and that it was not therefore entitled to a deduction from the valuation of its property on account of them.

ACTION by the State to recover a tax claimed to be due from the defendant company; brought to the Superior Court in Hartford County, and tried to the court upon a general denial, before *Hovey, J.* The court made a special finding of the facts.

The defendants were incorporated as a railroad company by the General Assembly of this state in the year 1836, and soon after, under the powers conferred by their charter, constructed and equipped a railroad from Bridgeport in this state to the Massachusetts state line, and ever since have possessed, maintained and operated the same.

On the 11th of January, 1843, the defendants made a contract with the Berkshire Railroad Company, a corporation created by the state of Massachusetts, the important parts of which are as follows:—

"Whereas the railroads of said companies, as constructed under their respective charters, form a junction with each other at the dividing line between Massachusetts and Connecticut, thereby forming one continuous line of railroad; and whereas it is necessary, in order to subserve the interests of said companies and of the public, that said roads should be operated by one of the said companies; and whereas the road

of said Berkshire Railroad Company is now, at a cost of two hundred and fifty thousand dollars, completed to the acceptance and satisfaction of said Housatonic Railroad Company, and is now and for some time past has been operated and used by said Housatonic Railroad Company:—Now in order to enable said Housatonic Railroad Company to use and operate said Berkshire railroad for all purposes necessary for the transportation of persons and freight upon and over said railroad, and so that the road of said Berkshire Railroad Company and the road of the Housatonic Railroad Company may be operated together as one road, the said Berkshire Railroad Company hereby grants, leases and demises to said Housatonic Railroad Company the said Berkshire railroad; subject, however, to all such restrictions and liabilities as are or may be imposed upon the said Berkshire Railroad Company or its successors by the legislature of Massachusetts, and subject also to such other terms as are hereinafter recited; and the party of the second part shall or may possess, use and operate said Berkshire railroad, together with all the lands, property, rights, privileges, and franchises thereto appertaining and belonging, or that hereafter may appertain or belong to said road, as fully and completely as the said party of the first part might or could do under its charter; to have and to hold the said railroad and all and singular the premises unto the said party of the second part, perpetually, for and during the full term of the continuance of the charter of the said party of the first part, and any renewals or extensions of the same, and as fully and freely, to all intents and purposes, as the said party of the first part might or could have, enjoy, use or operate the same under its charter. And furthermore, the said party of the first part shall, during the continuance of this lease, do all things in its power to maintain the organization of said Berkshire Railroad Company, choose all needful officers, keep all proper records, make all needful reports, hold all necessary meetings, pass such votes and do all such acts as may be necessary and proper in order to enable said party of the second part to carry into full effect the objects and intentions of this

indenture, and on reasonable demand give such other assurances as may be necessary therefor.

"And the said party of the second part hereby covenants with said party of the first part, that during the term in which the provisions of this indenture shall be in force, it will keep and maintain said Berkshire railroad and all the premises therewith connected or thereto appertaining and belonging, in good repair, and that said party of the second part shall be liable for and respond to said party of the first part for all damages, losses, costs and trouble that may in any way happen unto said party of the first part by means of any accidents, defaults, negligences or willful acts or omissions of the said Housatonic Railroad Company, or of any persons acting for said company. * * And said party of the second part covenants with said party of the first part to pay to said party of the first part, as a rent or compensation for the premises, the sum of $1,458.33 on the first Tuesday of each month, during the continuance of this lease, and on failure of said party of the second part to pay said rents for the space of ten days after the same shall at any time become due, or on failure of said party of the second part to maintain said Berkshire railroad in good order and condition after reasonable notice of any disrepair or defect in said road, or of the premises or property therewith connected or thereto appertaining, or on failure, after due and reasonable notice, to pay to said party of the first part all damages that may happen as aforesaid, then this indenture shall terminate, and said party of the first part shall have a right to re-enter and re-possess itself of all and singular the premises."

In the year 1845 the defendants made another contract with the same railroad company, the part of which important to the present case is as follows:—

"Whereas authority has been given by the legislature of Massachusetts to said Berkshire Railroad Company to build a certain branch of said Berkshire road, which said Berkshire company agree that said Housatonic Railroad Company may be at the expense of building, and, when built, may operate

the same as a part of said Berkshire railroad, if said Housatonic Railroad Company shall so choose; and whereas, to effect the objects above indicated, and to enable the Housatonic Railroad Company to accomplish the same, the Berkshire Railroad Company, on October 13th, 1845, resolved that said company will increase its capital stock to an amount not exceeding $250,000 within the discretion of the officers of said company, to re-lay said Berkshire road with a heavy iron rail of the same pattern and weight with that used by the Housatonic Railroad Company in re-laying its road, to improve the depot houses and water stations on the road, to re-lay the West Stockbridge railroad with iron similar to that to be used on the Berkshire railroad, and to build a branch to the Stockbridge Iron Works, if deemed by the directors advisable, with the assent of the Housatonic Railroad Company:—Now, therefore, it is hereby agreed by and between said Housatonic Railroad Company and said Berkshire Railroad Company, that said Berkshire Railroad Company will issue and deliver to the treasurer of the Housatonic Railroad Company the whole of said increased capital stock of said company, or so much thereof as said Housatonic Railroad Company shall choose to demand at any time when its treasurer shall make application in writing therefor. And said Housatonic Railroad Company hereby covenants and agrees, out of the avails of said stock, to re-lay the whole track of said Berkshire railroad with a heavy iron rail of the same pattern and weight with that to be used by the Housatonic Railroad Company in re-laying its road, to improve the depot houses and water stations on said Berkshire road; and also, if said Housatonic Railroad Company shall deem it expedient, re-lay, as aforesaid, said West Stockbridge railroad, and build said branch road. And all the enterprises and works aforesaid shall be at the sole risk and expense of said Housatonic Railroad Company. And said Housatonic Railroad Company further covenants and agrees to pay to said Berkshire Railroad Company, perpetually, during the continuance of the said agreement of January 11th, 1843, hereinbefore referred to, seven dollars per share per annum (said shares

being $100 each) on all shares of said capital stock of said Berkshire Railroad Company which shall be issued and delivered to said Housatonic Railroad Company as aforesaid, which said seven dollars per share per annum shall be payable in monthly installments from the date of its issue, and shall be taken and considered as additional rent for the use of said Berkshire railroad, to be added to the rent stipulated for in the articles of agreement hereinbefore referred to, and to be subject to all the stipulations and conditions referred to and provided in said original agreement, regarding right of re-entry for failure of payment, and other matters therein stated, and to be treated in every respect as if the amount of rent stipulated in said original agreement were increased by the addition of the sum herein stipulated to be paid."

The defendants in 1847 made a further contract with the same railroad company by which it was agreed that one hundred thousand dollars, increased capital of the Berkshire Railroad Company, should be transferred to the defendants, and that with the avails of this stock they should purchase new engines and cars, which should be the property of the Berkshire Railroad Company, but should be leased to the defendants for a rent of seven per cent. on the amount, during the continuance of the perpetual lease of January 11th, 1843.

In 1850 the defendants made a contract with the Stockbridge & Pittsfield Railroad Company, a Massachusetts corporation, the parts of which important to the present case are as follows:—

"Whereas a railroad has been constructed by the Stockbridge & Pittsfield Railroad Company under their charter from a point in the line of the Western railroad near the village of Pittsfield to a point in the line of the Berkshire railroad in the town of Great Barrington; and whereas the said Housatonic Railroad Company now control, operate and manage the said Berkshire railroad under a contract of transportation entered into with said Berkshire Railroad Company, and it is for the interest of said Housatonic Railroad Company to operate and use the said Stockbridge & Pittsfield railroad in connection with their own, so as to make a con-

tinuous line of railroad communication from Pittsfield to Bridgeport; and whereas the said Stockbridge & Pittsfield railroad is now completed at a cost of $438,600 to the acceptance and satisfaction of said Housatonic Railroad Company, and since the first day of January, 1850, has been operated and used by said Housatonic Railroad Company:—Now, in order to enable said Housatonic Company to use and operate said Stockbridge & Pittsfield railroad for all purposes necessary for the transportation of persons and freight upon and over said railroad, and so that the Stockbridge & Pittsfield railroad and the road of said Housatonic Company may be operated together as one road, the said Stockbridge & Pittsfield Railroad Company hereby grant, lease and demise to said Housatonic Railroad Company the said Stockbridge & Pittsfield railroad, subject however to all such restrictions and liabilities as are or may be imposed upon the said Stockbridge & Pittsfield Railroad Company by the legislature of Massachusetts, or by the legal authorities of the state of Massachusetts, and subject also to such other terms and conditions as are herein recited; and the said Housatonic Railroad Company shall and may possess, use and operate said Stockbridge & Pittsfield railroad, together with all the lands, property, buildings, rights, privileges and franchises thereto appertaining and belonging, or that hereafter may appertain or belong to said road, as fully and completely as the said party of the first part might or could do under its charter. To have and to hold the said railroad and all and singular the premises unto the said party of the second part, perpetually, from the first day of January, 1850, for and during the full term of the continuance of the charter of the said party of the first part, and any renewals or extensions of the same, and as fully and freely to all intents and purposes as the said party of the first part might or could have, enjoy, use or operate the same under its charter. * * And furthermore said party of the second part covenants with said party of the first part to pay to said party of the first part, as a rent or compensation for the premises under this contract, the sum of seven per cent. per annum on the cost

of said Stockbridge & Pittsfield railroad, that is to say, the sum of $30,702 annually, from the first of January last past. * * And on failure of said party of the second part to pay said rent or compensation for the space of ten days after it shall have become due and has been demanded, or on failure to maintain said Stockbridge & Pittsfield railroad in good repair and the premises and buildings appurtenant in good order and condition after reasonable notice of any disrepair or defect in said road or of the premises or property therewith connected, or on failure after due and reasonable notice to pay to said party of the first part all damage that may happen on said road as aforesaid, then this indenture, if the party of the first part shall so elect, shall be terminated; and the said party of the first part shall have the right to re-enter and possess itself of all and singular the premises above mentioned."

The Berkshire Railroad was connected with the railroad of the defendants at the terminus of the latter road at the Massachusetts line, and the Stockbridge & Pittsfield Railroad was a continuation of the same line, connecting with the Berkshire road at Stockbridge in Massachusetts.

The defendants have had possession of these roads since the execution of the foregoing contracts, and have operated and maintained them as if they were their own and in common with their own, no discrimination being made on their books between expenditures on or receipts from the different roads. Since they took possession they have made permanent improvements upon the roads, by purchasing lands for new depot buildings and side-tracks, and constructing such buildings and side-tracks thereon, by re-building all the trestle work and bridges, laying new ties and new rails on both roads, and by making and maintaining fences on their sides. As no separate account of these improvements was kept, it is impossible to state with accuracy their cost, but they are found on the estimates of the defendants' witnesses to have been about $500,000. A portion of the funded and floating debt of the defendants was incurred for the purpose of paying for these improvements. The whole amount expended by

the defendants for construction and permanent improvements, including the amount expended for improvements of the Massachusetts roads, is $3,163,498.56. The receipts from the Massachusetts roads are about sixty per cent. of the total receipts of the three roads. About one-half of the money expended by the defendants upon the three roads for repairs has been expended upon the roads in Massachusetts.

The capital stock of the Berkshire Railroad Company is $600,000; that of the Stockbridge & Pittsfield Railroad Company is $448,700; amounting in the whole to $1,048,700. This stock is taxable and taxed in Massachusetts at one per cent. of its market value, and the tax is paid by the Massachusetts corporations against which the tax is laid.

The length of the Housatonic Road in Connecticut is seventy-four miles, and of the two Massachusetts roads in Massachusetts fifty miles.

On the 20th of October, 1877, the defendants paid to the treasurer of this state for taxes due from them on that day, the sum of $9,931.81, and refused and ever since have refused to make any further payment on account of such taxes.

Upon the above facts the State claimed judgment for the sum of $6,858.33, being the balance of one per cent. on the valuation of the stock and bonds of the Housatonic Railroad Company as set forth in their statement, (less the amount of taxes paid on real estate owned by the company and not used for railroad purposes,) with interest thereon from the 20th of October, 1877. The defendants claimed exemption from the payment of any further tax for the year 1877, on the ground that their interest in the roads in Massachusetts was such that, by a proper construction of the statutes of this state, they were entitled to a deduction of such part of the stock and debt of the road as the number of miles of road in Massachusetts bore to the whole number of miles of road in both states.

The court sustained the claim of the State and overruled that of the defendants; and thereupon rendered judgment in favor of the State for the sum of $7,748.77 damages and costs of suit. The defendants brought the record before this court by a motion in error.

*C. E. Perkins*, for the plaintiffs in error.

*R. D. Hubbard*, for the defendant in error.

PARK, C. J. This action is based upon the following section of the statute with regard to taxation:—

"*Sec.* 5. The secretary or treasurer of every railroad company, any portion of whose road is in this state, shall, within the first ten days of October, annually, deliver to the comptroller a sworn statement of the number of shares of its stock, and the market value of each share, the amount and market value of its funded and floating debt, the amount of bonds issued by any town or city of the description mentioned in the twelfth section of chapter first of this title, when the avails of such bonds or stock subscribed and paid for therewith shall have been expended in such construction, the amount of cash on hand on the first day of said month, the whole length of its road, and the length of those portions thereof lying without this state.

"*Sec.* 6. Each of such railroad companies shall, on or before the twentieth day of October, annually, pay to the state one per cent. of the valuation of said stock and funded and floating debt and bonds as contained in said statement, after deducting from such valuation the amount of cash on hand, and from said sum required to be paid the amount paid for taxes upon the real estate owned by it and not used for railroad purposes; and the valuation so made, and corrected by the board of equalization, shall be the measure of value of such railroad, its rights, franchises and property in this state for purposes of taxation; and this sum shall be in lieu of all other taxes on its franchises, funded and floating debt, and railroad property in this state."

The defendants claim the exemption from taxation under this statute of the amount in controversy in this suit, under the following act passed in 1876:—"When only part of a railroad lies in this state, the company owning such road shall pay one per cent. on such proportion of the above named valuation as the length of its road lying in this state bears to the entire length of said road."

We agree with the counsel for the defendants, that these statutes seek to ascertain the value of the property of railroad companies, lying within this state, devoted to railroad purposes, and to tax that value. This was so held in the case of *Nichols* v. *The New Haven & Northampton Company*, 42 Conn., 103, and is clearly correct. These statutes proceed upon the idea that the market value of the stock of railroad companies, with their funded and floating debt, and the amount of certain bonds described, the proceeds of which have been expended in the construction of the roads after making certain deductions from the entire amount, fairly represent the value of the property of railroad companies used for railroad purposes, and therefore they take that amount as the basis of taxation. It is manifest that the debts of a company must be considered in ascertaining the value of its capital stock, for such debts must be paid out of the property of the company, and the capital stock takes its value from what remains of the property after the payment of such debts. Thus, if a company has capital stock to the amount of $1,000,000, and is indebted to the same amount, and has property of the value of only $1,000,000, the stock of the company would be worthless, for its debts would require the entire property of the company to pay them. But if the stock of a company with such a capital should be found to be worth fifty cents on the dollar, then the property of the company must be worth $1,500,000, for in that case $500,000 worth of property would remain after the debts had been paid, and this would be applied on the capital stock, and would be sufficient to pay it to the extent of one-half, or fifty cents on each dollar of the stock. Hence the true value of the stock of a company, with the amount of the debts of the company, must represent the value of its property.

The statutes in question, for purposes of taxation, take the market value of the stock of railroad companies as its true value. This is done for purposes of convenience. Ordinarily the market value of such stock differs but little from its real value, and there is no convenient mode by which a more accurate valuation of the stock could be made.

We come now to the consideration of the claim of the defendants. They insist that their case comes within the provision of the act of 1876. This act, as we have seen, provides that "where only a part of a railroad lies in this state, the company owning such road shall pay one per cent. on such proportion of the above named valuation as the length of its road lying in this state bears to the entire length of said road."

Suppose that when the defendants made their contracts with the Massachusetts corporations for the use of their roads, those roads had not been made, and the defendants had constructed them under a charter from that state authorizing them to do it, and had expended in such construction an amount equal to what the Massachusetts corporations have expended, then there would have been added to the defendants' present valuation under the sixth section of the statute, more than one million of dollars, which would have made their proportional taxation by the state more than the state now claims.

Again, suppose that when the defendants made their contracts they had purchased these roads of the Massachusetts corporations, if a purchase could lawfully have been made, and had paid them an amount equal to what the sum they yearly pay for the use of those roads capitalized at the rate of six per cent. would amount to; that sum, with the five hundred thousand dollars they have expended in improvements along the line of those roads, would again make more than one million of dollars in addition to the present valuation of the defendants' property under the sixth section of the statute; and this again would make their proportional tax larger than the amount the state now claims.

But if it be claimed by the defendants that the five hundred thousand dollars has gone into the valuation by the increased value of their stock and by the increase of their floating debt, still the eight hundred thousand dollars has not gone into the valuation, and that sum in addition to their present valuation would make their proportional tax nearly as large as the amount the state now claims.

Again, suppose the defendants should sell their interest in those roads back to the Massachusetts corporations, what would they receive on such sale? If the sum they yearly pay for the use of those roads is nothing more nor less than a fair compensation for such use, they would receive on such sale nothing more than compensation for the improvements they have made along the line of those roads, that is, the sum of five hundred thousand dollars, for they would have nothing else that was valuable to convey to them.

How then can the defendants claim to own those roads within the meaning of the statute? To own them within its meaning would be to own them as they own their road within this state. The statute proceeds upon the idea that the value of that portion of a road out of the state and that of its rolling stock will, in some form, enter into and enhance the valuation of the property of the company under the sixth section of the statute. The statute means simply to tax all the property of a railroad company which lies within this state and is devoted to railroad purposes. Where the road lies wholly within this state there is of course no difficulty. But here is a road which lies partly within and partly without the state. It is all under one management. The company's stock covers the whole road. Its funded and floating debt covers the whole. How shall its property lying within this state be taxed? Shall it be separately appraised item by item? That would not be practicable, or at least would involve great trouble and expense. The statute has conceived the way it can be conveniently done without trouble or expense. It takes the whole market value of the stock, and the whole funded and floating indebtedness of the company, and says that this amount shall be taken to be the whole value of the property of the company devoted to railroad purposes both in and out of the state. It then deducts from the whole amount the market value of the property which lies out of the state. This is done in this way. The amount of property lying in each state is regarded by the statute as being in proportion to the length of the road in each state. The property is so divided, and the property lying out of the

state is deducted from the whole amount of the property of the company as previously ascertained in the mode prescribed by the statute. Thus the amount of the property lying in the state is satisfactorily ascertained. No property lying within the state devoted to railroad purposes is intended to be exempted from taxation. It is simply an ingenious mode of ascertaining the amount of the property to be taxed. The property lying out of the state is first included in the valuation, because the computation cannot otherwise be made, and then it is deducted. No more is intended to be thus deducted than was thus first included. It is a mere process in mathematics.

The difficulty with the defendants' claim is that it adds but little and subtracts a great deal. The company has but little property out of the state to be added, but they propose to subtract the entire value of both roads out of the state. But what has entered into the amount of the final valuation from those roads in Massachusetts? Nothing whatever but a portion of the floating debt of the defendants, to what extent does not appear, and some increased value of the preferred stock of the company, to what extent likewise does not appear. The defendants claim that at least one-half the value of their stock grows out of their interest in those roads. If this was true, the valuation of their property under the sixth section of the statute would fall far below what it would have been if the cost or value of those roads had gone into the valuation to enhance the amount. The entire stock of the defendants is worth but a little over one million of dollars; consequently but half that sum would be represented in the valuation, growing out of the defendants' interest in those roads. But they are paying for the use of those roads the sum of forty-eight thousand dollars annually. They are therefore paying interest at six per cent. on a capital of eight hundred thousand dollars, which must be very nearly the value of those roads when they came into their hands. But this is not all. The defendants have expended five hundred thousand dollars in improvements along the line of those roads. These two sums together make thirteen

hundred thousand dollars, which leaves the sum of eight hundred thousand dollars unrepresented in the valuation under the sixth section of the statute.

But is it true that the defendants' stock receives one-half its value from their interest in those roads? No doubt the value of the stock is enhanced by such interest, inasmuch as the cost of the improvements made by the defendants upon those roads was paid in part by their ready money, and to that extent, if the value of the improvements were worth the expenditure, the value of the stock must be increased.

Again, the defendants claim that the value of their stock is greatly increased, from the fact that their road and the Massachusetts roads, taken together, make a trunk line from points on the Boston & Albany railroad to Long Island Sound, and that sixty per cent. of their income grows out of their connection with those roads. But without doubt they would have had a connection with those roads if they had had no interest in them, for the interest of all the roads would have required such a connection. About all the difference seems to be, that the roads are now bound together by a perpetual contract, while without a contract they would have been bound together by their common interest. But the defendants' stock is probably somewhat enhanced in value by their permanent connection with those roads. It does not appear to what extent, but it cannot be to a very great one.

So far as the defendants' stock has been increased in value by their interest in the Massachusetts roads, and so far as their floating debt has been increased by the making of permanent improvements along these roads, they ought to have the benefit of these facts in a proportional reduction of their tax; and no doubt, if the matter was brought to the attention of the legislature, a proper reduction would be made. But the courts have no power to do equity in the matter.

The conclusion then is, that the defendants do not own the Massachusetts roads within the meaning of the statute of 1876, whatever their interest in them may be called.

There is no error in the judgment below.

In this opinion the other judges concurred.

## WILLIAM HAMERSLEY, STATE'S ATTORNEY *vs.* CHARLES BLAIR.

The act of 1877 (Session Laws, 1877, p. 159,) provides that upon an appeal from the judgment of a justice of the peace to the Superior Court in a criminal case, if the defendant shall fail to give bond for the prosecution of his appeal the justice shall commit him to the county jail till the next session of the Superior Court, there to answer to the complaint. Held that where on such an appeal the defendant gave a void bond, it did not make the appeal void, but that the case went into the appellate court, which had power by proper process to bring the defendant before it.

Whether a bond given in such a case is invalidated by the omission from the condition of the words "to prosecute his said appeal to effect:" *Quære.*

Under the provisions of the statute (Gen. Statutes, tit. 20, ch. 13, part 10, sec. 1,) a very liberal construction should be given to such an instrument for the purpose of sustaining its validity.

APPLICATION by the Attorney for the State for a writ of mandamus to compel the defendant, a justice of the peace, to issue a mittimus for the execution of a judgment rendered by him in a criminal case; brought to the Superior Court in Hartford County. The Attorney demurred to the return of the defendant, and the case was reserved on the demurrer for the advice of this court. The case is sufficiently stated in the opinion.

*W. Hamersley*, State's Attorney, was heard in support of the demurrer. No counsel appeared for the defendant.

LOOMIS, J. From the record it appears that a justice court held by the defendant, having tried and convicted one Shook of the crime of cruelty to an animal, sentenced him to pay a fine and costs. From this judgment he appealed to the next term of the Superior Court, and gave a bond in all respects according to law except the addition of the words "to prosecute his said appeal to effect." Upon this bond the accused was given his liberty, and the justice transmitted copies of record in due form to the appellate court, where the accused appeared and moved to erase the cause from the docket, on the ground that the bond was void, and that there-

fore the appeal was void. The Superior Court, accepting this view of the law, erased the case from the docket. The Attorney for the State, assuming the ruling to be correct, and that the judgment of the justice remained unaffected by the appeal, instituted this application for a mandamus, to compel the defendant as justice aforesaid to execute and enforce his judgment.

It appears therefore that the question is in a nut-shell—if the appeal was a nullity, the judgment of the justice was not vacated and the defendant should issue his mittimus to enforce it as required by the writ of mandamus, but if the appeal was valid, the power of the justice has gone, and the appellate court alone can deal with the offense.

Prior to the act of 1877, (Session Laws of 1877, p. 159,) if the accused on appeal failed to give bonds, or gave a void bond, his appeal was considered of no avail, and the judgment of the justice court remained unaffected; but the act referred to was manifestly designed to remedy a defect in the old statute, under which the want of property or the want of friends might compel the accused to submit to the final judgment of a justice of the peace, however unjust. The new act secures to the accused the absolute right of appeal whether he gives bonds or not. The appeal is complete when taken in open court, and thereupon the jurisdiction of the justice over the accused (except on default of procuring bonds to commit him to jail as specified in the act,) ceases. And thereafter the Superior Court has sole jurisdiction of the offense, and can compel, by appropriate process, the appearance of the accused, even though he was not committed to jail by the justice, but was allowed his liberty on giving a bond for his appearance that proved to be void.

The view we have taken leads to the conclusion that the writ of mandamus will not lie in this case, irrespective of the question as to the validity of the bond given on the appeal. In avoiding the latter question however we would not be understood as endorsing by implication the opinion of the court below that the bond was void. Under the General Statutes, tit. 20, ch. 13, part 10, sec. 1, we should give a very

liberal construction to the instrument for the purpose of sustaining its validity. But the exigencies of the present case do not require a decision of this question.

We advise the Superior Court that the return as made by the defendant to the alternative mandamus is sufficient.

In this opinion the other judges concurred.

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## WILLIAM K. JONES AND OTHERS' APPEAL FROM PROBATE.

The general rule with regard to legacies to a class of persons is, that those only who are embraced in the class at the time the legacy takes effect will be allowed to take.

But where a legacy of that kind takes effect in point of right at one time and in point of enjoyment at another, the general rule is that all those will take who are embraced in the class at the time the legacy takes effect in point of enjoyment.

A testator gave certain property to his son for life and after his death to his children equally. When the testator died the son had a wife fifty-nine years of age and three adult children, but the wife afterwards died and the son married again, and had two more children, who were living at his death. Held that these children were entitled to share equally with the others in the property given by the will.

APPEAL from a probate decree ordering a distribution of a portion of the estate of James M. Goodwin, deceased; brought to the Superior Court in Hartford County. The following facts were found by the court:—

James M. Goodwin, the testator, died in the city of Hartford, on the 30th day of March, 1870, leaving a considerable estate. By his will, which was executed on the 2d day of February, 1870, he provided that, after the payment of certain legacies, the residue of his estate should be divided into fifty equal parts, twenty of which he bequeathed as follows:

"*Sixth.* I give and bequeath the use, income, interest and improvement of twenty of the above named fifty equal parts to my beloved son James M. Goodwin, Jr., for and during

the term of his natural life, and at his decease I direct the same to be divided equally among his children."

At the time of the death of the testator his son James M. Goodwin, Jr., was living, aged sixty years, and his wife, Charlotte Goodwin, was also living, aged fifty-nine years; and he had only three children living, each of whom was then married and more than twenty-one years of age, namely, Julia A. Jones, the wife of William K. Jones, Roxie E. Walker, the wife of M. W. Walker, and Addie J. Henry, the wife of E. C. Henry.

Of these children Julia resided with the testator up to 1856, when her education was completed, and she and her sisters, Roxie and Addie, frequently visited him up to a very short time prior to his decease, and he was very much attached to all of them.

Subsequent to the death of the testator the said Charlotte Goodwin died, and James M. Goodwin, Jr., afterwards married Eugenia H., his surviving wife. From this marriage there were born two children, namely, Virginia Goodwin and Beatrice Goodwin, who are now living, and are infants of tender years.

James M. Goodwin, Jr., has since died, leaving surviving him his widow, Eugenia H. Goodwin, the three adult children above mentioned by his first wife, and the two infant children above mentioned by his second wife, all of whom now survive.

Upon these facts the case was reserved for the advice of this court.

*R. H. Jones, Jr.*, and *W. R. McKenney*, of Virginia, with whom were *E. Johnson* and *S. O. Prentice*, for the appellants.

The question presented for the consideration of the court is whether, under the sixth clause of the will of James M. Goodwin, Sr., the twenty parts therein mentioned are to be divided into three parts, one of them to go to each of the three adult children by the first marriage, or whether they are to be divided into five parts, one of them to go to each

of the three adult children, and one to each of the two infant children by the second marriage.

1. The first question to be determined in the consideration of this case is, what was the intention of the testator? for it will not be denied that in the construction of wills the main purpose of the court always is to get at what was that intention; for unless it shall appear that that intention is in conflict with the principles of law applicable to such cases, then it must govern in the decision of the points in controversy. The most casual consideration of the peculiar circumstances of the case must lead to the conclusion that the children of James M. Goodwin, Jr., living at the testator's death, and no others, should share in the bequest.—1st. Because of the fact that there were then living three children, all of them over the age of twenty-one years and married.—2d. Because of his affection for these three children, as manifested by the fact that one of them lived in the house with him up to the time of the completion of her education, while all three of them, though they lived in a distant state, frequently visited him up to a short time before his death.—3d. Because of the very significant fact that, at the time of the testator's death, James M. Goodwin, Jr., was sixty years of age, and his wife, Charlotte, fifty-nine, and certainly the testator could not have contemplated the happening of three events, which a moment's thought would have convinced him were hardly within the range of the possible, namely, that James M. Goodwin, Jr., would have survived his wife; that after her death he would have married a second time; and that at his advanced age he would have had other children born to him; while the already advanced age of his wife precluded the thought of other children being born to her. It seems to be well settled that the construction of the words of a will cannot be affected by the occurrence of contingencies not in the mind of the testator either at the time of making his will (which in this case was the month prior to his death) or before his death; for no one can know with certainty what a testator might have been disposed to do, in a state of facts not presented to his mind. 2 Redfield on Wills, 22; *Pride*

v. *Fooks*, 3 De G. & J., 252, 275. Hence in aid of the construction of wills we can only introduce extrinsic evidence to show the state of facts and of the testator's knowledge at the time of making the will. But as for most purposes the words of the will speak from the death of the testator, it may often afford some aid in conjecturing the sense in which the testator expected it to be received, by showing the surrounding facts and the state of the testator's mind and knowledge up to the time of his death. 2 Redfield on Wills, 22.

2. The general rule in regard to bequests to a class is, that all who are embraced in the class at the time the bequest *takes effect* will be allowed to take, and consequently, as an interest devised under a will ordinarily takes effect at the death of the testator, it will be so regarded, and the class ascertained as of that time. 2 Redfield on Wills, 9; *Davidson* v. *Dallas*, 14 Vesey, 576; *De Witte* v. *De Witte*, 11 Sim., 41; *Petway* v. *Powell*, 2 Dev. & Batt. Eq., 308. Now if the class is to be determined as of the time the bequest in this case *took effect*, we can not do better than quote the language of CARPENTER, J., in *Dale* v. *White*, 33 Conn., 294, to determine when the bequest in this case is deemed in law to have taken effect. He says: "It is a well settled rule of construction that a legacy given to a person or a class, to be paid or divided at a future time, takes effect in point of right at the death of the testator. In such case the contingency attaches, not to the subject of the gift, but to the time of payment." And then he goes on to show that in all cases "where words are equivocal, leaving it in doubt whether the words of contingency or condition apply to the gift itself or the time of payment, courts are inclined to construe them as applying to the time of payment, and to hold the gift as vested rather than contingent." And as in the case before us, as well as in that case, the legacy is not in terms made to depend upon any contingency or condition, this rule seems to us decisive of the case, and to show clearly that at the death of James M. Goodwin, Sr., the legacy vested in the children of his son, James M. Goodwin, Jr., then living, and was not to be

divested by the birth of other children, born of a subsequent marriage; and hence that the legacy should be divided into three, rather than five parts. *Throop* v. *Williams*, 5 Conn., 98; *Colt* v. *Hubbard*, 33 id., 281; *Austin* v. *Bristol*, 40 id., 120; *Eldredge* v. *Eldredge*, 9 Cush., 516; *Nash* v. *Nash*, 12 Allen, 345; *Thompson's Lessee* v. *Hoop*, 6 Ohio St., 480. The mere fact that one estate under a will is provided to take effect after the termination of an intervening one, will not have the effect to prevent both estates becoming vested at the moment of the decease of the testator, the one in possession, the other in prospect or remainder. 2 Redfield on Wills, 216; 1 Jarman on Wills, 758. In confirmation of these principles we quote from the opinion of Sir James Wigram, V. C., in *Leeming* v. *Sherratt*, 2 Hare, 17, the following: "Courts of equity, in the construction of wills relating to personal property, follow the rules of the civil law. By that law, when a legacy is given absolutely, and the payment postponed to a future definite time, the court considers the time as annexed to the payment, and not to the gift of the legacy, and treats the legacy as *debitum in præsenti, solvendum in futuro*." And we find the rule as laid down in *Dale* v. *White* sustained in Massachusetts in *Emerson* v. *Cutler*, 14 Pick., 108; *Olney* v. *Hull*, 21 id., 311; *Furness* v. *Fox*, 1 Cush., 134; *Bowker* v. *Bowker*, 9 id., 519. And Parsons, C. J., in *Dingley* v. *Dingley*, 5 Mass., 537, thus states the rule:—"For it is a rule of law that a remainder is not to be considered as contingent, when it may be construed, consistently with the testator's intention, to be vested." See also *Shattuck* v. *Stedman*, 2 Pick., 468; *Blanchard* v. *Blanchard*, 1 Allen, 223. We therefore confidently submit, that agreeably to what evidently seems to have been the intention of the testator and the principles of law applicable to cases of this kind, the children of James M. Goodwin, Jr., who were living at the death of the testator, took a vested estate in the bequest, which was not divested by the birth of the two after-born children; and therefore that the entire bequest should be equally divided among the three children by the first

*C. E. Perkins*, for the appellees.

The question now before the court is fully considered in 2 Jarman on Wills, 55–57. With regard to devises to children as a class, after saying that the question has been as to the point of time at which the class is to be ascertained—that is, at what date the children who take must be existing, the author lays down some rules of construction, as follows:—"1st. An immediate gift to children (that is, a gift to take effect immediately on the testator's decease,) comprehends the children living at the testator's death (if any), and those only.—2d. That where a particular estate or interest is carved out with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution." And again—"In cases falling within this rule the children, if any, living at the death of the testator, take an immediately vested interest in these shares, subject to the diminution of those shares (that is to their being diverted *pro tanto*) as the number of objects is augmented by future births during the life of the tenant for life." These are given as the well-settled rules of construction in such cases, and many authorities are cited in their support. It is not even suggested that there are any conflicting authorities, or that the rule is doubtful. It is further stated that this rule is peculiar to devises to children and brothers and sisters, it being inferred, from the testator's not saying that the devise over is limited to children of the tenant for life who are living at the death of the testator, that he means to include, as in this case, all his grandchildren. Redfield on Wills, (Vol. 2, p. 10,) lays down the same principle, saying that, where no time is fixed for the payment of a legacy to the children of *A*, it is due at the death of the testator, and only the children then in existence can take; but where there is a bequest to take effect after the expiration of the intervening estate also created by the will, after-born children will be entitled where the gift is to children as a class. So on page 29 he says:—"But where bequests are

made to a class as the children of a person by name, it will be construed in general, and unless there is something in the case to indicate a different purpose, to include children by different marriages." The same rule is laid down in O'Hara on Wills, 289, and in the text books generally.

The decisions on the subject are very numerous and all to the same effect. A great number are referred to in the notes to Redfield and Jarman. We will cite only the following:— *Dingley* v. *Dingley*, 5 Mass., 535, 537; *Fosdick* v. *Fosdick*, 6 Allen, 41; *Hall v. Hall*, 123 Mass., 120; *Jenkins* v. *Freyer*, 4 Paige, 47, 53; *Kilpatrick* v. *Johnson*, 15 N. York, 322, 325.

There is nothing in this case to show that the testator had any different intent. It is found that the children by the first wife, or some of them, had lived with the testator or in his family, and that he was fond of them. It was not possible for the children of the second wife to have lived in his family, as they were not then born; but if they had been, there is no reason to doubt that he would have been equally fond of them. In *Bond's Appeal from Probate*, 31 Conn., 183, the court intimates, on page 191, that evidence to show the different affection a grandparent has for his different grandchildren is inadmissible to give a contruction to a clause of this kind. It may be said that at the time the will was made the son had a wife living who was beyond the age of child-bearing, and that the testator could not be supposed to have thought that she would die and that his son would marry again and have other children. It would seem most probable that he did not think anything about it, but intended the property to go to whatever children his son might have. If he had thought of such a possibility as his son marrying again and having more children, he would have been more likely to make provision for them, who would probably be very young and helpless, than for older children who were grown up and married and could take care of themselves. But it is immaterial whether the testator contemplated such a possibility or not, as he has used words fitted for such a state of things. *Critchett* v. *Taynton*, 1 Russ. & Mylne, 541.

CARPENTER, J. James M. Goodwin died March 30th, 1870. In his will he divided his estate into fifty equal parts. The sixth clause of the will reads as follows:—"I give and bequeath the use, income, interest and improvement of twenty of the above-named equal parts to my beloved son, James M. Goodwin, Jr., for and during the term of his natural life, and at his decease I direct the same to be divided equally among his children."

At that time James M. Goodwin, Jr., had three adult children, and his wife was still living. Subsequently she died; he married again, and had two children by his second wife. He is now dead, and the question reserved for this court is, whether the children by the second wife share in the legacy to his children.

The general rule in regard to a legacy to a class is, that those and those only who are embraced in the class at the time the legacy takes effect will be allowed to take. This is conceded. But it sometimes happens, as in the present case, that a legacy takes effect in point of right at one time and in point of enjoyment at a subsequent time. In such cases another rule, of nearly universal application, with hardly a dissenting authority, prevails; and that is, that all who are embraced in the class at the time of the distribution, or when the legacy takes effect in point of enjoyment, will take.

That rule applies to and determines this case. The fact that the legacy vested in the children of the first wife at the death of the testator is no obstacle to the application of the rule. It vested subject to diminution by the birth of children afterwards.

The Superior Court is advised that all the children of James M. Goodwin, Jr., including those by his second wife, are entitled to share in the legacy.

In this opinion the other judges concurred.

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## JAMES CARSON *vs.* THE CITY OF HARTFORD.

An ordinance passed by the common council of the city of Hartford under its charter, provides for the following mode of laying out streets: "A resolution of the council proposing to lay out the street is to be referred to the board of street commissioners, with publication in two daily newspapers of the city, and a notice to all objectors to file objections with the board; an investigation by the board, and a report approving or disapproving, with reasons; action by the council on the report, favorable or adverse; if favorable, an assessment of damages and benefits by the commissioners; a right of appeal from the assessment to the Court of Common Pleas; when these are determined a final report by the commissioners as to the entire cost of the proposed street; and a right on the part of the council to then adopt the lay-out or reject it. If it is adopted the land becomes appropriated to public use when paid for. In May 1874, a resolution that the common council "will lay out and establish" a street in part over land of the plaintiff, was introduced in the council and published as required by law and after publication was passed; the street commissioners met for the purpose of making assessments in June and made their report in September, 1874; appeals were taken by sundry parties which were not disposed of until August, 1877, when the commissioners made their final report, recommending, in view of the expense and of changes in the value of property, the abandonment of the improvement; and the council thereupon passed a resolution rescinding its former vote and discontinuing all proceedings in the matter. The plaintiff, in whose favor damages had been assessed by the commissioners, brought an action against the city, claiming that it was liable both at common law and under a statute which provides that when any highway duly laid out shall be legally discontinued before being opened or worked the owner of land that had been taken for it may recover his actual damages from the laying out of the same; alleging that he had contracted for the erection of a building on the land and was compelled to break the contract, that he was prevented from building upon or getting any revenue from the land for more than three years, and that he might have sold the land for $10,000, while by its depreciation he could not now sell it for over $5,000. Held—

1. That it was not a case of the discontinuance of a street that had been laid out, as all the proceedings were provisional and subject to the action of the council upon the final report of the commissioners, and that therefore there was no liability under the statute.
2. That there was no liability at common law, the council having the right to ascertain all the facts, and to act upon full consideration after such enquiry, and no unnecessary or inexcusable delay being alleged.
3. That the city could not be liable on the ground that it had deceived the plaintiff by its proceedings by leading him to suppose that the street had been or would be legally laid out, as all the proceedings were in accordance with law and could not be construed as a declaration that they had a legal effect which the law did not give them, or as a promise which they did not in law involve.

It seems however that the power given by the ordinance might be abused by an inexcusable delay in the proceedings of the city, and that in such a case the city might be compelled to indemnify a land-owner who had suffered loss thereby.

But the liability of the city could not depend solely upon the length of time between the reception and final rejection of the proposition to lay out the street.

ACTION ON THE CASE for an injury to the plaintiff's property by the institution and subsequent abandonment by the defendant city of proceedings for the laying out of a street; brought to the Superior Court in Hartford County.

The declaration contained four counts, under the first of which no claim was made. The second count was as follows:—

That on the 24th day of May, 1874, the plaintiff was, and for a long time previous thereto had been, the owner of a certain piece of land lying in the city of Hartford, [describing it,] and that the court of common council of the city of Hartford, on or about the 24th day of May, 1874, laid out a new street or highway over the same, and appraised the damages to the plaintiff by laying out of the same above the benefits, at the sum of eight thousand two hundred dollars; and that the plaintiff at the time of the laying out of said street had made preparations for erecting a building upon said lot, and said court of common council on or about the 1st day of October, 1877, discontinued said street. And the plaintiff says that said lot of land, at the time of the aforesaid vote of said common council, was worth the sum of twelve thousand dollars, and that the plaintiff, by the action of the city, was for more than three years deprived of the use of said land, was prevented from selling the same, and at the time said court of common council voted to discontinue and abandon all proceedings in reference to the laying out of said street said property had greatly depreciated in value; all of which is to his damage the sum of fifteen thousand dollars.

The third count was as follows:—

Also in a plea of the case under a certain statute, namely, section fifty-two of part first of chapter seven of title six-

teen of the General Statutes, whereupon the plaintiff declares and says that on the 24th day of May, 1874, he was, and for a long time prior thereto had been, the owner of the piece of land described in the foregoing count, and that afterwards, and whilst the plaintiff was the owner of said land, namely, on the 24th day of May, 1874, the court of common council of the city of Hartford duly laid out a certain new highway to be called West Street, as a substitute for the highway then existing in said city known by that name; that said new highway so laid out included in its limits nearly the whole of said piece of land, and so much thereof as to make the portion not so included wholly worthless; that afterwards, on or about the 1st day of June, 1874, said court of common council, by the board of street commissioners of said city, appraised the damages done the plaintiff, over and above the benefits received by him from the lay-out of said new highway, at the sum of eight thousand and two hundred dollars; and that afterwards, and whilst the plaintiff was the owner of said land, said court of common council on or about the 22d day of October, 1877, discontinued said new highway before it was opened and worked. And the plaintiff says that just before said new highway was laid out as aforesaid, he had contracted for a building to be immediately placed on said piece of land, and by reason of said lay-out was obliged to break said contract, whereby and by said action of the defendants he was damaged the sum of five hundred dollars; that by reason of said lay-out he was for the period of three and a half years prevented from building on his said land, and prevented from receiving any revenue or rent therefrom, whereby he was damaged to the amount of three thousand dollars; that at the time of said lay-out said land was of the value of ten thousand dollars, and the plaintiff might and would have sold the same had he not been prevented by said lay-out from so doing; that at the time of said discontinuance of said new highway the said land had depreciated in value fifty per cent., and the plaintiff, by reason of his having been prevented as aforesaid from selling said land, was damaged to the amount of five thousand dollars; and the

plaintiff says that the defendants are liable to pay the damage so done by said lay-out and discontinuance of said new highway, under and according to the statute aforesaid, all which is to the plaintiff's damage the sum of ten thousand dollars.

The fourth count, after setting out the same general facts, proceeded as follows:—

That the defendants, well knowing the premises and intending to injure and prejudice the plaintiff, did, on the 24th day of May, 1874, in violation of their legal duties, by their court of common council, pass a vote proposing to lay out a new highway as a substitute for a highway then existing, known as West Street, and included in said proposed lay-out nearly the whole of said piece of land of the plaintiff, and did deceitfully advise the plaintiff that said vote was a valid lay-out of said new highway, and did by its lawful agents forbid the plaintiff from completing the building he had so as aforesaid commenced on his said land, and did unlawfully endeavor to and did intimidate the plaintiff and prevent him from completing said building; and did further deceitfully, and in violation of their said duties, advise and notify the plaintiff and all other citizens of said city that said vote was a lawful lay-out, by causing an assessment of benefits conferred and appraisal of damages inflicted by the lay-out of said new highway to be made by their board of street commissioners, as if there had been a lawful lay-out, and by appearing by their attorney upon the trial of appeals from said assessment of betterments and appraisal of damages; and did wrongfully and unnecessarily prolong the proceedings on said vote until the 24th day of October, 1877, when by their court of common council said vote was rescinded. By means whereof the plaintiff, during the whole of the time from the passage of said vote until the same was rescinded as aforesaid, was prevented from building on his said land, and was deprived of the rents he otherwise would have received therefrom, to the amount of three thousand dollars, and was put to great expense in procuring counsel and witnesses upon the trial of said appeal from said assessment of betterments and

appraisal of damages, to wit, to the expense of five hundred dollars, and was during all of said period prevented from selling said piece of land by reason of the cloud upon his title and right to sell growing out of said unlawful and wrongful acts of the defendants; and by way of showing special damage in this regard the plaintiff says that at the time of said vote said land was readily salable for the sum of ten thousand dollars, and was worth ten thousand dollars, but that afterwards, and before said vote was rescinded, said land depreciated in value six thousand dollars, and became unsalable; all which is to the plaintiff's damage the sum of ten thousand dollars.

The defendants demurred to the declaration, and the case was reserved upon the demurrer for the advice of this court.

It was stipulated by the parties that the following statement of the proceedings of the city should be taken as being embodied in the declaration, and as a correct statement of all that had been done by the city in the matter.

The following resolution was presented in the court of common council on the 11th day of May, 1874, and was ordered to be published as required by the city ordinance, and having been duly published on the 13th and 14th of May, was passed by the council on the 24th of May, 1874.

"*Resolved*, That the court of common council of the city of Hartford will lay out, open and establish a new street or highway as a substitute for the present West street, as follows:—the east line thereof to commence at a point in the north line of Buckingham street, ten feet west of the dividing line between the lands owned by James Carson and Samuel Hanmer, thence running northerly in a direct line to Elm street, passing through a point on the face of the wall of the southwest corner of the brick house owned by William E. Butler; the west line to be fifty feet west of the above described east line and parallel thereto at all points; the building lines on both sides of said street to be coincident with the street lines; and the board of street commissioners are hereby instructed to take the necessary measures

for the laying out and establishment of said street and building lines in conformity to law."

The first meeting of the board of street commissioners for making assessments of damages and benefits was held on the 1st of June, 1874. The assessment was completed, and a certificate of it filed with the city clerk on the 2d of September, and was duly published on the 3d and 4th of September, 1874. From this assessment appeals were taken to the Court of Common Pleas, as by law provided, and William C. Crump, Esq., was appointed by that court a committee to hear the same. Mr. Crump made his report, sustaining the assessment in general, though reducing the benefits some ten per cent., and increasing the damages to one or two parties. The street commissioners then submitted their final report in the matter, (which included Mr. Crump's reassessment,) with the following recommendation, August 13th, 1877:

"From the report and statements as above recited it appears that the assessments for benefits are insufficient in the sum of $10,759.35, to pay the damages awarded, and such deficiency must be assumed and paid for from the city treasury if the improvement proposed is to be effected. It is the opinion of the board that the special benefits accruing therefrom to the city at large are not sufficient to warrant such assumption and payment; moreover the market value of real estate has become so much less since the assessment was made that both damages and benefits now seem excessive. The board therefore with great regret are obliged to recommend that the resolutions passed by the court of common council May 24th, 1874, for the laying out and establishment of new street and building lines of West street, be rescinded, and that all proceedings taken or pending in relation thereto be discontinued and abandoned, and to this end it respectfully submits the following resolution."

The resolution submitted was as follows:

"*Resolved*, That the resolution passed by this court May 24th, 1874, for the laying out and establishment of the new street and building lines of West street be rescinded, and

that all proceedings taken or pending in relation thereto are hereby discontinued and abandoned."

This resolution was passed by the common council on the 27th of October, 1877. *

* The city ordinance, relating to the laying out of streets, passed by the common council under authority of the city charter, is as follows:

SEC. 1. Whenever any vote or resolution shall be offered in either board of the court of common council, proposing to lay out, construct, or establish any new highway, street, public park, dyke, or walk; * * under any of the provisions of the city charter, or amendments thereto, such vote shall not be passed by either board until said court has caused said proposed vote or resolution and a certificate that the same is pending in said court, attested by the city clerk, to be published twice, at least, in two daily newspapers published in the city of Hartford, with a notice appended to such published vote or resolution to all persons to file a written statement of their objections, if any they have, with the board of street commissioners within ten days inclusive from the day of the first publication of said notice. * *

SEC 2. Every such proposed vote or resolution shall briefly and intelligibly state the general character and description of the proposed improvements, but need not contain definite measurements, courses, or termini. * *

SEC. 3. The court of common council shall, before further proceeding to pass or carry out said vote or resolution, refer the same to the board of street commissioners for their investigation, and said board shall forthwith inquire into the same, and make report thereon to the court of common council, either recommending or disapproving the passage of said vote or resolution, with their reasons therefor.

SEC. 4. At any time after the expiration of said ten days, and after the report of the commissioners thereon shall have been made and accepted, said court of common council may proceed to carry said vote or resolution into effect in manner as hereinafter provided, or otherwise act upon the same. And whenever said court shall order any of said proposed improvements, the entire expense of carrying out said improvement shall be assessed as betterments upon the persons or land specially benefited thereby, as hereinafter provided.

SEC. 5. [Provides for notice to be given by the street commissioners of their meeting to assess damages and benefits.]

SEC. 6. Whenever any vote or resolution described in the first section of this ordinance has been legally published, and it shall be necessary to take any land or any interest therein belonging to private owners or corporations for said contemplated improvement, the court of common council, before otherwise carrying said vote or resolution into effect, unless they obtain such land or interest by voluntary dedication from the owners thereof, shall refer the subject matter of the contemplated improvement to the board of street commissioners, and said board shall thereupon proceed in behalf of said court of common council, as follows Said board shall obtain from the city surveyor a map, drawing, or written description, clearly explaining the contemplated improvement, and showing the adjoining land and owners thereof, and shall then agree, if possible, with the owners of the land required for said improvement, upon the compensa-

*C. E. Perkins*, in support of the demurrer.

1. The plaintiff cannot recover under the provisions of the statute (Gen. Statutes p. 240, sec. 52), which provides that "when any highway, *duly laid out*, shall be *legally discontinued* before being opened or worked, the owner of land

tion to be made therefor, including the damages for establishing a building line or lines in case of opening a new street, and with those who will be specially benefited by said improvement, as to the payment of the entire amount to be assessed as betterments for said improvement, and the respective amounts or proportions thereof which each person so benefited will pay, and secure from each such owner or person proper written evidence of such agreement.

SEC. 7. If said board of street commissioners fail to agree with any owner of said land or interest therein, or with any of the parties who in their opinion should be assessed for any benefits on account of said proposed improvement, they shall, after the requisite notice given as hereinbefore provided, proceed to assess all betterments or benefits and to appraise all damages therefor to the persons liable to such betterments or entitled to such damages, including the damages for building lines in case of new streets or alteration of existing streets (except expense for construction, which shall be assessed as hereinafter provided), upon the proper parties or land specially benefited by said proposed improvement, in proportion to the benefit or damages to each respectively, and shall furnish a proper certificate thereof, signed by a majority of said board, to the city clerk, who shall forthwith cause the same to be published at least twice in two or more of the daily newspapers published in the city of Hartford, at least four days before the same shall be acted on by said court, and the original certificate shall be lodged on file in the city clerk's office, and the same shall be binding and conclusive upon all parties if said court order said improvement, unless appealed from and changed upon said appeal as by law provided; and when any appeal shall be taken, said board shall instruct and aid the city attorney in the matter of said appeal, until the same shall be determined.

SEC. 8. Whenever all persons who are entitled to compensation for damages, or liable for betterments on account of any of said improvements, shall agree upon the respective amounts to be received or paid by them therefor; * * said board shall immediately thereafter make their report to said court of common council, and, in cases where an appeal or appeals are taken as aforesaid, as soon as practicable after such proceedings are determined.

SEC. 9. Their report shall set forth the amount of damages agreed upon with each of said owners of land, and the amount of benefits agreed to be paid by the respective parties benefited by said improvement in cases of agreement with all parties; or, in case of assessment by said board, of the amount of damages appraised or betterments assessed upon each of the parties entitled to such damages or liable for such betterments, or upon an appeal the amount fixed by the court or judge hearing the same, so that all damages thus ascertained may become a part of the expense to be assessed, and all betterments may be thus assessed upon the persons or property specially benefited thereby. And said committee shall also embrace in their report a written descriptive survey

over which it is laid out may recover of the town or city his actual damages from laying it out." In *Kirtland* v. *City of Meriden*, 39 Conn., 107, the court says on page 114: "If we had no statute on the subject, the petitioners would be entitled to their damages, the discontinuance notwithstanding, for the discontinuance proceeds upon the idea that *a perfect legal highway had come into existence* by the operation of the proceedings laying it out." Now the real question in this case is whether the extension of West street was ever actually "laid out" and "discontinued." The city claims that no *lay-out* ever was made; all that was done was to take such necessary preliminary proceedings as would enable the common council to pass finally on the question whether, under all the circumstances of the case, the expense, the amount of assessments for damages, and the amount of those for betterments, it was on the whole best to lay out this extension or not. It clearly appears, from the city ordinance, that the method of laying out streets is as follows:—A vote is prepared *proposing* to lay out the street, this vote is published in the papers and referred to the street commissioners to examine and report their opinion to the

of the proposed improvement concerning which said proceedings have been had, and such a vote, resolution or ordinance as in their judgment ought to be passed in order to establish and carry out said improvement, fully describing therein the width, curve, boundaries, grade, and building lines, and such other particulars of said improvement as the case may require, and including an order for the payment, or deposit, at some place named therein, of the amount of damages appraised to the respective owners of any land or interest therein required for said improvement, and an order to the mayor to issue his warrant forthwith to collect all said assessments for said betterments assessed as aforesaid. Said court may alter said proposed vote, if it see cause, provided no change be made in the lines or location of the improvement which will require taking more or a greater interest in any land for said improvement than shown by said survey and report, and shall thereupon adopt such vote or resolution, with or without such alteration, or reject the same.

SEC. 10. Whenever any vote establishing any public improvement has been passed as aforesaid, and the proper compensation has been paid to or deposited for the owners of any land taken for such improvement, then said land shall be immediately open and subject to the public use on such conditions as said court may impose, and shall be, to all intents, appropriated therefor, unless the public work or improvement require the previous sanction of a city meeting, under the sixth section of the city charter, in which case such appropriation shall not take effect until such sanction has been obtained.

common council. After this report has been made the ordinance provides that the council "may proceed to carry said vote or resolution into effect in manner as hereinafter provided, or otherwise act upon the same." If it becomes necessary to take any land for these *contemplated* improvements, the matter shall be referred again to the street commissioners, who shall agree with the land owners upon, or shall assess, the damages and benefits, and these assessments shall be binding "*if said court order said improvement*," unless appealed from. If any parties are dissatisfied with these assessments they may appeal, and on such appeal any or all of the assessments may be altered or changed, or there may be an entire re-assessment. When all these matters have been finally settled, and it is ascertained how much it will cost to carry out the contemplated improvement, and whether such expense can be all assessed upon individuals, so that the city shall not have to pay any part of it, then the street commissioners are to make another report to the common council, stating all the facts, so that the council may have full information concerning it, and also what vote they advise to be passed relating to it in view of all the circumstances. The common council may thereupon pass such vote if they see fit, "*or reject the same.*" The tenth section then provides that if a "vote establishing any public improvement *has been passed as aforesaid*," and the compensation paid to owners of land taken, then such land "*shall be appropriated to the public use.*" Now from all this it clearly appears that it is the final vote passed in accordance with the last paragraph of the ninth section of the ordinance, and this only, which *lays out* the highway. It may be that in consequence of the action of the common council in taking these preliminary steps, and the delay caused by the appeals which were taken, the plaintiff has suffered some injury, but this is *damnum absque injuriâ*, and is clearly not such damage as the statute authorizes a recovery for. This view of the meaning of the expression "lay-out" is fully confirmed by the case of *Wolcott* v. *Pond*, 19 Conn., 601.

2. It is claimed that, apart from the statute, the city is

liable for the injury sustained by the plaintiff from not being able to use his land as he desired during the time these proceedings were pending, but there is no principle of law which will authorize such a recovery. The city was acting in the line of its duty. There was nothing illegal or improper in any of its actions. The charter, and ordinance passed in pursuance of it, were followed in all respects. It was made the duty of the city to inquire into the expediency and propriety of making the new highway, and if, in consequence of appeals which were taken, or for any other reason, that inquiry occupied more time than usual, the city is not responsible. These steps must necessarily take much time, and to hold that, whenever the city, after examining in a legal manner into the propriety of a proposed new highway, refuses to lay it out, it is liable for damages, would be an extraordinary doctrine. *Webster* v. *City of Chicago*, 83 Ill., 458.

3. The last count places the plaintiff's claim on an entirely different ground, or rather on several grounds.—1st. It alleges that the defendant "in violation of its legal duties" passed a vote *proposing* to lay out a new highway.—2d. That it "deceitfully" advised the plaintiff that this vote was a valid lay-out.—3d. That it did, by its lawful agents, forbid the plaintiff from completing a building on the land.—4th. That it did unlawfully "intimidate" the plaintiff, and prevent him from completing the building.—5th. That it did "deceitfully and in violation of its duties" advise and notify the plaintiff that the vote was a lawful lay-out, by causing the board of street commissioners to make an assessment of damages and benefits, and by appearing by attorney on the trial of appeals from them.—6th. That it wrongfully and unnecessarily prolonged the proceedings on the vote. We have already shown by the ordinance that the city had a right to pass just such votes as it did pass, and there is nothing in the case to show that the vote was an illegal one. The two allegations as to "advising" the plaintiff are to be taken together, and they both amount to this—that the city caused the street commissioners to assess damages, and had the city attorney attend the hearing of the appeals. But, as has

already been shown, this course was the one pointed out by the ordinance; it was the proper and legal course for the city to take. The allegation that this was done "deceitfully" does not aid the averment. Whether a city does a legal duty "deceitfully" or not makes no difference. It can hardly be intended to charge false representations. If it is, the count is seriously defective. Such a count needs an averment of a knowledge that the statement made was false. It must be an untrue statement of some fact, and not of the legality or illegality of proceedings; it must be averred that the defendant made the statement with intent to deceive, and that the plaintiff was deceived. It is alleged that the city "intimidated" the plaintiff, but it is not stated what was done to cause such fright on his part. How could a city "intimidate" any one unless by its votes. No agent of a municipal corporation could make it liable because he "intimidated" any one. Such an act would be outside of his legal duties, and it is well settled that agents of municipal corporations can only make their principals liable for acts clearly within the scope of their authority. Dillon on Munic. Corp., § 767. It is alleged that the city, "by its lawful agents, forbade the plaintiff from completing a building." But an action does not lie against a city because it, or its agents, forbade a person from doing anything, any more than against an individual. If he was foolish enough to stop merely because some agent of the city told him to, he cannot make the tax-payers pay him damages therefor. The last ground alleged is, that the city "wrongfully and unnecessarily prolonged the proceedings on the vote." But it is not alleged how the city prolonged the proceedings, and certainly in a count for such a cause of action enough should be stated to enable the court to see some ground for the allegation. But, apart from this, a city cannot be liable for damages merely because the proceedings are not carried on as fast as parties may desire, and it is believed that no authority can be found holding that a city is liable only for delay in the preliminary proceedings for determining whether the proposed improvement shall be carried out or not. The farthest that any case

has gone is to suggest that if a city delayed an unreasonable time in deciding after a final report was made, whether it would make the improvement or not, it might be liable. But in this case the final report was made August 13th, 1877, and the final vote was passed October 27th, 1877, which was surely not an unreasonable time.

*W. Hamersley* and *F. H. Parker*, with whom was *E. Goodman*, contra.

1. The second count sufficiently states a cause of action against the defendant. It alleges in substance that the plaintiff was the owner, on May 24th, 1874, of the land therein described; that on that day the common council of the city laid out a new street over the land in question; that the plaintiff's damages were assessed; that the plaintiff had made preparations to erect a building upon his lot; that the common council in October, 1877, discontinued the street; and that the plaintiff, by the action of the city in the matter, was deprived of the use of his lot for more than three years, and was prevented from selling it, and that it in the meantime had greatly depreciated in value. As far as this count is concerned it is immaterial whether the action of the city amounted to a lay-out or not. It is alleged that the action of the city caused the damage to the plaintiff. Is the city liable for this damage? 1st. The city in depriving the plaintiff of the use of his land and preventing him from selling the same for more than three years, took his land for public purposes during that time. It invaded his right of property, "which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution save only by the laws of the land." 1 Black. Com., 138; 2 Kent Com., 320, 326; *Wynehamer* v. *The People*, 13 N. York, 378, 433. Supposing that there was a lay-out of the highway, the city could compel the plaintiff to part with his property at a fixed price, to wit, the assessed damages. It had acquired to this extent a right in the lot. But could this right of the city in and over this property subsist without diminution of the plaintiff's rights therein? Clearly

not. The interest of the city must have been deducted from the entire property previously belonging to the plaintiff, and his property must have been taken or diminished to the extent of the interest acquired by the city. If there was not a valid lay-out in fact, still the apparent interest of the city and its apparent control over the property was the same, and there was the same cloud upon the plaintiff's title. His property rights were just as effectually invaded. *Eaton* v. *Boston, Concord & Montreal R. R. Co.*, 51 N. Hamp., 504. —2d. The authorities hold that any interference of the public with private property which deprives the owner of his exclusive right to use and dispose of the same is a taking of private property for public uses within the meaning of the constitution of the United States, and of this State, requiring a just compensation therefor. *People* v. *Kerr*, 37 Barb., 357, 399; *Glover* v. *Powell*, 2 Stockt., 211; *Barron* v. *Mayor, &c., of Baltimore*, 2 Am. Jurist, 203, 207, 212; *Pumpelly* v. *Green Bay Co.*, 13 Wall., 166, 179; *Hooker* v. *N. Haven & Northampton Co.*, 14 Conn., 146, 151; *Gardiner* v. *Trustees of Newburgh*, 2 John. Ch., 162; *Eaton* v. *Boston, C. & M. R. R. Co.*, 51 N. Hamp., 516.—3d. It has been expressly decided that where a city has laid out a street or taken such steps in the premises as have temporarily deprived a property owner of the use and disposal of his property, and then discontinued proceedings or delayed them unreasonably, it is liable for damages. *McLaughlin* v. *Second Municipality*, 5 Louis. An., 504; *Hullen* v. *Second Municipality*, 11 Robinson, 97; *Moale* v. *Mayor, &c., of Baltimore*, 5 Maryl., 314, 321; *Graff* v. *Mayor, &c., of Baltimore*, 10 id., 544, 554.

2. The third count declares upon the statute, which provides that where a street is discontinued before being opened and worked, the city shall not be liable for the assessed damages, but only for the actual damages the property owner has suffered by reason of the lay-out of the street. Gen. Stat., p. 240, sec. 52; see also edition of 1866, p. 501, sec. 38. It will be conceded that this count is good if the acts of the city were a valid lay-out. The plaintiff insists that such is their legal effect.—1st. The resolution defines the

limits of the new street and building lines thereon, and instructs the street commissioners to take the necessary measures to carry it into effect in conformity to law. This resolution was duly published and passed. The city charter authorizes the common council to lay out streets; its authority for that purpose is exclusive; its action is final, and is subject to the ratification of no other body; and no other or further act on the part of the council was required by the charter in order to complete the lay-out. 6 Special Acts, 314, 743.—2d. In pursuance of the resolution the street commissioners assessed the damages and benefits, and filed their certificate of assessment, which was duly published, and, thereafter, appeals taken from their assessments were determined as by law provided. Now this assessment under the city charter cannot be made until a street has been duly laid out. The lay-out must precede the assessment. 6 Special Acts, 315. And where a city in the exercise of the power of eminent domain, takes private property for public uses, every provision of its charter regulating such proceedings must be strictly complied with. *Nichols* v. *Bridgeport*, 23 Conn., 189, 208. Nor can the city escape liability by relying on any of its own ordinances. The provisions of its charter cannot be modified or varied thereby. *Thompson* v. *Lessee of Carroll*, 22 How., 422, 435; *State* v. *Welch*, 36 Conn., 215, 217.—3d. The street commissioners in their final report, and the common council in its resolution of discontinuance, recognize the fact that the street had been laid out, and, indeed, distinctly affirm it. Why rescind the resolution of lay-out, if it did not operate as a lay-out? Why use the technical word "discontinue," if there was no street to discontinue?—4th. The city, by its common council and its authorized agents, treated the resolution of May 24th, 1874, as a valid lay-out of a street for more than three years; and so held it out to the public and to the plaintiff. It caused the plaintiff by its acts and representations so to believe, and induced him to act upon that belief, so as to injuriously affect his previous position. He has been greatly damaged thereby, and the city is estopped from denying that such reso-

lution was a valid lay-out. *Roe* v. *Jerome*, 18 Conn., 138; *East Haddam Bank* v. *Shailer*, 20 id., 18; *Preston* v. *Mann*, 25 id., 118.

3. The fourth count alleges in substance that the defendant, intending to injure the plaintiff, passed the vote of May 24th, 1874; deceitfully advised the plaintiff that the vote was a valid lay-out; forbade the plaintiff to complete his building; intimidated him from so doing; proceeded in all respects as if the vote was a valid lay-out; and wrongfully prolonged the proceedings until October, 1877, when the vote was rescinded; and that by reason of these wrongful acts the plaintiff was deprived of the use of his property and suffered other damage as therein fully stated. In other words, the city abused the high governmental powers conferred upon it by its charter to the injury of the plaintiff. Is the tort declared upon of such a character that the wrongdoers must respond in damages? If not, the law permits a municipal corporation to inflict great damage upon a citizen and leaves him without redress. We assert that the law works no such injustice.—1st. It is well settled that an action of tort can be maintained against a municipal corporation in a variety of cases. Thus it is responsible for misfeasance in the performance of the public duties resting upon it. *Mootry* v. *Town of Danbury*, 45 Conn., 550, 558; *Rowe* v. *Portsmouth*, 56 N. Hamp., 291; *Inman* v. *Tripp*, 11 R. Isl., 520; *Ashley* v. *Port Huron*, 35 Mich., 296, 301; *Allentown* v. *Kramer*, 73 Penn. St., 400, 409; *Lee* v. *Village of Sandy Hill*, 40 N. York, 442, 452.—2d. It is also held that cities cannot interfere with private property except as the right is given by statute; and for wanton and unnecessary damages in such cases they are responsible in tort. *Mitchell* v. *City of Rockland*, 45 Maine, 496, 504; *Plum* v. *Morris Canal & Banking Co.*, 2 Stockt., 256, 260; *Barron* v. *Mayor &c. of Baltimore*, 2 Am. Jurist, 203, 206.—3d. A city is liable in tort for the damage resulting to a private person from illegal and void acts which are within the scope of its general powers. *Howell* v. *City of Buffalo*, 15 N. York, 512; *Walling* v. *Mayor &c. of Shreveport*, 5 Louis. An., 660; *Soulard* v. *City*

*of St. Louis*, 36 Misso., 546, 552.—4th. It is elementary law that where one wrongfully, by misconduct, or through fraud or deceit, injures another, an action on the case will lie. 1 Hillard on Torts, 84. Misconduct which deprives one of the use and income of his property will subject the wrong-doer to an action on the case. *Stetson* v. *Faxon*, 19 Pick., 147; *Barron* v. *Mayor &c. of Baltimore*, supra. And generally a city is liable in an action on the case where acts are done by its authority, which would warrant a like action against an individual. *Thayer* v. *City of Boston*, 19 Pick., 511, 516; *Soulard* v. *City of St. Louis*, supra. In this case the wrong complained of is an oppressive, unlawful and tyrannical exercise of the delegated power of eminent domain, the power to appropriate compulsorily private property for public uses; a power in derogation of that right of property which the law so jealously guards. Can it be that the law provides redress for torts committed by municipal corporations in the performance of their more common duties, and grants them immunity for all wrongs perpetrated in the exercise of this, the highest power of these local sovereignties?

GRANGER, J. In the exercise of powers conferred by charter the common council of the city of Hartford passed an ordinance specifying the manner of laying out streets. It is a sufficiently detailed statement of this to say, that it requires the reference of a resolution proposing to lay out a street to the street commissioners before any vote is taken thereon; a publication in newspapers with notice to all objectors to file written reasons with them; and an investigation by and a report from them, approving or disapproving, with reasons in writing. Upon the reception of this report the council may reject the resolution or proceed in the following manner:—The commissioners shall assess damages to the owners of land taken; benefits upon owners of land benefited to the extent of the cost of the street; from these assessments appeals may be taken to the Court of Common Pleas; when these are determined the commissioners are to report to the council the entire cost of the proposed street;

the latter may then pass or reject the resolution; if passed the land is appropriated to public use when it is paid for.

In May, 1874, a resolution was presented in the council proposing so lay a street over land of the plaintiff, and was referred to the commissioners. In June, 1874, they allowed damages to him and assessed benefits upon others; appeals were taken to the court, and were decided in 1877; in August of that year the commissioners made their final report as follows:—"From the report and statements above recited it appears that the assessments for benefits are insufficient in the sum of $10,759.35, to pay damages as awarded, and such deficiency must be assumed and paid for from the city treasury if the improvement proposed is to be effected. It is the opinion of the board that the special benefits accruing therefrom to the city at large are not sufficient to warrant such assumption and payment. Moreover, the market value of real estate has become so much less since the assessment was made that both damages and benefits now seem excessive. The board therefore with great regret are obliged to recommend that the resolutions, as passed by the court of common council May 24th, 1874, for the laying out and establishment of new streets and building lines of West street be rescinded; and that all proceedings taken or pending in relation thereto be discontinued and abandoned. And to this end it respectfully submits the following resolution:—*Resolved*, that the resolutions, as passed by this court May 24th, 1874, for the laying out and establishment of the new street and building lines of West street be rescinded, and that all proceedings taken or pending in relation thereto are hereby discontinued and abandoned."

The resolution thus recommended by the board was passed by the common council on the 29th of October, 1877.

In September, 1878, the plaintiff instituted this action for damages. The declaration is in four counts; the defendants interposed a demurrer. The case is reserved for the advice of this court.

Nothing is claimed under the first count. Passing the second, the allegations in the third are, that in May, 1874,

the council laid out a highway over land belonging to the plaintiff; that in June, 1874, it appraised damages to him therefor to the amount of $8,200; that in October, 1877, it discontinued the highway before it had been opened or worked; that previous to the first date he had contracted for the erection of a building on the land, which contract the lay-out of the way compelled him to break, to his damage the sum of $500; that he was prevented from building upon, or deriving any revenue from the land, for the period of more than three years, to his damage the sum of $3,000; that he might and would have sold the same for $10,000 but for the lay-out; that at the last-named date he could sell the same for no more than $5,000, to his damage the sum of $5,000; that the defendants are liable to pay the damages consequent upon the lay-out and the discontinuance, by virtue of the statute which provides that "when any highway duly laid out has been or shall be legally discontinued before being opened and worked, no action shall be brought to recover damages assessed therefor, but the owner of lands over which it is laid out may recover of the town, city or borough his actual damages from laying it out." Revision of 1875, p. 240, sec. 52.

By charter the council is vested with exclusive power to lay out streets and to pass ordinances limiting itself as to the manner in which that power shall be exercised. The ordinance in existence in 1874 was therefore the then charter method—the law of this lay-out. The scope and effect of each act of the council in reference to it is to be determined in the light of the whole ordinance; upon considerations of order as to time, and of the relations which one act bears to every other concerning the same matter. No one vote includes or expresses the action of the council.

The ordinance is so framed that the first two acts must remain tentative and provisional until a third shall make them component parts of one decisive and effective vote; so framed that no step taken anterior to the determination of all questions as to assessments, shall lay out a street; the council reserved to itself an opportunity for the exercise of

judgment upon knowledge. The opening of a city street hinges upon the proper adjustment of benefits to land improved to damages for land taken. By entertaining the proposition provisionally assessments could be made and appeals have a standing in court; by judicial action these would be unalterably determined; there would be knowledge as to the cost of the proposed way and as to the persons who would be compelled to pay it; and with this knowledge would come the first opportunity for the exercise of judgment; and in the ninth section of the ordinance, speaking of the time when there would be action upon full knowledge, the council expressly reserves to itself the right then to reject the proposition. This right it exercised on October 27th, 1877; therefore no way was laid out, and the statute affords no relief to the plaintiff.

In the second count the allegations are—that in May, 1874, the council laid out a street over the plaintiff's land, and appraised damages to him therefor to the amount of $8,200; that he had made preparations for the erection of a building upon his lot; that the council discontinued the street in October, 1877; that at the first-named date the land was worth $12,000; that by the action of the council he was deprived of the use of, and was prevented from selling it, for the period of three years; and that during that time it greatly depreciated in value—to his damage the sum of $15,000.

Although the allegation is that more than three years intervened between the first and final acts of the council, no blame for the delay is imputed. As we have said that no way was laid out, the count must stand upon the proposition that if the council considers, for any period however brief, the matter of laying out a way, and a provisional award of damages is made to an owner of land if it shall be taken, and he is delayed thereby in the sale, or omits to make profit by the use of it, the city is responsible in damages.

But, the council considered only—did not take. By considering no new relation between the city and the land came into being; for at all times the land of the plaintiff and of

every other owner is exposed to the right of the public to take it for public use. By considering, the taking became more probable than before; but it remained only a possibility; his exclusive possession was not interrupted; the power to sell was not taken from him; his use was made less profitable only by his apprehension lest a possibility might ripen into a certainty. Presumably the award of damages included the loss resulting from his breach of contract, as well as the value of the land; doubtless the award would prevent a sale for more than the valuation; but the prevention of a sale for more than a fair price constitutes no invasion of the rights of property for which the law furnishes any redress. Moreover, as with notice to the plaintiff of each act of the council there went notice that it was considering merely, and had not determined, if he has suffered loss by non-use it must be charged to his mistake in forecasting its action.

This count is supported by the citation of authorities, some of which we mention. *Eaton* v. *Boston, Concord & Montreal R. R. Co.*, 51 N. Hamp., 504—here the defendant removed a natural barrier, and as the result water carried sand and stones upon the plaintiff's land; *Glover* v. *Powell*, 2 Stockton, 211—here the defendant removed a dam; *Barron* v. *Mayor &c. of Baltimore*, 2 Am. Jurist, 203—the defendant turned a stream of water, and as the result sand and stones were deposited in front of the plaintiff's wharf, and vessels were obstructed in gaining access thereto; *Pumpelly* v. *Green Bay Co.*, 13 Wall., 166—the defendant flowed the plaintiff's land without compensation; *Hooker* v. *New Haven & Northampton Co.*, 14 Conn., 146—a like injury; *Gardiner* v. *Trustees of Newburgh*, 2 John. Ch., 162—an entry upon land without compensation for the purpose of building reservoirs. But, practically, each of these acts was a taking of land, was the actual expulsion and exclusion of the owner from it by force. *Green* v. *Button*, 2 Cromp., Mees. & Ros., 707—here the defendant by a false assertion to the vendor of a quantity of lumber, of a right to detain it from the possession of the vendee, the plaintiff, prevented the delivery thereof to him; *Wynehamer* v. *The People*, 13 N. York, 378

—declaring the law which forbids both the keeping anywhere, for any purpose, and the sale of intoxicating liquors, owned at the time when the same went into operation, to be an invasion of the rights of property. This last was in effect the destruction of property. These cases do not determine the law of an instance of a contemplated but unaccomplished taking for public use.

In the fourth count the allegations are that the defendants are an incorporated city, vested with powers granted and subject to duties imposed by their charter and the laws of the state; that in May, 1874, the plaintiff was the owner therein of a piece of land valuable only for building, and which could yield no revenue except from rents of buildings thereon; that previous to that date he had entered into a contract for the completing of an unfinished building thereon; that on that date the defendants, intending to injure and prejudice him, did, in violation of their legal duties, pass a vote proposing to lay out a highway which should include most of his land; did deceitfully advise him that the vote was a valid lay-out; did by their lawful agents forbid him from completing the building which he had commenced; did unlawfully endeavor to and did intimidate him and prevent him from completing it; did further deceitfully and in violation of their duties advise and notify him and all other citizens that the vote was a lawful lay-out, by making an assessment of benefits conferred and an appraisal of damages inflicted thereby, as if there had been a lawful lay-out; did appear by attorney upon the trial of appeals from said asessments; did wrongfully and unnecessarily prolong the proceedings upon said vote until October 24th, 1877, and did upon the last-named day rescind the vote; that during the period between these dates he was prevented from building upon the land; was deprived of rents therefrom which he otherwise would have received, was put to great expense for witnesses and counsel upon the trial of said appeals, was prevented during said period from selling the land by reason of the cloud upon his title and right to sell resulting from the unlawful acts of the defendants, and that at the first date

the land could have been sold for $10,000, and at the last could not be sold for more than $4,000; all of which he avers is to his damage the sum of $10,000.

But the vote by the council, the assessment by the commissioners, and the appearance in court by the attorney, were acts within legal permission. No one of them, nor all combined, constituted a declaration to the plaintiff that a street had been laid out, nor a promise that it would be. They contained no false statement as to the past; none at all as to the future. The "deception" was self-imposed by his erroneous inference of the future from the past. The "intimidation" had this extent, that he was made fearful lest he should not so read the future as to make the greatest profit from his land; but this is not the fear for which the law gives damages. And the allegation that the city "did wrongfully and unnecessarily prolong the proceedings," is too vague and general to support a judgment. It points neither to an act, nor to an omission to act, for the purpose of delay, and is without suggestion as to whether the obstruction was for a day or a year. Moreover, it calls upon us to say that, of legal necessity, the intervention of three and one-half years between the first and last votes would of itself and under all circumstances subject the city to damages. This we cannot do. But, while preserving to the council the privilege of considering after knowledge, we do not say that it cannot abuse this privilege; nor that as a consequence of such abuse the city may not be compelled to indemnify land-owners who have suffered loss by inexcusable delay.

This count is supported by the citation of authorities, among which are the following: *Mootry* v. *Town of Danbury*, 45 Conn., 550—a case of injury resulting from the negligent construction of a bridge; *Rowe* v. *Portsmouth*, 56 N. Hamp., 291—one of injury from negligence in allowing a sewer to be obstructed; *Inman* v. *Tripp*, 11 R. Isl., 520—injury from water turned upon the plaintiff's land by change of grade of the street; *Ashley* v. *City of Port Huron*, 35 Mich., 296—injury from a defective sewer; *Allentown* v. *Kramer*, 73 Penn. St., 406—injury from water from an obstructed gutter;

*Lee* v. *Village of Sandy Hill*, 40 N. York, 442—trespass upon land and removal of fence; *Mitchell* v. *City of Rockland*, 45 Maine, 496—where the officers of a town took possession of a portion of a vessel belonging to the plaintiff and converted it into a hospital; *Plum* v. *Morris Canal & Banking Co.*, 2 Stockt., 256—where the defendants proposed to raise the highway in front of plaintiff's premises; *Howell* v. *City of Buffalo*, 15 N. York, 512—where the city enforced payment of a void assessment; *Walling* v. *Mayor &c. of Shreveport*, 5 Louis. Ann., 660—entry upon land and cutting down trees without right; *Soulard* v. *City of St. Louis*, 36 Misso., 546—entry upon land without compensation; *Stetson* v. *Faxon*, 19 Pick., 147—obscuring the plaintiff's building by projecting the adjoining one into the street; *Thayer* v. *City of Boston*, 19 Pick., 511—obstructing access to plaintiff's premises by building a stall in front of them.

These again are trespasses, and, as we have said, furnish no precedent for making good to a land-owner profits which he omitted to make because of his belief that the city would take his land.

In *McLaughlin* v. *Second Municipality*, 5 Louis. Ann., 504, the court in affirming a judgment for the plaintiff says:—"We cannot conceive any reasonable excuse for the municipality to commence such a proceeding twice, and finally abandon it, after keeping the suffering proprietor in suspense for more than eighteen months, and have no hesitation in pronouncing that it is legal and equitable that they should pay the actual damages suffered." In *Graff* v. *Mayor &c. of Baltimore*, 10 Maryland, 544, the city abandoned a project after assessments were confirmed by a court against its objections; the court said that the city might be liable in some form of action for loss sustained by a land-owner by reason of its action; in *Hullen* v. *Second Municipality*, 11 Robinson, 97, the city abandoned proceedings after an assessment to a land-owner, but took possession of his land; the court said he could not recover the assessment price as upon an implied sale, but only damages for taking possession. In *Norris* v. *Mayor &c. of Baltimore*, 44 Maryland, 598, the court says

that "when the assessments have all been finally settled the city can then fairly exercise its election to abandon the enterprise or pay the assessments and proceed with the work. For losses to owners occasioned by delay *subsequently occurring* through failure of the city authorities thus *to abandon or pay*, it is, we think, just and right the city should be held liable, and this we understand to be the effect of the decision in *Graff's case.*"

But, if it is the purport of any one of these decisions that the liability of the city depends solely upon the space of time between the reception and rejection of a proposition, we cannot accept it as the law of this case.

We advise judgment for the defendant.

In this opinion the other judges concurred.

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## Henry Hamlin *vs.* The State.

The rules with regard to petitions for new trials for newly-discovered evidence in civil cases, apply to such petitions in criminal cases.

And they apply equally to capital cases; although, as an error here would be remediless, the court will be more inclined to give the petitioner the benefit of any doubt that may be raised in their minds by the new evidence.

It is one of these rules that the evidence must be sufficient to change the result if a new trial should be had.

The petitioner, a convict in the state prison, with a fellow-convict, made a plan of escape, by the connivance of one of the guard, but arming themselves with pistols to kill the night watchman if necessary. In the attempt an encounter with the night watchman took place and he was shot by one of them. On the trial the evidence was that the petitioner fired the shot, and he was found guilty of murder in the first degree. Held that newly-discovered evidence that the other convict fired the shot could not change the result upon another trial, as the prisoner in aiding and abetting was equally guilty.

And held that evidence that the original plan was to escape by the connivance of one of the guard and without violence, could not help the petitioner, inasmuch as it appeared that they both armed themselves for any encounter that might become necessary, and that he was with his fellow-convict in all the violence that followed.

After the prisoners left their cells they climbed to the top of the block of cells,

where they remained over two hours, waiting for an opportunity to attack the night watchman. During this time they both drank liquor to nerve themselves for the encounter. The petitioner now offered proof that he was so intoxicated at the time of the murder that he was not able to have a premeditated purpose and so could not be guilty of murder in the first degree. Whether the petitioner could in the circumstances have the benefit of that fact: *Quære.* The court was satisfied here that he was not so intoxicated as not to understand fully what he was doing, and held that that degree of intoxication could not affect the case.

Where on the trial the dying declarations of the murdered man had been given in evidence against the petitioner, and upon the petition for a new trial newly-discovered evidence was claimed to the effect that when the dying man made the declarations he dropped a word from which the witness inferred that he had some hope of living, it was held that this being a mere inference of the witness, not in itself evidence, and it not being stated what was said, the court could not regard it as entitled to consideration.

PETITION for a new trial upon an indictment for murder; brought to the Superior Court in Hartford County. The petitioner had been convicted upon the trial of murder in the first degree, and now sought a new trial upon the ground of newly-discovered evidence. The facts were found by the court and the case reserved for advice. The points decided by this court will be sufficiently understood without a statement of the facts, which would occupy much space.

*R. Welles* and *T. E. Steele*, for the petitioner.

*W. Hamersley*, State's Attorney, for the State.

PARK, C. J. The law on the subject of new trials for newly-discovered evidence, is well settled in this state by a long and uniform course of judicial decisions from our earliest reports down to the present time. The following are some of the leading cases on the subject. *Noyes* v. *Huntington*, Kirby, 282; *Lester* v. *The State*, 11 Conn., 418; *Norwich & Worcester R. R. Co.* v. *Cahill*, 18 Conn., 493; *Waller* v. *Graves*, 20 Conn., 310; *Parsons* v. *Platt*, 37 Conn., 563. These cases hold that to entitle a party to another trial on the ground of newly-discovered evidence, it must be made to appear that the evidence relied upon for such purpose was in fact newly-discovered; that it would be material to the issue on another trial; that it could not have been discovered and

produced on the former trial by the exercise of due diligence; that it must not be cumulative; and that it must be sufficient to produce a different result on another trial, should the cause be determined solely upon the law and the evidence.

The cases to which we have referred were generally civil ones, but the same rule applies to criminal cases. *Lester* v. *The State*, 11 Conn., 418.

It is true that, in the case of *Andersen* v. *The State*, 43 Conn., 514, the court say that the rules which govern in civil cases in relation to petitions for new trials for newly-discovered evidence, ought not to be applied in all their rigor to criminal cases where life is in question; still the court did not intend in that case to make any substantial departure from those rules. All that was intended by the language used was, that in cases of such serious character, and where an error would be so remediless, the court would be more inclined to give a condemned man the benefit of a doubt that might be raised in their minds by the newly-discovered evidence.

In the case before us we think it is clear that the evidence, claimed to have been newly-discovered, ought not to change the result upon a new trial, and would not do so if the case should be decided upon the law and the evidence.

It is said that the new evidence proves that Allen, the accomplice with the petitioner in the murder of Shipman, was the originator of the plan to escape, that he was the leader in the whole affair, that he procured the pistols and other instruments that were used; and, finally, that he was the one who actually committed the homicide.

All this may be true; but it is likewise true that the petitioner was present, aiding and abetting the whole undertaking; and as such aider and abettor he is equally guilty in a legal sense with the principal perpetrator, for the law takes no cognizance of the difference in respect to moral guilt between different persons who are engaged in the commission of a common crime, but lays the sin of the whole at the door of each one who participates in the act, whether he is the principal perpetrator, or is only aiding and abetting the com-

mission of the deed. Gen. Statutes, p. 545, sec. 3. And many common law cases might be cited in support of this rule.

All the evidence in the case tends to show that some time previous to the murder of Shipman the petitioner and Allen entered into a conspiracy to escape from the state prison at all hazards. They doubtless intended to avoid the necessity of taking human life, if the end they had in view could be accomplished without it; but if it should become necessary to take life, they resolved to take it rather than be thwarted in their purpose. To this end they armed themselves with deadly weapons, and made other preparations to carry their intent into execution. They knew the undertaking was a desperate one, especially as an armed watchman patrolled the prison during the night. And although it was their original plan to bribe one of the watchmen to allow them to escape early in the evening through one of the windows of the prison, still this window was strongly protected by iron bars, and their success depended upon their ability to remove one or more of the bars without making a noise that would attract the attention of other watchmen who were near at hand; and they knew that if this mode of escape should fail, their only remaining chance would be in a successful encounter with the night watchman of the prison. They provided for this contingency, and were prepared for the alternative when the plan failed, as it did. Under such circumstances the case should be considered precisely as it would have been if they had known at the outset that their attempt to escape would bring them face to face with the night watchman. But this is not all. When Shipman entered upon his duties at nine o'clock in the evening, instead of abandoning the undertaking, they made their way to the top of the block of cells, and there waited two hours or more for a favorable opportunity to commence the attack upon him. During this delay they had time enough to reflect, and to consider well the character of the transaction in which they were about to engage. But time and reflection produced no change in their purpose. They knew that Shipman was armed, that he was

a brave and determined man, and that he would perform his duty to the last extremity; but inasmuch as he stood between them and their escape, they were determined to effect it at any cost. They made the onset and Shipman was killed; and it matters but little by which of them he fell. They were both guilty of murder, wilfully, deliberately, and premeditately committed. Hence the new evidence, which tends to show that Allen was the originator of the plan to escape and was the principal perpetrator of the homicide, does not alter the character of the petitioner's participation in the deed.

It is further insisted that the new evidence tends to show that not only the original plan to escape, but the only plan in which the petitioner joined, contemplated an escape by the connivance of one of the prison guard and wholly without violence, and that the killing of Shipman by Allen was a departure from the arranged plan for which the petitioner ought not to be held responsible. But we think there clearly is no foundation for this claim. The petitioner entered upon the enterprise armed with a loaded revolver, and this is enough to refute the claim. But this is not all. When Shipman appeared a desperate encounter with him was inevitable. The petitioner knew this, and knew it for more than two hours before they began it. And when the contest commenced, the petitioner engaged in it with his revolver in his hand, and pursued Shipman, after repeated shots had been fired. Surely there is no foundation for this claim.

It is further claimed that the newly-discovered evidence of the Rev. Mr. Wooding would render the dying declarations of Shipman, which were received in evidence on the trial, inadmissible. This evidence is stated as follows:—"When in the presence of Shipman, after he was taken to his house, Shipman dropped a word from which I drew the conclusion that Shipman had some hope of recovery."

It will be observed that it is not stated what the remark was that Shipman made from which the inference was drawn. Nothing is stated but the inference drawn by the witness, which would not be evidence should another trial be granted, and we can not regard it as entitled to consideration here.

Again, it is claimed that the newly-discovered evidence of Allen shows that the petitioner was so far intoxicated at the time of the homicide that he was incapable of forming a willful, deliberate, and premeditated purpose, and consequently was incapable of committing the crime of murder in the first degree.

This question was fully gone into on the trial of the petitioner, and it was then considered that he was capable of committing the crime beyond all reasonable doubt, and the question is, whether the testimony of Allen, an accomplice in the crime, is sufficient to create, in connection with the other evidence, a reasonable doubt on the subject. We fully assent to all the law that has been cited by the counsel of the petitioner on this question, and we shall consider it merely as one of fact. *State* v. *Johnson*, 40 Conn., 136, and 41 Conn., 584. It will be observed that the newly-discovered testimony of Allen confines the drinking of spirituous liquors by the petitioner to the time when the petitioner and Allen were waiting on the top of the block of cells for a favorable opportunity for their attack upon Shipman. All their plans had previously been made; they had armed themselves to carry them into execution even by the taking of human life if necessary, and their plans had already been in part carried out before any resort was had to intoxicating liquors. It might well be questioned if intoxication was resorted to under these circumstances simply for the purpose of nerving themselves up to the desperate struggle that seemed inevitable if they would succeed, whether it would be of any avail as a matter of mitigation; but we choose to place our decision of the question upon another ground. We are entirely satisfied that the petitioner was so far sober that he fully understood the character of the transaction in which he was engaged. In the first place, these parties must have been under great excitement while waiting on the top of the block of cells, which would have a powerful tendency to prevent the effect of intoxicating liquors upon them. In the next place the petitioner himself makes no claim that he was intoxicated, or to any extent deprived of his self-possession,

but on the contrary he seemed to realize the importance of keeping sober, for he tried to prevent Allen from drinking too much, and gave him the bottle of liquor only to prevent discovery, when he said that he should cough unless he had it.

But it seems to us that the acts of the petitioner furnish conclusive evidence that his mental faculties were capable of fully comprehending the character of the transaction in which he was engaged, for on the instant that Shipman discovered them, he leaped down one tier of cells to the corridor of the fourth tier, and after running along that tier to get in advance of Shipman, he swung himself from that tier down to the third tier of cells, which was a hazardous feat that few could accomplish.

We have refrained from considering the other requisites for a new trial on the ground of newly-discovered evidence, choosing, in a case of this importance, to put our decision on the ground that a new trial would do the petitioner no good; for it is our duty to treat it as a case to be decided upon the law and the evidence.

We advise the Superior Court to deny the petition.

In this opinion the other judges concurred.

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SIMEON CURTIS *vs.* THE MUTUAL BENEFIT LIFE COMPANY.

A certificate of membership in a mutual life insurance company provided that, on the death of the wife of the plaintiff, an assessment should be made upon the policy-holders in the company for as many dollars as there were policy-holders, and that the sum collected, not exceeding one thousand dollars, should be paid to him within ninety days from the filing of the proof of death. Held that a declaration containing no allegation of a neglect to make the assessment provided for, and assigning no breach except of a promise to pay one thousand dollars, was fatally defective, and that the defect was not cured by the verdict.

ASSUMPSIT upon a certificate of membership in a mutual life insurance company; brought to the Superior Court in Hart-

ford County, and tried to the jury before *Beardsley, J.* The jury having returned a verdict for the plaintiff the defendants filed a motion in arrest of judgment for the insufficiency of the declaration, which being overruled they brought the record before this court by a motion in error. The case is sufficiently stated in the opinion.

*G. G. Sill*, for the plaintiffs in error.

*C. E. Perkins* and *S. P. Newell*, for the defendant in error.

Loomis, J. The declaration in this case consists of a single count, upon a certificate of membership commonly called a policy of insurance, issued by the defendants, in which the latter agreed that "upon the death of Esther M. Curtis," (the wife of the plaintiff), "she having conformed to all the conditions thereof, and on satisfactory proof of her death being filed with the secretary of the said company, an assessment for as many dollars as there are policy-holders in this company who have become such under this plan, shall be made upon all such policy-holders, according to the rate and proportion of assessment specified in the respective policies held by each, and the sum collected on such assessment (less the added cost for collection) shall be paid to Simeon Curtis (the plaintiff,) within ninety days from the time of filing the proofs of death;" with the further provision that in no case should the payment upon the policy exceed one thousand dollars.

The declaration, after setting out the policy in full, alleges the death of Esther M. Curtis and the filing of proofs of the fact as required, and then concludes as follows: "That he" (the plaintiff) "has complied with and performed all the other conditions of said policy on his part to be done and performed, whereby the defendants became liable to pay, and in consideration thereof assumed and promised the plaintiff to pay to him said sum of one thousand dollars according to the terms of said policy or certificate of membership; yet the plaintiff says that the defendants, their said promise not regarding, have never performed the same."

The only breach assigned is of a promise to pay one thousand dollars. This might avail to save the judgment if any facts were alleged to raise the promise. But the agreement upon which the plaintiff must recover, if at all, was merely to lay an assessment on the policy-holders of the class to which the plaintiff belonged for as many dollars as there were members, and pay the amount to the plaintiff, less the cost of collection. There is no allegation of any neglect to lay such assessment, or, having laid one, to pay over the amount. And not only is there an omission to state any facts to show ground for the defendants' liability, but nothing to show the amount, and no data are given from which it may be computed. The thousand dollars is not promised to be paid by the terms of the contract, but is mentioned merely as the limit of liability.

As the declaration assigns no breach within either the words or the import and effect of the contract, it is fatally defective; and as the defect consists of a total omission to allege matter essential to the plaintiff's title or ground of action, and is not a mere defective statement of such matter, it was not cured by the verdict. 1 Saunders Pl. & Ev., 135, and cases there cited; *Williams* v. *Hingham Turnpike*, 4 Pick., 341; *Smith* v. *Curry*, 16 Ill., 147; *Farwell* v. *Smith*, 16 N. Jersey Law R., 133; *Needham* v. *McAuley*, 13 Verm., 68; *Griffin* v. *Pratt*, 8 Conn., 513; *Smith* v. *Bank of New England*, 45 Conn., 416; Gould's Pleading, ch. 10, sect. 22.

For these reasons we think the motion in arrest ought to have prevailed.

There was error in the judgment complained of, and it is reversed and the case is remanded.

In this opinion the other judges concurred.

## JOHN W. STARKWEATHER *vs.* EDWARD GOODMAN.

A builder made a written contract to furnish the materials and build a house for the defendant according to definite plans and specifications and for a fixed sum, all the materials and work to be accepted by an architect named, who was to superintend the construction. The builder, under the direction of the architect, did certain work variant from and in addition to the specifications, which increased the cost and value of the house. Held that the ordering of this work was beyond the scope of the architect's agency, and that the defendant was not liable to the builder for it.

When the house was nearly completed the builder gave the defendant a written statement of the extra work and materials, to which the latter made no objection at the time. Held that he was not estopped thereby from making the objection afterwards.

The extra work and materials had then gone into the building, and could not be withdrawn, so that, as to these extras, the builder was not led into any action resulting in loss to him by the defendant's failing to make the objection.

Some other extras were afterwards ordered by the architect and furnished by the builder; but it did not appear that the builder suggested at the time of exhibiting his first bill of extras to the defendant that more extras might be so ordered or that either party thought of the matter. Held that the defendant was not estopped, by his failure to object to the first bill, from denying the architect's authority to order the later extras.

The question whether the defendant intended, by not objecting, to influence the future action of the builder or was so grossly negligent that that intention would be imputed to him, and the further question whether the builder was influenced as to his future action by the defendant's conduct, were questions of fact and not of law, and the court below could alone pass upon them.

ASSUMPSIT for work and materials in the building of a house for the defendant; brought to the City Court of the city of Hartford and tried to the court, on the general issue, before *Bennett, J.* The court found the following facts:—

The claim was originally that of one A. D. Smith, by whom it had been legally assigned to the present plaintiff, who was the bonâ fide owner of it. The facts out of which the claim arose were as follows:—On the first of October, 1878, Smith entered into a contract in writing with the defendant, in which it was agreed that he should build for the defendant in the city of Hartford a house in accordance with certain plans and specifications, for the sum of $3,107. The specifications called for a wooden frame and clapboarded house. On the 15th of October, 1878, the parties entered

into an additional contract in writing, in which it was agreed that the house should be changed from a frame and clapboarded to a brick-walled house, with stone trimmings, and for this change Smith was to be paid the additional sum of $125. The first contract was as follows:—

"This contract between Edward Goodman and A. D. Smith, witnesseth: That the said Smith agrees to furnish all materials and do all work in the erection of a dwelling-house, to be built on the east side of Winthrop Street, according to the accompanying plans and specifications, said plans and specifications having been made for the said Goodman by O. H. Easton, who shall superintend the erection of said house; all materials and work to be to his acceptance; the house to be completed on or before the 15th day of April, 1879. The said Goodman reserves the right to make additions to or alterations in said house, as the work progresses, for which additions or alterations the said Smith shall add to or subtract from the contract price, as his interest shall appear, and for said house, when so completed, the said Goodman agrees to pay the said Smith the sum of $3,107, in monthly payments of seventy-five per cent. on the cost of materials put into and work done on said house, the balance of contract price when the contract is fulfilled; all payments to be made through the superintendent, who alone shall have power to receipt for said payments of money on the foregoing contract. In witness whereof, &c."

The time for completing the house was afterwards extended to May 1st, 1879.

Smith built the house under the superintendence and direction of Easton, in conformity with the contract and according to the plans and specifications, except in such particulars as Easton ordered otherwise. Sundry alterations and additions were made by Smith in the construction of the house, all of which were made by Easton's direction. These materially increased the cost of construction of the house, both in material and labor, and correspondingly enhanced its value as completed; and by reason of this extra work the house could not be completed within the time limited in the contract.

Smith completed the house in the latter part of May, 1879, and the defendant then accepted and took possession of it, and has continued in the use and occupation of it ever since.

Some time in the month of March, 1879, Smith gave to the defendant, at his request, a list of the items which he claimed were extras. That list included substantially all the items of extras up to that date. The defendant did not inform him that he had not ordered those extras.

Other extra work was performed after this, and upon the completion of the house the plaintiff presented to the defendant a bill in which was included a list of all the items of extra work substantially as now presented in his bill of particulars.

The defendant admitted that he assented to and ordered through Easton some of the items of extra work, to the amount of about $175, but claimed that all other extras, if ordered by Easton, were ordered without his knowledge and assent. The defendant personally gave Smith no orders regarding the construction of the house, except the order for the cutting of registers and the purchase of the range and for the wash-tubs, but whatever other orders and directions the defendant gave were given to Easton.

The extra work was performed in good faith on the part of Smith.

The defendant claimed and proved certain omissions and variations from the original plans, for which deductions should be made, and the sum of $73 should be allowed in the defendant's favor for the same.

Smith furnished materials and labor in the construction of the house to the amount of $4,043.06, after deducting the $73. The defendant has paid Smith the sum of $3,092.66, and there is now due to the plaintiff the sum of $842.40, with interest from June 1st, 1879.

Upon the trial the defendant claimed, and asked the court to hold as matter of law, that upon the facts proved and found he was not liable to the plaintiff for any extra work performed on the house, except for the admitted amount of $175; and that the plaintiff was liable to him in damages for not

completing the house within the time limited in the contract; but the court overruled these claims of the defendant, and rendered judgment for the plaintiff for the sum above stated.

The defendant brought the record before this court by a motion in error.

*E. Goodman* and *F. H. Parker*, for the plaintiff in error.

*A. F. Eggleston*, for the defendant in error.

PARDEE, J. A. D. Smith made a written contract to furnish all materials and do all the work necessary for the construction of a house for the defendant according to definite plans and specifications and for a fixed sum. O. H. Easton, the architect who drew the plan, was by the contract made superintendent of construction, and all materials and work were to be accepted by him. Easton ordered Smith to make certain changes in and additions to the plan. It is not found that the defendant instructed Easton to make these changes, or that he had knowledge of them until completed. Smith made them and thus increased the cost and value of the house. When completed the defendant took and has since retained possession of it. The plaintiff as assignee of Smith brought this action for payment for the labor and materials thus ordered by Easton, and having recovered judgment therefor in the City Court of Hartford, the defendant filed a motion for a new trial.

The contract sets forth the extent of Easton's agency for the defendant; he is only to see that the materials and workmanship are in accordance with the specifications. There remained no opportunity to Smith to extend that power by inference, and when he furnished materials for or performed labor upon the house in excess of the specifications upon the order of Easton, he assumed the risk of ratification by the defendant.

Nor is the defendant estopped from insisting upon this contract limitation upon Easton by the fact that when the house was nearly completed he received in silence a statement of work and materials not specified in the written contract,

which included some which he had not ordered; for these had been wrought into the building and were then beyond possibility of withdrawal by Smith, however strongly the defendant might have protested against payment for them. It is very clear therefore, that, as to these extras, Smith was not led into any action resulting in loss to him by the defendant's failing to make the objection.

But it is said that other extras were afterwards ordered by Easton and furnished by Smith, and that, whatever might be the effect of the defendant's silence upon the extras already furnished, he ought to be regarded, by reason thereof, as authorizing the extras afterwards ordered. But it does not appear that Smith at that time suggested to him that there might be other extras ordered by Easton, or that the matter was thought of by either of them. Besides, the question whether the defendant intended to influence the future action of Smith, or was guilty of such gross negligence that he could be chargeable with that intention, and the further question whether Smith was influenced by his conduct, were both questions of fact and not of law, and it is impossible for us to find these facts when the court below has failed to do so.

There is error in the judgment below, and it is reversed.

In this opinion the other judges concurred.

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CHARLES S. DANIELS *vs.* THE EQUITABLE FIRE INSURANCE COMPANY.

A policy of insurance upon personal property in the shop of a mechanic contained the following provision:—"The assured has permission to use naphtha in his business, but fire or lights are not permitted in the building, except a small stove in the office." During the term of the policy a large stove was placed by the assured in a room of the building used as a drying room, and was thereafter used in connection with hot water pipes for warming the naphtha in tanks in the basement. A fire occurred soon after, caused by an explo-

sion of gas. The policy contained a provision that if the risk was increased the policy should become void. Held in a suit on the policy—

1. That the permission to use one stove definitely located carried with it a strong implication that the use of any other was prohibited.
2. That if it was not thus prohibited, yet if it increased the risk it was prohibited by the provision that the policy should become void by an increase of the risk.
3. That the question whether the risk was increased was one of fact for the jury.
4. That it was not enough for the assured to show that the fire was not caused by the second stove, as the defendants did not insure against the risk of two stoves.
5. That under the restrictions contained in the policy, the insurance of the property in a business in which naphtha was used did not by implication give the assured the right to use the ordinary means for carrying on that business without reference to the increase of risk.
6. That a provision in the policy for renewal, which contained the following clause—"but in case there shall have been any change in the risk not made known to the company at the time of renewal, the policy and renewal shall be void"—did not prevent the policy becoming void before renewal by increase of risk.

A verdict for the plaintiff set aside as being against the evidence upon the question of the increased risk.

ASSUMPSIT on a policy of insurance; brought to the City Court of the city of Hartford, and, by appeal, to the Superior Court in Hartford County. The insurance was in favor of E. M. Bray, and was for $500, "on his furniture, fixtures and tools, used by the assured in his business as renovator of furniture, clothing and carpets, and on the improvements to the building put in by him, all contained in the one-story brick building, tin roof, situate No. 10 Seyms Street, Hartford." The claim upon the policy was held by the plaintiff by assignment from Bray. The case was tried to the jury before *Hitchcock, J.*

The policy contained the following provision:—"The assured has permission to use naphtha in his business, but fire or lights are not permitted in the building, except a small stove in office."

It also contained the following conditions:—

"*First.* * * If the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, without notice to and consent of this company in writing, or the risk be increased by the erection

or occupation of neighboring buildings, or by any means whatever within the control of the assured without the assent of this company indorsed hereon, * * or if the assured shall store, use or vend * * naphtha * * without written permission in this policy, * * then this policy shall be void."

"*Eleventh.* This insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided the premium therefor is paid and indorsed on this policy, or a receipt given for the same; and it shall be considered as continued under the original representation, and for the original amounts and divisions, unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the company by the assured at the time of renewal, this policy and renewal shall be void."

The term of the insurance was for one year from July 7th, 1877. The property insured was, with the building, totally destroyed by fire April 6th, 1878.

Upon the trial *Charles R. Howard*, the principal witness called by the plaintiff, testified substantially as follows:—

"I reside in Hartford. I had an interest in the naphtha works, and was there at the time of the fire. The building was about thirty by forty feet, one story; it fronted south on Seyms street; in the southeast corner was the office, about eight by eleven feet, the room next it was a store or dry-room about eighteen by twenty-two feet; behind both of these was a large room running the whole length of the building. In the office was a small cylinder stove, twelve inches diameter, which stood on the east side. The office had a door into the dry-room on the west side, and another door opened from this room into the back room. In the dry-room was another large stove, a cylinder, about eighteen inches through and three feet high, at the east end, near the partition dividing it from the office. This drying-room was used to dry garments in, to prepare them for delivery; also other articles. The door between the dry-room and the office was generally kept closed. The fire in the office was to heat the office; it was not used

in summer. The naphtha was contained in a large tank in the cellar; it was heated from the large stove in the dry-room. Hot water pipes went from a water-back in that stove to a boiler, and from that to the tank, and there warmed the naphtha and made it operate. The naphtha ought to be heated to about eighty degrees in winter; without heat it would not operate; it got down to twenty-five or thirty degrees and didn't work as well. This extra stove, pipes and boiler were put in about the 1st of January, 1878. They didn't work it much winters before that. The fire occurred April 6th, 1878, Saturday afternoon, about four o'clock. It was a damp day, and the gas of the naphtha stayed in the rooms; we opened the doors to the outside, but it kept in. There were articles drying in the drying-room; it got so full of gas that we thought we had better get out of there. I went into the office and shut the door behind me; it came back on me before I could sit down, and the building lifted up. I didn't get to a chair; I was apprehensive of danger. I first saw the fire in the office, near the door leading from the drying-room into the office, close by me at the top of the office door. I was looking up and facing that door; I had just turned towards the door. It was about four or five feet from the office stove. There was a fire in the office stove; I had put on more coal about twenty minutes before. In the stove in the drying-room I had last put coal on the fire Friday night. We didn't make it up there Saturdays, so as not to have it last over Sunday. The door and dampers were all shut in the drying-room stove. In the office stove the dampers were open. Gas was all through the building and went off like powder."

On cross-examination the witness said: "Fire lasts about twelve or fourteen hours in the dry-room. I made a fire in the dry-room stove about 6 P. M., Friday. I had put fresh coal on the office stove about twenty minutes before I shut the door, and had opened the drafts. I saw no flame in the office except that in the door-way leading from the office into the drying-room."

On the part of the defendants the principal evidence was as follows:—

*Silas Chapman* testified:—"I live in Hartford. Was agent of the defendants when this policy was taken out; am not now. I issued this policy. I lived within five hundred feet of the building insured, and was familiar with it. I would not have insured the property at all if I had known there was to be such a stove in the dry-room. Open stoves in dry-rooms are dangerous. It increased the risk very materially, and made it uninsurable."

On cross-examination he said:—"I was familiar with the premises at the time the policy was issued, and knew that there was no stove there other than the office stove, and no arrangement for heating the naphtha. At that time the room west of the office was not used as a drying-room. The large room in the rear was then used for drying, and the room next the office for folding and pressing clothes."

*Leonard Dickinson* testified:—"I reside in Hartford. Am agent for the Ætna Fire Insurance Company, and have been for about twelve years. I am acquainted with insurance risks. I was familiar with these premises before this policy was taken. It increased the risk materially to put in this additional stove and heating apparatus, so much so that I would not have taken the risk with it there. It was uninsurable. Mr. Bray's father first came to me to insure it. I took him to Mr. Chapman. The greater the number of fires and lights in the building the greater would be the hazard; the pipes would heat the naphtha, and cause it to generate gas, and the more gas there was, the more liability to explosion and fire."

The defendants requested the judge to charge the jury as follows:

1st. If the jury find that at the time of the fire the assured had for use in the building another stove than that permitted in the policy, which had a fire in it at the time of the fire, without the consent of the company, the policy was thereby avoided, and the plaintiff cannot recover, whether the fire originated in such other stove or not.

2d. If the jury find that at the time of the fire the assured was so occupying or using the premises as to increase

the risk beyond that permitted by the policy without the consent of the company, then the plaintiff cannot recover, whether the fire was caused by the increase of risk or not.

The court did not so instruct the jury, but charged them as follows:—

"The defendants claim that the assured put in a stove and other apparatus, after the policy was issued, without the consent of the company, and that this materially increased the risk. Now if this was done, and materially increased the risk, it vitiated the policy. You are to decide whether putting in that additional stove and apparatus and using it, increased the risk. It did not of itself avoid the policy, unless it increased the risk. The policy makes no provision for its becoming void for such cause."

The jury returned a verdict for the plaintiff, and the defendants moved for a new trial for error in the charge of the court and on the ground that the verdict was against the evidence.

*C. E. Perkins*, in support of the motion.

1. As to the charge of the court. The policy provides in the printed part that naphtha should not be used in the building, and that if it was used without the written consent of the company the policy should become void. Naphtha is well known to be a most dangerous article to use, as the vapor arising from it explodes when mixed with air if it comes in contact with fire. In the written part of the policy, however, is the following clause:—"The insured has permission to use naphtha in his business, but fire or lights are not permitted in the building, except a small stove in office." It was admitted that the insured used naphtha in his business, and that the fire occurred from the use of it, and that besides the small stove in the office he had a large stove in the drying-room, where the naphtha gas would naturally be thickest. On these facts the defendants asked the court to charge that, if the jury found these facts so, the policy was avoided by the use of this additional stove; but the court charged that the putting in and using the additional stove did not avoid

the policy. But the original printed clause of the policy provided that the use of naphtha without the consent of the company should avoid the policy. The written consent only allowed the use of naphtha provided no other fire or lights were used except the office stove. Nothing can be more plain than that the meaning and construction of the whole taken together was that the consent was conditioned on the use of only one stove, and the use of other fire and lights would avoid the policy. The consent and the clause of prohibition are to be taken together. It is as if the policy had read "the use of naphtha, if any other fire or lights are used than a small stove in the office, shall avoid the policy." Any other construction would make this limited and guarded consent an absolute one, and the charge of the judge treats it exactly as if this provision about other fires had been left out altogether.

2. The verdict was clearly against the evidence, as to the increase of the risk by the use of the second stove. Two witnesses for the defendants declare the property to have been absolutely uninsurable with that stove, while the principal witness for the plaintiff testifies that the "gas was all through the building and went off like powder."

*G. G. Sill* and *J. H. Tallman*, with whom was *G. Case*, contra.

1. As to the charge of the court. It was expressed in writing in the policy that "the insured has permission to use naphtha in his business, but fire or lights are not permitted in the building, except a small stove in office." The insurance was taken as a hazardous risk at a large premium, and except for the written limitation in it, the printed policy, by the settled interpretation of the courts, permitted the conducting of the business in any reasonable manner necessary to its successful operation, even if such manner was prohibited by the printed conditions, and this because the company insured the naphtha laundry as a business, and therefore had insured against any use necessary and proper to its successful operation; and a written prohibition can have no force given it by construction against the assured beyond its express

terms. For, unless the naphtha was brought to a temperature of about eighty degrees, it was inoperative for cleansing purposes and the destruction of vermin, and, consequently, the business could not be carried on in the winter, and so was completely paralyzed by the prohibition of heat. The defendant below requested the court to charge the jury that the mere putting in of any other than the office stove avoided the policy. The court correctly refused so to charge. That the use of a necessary stove in good faith, although not covered by the contract, renders the policy void and releases the insurers from a loss from another cause falling strictly within the risk insured against, (unless there is in the policy a clause that such use shall render it void,) is a novelty in the legal construction of a fire insurance policy, which is to be construed strictly against the insurers who drew it. Not a reported case, nor a single legal writer has ventured to maintain such a doctrine; and, if sanctioned, it would render all insurance insecure. The company is fully protected if any loss happens from a prohibited use, for the insured cannot recover; and if the insurer desires to make such use itself avoid the policy, he must so express it in his policy.

2. The 11th section of the policy provides that "in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the company by the insured at the time of renewal, this policy and the renewal shall be void." We submit that the fair and legal construction of this clause is, that the policy was to continue in force where there had been some increase of risk to the time of renewal, as many risks are liable to such change, and unless so continued the policy could not be renewed, for a void policy could not have force by renewal.

3. The verdict of the jury. The jury found there was no material increase of risk. They had before them the witnesses and could judge of their credibility, their knowledge of the circumstances, their accuracy, and their interest in the suit, and with all the lights which spoken testimony and observation of the witness can convey and which the printed record fails to disclose, they came to their conclusion.

Does the printed record convict them of error? As to the increase of danger from the use of the stove complained of, it was proved that the fire actually caught from the office stove, for, if otherwise, the plaintiff did not claim the right to recover. The business was a new one, commenced about July, 1877, the date of the policy. No raising of the temperature of the naphtha, and, of course, no stoves whatever, either in the office or elsewhere, were used or needed till the season advanced. Later, the office stove and then the stove to heat hot water, (which water was safe and harmless as affecting naphtha,) were put in to enable the insured to continue his business in the winter, which, as specified in the policy, was mainly in cleansing carpets and furniture, and destroying moths and vermin therein, while clothing was a mere fraction of the business. The carpets and other heavy articles, which would give out most gas when being dried, were hung in a remoter room for that purpose, while the drying room so called was really an ironing and folding-room, with a few light garments placed for convenient access about, and not capable of giving off any dangerous amount of gas. It was a room to iron, fold, and store goods ready to be delivered, and was a finishing and store-room properly and no other. This the jury saw and justly found no element of increased risk in it as claimed by the defendants.

CARPENTER, J. This is an action on a fire insurance policy. The cause was tried to the jury and the plaintiff had a verdict. The defendants move for a new trial for a misdirection and for a verdict against evidence. On one point in the case we think the verdict was clearly against the weight of evidence, and we will confine our attention mainly to that.

The property insured is described in the policy as follows: —"Furniture, fixtures and tools, used by the assured in his business as renovator of furniture, clothing and carpets, and on the improvements to the building put in by him." Then follows this clause:—"The assured has permission to use naphtha in his business, but fire or lights are not permited in the building, except a small stove in the office." At that

time there was no other stove in the building. The policy issued July 7th, 1877, for one year. About the first of January following a large stove was placed in a room used for a drying room, and was thereafter used in connection with hot water pipes for warming the naphtha in tanks in the basement. The fire occurred in April, and was caused by an explosion of gas.

The court charged the jury as follows:—"The defendants claim that the plaintiff put in a stove and other apparatus, after the policy was issued, without the consent of the company, and that this materially increased the risk. Now if this was done, and materially increased the risk, it vitiated the policy. You are to decide whether putting in that additional stove and apparatus and using it increased the risk. The question is whether there would be more likelihood of danger from two stoves, with the pipes for heating naphtha, than from one stove."

It was conceded that the additional stove was used in the manner and for the purpose stated, and that the use of naphtha caused an accumulation of highly inflammable gas in the room where the stove was. The defendants chose to insure property in a building in which there should be but one small stove, and that definitely located in as safe a place probably as there was in the building. By strong implication the use of any other stove was prohibited. We must presume that the defendants would have refused to insure with liberty to use two stoves in the manner they were used at the time of the fire. It will not do to say that they insured business carried on with naphtha and that therefore the insured had a right to use the ordinary means for carrying on that business. The conditions and manner of use were clearly defined and limited, to which he agreed, and he had no right to use means which involved a violation of his agreement. Nor was it necessary; for obviously the naphtha could have been heated by means of steam or hot water pipes from a fire at a safe distance.

But the plaintiff says that it is not expressed in the policy that the use of another stove shall make it void, and there-

fore that such use is not of itself a defense. It may be true that such use, irrespective of the increase of risk, will not have that effect; but the policy in another part expressly provides that if the risk is increased it shall be void; so that the real question was whether the additional stove increased the risk. The court correctly instructed the jury that if it did the plaintiff could not recover. The jury therefore must have found that the risk was not increased. There was no evidence to justify such a finding. The testimony the other way was clear and conclusive. In addition to the obvious danger from the use of such materials, two witnesses, familiar with the business of insurance, testified unqualifiedly that the use of the additional stove materially increased the risk and rendered the property uninsurable; and there was no conflicting evidence. It seems very clear that the jury must have disregarded the evidence.

The case is not met by the suggestion that there was evidence tending to show that the fire caught from the office stove. The difficulty reaches back of that. The defendants not only did not insure against the risk of two stoves, but virtually refused to insure at all if the premises were subjected to that additional risk. They had a right to refuse insurance in a case in which the question would be an open one, whether a loss was occasioned by a risk insured against or one that was not insured against. The difficulty of proving the origin of a fire, to say nothing of the inclination of juries to find against corporations, is a sufficient reason for the exercise of the right; and when a party has clearly exercised the right, as the defendants have in the present case, the court ought not to deprive him of the benefit of it by a strained interpretation of the policy.

Nor is the plaintiff's claim a tenable one that the policy continued in force during the term for which it issued, notwithstanding the increased risk, by virtue of the eleventh condition in the policy. That condition provides for a renewal of the policy at the expiration of the term, and then adds, "but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not

made known to the company by the assured at the time of renewal, this policy and renewal shall be void."

It is obvious that this is not inconsistent with the first condition, which provides that the increased risk shall avoid the policy; nor was it intended to modify that condition; but was intended to extend it to the renewal in case one should happen to issue in ignorance of the increased risk.

Feeling constrained as we do to grant a new trial for the reason given above, it is unnecessary to consider the other questions raised by the motion.

A new trial is granted.

In this opinion the other judges concurred.

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DANIEL B. HATCH AND ANOTHER *vs.* JOHN M. DOUGLAS.

The defendant wrote the plaintiffs, who were stock brokers in the city of New York—"I want to buy say one hundred shares Union Pacific stock on margin. Will you take $1,000 first mortgage N. York & Oswego R. R. and do it?" The plaintiffs replied that they would, and at once bought the stock, and soon after sold it by the defendant's order at a profit. Other stocks were afterwards bought and sold by the plaintiffs for the defendant under the same arrangement, resulting in a final loss, exceeding the value of the security held, and the plaintiffs sued for the balance. Held—

1. That evidence was admissible on the part of the plaintiffs to show the meaning of the words "on margin," that term being used by stock brokers and having acquired a special and well understood meaning in their business.

2. That the contract not being one for the mere payment of differences, but the defendant having through the plaintiffs as his agents actually purchased the stock, which was delivered to them and which they were ready to transfer to him on payment of the purchase money, it was not a gaming contract.

Where a party uses a technical term which has a clearly defined and well understood meaning in the business to which it relates, and the other party, giving it that meaning, acts upon it, the former can not be permitted, to the prejudice of the latter, to say that he used it in a different sense.

The custom of stock brokers to debit and credit interest monthly, computing interest on balances, does not necessarily involve usury, as the balances may be paid. But if the taking of such interest would be usury, it is only a question of the allowance of it by the court, and does not affect the contract for the purchase and sale of the stocks, as it is wholly outside of it.

ASSUMPSIT to recover a balance claimed to be due upon certain stock transactions; brought to the Superior Court in Middlesex County. The following facts were found by a committee:—

On the 23d day of June, 1873, the defendant requested the plaintiffs, who were brokers doing business in the city of New York, to purchase certain stocks for his account on a margin of certain securities offered, which request was made in the following letter:—

"Middletown, Conn., June 23, 1873.

"MESSRS. HATCH & FOOTE. *Gentlemen*—I want to buy say 100 shares Union Pacific stock on margin. Will you take $1,000 first mortgage New York & Oswego Railroad and do it? I shall only want to have on hand 100 shares at a time. If you can do this please buy 100 shares as above at the market to-morrow, 24th, and telegraph me, and I will send you the bond by express. Yours very truly,

JOHN M. DOUGLAS."

The plaintiffs complied with the request, and accepted the terms of the defendant and immediately notified him by telegraph. The defendant thereupon forwarded to the plaintiffs the bond for margin as promised, which was received and accepted by them. The plaintiffs purchased the stock for 24⅛ and carried it until July 2d, when by the defendant's order they sold it for 26⅜.

Between that time and the 23d of July, the plaintiffs, by order of the defendant, purchased in the same way for his account 100 shares of Erie Railroad stock, and two lots of 100 shares each of the common stock of the Chicago & North Western Railroad Company, and by his order sold the Erie stock and 100 shares of the Chicago & North Western, of which transactions they gave him notice as they severally occurred. The purchases were generally made below, and the sales above the figures named and authorized by the defendant, and the net profits to him to the last mentioned date were $737.50, of which he drew for $645, leaving in the plaintiffs' hands a balance of $92.50, and also the margin

bond and the remaining 100 shares of Chicago & North Western stock.

After the purchase of the last mentioned shares of Chicago & North Western stock on the 22d of July, there was no time when it could have been sold for the price ordered by the defendant. It continued like all other stocks to gradually decline until the occurrence of the panic of September, when it dropped largely and never recovered while the plaintiffs held it for the defendant, and after it was sold by them as hereinafter stated went much lower.

On the 11th of September, 1873, the plaintiffs gave the defendant the following notice:

"Sept. 11th.

"JOHN M. DOUGLAS, ESQ. *Dear Sir*—Your account requires more margin as per statement below. Please keep us supplied and oblige. Yours respectfully,

HATCH & FOOTE.

| | | | |
|---|---|---|---|
| Debit balance, - - - | | | $7,100 |
| 100 N. West, - - - | $5,800 | | |
| 1000 Oswego bond, - - | 850 | 6,650 | |
| | | Dr. $450 | |
| 10 per cent. margin, - - | | 1,000 | —deficit, $1,450." |

A similar notice was also given on the 17th of September, to which the defendant replied on the 18th by the following letter:

"Middletown, Sept. 18, 1873.

"MESSRS. HATCH & FOOTE. *Gentlemen*—I was absent from town when your telegram came and this A. M. sent you message saying 'Hold on.' I will back up all I owe your house and pay interest until you are entirely out. At present things are pretty well locked up. I have securities but not such as you would take, and could send the cash if money was not quite so tight with some of our institutions. You will please hold on and not get alarmed. I can pay everything even with the North Western common stock sunk out of sight. Please be easy; you know the writer will back you

for his account, and will send you money after a little if things do not improve in Wall Street.

Yours respectfully, JOHN M. DOUGLAS."

The defendant failed to make good his margin, or to make any arrangement with the plaintiffs, and on the 30th of October they informed him that they saw no other way for them but to sell him out and collect the balance by law, and November 18th gave him the following notice:

"New York, Nov. 18, 1873.

"JOHN M. DOUGLAS, ESQ. *Dear Sir*—We desire to give you notice that on Wednesday, Nov. 26th, 1873, we shall cause to be sold at public auction in this city, at the Exchange Sale Room, No. 111 Broadway, by Adrian H. Muller & Son, auctioneers, the following described stock and bond, namely: 100 shares Chicago & North Western R. R. Company common stock, and $1,000 New York & Oswego Midland R. R. 7 per cent. first mortgage bond, the same being held by us as security for money advanced to you.

Very respectfully, HATCH & FOOTE."

And on November 26th, they sent the following notice:

"New York, Nov. 26, 1873.

"JOHN M. DOUGLAS, ESQ. *Dear Sir*—We have sold for your account at public auction through Adrian H. Muller & Son, $1,000 N. Y. & Oswego Midland R. R. first mortgage 7 per cent. bond at 55, to H. Marks, and 100 shares Chicago & North Western R. R. common stock at 46¼ to J. Pangborn. The above securities will be delivered on Friday and the proceeds placed to your credit, and we shall look to you for the payment of the balance due us.

Yours respectfully, HATCH & FOOTE."

The defendant had on the morning of that day telegraphed the plaintiffs in the following words: "Please postpone sale of stocks."

When the defendant made his first order and opened his account with the plaintiffs he made no inquiry as to the effect of a loss beyond the value of his margin, or of the custom

of New York brokers with regard to such a result. He supposed he was in no event subjecting himself to risk of loss beyond the value of the margin. But prior to his letter of September 18th he knew or had reason to suppose that he was risking whatever loss might occur in the transactions. He had previously dealt with other brokers in the same way, but his margin had not been absorbed. The plaintiffs supposed he made the order, and commenced the account, with reference to the general practice and custom of the business in similar transactions, and they had no reason to suppose otherwise. A mere payment by the defendant of the differences in the value at the time of purchase and time of sale would have satisfied the plaintiffs' demand, if this had been the only transaction, and the interest debt balance had been paid.

The plaintiffs did not transfer or tender a transfer to the defendant of any of the stocks purchased for his account, and were not requested by him to do so, and neither party expected or contemplated such transfer or delivery. The stocks were purchased for the defendant and paid for by the plaintiffs, and received under blank powers of attorney for transfer, and held by the plaintiffs subject to the defendant's order to sell, and would have been transferred and delivered to the defendant on request and the settlement of his account. The several purchases and sales were actual as between the plaintiffs and the persons of whom they purchased and to whom they sold; and as between the plaintiffs and defendant, the plaintiffs in buying and selling were acting for and executing the orders of the defendant, and only charged the usual commission. The plaintiffs did not hold and carry, and sell for the defendant, the identical shares they purchased for his account. They were at the same time dealing in a similar way in the same stocks for other parties, and when ordered to sell a certain number of shares of a particular stock which they were carrying for parties, did so without reference to the person for whom those specified shares were bought; in other words, they did not keep stocks purchased for one person, distinct from the same kind of stocks purchased

for another; but they always from the time they purchased the last hundred shares of Chicago & North Western stock for the defendant until they were sold, held an equivalent number of shares in a single certificate, and could and would at any time, if requested by the defendant, have sold or delivered to him that precise amount on settlement for the same.

The plaintiffs were in the habit, when necessary, of borrowing money for their own use on the security of stocks they were carrying for other parties, and for that purpose hypothecated the defendant's Chicago & North Western stock, but they could at any time have released it from hypothecation by the substitution of any other marketable securities of equal value, and were at all times in a condition to have redeemed the defendant's stock if there had been any necessity, or occasion, or request for it. The plaintiffs claimed the right to hypothecate in that way and for that purpose, subject to the defendant's right to settle his account and demand the delivery of his stock. There was no intention to deliver to the defendant the shares of stock purchased for his account unless he requested it, but the intention of the plaintiffs was to purchase and sell from time to time as ordered by the defendant, and carry his stocks on the security of the margin, required by the custom to be kept at not less than ten per cent. unless otherwise specified, until a settlement was made according to the usage of the business.

The defendant by his counsel objected to all evidence respecting usage and margin, but it was admitted; and upon such evidence it was found that all the transactions of the plaintiffs with the defendant and his stocks, including their hypothecation and sale at auction and the demand for the remaining balance, were in all respects in conformity with the uniform and established usage of brokers in New York.

The custom of the plaintiffs and other New York brokers in such transactions is to make monthly debit and credit interest balances, by which the interest is compounded. And the undertaking of the plaintiffs in this transaction was in accordance with and in pursuance of that custom in the

computation of interest on their account against the defendant. The plaintiffs claimed the right to that mode of computation with the defendant, and so entered it in their books, and in their bill of particulars; but on the trial waived and withdrew that part of their bill of particulars, and claimed only a running interest balance at seven per cent. per annum, in which manner the committee computed it.

On the foregoing facts the balance of principal due the plaintiffs November 28th, 1873, was found to be— $2,005.75
Interest at 7 per cent. to February 28th, 1878, 4 years and 3 months, - - - - 596.71

$2,602.46

The defendant remonstrated against the acceptance of the report on sundry grounds, but the court (*Granger, J.*,) overruled the remonstrance, accepted the report, and rendered judgment for the plaintiffs for the sum found due by committee. The defendant brought the record before this court by a motion in error.

*S. L. Warner* and *S. A. Robinson*, for the plaintiff in error.

1. The contract was a wager contract. As such it is void by the statute. Gen. Statutes, p. 228, sec. 1. And such a contract is void at common law. *Wheeler* v. *Spencer*, 15 Conn., 31. The courts have been loth to fix absolutely what a wager contract is. And for the same reason they have refused a definition of fraud. No court however has hesitated to declare that "a contract by which two or more persons agree that a certain sum of money or other thing shall be paid or delivered to one of them, on the happening or not of an uncertain event," is a wager. Bouvier Law Dict., *Wager*. The case finds "*that a mere payment by the defendant of the differences in the value at the time of purchase and time of sale*, would have satisfied the plaintiffs' demand, if this had been the only transaction and the interest debt had been paid." With reference to other transactions or purchases the record discloses that they were of the same char-

acter and purchased in the same way. With reference to the "interest debt" we will only say, that if it grew out of a wager contract it can stand no better than the principal sum. It is also found that the defendant, prior to and at the time of the purchases, supposed that he was in no event subjecting himself to liability beyond the margin. Also that there was no intention to deliver to him the shares of stock purchased for his account, unless he requested it. It is not claimed that such request was ever made; nor is it claimed that the parties ever contemplated that such request was to be made. On the contrary "the plaintiffs' intention was *to purchase and sell from time to time, as ordered, on the security of the margin.*" The margin is the stake, and *differences*, not stock, are the subject of the demand. The finding of the court that the plaintiffs during all the time of this transaction were dealing with other parties in this stock and held an equivalent number of shares in a single certificate, and could or would have *sold or delivered* to him that precise amount, is not an important fact against the defendant, for, first, it discloses that the stock was not *sold*, and, secondly, that it was to be at the defendant's option whether to take it. So long as the subject of the contract was the difference in the market value of the stock, the plaintiffs' capacity or willingness *to deliver or sell* the stock is immaterial. There must have been an actual intention to deliver. *Barry* v. *Croskey*, 2 Johns. & Hem., 1; *Lyon* v. *Culbertson*, 4 Am. Law Times, 57. If there had been no fluctuations of the price, there could have been no obligation, if the commission and interest balances had been paid. But as such a contract is void in law, it is idle to discuss the question whether commissions or interest could result. The following authorities amply sustain us in our general position:—*Story* v. *Salomon*, 71 N. York, 420, 422; *Bigelow* v. *Benedict*, 16 N. York Supreme Ct., 429; *Yerkes* v. *Salomon*, 18 id., 471; *Unger* v. *Boas*, 13 Penn., 601; *Brua's Appeal*, 55 Penn. St., 298; *In re Chandler*, 13 Am. Law Reg., 310; *In re Green*, 7 Biss., 338; *Rudolf* v. *Winters*, 7 Neb., 125; *Cassard* v. *Hinmann*, 14 How. Pr. R., 84; *Rumsey* v. *Berry*, 65 Maine, 570; *Grizewood* v. *Blane*, 11 Com. B., 525.

2. The contract was usurious and for that reason void. By the law of New York "all bonds, notes, conveyances, contracts or securities whatsoever (except bottomry bonds,) and all deposits of goods, whereby there shall be reserved, or taken, or secured, or agreed to be reserved or taken, a greater rate of interest than seven per cent. per annum, are absolutely void." The case here discloses a contract made "according to the general practice of this class of stock purchases;" also that the general practice of New York brokers in such transactions is, to make on their books monthly debits and credits of interest, by which the interest is compounded. And it is found that "the undertaking of the plaintiffs in this transaction was in accordance with and in pursuance of that custom, in the computation of interest. Here then was a contract which at its inception called for a greater rate of interest than seven per cent. per annum. It is not a contract to carry the stocks at a *lawful* rate for a given time with interest compounded *after due.* Nor is it a contract to pay *after it has been due and compounded.* Nor is it a contract to carry the stock for any specific time after the interest could be considered as due. By its terms Douglas had the right to continue the loan by *keeping up the margin.* It is *simply a method of computing interest before it is due, giving a greater rate than seven per cent. when due.* Such a contract as this is plainly within the spirit and letter of the prohibition of the statute. But there is still another objection. Here the contract calls for specific interest; it was interest compounded monthly. The contract being express no implication can result. The law never implies a contract where the parties have stipulated. If interest compounded on monthly balances can not be collected on the ground of illegality, on what principle can any interest be charged? Is it so that, where parties have contracted illegally, the court can set up an entirely different contract on the same subject matter, of a legal character?

3. The evidence of the usage of New York brokers as to holding a party liable for a loss beyond the amount of the margin, was improperly admitted. The custom was not

universal, it was that of the New York brokers. Universal custom has the obligation and effect of law, and parties are charged with notice, but the only ground on which the evidence of custom of a particular section, or locality, or trade, or business, is admissible, is that the parties who made the contract were both cognizant of it and made their agreement with reference to it. When either party has no notice it is inadmissible. *Kirchner* v. *Venus*, 12 Moore P. C. C., 361; *S. C.*, 5 Jurist N. S., 395; *Rushforth* v. *Hadfield*, 7 East, 224; *Walls* v. *Bailey*, 49 N. York, 464. The case here shows that this usage was not known by the defendant; on the contrary, he supposed he was risking in no event any more than his margin. But it will be said that prior to September 18th he had reason to know his risk was greater. What if such was the case? His contract was already made and his obligation was complete. His letter of September 18th is an answer to a specific claim for margin, and cannot without violence to all construction be claimed to extend to anything else, *and all he supposed he owed was margin.* Besides, if this contract was void on any ground no agreement enforceable at law could grow out of it. From such foundation no obligation could arise. *Cannan* v. *Bryce*, 3 B. & Ald., 179; *Thacker* v. *Hardy*, L. Reps., 4 Q.B. Div., 685; *Rudolf* v. *Winters*, 7 Neb., 129; *Fareira* v. *Gabell*, 89 Penn. St., 89. The agreement was for purchase "on margin." The contract, by its terms, limits the defendant's liability, unless some custom is admissible to change the force of the terms of the contract. This expression means on the liability, credit and risk of the margin—and that alone. Usage, custom or dealings cannot be given in evidence to enlarge the scope of a written agreement when its terms are plain and unambiguous. Here it changed the margin liability to that of the individual.

*S. E. Baldwin* and *A. W. Bacon*, for the defendants in error.

1. The validity of the transaction, in all its parts, is to be determined by the laws of New York, where the defend-

ant's proposition was made and accepted, and everything was to be and was done. 2 Parsons on Cont., 582; *Trevor* v. *Wood*, 36 N. York, 307.

2. The transaction was a lawful one. The plaintiffs actually paid for and received transfers of all stocks which they bought for the defendant, and these would have been delivered to him at any time, if he had wanted them and tendered the money advanced for their purchase. It was not a contract to pay "differences." In such a contract there are no actual purchases made or contemplated, but a mere series of bets on the course of the market, without any actual transactions. *Bigelow* v. *Benedict*, 70 N. York, 202; *Schepeler* v. *Eisner*, 3 Daly, 11; *Rumsey* v. *Berry*, 65 Maine, 570. The custom to hypothecate the stocks purchased, as security for moneys lent to the broker to use in carrying them, was not an unreasonable one. *Sturges* v. *Buckley*, 32 Conn., 18; *Nourse* v. *Prime*, 7 Johns. Ch., 69, 83; *Wood* v. *Hayes*, 15 Gray, 375. There was no reason for keeping the stocks bought for the defendant separate from those bought for other customers, so long as no injury has been thereby occasioned to the defendant. *Horton* v. *Morgan*, 19 N. York, 170; *Wynkoop* v. *Seal*, 64 Penn. St., 361.

3. Evidence of the meaning of the word "margin," which has a technical and peculiar sense as applied to stock transactions, was plainly admissible. *Nelson* v. *Sun Mutual Ins. Co.*, 71 N. York, 453, 458. The defendant, having used this technical term in contracting with a firm of brokers, cannot set up that he did not understand its meaning. *Sturges* v. *Buckley*, 32 Conn., 18; *Leach* v. *Beardslee*, 22 id., 404, 406, 408; *Bridgeport Bank* v. *Dyer*, 19 id., 136, 139; *Whitehouse* v. *Moore*, 13 Abb. Pr. R., 142; *Pollock* v. *Stables*, 12 Q. Bench, 765. And it is found that he did know or have reason to know what it meant, before writing the letter of September 18th, the promises in which are ample to support this action. *Durant* v. *Burt*, 98 Mass., 161.

4. The custom of New York brokers to make monthly debit and credit interest balances, which the plaintiffs pursued in their original account with the defendant, is a reasonable

one, and gives an equal advantage to each party. It was not meant in this case as a cover for usury. *Hart* v. *Dewey*, 2 Paige, 207; *Stewart* v. *Petree*, 55 N. York, 621; *Meeker* v. *Hill*, 23 Conn., 574, 578. And all claim for compound interest was waived on the trial; and none is included in the judgment.

CARPENTER, J. The authorities are clear that a contract relating to stocks or other commodities, to be performed at a future day, by which the parties contemplate only the payment of the difference in the market value by one or the other as the case may be, is a mere gaming contract and void. So if parties in form contract to sell goods to be delivered in the future, the seller in fact having no goods, and the parties not intending an actual delivery, but contemplating merely a payment of the difference between the market value on that day and the agreed price, it is a gaming contract and cannot be enforced.

Contracts of this nature however are distinguishable from speculating contracts. A man may legitimately buy goods or stocks intending to sell in a short time and take advantage of an advance in the price if there is one. In such a case he takes the risk of a decline, but that does not make it a gambling contract. And he may purchase goods at a fixed price to be delivered at a future day, if the parties intend an actual delivery and acceptance. The actual intention may be difficult to prove or disprove; but when once the fact is established one way or the other, there is no difficulty in applying the law.

Now there are in the transactions between these parties some of the elements which are usually found in a gaming contract. For instance, it is pretty evident that the parties did not contemplate that the stock should be actually transferred to the defendant; but he would have been satisfied with the receipt of the difference between the price paid and the price received, less interest and commissions, if the price advanced, and expected to pay that difference if the price declined. To that extent it was a contract for the payment

of differences. But it was more than that. The defendant through his agents, the plaintiffs, actually purchased the stock, and there was an actual delivery—not to the principal, but to the agents for the principal. The plaintiffs advanced the money and held the stocks in their hands as security. The plaintiffs were ready at any time to transfer the stock to the defendant on payment of the purchase money. The import of the finding is, and we must so regard it, that it was an actual and bonâ fide employment of the plaintiffs to purchase stocks, and not a mere formal employment designed to cover a betting operation. It does not appear that the plaintiffs assumed any risk. They were entitled to their commissions and interest on their advancements whether the stocks went up or down. The most that can be said of them is, that they knew that the defendant was speculating, and that they advanced him money for that purpose. But that was neither illegal nor immoral.

The circumstances relied on to prove the illegality of this contract are consistent with the claim that it was a legitimate business transaction. It is probably true that dealing in stocks "on margin," as it is called, is fraught with much evil. It encourages speculation, and induces many to engage in it who would not otherwise have the requisite means. In that way many people and business generally suffer more or less. But it is an evil that existing laws do not reach. No case has been cited which declares such a contract illegal. If we should so hold it would be difficult if not impossible to draw the line between legal and illegal transactions.

We are of the opinion that there are not in the case before us sufficient reasons for declaring the contract illegal.

The defendant raises a question of evidence. In his letter of June 23d he writes:—"I want to buy say one hundred shares Union Pacific stock on margin." What does that mean? Those unacquainted with the business would not understand its meaning from the language. It is not to be presumed that the court understood it. The plaintiffs produced witnesses, who were familiar with the business, and who knew from experience and observation the meaning

attached to the words, to prove their meaning. The defendant objected, but the court admitted the evidence, and we think properly. *Nelson* v. *Sun Mutual Ins. Co.*, 71 N. York, 453. It was in the nature of a technical phrase, the meaning of which must be understood before the court could know what the contract between the parties really was.

But it is said that the parties did not understand the phrase alike, the defendant supposing that he risked nothing but the margin, while the plaintiffs understood that he assumed a personal liability as well. The language is that of the defendant. He used a phrase peculiar to the plaintiffs' business, knowing that they would understand its meaning as used in that business. In such cases if the parties did not understand it alike it must be interpreted in the sense in which the plaintiffs understood it. If the defendant chooses to use a technical term which has a clearly defined and well understood meaning in the business to which it relates, and the plaintiffs giving it that meaning act upon it, he cannot be permitted, to the prejudice of the plaintiffs, to say that he used it in a different sense. He left it to be interpreted by usage, and by that interpretation he is concluded. For that purpose usage was properly shown.

But it is said that it is the custom of brokers in their business to debit and credit interest monthly, computing interest on balances. This, the defendant says, being compound interest, infects the contract with usury. The contract in its terms is silent on the subject of interest. It is only because the contract was to be performed in conformity with the uniform and established usage of brokers in New York that this claim has any foundation. It will be observed that the usage does not necessarily call for compound interest. If dealings do not extend beyond the period of one month, or if the monthly balances are paid, there is no compound interest. It is only when dealings continue from month to month that it is called for. The question then is this:—Is a contract usurious which is legal on its face, but which is to be performed according to a local custom, when that custom in one contingency calls for compound interest? We think

not. The vice of usury is not certain; it is only possible. In contracts of this nature the question of interest pertains rather to the remedy than to the contract. It is incidental, and not of the substance of the contract. It is allowed not strictly as interest, but in the nature of damages, although it is commonly called interest, and the amount is determined by the rate of interest where the contract is to be performed.

Viewed in this light the question is whether that part of a custom which contravenes the policy of the law will be enforced. But that question is out of the case, as the plaintiffs waived their claim for compound interest, and judgment was rendered for simple interest only.

There is no error in the judgment.

In this opinion the other judges concurred; except GRANGER, J., who having tried the case in the court below, did not sit.

# SUPREME COURT OF ERRORS.

## HELD AT LITCHFIELD, FOR THE COUNTY OF LITCHFIELD,

### ON THE FOURTH TUESDAY OF MAY, 1880.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, JS.

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TALLMADGE BAKER, TREASURER OF THE STATE, *vs.* GEORGE H. BALDWIN AND OTHERS.

The defendants were sureties of a sheriff on an official bond for $10.000, of which the condition was as follows:—"That whereas the said *B* has been duly appointed sheriff of Litchfield County for three years from June 1st, 1875, according to the provisions of the constitution and laws of the state, and has accepted said appointment and undertaken the obligations and duties incident to said office; now if the said *B* shall faithfully discharge the duties of said office and answer all damages which any person may sustain by any unfaithfulness or irregularity in the same during said term of three years, then this obligation is to be void." In March, 1876, a writ of attachment was placed in the sheriff's hands directing him to attach the property of the defendant therein to the amount of $300. The sheriff attached personal property, completed the service of the writ, and made return in the usual form. Judgment was recovered by the plaintiff in the suit in November, 1878, after the expiration of the sheriff's term, for $258. Execution was issued and demand made upon it on the sheriff by a proper officer for the property attached for the purpose of levying the execution upon it, but the sheriff neglected to deliver it or to pay the amount of the judgment. Held that the defendants were liable upon their bond, although the default occurred after the end of the three years.

It was a part of the duty of the sheriff to keep the property and have it forthcoming on demand, although not demanded until after the close of his official term. This duty was "incident to his office," within the meaning of the bond.

And the undertaking of the sureties was co-extensive with the duties of the sheriff.

The command of the writ being to attach property to the amount of $300, and the sheriff having made return that he had attached personal property in obedience to the writ, and not having made return that the property was insufficient or that other property could not be found, it was to be presumed that he had attached property of sufficient amount to pay the judgment.

Baker *v.* Baldwin.

DEBT on an official bond to the treasurer of the state for the faithful discharge by George H. Baldwin, the principal obligor, of the duties of sheriff of Litchfield County, the other defendants being sureties upon the bond: brought to the Superior Court, and tried to the court before *Hovey, J.* Facts found and judgment rendered for the plaintiff and motion in error by the defendants. The case is sufficiently stated in the opinion.

*G. A. Hickox*, for the plaintiffs in error.

1. "Liabilities of sureties are *strictissimi juris*, and cannot be extended by construction or enlarged by the acts of others." *People* v. *Pennock*, 60 N. York, 426; *Miller* v. *Stewart*, 9 Wheat., 680; *Myers* v. *United States*, 1 McLean, 493.

2. A sheriff's bond is unknown to the common law, and this court has already decided that it does not provide against malfeasance on his part, but simply against misfeasance and non-feasance while in office. *Coite* v. *Lynes*, 33 Conn., 114. It is a creation of statute and should be confined to his statute liability; there is no default of statute duty in the present case. Gen. Statutes, p. 31, sec. 5.

3. No breach of the bond now in suit is proved. There is no evidence, or allegation even, of any default of duty on the part of the sheriff till about seven months after the expiration of the three years' term "from and after the 1st day of June, 1875," to which the defendants' liability is restricted by the express terms of the bond. *Williams* v. *Miller*, Kirby, 189; *Welch* v. *Seymour*, 28 Conn., 387; *Warren* v. *The State*, 11 Misso., 583; *Governor* v. *Robbins*, 7 Ala. N. S., 79; *Bruce* v. *United States*, 17 How., 437; *Dover* v. *Twombly*, 42 N. Hamp., 67; *Kitson* v. *Julian*, 4 El. & Bl., 854.

4. In one particular, of vital importance in the present case, the duties and the liabilities of sheriffs and their sureties differ from the duties and liabilities of treasurers, collectors, &c., and their bondsmen. Officers of the latter class must, immediately on retirement from office, pay over

all the funds of their official trusts to their successors. Unless they do this, there is an immediate breach of their official bonds, on which suit may be brought forthwith without demand. *Egremont* v. *Benjamin*, 125 Mass., 19; *Bulkley* v. *Finch*, 37 Conn., 84. The duty of the sheriff, on the other hand, requires him to keep in his possession, after retirement from office, all the property he has taken upon mesne process, till it is demanded of him by the parties found entitled thereto by determination of the suits in which it was attached. Unless an actual conversion or other improper disposition of the property can be proved, none will be presumed; his liability will begin with, and date from, the demand and refusal. If re-elected, it is the new sureties, not the old, who will be held liable, unless they can show a conversion or improper disposition of the property during the previous term. In this respect their liability is the same as that of the sureties of treasurers, collectors and the like, re-elected to successive terms. *Bruce* v. *United States*, 17 How., 437; *Governor* v. *Robbins*, 7 Ala. N. S., 79; *Dumas* v. *Patterson*, 9 id., 484; *Sherrell* v. *Goodrum*, 3 Humph., 419; *Vivian* v. *Otis*, 24 Wis., 518; *Thomas* v. *Blake*, 126 Mass., 320; *Bissell* v. *Saxton*, 66 N. York, 55.

5. The rule of damages in this case is the value of the property attached. The amount for which the sheriff was directed to attach in the original suit, in the words of the court in *Jones* v. *Gilbert*, 13 Conn., 523, "had no just bearing on the amount of damages." The declaration, even had there been a general *ad damnum* clause, as in assumpsit, trespass and trover, would have been bad on demurrer. *Treat* v. *Barber*, 7 Conn., 279; *Palmer* v. *Gallup*, 16 id., 562; *Morgan* v. *Myers*, 14 Ohio, 538; *Reading* v. *Clarke*, 4 Barn. & Ald., 268. In the present action, in which, by the terms of the statute and of their bond, the defendants are liable only to answer such damage as Caffrey has sustained, the allegation of the value of the cattle, which is merely descriptive in the actions of trespass, trover, &c., (1 Chit. Pl., 377), becomes an indispensable averment. There is nothing in this declaration which indicates even

approximately the damage Caffrey claims to have sustained; and, consequently, none of the accuracy our courts require in the assignment of breaches of official bonds. *Mills* v. *Skinner*, 13 Conn., 436.

6. Even if such a defect in a declaration is cured by verdict the absence of any evidence of the amount of damage on the trial is not cured. "The expression *cured by verdict*," says Chitty (1 Pl., 673), "signifies that the court will, after verdict, presume or intend that the particular thing which appears to be imperfectly stated or omitted in the pleading, was duly proved at the trial." As it appears in the record in the present case that there was no such proof, and that exception was taken to the lack of it by the defendants on the trial below, no such presumption can arise. *Treat* v. *Barber*, 7 Conn., 278.

*C. B. Andrews* and *D. C. Kilbourn*, for the defendant in error.

PARK, C. J. The defendants are sureties on a bond of ten thousand dollars given by one George H. Baldwin as sheriff of the county of Litchfield for the faithful performance of the duties of his office as sheriff. The condition of the bond is as follows:—"The condition of the said obligation is such, that whereas the said George H. Baldwin has been, by the electors of Litchfield County, duly appointed sheriff of said county for three years from and after the first day of June, 1875, according to the provisions of the constitution and laws of the state of Connecticut, and has accepted said appointment, and undertaken the obligations and duties incident to said office. Now if the said George H. Baldwin shall faithfully discharge the duties of said office, and answer all damages which any person or persons may sustain by any unfaithfulness or neglect in the same during said term of three years, then this obligation to be null and void; otherwise to be and remain in full force, power and virtue in law."

In the month of March, 1876, a proper writ of attachment, in favor of one Caffrey and against one Hitchcock, was placed in the hands of Baldwin as sheriff to serve, the writ

directing him to attach property to the value of three hundred dollars. On the following day Baldwin served the writ, and made an attachment of personal property belonging to the defendant in the suit, afterwards completing the service and making return that he had "attached the property under the writ." Caffrey recovered judgment in the suit against Hitchcock, at the November term of the Superior Court for the county of Litchfield, in the year 1878, after Baldwin's term as sheriff had expired, for $182.70 damages, and $75.32 costs of suit. Execution was duly issued on the judgment, and a proper demand was made on the execution upon the defendant in the suit, within sixty days from the rendering of the judgment, both for the amount of the judgment and for property on which to levy the execution, but the defendant neglected and refused either to pay the judgment or to turn out property to be levied on. A demand was also made by the officer upon Baldwin for the property that had been attached by him in the suit, for the purpose of levying the execution upon it, and on his neglect to deliver it for the amount of the judgment, but he neither delivered the property nor paid the judgment.

These are the principal facts in the case, and the important question is, do they establish the liability of the defendants as sureties on the bond?

The constitution of the state provides that the sheriff shall be elected for the term of three years, and that he shall become bound with sufficient sureties for the faithful discharge of the duties of his office; not for a part of those duties, but for all that shall, under any circumstances, devolve upon him as sheriff during the three years for which he is appointed. The statute provides that "no person shall enter upon the duties of sheriff until he shall have executed a bond of ten thousand dollars with two or more sureties * * conditioned that he will faithfully discharge the duties of his office, and answer all damages which any person may sustain by his unfaithfulness or neglect in their discharge." It is obvious that the statute intends that the bond shall cover all unfaithfulness on the part of the sheriff, of every kind, which

shall occur while he is performing or assuming to perform any of the duties which his office requires him to perform.

It was clearly the duty of the sheriff to keep the property attached to await the result of the suit in which the attachment was made. Drake (on Attachment, § 299,) says:— "The removal of an officer from office between the time of levying the attachment and that of the issue of execution will not excuse his failure to produce the property to meet the execution; for his special property remains to secure the plaintiff in the fruits of his judgment." See also *Turkey* v. *Smith*, 18 Maine, 125; *McKay* v. *Harrower*, 27 Barbour, 463.

The defendants concede that such was the duty of the sheriff, but they base their defense upon the phraseology of the condition of the bond, which, they say, expressly confines their liability to such unfaithfulness or neglect of the sheriff as occurred previously to the first day of June, 1878, when his term of three years expired. And inasmuch as the neglect of the sheriff to produce the property to be levied upon on the execution occurred after that time, they claim that they are not responsible for the neglect.

We do not consider it important to determine, as matter of law from the facts found, when the neglect of the sheriff in fact occurred, for we are satisfied from the condition of the bond that the undertaking of the defendants was co-extensive with the duties of the sheriff, and they are therefore responsible for such neglect whenever it occurred. The condition of the bond goes on to recite the election of the sheriff for three years, according to the constitution and laws of this state, and that he had accepted the office, and had undertaken to perform the obligations and duties incident to it. This language embraces all the duties that could possibly devolve upon the sheriff by virtue of his office; and if it was his duty as sheriff to keep the property in question till it should be called for by the officer serving the execution, then the condition is to be regarded as referring to this duty in common with others, and is equivalent to an express statement of it. Now the undertaking of the defendants, which follows this recital in the condition, was obviously intended

to be as extensive as the recital itself. And in fact it is as extensive, although it contains the phrase "during said term of three years."

The obligation of the sheriff to keep the property till it should be called for on the execution arose by virtue of the attachment which was made "during said term of three years." When the attachment was made the sheriff at once assumed this obligation and duty, and the undertaking of the defendants bound them for the faithful performance by the sheriff of all obligations and duties that should arise "during said term of three years."

Again, the phrase, "during said term of three years," should be construed, in the defendants' undertaking, as meaning *incident to said term of three years.* As we have seen, the condition recites the fact that the sheriff had been elected for the term of three years, and that he had "undertaken the obligations and duties incident to said office," that is, incident to said term of three years. Now the undertaking should be construed as equally extensive with the recital, which is the basis of the undertaking; and if so, then the phrase should be construed as meaning *incident to said term of three years*, which would include all obligations and duties which had their origin during that time. Moreover, "said term of three years" refers to the term described in the recital, and by every rule of construction means the same thing, and covers all the duties and obligations therein described. A sheriff who commences the service of process is required by statute to complete the service if his term of office shall expire before it is done. Can there be any doubt that a bond of this character would bind the sureties in such a case, if the sheriff should neglect, after his term of office had expired, to make return of a writ of attachment on which property had been taken, and in consequence of such neglect the claim of a creditor had been lost?

Again, the phrase "during said term of three years" was used in the condition of the bond merely as descriptive of the sheriff's *term of office*, and not as restrictive of the defendants' obligations. The sheriff was elected for three years.

That is the constitutional requirement, and if there are duties and obligations incident to the term of office that require more than three years for their discharge, they are covered by the phrase "during said term of three years." A distinction should be made between the "term of three years," as used in the condition of the bond, and three years as a period of time. The "term of three years" is the sheriff's term of office, and includes whatever time is necessary for the performance of all the duties which are incident to his term of office.

The conclusion then is, that the undertaking of the defendants was co-extensive with the duties and obligations of the sheriff, and that they are therefore responsible for his neglect to keep the property attached to respond to the demand on the execution.

The defendants further claim that the value of the property attached is the rule of damages in such a case as this; and that inasmuch as no evidence of such value was produced on the trial, and there being no allegation of such value in the plaintiff's declaration, there can be no presumption after judgment that such value was proved; especially as it is found that defence to the action was made on that ground.

If the value of the property attached in a given case is less than the amount of the judgment recovered, and no complaint is made of any misconduct of the sheriff in not attaching more property, then the value of the property attached would be the rule of damage. But if the value of the property attached is equal to or more than the amount of the judgment recovered, then the amount of the judgment would be the rule of damages. The plaintiff's declaration proceeds upon the ground that the value of the property attached was equal to or more than the amount of the judgment recovered, and that therefore the amount of the judgment is the amount of damage the plaintiff had sustained by reason of the misconduct of the sheriff.

The writ commanded the sheriff to attach property to the value of three hundred dollars, which was a reasonable amount in reference to the plaintiff's claim. Consequently

it was the duty of the sheriff to obey the command if the defendant in the suit had visible attachable property to that amount. He made an attachment of personal property and made return that he had attached it in obedience to the writ, and there is no statement that the defendant had no other visible attachable property. The presumption then is that the sheriff performed his duty till the contrary appears, and attached property to the value of three hundred dollars.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

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WILLIAM E. GASTON *vs.* TIMOTHY CANTY AND ANOTHER.

The statute (Gen. Statutes, tit. 19, ch. 14, sec. 8,) provides that in all actions of tort tried in the Superior Court, Court of Common Pleas or District Court, and not brought to such court by the defendant by appeal, if the damages found do not exceed fifty dollars the plaintiff shall recover no more costs than damages, except in certain specified cases. Held not applicable to actions of replevin, where the right to the possession of the property replevied is the principal matter, and the jurisdiction is determined (Gen. Statutes, tit. 19, ch. 17, sec. 4,) by adding to the value of the goods to be replevied, as stated in the writ, the amount claimed as damages for the detention.

REPLEVIN; brought to the District Court of Litchfield County and tried to the jury before *Cowell, J.* Verdict for the plaintiff for three dollars damages. The defendants moved that, under the statute (Gen. Statutes, p. 445, sec. 8,) the plaintiff be allowed no more costs than damages. The court allowed full costs and the defendants brought the record before this court by a motion in error. The case is sufficiently stated in the opinion.

*A. H. Fenn*, for plaintiffs in error.

*H. P. Lawrence*, for defendant in error.

GRANGER, J. This is an action of replevin, brought to the

District Court of Litchfield County, in which the property sought to be recovered is alleged to be of the value of two hundred dollars, and the damages claimed are six hundred dollars. The jury returned a verdict for the plaintiff, and for three dollars damages. The court accepted the verdict and rendered judgment for the plaintiff for three dollars damages and full costs. The defendant has filed a motion in error, on the ground that the plaintiff was entitled to no more costs than damages under the statute (Gen. Statutes, p. 445, sec. 8,) which provides that "if the damages found and assessed in any action at law in the Superior Court, Court of Common Pleas, or District Court, and not brought to such court by the defendant by appeal, shall not exceed one hundred dollars, costs may be taxed at the discretion of the court in favor of either party; provided that, in all actions of tort so tried, and not brought to such court by the defendant by appeal, if the damages found do not exceed fifty dollars, the plaintiff shall recover no more costs than damages, unless the title to property or a right of way or to the use of water is in question, the value of which property is found to exceed fifty dollars."

But it is very plain that this statute was intended to apply (aside from the cases excepted in the last clause) only to actions of tort, in which the damages claimed are the sole object sought, and go to make up the whole judgment for the plaintiff, where judgment is rendered in his favor. This is the case in actions for assaults, for slander, for fraud, and the like. In replevin the property replevied is really the subject matter of the suit and trial, and the damages merely incidental. Indeed the matter in demand, for the purposes of jurisdiction, is made by statute to consist of the alleged value of the property added to the damages demanded. Gen. Statutes, p. 485, sec. 4. As the plaintiff has already the property in his possession by the replevin, there is no need of a judgment that he retain it, and no occasion for an assessment of its value by the jury. If the jury find a verdict for the plaintiff it leaves the property in his hands, and the damages awarded are merely for the detention. It is

like the case of trespass for taking and carrying away goods, where the plaintiff ordinarily recovers the value of the goods, but where, if the defendant returns them while the suit is pending, he recovers only for the taking and detention. It is only where some portion of the property claimed by the plaintiff in his writ has not been replevied, that the value of such property can be added to the damages for the detention and included in the judgment. In every other case the damages may be very small, while the value of the property replevied may be large. Indeed the value of the property has little relation to the damages. They are larger or smaller according to the longer or shorter time that the property has been detained and are affected by the character of the property as well as by its value. It is very clear that the statute was never intended to make the amount of the damages recovered determine the question of costs, and this independently of the question whether the title to the property is put in issue by the pleadings.

There is no error in the judgment of the court below allowing the plaintiff full costs.

In this opinion the other judges concurred.

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## CHARLES S. NORTON *vs.* HENRY SHEPARD.

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A debtor, whose debt was barred by the statute of limitations, said to his creditor with regard to it—"I will pay it as soon as possible" Held to be a sufficient acknowledgment of the debt to take it out of the statute.

As a general rule any language of the debtor to the creditor clearly admitting the debt and showing an intention to pay it, will be considered an implied promise to pay and will take the case out of the statute.

ASSUMPSIT for goods sold; brought to the District Court of Litchfield County. The defendant pleaded the general issue with notice of the statute of limitations, and the case was tried to the court before *Fyler, J.* The facts were found and

judgment rendered for the defendant, and the plaintiff brought the record before this court by a motion in error. The case is sufficiently stated in the opinion.

*H. B. Graves* and *F. E. Cleaveland*, for the plaintiff.

*S. B. Horne*, for the defendant.

LOOMIS, J. Our statutes of limitation do not create an arbitrary bar to the recovery of a debt independent of the will of the debtor. If they did a new promise would not avail the creditor unless founded on some new consideration, and in such case the action would have to be brought on the new promise. But our courts have always considered them mere statutes of repose, which suspend the remedy, leaving the debt uncanceled and still binding *in foro conscientiæ*. Hence it is well settled that the debt may be revived and the bar to its recovery removed by a new promise, either express or implied. *Lord* v. *Shaler*, 3 Conn., 132; *Bound* v. *Lathrop*, 4 Conn., 336; *Austin* v. *Bostwick*, 9 Conn., 496; *Belknap* v. *Gleason*, 11 Conn., 160; *Phelps* v. *Williamson*, 26 Verm., 230.

In general any language of the debtor to the creditor clearly admitting the debt and showing an intention to pay it will be considered an implied promise to pay and will take the case out of the statute. *Wooters* v. *King*, 54 Ill., 343; *Gailer* v. *Grennell*, 2 Aiken, 349; *Phelps* v. *Stewart*, 2 Verm., 256. And in this state, an acknowledgment that a debt was once justly due and has never been paid, will ordinarily authorize the triers to infer a promise to pay it. *Sanford* v. *Clark*, 29 Conn., 460.

In the case at bar the promise of the defendant was—"I will pay them" (referring to the debts) "as soon as possible;" and the question is, whether these words constitute a sufficient acknowledgment to take the case out of the statute, in view of the principles above stated.

The defendant insists that the promise referred to was conditional, and that it cannot avail the plaintiff without proof that it was possible for the defendant to pay.

It seems to us that the words "as soon as possible" are too uncertain and indefinite to amount to a condition. They do not point to any future event capable of proof. It is said they mean "as soon as I am able." This would not help the matter unless we assume that general financial ability is intended, which might be susceptible of proof. But neither the words nor the context require this restricted meaning. If the debtor should have insufficient property to pay all his debts, it would not follow that it was not possible to pay the debt in question. He might do so perhaps by borrowing the money, by some friendly aid, or by his future earnings. The words do not necessarily imply poverty in the promiser; they might with equal propriety be used by a man of wealth, who at the time had no money on hand, but who had debts of large amount due him or who had other estate not at his immediate disposal. What would be possible for one to accomplish must be exceedingly difficult of proof because it must depend so much on his own exertions. Why the debtor used the language in question does not appear. The language may have been understood by both parties at the time as pointing to a speedy payment. If a man of large estate should use the words the creditor would have a right to expect his money very soon, while if used by another they might afford little encouragement. So that if the promise in question was to be considered express we should incline to hold it unconditional. But the language may be construed as an acknowledgment of the defendant's indebtedness to the plaintiff, and as such it clearly admits the continued existence of the debt and implies a willingness, and even a positive intention to pay it; and the words "as soon as possible" do not really restrict or limit the meaning and force of the acknowledgment. On the other hand they are strong words, implying a lively consciousness of obligation, and an earnest purpose to pay the debt.

There are numerous decided cases which afford strong confirmation of the position we have taken.

In *First Congregational Society* v. *Miller*, 15 N. Hamp., 520, the defendant's language was, "that he had not the

money, but would pay as soon as he could," which was held not to be a conditional promise, because there was no certain event to which the words looked forward, and it was held a sufficient acknowledgment to take the case out of the statute.

In *Butterfield* v. *Jacobs*, page 140 of the same volume, the defendant said "he would go to work and would pay as fast as he could," in regard to which the court pronounced a similar opinion.

In *Cummings* v. *Gasset*, 19 Verm, 308, the promise of the debtor was to pay "as soon as I can," and it was held sufficient to remove the bar of the statute.

In *Sluby* v. *Champlin*, 4 Johns., 461, the defendant on being arrested by the sheriff promised to "settle with the plaintiff if he would give him time for payment," which was held sufficient as an acknowledgment.

In *De Forest* v. *Hunt*, 8 Conn., 180, the plaintiff having written to the defendant calling his attention to the fact that he had previously sent his account requesting payment, the defendant replied:—"Yours of the 12th inst. came to hand this day, requesting to know what prospect I have of paying the demands against me. I am extremely sorry to say to you that the prospect, at present, is not very flattering, as it is utterly out of my power to pay anything;" which was held an unqualified and unconditional acknowledgment that the precise balance stated was at that time justly due the plaintiff.

In *Brown* v. *Keach*, 24 Conn., 73, the plaintiff's agent wrote to the defendant, calling his attention to the fact that he was indebted to the plaintiff by note, and the defendant replied:—"Yours of the 24th has been received, and in reply I hardly know what to say; but as you request an answer soon, I will say in return that I can't tell you what I can do at present, but I have been thinking of coming to Woonsocket for some time, but will omit it until I hear from you again. I wish you by return mail to send me a true copy of all the claims that you hold against me in full dates; that is, I want it word for word, and endorsements, &c., and state where your mother and sister are now living, and I will see them or write soon." This was held sufficient to remove the bar.

In *Blakeman* v. *Fonda*, 41 Conn., 561, the debtor said to his creditor—"If you will call in two weeks I will pay you something on the debt; I cannot tell how much;" and the words were held an unqualified recognition of the defendant's liability to pay the whole debt.

There was error in the judgment complained of, and it is reversed.

In this opinion the other judges concurred.

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STATE OF CONNECTICUT, UPON THE RELATION OF NELSON W. COE, *vs.* ORSAMUS R. FYLER.

Where property of a tax-payer has been legally assessed for taxation the town has no power to release him from a portion of his tax, he being of ability to pay.

After the assessors have completed their valuation of property, their work is subject to review and correction by the board of relief, and by them only.

Upon an application for a mandamus to compel a tax-collector to collect a tax, it is not necessary that the public prosecutor should proceed alone. He may act upon the relation of a citizen and tax-payer. The relator in such a case has an interest as a citizen in having all public officers discharge their official duty, and as a tax-payer he has a direct pecuniary interest.

It is not a reason against granting a mandamus that there is a remedy at law against the collector on his bond and by execution against his body and estate. Such proceedings may be fruitless, and as a remedy neither would be adequate; besides which the collector should not be heard to suggest that he might be punished for the non-performance of his duty.

APPLICATION for a mandamus, to compel the respondent, a tax-collector of the town of Torrington, to collect a tax laid upon the property of The Coe Brass Manufacturing Company, a corporation located in that town; brought to the Superior Court in Litchfield County by the State's Attorney upon the relation of Nelson W. Coe, a resident and tax-payer of the town.

The application set forth the corporate character of the company mentioned, its ownership of property in the town,

the assessment of the property by the assessors, the increase in the valuation of it by the board of relief, the names of the officers empowered to act and who did act in the matter, the laying of the tax by the town, the official character of the respondent as tax-collector, and the collection by him of a part of the tax and his refusal to collect the balance; and prayed that the respondent be commanded to proceed to collect the whole of the tax, or show cause to the contrary.

The respondent made the following return:

That though true it is that the relator is a resident of said Torrington and the owner of property liable to taxation on which he is assessed and pays taxes therein, and that there are many others who are the owners of property and tax-payers thereon in said town, and that among them the Coe Brass Manufacturing Company has its place of business and exercises its corporate powers in said town, and is the owner of property liable to taxation therein; and that, at the annual town meeting of said town, held on the first Monday of October, 1875, the officers named in said motion were duly elected and qualified; and that said town then passed certain votes, and appointed the respondent collector of the tax then laid, and that the assessors then chosen attended to the duties of their appointment as required by law, all as more fully set forth in the motion of said relator; and though true it is, that an assessment list and valuation of property claimed to belong to said Coe Brass Manufacturing Company, and claimed to be liable to taxation, was set in the grand list of taxable property in said town at the sum and value of $225,000, as stated in said motion, and that said selectmen made out and signed a rate-bill containing the property which it was claimed according to such list the tax-payers in said town were to pay, and which was placed in the hands of the respondent, with a warrant annexed thereto, as stated in said motion, and that the respondent accepted said office of collector and received said rate-bill as in said motion stated, and has collected the amount of said rate-bill with the exception hereinafter stated: Yet, for cause of omission to collect the whole of said rate-bill,

or any more thereof than he has already collected, accounted for and paid over, he assigns the following reasons: That on the 18th day of October, 1875, the said Coe Brass Manufacturing Company made and delivered to said assessors a true statement of all its property liable to taxation in said town of Torrington, in which list was embraced "two mills," valued by the owner, and also by the assessors at the sum of $50,000. And there was also embraced in said list "investments in mechanical and manufacturing operations—$75,000;" which said list was by the president of said company duly sworn to according to law. And on consultation with said assessors it was agreed between them and said company, that the value of said "investment in mechanical and manufacturing operations" was, and should be put into said list at, the sum of $100,000, amounting in the whole, with the other property of said company as finally adjusted by said assessors, to the sum of $164,150, which list was accepted by said assessors as a true statement of all of said company's property liable to taxation in said town, and said assessors made up the grand list of said town accordingly. That a meeting of the board of relief of said town was duly called to be held on the first Monday of January, 1876, at which only two of the members thereof, they being a majority of said board, were present, namely, N. W. Coe and F. P. Whiting, who, as such board of relief, on the 3d day of January, 1876, being the first Monday of January, issued a notice, of which the following is a copy, viz: "Wolcottville, Jan. 3, 1876, Coe Brass Co.: Gentlemen—The board of relief for Torrington, in equalization of taxes, propose to raise the real estate and amount invested in business of your company, $60,850."

That Lyman W. Coe, the president of said company, appeared before said N. W. Coe and F. P. Whiting, as such board of relief, and claimed that said sum ought not to be added to said list, and especially that the value of the mills named in said list did not exceed the sum of $50,000, and that the amount invested by said company in mechanical and manufacturing operations liable to be assessed in said

town did not exceed $100,000, and that the addition of said amount would be unjust, excessive, inequitable and unlawful. But that, notwithstanding the protest, the said N. W. Coe and the said Whiting, as such board, did increase said valuation of said mills by the sum of $20,000, and did also increase the valuation of said "investment in mechanical and manufacturing operations" by the sum of $40,850, whereby the list of said company was increased to the sum of $225,000, and was so included in the grand list of said town for that year. And thereupon a rate-bill was made out against said company in which its tax was stated to amount to, and was set at the sum of $3,375, instead of the sum of $2,462.25, as it should have been, and as it would have been but for said additions so made as hereinbefore set forth.

And the respondent says that, as such collector, he received said rate-bill, and proceeded to the collection thereof, and that said company did pay to said collector, on its said tax, the sum of $2,462.25, leaving, after said payment, apparently due on the rate-bill the sum of $912.75, which last mentioned sum said company refused to pay as having been unfairly, unjustly and unlawfully assessed upon them.

And the respondent further says, that upon consultation with the selectmen of said town, he, upon their advice, in view of the claims made by said company and of the facts above stated, delayed to collect said tax. And that afterwards, on the 28th day of May, 1877, a warning for a special town meeting of said town to be held on the 2d day of June, 1877, was duly given by said selectmen, which warning contained, among other notices of the purpose for which the meeting was called, the following: "Also, to take such action as may be deemed advisable with reference to the collection or reduction and abatement of the tax against the Coe Brass Manufacturing Company of said town in the tax list of the town for the year 1875."

That on said 2d day of June, 1877, said meeting was duly held, and said subject of the collection or reduction and abatement of said tax was fully discussed and considered,

and during said discussion said Coe Brass Manufacturing Company claimed that the said additions to their list hereinbefore stated were inequitable, excessive, unjust and unlawful; and upon due consideration it was thereupon voted unanimously, with the exception of the solitary vote of the relator, "that the tax assessed and laid against the Coe Brass Manufacturing Company of this town on the tax list of the town for the year 1875, be so abated and reduced that said company be required by the town to pay taxes on said list on the sum of $164,150, amounting to a tax of $2,462.25, and no more; provided that the selectmen of the town become satisfied, upon investigation, that such abatement and reduction can legally be made by the town."

That afterwards, on the 27th day of September, 1877, the selectmen of said town having investigated the question of the legality of said vote in relation to the abatement and reduction of the tax list of the Coe Brass Manufacturing Company on said tax list, and having become satisfied, upon the advice of counsel, of the legality of such reduction and abatement, did make a settlement with said company on said tax list by deducting from said tax the sum of $912.75 with interest, of all which the treasurer of said town and the respondent had notice. And that after the aforesaid action of said town and of said selectmen, on the said 27th day of September, 1877, the treasurer of said town balanced said rate-bill on the tax list of 1875, which was in the respondent's hands as said collector, and credited thereon in making said balance said sum of $912.75 and interest so abated from the list of said company, thereby leaving said rate-bill fully collected, and your respondent's duties in respect to the same as said collector completed and at an end; and that said treasurer then gave credit to your respondent as said collector on the books of said town for said sum of $912.75 and interest to balance the charge thereof made against him when said rate-bill was put into his hands for collection, and no charge exists in favor of said town against your respondent, as collector, upon said rate-bill.

And your petitioner further says, that said town, on the 27th day of September, 1877, surrendered to him the bond which he as such collector gave to said town to secure the faithful discharge of his duties as such, and that he is wholly released therefrom, and that all the facts above alleged occurred and took place prior to the date and impetration of said information and motion. And the respondent avers that all the allegations in said motion, not herein admitted to be true, are untrue.

Wherefore, for each and all of the causes and reasons in this his answer and return set forth, the said respondent insists that said writ of mandamus should not issue as prayed for in said motion, and he prays the judgment of the court thereon, and that he may be hence dismissed.

To this return the State's Attorney demurred, and the questions arising on the demurrer were reserved for the advice of this court.

*C. B. Andrews*, for the relator.

1. The only tribunals known to the law in this state for the purpose of determining the amount of each individual's taxable property are the assessors and the board of relief. Gen. Statutes, p. 152, sec. 1, and p. 159, sec. 35; *Goddard* v. *Seymour*, 30 Conn., 394; *Munroe* v. *New Canaan*, 43 id., 309. Assuming that these officers committed no error or illegality in making their valuation (and no error is claimed,) it will be admitted that it was the duty of the company to pay the sum of $3,375, as their tax.

2. There being a valid tax lawfully laid against a party abundantly able to pay it, the town of Torrington had no authority to abate it or any part of it. Towns have no inherent powers. They have only just such power as is expressly or impliedly granted to them by the legislature. *Abendroth* v. *Greenwich*, 29 Conn., 356; *Baldwin* v. *North Branford*, 32 id., 47; *Booth* v. *Woodbury*, id., 118; *Hoyle* v. *Putnam*, 46 id., 56. The powers of towns are to be strictly pursued. *Betts* v. *Starr*, 5 Conn., 550; *Comstock* v. *Hadlyme Eccl. So.*, 8 id., 247; *Higley* v. *Bunce*, 10 id., 436. The

power to abate a tax is not among the powers granted to towns by our statutes. A town cannot by a vote exempt property from taxation. *Weeks* v. *Milwaukee*, 10 Wis., 242, 265. The assessment and collection of taxes are acts of sovereignty, effectual only because authorized by the state. *Heine* v. *Levee Commissioners*, 19 Wall., 660. Towns are the instrumentalities which the state uses to accomplish the several steps in the levying and collecting taxes. They have no power of their own. The tax assessors and collectors are the agents of the law, rather than of the town. Gen. Stat., p. 165, sec. 21; Cooley on Taxation, 292; *Tomlinson* v. *Leavenworth*, 2 Conn., 292; *Torrington* v. *Nash*, 17 id., 199; *Farrell* v. *Bridgeport*, 45 id., 191; *Torbush* v. *Norwich*, 38 id., 225; *Jewett* v. *New Haven*, id., 368. In the statutory provisions for raising money by taxation, the town is not called into action, except to pass the introductory vote. And if they fail to do this, the law authorizes and requires the selectmen to do it. Gen. Stat., p. 161, sec. 47. The legislature foresaw that poverty might prevent some individuals from paying their taxes, and gave the selectmen power to abate in such cases. Gen. Stat., p. 162, sec. 10. But they have given no authority to abate for any other cause, and no authority to the town to abate at all. "A statute that prescribes that a thing should be done in a particular way carries with it an implied prohibition against doing it in any other way." *N. York Firemen's Ins. Co.* v. *Ely*, 5 Conn., 572; *New Haven* v. *Whitney*, 36 id., 375. Broom's Legal Maxims (7 ed.), 664. As to the collection of the tax, the selectmen have certain powers and obligations, but the town itself has "no duty to perform, no rights to defend, and no interest to protect." *Gregory* v. *Bridgeport*, 41 Conn., 76, 86. The money raised by taxation is to be held and used by the town as a public trustee, not as the beneficial owner. Part flows directly back to the state treasury and the rest is to be applied in discharge of those public duties which are imposed upon towns by the legislature, such as the support of highways and bridges, schools, paupers, &c., *Loan Association* v. *Topeka*, 20 Wall., 655;

Cooley's Const. Lim., 487; *Chidsey* v. *Canton*, 17 Conn., 478; *New London* v. *Brainard*, 22 id., 552; *Jenkins* v. *Andover*, 103 Mass., 94; *Morse* v. *Stocker*, 1 Allen, 150. Public policy forbids that a town should have the power by vote to abate a tax. If a town can release the tax of one man, because they think the board of relief have acted injudiciously, they can release the tax of any and every other. *Weeks* v. *Milwaukee*, 10 Wis., 242, 263. To abate the tax of a person able to pay would be to increase the tax of every other tax-payer. Under the guise of an abatement, it would take money from all the other citizens to give to one. It would destroy the equality which is necessary to all just taxation. "It would be the robbery and spoliation of those whose estates in whole or in part are confiscated." *Allen* v. *Jay*, 60 Maine, 142. Towns cannot give away town property to private individuals for private use. *Booth* v. *Woodbury*, 32 Conn., 118; *Gregory* v. *Bridgeport*, 41 id., 76, 87; *Allen* v. *Inhabitants of Marion*, 11 Allen, 108. And whether it be a gift, or a loan, or an abatement of any lawful obligation, the principle is the same. *Lowell* v. *Boston*, 111 Mass., 454; *Attorney-General* v. *Boston*, 123 id., 460; *Weismer* v. *Village of Douglas*, 64 N. York, 91; *Loan Association* v. *Topeka*, 21 Wall., 655; Opinion of the Judges, 58 Maine, 560; *Brewer Brick Co.* v. *Brewer*, 62 id., 62; *Farnsworth Co.* v. *Lisbon*, id., 451.

3. Mandamus is the proper remedy. The relator has a clear right to *some* remedy. Every tax-payer has the right to insist that every tax lawfully laid against a person who is not "poor and unable to pay the same" shall be collected. *New London* v. *Brainard*, 22 Conn., 552; *Webster* v. *Harwinton*, 32 id., 131; Moses on Mandamus, 139. And mandamus is the only remedy. 3 Black. Com., 110; High Ex. Rem., § 143; *Smyth* v. *Titcomb*, 31 Maine, 272; *Tremont School District* v. *Clark*, 33 id., 482; *Commissioners of Knox Co.* v. *Aspinwall*, 24 How., 376; *Rees* v. *Watertown*, 19 Wall., 107, 117; *Waldron* v. *Lee*, 5 Pick., 323; 4 Bacon Abr., 495, *Mandamus*. But even if the relator had no inter-

est, the state is interested; and mandamus should issue in its behalf. *Attorney General* v. *Boston*, 123 Mass., 460, 477; *State* v. *Hart. & N. Hav. R. R. Co.*, 29 Conn., 538; *Gilman* v. *Bassett*, 33 id., 298; *Lyon* v. *Rice*, 41 id., 245.

*G. C. Woodruff* and *E. W. Seymour*, with whom was *G. H. Welch*, contra.

1. The writ of mandamus should have been applied for and prosecuted by the State's Attorney alone, and not upon the relation of an inhabitant of the town, who is injured, if at all, in common with the other tax-payers of Torrington. That it could not have been maintained by the relator in his own name alone, inasmuch as the subject-matter of the writ concerns all the tax-payers of the town alike, was decided in *Lyon* v. *Rice*, 41 Conn., 245, and *Peck* v. *Booth*, 42 id., 275. Whether the prosecuting officer alone must apply for and prosecute the writ, in a case like the one at bar, or whether it may be prosecuted by any tax-payer of the town as relator, has never been decided in this state, and the authorities differ upon the question. We urge the adoption of the rule requiring the prosecuting officer alone to prosecute where public rights are concerned. *Rex* v. *Merchant Tailors' Co.*, 2 Barn. & Adol., 115; *Sanger* v. *Commissioners of Kennebec*, 25 Maine, 291; *State* v. *Inhabitants of Strong*, id., 297; *Wellington* v. *Petitioners*, &c., 16 Pick., 105; *People ex rel. Drake* v. *Regents*, 4 Mich., 98; *Russell* v. *Inspectors of State Prison*, id., 187; *Linden* v. *Almeda Co.*, 45 Cal., 6; *Heffner* v. *Commonwealth*, 28 Penn. St., 108.

2. A mandamus will not be granted except in favor of a clear and well-defined legal right, and where there is no other adequate remedy. *Am. Asylum* v. *Phœnix Bank*, 4 Conn., 178; *Peck* v. *Booth*, 42 id., 271. This application is brought in its present form on the ground, of course, that the relator, in common with the other inhabitants and tax-payers of Torrington, has a public interest in the subject matter thereof; it is a public and not a private right which is sought to be enforced. The question then arises—Has the public—namely, the public about whose rights the relator

is solicitous—any other adequate remedy? We say it has. 1. By suit on the collector's bond, if he has failed to faithfully discharge his duties. 2. If a more summary remedy is preferred, then by proceedings undertaken by the selectmen for an execution against his body and estate. Gen. Stat., p. 162, sec. 6. Where there is other specific remedy or other means of satisfaction equivalent to specific relief, a mandamus will not be granted. *Am. Asylum* v. *Phœnix Bank*, 4 Conn., 178.

8. A mandamus will not be issued, because, under the facts of this case, there is no uncollected tax against the company which it is the duty of the collector to collect.—(1st.) The vote passed by the town was a legal vote. It justified the acts of the selectmen performed in pursuance of it, and the vote, together with the subsequent acts of the town and its selectmen, treasurer and collector, absolved the respondent from any further duty to collect the balance claimed by the relator to be still due from the company. Cooley (Const. Limitations, 190) says:—"It has already been seen that the legislature cannot delegate its authority to make laws; but, fundamental as this maxim is, it is so qualified by the customs of our race and by other maxims which regard local government, that the right of the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulations usual with such corporations, would always pass unchallenged." In the Town Bounty cases, the inherent powers of towns in Connecticut was the subject of much discussion. Our courts refused to accord to the towns that amount of sovereignty with which they have always been credited by historians and popular writers on government. But the possession of such powers as are necessary to the performance of their duties as territorial and municipal corporations, in addition to the powers expressly granted by the legislature, was recognized. *Baldwin* v. *North Branford*, 32 Conn., 54; *Booth*

v. *Woodbury*, id., 124; *Webster* v. *Harwinton*, id., 131. Previous to the revision of 1875, we had a statute providing that towns might make such orders, rules and regulations for their welfare as they might deem expedient, and that they "shall grant annual taxes on the assessment list last made out." Rev. Stat. of 1866, p. 102, secs. 31, 32. The revision of 1875 does not contain section 32, that "towns shall grant annual taxes," nor the substance of it. The provisions applicable are found in Gen. Stat., p. 85, sec. 1, and p. 161, secs. 46, 47. It follows then under our present statutes,—and the same were in force in October, 1875, when the tax in question was voted,—that the right of a town to grant taxes arises: (1) By virtue of the provisions of Gen. Stat., p. 85, sec. 1, as to powers of towns to make regulations for their welfare, and which the revisers and legislature undoubtedly thought sufficient for the purpose; (2) by necessary implication; (3) from immemorial custom, or (4) as a power necessary to be exercised "to the performance of its duties as a territorial and municipal corporation." Whichever way the authority is received, it is the *town* that is authorized to grant the tax. Now the power to lay a tax involves the power to remit, abate, reduce, stop the collection of, and refund a tax. There inheres in the power to take up the matter of taxes and vote thereon, the correlative power to vote that they shall not be unjustly laid, and to vote to relieve any upon whom they are unjustly laid. It is no inconsiderable addition to the force of this argument that the power exists nowhere, unless in the town, to relieve this company from a tax recognized by both parties interested in this proceeding, to wit, the public, represented by the relator, and the company, to be unjust. And it comes to this, if the town had no right to take the action it did, that there is no way to right a recognized wrong which is full of damage to one party, and which both parties concerned desire to have righted; and, worse yet, that the agent of the town shall be commanded by a mandamus to go forward and consummate a wrong, and thus, by order of the court, force the town to act unjustly. The broad principle that the right to refund

or abate a tax wrongly assessed or exacted, necessarily follows from the right to grant or collect a tax, is fully recognized by Cooley in his work on Taxation, p. 530. Speaking of refunding taxes, he says: "This is only an abatement made after the tax has been paid or enforced. A general right exists in the state to refund any tax collected for its purposes, and a corresponding right probably exists in the common council or other proper boards of cities, villages, towns, &c., to refund to individuals any sums paid by them as corporate taxes, which are found to have been wrongfully exacted, or are believed to be for any reason inequitable, but no ministerial or executive officer could have any such authority unless expressly given by law." Of course, if, upon general principles, the selectmen of a town may refund taxes inequitably exacted, *a fortiori* can the town itself do it. And if the right of the selectmen to do it, except in certain cases, is restricted by statute (and we can see very good reasons why, except in the case of those actually unable to pay, the action of the town itself should be necessary,) this in no way abridges the power of the town itself. And equally, of course, if a town has a right, for cause, to refund taxes already exacted, it has the right to abate and reduce them before they are collected. Cooley on Taxation, 527.—(2d.) The public having recognized the justice of the company's claim that the additional tax sought to be collected was unjust, and having voted to so reduce the tax as to require payment only of the portion admitted to be just, cannot, certainly while such vote remains unrescinded, be heard to ask this court, in the exercise of its discretion, to issue a mandamus to compel the collection of what it has abated. —(3d.) Aside from the legality of the vote and the general principles applicable to the position of the public, this application cannot be sustained. "A writ of mandamus lies to compel a public officer to perform a *duty* concerning which he is vested with no discretionary power, and which is either imposed upon him by some express enactment or necessarily results from the office which he holds." *Pond* v. *Parrott*, 42 Conn., 13. "It will not lie to compel the performance of

an act where it is doubtful whether the officer has a right to execute the act." 1 Swift Dig. Rev., 578. Upon the facts of this case, is it the respondent's duty to collect the tax in question? Has he any right to do it? If he owes any duty, it is to the town, which voted to abate and reduce the tax, if its selectmen became satisfied it could be legally done. They did so become satisfied, and made a settlement of this very matter with the company, making the abatement and reduction voted by the town. The town treasurer balanced the rate-bill on the tax-list of 1875, which was in the respondent's hands, crediting the sum abated, thereby leaving the rate-bill fully collected; and gave credit to the respondent as collector on the books of the town of the sum abated, to balance the charge made against him when the rate-bill was put into his hands for collection, so that no charge exists in favor of the town against the collector on the rate-bill; and the town has surrendered to him his collector's bond, and he is fully relieved therefrom.

4. In conclusion, we submit that it would be against law and equity to grant the writ applied for. It is a prerogative writ, granted, not of right, but in the exercise of a sound discretion to be allowed or denied, according as, in the opinion of the court, justice requires; a writ provided, as says our own court in *Treat* v. *Middletown*, 8 Conn., 246, "*to prevent a failure of justice* when there is no established specific remedy, and when, in justice and good government, there ought to be one." There is nothing in this case to require our courts to interfere and prevent the town of Torrington from averting from this company the injustice which the agents of the town attempted.

PARDEE, J. The respondent asks us to adopt the rule requiring the public prosecutor alone to prosecute where public rights are to be protected.

But, as a citizen, the relator has an interest in having all public officers discharge their official duties according to law; as a tax-payer he has an individual pecuniary interest in the collection of all legally assessed taxes and in securing

to himself protection from compulsory contribution to deficiencies resulting from neglect of official duty upon the part of the collector. The fact that the representative of the state permitted him to appear of record as joining in the motion does not call upon us to deny their prayer.

Again, the respondent insists that we should deny the writ because there is adequate remedy at law by suit upon his bond and by execution against his body and estate.

But, the assessed corporation is able, and it is its duty, to pay the tax; he is able, and it is his duty, to collect it. The town and the relator each have the right to insist that he shall perform his duty according to law; and he is not to be heard to suggest that he can be punished for non-performance. Moreover, collection is certainty; the substitutes offered by him may each prove fruitless; neither is in any sense adequate.

Again, he insists that the vote of the town absolved the corporation from the duty of paying, and himself from the duty of collecting the tax.

This court has repeatedly declared that towns have no inherent powers; none except such as they have either by express grant or necessary implication. The State makes them its instruments in the administration of civil and criminal justice, in the construction and reparation of highways, in the maintenance of schools, and in the support of the poor. The requirement by the legislature is that they shall raise by taxation sufficient, and only sufficient, money to defray the expense attendant upon the discharge of duties imposed or the performance of acts permitted; this to be estimated with all convenient certainty. When the proper officers have legally placed upon each individual his share of this public burden, the town has no power to lift it from him, he being of ability to pay, either in the form of abatement before, or in that of gift after collection; for, this being done, a deficiency would result, to be supplied by the imposition of additional assessments upon others: and this is to violate the fundamental law of taxation, that it shall bear equally upon all.

Moreover, money being absolutely necessary to the existence of the government, taxes must be paid with promptness. To this end the legislature has provided a simple, economical and effective method; and the establishment of this, as a matter of law, prevents the use or existence of any other; nothing remains to the town, the officers, or the individual but obedience.

After the assessors have completed their valuation, it is subject to review and correction by the board of relief, which is vested with power to increase the items of taxable property in the list of any person, or the number, quantity or amount of any such item, upon hearing after notice. So far as this question is concerned, which is wholly one of valuation, that board was by statute the court of final resort; no appeal lay from its action. The assembled inhabitants of the town were without power in the matter, and for the wisest reasons; the power to release one person of ability to pay, from payment of a lawful tax, is the power to release others—to release all; and that means the nullification of proceedings for the assessment and collection of taxes as often as they may be instituted. The power to diminish the burden imposed upon one implies the power to increase that of another; this means the usurpation by the town of powers vested solely in the board of relief. The statute giving to that board power to review the entire assessment list and to increase or diminish individual assessments, is in effect the prohibition of the town from action thereupon.

The Superior Court is advised to grant the writ prayed for.

In this opinion the other judges concurred; except CARPENTER, J., who dissented.

## HENRY B. GRAVES *vs.* SOLON B. JOHNSON.

Parol evidence is admissible to show the true relations of the parties to a promissory note, as between themselves, where the law would have inferred, in the absence of such proof, a different relation of the parties.

The plaintiff undersigned a note as surety which was payable to the defendant's order and held by him. This was done at the request of the defendant, and solely for his benefit, and upon an agreement that the arrangement should be kept secret from the principal, and that the defendant would hold the note till due, and if the principal did not pay it that the plaintiff should not be compelled to pay it. The defendant in violation of the agreement negotiated the note before due for value to a bonâ fide holder, who brought suit upon it against both the makers and the plaintiff was compelled to pay it. In a suit afterwards brought by the plaintiff to recover the amount from the defendant, it was held that proof of the parol agreement between the parties was admissible and that under the agreement the plaintiff was entitled to recover.

And held that the statute of limitations did not begin to run in the defendant's favor upon the claim of the plaintiff for money paid for him, until the payment of the money.

The note was negotiated by the defendant more than three years before the suit was brought, but the payment of it was made by the plaintiff within the three years. By the statute of limitations suits on express contracts not in writiug must be brought within three years. Held that, however it might be as to the breach of the agreement by the negotiation of the note, yet the other part of the agreement, that the plaintiff should not be compelled to pay the note, was not broken until he was compelled to pay it, and the statute of limitations as to this part of the agreement did not begin to run until then.

Besides this, the agreement fixed the relation between the parties, so that whenever the plaintiff was compelled to pay the note he was paying it at the request of the defendant, and could recover the amount as money paid for him, without counting upon the breach of the special agreement.

ASSUMPSIT on a special contract, with the common counts; brought to the Superior Court in Litchfield County, and tried to the court before *Hovey, J.* The court found the following facts.—

In the month of August, 1873, and prior to the 25th day of that month, John R. Farnum made and delivered to the defendant for a valuable consideration his promissory note in writing, as follows:—"Litchfield, Aug. 1, 1873. For value received I promise to pay to Solon B. Johnson or order on the 1st of January, 1874, two hundred and fifty dollars with interest. JOHN R. FARNUM." On the 25th of August, 1873,

the plaintiff signed the note as surety, for the sole accommodation and benefit of the defendant and at his request, and without receiving therefor any consideration whatever. He was induced to sign it by the promise of the defendant that if he would do so, he, the defendant, would hold it until its maturity and not negotiate it, and that if Farnum failed to provide for its payment the plaintiff should not be compelled to pay it, provided he would not disclose to Farnum that he was not legally holden as surety for the payment. This agreement was proved wholly by parol evidence, to which the defendant objected, but the court admitted it. The plaintiff did not disclose to Farnum that he was not legally holden as surety, but kept him in ignorance of the fact.

Soon after the note was signed by the plaintiff and before it became due the defendant indorsed and delivered it to one Foster, who purchased it in good faith, for a valuable consideration, and without notice of the circumstances under which the plaintiff became a party to it. The plaintiff had notice of the indorsement and delivery of the note to Foster the latter part of December, 1873.

Farnum did not pay the note when it matured or at any time, and on the 13th of March, 1874, Foster commenced a suit at law against Farnum and the plaintiff, in the Superior Court at Litchfield, to recover its amount; and while the suit was pending, on the 16th day of November, 1875, the plaintiff was compelled to pay and did pay to Foster $289.08, being the amount due on the note, and received from him the note, which he has ever since held. The defendant, though requested, has never paid any part of the amount to the plaintiff.

Upon these facts the court rendered judgment for the plaintiff for $348 damages and his costs. The defendant brought the case before this court by a motion in error.

*G. A. Hickox*, for plaintiff in error.

1. The plaintiff could not have successfully defended against the note in question even had it remained in the defendant's hands till due. It was not accommodation paper,

but given for valuable consideration, and its terms could not have been varied or contradicted by the parol evidence on which the plaintiff bases his present case. *Hoare* v. *Graham*, 8 Camp., 57; *Mosely* v. *Hanford*, 10 Barn. & Cress., 730; *Hall* v. *Rand*, 8 Conn., 560, 577; *Woodbury Savings Bank* v. *Charter Oak Ins. Co.*, 29 id., 374, 381; *Bradley* v. *Bentley*, 8 Verm., 243; *Wakefield* v. *Stedman*, 12 Pick., 562; *Hanchet* v. *Birge*, 12 Met., 548. Though formerly holding that the contract implied from a blank endorsement might be varied by parol evidence, our courts have since confined even that exception to the usual rule within narrow limits such as would not include the present case. *Dale* v. *Gear*, 38 Conn., 15.

2. Having paid the amount due on his note, the plaintiff cannot recover in the present action, since the so-called contract he sets up is a parol condition or defeasance such as the law will not allow him to attach to the original instrument in writing, still less to recover upon as an independent contract. *Curtis* v. *Wakefield*, 15 Pick., 437. If the defendant is liable to the plaintiff in any action, it is in case for fraud; clearly not in assumpsit. *Dale* v. *Gear*, 38 Conn., 15; *Curtis* v. *Wakefield*, 15 Pick., 437; 2 Parsons on Notes & Bills, 503.

3. The plaintiff's right of action, if he has any, is upon a special parol contract, and is barred by the statute of limitations unless brought within three years from the time when it accrued. *Kennedy* v. *Carpenter*, 2 Whart., 344; *Farmers' Bank* v. *Gilson*, 6 Penn. St., 51; *Stocking* v. *Sage*, 1 Conn., 75; *Beach* v. *Mills*, 5 id., 493; *Terrill* v. *Beecher*, 9 id., 344; *Remington* v. *Noble*, 19 id., 387; 1 Swift Dig., 582; Gen. Statutes, 494, sec. 7. The plaintiff's right of action accrued, if at all, when the defendant negotiated the note to Foster, before December, 1873. It is upon this alleged breach of contract that the plaintiff declares, averring that, in consequence of Foster's suit, "the plaintiff was, contrary to said agreement, *and in consequence of the conduct of the defendant in negotiating said note as aforesaid*, compelled to pay said note and interest." 2 Greenl. Ev., § 435; *Lathrop* v. *Atwood*, 21 Conn., 117, 128; *Bank of Hartford*

*County* v. *Waterman*, 26 id., 335; *Battley* v. *Faulkner*, 3 Barn. & Ald., 288; *Colvin* v. *Buckle*, 8 Mees. & Wels., 680; *Whitehead* v. *Walker*, 9 id., 506; *Bank of Utica* v. *Childs*, 6 Cow., 238; *Wilcox* v. *Plummer's Exrs.*, 4 Pet., 172, 179; *Kennedy* v. *Carpenter*, 2 Whart., 344; *Farmers' Bank* v. *Gilson*, 6 Penn. St., 51.

*H. B. Graves*, for defendant in error.

GRANGER, J. This action is founded upon a special parol agreement made by the defendant, which was in substance that if the plaintiff would sign the note of Farnum as surety, he, the defendant, would hold it until its maturity, and not negotiate it, and that if Farnum failed to pay the note the plaintiff should not be compelled to pay it, provided he would not disclose to Farnum that he was not legally holden as surety for its payment. The plaintiff fulfilled his part of the agreement, and did not disclose to Farnum the arrangement between him and the defendant, but the latter violated his part of the agreement, and negotiated the note to a bonâ fide purchaser. Farnum did not provide for its payment, and the plaintiff was sued upon the note by the holder and was compelled to pay it.

The plaintiff signed the note as surety for the sole accommodation and benefit of the defendant and at his special request, and without receiving therefor any consideration whatever. Can there be any reason in law or equity why he should not recover? He has paid his money for the benefit of the defendant, and if any rule of law precludes him from recovering, such a rule is against all reason and justice. The defendant makes no denial that he has had the plaintiff's money, but he says that the law is so that the plaintiff cannot recover; and the rule of law which he relies upon is the old and salutary one, that a written instrument cannot be varied or contradicted by parol evidence. We have only to say, as CARPENTER, J., says in the case of *Schindler* v. *Muhlheiser*, 45 Conn., 154—"That rule has no application to a case like this." It has for its object the prevention of fraud and per-

jury in those cases where parties have put their contract in writing by excluding other evidence of the terms of the contract than the writing itself. In fact the case referred to bears a striking analogy to the present, and the reasoning in that case applies well to this. If the defendant can succeed in applying the rule, he makes it an instrument of fraud and wrong, and cheats the plaintiff out of an honest and perfectly equitable claim. See the cases cited in that case and in *Thacher* v. *Stevens*, 46 Conn., 561.

The action, as we have seen, is not founded upon the note, but upon the agreement made between the parties at the time the plaintiff became surety on the note for the sole accommodation of the defendant, and the contract was good and valid, and was in effect a contract of indemnity to the plaintiff. It was not in writing and of necessity must be proved by parol, if provable at all, which it clearly was. But if the action was upon the note, and Johnson the payee was plaintiff, and Graves defendant, the latter could show by parol the circumstances under which he signed the note, that it was without consideration, and at the request and for the accommodation of Johnson. "Nothing is more common than to introduce evidence of the real and true relation of parties to each other whose names are on negotiable paper, where *primâ facie* the position or order of signature makes a contract different from the true relations of the parties. The proper inquiry is, who among the parties is to pay the debt." ELLSWORTH, J., in *Colegrove* v. *Rockwell*, 24 Conn., 583.

The claim of the defendant, that the plaintiff's claim is barred by the statute of limitations, cannot be allowed to defeat the claim. The agreement of the defendant that he would hold the note till maturity and that the plaintiff should not be compelled to pay it was of course violated by the defendant's negotiation of it soon after it was made, which was on the 1st of August, 1873, and perhaps, so far as his liability to damages for the mere negotiating of the note is concerned, that liability was barred by the statute when the suit was brought on the 21st of August, 1878. It is not necessary for us to consider this point, for the defendant also

agreed that the plaintiff should not be compelled to pay the note, and this part of the agreement is set out and relied upon in the special count. This agreement of course was not violated until the plaintiff was actually compelled to pay the note, which was on the 16th of November, 1875, and less than three years before the suit was brought. Besides all this, the agreement had fixed the relation between the parties, so that whenever the plaintiff was compelled to pay the note he was paying it at the request of the defendant, and could recover the amount of him as money paid out for him, without counting upon the breach of the special agreement. That agreement had created a duty on the part of the defendant to provide for the payment of the note; this was a perpetual duty, and when the plaintiff was compelled to pay it he was paying a debt of the defendant. It was substantially a contract of indemnity, which of course holds good so long as the liability remains against which the indemnity was intended to provide.

There is no error in the judgment.

In this opinion the other judges concurred.

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62 152

## Stephen H. Culver's Appeal from Probate.

*A* had lived in *S*, within the probate district of *N*, and had a conservator who was appointed by the probate court of that district, and who acted as such to the time of *A*'s death. He had been addicted to intoxication, and his mind, naturally weak, had become more enfeebled, but he was able to determine where he preferred to reside. A few months after the appointment of the conservator *A*, of his own accord, went to *W*, intending to remain there, and did in fact dwell there till his death, about a year and a half later. The conservator did not, at the time, assent to his going there, but soon afterwards consented to his remaining for a while, and afterwards paid a person with whom he lived for his clothes and in part for his board. While there he was admitted as a voter of *W*, and voted there. Held that he was to be regarded as domiciled in *W*, and that the probate court of that district had jurisdiction of the settlement of his estate.

Culver's Appeal from Probate.

The probate court of *N* found that *A* resided in *S* at the time of his death, and admitted his will to probate there. Upon an application to the probate court of *W* for the probating of his will, the record of the proceedings of the probate court of *N* was introduced in opposition, for the purpose of showing that *A* was domiciled in *S*. Held that the record was not conclusive, but that the probate court of *W* could receive parol evidence of his being domiciled in *W*.

The jurisdiction of courts of limited and inferior jurisdiction can be collaterally attacked, and if the want of jurisdiction in fact exists the judgment is an absolute nullity.

The fact that the probate court of *W* acted upon a copy of the will of *A* did not in any manner affect its jurisdiction.

APPEAL from the decree of a court of probate, approving the will of Clark Adye, deceased; taken to the Superior Court in Litchfield County, and heard before *Culver, J.*

The appellant moved to have the case stricken from the docket for want of jurisdiction, which motion the court denied. The court made the following finding of facts:

The deceased, Clark Adye, was born in the town of Seymour, in this state, and was a settled inhabitant therein till some time in the early spring of 1876, and up to that time received support from the town at different times as a pauper. In 1855 he was made an elector of the town, and voted once or twice. In the spring of 1876 he inherited some three or four thousand dollars' worth of property from a relative, and then ceased to be a pauper of the town, and was never afterwards treated as such by that or by any other town.

On September 2d, 1876, Adye went of his own free will to the dwelling-house of Roderick Atwood, in the town of Woodbury, in this state, with the intention of making that place his permanent home, and did, in fact, make it his home until his death, having a room and bed assigned him there, sometimes working for Mr. Atwood, and occasionally for other persons in that town for short periods of time, but always considering Atwood's his home.

He was from boyhood addicted to habits of intoxication, which affected his mind somewhat; his intellect was naturally weak and below the average of mankind, but not to that degree which prevented him from distinguishing between

right and wrong, or from determining where he preferred to reside and have his home. He was never insane. He was never married, and until the death of his mother—which occurred about twenty years ago—he made it his home with her in Seymour, but did not spend much of his time in that town after her decease. From all the testimony, it is found that the deceased last dwelt at Woodbury.

The appellant claimed that Adye could not and did not have a domicil in Woodbury, and did not last dwell there within the meaning of the statute, because Samuel L. Bronson, of New Haven, was appointed his conservator, May 8th, 1876, by the probate court for the district of New Haven, within which the town of Seymour is included, and acted as such down to the time of the decease of Adye; that, although Adye did not consult Bronson at the time he went to Atwood's, he did soon afterwards, and Bronson told him he could remain there for the present, and that he would try to get a place for him at Seymour; that he did try, but without succeeding; that Bronson paid Atwood for clothes for Adye and for support in part down to the time of his death; and that Adye called on Bronson as conservator several times at New Haven, while he was staying at Atwood's. And in proof of Bronson's having been appointed conservator, the appellant offered in evidence a copy of the record of the proceedings of the court of probate of the New Haven district, which was all the evidence he offered on that subject. The appellees objected to this document being received as evidence, upon the ground that it did not appear by the record that the notice ordered to be served on the deceased was complied with. The appellees also objected to all the testimony as to what Bronson did as conservator, or said to Adye as such; and it was received, subject to the objection; but, on further consideration, the court sustained the objection and ruled out the document and the parol evidence.

Adye was made an elector in Woodbury in the fall of 1876, and voted at the presidential election, and his name was on the registry list in 1877, but it did not appear that he voted that year.

He died in Woodbury, and was buried there in March, 1878.

It is found, from the record of the proceedings and decree of the court of probate for the district of New Haven, offered in evidence by the appellant, and made part of the finding, that Culver, the appellant, was appointed by that court administrator of the goods and estate of the deceased, April 18th, 1878; and that he accepted the trust and gave bonds according to law. The appellant claimed, and asked the court to decide, that this decree, not having been appealed from nor set aside, was conclusive, or, at least, *primâ facie* evidence, as to the place where the deceased last dwelt, and that parol evidence could not be received to prove that he last dwelt in Woodbury; but the court did not so decide.

The court rendered judgment for the appellees, and the appellant moved for a new trial for error in the rulings of the court and also filed a motion in error.

*H. B. Munson* and *C. B. Andrews*, in support of the motions.

1. The case should have been stricken from the docket for want of jurisdiction of the matter. The only paper presented for probate was what purported to be a copy of the will. The identical will alone could be proved, and not merely another paper like it. It was only on presentation of the original will that the court could take jurisdiction and admit it to probate. No sufficient reason was given for not presenting the original will.

2. The court erred in excluding the record evidence that Adye was the ward of the court of probate for the district of New Haven and under a conservator at the time of his death. This was a fact of great importance in connection with the question of domicil, for if he was under the control of a conservator he could not choose a residence for himself. He cannot have the "intent" required for the purpose. Story Confl. Laws, §§ 43, 44; *Clark* v. *Whitaker*, 18 Conn., 543; *Kirkland* v. *Whately*, 4 Allen, 462. Here the conser-

vator gave his consent to his remaining only "for the present." It is clear that he did not consent to his change of domicil.

3. The residence in Woodbury was not such as to fix Adye's domicil there. *First National Bank* v. *Balcom*, 35 Conn., 351, 358; *Easterly* v. *Goodwin*, id., 286; *Charter Oak Bank* v. *Reed*, 45 id., 391; *Harvard College* v. *Gore*, 5 Pick., 370.

4. The decree of the probate court of the district of New Haven should have been held conclusive so long as not appealed from. That court had all the parties before it, and upon evidence found the fact of residence within its jurisdiction. The question of residence became thus *res adjudicata*. That judgment is to have the effect of a judgment *in rem*, and bind all parties. *Woodruff* v. *Taylor*, 20 Verm., 73; *Crippen* v. *Dexter*, 13 Gray, 330. Citizenship, residence, marriage, divorce, and other like questions follow the same rule. *Bolton* v. *Brewster*, 32 Barb., 389; *Greene* v. *Greene*, 2 Gray, 361; *Driggs* v. *Abbott*, 27 Verm., 580; *Abbott* v. *Coburn*, 28 id., 663.

*H. B. Graves* and *W. Cothren*, with whom was *J. Huntington*, contra.

LOOMIS, J. It appears from the record that an instrument purporting to be a copy of the last will of Clark Adye, of Woodbury, having been lodged with the court of probate for that district, the executor named in the will appeared in court and "moved that said copy be proved, approved and admitted to probate as and for the last will and testament of said deceased," and that the present appellant also appeared and filed his written motion, being in substance a plea that the court had no jurisdiction of the matter, because the testator last resided in Seymour in the probate district of New Haven, and was not a resident of Woodbury. The court, after a full hearing, found that the testator last resided in Woodbury, and denied the motion. From this denial the appellant appealed to the Superior Court, where he moved

to erase the case from the docket, which the court refused, and after a full hearing the decree of the probate court was affirmed.

The first objection now made is, that the decree of the probate court was erroneous because the court received and acted upon a copy of the will, instead of the original. It is sufficient for the purposes of this case to say that no such objection was made in the probate court or in the Superior Court. The distinct and only issue presented by the appeal was that the court had no jurisdiction because the last residence of the testator was not in Woodbury, but was in Seymour.

Moreover, the motion in error contains no assignment of this point. True, it is assigned for error that the cause ought to have been erased from the docket because the court of probate had no jurisdiction, and the counsel for the appellant argues the question as belonging to this head. But if the jurisdictional question had not been restricted by the proceedings in the probate court and the terms of the appeal, the point now made could not, in any sense, be appropriately made as an objection to the jurisdiction. If the probate court had jurisdiction of the original will, it had as ample jurisdiction to allow a copy to be substituted if the original was lost. The real objection is, that the form of the decree is defective in not stating the reason for substituting a copy. It will be noticed, however, that in the record of the appellant's appeal, which recites the order and denial of the court appealed from, the reason for substituting a copy is in effect given, namely, that the supposed will was claimed to have been lost.

The other questions presented for review all relate either to the admissibility or to the effect of certain evidence offered during the trial.

The finding states the questions as follows: "The appellant claimed that the deceased could not and did not have a domicil in Woodbury, and did not last dwell there within the meaning of the statute, because Samuel L. Bronson, Esq., of New Haven, was appointed his conservator, May

8th, 1876, by the probate court for the district of New Haven, and acted as such down to the time of the decease of said Adye; that, although the deceased did not consult said Bronson at the time he went to said Atwood's, which was in September, 1876, he did soon afterwards, and Bronson told him he could remain there for the present, and he would try to get a place for him at Seymour, and did try but without succeeding; that said Bronson paid said Atwood for clothes and for support in part, down to the time of the death of the deceased; that said deceased called on said Bronson, as conservator, several times at New Haven while he was staying at Atwood's; and in proof of Bronson's having been appointed conservator the appellant offered in evidence, subject to the appellee's objection, the record of such appointment and the application therefor." The evidence was all objected to by the appellees and ruled out by the court. We will assume for the purposes of this case that the testimony was admissible, but as all the facts desired to be proved are fully stated in the offer, if the evidence had been received and the facts found as stated the result would have been the same, and we can see that no injustice was done, and therefore no new trial should be advised.

It may be suggested that the appellant relies on his motion in error to reach this point as matter *stricti juris*. But he has joined a motion for new trial, and the court will refer the question to the appropriate motion. If, however, there had been no motion for new trial, the suggestion in *Selleck* v. *Rusco*, 46 Conn., 375, would be followed, and the rules applicable to the latter would be applied.

Our conclusion that no injustice was done by excluding the evidence referred to involves the assumption that Adye, under all the circumstances mentioned, could and did dwell in Woodbury at the time of his decease, notwithstanding he was under a conservator. The court finds that, on the 2d day of September, 1876, he went, of his own free will and accord, to the house of Atwood, in Woodbury, with the intention of making that his home until his death, having a room and bed assigned him there, sometimes working for

Mr. Atwood, and occasionally for other persons in that town, for short periods of time, but always considering Atwood's his home; that from boyhood he was addicted to habits of intoxication which affected his mind somewhat, and that his mind was naturally weak and below the average of mankind, but not to that degree which prevented him from distinguishing between right and wrong, or from choosing and determining where he preferred to reside and have his home; that he was made an elector in Woodbury in the fall of 1876, and voted at the presidential election; and the court distinctly finds that he last dwelt at Woodbury. He died there in March, 1878. Now, although a person lawfully under a conservator must be presumed incapable of managing his affairs so that he can make no binding contract with another, yet it seems to us it does not necessarily imply that the person is incapable of exercising such intent and of performing such acts as may, with the simple assent of his conservator, result in establishing a domicil sufficient to enable the court after his decease to probate his will. The law, in its beneficent care and protection of incapable persons, has no need to go to the extent claimed in this case, and the rights of other persons do not require it.

It will, therefore, suffice to dispose of the particular question before us, if we say that the excluded testimony, if received, could not have impaired the case for the appellees at all, because, under the circumstances mentioned, the assent on the part of the conservator to the residence of Adye in Woodbury was clearly sufficient to enable the latter to "dwell" in that town, within the meaning of the statute.

The only remaining question is, whether the court gave proper effect to the record evidence offered and received, showing that, on the 18th day of April, 1878, the probate court for the district of New Haven appointed S. Culver, the appellant, administrator of the goods and estate of Adye, and that he accepted the trust and gave bonds as required by law. The finding states that "the appellant claimed and asked the court to decide that this action of the court of probate, not having been appealed from nor set aside, was

conclusive, or at least *primâ facie* evidence, as to the place where the deceased last dwelt, and that parol evidence could not be received to prove that the deceased last dwelt at Woodbury."

The proposition as made is complex, if not inconsistent; but as the last clause relative to parol evidence is connected with the preceding by the conjunction "and," we construe the request as meaning that, whether the court should hold the action of the New Haven court conclusive, or only *primâ facie*, parol evidence could not be received to prove a residence in Woodbury.

It is not claimed in the assignment of errors nor in the argument that the court erred in not holding the record of the New Haven court *primâ facie* evidence, or that the court so decided. The court received the record as evidence, and if uncontradicted it would doubtless have had the effect, as it should, of *primâ facie* evidence. The real complaint is that the court did not give a controlling effect to the action of the New Haven probate court.

The argument for the appellant on this question, as stated in the brief, was as follows: "Any court has the power to decide the facts that give itself jurisdiction. Such power is essential to the existence of the court; and a finding of jurisdictional facts by any court is final unless set aside by some regular proceeding. It cannot be treated as a nullity. The court of probate in New Haven had decided the question of Adye's residence, and the court in Woodbury was bound by that decision so long as it stood. That question was *res adjudicata*."

This argument entirely ignores a well-settled distinction between judgments of courts of general jurisdiction, which cannot be collaterally attacked (unless the want of jurisdiction is apparent on the record), and judgments of courts of limited and inferior jurisdiction, which can be collaterally attacked, and if the want of jurisdiction in fact exists the judgment is an absolute nullity. There is no disagreement in the cases at home or abroad on this subject. But our

own decisions are sufficiently explicit. *Sears* v. *Terry*, 26 Conn., 273; *First National Bank* v. *Balcom*, 35 Conn., 351.

There is no error in the judgment complained of, and a new trial is not advised.

In this opinion the other judges concurred.



JAMES HUNTINGTON, STATE'S ATTORNEY, *vs.* JOHN H. MCMAHON AND OTHERS.

Certain liquors were seized with a view to condemnation under the statute. Two of the present respondents, *M* and *W*, appeared before the magistrate and claimed the liquors as their own, and on a decision against them appealed to the District Court. After the appeal and before the session of the appellate court they obtained from the third respondent, who was a magistrate, a writ of replevin, upon which the fourth respondent took the liquors by force from the officer in whose custody they were and delivered them to *M* and *W*. Upon proceedings for contempt of the appellate court, instituted in that court by the State's Attorney, all the respondents were held guilty. Held upon error—

1. That the cause was pending at the time the liquors were replevied, before the appellate court.
2. That the liquors were sufficiently in the custody of that court, being held subject to its order.
3. That it did not affect the case that the acts were not committed in the presence of the court.
4. That the claimants of the liquor were not entitled to the writ of replevin under the statute which provides that it shall lie for property wrongfully detained and of which the party is entitled to the immediate possession.

Where liquors were thus held for adjudication upon proceedings averring probable cause for believing they were forfeited under the statute, the officer did not hold them in any sense wrongfully.

And the claimants could have no right to the immediate possession, since such a right would be inconsistent with the right of the court to hold them for adjudication.

The statute (Gen. Statutes, tit. 4, ch. 6, sec. 15,) which provides for the punishment of contempts committed in the presence of the court, leaves all other cases of contempt to be ascertained and punished according to the course of the common law.

The same principle which governs courts in enforcing their decrees by a judgment for contempt will justify them in the use of the same means to protect their jurisdiction in order that they may pass decrees.

Where the parties charged with the contempt have testified under oath that they acted in good faith and intended no disrespect to the court, it does not so far purge the contempt that no further proceedings can be had against them except a prosecution for perjury. The practice in this state is to receive other testimony and settle the whole question of contempt in one proceeding.

The respondents in such a proceeding for contempt are not entitled to a trial by jury.

The complaint filed by the State's Attorney for the contempt was demurred to by the respondents in the court below. Held that the judgment of the court overruling the demurrer was not a final judgment from which proceedings in error could be taken.

PROCEEDINGS for a contempt, in the District Court of Litchfield County, before *Fyler, J.*

Certain liquors had been seized and condemned in the town of Winchester, by proceedings before a justice of the peace, under the 5th section of the act with regard to intoxicating liquors. From this judgment John H. McMahon and Peter W. Wren, who claimed to own as partners a portion of the liquors and had appeared and been heard before the justice as such claimants, appealed to the District Court. After this appeal was taken and before the session of the appellate court, McMahon and Wren replevied the liquors claimed by them and took them out of the hands of the officer. The present proceeding was for a contempt in thus taking the liquors, and was brought against McMahon and Wren, the plaintiffs in the replevin suit, Patrick J. Leonard, a justice of the peace who issued the writ of replevin, James M. Chatfield, who served the writ as an officer, and John A. Hurley, who gave bond on the writ. The decree of the court, which states the proceedings before the court and finds the facts in the case, was as follows:—

Upon the petition and application of James Huntington, State's Attorney for said Litchfield County, filed in said District Court at the October term thereof, 1879, praying that John H. McMahon, Peter W. Wren, Patrick J. Leonard and John A. Hurley, all of the town of Bridgeport in Fairfield County, and James M. Chatfield of the town of Thomaston in said Litchfield County, might be made to appear before this court to show cause, if any they had, why they should not be dealt with for contempt in doing and committing the

acts named and set forth in said petition and application; and an order having been made by this court in the premises at said October term, which was duly served on each of said persons, they appeared in said court in compliance therewith at said October term, and said petition and application came by regular continuance to the January term of the court, when the parties again appeared, and the said respondents for answer to said petition and application entered a demurrer thereto as on file. And the respondents and said Attorney having been fully heard thereon, it was adjudged that said petition and application and the matters therein contained were sufficient in law; and thereupon the respondents, before answering over, filed their motion in error, which said motion the court overruled and required the respondents to answer over to said petition and application. Whereupon the respondents severally made answer to said petition and application as on file; to which said answers said State's Attorney made reply denying the truth of said answers as on file, and the parties were at issue thereon, as by said answers and reply on file appears; and thereupon the respondents made their motion to the court in writing, as on file, for a trial by jury on said issues of fact joined, but the court overruled and denied said motion and ordered the respondents to proceed to trial by the court without a jury; and the respondents and the State's Attorney were fully heard upon the facts, and the respondents, excepting Peter W. Wren, being severally sworn testified to the court and claimed that in taking the liquors or any part thereof set out in said petition and application they did not intend any disrespect to or contempt of this court or any other court, and, excepting said McMahon and said Wren, testified that they had no knowledge that said liquors were held by virtue of any seizure process for the purpose of condemnation; and all the respondents, except said Wren, testified that they did no more than they supposed they in good faith had a legal right to do; and thereupon the Attorney for the State offered to introduce the testimony of other witnesses, and the file of the appealed cause now in this court, entitled *State* v. *Gren-*

*nan's Liquors*, for the purpose of contradicting these statements of the respondents, and to show that they had such knowledge and did not act in good faith. To all this evidence the respondents objected, upon the ground that in proceedings for contempt of this character no such evidence is admissible. But the court overruled the objection and admitted the evidence.

Upon all the evidence offered, it is found that, on the 23d day of August, 1879, due and legal complaint was made in writing by three duly qualified residents of the town of Winchester under oath to Albert M. Beach, a justice of the peace for the county of Litchfield, residing at Winchester, that certain liquors described were kept in certain buildings in said town, which were described, to be sold contrary to and in violation of law; thereupon said justice issued his warrant to search the premises named in the application; the warrant was placed in the hands of Patrick H. Ryan, a duly qualified constable of the town, who on the 23d and 25th days of said August duly served the same at the premises named in the complaint, and seized and took into his possession the liquors described in his return made to said justice, and thereupon placed said liquors in the possession and care of Samuel B. Forbes, at Winchester, to securely keep the same for him as such constable. Said justice on the 25th day of August issued the notices required by law, directed to John Donovon and others, citing them to appear before him on the 13th day of September, 1879, at 9 o'clock in the forenoon, at his office in Winchester, then and there to show cause, if any they had, why the liquors and vessels so seized should not be adjudged a nuisance, which was duly served.

In pursuance of said notice a justice court was holden by said justice at Winchester, on the 13th day of September, when the respondents, John H. McMahon and Peter W. Wren, and also Gabriel Grennan of Winchester, not a respondent, appeared and were made parties defendant to the proceedings, and the said McMahon and Wren claimed the 22-gallon cask of rum, the two 23-gallon casks of whisky, the 20-gallon

cask of whisky, and the 10-gallon cask of gin, as set forth in said warrant; and thereupon a hearing was had before said justice, and said liquors and all the liquors so seized were adjudged a nuisance; and thereupon said respondents McMahon and Wren, severally appealed from the decision of said justice court to this court, at the October term, 1879, which appeal was allowed, and said McMahon and Wren gave bonds with sureties as required by law; all of which appears by certified copies of said proceedings on file.

The court also finds that the appeal copies of said McMahon and Wren from the decision of the justice court in the proceedings for the seizure and condemnation of the liquors in question, were entered in this court at its October term, 1879, between the first and second openings thereof, on or about the 9th day of October, and that said cause is now pending in this court.

The court further finds that after said McMahon and Wren had taken their appeal from the judgment of the justice in the month of September, 1879, they instructed the respondent Leonard, who was then a duly elected and qualified justice of the peace for Fairfield County, to issue for them a process for the recovery of said liquors, and that said Leonard claimed to have issued such a process for the restoration of said liquors to the possession of said McMahon and Wren which he claimed at their request to have delivered for service to the respondent Chatfield, who then was a duly appointed and qualified sheriff's deputy for the county of Litchfield. Whether or not such process was a lawful one did not appear from the evidence introduced in court. Said Chatfield with said process, accompanied by said Leonard, went to the house of said Forbes, in Winchester, who had said liquors in his care and possession, and then and there on the 4th day of October, 1879, said Chatfield and Leonard forcibly took and carried away said liquors from and out of the possession of said Forbes, and the custody and jurisdiction of this court, and after retaining said liquors twenty-four hours delivered the same to the said McMahon and Wren, all by virtue of said process. Said Forbes was on said 4th day of October

lawfully holding said liquors under and by virtue of authority of said seizure proceedings, and informed said Chatfield in presence of said Leonard that said liquors were in the custody of the State, and that they had no right to take them.

The court further finds, that said liquors have never been returned by any of the respondents to said Forbes, or to said constable, or to the custody and jurisdiction of this court. The court also finds that no demand for such return has ever been made, nor had this court ordered the respondents to return the liquors before the commencement of these proceedings. Said liquors were taken and carried away as aforesaid on the 4th day of October, 1879, and before the 1st day of the October term of this court.

The court further finds, that all the averments in the answers of the respondents other than said Hurley, except so far as they admit the facts alleged in said application, and such as are found true in the finding of this court, are not proven; also that each of the respondents (except said Hurley), at the time of the acts by them committed had full knowledge that said liquors were held by virtue of a seizure process with a view to their condemnation, and that in taking and carrying them away they intended to prevent them from being adjudicated upon or condemned by this court.

The court decides and adjudges that John A. Hurley is not guilty of contempt of the court; it is therefore ordered that he be discharged. The court adjudges upon the foregoing facts that John H. McMahon, Peter W. Wren, Patrick J. Leonard and James M. Chatfield are and that each of them is guilty of contempt of this court; and it is ordered that the said McMahon pay a fine of one hundred dollars, and be imprisoned in the common jail at Litchfield, in said Litchfield County, for the term of sixty days; that said Wren pay a fine of one hundred dollars; that said Leonard pay a fine of sixty dollars, and be imprisoned in the common jail at said Litchfield for the term of thirty days, and that said Chatfield pay a fine of seventy dollars and be imprisoned in the common jail at said Litchfield for the term of thirty days; and that they and each of them be attached

of their bodies, and be committed to said common jail at said Litchfield, and be confined and imprisoned therein, till this order, judgment and decree is fully complied with, or until they and each of them be discharged by order of this court or otherwise by due process of law.

The respondents brought the record before this court by a motion in error.

*R. E. DeForest* and *A. H. Fenn*, for the plaintiffs in error.

*First.* The court erred in overruling the demurrer.

1. The acts alleged in the petition as having been committed by the respondents constitute no contempt of any court. The liquors were not in the custody of any court. Under the statute the seizure proceedings are simply a civil action. The State, as one party, claims them for the purpose of destroying them as a nuisance. The owners of the liquors, on the other hand, claim them, and deny and contest the title of the State. Here is an issue raised between these two parties as to the title to these liquors, which the courts are invoked to decide. In the meantime they are held by the constable on a warrant issued by a justice of the peace. The justice acts not judicially, but rather ministerially, precisely as he does in issuing a writ of attachment, or of replevin, or any other mesne civil process; and the officer who takes and holds the goods under this warrant holds them in no higher capacity than that in which he would hold the property attached or replevied, as the case might be. He is in a certain sense a bailee for both parties, responsible to both for the preservation of the liquors. If the liquors should ultimately be awarded to the State, he is then responsible to the State to produce them for destruction. If the court finally decides that they do not belong to the State, but to the other claimant, then the officer is responsible to the owner for their preservation and return. In the meantime, therefore, while they belong in a certain sense to both parties, they belong to no court in any sense. They are in the custody and subject to the control of no court. They are held by no officer of any court and by no warrant issued by any court. The subject of the controversy is as much at

the disposal of the parties as in any other civil suit. They may settle the case and dispose of the property accordingly, and the court cannot interfere. But it is suggested that this is an action *in rem;* that the liquor is the party—the very thing to be adjudicated upon; that without the liquor there is no case; that by forcibly removing the liquor from the hands of the officer the court has been deprived of its subject matter of jurisdiction, and that therefore it is an act of contempt. If this argument proves anything, it proves that any unlawful act to prevent a cause from coming on to trial in court is a contempt of that court; for instance, to kill a plaintiff, after suit brought and before trial, in a case where the death of the party operates to abate the action, this would be a contempt of court. The proposition will not bear a moment's examination.

2. The information is insufficient because the alleged contemptuous acts were not committed in *the presence of the court*, either actually or constructively. We confidently submit that on the facts shown no court has power to punish the respondents in the present case as for contempt. By careful examination of our statutes and decided cases it will be found that all the contempts, so called—that is, all offences which courts have power to take cognizance of as committed against their own dignity and without criminal jurisdiction, are embraced in two classes. The first class includes those cases where the power of the court is not, properly speaking, a punitive one, but simply the power of controlling its own officers and executing its own decrees. Such is the power to compel the attendance of witnesses, and incidentally to prevent all interference with such attendance. Such is the power to enforce orders of injunction, by fining or imprisoning those who having been enjoined refuse to obey. Such is the power to discipline attorneys at law, to fine sheriffs for not executing the court's orders, &c. And, assuming that the District Court had anything whatever to do with the custody of these liquors, and that they were taken by the respondents as alleged, then if the court, after the appeal had been entered, had ordered the respondents to return them and they had not obeyed, perhaps there would

have been some ground for claiming that the case fell within this first class. But no such order having been made, and therefore no order having been disobeyed or interfered with by the respondents, and they not having been officers of the court, the case clearly does not fall within this class, and if it exists at all must be found in the second class. The second class includes all contemptuous acts committed in the presence of the court, that is, in such a manner that the court can decide by the evidence of its own senses, and without the intervention of witnesses or other proof whether or not a contempt has been committed. In such cases the court can punish summarily and without the intervention of a jury. It may fine and imprison, not as a means of executing its decrees, not to regulate the conduct of its own officers, but by way of punishment, whether there has been any decree or order of the court to enforce or not, and whether the accused is an officer of the court or not. For example, insulting language addressed to the court, the court has power to take jurisdiction of, pass upon without evidence, and punish. This is merely the power which necessarily inheres in the court to preserve its own dignity and protect itself while in the actual discharge of business. And the power to punish summarily and without evidence is conceded, because the court saw the act and thus has knowledge of it without further proof. But this power to punish simply as punishment, and not by way of enforcing the orders of the court, or of restraining its own officers, exists, we contend, in no other cases. We deny that it exists even at common law. In all other cases the necessity for any such power ceases. While a court is in session, actually engaged in business, affrays, loud talking, and other like disturbances in its presence, unless they are summarily suppressed, actually prevent judicial proceedings. Therefore, upon the principle of self-preservation, the court is permitted to exercise a power not ordinarily belonging to it, and without delay or formality proceed criminally against the offending party. But where an act is committed at a distance, and perhaps, as in this case, long before the attention of the court is called to it, there is no such necessity. The offender may, if he has

been guilty of any misdemeanor, be informed against and tried and punished in the usual way. The plea of necessity can no longer be interposed. The court will be as much protected by the punishment of the offence in the ordinary way as though it were done summarily. "*Cessante ratione legis, cessat ipsa lex.*" Again, where offences are not committed in its presence there is no propriety in allowing the court to decide the issue of fact. Where the offence is committed in presence of the court, it has immediate knowledge of the fact, and there is no need of any further evidence or of any trial whatever. But not so here. Here there must be a trial; witnesses must be examined; the proceeding is criminal in its nature. If the accused is convicted, his property, his liberty, his character, are affected. In such a case the right of trial by jury ought not to be denied and the criminal thrown upon the mercy of a single trier, who, in vindicating his own dignity, can hardly be regarded as disinterested. Undoubtedly dicta can be found to the effect that acts committed by others than court officers not in the presence of the court, and not in opposition to or disobedience of any order of court, may be punished as contempts. But when the precedents from which such inferences are drawn are closely examined, we believe they will not warrant the conclusion claimed from them. In many of these cases it will be found that the prosecution was not summary, but upon regular information or indictment, and before a jury. And when the proceedings were summary, it will be found that the accused was some officer of the court, and so amenable to its authority; or that the offence was in opposition to some order of the court; or that it had a direct tendency to obstruct the court in the actual discharge of public business, and was committed, if not actually, yet constructively, in the presence of the court. But whatever the rule at common law may be, we insist that under our statute the court had no power to punish in this case for contempt, on the facts alleged. The statute (Gen. Stat., p. 61, sec. 15,) is: "Any court may punish by fine and imprisonment any person who shall in its presence behave contemptuously or disorderly; but no justice of the peace shall inflict a greater

fine than seven dollars, nor a longer term of imprisonment than thirty days; and no other court shall inflict a greater fine than one hundred dollars, nor a longer term of imprisonment than six months." It may be conceded that this statute leaves untouched and unaffected the power inhering in courts to enforce their own decrees and coerce their own officers, powers that arise out of an entirely different necessity, and stand upon an entirely different ground, from that claimed in this case. The offenses contemplated by the statute are those committed by any person, and not by an officer of the court. Here is a wide distinction. Where an officer of the court disgraces his office or disregards the obligations of his official position, the essence of his misbehavior is not that he does the act in any particular place, or that the act is of any particular kind, but that as an officer of the court he is under its government and subject to its rules and regulations at all times and wherever he is. On the other hand, the essence of the offense of "any person" referred to in the statute, is the positive commission of something which, from the peculiar circumstances under which it was committed, is derogatory to the rights and dignity of the court. Again, the offenses contemplated by the statute consist not of disobedience to or interference with any order of the court, but of contemptuous and disorderly behavior,—positive acts, rather than neglect or refusal. This class of cases, therefore, is clearly distinguished from all other acts, which may be either properly or improperly called contempts. In relation to this class, it is provided that courts may punish for them in certain cases and to a certain extent. It follows that for this class of contempts no court can punish to any greater extent or in any other cases. What extent? In the case of a justice court, $5 fine and thirty days imprisonment. In the case of a higher court, $100 fine and six months imprisonment. In what cases? When the offense is committed in *the presence of the court*. Could the court imprison for a year for any of these classes of offenses? It will not for a moment be claimed that it could. No more, we say, can it punish at all any one of this class of offenses, unless it is committed in its presence. Stated

in another form our view of the statute is this: The subject of the statute is that entire class of contemptuous acts which are not committed by officers of court or in disobedience to the court's orders; but which might be committed either in or out of the presence of the court; that in relation to this class, if at common law the courts had greater power, the statute has repealed the common law, and in place of it provided that courts may punish within certain limits whenever the offense is committed in their presence; that under the statute all offenses within this class not committed in its presence the court has no power to punish. If this is not the object and meaning of the statute, what is? Is it suggested that the object of the legislature was simply to regulate proceedings in cases where the contemptuous acts are committed in the presence of the court, and not in any way to affect those offenses committed out of its presence? If so, was it intended to confer on courts a power not possessed at common law? But this cannot be, for every one admits that at common law courts have power to punish contempts committed in their presence. If the object was not to confer power, then it must have been to restrain. But is it supposable that the legislature designed to limit the power to punish in cases of contempt committed in the presence of a court, and leave the power unlimited in cases not committed in its presence? What possible explanation could be offered for any such folly? To *limit* the court in its power to punish in such a case, and leave it *unlimited power* where the offense is not committed in its presence, and where it can know nothing about it but at second hand, and on the testimony of witnesses, and where, from the very fact of its not being in the presence of the court, it is necessarily less contemptuous, would be unaccountably ridiculous. We submit that our construction of the statute is the only one that can upon thorough consideration be rationally adopted. Now in *State* v. *Daley*, 29 Conn., 272, our court decided that a statute fixing the punishment for the crime of manslaughter so superseded the common law that no power remained in the court to convict or punish for that crime as a common

law offense. Precisely so, we insist, has the statute under consideration superseded the common law. As confirming the views here advanced we refer to some well-considered cases in other states. In *Dunham* v. *The State*, 6 Iowa, 245, the court say (p. 254): "Our code declares that certain acts or omissions therein named are contempts and are punishable as such by the courts or any judicial officer acting in the discharge of an official duty. The acts charged in this case, if punishable under the code, must be so as being contemptuous or insolent behavior toward the court while engaged in the discharge of a judicial duty which may tend to impair the respect due to its authority. We think this clause has reference to some act or behavior in the actual or constructive presence of the court. The use of the words 'behavior towards,' 'while engaged,' and 'in the discharge of,' would clearly seem to show that this was intended. Not, it is true, that the contemptuous and insolent behavior need be in the court room and under the eye of the court in order to amount to a contempt, but the court being in the discharge of its judicial duties, the guilty party, though not in its immediate presence, might do those things which would amount to a contempt. But to make a party guilty under this claim the contempt or insolent behavior must be towards the court; the court must be engaged in the discharge of judicial duty, and this behavior must tend to impair the respect due to its authority. It would be a perversion of the entire language used and a palpable violation of the spirit and policy of the provision to say that a judge could bring before him every editor, publisher or citizen who might in his office, in his house, in the streets, away from the court, by printing, writing, or speaking, comment on his decision or question his integrity or capacity. The law never designed this. If therefore the respondent did nothing more than comment, though never so severely, upon the action of the court, and though he may have published ever so fully, and whether truly or falsely, the proceedings upon the first hearing, we cannot think it would amount to a contempt under the first clause of the section under consideration. It is insisted, however, that the courts of this

state may punish *other* acts and omissions as contempts than those *mentioned in the code.* We are strongly inclined to think, however, that the provisions of the code upon this subject must be regarded as a limitation upon the power of the courts to punish for any other contempts." See also *Ex parte Hickey*, 12 Miss., 751; *Lining* v. *Bentham*, 2 Bay, 1, 8; *Clarke* v. *May*, 2 Gray, 410; *Hollingsworth* v. *Duane*, J. B. Wall., 77; Niles's Civil Officer (10th ed.), 67.

3. Even if the acts alleged in the information were contemptuous, and even if those acts are punishable by some court, yet the acts can in no view of the case constitute any contempt of the District Court. There is no pretense that these acts were in disobedience of or resistance to any order or decree of that court. The sole ground on which it is claimed that it had any jurisdiction is that the liquors were held by a constable in a cause which was pending in that court at the time of the alleged offence. The information indeed alleges that when the offence was committed the cause was pending in the District Court. Of course, however, this naked statement does not aid the information, if from the facts stated in it it appears that the cause was not pending. From those facts we insist that this does appear. It is alleged that the case had been tried before a justice of the peace and an appeal taken from his decision to the District Court at its October term, 1879. The October term of the court commenced on the 6th day of October, 1879. The contempt, therefore, is alleged to have been committed before the term of court to which the appeal was taken had begun; before the case could have been entered in that court. We say that, upon these facts, the cause was in no sense pending in the District Court. That court had obtained no control over it; had no power to make any order in relation to it, or to the parties in it, or to the subject matter of it. It depended entirely upon the parties to the action whether the District Court ever should obtain any jurisdiction whatever in the cause. The owners of the liquors had indeed given a bond to enter and prosecute their appeal in that court, but they might, if they saw fit, refuse to do this and forfeit their recognizance. In the event that the appellant failed to enter

the appeal, the appellees might enter it during the first term. If neither party entered it, and until it had been entered, the case was not pending in court. Nor had the court obtained any jurisdiction over it. Such being the case, on the very face of the information the proceeding was *coram non judice*, and the court should have sustained the demurrer. *People* v. *Brennan*, 45 Barb., 346; *People* v. *County Judge*, 27 Cal., 151; *Batchelder* v. *Moore*, 42 id., 412; *Lessee of Penn* v. *Messinger*, 1 Yeates, 2; *Moore* v. *Clerk of Jessamine*, 6 Little, 104; *Cheshire* v. *Atkinson*, 1 Hen. & Mun., 210; *Weaver* v. *Hamilton*, 2 Jones (Law,) 343; *Taliaferro* v. *Horde's Admr.*, 1 Rand., 242; *Funk* v. *Israel*, 5 Iowa, 452; *Ex parte Tillinghast*, 4 Pet., 108; *Brent* v. *Beck*, 5 Cranch C. C., 461; *Hewitson* v. *Hunt*, 8 Rich., 106; *McDermott* v. *Butler*, 10 N. Jer. Law R., 158; *Ex parte Grace*, 12 Iowa, 208.

*Second.* The court having overruled the demurrer and required the respondents to file their answers, and the State's Attorney having traversed these answers, thus forming an issue of fact for trial, the respondents moved for a trial by jury. This motion the court refused to allow. If the respondents could be tried in this proceeding at all we say they had a clear right to be tried by a jury. The proceeding is criminal in its nature. The punishment is fine and imprisonment. The decision is final. There is no appeal. Besides this, it being claimed that the offence was committed against the authority and dignity of the very court assuming jurisdiction, and to some extent therefore against the judge who presides in it, whatever theories counsel may indulge in such judge is practically an interested party. Of all conceivable cases, therefore, it is the one in which such judge ought not to be permitted to decide the issues of fact. It violates that fundamental principle of law and justice that no man should be allowed to be judge in his own case. We have in this finding facts, which we perhaps are not permitted to say there was no evidence to support, but which are not alleged in the information or involved in the issue. Such, for example, is the finding that the respondents took the liquors to prevent their being adjudicated upon by the District Court. But whatever might be the case upon general principles, yet,

under our constitution, the respondents were entitled to a trial by jury. Two clauses of our constitution guarantee the right of trial by jury. The first provides that "in all criminal prosecutions and in all prosecutions by indictment or information, the accused shall have a right to a speedy public trial by an impartial jury." Now we have before alluded to the fact that proceedings for contempt are criminal in their nature. It is true that they are not so strictly criminal as to be within the jurisdiction of no court not having criminal jurisdiction, as the court decided in *Middlebrook* v. *The State*, 43 Conn., 257. But that they are criminal in their effect on the accused and in such a sense as to bring them within the spirit and purview of constitutional guarantees established for the protection of all who are criminally prosecuted, it appears to us none can deny. If then, within the meaning of this clause of the constitution this is a criminal proceeding, inasmuch as the prosecution is upon the information of the State's Attorney, we claim the right of jury trial on this ground. *Goddard* v. *The State*, 12 Conn., 454. Again, another clause of our constitution provides that "the right of trial by jury shall remain inviolate." This has been decided to mean that the right shall be allowed in all those cases in which it existed at the time of the adoption of our constitution. Now, we inquire, assuming that there could be any trial at all in a case like this, was there not a right at the time our constitution was adopted to a trial by jury? The constitution was adopted in 1818. In the edition of the statutes of Connecticut last published before that date we find a chapter on the subject of "delinquencies." The word "delinquencies" in that edition, and in many prior and subsequent editions, was used in place of the word "crimes," and as a word of exactly similar import. At the head of that chapter, page 142, we find this provision:—"That all persons prosecuted for any matter of delinquency before the superior or county court shall have liberty to be tried by a jury if desired." Now on the opposite page and under the same title we find this statute in relation to contempts. Contempts, therefore, were before the adoption of the consti-

tution recognized, classified and treated as delinquencies, and in relation to contempts together with other delinquencies, the express law of Connecticut declared that whenever persons charged with contempt were prosecuted in the superior or county court a trial by jury was of right demandable. The term "county court" in a constitution or statute applies not only to county courts then existing, but to all county courts which may afterwards be established. The district court is a county court. We claim, of course, as before, that the statute then existing, which is substantially the same as the one now on our book, prohibited a court from proceeding against parties for contempts in cases like this, unless they were committed in the presence of the court; but assuming that we are mistaken in this, then, we say, those other offences, being delinquencies as much as those mentioned in the statute and not falling within the class embraced in the statute, do come under the general provision relating to delinquencies, and under that provision were of right triable by jury. Thus, it appears that prior to the adoption of the constitution the right existed, and therefore is preserved in the section of that instrument now under consideration, and if it shall appear that in other states the law before the adoption of their constitutions was different, and men there could be fined and imprisoned at the caprice of a single magistrate in any court and to any extent for offences not committed in their presence, and the facts of which being disputed must necessarily be determined by trial, and ought upon every principle of fairness and justice to be tried by an impartial jury, we may congratulate ourselves that in Connecticut at least, such an abominable and oppressive doctrine was repudiated in the very infancy of our body politic.

*Third.* Assuming again that the court had jurisdiction of the matter, then we say the court erred in allowing the State to introduce evidence after the respondents had testified and purged themselves of the contempt, as appears of record. Judge Swift, (2 Digest, 382,) says: "The court will proceed to examine the party on oath, and if he fully purge himself on oath in his answers to the interrogations put to

him, the court will discharge him of the contempt and leave him to be prosecuted for perjury if it be thought proper." This rule is sustained by numerous authorities in this country and in England. Hawkins P. C., 214; 4 Black. Com., 288; *Murdock's case*, 2 Bland, 486; *Jackson* v. *Smith*, 5 Johns., 117; *U. States* v. *Dodge*, 2 Gall., 313; *Watson* v. *Fitzsimmons*, 5 Duer, 629; *Ex parte Noah*, 3 City Hall Recorder, 31; *Ex parte Van Hook*, id., 64; *Ex parte Strong*, 5 id., 8. Now when the State offered evidence to contradict the statements made by the respondents on oath, they had fully purged themselves of the alleged contempt, and were entitled to an immediate discharge. They had thus fully purged themselves by denying that they had done anything more than they supposed they had a legal right to do, and that they had intended no contempt of or disrespect to the court. "In modern times a man may purge himself of an offence in some cases, where the facts are within his own knowledge. For example, when a man is charged with a contempt of court, he may *purge* himself by *swearing* that in *doing the act charged, he did not intend* to commit a contempt." Bouvier's Law Dict., *Purgation*. It is therefore the contemptuous *intent* which constitutes the offense; and denying any such intent purges the accused of the contempt. If, however, we have so monstrous a doctrine in this country and age as that a man may be imprisoned for an act done with perfectly innocent intent, and in pursuit of what he conceived to be his legal rights, even then the court certainly had no power to hear evidence to contradict them, but could only punish them on the facts admitted in their disclosures.

*Fourth.* Aside from all objections to the jurisdiction of the court, and the mode of procedure adopted in this case, we submit that upon the facts found and apparent on the record, the respondents have done nothing which can properly be considered or legally punished as a contempt of court. The case was simply this: Certain liquors belonging to McMahon & Wren, had been seized at Winchester. On the hearing before the justice, they had claimed the

property, and taken an appeal from the judgment condemning it to destruction. The liquors had not been kept by the constable in his own possession, but had been delivered by him to a third person, who was in no sense an officer, or under the obligation of any bond for their preservation. Aware that under such circumstances the property, even in the event that the owners should eventually establish their right to its return, would be liable to great waste and diminution in quantity and value, and believing that pending the proceedings on the seizure process they could more effectually secure and preserve it themselves, they sued out a writ of replevin, by virtue of which the liquors were placed in their possession. For this great crime they have been treated as thieves and robbers, and the justice who issued the writ, and the deputy sheriff who served it, have with them been sentenced to fines and imprisonment. Did the respondents do anything more than they had a perfect right to do? Would replevin lie in such a case? The language of the statute, (Gen. Stats., p. 484,) certainly seems broad enough to include it. It must be conceded that the right to *bring* the action includes not only cases where the court finally *decides* that the plaintiff had a general or special property in the goods replevied, with a right to their immediate possession, and that when the action was brought they were wrongfully detained, but also cases where these facts can be and are claimed. Why, then, would replevin not lie? The goods were claimed by the plaintiffs in replevin as their property. They claimed a right to the immediate possession of them; they claimed that they were wrongfully detained. The statute says that in every case where the facts here claimed exist, the action may be *maintained*. Claiming these facts the plaintiffs in replevin certainly had a right to *bring their action* in the manner prescribed by law, and, if they were able, *prove* their claims and obtain judgment. If they failed to establish their claims, they were bound to restore the goods and pay all costs and damages, and the bonds they had given were more than sufficient security to the adverse party. To suggest that they incurred any other liability,

civil or criminal, in thus pursuing their legal rights—that in case they should fail to establish the claims which they lawfully made in their action, they could be fined and imprisoned—seems to us a reproach to the law, and an insult to common sense. It may be suggested, however, that upon the facts found the respondents were charged with the legal knowledge that they could not maintain their action, and that therefore they are chargeable as for instituting a groundless and malicious prosecution. But any such assumption is false. McMahon & Wren, it is true, knew that the goods were originally seized on a warrant issued in seizure proceedings, and it is found that Leonard and Chatfield were so informed. It does not follow, however, from this, that the action of replevin could not be maintained. Our opponents say that the goods, when they had been seized, were in the custody of the law. So, we say, are goods taken by an officer on an execution. So is property taken by a tax collector on his warrant. But cannot replevin be maintained in such cases, and have not our courts so repeatedly decided? Once the statute giving the action of replevin used the words "*unlawfully* detained." Then, perhaps, the action could not be maintained for property taken on execution and on tax warrant. But since the language has been changed to *wrongfully* the rule is different. But it is claimed that in the peculiar circumstances in which this property was situated, the owner could not legally bring the suit. They at least *supposed* that they could bring it. The justice *supposed* it was his *duty* to issue the writ and endeavored to perform that duty. The officer *supposed* it to be obligatory upon him to serve the process and acted under that belief. These facts, which if not expressly found, the law, in the absence of contrary proof, will presume, ought certainly to acquit the respondents of contempt. There may, perhaps, be cases where a party thinking an order of injunction or other order of court illegal, and that therefore he was not bound to obey, has willfully disobeyed and has been held guilty of contempt. It is in such a case, if in any, that we find an occasional dictum to the effect that ignor-

ance or mistake of the law does not excuse a party for contempt; but it never can be tolerated in a government of freemen that men, in the absence of any order of court, seeking their rights in a manner which they supposed was authorized by law, and officers of the law acting in good faith in what they supposed was the discharge of official duty, should for this be dragged before a court, arraigned as criminals, denied a trial by jury, compelled to testify against themselves, and finally condemned to infamous punishment. *State* v. *Harvey*, 14 Wis., 151; *Watson* v. *Fitzsimmons*, 5 Duer, 630.

*C. B. Andrews* and *J. Huntington*, contra.

CARPENTER, J. The facts of this case are briefly these: Certain liquors were seized with a view to condemnation under the statute. Two of the respondents, McMahon and Wren, appeared before the magistrate and claimed the liquors, and, being unsuccessful, appealed to the District Court. After the appeal, and before the session of the appel late court, they obtained from one of the other respondents, who was a magistrate, a writ of replevin, by virtue of which another respondent, who was an officer, took the liquors by force from the officer in whose custody they were and delivered them to the claimants, McMahon and Wren. The present proceedings were instituted by the State's Attorney with a view to the punishment of the parties concerned in the issuing and serving the writ of replevin for a contempt. The District Court found the facts and rendered judgment against the respondents, and the record is brought before us by a motion in error.

There was a demurrer to the complaint which was over ruled. The insufficiency of the complaint is still insisted on, on the ground, as it is claimed, that the acts alleged do not constitute a contempt of any court, especially the District Court; and for the reason that the liquors were not in its custody, and the acts not committed in its presence, and that the appealed case against the liquors was not then pending before that court.

First in importance perhaps, if not first in regular order, is the question whether the cause was pending before the District Court.

A trial had been had before the magistrate and a judgment rendered. After that, certainly the case was not pending before the magistrate. If no appeal had been taken the judgment would have ended the case and it would not have been pending anywhere. The appeal vacated the judgment and the case revived. In its resurrected form however, it was not remitted to its former position—a case before the magistrate, but it at once entered upon a higher scale of existence. The appeal transferred the case *instanter* to the jurisdiction of the District Court. That court for the purpose of acquiring jurisdiction of new cases is always in existence. Jurisdiction in point of right does not at all depend upon the actual sessions of the court, but attaches as soon as an appeal is taken or an ordinary process served. That is more apparent perhaps in those states and jurisdictions where processes returnable to the court must issue from the court itself. Our practice of allowing any magistrate to issue writs returnable to the higher courts does not vary the principle. It is familiar to the profession in this state that a suit is regarded as pending as soon as legal service is made on the defendant. For the same reason it must be regarded as pending before the appellate court as soon as the appeal is taken. The right of the court to entertain jurisdiction of the cause, unless it is otherwise disposed of by the parties, is then complete, and no other tribunal can interfere with it. The fact that as a matter of convenience, practice, and law, the court will take no action until the session of the court, does but affect the question of right. The cause was therefore pending immediately after the appeal, and as it could be pending in no other court it was pending in the District Court.

But it is said that the liquors were not in the custody of that court. If by this is meant that they were not in the actual physical custody of the judge or of some officer by him appointed, or that they were not held by order of that court,

we shall have no occasion to controvert the assertion; but if it is intended to say that the liquors were not held after the appeal subject to the orders of that court, we cannot assent to it, for it is very clear that they were so held. In that sense therefore and for that purpose they must be regarded as constructively at least in the custody of the court. The fact that they were in the actual possession of a constable of the town makes no difference, as the constable was but the agent of the law, and the law held them that they might be disposed of as the District Court might direct.

It is further said that the acts complained of were not committed in the presence of the court; and the statute regulating the punishment of that class of contempts is referred to. It is said that the statute is exclusive, and practically abolishes all other common law contempts, with two exceptions presently to be noticed; and that inasmuch as the statute does not reach this case the respondents cannot be punished in this proceeding at all. Confessedly the statute deals only with acts of contempt committed in the presence of the court, and where no process is required to bring the offender into court. It leaves all other cases of contempt to be ascertained and punished according to the course of the common law.

It is conceded by the learned counsel for the respondents that there are two classes of cases in the nature of contempts which are not covered by our statute and which are summarily punished by our courts; and these are misconduct of the officers of the court and disobedience to the orders and decrees of the court. The principal difference between these and statutory contempts is, that in the former, process is required to bring the party into court, and the acts or omissions constituting the offense are to be proved as in ordinary cases by the introduction of witnesses; while in the latter the offender is ordered into custody without process and the judge may act upon his own knowledge.

The power to enforce by attachment its own orders and decrees necessarily inheres in every court of record, and that power has been repeatedly exercised by the Superior Court in this state with the sanction of this court. *Lyon* v.

*Lyon*, 21 Conn., 185; *Rogers Manufacturing Company* v. *Rogers*, 38 Conn., 121; *Tyler* v. *Hamersley*, 44 Conn., 393. This is not denied.

The present case presents the question whether the court has power to protect its own jurisdiction over a case before trial, against the unlawful acts of a party who would be benefited by defeating that jurisdiction. For it must be admitted that the acts of the respondents tended directly to destroy the jurisdiction of the District Court, and doubtless that was the object in view. That is apparent from the nature of the proceeding. It was a proceeding *in rem*. Without the custody, actual or constructive, of the thing proceeded against, the court could have no jurisdiction and all its proceedings would be nugatory. Now it is not to be tolerated in a civilized and enlightened community that a party interested in defeating the ends of justice should have it in his power by force and violence to take away the jurisdiction of the court. That this is attempted to be done under the forms of legal proceeding is an aggravation, and calls upon the court to be astute not to allow its process to be used for any such purpose. We come then to the inquiry whether the principles of the common law and precedents in this state or elsewhere will justify the court in protecting its jurisdiction by proceedings as for a contempt.

A case is referred to in Salkeld arising during the reign of Henry the Seventh, in which a party attempted to proceed in the lower court after the cause had been legally removed into another jurisdiction. In 1 Anst., 212, Eyre, Chief Baron, gives a very interesting description of the proceedings. "The roll of the 19th of Henry the Seventh, to which I alluded, and which is referred to in Salkeld, and is there supposed to be a precedent for removing an action and for granting an attachment, because the party after service of the order took upon himself to proceed, was in truth a proceeding as for an immediate contempt, for levying a plaint in a court at Bristol for a parcel of wine that had been seized and prosecuted to condemnation in this court, and it was a very orderly proceeding. The Attorney-General states it as a matter of complaint against the party; there is a capias

awarded; he is taken into custody; he is brought into court; is committed for the contempt to the Fleet; he is brought up again; makes fine to the court; his fine is regularly recorded; and then upon the ground of the fine he is dismissed."

It is probably true that courts were more arbitrary at that early day and governed less by forms and principles prescribed by the written law than are our own courts; and in a case like that we should probably find a less harsh but equally effective remedy by an injunction, or by treating the proceedings in the lower court as a nullity. In the case before us, however, no other remedy seems to be adequate. An injunction could not prevent the acts, for it would not ordinarily be known in season that they were contemplated. The acts could not be treated as a nullity, for the liquors were thereby taken from the custody of the court. It is suggested that the court might have ordered the respondents to return the liquors. That might or might not have been a remedy. In many cases it would not be. The party and the liquors might be without the territorial jurisdiction of the court; or, by reason of sales or otherwise, it might be impossible to trace and identify the liquors. The case referred to, however, is important as showing how jealously the court at that day guarded and protected its own jurisdiction.

The case in 1 Anst., 212, arose under the revenue laws. The language of the Chief Baron is pertinent to the present case. After the part quoted above, he proceeds as follows:— "In this they evidently proceeded upon a general analogy to the proceedings in other courts; for there is no court that suffers its process either to be insulted or to be materially interrupted; and whenever this is attempted it is a contempt upon which the courts proceed to grant an attachment in the first instance. * * But that this jurisdiction was not a very novel thing, nor this a single instance, we may collect from other cases that are very clearly established, namely, that if a man at this day, there being a seizure in order to condemnation, was to presume to replevy the goods, it would be a contempt of the court for which an attachment would be granted instantly; so if a distress is taken upon a

fee farm rent or other duty to the crown, it is considered as a contempt to replevy and an attachment will issue upon it."

The case of *Riggs* v. *Whiting*, 15 Abb. Pr. Reports, 388, was an application to the court to direct a receiver to pay the landlord from rents collected of under-tenants before distribution to creditors. It was objected that the landlord should be left to a suit against the receiver. The court, after approving the course taken, say:—"Any attempt to deprive an officer of the court of property in his possession, by suit or other adverse proceeding, without first obtaining leave of the court, would be regarded as a willful contempt, for which the party instituting the proceeding would subject himself to punishment by attachment."

In *Richards* v. *the People*, 81 Ill., 551, the court holds that "a receiver is an officer of the court, and that his possession is the possession of the court itself, and any unauthorized interference therewith, either by taking forcible possession of the property committed to his charge, or by legal proceedings for that purpose without the sanction of the court appointing him, is a direct and immediate contempt of court and punishable by attachment."

The same doctrine is found in *Cochrane* v. *Mead*, L. Reps., 20 Eq. Cases, 282.

These authorities are sufficient perhaps to show that whenever courts acquire jurisdiction over property and hold it subject to judicial proceedings they will not suffer their possession to be unlawfully disturbed, or quietly submit to being deprived by unlawful means of their power to proceed; but will protect that jurisdiction by the summary process of attachment for contempt. Property attached in an ordinary civil suit stands upon a different ground. The attachment merely creates a lien upon it in favor of the judgment that may be obtained. It is in no sense a proceeding *in rem*. The jurisdiction of the court does not depend at all upon the possession of the property, but does depend upon the parties and the subject matter. Hence the defendant may cause the property to be receipted, or the attachment dissolved by substituting a bond, without affecting the jurisdiction of the court.

Our conclusion upon this part of the case is, that the same

principle which governs courts in enforcing their decrees will justify the use of all necessary means to protect their jurisdiction in order that they may pass decrees. A proceeding for contempt is an effectual means to that end.

That the act of the respondents was a contempt is sufficiently shown, unless they are right in their claim that the statute gave them a right to an action of replevin.

The statute is, that "the action of replevin may be maintained to recover any goods or chattels, in which the plaintiff has a general or special property with a right to their immediate possession, and which are wrongfully detained from him in any manner," &c.

It is claimed that the property was wrongfully detained, or that they in good faith supposed that it was, and that they had a right to try the question in this way. We do not think the word "wrongfully" was used in such a sense as to cover a case of liquors seized under the statute. If there was probable cause for believing that the liquors had been forfeited under the law, and we must assume that there was, the statute authorized a process by which they might be seized and held to await a judicial determination of that question. That being so, it can in no just sense be said that the officer who held it held it wrongfully. Even property attached, if liable to attachment, cannot be replevied by the owner if he is the defendant in the suit. It is only where property of a stranger to the suit is attached that replevin will lie. Here there can be no pretense that the property of the wrong person was taken. It is not the ownership by any particular person that gives a right to seize it, but it is the purpose for which it is being used without regard to ownership.

Again, the claimants had no right to the immediate possession of the property. Such a right would be wholly inconsistent with the power of the court to condemn it. The replevin suit therefore could not be maintained. See authorities cited above; also *Allen* v. *Staples*, 6 Gray, 491.

It is further claimed that the respondents, having been examined as witnesses under oath, and having testified that they acted in good faith and intended no disrespect to the

court, thereby purged themselves of the contempt, and that no further proceedings could thereafter he had against them except a prosecution for perjury. That may be the practice in some jurisdictions, but we agree with the Supreme Court of New Hampshire, that the better practice is to receive other testimony and settle the whole question of contempt in one proceeding. *State* v. *Matthews*, 37 N. Hamp., 450. And such we understand to be the practice in this state. There is no error in this respect.

It is also claimed that the court erred in refusing to allow a trial by jury. We are not aware of any case in this state or elsewhere in which it has been held that a party accused of contempt is entitled to a trial by jury. The contrary has been repeatedly held. *State* v. *Matthews*, 37 N. Hamp., 450; *Oswald's Case*, 1 Dallas, 319; *State* v. *Becht*, 23 Minn., 411; *State* v. *Doty*, 32 N. Jer., 403; *Crow* v. *The State*, 24 Texas, 12. It would seem to be necessary that the court should have the power to judge of all questions of this nature. The power to protect the dignity of the court might hang by a slender thread if it was made subject to the uncertainties of a jury trial.

It is true the proceeding is summary, and in some measure arbitrary, but no special inconvenience is likely to result from it. Parties can always have the assistance of able counsel, who will be vigilant and zealous in their behalf; every right-minded judge will bear in mind that it is not his private and personal dignity but the dignity of the law and of the state that is in his keeping, and will be disposed to act fairly and impartially; and if these fail, there is public sentiment, which is quick to perceive and prompt to challenge any abuse of power, and which would speedily find expression, if need be, in the passage of a remedial statute.

The judgment of the court overruling the demurrer was not a final judgment, and the respondents were not at that stage of the case entitled to a motion in error. Gen. Statutes, p. 450, sec. 14.

There is no error.

In this opinion the other judges concurred.

# SUPREME COURT OF ERRORS.

## HELD AT NEW HAVEN FOR THE COUNTY OF NEW HAVEN,

ON THE FIRST TUESDAY OF JUNE, 1880.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, Js.

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### EDWARD F. HARRISON'S APPEAL FROM PROBATE.

Fraud or undue influence in procuring one legacy in a will does not invalidate other legacies not so procured.

Where the issue is as to the fact of undue influence in procuring a will, and it appears that the undue influence was confined to a single legacy in the will, the jury may find under that issue the will void as to that legacy and valid as to the others.

Reasons of appeal are not necessary to form an issue upon such a trial, but when filed they constitute a notice to the adverse party of the matter relied on.

A witness having testified to certain facts, was asked on cross-examination if he had not made a certain different statement to *A*, to which he replied that he had not. The adverse party afterwards called *A* as a witness, who testified that the former witness had said to him what he denied saying. The former witness was again called, and stated what he did say to *A*, and was going on to give the further conversation at the time on the same subject, when on objection of the adverse party the court ruled it out. Held that the party calling the witness was entitled to the whole conversation, so far as it related to the same subject.

APPEAL from the decree of a probate court approving the will of Edward Harrison, deceased; brought to the Superior Court in New Haven County, and tried to the jury before *Hitchcock, J.* The jury returned a verdict setting aside the will, and the appellees moved for a new trial for error in the rulings and charge of the court, and on the ground that the verdict was against the evidence. The case is sufficiently stated in the opinion.

*H. Stoddard*, in support of the motion.

*L. B. Morris* and *G. H. Watrous*, contra.

LOOMIS, J. This appeal was from the decree of the New Haven probate court, approving the will of Edward Harrison, late of New Haven, deceased.

The testator was twice married. The appellant is a son by the first wife. The testator's last wife and his four children by her survive him; and to them the will gives all his property, to be equally divided, subject however to a bequest to one Ann Naughton, a servant in the family, of an amount sufficient to make her share equal to each of the other shares. To this Ann Naughton, the appellant attributes an undue influence over the testator in the making of his will, which rendered it invalid.

The verdict of the jury sustained the claim of the appellant and the entire will was set aside. The question now comes before this court for review by the appellees' motion for a new trial, predicated on three grounds,—namely: that the verdict was against the evidence, and that the court erred in its instructions to the jury, and that its rulings as to the admissibility of evidence were erroneous.

The consideration of the first question is unnecessary, as the other grounds are sufficient to require the granting of a new trial.

The appellees requested the court to charge the jury—"that a will may be void in part and valid in part; that if the jury should find that the legacy given to Ann Naughton by the provisions of the will was obtained by her undue influence, then the legacy only would be void, and not the remaining provisions of the will, unless the jury should further find that the undue influence extended to the other provisions of the will." But the court refused so to charge, and on this point instructed the jury as follows: "It is true that a will may be void in part, and in all other respects be valid; but, as this case stands, the question of the partial validity of the will is not presented, and has not been tried. The executor and all the parties claiming under the will are made parties by service of order of notice to this appeal. All have appeared, and have been fully heard by evidence, on the question raised by the reasons. No specific question,

by way of reasons for the appeal, needed to be presented; but such reasons having been filed attacking the will as a whole, the evidence, on both sides, having been directed to that sole point, and the trial having proceeded throughout, up to the argument, solely on that question, the will, on such proceedings, must be sustained or be rejected as a whole."

That the request of the appellees embodies an accurate statement of the law is shown by many authorities. In *Trimlestown* v. *D'Alton et al.*, 1 Dow. & Clark, 85, it was held that "where an undue influence is exercised over the mind of a testator in making his will, the provisions in the will in favor of the person exercising that influence are void; but the will may be good as far as respects other parties; so that a will may be valid as to some parts and invalid as to others; may be good as to one party and bad as to another." So in *Florey's Executors* v. *Florey*, 24 Ala., 241, it was held that "fraud or undue influence in procuring one legacy does not invalidate other legacies which are the result of the free will of the testator, but if the fraud or undue influence affects the whole will, though exercised by one legatee only, the whole will is void." So in 1 Redfield on Wills (4th ed.), p. 519, § 20, it is said that "it is undoubtedly true that a will may be void in part and not in all its provisions; or it may be void as to one legatee and not as to others."

Further citations are quite unnecessary, if indeed any were required; for there was no controversy in the court below on this point. But the court, while acknowledging the law as claimed by the appellees, refused to allow them the benefit of it in the case on trial, upon the idea that the question as to the partial validity of the will was not in issue, and that it was too late to make the claim upon argument.

In this respect the court erred. The issue was as to the fact of undue influence, and also and necessarily as to its nature, effect and extent.

Even where the pleadings are of the most technical character the greater, of necessity, includes the less. A charge of murder involves manslaughter as well. In ejectment,

where the pleadings have sole reference to a specified tract of land as an entirety, any part within the boundaries may be recovered without the rest. So that, if tested by the strictest rules, the court was wrong. But the technical rules of pleading do not apply to issues on the trial of the validity of a will. Reasons of appeal are not necessary to form an issue, but when filed they constitute a notice to the adverse party of the matter relied upon. *St. Leger's Appeal from Probate*, 34 Conn., 434.

The interests of different legatees are by law separate and distinct. The widow and children had a clear right to have the jury pass upon the question, whether the will of the testator was not entirely free from undue influence as to them and their legacies, and whether the undue influence had anything to do with the exclusion of the appellant from a share in the estate. There was evidence tending to show that the undue influence, if any, might have begun and ended with Ann Naughton, which the jury ought to have been permitted to consider. The question as to the effect of the undue influence, as shown by the evidence, was properly made in the argument.

The remaining question relates to the admissibility of evidence. The motion presents the question as follows:—On the trial of the case the appellees called as a witness Pulaski Leeds, who testified to his frequent and almost daily intercourse with Mr. Harrison, the decedent, and his family, and that he had never seen any improper conduct, familiarity or act of intimacy between Mr. Harrison and Ann Naughton. And upon cross-examination by the appellant's counsel, he was asked if he had ever commented upon the way that Mr. Harrison lived with Ann, and in reply he said that he had not. To contradict him the appellant offered himself as a witness, and testified that in April, 1878, after his father's funeral, he went to see Leeds and talked with him, and that Leeds said: "We all have our suspicions of the position of Ann in the family, relative to Mr. Harrison, but it might be difficult to prove them." And in reply the appellees called Leeds, who testified that the appellant came to him and

asked him some questions to make up his case, and said he was going to appeal; and that he said to him; "You had better drop it, for while you may have your suspicions, it is a dreadfully hard thing to prove." The witness stated that he did not say that he had any suspicions. The witness was going on to state what further was said in that connection by the appellant at the same time and as a part of the same conversation and the next words that were uttered, when the appellant's counsel objected to his stating any more of the conversation; and the appellees claimed that they were entitled to have the witness state the whole conversation that occurred at that time in reference to that subject; and that they were certainly entitled to have the witness state whether anything was said as to the grounds of suspicion, and by whom they were held, especially as the appellant had testified that he did not ask Leeds what grounds he had for his suspicion. The court sustained the objection and refused to allow the witness to state the rest of the conversation, to explain the testimony which had been given, or for any purpose whatever.

If the assumption upon which the appellant's counsel based their objection to this testimony had been true, that the answer already given covered the entire ground and that the rest of the conversation was immaterial and irrelevant, the ruling of the court was clearly right. But the nature of the testimony excluded appears only from the statement in the record as to the offer. This shows that the additional testimony was not new matter, but a continuation of the same conversation, on the same subject, and directly connected with the assertions to which the cross-examination related. It might therefore have rendered it more clear that the sense and meaning of the words actually used by the witness were very different from those attributed to him and entirely consistent with his testimony in chief. For these reasons we think the evidence ought not to have been excluded. 1 Greenleaf's Evidence, § 467.

A new trial is advised.

In this opinion the other judges concurred.

## STATE OF CONNECTICUT *vs.* JOHN H. HOWARTH.

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A testamentary trustee gave a bond with the defendant as surety for the faithful discharge of his trust. He had held the trusteeship for some time before, the bond being given in place of another, and it appeared that at some time previous to giving the new bond he had had the trust fund uninvested in his hands. Two years later he was removed and the fund was found to have been converted by him. Held that, as he had a right to hold the fund during his trusteeship, it was no answer to the claim upon the defendant on the bond, that the conversion might have been made before the bond was given, his completed default being his neglect to pay over the fund in money or proper securities to his successor.

If the trustee at any time retained any part of the money in his own hands he became a debtor to the fund for the amount, and this indebtedness was to be regarded as assets in his hands.

An account filed with the court of probate by the trustee before the bond was given in which he charged himself with certain funds, held to be evidence against the surety as much as it would have been against the trustee, the liability of the former being co-extensive with that of the latter.

The accounts of testamentary trustees appear upon the probate files and records, and are open to the inspection of the public, so that a surety has the means of informing himself with regard to the faithfulness of his principal. It is the duty therefore of the surety to inform himself, and he is not discharged by the same failure on the part of a cestui que trust to give information or take measures for his protection that would discharge the surety on a bond for the faithfulness of a private servant.

Besides this, testamentary trusts are generally for the benefit of persons who are unable to exercise vigilance with regard to the management of the trust, and the statute requires the giving of the bond for their protection.

Where a trustee refuses to account for the profits arising from his use of the money or has so mingled it with his own that he can not separate and account for the profits that belong to the *cestui que trust*, the latter is allowed compound interest. This rule applies especially to cases involving a willful breach of duty.

COVENANT, upon a joint and several bond given by William N. Barnett as principal and the defendant as surety for the faithful performance by the principal of his duties as testamentary trustee under the will of Henry Ward; brought to the Superior Court in New Haven County. The declaration set forth the breach of the bond, which the defendant denied and pleaded full performance. The facts were found by a committee and the case reserved for the advice of this court. The case is fully stated in the opinion.

*L. B. Morris* and *J. W. Alling*, for the plaintiff, cited, to the point that where a trustee becomes indebted to a trust estate the indebtedness is regarded as assets in his hands—*Prindle* v. *Holcomb*, 45 Conn., 111; *Davenport* v. *Richards*, 16 id., 310; *Dawes* v. *Edes*, 13 Mass., 177; *Mattoon* v. *Cowing*, 13 Gray, 387; *Leland* v. *Felton*, 1 Allen, 531; *Chapin* v. *Waters*, 110 Mass., 195; *State* v. *Drury*, 36 Misso., 281. To the point that the obligation of the surety was precisely the same as that of the principal—*Wattles* v. *Hyde*, 9 Conn., 15; *Gilbert* v. *Isham*, 16 id., 528. That the surety was liable where there was a continuing duty of the principal—*Merrells* v. *Phelps*, 34 Conn., 109; *Choate* v. *Arrington*, 116 Mass., 552. That the trustee could not lend on mere personal security—1 Perry on Trusts, §§ 452, 453. That the *cestui que trust* was under no obligation of active diligence toward the defendant—*Bull* v. *Allen*, 19 Conn., 105; *Glazier* v. *Douglass*, 32 id., 400; *U. States Bank* v. *Magill*, 1 Paine, 667; *Adair* v. *Brimmer*, 74 N. York, 539. And that the trustee should be charged with compound interest—1 Perry on Trusts, §§ 468, 471; *Booth's Appeal from Probate*, 35 Conn., 165; *Prindle* v. *Holcomb*, 45 id., 111; *Adair* v. *Brimmer*, 74 N. York, 539.

*C. R. Ingersoll* and *W. C. Robinson*, for the defendant, cited, as to the defendant's not being liable for certain of the defaults as having occurred before the bond was given—*Farrar* v. *U. States*, 5 Pet., 373; *U. States* v. *Boyd*, 15 id., 187; *U. States* v. *Linn*, 1 How., 104; *Myers* v. *U. States*, 1 McLean, 493; *Postmaster-General* v. *Norvell*, Gilpin, 106; *County of Mahaska* v. *Ingalls*, 16 Iowa, 81; *Bessinger* v. *Dickerson*, 20 id., 261; *Vivian* v. *Otis*, 24 Wis., 518; *Townsend* v. *Everett*, 4 Ala. N. S., 607; *Patterson* v. *Freebold*, 38 N. Jer. Law R., 255; *Hetten* v. *Lane*, 43 Texas, 279; *Rochester* v. *Randall*, 105 Mass., 295; *Thomas* v. *Blake*, 126 id., 320. As to the defendant being discharged as to this part of the loss by indulgence and negligence on the part of the *cestui que trust*—*Phillips* v. *Foxall*, L. Reps., 7 Q. B., 666; *Leland* v. *Felton*, 1 Allen, 531; *Rochester* v. *Randall*, 105

Mass., 295. And as to the non-liability of the defendant by reason of the neglect of the *cestui que trust* to notify him, when the bond was given, of the previous conduct of the trustee—1 Story Eq. Jur., § 215; *Doughty* v. *Savage*, 28 Conn., 155; *Franklin Bank* v. *Cooper*, 36 Maine, 179; *S. C.*, 39 id., 551; *Sooy* v. *The State*, 39 N. Jer. Law R., 135; *McKecknie* v. *Ward*, 58 N. York, 541; *Telegraph Co.* v. *Barnes*, 64 id., 385; *Atlas Bank* v. *Brownell*, 9 R. Isl., 168; *Charlotte &c. R. R. Co.* v. *Gow*, 59 Geo., 685; *Smith* v. *Bank of Scotland*, 1 Dow, 272, 292; *Railton* v. *Mathews*, 10 Clark & Fin., 934, 943; *Hamilton* v. *Watson*, 12 id., 109; *Lee* v. *Jones*, 14 Com. Bench N. S., 386; *Phillips* v. *Foxall*, L. Reps. 7 Q. B., 666; *Owen* v. *Homan*, 3 Mac. & Gord., 378; *Stone* v. *Compton*, 5 Bing. N. C., 142.

PARDEE, J. Henry Ward, of Orange, died prior to May 15th, 1857, leaving a will, in which was the following paragraph:

"The balance of my estate, if any, over and above the foregoing legacies and specific devises and bequests, I direct my executors to invest safely at their discretion, and to hold the same with the interest thereon accruing until the interest shall be equal to the principal; and thereafter to pay and appropriate the interest and income of the whole fund thus accumulated for the support of the gospel ministry in said Episcopal society, provided the same shall be approved by the bishop of the diocese, or in his absence by the standing committee. I nominate, constitute and appoint Enos A. Prescott, of New Haven, and Isaac Hine and William N. Barnett, of Orange, executors of this my will, hereby revoking and annulling all former wills by me executed."

This will was duly proved before and approved by the probate court for the district of New Haven, having jurisdiction thereof.

Of the persons named as executors Isaac Hine and William N. Barnett qualified as such, and continued to act in that capacity until July 3d, 1862, when Hine tendered his resignation as executor and trustee under the will; which resig-

nation was accepted by the probate court on September 26th, 1862. From this date to December 15th, 1877, when he was removed, Barnett was sole executor and trustee. On July 15th, 1862, Barnett filed a new probate bond with Jeremiah Barnett as surety. In 1872 the executor of Jeremiah Barnett, then deceased, filed an application in the probate court to be released from his liability as surety upon the bond given on July 15th, 1862; the petition was granted, and on October 2d, 1872, Barnett filed a new bond with A. F. Wood as surety. On February 16th, 1876, Wood applied to the probate court to be relieved from his liability as surety; his petition was granted, Barnett having on March 6th, 1876, executed the bond in suit with John H. Howarth, the defendant, as surety; which bond is upon condition as follows:—"The condition of this obligation is such, that whereas Henry Ward, late of said Orange, deceased, in and by his last will and testament bearing date the 10th day of September, A. D. 1850, and duly proved before and approved by the court of probate for the district of New Haven in said county and state on the 15th day of May, A. D. 1857, created a certain trust for the benefit of Christ Church, West Haven; and whereas said William N. Barnett is one of the trustees appointed to manage and execute said trust; now therefore if said William N. Barnett shall faithfully perform his duty as such trustee according to law and said will then this bond to be void, otherwise good and valid."

A few days prior to the execution of this last-mentioned bond Barnett presented to the probate court an account, in which he charged himself with the following items as constituting the principal of the fund then in his hands:

| | | |
|---|---|---|
| "Note of G. R. & E. A. Hotchkiss, | $727.71 | |
| " " " " | 500.00 | |
| " " " " | 1,250.00 | |
| New Haven Bond, - - | 500.00 | $482.50 |
| Connecticut Savings Bank, - | 1,000.00 | |
| New Haven Bank, - - | 1,000.00 | |
| National Bank, - - | 500.00 | |

| | |
|---|---|
| Check, - - - | 1,000.00 |
| Cash, &c., - - - | 103.74 |
| | $6,563.45" |

Between the date of the presentation of this account and July 15th, 1876, he appropriated to his own use the bond, the bank deposits, and the cash therein mentioned. On December 15th, 1877, he was removed from his office and trust as executor. On January 5th, 1878, John C. Hollister, Esq., was duly appointed by the probate court to execute the trust created by the will; he qualified as such trustee to the acceptance of the court, and now acts as such. Shortly after his appointment he made demand upon Barnett for the amount of the Ward fund; but the latter has never delivered to him any money or other assets, and none have ever come to his hands as such trustee.

In his account Barnett stated that the sum of $727.21 was then invested in a note signed by G. R. Hotchkiss, endorsed by E. A. Hotchkiss. Concerning this note it is found that it was dated in February, 1871, and was payable February 4th, 1876; that on or about October 20th, 1875, it was paid by the substitution therefor of a new note of $753.78, made and endorsed by the same parties, payable at four months from date; that on November 1st, 1875, Barnett procured this last note to be discounted for his individual account and received the avails thereof; and that it was subsequently taken up by him and presented as a claim due to himself from the assigned estates of the maker and endorser.

He also stated in that account that a portion of the trust fund had been invested in a note for $1,250, dated November 4th, 1875, payable nine months from date, and a further portion in a note for $500, dated January 25th, 1876, payable four months from date, both signed by G. R. Hotchkiss and endorsed by E. A. Hotchkiss. These notes were made, endorsed, and placed in the possession of Barnett, only as collateral security for his accommodation endorsement upon the notes of G. R. Hotchkiss.

From this it results, therefore, that at a certain time he

had in his hands uninvested principal of the fund equal to the sum represented in the three notes, namely, $753.78, $500, and $1,250. As his account was rendered in his official capacity in obedience to the law and with the intent to charge himself with the sum therein expressed, and for the special purpose of informing all persons interested therein as to the amount of the fund, it is evidence upon that point against him, and against the defendant as well, since in this regard his liability is co-extensive with that of his principal. And as there is no finding that he subsequently discharged this duty of a trustee in reference to this money, either by investment of it and the delivery of the securities to his successor, or by payment to his successor of the amount in money, his default for the entire amount of the fund at the termination of his trusteeship is established; and for that the defendant is answerable.

When Barnett presented this statement to the probate court, the *cestui que trust*, the society of Christ Church of West Haven, was present by members of its vestry and by counsel, and objected to the reception thereof for the reason that the notes were not endorsed to the order of Barnett as trustee, and that it had no interest in them; also that both maker and endorser had gone into insolvency and they were worthless. Thereupon he endorsed them to himself as executor, and said that if he was allowed a little time he could make them good. The church still objecting to the allowance of the account, the probate court ordered it to be recorded. Subsequently Barnett instituted suits as executor against the endorser of these notes and made attachments in the actions. After his removal application was made to his successor to furnish bonds and funds for the prosecution of the suits, which he declined to do, assigning as reasons that the *cestui que trust* did not recognize that it had any interest in the notes or that they constituted any part of the trust fund, and that it had recently for the first time learned that the note for $727.21 had been exchanged for the note for $753.78, and that the notes for $500 and $1,250 were pledged to Barnett as collaterals; whereupon the suit was discon-

tinued. The defendant had no knowledge either of the pendency of these suits, or of the refusal of the new trustee to continue them. It is the claim of the defendant that if these notes were assets in March, 1876, they were so in January, 1878, and that no cause of action therefor arose against him; or if they were not assets upon the first date, and were merely a cover for a previous conversion, he is not responsible therefor, under the rule that he is only to answer for acts and omissions of his principal occurring during his suretyship; citing *Farrar* v. *United States*, 5 Peters, 373; *United States* v. *Boyd*, 15 Peters, 187; *Rochester* v. *Randall*, 105 Mass., 295; and other cases. Most of these are cases of suretyship for collectors of taxes. The duty of such collector in reference to money received is at a fixed time to pay it to the sovereignty or community entitled to it; by neglecting to perform that duty, and by appropriating the money to his own use, he is, in reference to it, at once and completely in default, for which whoever is then surety for him is answerable.

But it was the right and duty of Barnett to hold the principal of the fund until the termination of his trusteeship; if therefore he at any time retained any part of it in his own hands he became a debtor to the fund, with the continuing duty either of investing it or upon his removal of delivering it to his successor. His failure to do this is the completed default shown by the record and is within the time and terms of the defendant's undertaking.

It is furthermore the claim of the defendant that the *cestui que trust* has relieved him from all responsibility upon his bond by its failure to repeat to him the protest entered at the probate court against the acceptance of the trustee's account; by its delay in moving for his removal; by its omission to inform the defendant that the management of the fund was improper; by its omission to protect him, by commencing suits against the trustee, the maker and the endorser of the Hotchkiss notes; and by its omission to continue at its own cost the suits which had been instituted. And in support of this claim he cites numerous cases which may be represented by a selected few.

In *Smith* v. *Bank of Scotland*, 1 Dow, 272, 292, it is said that if "a principal, suspecting the fidelity of his agent, requires security in a way which holds him out as a trustworthy person, the cautioner is not liable." In *Railton* v. *Mathews*, 10 Cl. & Fi., 934, that "mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with and within the knowledge of the person obtaining a surety bond, is undue concealment, though not willful or intentional, or with a view to any advantage to himself." In *Phillips* v. *Foxall*, Law Reps. 7 Q. B., 666, that "on a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during subsequent service." In *Hamilton* v. *Watson*, 12 Cl. & Fi., 109, that "a surety is not of necessity entitled to receive, without enquiry, from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and that party." In *Atlantic & Pacific Tel. Co.* v. *Barnes*, 64 N. York, 385, the head note is as follows:—"The sureties upon a bond given by an employé to his employer, conditioned that the former will faithfully account for all moneys and property of the latter coming to his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of their principal known to the employer, and a continuance of the employment after such default, in the absence of evidence of fraud and dishonesty on the part of the employé. *It seems* that the rule is otherwise where the default is of a nature indicating a want of integrity in the employé, and this is known to the employer."

These are suretyships required by individuals or private corporations for protection against loss by reason of the unfaithfulness of clerks or servants; the nature and extent

of the duties which these have undertaken to perform and of the trust which has been confided to them, and the state of the accounts between them and their employers at any given time, can accurately be known by the surety only by the acts and words of the employer; if therefore the latter knowing the surety to be shut up to this single source of information misleads him to his injury, the law will not permit the employer to reap any advantage from concealment or misrepresentations.

In the testamentary trust before us the acts and accounts of the trustee being matters of record in the probate court, accessible to all persons interested in knowing what they were, the *cestui que trust* might well presume full knowledge on the part of the defendant in the absence of any application to it by him for information. In the cases cited the person for whose benefit the surety assumes a risk is absolute master of the servant, and can at the moment of discovering his unfaithfulness put an end to his service, and thus make the resulting loss as small as possible. But a testamentary trustee is neither the agent, nor under the power of the *cestui que trust;* the latter can only petition for his removal; it is for the probate court to act upon hearing after notice and consequent delay; during this delay the trustee may complete the conversion of the fund in spite of the most diligent effort to prevent it.

Again, ecclesiastical and charitable corporations, females, minors, infants, and insane persons, may be and often are beneficiaries under testamentary trusts; for the protection of these the statute commands the probate court to require of the trustee a probate bond, and makes his refusal to give it a refusal to accept or perform the duties of the trust. The procurement of a surety is the act of the trustee, performed in obedience to the law; it is not at the request of the *cestui que trust;* need not be with his knowledge; may be against his will and in spite of his protest. He is the ward of the state; the passive recipient of its protection; he can neither terminate the duties of the trustee nor diminish the risk of the surety by any act or declaration; these are determined by the law administered by the probate court.

The surety, always, of course, has both the ability and the opportunity to decide for himself the extent of the risk assumed; and it is only by force of his self-imposed burden that the trustee is enabled to obtain possession of the fund. Upon him rests the duty of enquiry as to the character and acts of his principal; he is to be diligent in his own protection; he is to discover for himself the earliest indications of fault or fraud. It is not his privilege to abstain from all enquiry and cast upon the *cestui que trust* the loss resulting from his voluntary ignorance.

The *cestui que trust* is under no obligation to determine for him what acts or investments on the part of his principal may or may not put him in peril; is not bound to institute or continue legal proceedings for his protection; not bound either to obtain information for his benefit, or to provide against or foresee possible loss to him. The purpose of the statute is to compel the surety to insure the *cestui que trust*, not that the latter shall defend him.

Moreover, upon the facts the case before us furnishes no opportunity for the application of the principles established by the cited cases. Concerning the transactions of Barnett in the Hotchkiss notes, it is not found that the *cestui que trust* had any information other than that given in his annual reports to the probate court. The defendant knew that he had long acted as trustee; that he was himself undertaking a suretyship which another had borne and desired to lay down; knew that the *cestui que trust* was accessible to him, but refrained from asking for any information. The *cestui que trust* might well presume that he had by way of precaution exhausted all means of knowledge, and had learned all facts known to itself.

It is not found that the *cestui que trust* had either knowledge or suspicion as to the conversion of any part of the fund until after the conversion of the whole; its knowledge came too late for any effort to save any portion from the trustee; and soon after knowledge came its petition for his removal. The case does not find negligence in fact on its part in not sooner knowing or suspecting the misappropria-

tion; nor undue delay after knowledge in asking for his removal; nor fraud in concealing any fact from the defendant; nor that it withheld any knowledge upon enquiry of it by him; nor does the law impute either negligence or fraud to it.

It was the right of the trustee to keep possession of the principal, the right of the *cestui que trust* to receive the income only; that was paid to it up to, but not beyond, the time when the defendant became surety. The trustee might fail to receive and consequently fail to pay over income without fraud or fault on his part; the *cestui que trust* was not of legal necessity bound to suspect either simply from the fact of non-payment; when upon enquiry it was in effect assured by the trustee that the fund had earned interest as before, but that he had expended it in the protection of the principal.

In reference to interest the rule is, that if the trustee refuses to account for the profits arising from his use of the money, or if he has so mingled the money and the profits with his own money and profits that he cannot separate and account for the profits that belong to the *cestui que trust*, the latter may have legal interest computed with annual rests. This rule is especially applicable to cases involving a willful breach of duty. 1 Perry on Trusts, § 471, and cases there cited.

We advise the Superior Court to render judgment for the plaintiff for the sum of $6,563.45, as the principal of the fund, with the interest remaining unpaid computed with annual rests.

In this opinion the other judges concurred.

HENRY PLUMB *vs.* WILLIAM W. STONE AND WIFE.

In a civil action before a justice of the peace against a husband and wife, the justice rendered judgment against the husband and in favor of the wife. The plaintiff appealed and in the appellate court judgment was rendered for the wife. Held that she was entitled to her cost, under Gen. Statutes, tit., 19, ch. 14, sec. 12

ASSUMPSIT against a husband and wife, brought before a justice of the peace. The justice rendered judgment against the husband and in favor of the wife, and the plaintiff appealed to the Court of Common Pleas, where the case was tried to the jury and a verdict rendered against the husband and in favor of the wife. The court (*Harrison, J.*,) rendered judgment in favor of the wife for costs, and the plaintiff brought the record before this court by a motion in error.

*L. L. Phelps* and *C. H. Fowler*, for the plaintiff in error, relied upon *Warren* v. *Clemence*, 44 Conn., 308.

*W. C. Robinson*, for the defendant in error.

GRANGER, J. The only question made in this case is, whether the defendant Sarah C. Stone is entitled to cost, judgment having been rendered in her favor.

The action is assumpsit, and was brought originally before a justice of the peace against William W. Stone and his wife Sarah C. Stone. The justice rendered judgment against the husband and in favor of the wife. The plaintiff appealed from this judgment to the Court of Common Pleas, where it was tried before a jury, and a verdict rendered against the husband and in favor of the wife.

The plaintiff claims that the wife is not entitled to cost, and relies in support of this position upon the case of *Warren* v. *Clemence*, 44 Conn., 308. That decision was rendered upon a construction of the statute (Gen. Statutes, 417, sec. 12.) which provides that "in any civil action by or

against a married woman, her husband may be joined with her as a co-plaintiff or co-defendant as the case may be, and when so joined, if a cause of action is found to exist in favor of or against one of them only, a judgment or decree shall be rendered accordingly; and in such cases no cost shall be taxed for such husband or wife in favor of whom no cause of action is found." This statute seems in its very terms to require that no cost shall be taxed in favor of a wife where a judgment is rendered in her favor and against her husband where they are made joint defendants, and we so held in the case referred to.

There is however another statute (Gen. Statutes, p. 446, sec. 12,) which provides that "when on an appeal in any civil action from the judgment of a justice of the peace a more favorable judgment shall not be obtained by the appellant in the appellate court, he shall recover no cost on such appeal, and the court may at its discretion allow double costs to the appellee."

These two statutes may have been passed without any reference to each other and may to a certain extent cover the same ground and so far be inconsistent. As neither has any preference over the other, we see no way but to give the latter statute effect in the case of appeals from justices of the peace, to which it expressly applies and is limited, and to give the former statute effect as to all other cases. Both are special statutes and each is to stand upon its own ground and receive its own construction. We are not to look for any special reasons for the distinction which the legislature has made between the two cases to which the statutes respectively apply. It is enough for us that the legislature has in each case in language easily understood expressed its will.

There is however a justice in awarding the wife her costs in this case, inasmuch as the appeal taken by the plaintiff from the judgment of the justice in her favor was for the sole purpose of establishing her personal liability. Judgment had been rendered by the justice against the husband, and there was no object in carrying the case further so far

as he was concerned. To all effect he was dropped out of the litigation, and the appeal was practically a pursuit of the case against the wife alone. When at last, after a jury trial in the appellate court, she obtained a verdict, it would seem to be a serious injustice to refuse her her costs.

We are of opinion that the wife should be allowed her costs in this case.

In this opinion the other judges concurred.

48 220
63 600

LUCY A. MORSE *vs.* THE BOROUGH OF FAIR HAVEN EAST.

An amendment of the charter of the borough of *F* within the town of *E* provided that the town should not thereafter have power to lay out or discontinue highways within the borough, nor be liable for any damage sustained by reason of any defective highway within it, but that the borough should be liable therefor to the same extent that the town would have been if the amendment had not been passed. The town of *E* a short time before had laid out and constructed a highway along a hill-side above the plaintiff's house, removing the earth and filling the excavation with stones, in consequence of which the water at times worked through from the gutter on the other side and ran down upon the plaintiff's premises, doing serious damage. This damage occurred after the passage of the amendment, and the plaintiff brought suit against the borough for it. It was found that the borough had at the time no knowledge of the nuisance. Held:—

1. That it was not a case of a defective highway, the fitness of the road for public travel having been promoted by the mode of its construction.
2. That it was a nuisance, for the creation of which the town of *E* was originally liable, and for which if the borough became liable, it would not be by reason of the provision of its amended charter, but by reason of its intentionally continuing the nuisance.
3. That the borough could not be liable here, it being found that it had no knowledge of the nuisance.

ACTION ON THE CASE for a nuisance; brought to the Court of Common Pleas in New Haven County, and heard before *Harrison J.* The defendants demurred to the declaration, the court over-ruled the demurrer, and heard the case in

damages. The defendants brought the record before this court by a motion in error. The case is fully stated in the opinion.

*S. E. Baldwin*, with whom was *J. H. Whiting*, for the plaintiffs in error.

*C. H. Fowler*, for the defendant in error.

PARK, C. J. This is an action on the case for damages caused by a nuisance created by the town of East Haven in the improper construction of a public highway, and continued by the borough of Fair Haven East. It is found that the plaintiff is the owner of a dwelling-house erected in the year 1875 upon a hill-side within the limits of the borough, and that the town of East Haven in the year 1877 laid out and worked the highway in question along the hill above the plaintiff's house, the bed of the road being a little higher than the sills of the house, and that in constructing the highway opposite to the house, a portion of the earth was removed and the excavation filled with stones, the object being to make a better road-bed. A gutter was dug along the upper side of the road-bed, which carried off the water in ordinary rains, but at times of heavy rain and of melting snow the water worked through the stones, which operated as a blind drain, and ran down upon the plaintiff's house and into her cellar, undermining the wall and doing serious damage—the particular damage for which the suit is brought having been done in February, 1879.

The plaintiff attempts to hold the defendants liable for the damage under a provision in the charter of the borough, passed as an amendment to it in the year 1878, which is as follows: —"From and after the time this resolution shall go into effect the town of East Haven shall not be liable or have power to lay out, construct, repair, or discontinue highways within said borough, nor shall said town be thereafter liable for any damages which may be sustained by any person by reason of any defective highway in said borough,

but said borough shall be liable therefor to the same extent that the town of East Haven would be if this resolution had not passed."

But it is a total misconception of the intent and effect of this resolution to apply it to a case like this. It was clearly its object to take from the town and vest wholly in the borough the right and power to lay out streets and highways within the limits of the borough, and to impose upon the borough the sole responsibility with regard to them. If any defects existed in any highway within the borough at the time the resolution took effect, it was the duty of the borough to see that the highway was repaired, and the responsibility of the town ceased for any injury thereafter caused by such defect. But this case is not one of a defective highway. The very construction of the bed of the highway which caused the injury may have been and probably was the means of making the highway better for public use. Indeed it is found that since the road was built it has been in good order for public travel. The real injury was in the creation of a nuisance by the town of East Haven, and it is merely an accident of the case that the structure which causes the injury is the bed of a road. It might just as well have been the foundation of a town hall or alms-house that had been so constructed as to operate as a blind drain and carry water through upon the premises of an adjoining owner. In grading a highway some depression through which the water had been accustomed to flow in times of rain, may have been filled up and an insufficient culvert constructed, so that the water at times of heavy rain would be set back and flood adjacent premises. Here the injury would not have been caused by a defective highway; that may have been greatly improved for public travel and in the best possible condition. The insufficient culvert would be a nuisance and the town would be liable for it as an individual would for a nuisance which he had created. *Mootry* v. *Town of Danbury*, 45 Conn., 550; *Healey* v. *City of New Haven*, 47 Conn., 305.

But supposing the town to have been liable for the nui-

sance created in the present case, what is the liability of the defendants? Clearly the resolution referred to has no application to the case, but it does not follow that they are not liable. The defendants have succeeded to the ownership and control of the public highways made by the town within the limits of the borough. They stand in this respect like any other party who succeeds to the ownership of premises which contain a nuisance. An intentional continuance of a nuisance is equivalent to the creation of one. But the continuance must be intentional. To the existence of such an intent knowledge of it is necessary. It is here found expressly that the defendants had no such knowledge.

The law is well settled with regard to such knowledge being necessary. It is held in *Johnson* v. *Lewis*, 13 Conn., 303, that a purchaser of premises on which a nuisance exists is not liable for the continuance of the nuisance until he has been requested to remove it. SHERMAN J., says, (p. 307,) "The law is well settled that a purchaser of property on which a nuisance is erected is not liable for its continuance unless he has been requested to remove it. This rule is very reasonable. The purchaser of property might be subjected to great injustice, if he were made responsible for consequences of which he was ignorant and for damages which he never intended to occasion. They are often such as can not easily be known except to the party injured. A plaintiff ought not to rest in silence and finally surprise an unsuspecting purchaser by an action for damages, but should be presumed to acquiesce until he requests a removal of the nuisance." And Chitty (2 Chitty Pl., 333) says, that in such a case it is necessary to allege a special request to the defendant to remove the nuisance.

It has recently been held in the state of New York, upon an elaborate review of the authorities, that a request to remove the nuisance is not necessary. *Conhocton Stone Road* v. *Buffalo, N. York & Erie R.R. Co.*, 51 N. York, 573; *Miller* v. *Church*, 2 N. Y. Supreme Ct. R., 259. But it is there held that there must be knowledge of the existence of

the nuisance. It is not necessary for us to consider whether such a request is necessary, as the want of knowledge is decisive of the present case.

It is clear upon the facts found that the defendants can not be held liable for the damage complained of, and their demurrer to the declaration should have been sustained.

It was claimed upon the argument, by the counsel for the defendants, that upon the facts found the damage sustained by the plaintiff could not be regarded as the natural result of the mode in which the road-bed was constructed, and that the structure therefore was not a nuisance, and no one liable to her; that it was a case of *damnum absque injuriâ*. We have not considered this question, as we hold the defendants not liable for the damage, even supposing the plaintiff to have sustained an injury for which she is entitled to redress against some party.

There is manifest error in the judgment complained of.

In this opinion the other judges concurred.

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ELLIOTT R. BASSETT & OTHERS *vs.* ROBERT B. BRADLEY.

Where one purchases real estate encumbered by a mortgage, and agrees to pay the mortgage debt as a part of the consideration, the promise may be enforced by the mortgagee. In such a case the purchaser merely agrees to pay his own debt to a third person, who by an equitable subrogation stands in the place of the promisee. The action may also be sustained on the principle which governs assumpsit for money had and received.

The mortgagee may also sustain an action whenever the circumstances are such as to justify the conclusion that the promise was made for his benefit.

Where, however, the conveyance in which the promise is inserted is itself a mortgage, the case is different. Here the grantee owes no debt which he can promise to pay to the prior mortgagee, and such a promise is ordinarily a mere agreement to purchase the prior mortgage. It is simply a transaction between the immediate parties.

In such a case, after the last mortgage has been satisfied and discharged, it is clear that the promise has been cancelled and cannot be enforced by any one.

This would be presumed to be the intention of the parties, where nothing to the contrary appears.

*It seems*, however, that where the promise was made in part for the benefit of third parties, who have given a valuable consideration for it, their rights can not be affected by the discharge of the mortgage.

But while the last mortgage remains unsatisfied and in force, the mortgagee remains liable to the mortgagor on his promise, and the prior mortgagee may acquire and enforce his rights.

The defendant having a claim against *M*, it was agreed that the latter should give him a mortgage of a piece of land with a factory on it, which was part of a tract already encumbered by three mortgages, that *M* should procure from the third mortgagee a release of the factory lot, and that the defendant should assume the two prior mortgages, leaving the third mortgage the first on the remaining part. The third mortgagee released to *M*, who then made the mortgage agreed to the defendant, the deed containing a clause by which the defendant assumed and agreed to pay the two prior mortgages. The factory was afterwards burned without insurance, and the value of the whole tract became so reduced as to be sufficient only to pay the first mortgage. *M* thereupon assigned to an assignee of the second mortgagee his rights under the defendant's promise, who brought suit upon it against the defendant to recover the amount of the second mortgage. Immediately after this the defendant tendered to *M* a reconveyance of the property, but *M* refused to receive it and the defendant put it upon record. At this time the mortgage to the defendant was not satisfied, but the debt had been reduced from $2,000 to $ 400. Held,—

1. That the defendant could not, at his own will, discharge the mortgage to himself and so relieve himself of his liability upon his promise.
2. That to allow him to do it would be a fraud upon the third mortgagee.
3. That the case was not affected by the fact that the mortgage was by an absolute deed, with a separate defeasance, by which the grantee agreed to reconvey, upon the written request of the mortgagor, on the mortgage debt being paid at any time within three years.
4. That the plaintiff was entitled to recover.

The plaintiff, being about to purchase the second mortgage debt, enquired of the defendant with regard to his liability to pay it, and the latter, with full knowledge that the enquiry was made with reference to a purchase of the debt, replied that "he had assumed and agreed to pay the debt, as his deed would show." Held that he was equitably estopped from denying his liability upon the promise.

ASSUMPSIT; brought to the Superior Court in New Haven County. The action was brought upon the assumption by a grantee, in a mortgage deed, of two prior mortgages and a promise to pay the mortgage debts. There were several counts in the declaration, the first and third setting forth the interest of the plaintiffs as owners of the second of the two prior mortgages, and an assignment to them of the

rights of the mortgagor under the promise of the defendant, the second stating the same general facts and alleging that the promise was made for the benefit of the prior mortgagees, and the fourth count being general for money had and received. The case was tried to the court before *Beardsley, J.*, who made the following finding of facts:

On the 10th of October, 1876, Solomon Mead was the owner of a tract of land in the city of New Haven, on a portion of which, one hundred feet front and two hundred feet deep, stood a shop four stories in height and a foundry. These buildings were fitted with boiler, engine, shafting, furnaces, and other machinery, and were in use by Mead as a plow manufactory. There were no buildings or improvements on the other portion of the land, and this lot, with its buildings and machinery, was by far the most valuable portion of the property.

At the date aforesaid the whole tract was subject to three mortgages, to wit: a first mortgage to the New Haven Savings Bank, dated July 14th, 1869, to secure a note of $2,500, of which $100 had been paid; a second mortgage to Anson Perkins, dated March 18th, 1874, to secure a note of $3,000, none of which had been paid; and a third mortgage to Cyrus Northrop, dated October 21st, 1875, to secure a note of two thousand dollars, $1,000 of which had then been paid, leaving $1,000 due.

The defendant, Robert B. Bradley, doing business under the name of R. B. Bradley & Co., was, and for a long time had been, a dealer in agricultural implements in New Haven, and among other things had bought plows from Mead for sale in his business, and had had other business dealings with him from time to time.

On said 10th day of October Mead was indebted to Bradley in the sum of $1,970.25, on account of certain notes, and the renewals thereof, which Bradley had theretofore endorsed, and been obliged to pay, for the accommodation of Mead. This indebtedness Bradley desired to secure or collect, and Mead desired to pay or secure the same, and for this purpose they agreed by parol that if Mead would procure

the release of the factory lot with the buildings from the Northrop mortgage, and would convey the same to Bradley by warranty deed, he, Bradley, would assume and pay the savings bank and the Perkins mortgages, and leave the Northrop mortgage the first on the other portions of the land. Mead, in view of this agreement, and for the purpose of carrying it out, did procure from Northrop, without other consideration to Northrop than the proposed benefit here stated, a release of the factory lot and buildings, and thereupon executed and delivered to Bradley a warranty deed of the same, dated October 10th, 1876, which deed contained the following clause:

"The premises above described, with other adjacent land belonging to me, are subject to two mortgages, namely, one mortgage to the New Haven Savings Bank for twenty-five hundred dollars, of the principal of which mortgage one hundred dollars has been paid, leaving twenty-four hundred dollars only of principal due thereon, and one mortgage to Anson Perkins for three thousand dollars, both of which said mortgages, together amounting to fifty-four hundred dollars, the said Bradley assumes and agrees to pay as part of the consideration of this deed."

Mead and Bradley for the same purpose also agreed that Mead should give to Bradley a bill of sale of all the movable property, tools, stock, manufactured goods, &c., upon or connected with the lot conveyed to him and with the plow manufactory thereon, and that Bradley should lease the factory, machinery and tools to Mead in order that he might continue to carry on his business therein, and in pursuance of this agreement a lease and bill of sale were executed. There was also, at the same time, executed and delivered to Mead by Bradley a writing which, after setting forth the fact of the conveyance of the factory lot by Mead to him, and the bill of sale of the machinery, tools and stock, and the indebtedness of Mead to him, proceeded as follows:

"Now, therefore, in consideration of the premises and of one dollar received to my full satisfaction of the said Solomon Mead, and in further consideration that said Mead shall

well and faithfully perform the conditions hereinafter mentioned, I hereby agree at any time on or before the expiration of three years from the date of this instrument, upon the written request of the said Mead, to reconvey to him, by a good and sufficient warranty deed, containing all the usual covenants, said land and buildings on the south side of Derby avenue heretofore conveyed to me by said Mead as aforesaid, subject to the same incumbrances (or to incumbrances of equal amount) as are in said deed from said Mead to me enumerated; and at the same time to execute and deliver to said Mead a good and sufficient bill of sale of all the tools, machinery and stock of every name and nature at that time on or about said premises; but provided and on condition that the two notes hereinbefore mentioned and endorsed by said R. B. Bradley & Co., as aforesaid, and any and all renewals of the same, in whole or in part, not to exceed the sum of $1,970.25 (which is the amount of the two notes so endorsed by said R. B. Bradley & Co.) shall be first paid in full by said Mead, and said firm of R. B. Bradley & Co. be forever saved harmless from all loss, cost, expenses and damage on account of endorsing said two notes above described and any and all renewals of the same in whole or in part; and upon the further condition that said Solomon Mead shall first reimburse me in full for all moneys paid by me on account of taxes or liens upon said land and buildings, or on account of interest upon the mortgages now upon said land and buildings. In witness whereof," &c.

This writing was never recorded; the warranty deed of Mead to Bradley and the lease of Bradley to Mead were both duly recorded.

Mead remained in possession of the factory lot and buildings, and carried on business there as before, but under the lease, until June, 1878, and during that period turned the manufactured goods, or the proceeds thereof, over to Bradley in payment of the debt secured by the mortgage, and another debt due from him to Bradley. After June, 1878, much of the movable property described in the bill of sale

was sold and the proceeds applied on the debt, which was thereby reduced, on the 23d day of October, 1878, to about the sum of $400. On that day the buildings with their contents were destroyed by fire, and were uninsured.

On the 28th of April, 1877, while Mead was occupying the factory under the lease, and while Bradley held the title to the factory lot, the plaintiffs became the owners of the Perkins note and mortgage of $3,000, in the manner and under the circumstances following: By the decease of Anson Perkins and the settlement of his estate, the note and mortgage had become the property of Alma Perkins and Elizabeth Andrews, the latter the daughter of said Alma and the wife of one James Andrews. James Andrews was indebted to the plaintiffs in the sum of $2,800, which debt was amply secured by a first mortgage. When this debt became payable, Andrews called upon the plaintiffs and offered to pay it by procuring the transfer to them of the Perkins note and mortgage upon the payment to him by them of the difference ($200) in money. At the same time Andrews stated to the plaintiffs that the property mortgaged to secure the Perkins note had been purchased by Bradley, and that Bradley had assumed and agreed to pay the note, and he asked the plaintiffs to enquire into the matter for themselves. Accordingly, on the 28th of April, 1877, Elliott R. Bassett, one of the plaintiffs and acting for all of them, went with Andrews to the store of Bradley, where the following conversation took place: Bassett told Bradley that he was negotiating for the Perkins note and mortgage, and had understood that he, Bradley, had bought the property, and then asked him if this was so. Bradley said it was so. Bassett then asked him to give his own note instead of the Perkins note. Bradley said he did not know that it would be any better for him, Bassett, as he had assumed and agreed to pay the Perkins note, as his deed would show. Bassett then asked Bradley how he considered the security. Bradley said it showed what he considered the property worth when he had paid on it or it had cost him some $1,800 more than the mortgages. This conversation was reported to the

other plaintiffs by Bassett, and relying mainly upon the liability of Bradley to pay the Perkins note, the plaintiffs accepted the same in payment of the debt due to them from Andrews, and paid Andrews the difference ($200) in money. There was no evidence to show that Bradley was aware of any of the dealings between Andrews and the plaintiffs except as they were communicated to him in the foregoing conversation.

The plaintiffs, from and after the 28th of April, 1877, remained and still remain the owners of the Perkins note and mortgage, and have never received payment of the note or of any part of it; and the property subject to the mortgage has not since the fire been worth more than the savings bank mortgage debt, or afforded any security to the Perkins note.

On the 25th day of October, 1878, immediately after the destruction of the buildings by fire, Bradley was informed that a demand was about to be made upon him by the plaintiffs for the payment of the Perkins note, and he thereupon procured a quitclaim deed of the factory lot from himself to Mead to be prepared, and on the 29th of October executed it and offered to deliver it to Mead. Mead refused to receive it, and reminded Bradley that other parties had rights which forbade his accepting it. Bradley then put the deed on record, and left it in the town clerk's office, where it has since remained, Mead never having accepted it.

In December, 1878, the plaintiffs made a direct demand upon Bradley for the payment of the Perkins note, and procured from Mead an assignment of his cause of action against Bradley, and of all his rights arising out of the neglect and refusal of Bradley to pay the note.

Mead for some time before the present suit was commenced had been, and is still, insolvent and unable to pay the Perkins note.

Upon these facts the defendant claimed that the plaintiffs could not recover upon any count in their declaration; that the transaction between Mead and himself was a mere mortgage, and that the assumption clause in the deed was not

binding upon him, either in favor of Mead or of the plaintiffs; and that he was not precluded by any of the above facts from claiming that the transaction was a mortgage and the assumption clause in the deed not binding upon him. The court overruled this claim.

The plaintiffs offered in chief the mortgage deed from Mead to Anson Perkins, the Perkins note with its endorsements, the deed from Mead to Bradley, and the assignment from Mead to the plaintiffs. It was admitted by the defendant that the Perkins note now belonged to the plaintiffs, and that no payment had been made thereon. The plaintiffs also offered evidence of their demand on Bradley for the payment of the Perkins note before suit. The plaintiffs also offered to show the conversation hereinbefore recited as having taken place between Bassett and Bradley, but the defendant objected and the court excluded the evidence. The plaintiffs then rested their case.

The defendant then offered in chief the mortgage from Mead to the bank; the mortgage from Mead to Perkins; the deed from Mead to Bradley; the writing from Bradley to Mead; the lease from Bradley to Mead; the bill of sale from Mead to Bradley; and the quit-claim deed from Bradley to Mead. To the admission of the writing given by Bradley to Mead, of the lease, of the bill of sale, and of the quit-claim deed, the plaintiffs objected. The defendant claimed that these instruments showed that the transaction between Mead and Bradley on October 10th, 1876, was a mere mortgage, and that the interest of Bradley in the land and his liability on account of it had terminated on the 29th of October, 1878. The court admitted the instruments under the above claim subject to the exception of the plaintiffs. The defendant then rested his case.

The plaintiffs, in reply to the evidence thus introduced by the defendant, and for the purpose of showing that the transaction between Mead and Bradley was not a mere mortgage, at least as against the plaintiffs, offered evidence, by Mead as a witness, as to the parol agreement between Mead and Bradley hereinbefore stated, and as to the circumstances

under which and the objects for which the written instruments of October 10th, 1876, were executed and delivered. The plaintiffs' counsel requested the witness to state "the circumstances under which the deed of Mead to Bradley was given." To this question the defendant objected, but the court admitted it, the defendant excepting. In reply to this question the witness narrated the circumstances and transactions between himself and Bradley, as before stated, without further objection by the defendant, and the defendant at a later stage of the proceedings gave his version of the same transaction.

The plaintiffs' also claimed that whatever might be the real character of the transaction between Mead and Bradley on the 10th of October, 1876, Bradley was estopped from claiming that anything therein relieved him from liability to the plaintiffs, and in support of this claim offered evidence to show, as before stated, that when the plaintiffs took the Perkins note they paid full value for it, that they took it relying mainly upon the liability of Bradley to pay it, and before they agreed to take it sought for and obtained from Bradley the information before stated. To all this evidence the defendant objected, but the court admitted the same, the defendant excepting.

Upon these facts the court rendered judgment for the plaintiffs for the sum of $3,213. The defendant moved for a new trial for error in the rulings of the court.

*J. S. Beach* and *J. K. Beach*, in support of the motion.

1. The transaction between Mead and Bradley on the 10th of October, 1876, as evidenced by the written instruments by them respectively executed and delivered each to the other on that day, resulted in a mortgage from Mead to Bradley of the real estate described in the deed, to secure Bradley against loss by reason of his accommodation endorsements of the two promissory notes described in the defeasance. The deed and the defeasance being executed and delivered at the same time and as a part of the

same transaction, the contract evidenced thereby is a unit, and is to be measured by the same rules as if they had both been transcribed on a single sheet of paper, and had thus become in form as well as in fact one instrument. Under this rule the writing executed by Bradley to Mead is clearly a defeasance. 4 Cruise's Dig., 113; 1 Jones on Mortg., § 244; *Dow* v. *Chamberlain*, 5 McLean, 281; *Judd* v. *Flint*, 4 Gray, 557; *Bailey* v. *Bailey*, 5 id., 505; *Murphy* v. *Calley*, 1 Allen, 107; *Lane* v. *Shears*, 1 Wend., 433; *Brown* v. *Dean*, 3 id., 208; *Clark* v. *Henry*, 2 Cowan, 324; *Peterson* v. *Clark*, 15 Johns., 205; *Manufacturers' Bank* v. *Bank of Pennsylvania*, 7 Watts & Serg., 335; *Friedly* v. *Hamilton*, 17 Serg. & R., 70; *Guthrie* v. *Kahle*, 46 Penn. St., 331. The plaintiffs however seek to narrow the limits of this contract by pointing out that it contains a certain phrase which they say so far affects the rights and obligations of the parties as to extinguish their relative rights and obligations as mortgagor and mortgagee, and put in their stead those of an absolute grantor and grantee. They say that the obligation of Bradley to reconvey was dependent upon the optional right of Mead to make or not to make a written request for such conveyance. The language of the defeasance is as follows:—"If said Mead shall well and faithfully perform the conditions hereinafter mentioned, I hereby agree at any time on or before the expiration of three years from the date of this instrument *upon the written request of said Mead* to reconvey, &c." It is obvious that this italicised clause was inserted, not to confer on Mead the power of treating the transaction as an absolute deed or as a mortgage at his option, but, in connection with and following right after the three years extension of his rights as mortgagee in possession, its object was to enable him to terminate his obligations at any time *during that period* upon payment of his two notes, and notice to the mortgagee that he wanted a reconveyance. The corollary of the plaintiffs' proposition would be, that if Mead failed to exercise this option within the three years, the mortgage would at the expiration of that period cease to exist, and the title would become absolute in Bradley. But

"once a mortgage always a mortgage." The two instruments are to be construed as one deed, so that the rule contended for by the plaintiffs would apply to and disturb every mortgage in which the mortgagee, giving his deed to secure a time obligation, stipulates for the right to shorten the period of its existence if he shall so elect.

2. The assumption by the junior mortgagee of a prior mortgage, and his agreement to pay it, contained in the deed he accepts, does not impose upon him any personal liability for the payment of the prior mortgage debt, which can be enforced against him either by the mortgagor or by the prior mortgagee. The legal conclusions announced in *Foster* v. *Atwater*, 42 Conn., 244, and kindred cases, are sound law. But the logic of that law does not simply fail to sustain, but is fatal to the theory that a junior mortgagee becomes by this assumption clause personally responsible for the prior mortgage debt. Judge PARK, in giving the opinion in that case, (page 250,) says:—"The principle is well settled that where one by deed poll grants land and conveys any right, title or interest in real estate to another, and when *there is any money to be paid by the grantor to the grantee*, or any other debt or duty to be performed *by the grantee to the grantor* or for his use or benefit, and the grantee accepts the deed and enters on the estate, the grantee becomes bound to make such payment or perform such duty, and not having sealed the instrument *is not bound by it as a deed, but it being a duty, the law implies a promise to perform it*, upon which promise, in case of failure, assumpsit will lie." * * "It makes no difference to the defendant whether he should pay the price to his grantor or to the holders of the notes, so far as the amount was concerned. But if he should pay his grantor, he would have no security that the grantor would pay the incumbrances on the property. If he should pay the holders of the notes he would be secure in that respect. It was for the defendant's interest therefore, so long as *he must pay the money consideration for the land* to one party or the other, to pay it to the holders of the notes." Let us apply these principles to this case. If Mead and

Bradley, on the 10th day of October, 1876, had met as vendor and vendee, and the interview had resulted in a purchase of this property by Bradley under a contract by which he agreed to pay as purchase money the sum of $5,400, then under such a transaction there could be no objection to his paying that purchase money by an assumption of these two mortgages of that amount, and his duty to make such payment being evidenced by his acceptance of the deed "the law implies a promise to perform it, upon which promise in case of failure assumpsit will lie." But Bradley and Mead did not meet on that day as vendee and vendor, they met as creditor and debtor, and the interview resulted in a transfer of title to the creditor to secure him against loss for accommodation indorsements he had made for his debtor. In such a transaction the assumption clause is "a mere declaration that the property was conveyed to the mortgagee, subject to the lien of the prior mortgages," for unless and until the transaction resulted in a debt from Bradley to Mead, the mode of paying that debt, whether by cash, or by the assumption of mortgages, or otherwise, could not be the subject of negotiation. "Where the grantee takes only a mortgage he owes no money for the land which he can promise to pay to the prior mortgagee, for he does not acquire a title to the land. To become a debtor to any one he must owe a debt. When he buys land absolutely for a stipulated price, and instead of paying the whole of it to his grantor he is allowed to retain a part which he agrees to pay to a creditor of the grantor having a lien upon the land, this amount which he thus agrees to pay is his own debt." *Garnsey* v. *Rogers*, 47 N. York, 239. "If the deed was indeed a mortgage merely, the complainant has no claim to a personal decree for deficiency against Mayer. He is not in that case liable to Mrs. Lichenstein on the assumpsit contained in the deed; obviously under such circumstances he would not be bound to indemnify her against the complainant's mortgage. The equity on which the relief of the mortgagee depends in case of assumpsit by the grantee of the mortgaged premises, is the right of the grantor against his vendee to which the

mortgagee is permitted to succeed by substituting himself in the place of the mortgagor." *Arnaud* v. *Griggs*, 29 N. Jer. Eq. R., 482. "When such an agreement to assume the payment of a mortgage is contained in a mortgage, it does not as a general rule impose any personal liability upon the mortgagee for the payment of the prior mortgage debt which can be enforced against him by the prior mortgagee. The subsequent mortgagee owes no money for the land which he can promise to pay to the prior mortgagee, for he does not acquire any title to the land." 1 Jones on Mortg., § 756. "The fact that the assumption of the prior mortgage is made on a conveyance of the land absolute in form, but intended as a mortgage does not change the rule." Id., § 757.

3. It being established that no valid obligation to pay these mortgage debts rested upon the defendant as evidenced by the written documents of October 10, 1876, no such obligation is to be found in the parol testimony set forth in the record. The avowed object of this parol testimony as disclosed by the record was "for the purpose of showing that the transaction between Mead and Bradley was not a mere mortgage." "In the case before us, the parol evidence adduced by the plaintiffs to prove an absolute deed to be a deed on condition was entirely inadmissible. No case determined in a court of law proving its admissibility has been cited: nor am I aware that any such case exists. * * It has been so frequently adjudged by the courts on each side of the Atlantic as to have the resistless force of a maxim, that parol evidence cannot be received in a court of law to contradict, vary, or materially affect by way of explanation, a written contract. HOSMER, C. J., in *Reading* v. *Weston*, 8 Conn., 120. "But that parol evidence in a court of law is incompetent to convert an absolute deed into one that is conditional is too well established to be made a question." *Benton* v. *Jones*, 8 Conn., 189. *A fortiori* parol evidence is incompetent to convert a mortgage into an absolute deed. Courts of equity admit parol evidence to convert an absolute deed into a mortgage, because "it is the fraudulent use

of the deed which equity interposes to detect and prevent," but no case can be found in any court, either of law or equity, where parol evidence was admitted to convert a mortgage into an absolute deed, because the very reason of the rule of admission in the one case would exclude it in the other.

4. But if the parol testimony is admitted, it fails to prove either count of the plaintiffs' declaration. The declaration sets out as its basis, an indebtedness, not of the defendant to the plaintiffs, or to Mead, or to any one, but an indebtedness of Mead to Anson Perkins "in the sum of $3,000 as evidenced by the promissory note of said Mead for said sum, dated March 18th, 1874, payable to said Perkins or order, one year after date." It alleges that this note was secured by mortgage of that date on certain described real estate; that Mead, on the 10th of October, 1876, by deed poll of that date, conveyed a portion of the mortgaged premises to the defendant; "that it was part of the consideration of the conveyance from Mead to the defendant, and part of the price which the defendant agreed to pay for the premises, that the defendant should pay the mortgage indebtedness to the New Haven Savings Bank and to Perkins, or the several holders of the same, instead of paying the same amount to Mead; that the defendant by accepting the deed, did, on the 10th of October, faithfully promise and agree with Mead that he would assume and pay said mortgage indebtedness." But the parol testimony proves another contract based upon a different consideration. The promise alleged is an implied promise to pay $3,000 growing out of the defendant's acceptance of the deed poll. The promise claimed to be proved by the parol testimony is an express promise to pay the $3,000. The consideration of the promise alleged in the declaration is that the sum promised to be paid was part of the price the defendant had agreed to pay for the land. The consideration claimed to be proved by the parol testimony is the procurement by Mead of a release by Northrop of an incumbrance, as to which incumbrance, or any release thereof, no intimation is given in the declaration. The dec-

laration describes the defendant as a purchaser from Mead, and describes the consideration of an implied promise to be an agreement to pay the plaintiffs $3,000 as part of the purchase money. The parol testimony represents him as a creditor of Mead seeking security for a future contingent liability, and sets forth as the consideration of an express promise, the obtaining of such security to the amount of less than $2,000, by an assumption of absolute liability to an amount of over $5,000. The variance between the facts so claimed to be proved by the parol testimony, and the facts as alleged in the plaintiffs' declaration, is fatal to a recovery on either count. *Willoughby* v. *Raymond*, 4 Conn., 130; *Shepard* v. *Palmer*, 6 id., 95; *Russell* v. *South Britain Society*, 9 id., 508; *Kellogg* v. *Denslow*, 14 id., 425; *Chittenden* v. *Stevenson*, 26 id., 442; *Camp* v. *Hartford & N. York Steamboat Co.*, 43 id., 333; *Shepard* v. *N. Haven & Northampton Co.*, 45 id., 54.

5. The promise claimed to be proved by the parol testimony that Bradley would answer for the debt of Mead to Perkins, and for his default of payment thereof to the plaintiffs, was not legally proved by it, either in the form of an express parol promise, or under the guise of an attempted estoppel. *Danforth* v. *Adams*, 29 Conn., 107; *Clapp* v. *Lawton*, 31 id., 95; *Packer* v. *Benton*, 35 id., 343; *Pratt's Appeal from Probate*, 41 id., 196; *Kinney* v. *Whiton*, 44 id., 262; *Pierce* v. *Andrews*, 6 Cush., 4; *Insurance Co.* v. *Mowry*, 96 U. States, 544; *Brightman* v. *Hicks*, 108 Mass., 246; *Brown* v. *McCune*, 5 Sandf., 224; *Dewees* v. *Manhattan Ins. Co.*, 35 N. Jer., 375.

*W. C. Robinson* and *J. W. Alling*, contra.

CARPENTER, J. The defendant having a claim of nearly two thousand dollars against one Mead, took a deed, absolute in form but intended as a mortgage, of certain real estate, which was a part of a larger tract of land, all of which was subject to three prior mortgages. The contract between the parties was, that Mead should procure the third mortgagee to release to him the portion mortgaged to the

defendant so that it should be subject only to two mortgages, the defendant agreeing to pay those mortgages, so that the third mortgage should be the first on the remaining portion of the land. The owner of the third mortgage did release his interest to Mead as agreed, and Mead thereupon conveyed the land, subject only to the two mortgages to the defendant by a warranty deed in which a clause was inserted, that the defendant assumed and agreed to pay the amount of the first two mortgages.

The building on the premises was used as a plow-manufactory. The contract further provided that the personal property therein contained, consisting of stock, tools, manufactured goods, etc., should also be conveyed to the defendant.

A defeasance executed on the same day provided that the defendant, his own debt being first paid, would at any time within three years, at Mead's request, reconvey the land, tools, etc., to Mead. The defendant leased the mortgaged premises to Mead, who continued in possession carrying on business as before. The deed and the lease were recorded; the defeasance was not recorded.

The defendants' claim, excepting about four hundred dollars, was paid, when the buildings were destroyed by fire. Soon after the note described in the declaration was presented to the defendant and payment demanded, which was refused. Thereupon this suit was brought. A few days afterwards the defendant, without any request from Mead, executed and tendered a re-conveyance of the premises to him, but he declined to accept it. The defendant then caused the deed to be recorded.

The buildings were uninsured, and the land is now worth no more than the first mortgage.

The Superior Court having rendered judgment for the plaintiffs, the defendant filed a motion for a new trial.

The question presented by the motion is, whether the defendant's promise to Mead to pay the amount of the prior mortgages can be enforced.

The authorities substantially agree that when one pur-

chases real estate incumbered by a mortgage, and agrees to pay the mortgage debt as a part of the consideration of the deed, the promise may be enforced by the mortgagee. In such cases the purchaser merely agrees to pay his own debt to a third person, the mortgagee, and he, by an equitable subrogation, stands in the place of the promisee. It would seem that such an action might also be sustained upon the familiar principle which governs assumpsit for money had and received.

The mortgagee may also sustain an action whenever the circumstances are such as to justify the conclusion that the promise was made for his benefit.

Where however the conveyance in which the grantee assumes a prior mortgage is itself a mortgage, the case is somewhat different, and the obligation may be materially modified or abrogated altogether by subsequent events. In such a case, the grantee owes the grantor no debt which he can promise to pay to a prior mortgagee, and if he makes such a promise it is ordinarily a mere agreement to advance money to pay the prior mortgage, or rather an agreement with the mortgagor to purchase it. In such cases there is little room for the conclusion that the promise was made for the benefit of the prior mortgagee. It is simply a transaction between the immediate parties. To what extent such a contract may be enforced must depend upon the circumstances of the case.

The question whether the promisee, Mead, his mortgage to the defendant being still outstanding, can enforce the promise, is another form of stating the question involved in this case. After the last mortgage is satisfied and discharged, it seems quite clear, both upon principle and authority, that, in an ordinary case the promise is canceled, and cannot be enforced by any one. Presumptively that is the intention of the parties, unless there is something in the case showing a contrary intention. In the present case Northrop, the third mortgagee, had, upon a valuable consideration, acquired certain rights which, it would seem, could not be affected by a discharge of the mortgage by the mortgagor, but as those

rights are not involved in the case, we need not consider them. This subject is fully and ably discussed in *Garnsey* v. *Rogers*, 47 N. York, 233. That case is a leading case and is cited with approbation in Jones on Mortgages, and was followed in *Arnauld* v. *Griggs*, 29 N. Jersey Eq. R., 482.

These authorities show that such a promise contained in a mere mortgage imposes upon the promisor no absolute continuing obligation which can be enforced by the prior mortgagee. They do not however touch the question whether he may not acquire and enforce the rights of the mortgagor in the promise.

Assuming the law to be as stated in the cases cited, how does it affect the present case? From what has already been said it is obvious that the obligation would not continue after the mortgage containing the promise had been satisfied and the property re-conveyed to the mortgagor. That had been done in the case of *Garnsey* v. *Rogers*, supra, although the decision does not rest on that ground.

In the present case, at least so far as this question is concerned, we must regard the mortgage to the defendant as still outstanding. Four hundred dollars of the debt remained unpaid. Mead had not called for a re-conveyance under the defeasance, and indeed had no right to call for it. It can hardly be regarded as the privilege of the defendant to discharge the mortgage at his pleasure, and thereby relieve himself of his obligation against the wishes of Mead. Mead had an interest in having the prior mortgages paid; he had for a valuable consideration contracted with the defendant to pay them, and had placed in his hands sufficient property to indemnify him therefor. That property, without his fault we must presume, had been reduced in value so that it was insufficient for that purpose. The defendant having failed to protect himself by insurance was not in a condition to insist that the loss should fall upon Mead. Mead therefore might well refuse to accept the re-conveyance; and having done so, the relation of mortgagor and mortgagee between himself and the defendant still exists and the defendant's promise still remains in force.

Again: If the defendant may in this way, of his own will, escape liability, it will operate as a fraud upon Northrop, the third mortgagee. He had released the property mortgaged to the defendant from his own mortgage, and probably upon the strength of the defendant's promise to pay the prior mortgages. The defendant thereby obtained better security for his own debt, and, had the contract been carried out, Northrop would have had the security of a first mortgage on the remaining property. If now the two prior mortgages are to be collected from the property they will more than absorb the whole, and Northrop loses his whole claim. Thus the loss occasioned by the fire falls in fact on him, while he had no interest in the property and had no power to protect himself by insurance.

Moreover, one of the plaintiffs, before purchasing the Perkins note, had an interview with the defendant respecting his liability to pay the same. The defendant, with full knowledge that the plaintiffs were negotiating for it, told him that he had bought the property and "had assumed and agreed to pay the Perkins note, as his deed would show," and that "it showed what he considered the property worth when he had paid on it or it had cost him some $1,800 more than the mortgages." This conversation was reported to the other plaintiffs; and relying mainly on Bradley's liability to pay the Perkins note they purchased it. Now, upon the theory of the defense that there was no subsisting valid promise to pay the note, his declaration is a misrepresentation, which having been acted upon amounts to an equitable estoppel. If it was true, as he stated, that he had agreed to pay the note, then there was a valid promise at that time which Mead could enforce, and that obligation not having been discharged, he is still liable.

And this brings us to a more important distinction between this case and the case of *Garnsey* v. *Rogers*. In that case the prior mortgagee, having foreclosed and sold the property, and the avails being insufficient to pay his demand, sought to make the subsequent mortgagee liable for the deficiency on his promise to assume, and that after the mortgagor, to

whom the promise was made, had discharged the same by satisfying the mortgage debt and taking a release of the property. In this case Mead has not discharged the promise. On the contrary, the mortgage to the defendant remains unpaid; the release deed which the defendant executed and tendered to him he refused to accept, on the ground that other parties were interested in the defendant's promise; and after the note in suit had been presented to Bradley and payment demanded and refused, he assigned his claim against Bradley under the promise to the plaintiffs. And that is the claim which the plaintiffs are prosecuting and the ground on which they ask for a judgment on the first and third counts in the declaration. We think they are entitled to it. *Foster* v. *Atwater*, 42 Conn., 244. There is nothing illegal in the contract and nothing in it contrary to public policy. The promise was made upon a sufficient consideration, and, but for the accident of the fire, would have been beneficial to the defendant as well as to the others. It may be hard for him to bear the loss, but it is not inequitable, while to transfer the loss from the defendant to the plaintiffs would be both hard and inequitable.

We conclude, then, that the plaintiffs, standing in the place and having the rights of Mead, are entitled to maintain this action, and that a new trial must be denied.

In this opinion the other judges concurred.

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## The Albany Brewing Company *vs.* The Town of Meriden.

The statute (Gen. Statutes, tit. 12, ch. 2, secs. 15, 16,) provides that real estate shall stand charged with the owner's taxes in preference to any other lien, and may be sold for the same within one year notwithstanding any transfer or levy of attachment or execution; and that the selectmen may continue any such tax lien for not more than ten years after the tax becomes payable, by recording in the land records of the town their certificate describ-

ing the real estate, and stating the amount of the tax and the time it became due. Held—

1. That this statute authorizes the imposition upon one piece of land of a lien for the taxes of the owner upon all his property real and personal.
2. That this lien takes precedence of all pre-existing mortgages and liens.
3. That it does not affect the case that the owner had other property which might have been taken on a tax-warrant.

Where a tax payer puts several pieces of land into his assessment list as one, with a valuation of them as a whole, and the assessors accept the list and make their valuation of them as a whole, it is not for the tax-payer or any grantee of his to complain, after all opportunity for a separate assessment of the pieces has passed.

BILL IN EQUITY, to set aside or postpone two tax liens; brought to the Court of Common Pleas for New Haven County. Facts found and case reserved for advice. The case is fully stated in the opinion.

*R. Hicks*, for the petitioners, contended that the tax liens were invalid because they included taxes on other property; (Gen. Statutes, p. 153, sec. 2, and p. 155, sec. 13; Acts of 1866, p. 712; Cooley on Taxation, 342; Hilliard on Taxation, 464; Burroughs on Taxation, 211; *Hayden* v. *Foster*, 13 Pick., 492, 497; *Wallingford* v. *Fiske*, 24 Maine, 390; *Andrews* v. *Senter*, 32 id., 394; *Woodburn* v. *Wireman*, 27 Penn. St., 18; *McQuesten* v. *Swope*, 12 Kan., 34; *Hubbard* v. *Brainard*, 35 Conn., 563; *First Eccl. So.* v. *Hartford*, 38 id., 274.) That the taxes on other property could not be collected out of this real estate, to the injury of other parties interested, when other property could have been found to levy upon; (Gen. Statutes, p. 163, secs. 13, 15; Cooley on Taxation, 305, 307; Burroughs on Taxation, 272; *Hutchins* v. *Moody*, 30 Verm., 655; *Coe* v. *Wickham*, 33 Conn., 393; *Briggs* v. *Morse*, 42 id., 258.) That a mortgage takes precedence of a tax lien of a later date; (Blackwell on Tax Titles, 547, 550; Burroughs on Taxation, 275; *Brown* v. *Austin*, 41 Verm., 262, 270; *Gormley's Appeal*, 27 Penn. St., 49, 51.) And that a grantee is not estopped by accepting a deed which describes the premises as subject to an incumbrance, from showing that the incumbrance does not legally exist; (*Goodman* v. *Randall*, 44 Conn., 321.)

*J. P. Platt*, for the respondents.

PARDEE, J. This is a bill in equity; in it the petitioners ask the Court of Common Pleas for New Haven County either to declare that certain tax liens recorded by the town of Meriden against a piece of land therein belonging to them are illegal and void, or, if legal, that they are to be postponed to their mortgage title.

In June, 1874, John Brady and Hugh Grogan, then owning the lot, mortgaged it to Moriarty and Abell of New Haven; in September, 1876, Brady conveyed his interest to Grogan; in March, 1877, the latter conveyed it to his assignee in bankruptcy, who sold it at public auction on July 27, 1877, to C. C. Herbert, who purchased it as agent for the petitioners; the latter subsequently bought the mortgage.

At the public sale the assignee gave notice in hearing of Herbert, that the taxes hereinafter mentioned were an incumbrance upon the property, and he accepted a deed in which they were specified as such.

During the years 1874–5–6, Brady and Grogan were the joint owners of this and four separate pieces of land in the town of Meriden, also of personal property valued at about $1,000. In each of those years they made and delivered to the assessors a list of their property for purposes of taxation, in each of which they made one item of their separate pieces of land and named one sum as the value of all. If the tax-payer chooses to list and value separate pieces of land as one, and thus invite an assessment thereon as one, and the assessors accept the list and accede to the request, it is not for him nor for any grantee of his to complain after all opportunity for separate assessment has passed.

Up to the time of his bankruptcy Grogan was in possession of personal property sufficient to pay these taxes; during a portion of the time prior to October, 1877, and during all of the time since, Brady has been in possession of personal property sufficient to pay them. The collector demanded payment from each, but having no knowledge of the possession of personal property by either, no steps were taken to

enforce or secure payment other than the filing of notice of a lien.

The tax upon the list of 1874 became payable on April 20th, 1875; the tax upon the list of 1875 on April 21st 1876. Upon April 19th, 1876, the selectmen of Meriden recorded a lien against the lot for the first, and upon April 20th, 1877, another for the last of these taxes. These were assessed upon all of the estate, real and personal, of Brady and Grogan. The liens were filed under the statute (Gen. Statutes, p. 163, secs. 15 and 16,) which provides that "real estate, owned by any person in fee or for life or for a term of years, by gift or devise and not by contract, shall stand charged with his lawful taxes in preference to any other lien, and may be sold for the same and costs of collection within one year after the taxes become due, notwithstanding any transfer thereof, or any levy of attachment or execution thereon; and shall after the expiration of such year, and before any such transfer or levy, remain liable for the payment of such taxes and costs until paid; but no real estate so transferred or levied upon shall be sold for the payment of any taxes laid upon a list made after such transfer or levy, nor shall any real estate, legally transferred, attached or taken by execution, be sold for taxes when other estate can be found sufficient to pay them and the legal costs." * * "The selectmen of any town may continue any tax lien upon any real estate therein for not more than ten years after the tax becomes payable, by recording in the land records of the town within the first year of said period their certificate, describing the real estate, the amount of the tax and the time when it became due; and thereupon such tax shall remain a lien upon such land at interest at seven per cent. a year, and said land may at any time during said period be sold for said tax in the same manner as if sold within said first year."

This statute 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.

For the period of one year from the several dates when they became payable, the taxes took precedence of every other lien upon the real estate of Brady and Grogan, and the same might have been taken therefor without regard to the transfer thereof or the levy of an execution thereon; within that period and while that lien was in full force the selectmen legally gave to it the statutory extension of ten years, thus preserving to it during that period the priority which it enjoyed during the first year of its existence. This lien with its extension is a statutory creation; it stands quite apart from the matter of selling land upon a tax-warrant, and is not encumbered by any proviso as to the possession of other property. It is a concession to the taxpayer. The State waives its right to immediate payment by a forced sale, and accepts a first mortgage for ten years. All that the statute has made necessary to its validity is a legal assessment and a proper and timely record of the lien.

This lien takes precedence of all others; mortgagees take their security with knowledge that the sovereignty must and will take by taxation all that is necessary to the preservation of its own life; the life of the State is of higher concern than the protection of a debt due to an individual member of it. Therefore every piece of real estate must contribute its fair proportion to the public treasury if the authorities move within a specified time and according to statutory methods; and this regardless of mortgagees or purchasers.

We advise the Court of Common Pleas to dismiss the petition.

In this opinion the other judges concurred.

## Elliott Pulford's Appeal from Commissioners.

A bill of particulars in a suit pending, was prepared for the plaintiff under his direction by a person not an attorney-at-law, and by the latter handed to the plaintiff's attorney, who did not make use of it as the case was set-

tled without a trial. This paper afterwards came into the hands of the executor of the other party, and became important evidence in favor of the estate upon a claim presented by the former plaintiff against it. Held that it was not privileged as a confidential communication from that party to his attorney.

Whether the attorney could have been called on to testify with regard to it: *Quære.* If he could not have been, yet any other person who knew the facts with regard to it could have been compelled to testify.

APPEAL from the allowance by commissioners of a claim against the estate of Norman Pulford, deceased; taken to the Superior Court in New Haven County. The facts were found by a committee, a remonstrance of the appellee against the acceptance of the committee's report overruled by the court, (*Culver J.*,) and judgment rendered for the appellant. The appellant moved for a new trial for error in a ruling of the court as to the admission of evidence. The case is fully stated in the opinion.

*W. Cothren*, in support of the motion.

*D. Torrance*, contra.

CARPENTER, J. David Pulford's claim against the estate of Norman Pulford was allowed by the commissioners and an appeal taken by Elliott Pulford, a legatee under the will and a creditor of the estate. On the trial the appellant contended that the claim was settled and discharged during the life time of the testator. It appeared in evidence that cross suits between the parties were pending before a justice of the peace on the same day, which were settled without trial and discontinued. The appellant attempted to prove that the claim then made and settled was identical with the one now made. As one step in the proof he offered a paper containing the charges then made by David Pulford. His counsel objected on the ground that it was a confidential communication between him and his counsel. On the trial before the commissioners the paper was called for, and produced by the attorney who appeared for him before the justice, and after the trial was handed to the counsel for the

executor, who produced and offered it in evidence on the trial in the Superior Court. It further appeared that the paper was never filed as a bill of particulars in the suit before the justice, but was made out for that purpose, by David Pulford's direction, by one Osborn, and by him handed to the attorney, in whose possession it remained until produced before the commissioners. Upon these facts the paper was received, after being identified, and the appellee excepted.

We think the ruling was correct. The rule that confidential communications from clients to their attorneys are privileged, remains in force notwithstanding the statute allowing parties to testify, and we have no disposition to weaken its force by too rigidly restricting its application. On the other hand it ought not to be extended to matters not within the reason and spirit of the rule. We think it was never intended to apply to a case like this. Third persons who are neither the agents nor clerks of the attorney, and who hear the communication, may be compelled to testify. Upon the same principle it was competent for the appellant to prove not only the existence of this paper, but, if necessary, its contents, by Osborn. No reason appears for excluding him as a witness. So also the party himself might have been examined. The mere fact that the paper, prepared as stated, was handed to an attorney for the purpose of being used on the trial, may possibly have sealed the mouth of the attorney, but it certainly would not exclude other witnesses. The mere production of the paper was hardly sufficient to establish the point in controversy. It was also necessary to show that the items it contained constituted the appellee's account against the deceased and that it was substantially identical with the claim now presented. To that end the fact that it was made by Pulford's direction, and handed to the attorney as a bill of particulars, was material. How, or by whom, that and other necessary facts were proved does not appear. Presumptively they were proved by proper and competent evidence. It is enough for our present purpose that it does not appear that the attorney

was examined and required to violate any professional obligation by disclosing confidential communications.

We do not see that the rule was violated, and we must hold that there is no error in the record.

In this opinion the other judges concurred.

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## Ida E. Hull *vs.* Alfred G. Hull.

By a contract between *A* and *B*, all the colts thereafter foaled by certain mares sold by *B* to *A* and kept in *B's* stables under *A's* care, were to belong to *A*. Held—

1. That a valid sale could be made of the colts before they were foaled.
2. That the question of retention of possession by *B* could not apply to them, as they were not in existence when the mares were sold to *A* and the contract made.
3. That it was not important, upon a question between *A* and the creditors of *B* as to the title to the colts, whether there had been a legal and visible change of possession as to the mares.

*B* having gone into insolvency the colts were attached as his by one of his creditors, who afterwards delivered them to the trustee in insolvency. *A*, who lived near by and had knowledge of the fact, waited five months before bringing replevin for them, during which time the trustee was at the expense of keeping them. Held not to constitute an equitable estoppel against *A's* claim.

*A*, to rebut evidence that *B* had claimed to own the mares and colts, offered in evidence a stock book kept by him in which he had made entries against the names of the horses that they were the property of *A*. Held to be admissible.

Replevin for six colts; brought to the Court of Common Pleas in New Haven County, and tried before *Cowell, J.*, who found the following facts:—

The plaintiff is the sister of the wife of Rev. William H. H. Murray. The defendant is the trustee of his insolvent estate.

In 1868 or 1869 the plaintiff was employed by Mr. Murray as superintendent, book-keeper and cashier of his stock farm at Guilford in this state, the farm consisting of about three hundred acres with three dwellings and large and commodi-

ous barns and stables. From the commencement of such service down to the institution of insolvency proceedings against him in the summer of 1879, she continued in his employment, residing upon the farm constantly, except occasional visits to Boston and the Adirondacks with Mr. Murray's family. During this period Mr. Murray was a settled minister in Boston, and resided in that city, spending not more than one month in a year upon his farm.

From the commencement of the plaintiff's services until November 12th, 1870, she received no compensation except her board. At that date, being then on a visit to Mr. Murray's family at Boston, he, on account of his indebtedness to her, sold her a brood mare called "Nell," which he then owned and kept in Boston, the mare having never been upon his Guilford farm. At the time of this sale he executed and delivered to her a bill of sale of the mare, and at the same time, to induce her to continue in his employment as superintendent and book-keeper upon his Guilford farm, he agreed with her that she should have the right to keep the mare upon his farm and rear whatever stock she chose to raise from the mare, he paying all expenses of such keeping, and allowing her the free use of his stallions; and that the mare and her progeny should be her compensation for her services as superintendent.

On November 18th, 1870, the mare was sent by Mr. Murray to the Guilford farm with two other horses, a stove and other furniture, belonging to him, all billed as freight to him. All the horses were received at Guilford and placed upon the farm. The plaintiff had meanwhile returned from Boston.

In January, 1872, the plaintiff being again in Boston, the mare "Nell" being unproductive, Mr. Murray, being then further indebted to the plaintiff for her services, sold her another blooded brood mare named "Flying Belle," then owned by him in Boston, and which had never been upon his Guilford farm, under a similar arrangement with that in the sale of the mare "Nell," with the agreement that the plaintiff should thereafter have the two mares, and that whatever stock she could rear from them upon his Guilford farm and at his

expense, should be her compensation for services. He gave her at the same time a bill of sale of the second mare. But this mare was not sent to the Guilford farm until June 12th, 1872, when it was forwarded by Mr. Murray with three other horses and a buggy consigned to him, which were received and put upon the farm as in the former case.

At the time these mares were put upon the Guilford farm the average number of horses kept on the farm by Mr. Murray was three or four, but subsequently a much larger number was kept, and many horses owned by other parties were boarded upon the farm. The mares were worked upon the farm and used by Mr. Murray's family, including the plaintiff, in the same way with the horses belonging to Mr. Murray.

The plaintiff has raised from the mare "Nell" four colts, one of which she sold when four years old. The other three are a part of those described in the replevin writ. The plaintiff has had five colts from the mare "Flying Belle," one of which died, one she sold, and the other three are the remainder of the six described in the replevin writ. All these colts have been kept on the Murray farm or on land leased by Mr. Murray since they were foaled, under the supervision of the plaintiff, and fed and cared for by his grooms in the same manner as the colts and horses owned by Mr. Murray, and the taxes on them and their colts have been paid by Mr. Murray. The amount of the taxes on the horses of the plaintiff was not given in evidence, but the taxes on them and on Mr. Murray's horses were generally all paid by him at the same time.

There was no evidence that at the time of the purchase of these mares by the plaintiff Mr. Murray was indebted to any one.

The plaintiff is an unusually active, capable woman, and at the time of the purchases and agreements Mr. Murray intended to deal liberally with her, believing it was to his benefit for her to reside upon and manage his farm, keeping his house there always in readiness for the reception of his family when they should choose to visit the farm; and to her

benefit to accumulate property by the rearing of colts pursuant to the agreement. The plaintiff for more than ten years of faithful and valuable services has received no compensation except her board and these two mares and the progeny reared from them.

The mares are now old and of little value, and have been so employed by Mr. Murray's family and upon the labor of the farm under her supervision, as to have more than reimbursed him for all taxes paid by him on her account.

Mr. Murray, about the commencement of 1879, moved from Boston to Guilford, but spent but little time upon the farm, being engaged in business in New Haven. About the middle of June, 1879, he left the state, and has never since exercised any control or supervision over his farm or personal property in this state.

The plaintiff still owns and keeps the mares, and no one else has ever claimed them or either of them since her purchase.

On the first day of August, 1879, the six colts were attached by a creditor of Mr. Murray, with nine other colts belonging to him, they being all together—the mares not being attached, as they were away from the farm. The attaching creditor kept the colts at Guilford for about three months, and then delivered them to the defendant, the trustee in insolvency of Mr. Murray.

No attempt was made by the plaintiff to maintain her title to the colts by suit until January 12th, 1880, although she was living during the time at Guilford where the colts were. But as soon as she became aware of the attachment of them she forbade the officer taking them and demanded their immediate return to her.

There was no evidence offered as to the financial condition of Mr. Murray other than the facts that the plaintiff's horses were attached as his, and that other horses of his and other of his personal property were attached, and that the defendant was afterwards appointed trustee of his insolvent estate.

The defendant on the trial offered evidence which he claimed tended to prove that the plaintiff was never the

owner of the mares or colts, but that Mr. Murray claimed to own them until about the time of the attachment. To rebut this claim the plaintiff produced the book known as Murray's Stock Book, which had always been kept at the barn office at his farm in Guilford, and offered in evidence three entries therein made by Mr. Murray and one Bixby, his confidential friend, under Mr. Murray's direction in 1873 or 1874, which entries described the mares, and a colt of one of them, and gave the age of each of them, following each of the descriptions with the words—"The property of Miss Ida E. Hull, of Guilford, Connecticut." The defendant objected to these entries being received by the court as evidence for the purposes for which they were offered. But the court overruled the objection and received the evidence.

Upon the foregoing facts the defendant claimed, and asked the court to hold, that the law was so that the plaintiff was not entitled to take the property from the defendant as such trustee; that she never became the bonâ fide owner of the mares and colts; that there was never any such possession on her part as would entitle her to hold the mares or their progeny against the attaching creditors of the vendor or his trustee in insolvency; and that she was guilty of such laches in failing to assert her claim to the property, both before and after the attachment, that she was estopped from now claiming it from the trustee.

But the court overruled all of these claims and rendered judgment for the plaintiff to recover the property claimed.

The defendant filed a motion in error, and also moved for a new trial for error in the admission of evidence.

*W. K. Townsend* and *J. H. Whiting*, in support of the motions.

*H. B. Munson*, contra.

Loomis, J. The controversy in this case has reference to the ownership of six colts, the progeny of two brood mares, which the plaintiff, some ten years prior to this suit, purchased in Boston of the Rev. William H. H. Murray. The

contract of sale provided that the plaintiff might take the mares to Murray's farm in this state, of which she was and had been for several years the superintendent, and there keep them as breeding mares; and all the colts thereafter foaled from them, though sired by Murray's stallions, were to be the exclusive property of the plaintiff.

No attempt has been made by Murray's creditors or his trustee to deprive the plaintiff of the mares so purchased, and they are now in her undisturbed possession; but the colts, while on Murray's farm on the 1st of August, 1879, were attached by one of his creditors, who subsequently released the property to the defendant as trustee in insolvency, who had the property in his possession at the time the plaintiff brought her writ of replevin.

The sole ground upon which the defendant claims to hold these colts is, that there was such a retention of possession by Murray after the sale as to render the transaction constructively fraudulent as against creditors.

The court below overruled this claim, and in so doing we think committed no error.

The doctrine as to retention of possession after a sale has no application to the facts of this case. A vendor cannot retain after a sale what does not then exist nor that which is already in the possession of the vendee. This proposition would seem to be self-sustaining. If, however, it needs confirmation, the authorities in this state and elsewhere abundantly supply it. *Lucas* v. *Birdsey*, 41 Conn., 357; *Capron* v. *Porter*, 43 id., 389; *Spring* v. *Chipman*, 6 Verm., 662. In *Bellows* v. *Wells*, 36 Verm., 599, it was held that a lessee might convey to his lessor all the crops which might be grown on the leased land during the term, and no delivery of the crops after they were harvested was necessary even as against attaching creditors, and that the doctrine as to retention of possession after the sale did not apply to property which at the time of the sale was not subject to attachment and had no real existence as property at all.

The case at bar is within the principle of the above authorities, for it is very clear that the title to the property

in question when it first came into existence was in the plaintiff.

In reaching this conclusion it is not necessary to hold that the mares became the absolute property of the plaintiff under Massachusetts law without a more substantial and visible change of possession, or that under our law, the title to the mares being in the plaintiff clearly as between the parties, the rule imported from the civil law, *partus sequitur ventrem*, applies.

We waive the consideration of these questions. It will suffice that, by the express terms of the contract, the plaintiff was to have as her own all the colts that might be born from these mares. That the law will sanction such a contract is very clear.

It is true, as remarked in Perkins on Conveyances (tit. *Grant*, § 65,) that "it is a common learning in the law that a man cannot grant or charge that which he has not;" yet it is equally well settled that a future possibility arising out of, or dependent upon, some present right, property or interest, may be the subject of a valid present sale.

The distinction is illustrated in Hobart, 132, as follows:— "The grant of all the tithe wool of a certain year is good in its creation, though it may happen that there be no tithe wool in that year; but the grant of the wool which shall grow upon such sheep as the grantor may afterwards purchase, is void."

It is well settled that a valid sale may be made of the wine a vineyard is expected to produce, the grain that a field is expected to grow, the milk that a cow may yield, or the future young born of an animal. 1 Parsons on Contracts, (5th ed.,) page 523, note *k*, and cases there cited; Hilliard on Sales, § 18; Story on Sales, § 186. In *Fonville* v. *Casey*, 1 Murphy (N. C.), 389, it was held that an agreement for a valuable consideration to deliver to the plaintiff the first female colt which a certain mare owned by the defendant might produce, vests a property in the colt in the plaintiff, upon the principle that there may be a valid sale where the title is not actually in the grantor, if it is in him potentially,

as being a thing accessory to something which he actually has. And in *McCarty* v. *Blevins*, 5 Yerg., 195, it was held that where *A* agrees with *B* that the foal of *A's* mare shall belong to *C*, a good title vests in the latter when parturition from the mother takes place, though *A* immediately after the colt was born sold and delivered it to *D*.

Before resting the discussion as to the plaintiff's title we ought perhaps briefly to allude to a claim made by the defendant, both in the court below and in this court, to the effect that if the plaintiff's title be conceded she is estopped from asserting her claim. This doctrine of estoppel, as all triers must have observed, is often strangely misapplied. And it is surely so in this instance. The case fails to show any act or omission on the part of the plaintiff inconsistent with the claims she now makes, or that the creditors of Murray or the defendant as representing them were ever misled to their injury by any act or negligence on her part. On the contrary the estoppel is asserted in the face of the explicit finding, that "as soon as the plaintiff became aware of the attachment of her horses she forbade the officer taking the same, and demanded their immediate return to her."

The only fact which is suggested as furnishing the basis for the alleged estoppel is, that from the first of August, 1879, to the 12th of January next following, "no attempt was made by the plaintiff to maintain her title by suit, although she was living during the time at Guilford where said colts were." But who ever heard of an estoppel in an action at law predicated solely on neglect to bring a suit for the period of five months? To recognize such a thing for any period short of the statute of limitations would practically modify the statute and create a new limitation. Furthermore, in what respect have the defendant and those he represents been misled to their injury by this fact? The plaintiff never induced the taking or withholding of her property. And can a tort-feasor or the wrongful possessor of another's property object to the delay in suing him for his wrong, and claim, as in this case, an estoppel on the ground that his own wrongful possession proved a very expensive

one to him, amounting even to more than the value of the property? He might have stopped the expense at any time by simply giving to the plaintiff what belonged to her.

The single question of evidence which the record presents we do not deem it necessary particularly to discuss. It will suffice to remark that if the defendant's testimony was admissible to show that Murray, after the sale to the plaintiff, (and so far as appears in her absence,) claimed to own the mares and colts, it was a complete and satisfactory reply for the plaintiff in rebuttal to show that Murray's own entries, (presumably a part of the *res gestæ*,) in the appropriate books kept by him, showed the fact to be otherwise, and in accordance with the plaintiff's claims.

At any rate it is very clear that no injustice was done by this ruling to furnish any ground for a new trial.

There was no error in the judgment complained of and a new trial is not advised.

In this opinion the other judges concurred.

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ALFRED G. HULL, TRUSTEE, *vs.* WILLIAM SIGSWORTH.

The defendant, who was in the employment of *M* upon his farm, bargained with him for the purchase of a horse which *M* had for some time owned and kept on the farm, when he should have earned the money to pay for it. The horse remained on the farm as before, and two years after *M* sold it to the defendant, taking his receipt in full for wages earned in payment. The horse still remained on the farm and was kept in *M's* stable, the defendant continuing in his service, and feeding it from *M's*, hay and grain as before paying a certa um per week for its keeping. The defendant took exclusive care of the horse, breaking it to harness, and keeping it shod, and claiming to own and be in possession of it. About two months after the sale the horse was attached by one of *M's* creditors. Held, that there had been no such change of possession as made the sale good against the creditors of *M*.

Where a trustee in insolvency sues, it is not sufficient to describe himself in the writ merely as trus ,but he should state the character of the assignment and the name of the assignor.

REPLEVIN for a horse; brought to the Court of Common Pleas for New Haven County. The following facts were found by the court.

The horse in question, now four years old, was bred and owned by Rev. Wm. H. H. Murray, up to the 15th day of May, 1879, and was always kept on his stock-farm in Guilford.

About two years previous to that date, Sigsworth the defendant, then in the employ of Mr. Murray (and ever since up to the time of the purchase hereinafter mentioned,) bargained with him to purchase the horse, then a colt, as soon as he should earn money enough in Mr. Murray's employ to pay for it.

On the 15th of May, 1879, the wages of Sigsworth had amounted to $250, and Mr. Murray, in performance of the agreement, sold the horse to him for that sum, and delivered it with a bill of sale to Sigsworth, and thereupon Sigsworth gave to Mr. Murray a receipt in full for the amount then due him as aforesaid. The transaction was open and in good faith, and not with any view to insolvency or for the purpose of defrauding any creditors, and there was no evidence that Mr. Murray was at that time indebted or embarrassed.

After the purchase Sigsworth bargained with Mr. Murray to permit him to keep the horse at the latter's stable, in the same manner as he had been theretofore kept, and to be fed from Mr. Murray's grain and hay at the rate of $2.50 per week, but to be at all times under the control of Sigsworth. The horse was then unbroken and had never been personally handled by Mr. Murray, nor used by any one, but had been taken care of by his employees in the same manner as the other stock. Sigsworth at this time made an arrangement with Mr. Murray to stay with him until the close of the haying season and work for him, doing farm work and taking care of stock in the same manner as he had before; and it was agreed that the price of the keeping of the horse should be taken out of his wages when they settled. Sigsworth continued to work for Mr. Murray on these terms during the remainder of the season and until all the prop-

erty came into the hands of the trustee. He kept the horse in his barns until it was attached, and took exclusive care of it himself, and broke it to harness, and shod it himself, (he being a horse-shoer,) and always claimed to own and be in possession of it. Except as here stated, there was no apparent public change in the ownership or custody of the horse.

Sigsworth intended at the close of the season to remove the horse to his own house, at Prince Edward's Island, and to have its keeping taken out of his wages at the close of the season. Mr. Murray, during all this time, was keeping a large and extensive stock-farm, with stables and barns, and was boarding a number of horses for other persons, as well as a great number of his own horses; and such horses were all kept in the same manner without any apparent distinction. The horse in question was born on Mr. Murray's farm from a sire and dam owned by him, but after the sale he never claimed this horse or exercised any control over it.

Mr. Murray spent but little time on his place at Guilford, where his farm and stables were. About June 14th, 1879, he left the place and the state, and has never since returned or exercised any personal control over any of the property nor given any direction concerning it. In the latter part of July, 1879, all of his personal property, including this horse, was attached and taken away by sheriffs, and this horse remained in the custody of officers until October, 1879, when it was delivered by the officers to the plaintiff, as trustee of Mr. Murray's estate in insolvency. It remained in the custody of the plaintiff until February, 1880, when the defendant took possession of it under a claim of right for the purpose of compelling the trustee to replevy it if he claimed it as a part of Mr. Murray's estate.

At the time the horse was attached the defendant was present and objected to its being taken, and claimed to be the owner and in possession of the horse, and has ever since asserted his title, but did not bring a replevin suit because he was poor and unable to give a proper replevin bond.

Prior to May 15th, 1879, Mr. Murray had not in fact suf-

ficient available assets, other than certain patent rights, to meet his obligations, but this fact was not known to Sigsworth or the public at the time of the sale; and at that date Mr. Murray owned certain patent rights from the sale of which he expected to be able to meet all of his obligations and save his stock-farm and other personal property clear of indebtedness.

Upon these facts the case was reserved for the advice of this court.

*L. Harrison*, for the plaintiff, cited *Swift* v. *Thompson*, 9 Conn., 63; *Osborne* v. *Tuller*, 14 id., 529; *Kirtland* v. *Snow*, 20 id., 28; *Webster* v. *Peck*, 31 id., 500; *Norton* v. *Doolittle*, 32 id., 410; *Bird* v. *Andrews*, 40 id., 542; *Hatstat* v. *Blakeslee*, 41 id., 301; *Seymour* v. *O'Keefe*, 44 id., 130.

*H. B. Munson*, for the defendant.

1. The defendant, on the 15th day of May, 1879, consummated a bargain which he had made two years previously, and purchased this horse with his earnings. He acquired the legal title, by a proper bill of sale, and by an actual delivery of the horse. He paid the full value, $250, and all was done openly and in good faith. His title thus acquired was complete and perfect against Murray, the original owner, and against the whole world. The conduct of both parties after the sale was perfectly consistent with the sale. Murray was not to have any use of or control over the horse after the sale; and did not have. His estate was to receive the benefit of Sigsworth's labor for keeping the horse, and did receive it at the rate of $2.50 per week. Sigsworth, not Murray, was to keep the horse at Murray's stable, at all times under his own control. Sigsworth kept the horse in Murray's barn until it was attached, and took exclusive care of it himself, and broke, and shod, and drove the horse, and always claimed to own and be in possession of it. On the 14th of June Murray left the state and abandoned all connection with his farm and personal property. Sigsworth was there with his horse, having the sole charge of it in his own behalf all

of this time (nearly two months), and neither Murray nor any servant or agent in his behalf from that time to the time of attachment had anything to do with it. And when the officers came to attach the horse Sigsworth was in the actual possession—there present—"claiming to be the owner and in possession of it." Possession of personal property is presumed to be in the owner unless the contrary appears. *Haight* v. *Turner*, 21 Conn., 593, 597. If the owner is close by, where the horse is under his eye and control, it is sufficient. As between Sigsworth present, asserting his ownership and possession, and Murray absent and a thousand miles away, it is absurd to say that the "eye of the law" could see Murray then in possession, because he held the invisible title to the boarding stable, which he had abandoned, and could not perceive Sigsworth, who was then present asserting ownership and possession, and the only person who had anything to do with the care, custody and control of the horse. The "visible possession" was clearly in Sigsworth, and this alone at the time of the attachment was sufficient. *Hall* v. *Gaylor*, 37 Conn., 553. The circumstances of this case are peculiar, and strikingly unlike those of any case where a sale has been held constructively fraudulent, from *Twyne's case* in 1601 to the present time. In *Mead* v. *Noyes*, 44 Conn., 492, the court say—"Whom would a stranger have considered in possession in this case?" We say he would have seen the vendee breaking and shoeing this colt as his own. He would have seen him feeding the horse and taking the exclusive care of it and using it exclusively and for his own purposes. He would have seen these acts repeated and continued down to the time of the attachment. He would have seen that neither the vendor nor any other person had the slightest care, control or use of the horse after Sigsworth bought him. He would have seen Sigsworth working on the farm, in the hay and harvest field, paying for his horse's board, and trying to earn money enough to pay his way home with his horse. None of these circumstances ever occurred before the sale with reference to this horse, and not with reference to any other horse or stable on the

premises. When the sheriff came to attach the horse, the "stranger" would have seen this laboring man standing by his horse, asserting his title and exclusive possession, and would have seen that no one else was in fact in possession of the horse or stable, or claimed to be, and he would have been put upon inquiry as much as though he had found a watch hanging in Sigsworth's bed-room in Murray's house, which Sigsworth had bought and paid for, before Murray abandoned the place, and which he had repaired, possessed and used ever since. The case at bar is widely different from that of *Norton* v. *Doolittle*, 32 Conn., 410. In that case the sale was secret. "The property was returned to the same apparent use and enjoyment as before." The only similarity to the case of *Mead* v. *Noyes* is the fact that the horse was kept in the same barn where he was kept before the purchase, and fed upon the hay and grain of Murray paid for by Sigsworth; but with this marked difference, that Murray had abandoned the place and all his property, and there was no one in charge of this stable and horse but the defendant, and had not been for more than six weeks. And there was good reason for this; it was the most convenient and natural place to keep the horse when Sigsworth had finished his day's work for Murray, especially as he was breaking him by frequent use. That case does not decide that the fact of keeping the horse in the same place after the purchase as before is constructively fraudulent, but that this fact combined with the other peculiar accompanying circumstances rendered the sale void; not one of those facts is in this case, but in their stead every positive circumstance shows this sale to be beyond suspicion of fraud, either actual or constructive. There was no common occupancy of the stable where this horse was kept; no one but the vendee ever stepped into it after he bought the horse. This point was directly decided in *Potter* v. *Mather*, 24 Conn., 554. HINMAN, J., says: "It appears to us a man may have exclusive possession of personal property which is upon land occupied by him and another in common." In that case the wagon was left in the same place after the sale as before, and the purchaser had never used it but once. In

*Kirtland* v. *Snow*, 20 Conn., 28, HINMAN, J., says: "The *mala fides* upon which the case turns is the trust which entered into the sale for the benefit of the vendor. The rule is founded upon the presumption that the purchaser will naturally perfect his purchase by taking possession. The enjoyment of the thing purchased is generally, if not always, the object the purchaser has in view, and his neglect therefore to take possession is so unusual and contrary to general experience as to be very strong evidence that the purchase was not real." In this case, the conduct of both vendor and vendee was consistent with a bonâ fide sale. No reasonable man situated as Sigsworth was would have conducted differently. BISSELL, J., in *Talcott* v. *Wilcox*, 9 Conn., 134, 140, says: "There was an effected change of property, the sale was open and notorious, and there is nothing unusual in the tenant having possession of the stock of his landlord." So also in *Bird* v. *Andrews*, 40 Conn., 542, the vendor became the clerk and was "visibly" in possession, selling the same goods as clerk of which he had before been the proprietor. In all of these cases the goods went back to the same place. The visible appearance of a change in that case was far less marked than in the case at bar. In *McKee* v. *Garcelon*, 60 Maine, 167, the court say:—"It will be found exceedingly difficult, if not absolutely impossible, to lay down a general rule applicable to all cases. There must be such evidence arising from the conduct of the parties, as shows a relinquishment of the ownership and possession of the property by the vendor and an assumption of these by the vendee." We have both the relinquishment and assumption of ownership in this case. In *Stephenson* v. *Clarke*, 20 Verm., 624, the court say that the change of possession necessary is only such a divesting of the possession of the vendor as any man knowing the facts, as they could be ascertained upon reasonable inquiry, would be bound to understand was the result of a change of ownership. See also *Flanagan* v. *Wood*, 33 Verm., 339; *Ridout* v. *Burton*, 27 id., 383; *Allen* v. *Knowlton*, 47 id., 512; *Ingalls* v. *Herrick*, 108 Mass., 351; *Farrar* v. *Smith*, 64 Maine, 74, 78; *Kidd* v. *Rawlinson*, 2 Bos. & Pul., 59; *Jezeph*

v. *Ingram*, 1 J. B. Moore, 189. In all of these cases the property was kept at the same place after the sale as before, and the sales were held to be valid. To defeat the defendant's title to this horse, which he acquired in perfect good faith, and whose value he increased after he purchased it, will require the extension beyond all precedent of that ancient and cast-iron rule of a supposed public policy, which in order to prevent the people from practicing frauds, requires the courts to decide that a just and honest sale is false and fraudulent. That rule in England, where it originated, has been almost done away with, and so modified as to protect an honest purchaser. Massachusetts and Maine and almost every other state but Connecticut and Vermont has followed that example.

2. Aside from the merits of the case, the plaintiff can not recover upon his declaration, as he alleges only that he is trustee, without stating the character of the trust nor the name of the assignor in insolvency. He can not stand upon such a title against this defendant, whose title is clearly good against all the world, and in case of a retention of possession by the vendor would be good against all but the creditors of the vendor. The plaintiff merely as trustee does not represent the vendor's creditors, nor anybody else.

PARDEE, J. It is found that Rev. William H. H. Murray owned and kept the horse upon his farm for three years prior to May, 1879; that in 1877 the defendant then in his service bargained with him for the purchase of it as soon as he should earn the money to pay for it; that in May, 1879, Murray sold and delivered the horse to him, taking his receipt in full for wages earned in payment; that thereafter he continued in the service of Murray, keeping the horse in his stable and feeding it from his hay and grain as before, paying Murray two dollars and a half per week for the hay and grain; that he took exclusive care of it, broke it to harness and shod it, claiming to own and be in possession of it; and that while so kept it was attached as the property of Murray;

and that subsequently the defendant took possession of it under the claim of ownership.

Upon this finding we have the continued ownership and use of the premises by the vendor; the continued employment thereon of the vendee as his servant; the continued care by the latter of the horse, with others belonging to his employer, feeding all from the stock of hay and grain belonging to him. To the world all things remained unchanged, and it might well be presumed that the continued acts of feeding, shoeing and training, subsequent to the sale, were a part of the duties incident to the continued service. The case of the vendee is not strengthened by the fact that at the time of the attachment the vendor was, and during several weeks prior thereto had been, absent from his farm; his ownership and use continued; the vendee remained the servant of an absent master; there was no visible change in the relation of each to the other; nor in that of either to the property, real or personal. And the declarations of ownership by the vendee, including that made at the time of the attachment, must go for nothing, because the apparently unchanged ownership by the vendor was a constant denial of their truth, and as a matter of law bore them down. So must also his good faith, for in the presence of the facts found the law will not consider it.

In *Norton* v. *Doolittle*, 31 Conn., 405, this court said:— "The rule of law which requires a change of possession is one of policy. Its object is the prevention of fraud. * * The policy which dictates it, and the prevention at which it aims, require its rigid application to every case where there has not been an actual, visible, and continued change of possession. * * And as in applying the rule we must look beyond the good faith, or the secret, technical features of the transaction, so purchasers must learn and understand that if they purchase property and without legal excuse permit the possession to remain, in fact, or apparently and visibly, the same, or if changed for a brief period, to be in fact or apparently and visibly continued as before the sale, they hazard its loss by attachment for the debts of the

vendor, as still, to the view of the world, and in the eye of the law, as it looks to the rights of creditors and the prevention of fraud, his property."

The case of *Elmer* v. *Welch*, 47 Conn., 56, had not been published when this case was argued, and therefore was not cited by the counsel on either side. We now refer to it only that it may be understood that it has not been overlooked by us in the determination of this case. The facts of that case were in many respects like those of this, but there was this all-important fact there which does not exist here, and which was decisive of the case in favor of the vendee—that the real estate, with the barn in which the horse that had been sold was kept, was conveyed, at the time of the sale of the horse, by the vendor to the vendee, and was at the time of the attachment of the horse by a creditor of the vendee in the exclusive possession of the vendee, although the horse was taken care of by the same persons previously in the employment of the vendor, and in part by the vendor himself. The deed of the premises had been duly recorded, and the grantee was in open and exclusive possession of them.

In his writ the plaintiff describes himself as trustee, without naming his assignor in insolvency or stating the character of the assignment. We advise the Court of Common Pleas to render judgment for the plaintiff upon his amendment of the writ in this respect.

In this opinion the other judges concurred.

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NELSON W. HINE *vs.* WILLIAM E. ROBERTS.

The defendant received of the plaintiff an organ, and signed and delivered to him the following agreement prepared by the plaintiff:—"The subscriber has this 21st day of Dec., 1877, rented of *H*, (the plaintiff) one choral organ, during the payment of rent as herein agreed, for the full rent of $190, payable as follows—one melodeon valued at $50 as first payment, and one note for $140 due Jan. 15, 1879; with the understanding that if I shall have punctu-

ally paid all said rent I shall be entitled to a bill of sale of the organ, and if I fail to pay any of said rent when due all my rights herein shall terminate and said *H* may take possession of said organ." Held not to be a lease of the organ, but a conditional sale, and that the plaintiff could not recover upon the $140 note after the organ had been returned.

The consideration of the note was not the mere right to pay for and receive title to the organ, but the actual purchase and the acquisition of title as an accomplished fact. When therefore the purchase failed there was a complete failure of consideration.

ASSUMPSIT on a note; brought to the Court of Common Pleas of New Haven County, and tried to the jury before *Pardee, J.* Verdict for the plaintiff, and motion for a new trial by the defendant for error in the charge of the court. The case is sufficiently stated in the opinion.

*H. C. Baldwin* and *H. L. Hotchkiss*, in support of the motion.

*J. D. Ballou*, contra.

CARPENTER, J. The subject of this suit is a note for $140, given by the defendant to the plaintiff, in the ordinary form. At the same time and as a part of the same transaction the defendant signed the following writing:—

"The subscriber has this 21st day of December, 1877, rented and received of N. W. Hine one choral organ, style union top, during the payment of rent as herein agreed, for the full rent of one hundred and ninety dollars, payable at his office in New Haven, Conn., as follows, viz.:—one melodeon valued at fifty dollars as first payment, and one note for one hundred and forty dollars, due January 15th, 1879, and on the day of each succeeding month until the whole is paid, with the understanding that if I shall have punctually paid all said rent, and shall not have removed said organ from the premises now occupied by me without the written consent of said Hine, I shall be entitled to a bill of sale thereof, but not otherwise; and if I fail to pay any of said rent when due, or shall remove said organ without such written consent, all my rights herein shall thereupon expire and terminate, and the said Hine, his agents, executors,

administrators or assigns, may enter any premises accessible to me, using necessary force, and take possession of said organ; I hereby agreeing to waive and relinquish all claim to the same, and for payments hereon, and for damages for any such entry. All injury to said organ from any cause to be made good by me."

The plaintiff's case proceeds upon the theory that this instrument is a lease, and that the whole transaction between the parties amounted simply to a hiring of the organ for a year; and the court below so treated it. The court in charging the jury repeatedly called it a lease, and they were told that the right to keep and use the organ and demand a bill of sale of it, was in law a sufficient consideration to sustain the note. They were also told that the plaintiff was entitled to recover the whole amount of the note unless there had been an entire failure of consideration; and in the course of the charge the court said:—"It is not disputed that the defendant had the use of the organ till the note came due, and there is no claim that he could not have received the title on paying the note."

We think this view of the case was erroneous, and was well calculated to mislead the jury.

The transaction was not, except in a limited and materially qualified sense, a lease; that is, if the contemplated sale was not completed by the payment of the note, it would operate as a lease of the organ until the note became due. But that was not the ultimate aim and object of the parties; it was simply contemplated and provided for as a possibility. The real purpose was to sell the organ, with an agreement that the seller should not part with the title until the purchase money was paid. A careful inspection of the instrument shows that this must be so. It is not in the form and does not contain the usual stipulations of a lease. It is not signed by the lessor, and expresses but one agreement to be performed by him, and that is *to give a bill of sale if the note is paid at maturity.* Erase the words "rented" and "rent" from the instrument wherever they occur, and substitute the word "money" or its equivalent wherever necessary to com-

plete the sense, and the instrument expresses the exact idea which the parties had in mind, and there is not left in it a single element of a lease except as above stated.

We read the transaction therefore as a conditional sale; and so the plaintiff's counsel regarded it when the request was framed asking the court to charge the jury that such sales are recognised and upheld by our law. The question then arises—what was the nature of that condition? The plaintiff seems to treat it as a *conditional sale by him* but as an *absolute purchase by the defendant;* and the court seems to have sanctioned that view. We think that view does not give effect to the real intention of the parties. It cannot be denied that the plaintiff had a right to prescribe the terms on which he would part with his property, and we think he has done so. For, while the language of the instrument purports to be the language of the defendant, it is in reality the language of the plaintiff. The instrument is a printed blank, carefully prepared by the plaintiff and extensively used in his business. It was filled out by the plaintiff's agent and the defendant was required to sign it. Presumptively he would not have been permitted to sign any other, for that was evidently the mode and form in which the plaintiff transacted business. The plaintiff said to the defendant, in substance, "I will sell the organ to you for $190. I will accept your melodeon in part payment at $50, and your note for $140 payable at the end of one year. If you pay the note promptly when due the organ is yours. If you do not, you forfeit all your rights under the contract, and both the organ and melodeon are mine." We believe this to be a fair statement of the material part of the contract. If the note is not paid the payment of $50 is forfeited by express agreement. As that is something more than twenty-five per cent. of the whole price of the organ it would seem to be ample compensation for its use during the year. The plaintiff now insists that the defendant shall not only forfeit the melodeon but shall also pay the note. He virtually injects into the contract, in case of failure to pay the note, this further provision—"And the said Hine shall be at liberty to sue for and

collect the note." We do not think that is a fair interpretation of the contract. We do not think that the defendant so understood it, or that he would have signed it if it had been so expressed. We think that the defendant understood that it was at his option to pay or not to pay the note. The consequences of payment or non-payment were expressly provided for, and nothing is left to implication. The contract is adroitly framed so as to induce that belief, and it is our duty to interpret it in the sense in which the defendant would naturally understand it, especially if the plaintiff knew or had reason to believe that the defendant so understood it.

From this view of the case it is apparent that the consideration for the note was not the mere abstract right to pay for and receive title to the organ, as the court charged the jury, but it was the actual purchase and the acquisition of title as an accomplished fact. This is obvious from the rigid provisions of the contract—"And if I fail to pay any of said rent" (the note) "when due" (no matter from what cause,) "all my rights herein shall thereupon expire and terminate, and the said Hine, his agents, &c., may enter any premises accessible to me, using necessary force, and take possession of said organ."

The purchase failed—the title did not pass. The plaintiff received the melodeon and the return of the organ in good condition, which is all he contracted for in that contingency, and the defendant forfeits all previous payments, (in this case the melodeon,) which is all he agreed to forfeit. There was therefore an entire failure of the consideration for the note, and the ruling of the court to the contrary was error.

A new trial is advised.

In this opinion the other judges concurred.

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## CHARLES IVES *vs.* THE TOWN OF EAST HAVEN AND OTHERS.

There would seem to be no good reason why highway proceedings should be an exception to the general rule that allows a party to accept service of a process that is to be served upon him by copy or reading.

By statute a petition to the Superior Court for the laying out of a highway must be served upon one or more of the selectmen of the town twelve days before the session of the court. In the present case two of five selectmen of a town accepted service of such a petition in writing eleven days before the session of the court. *It seems* that such acceptance of service was good.

An agent of the respondent town, appointed to attend to all suits brought against the town, agreed in writing with the petitioner during the first term of the court, that the court might appoint a committee in the case, and one was so appointed. Held to be an appearance of the town.

Towns are as much parties, and as much bound by their admissions and waivers, in highway cases as in other suits.

And where, after the case was pending in court, sundry land-owners were brought in as respondents by notice of a hearing before the committee, it was held that they could not make objection to the service upon the town. Where the town had come into court by voluntary appearance it was in court for all purposes.

The order of notice to the land-owners was not made until the next term after the appointment of the committee. Held not to affect the validity of the proceeding.

The statute (Gen. Statutes, tit. 16, ch. 7, sec. 47,) provides that upon a highway petition before the Superior Court, any person interested in procuring the highway may execute a penal bond with surety payable to the respondent town, conditioned that the obligors will, for a specified sum, make the highway in a specified time and manner, and that the committee may receive the bond, and regard it as evidence in determining the expense of constructing the highway. The petitioner, with a surety, executed a bond in the penal sum of $1,000, payable to the respondent town, binding himself, if the committee should lay out the highway in question on a line not varying materially from that prayed for, to construct it wholly at his own cost. Held that the bond conformed sufficiently to the statute and was properly received by the committee.

Where the committee found that the selectmen had refused to lay out the highway, against the objection that it was not a matter for them to find, and the court afterwards made a separate finding of that fact, it was held that the finding of the committee became of no importance.

The committee in its report made a contingent and alternative assessment of damages and benefits, and on this account the report was re-committed by the court. No additional order of notice was made and no further evidence heard, but the committee upon the evidence already received made a supplemental report, assessing the damages and benefits absolutely. Held to be no error.

And held that it was not necessary that the old report should be formally set aside, but that the two could stand together, the new one operating as a modification of the old one, and to the extent of the changes a substitute for it.

Four years after the suit was brought and while it was still pending, and after the committee had made its report, the legislature, by an amendment of the charter of a borough within the limits of the respondent town, imposed upon the borough the duty of making and maintaining all highways within its limits. The proposed highway was within its limits. Held not to affect the case.

At the time of the hearing before the committee a new street had been opened, near the line of the highway prayed for, by a party for purposes of speculation, but had not then been accepted by the public. The existence of this street was claimed to affect the question of the convenience and necessity of the highway prayed for. Held that, in finally accepting the report of the committee four years later, the court did not err in not considering the then condition of the street in question, the whole question of the convenience and necessity of the highway prayed for being by statute for the committee and not for the court.

By the order of the court *N* was to be notified as a land-owner of the time and place of the hearing before the committee. An officer called at his house to leave a certified copy of the order, but found that no one was in it and that he and his family had gone to another state. His partner in business proposed to take the copy and send it to him by mail; which was done, and *N* received it the next day. He returned in ample time to be heard before the committee, but did not appear. Held that the whole object of giving notice had been accomplished, and that his objection to the informality of it was not entitled to consideration.

PETITION for the laying out of a highway; brought to the Superior Court in New Haven County.

The case was referred to a committee, whose report, made at the October term of the court, after stating the times and place of their sitting, and their having heard the parties and their evidence, proceeded as follows:—

Having duly considered the evidence, and having examined the ground described over which a highway was prayed for, we do find that common convenience and necessity require that a highway should be laid out within the limits prayed for in said petition, and that upon the application of said petitioner, and before the bringing of said petition, the selectmen of said town of East Haven refused to lay out the same.

During the trial before the committee upon the question as to the common convenience and necessity of the proposed new highway, Charles Ives, the petitioner, executed a penal bond with satisfactory security, in the sum of $1,000, payable to the town of East Haven, conditioned to construct and

build, without expense to the town, within the time and in the manner therein specified, the proposed highway. The bond was placed in the hands of the committee, and upon making this report we have delivered it to the agent of the town of East Haven. The bond we find to be legal in form, and properly executed by persons owning real estate in fee simple situated in this state in value double the amount of the penal sum in the bond.

The committee have therefore surveyed and laid out the highway prayed for as follows: [describing it.]

The committee further report that after laying out the highway they proceeded to hear the parties in interest relative to the damages sustained by such lay-out, and the benefits accruing therefrom, and on these questions we find the following facts:—

During the months of February and March, 1874, Charles Ives, the petitioner, and Henry Rogers, an owner of land adjoining the above highway as laid out by us, were negotiating relative to the opening of a highway where your committee have laid out the same, and another highway about three hundred feet westerly therefrom, for the purpose of opening their adjoining lands for building lots; but they did not come to an agreement. Then Ives, about the first of April, 1874, applied to the selectmen of East Haven to lay out a highway within the limits described in the petition. A majority of the selectmen some time during the first week in April, 1874, examined the route for the highway applied for, and refused to lay it out. Ives and Rogers were both present at the time the selectmen made the examination. Subsequently a town meeting was called on the subject, and the action of the selectmen in refusing to lay out the highway was sustained.

After the refusal of the selectmen to lay out the highway, Ives brought this petition to the Superior Court praying for the laying out of the same; and the committee find that Rogers knew that Ives had brought his petition, but that no legal notice was served upon Rogers until September 2d, 1874.

About the time that Ives applied to the selectmen to lay out the highway, Rogers caused a survey to be made for a road entirely within his own land, and about one hundred and ten feet westerly from the highway laid out by us. At the time the selectmen examined the route for the highway applied for, the Rogers road was staked out but no grading had been done upon it, and no grading was done on it until after the petition of Ives had been brought. But Rogers, after surveying and staking out his proposed road, proceeded to sell lots fronting on the same as follows: To E. L. Washburne, one lot, April 13th, and another April 24th, 1874; one to R. McNeil, April 13th, and another April 24th, 1874; and one to Susan A. J. Kirby, June 29th, 1874; all which deeds were duly recorded on the land records of East Haven. Another deed of three lots to Rufus Rogers, his father, bearing date April 28th, 1874, was exhibited to us, but has never been recorded. Rogers also entered into a written contract, dated April 21st, 1874, with Harrison & Gordon to grade his proposed road, and at the time the committee examined the route for the highway applied for they had graded and fenced it, and Rogers in consideration therefor had deeded a lot to them, which deed bears date September 8th, 1874, and has been recorded. All of the conveyances by Rogers were bounded on the road opened by him, or a right of way over his proposed road was conveyed to the grantees.

If, upon the foregoing facts, the court shall be of the opinion that the damages and benefits should be assessed as if no work had been done by Rogers in grading and fencing his road, then we assess the damages and benefits as follows: The town of East Haven to pay to Henry Rogers for the damages sustained by him over and above benefits received, $150. Charles Ives to pay to the town of East Haven for benefits accruing to him, over and above all damages by him sustained, $50. Samuel B. Hill to pay to the town of East Haven, for the benefits accruing to him over and above all damages by him sustained, $25. And to all other persons in interest we assess the damages and benefits as equal.

If, on the other hand, the court shall decide that Rogers

was not obliged to take notice of the proceedings in the Superior Court on the petition of Ives, and that the damages and benefits should be assessed as they were after his road was graded and fenced, then we assess the damages and benefits as follows:—To the following persons we assess the sums respectively set opposite to their names to be paid to them by the town of East Haven, as damages by them sustained over and above all benefits accruing to them by the laying out of the highway:—Henry Rogers, $800; Susan A. J. Kirby, $50; Rollin McNeil, $100; Edward L. Washburne, $100; Rufus Rogers, $150. And that the following persons shall pay to the town of East Haven the sums respectively set opposite to their names for the benefits accruing to them over and above all damages by them sustained:—Charles Ives, $400; Samuel B. Hill, $200. And to all other persons in interest we assess the damages and benefits as equal. All which is respectfully submitted. Dated at New Haven, this 20th day of October, 1874.

The town of East Haven remonstrated against the acceptance of the report of the committee, upon the following grounds:

1. Said report contains a finding that the selectmen of East Haven refused to lay out a highway within the limits prayed for in the petition, before it was brought; which finding the committee had no jurisdiction to make; and the town objected, on the hearing, to any evidence thereon as being irrelevant and without the province of the committee; notwithstanding which the committee received such evidence.

2. There has never been, in fact, any such neglect and refusal by the selectmen to lay out the proposed highway.

3. The committee acted improperly in taking into consideration the bond offered by the petitioner, said bond not being such an one as is authorized by statute, as it does not describe the time or manner of constructing the highway proposed by the petitioner, nor specify with any certainty the route, line and limits thereof, nor refer to the highway as laid out by the report, nor bind both the obligors therein to construct any highway, nor bind any one to construct any

highway for a specific sum, and is not to an amount sufficient to answer to the cost of constructing the proposed highway.

4. Said report lays out said highway at that part thereof near Hemingway street, on a line as to which no evidence was offered before the committee, nor hearing had. Said committee considered three lines only at the public hearing, and laid out the road so as to diverge some ten feet from the nearest of said lines, and cut the land adjoining it at an awkward slant, impairing its salable value.

5. Said report is irregular and improper in making an alternative, conditional and uncertain assessment of damages and benefits.

6. Said report shows upon its face that the benefits assessed against the petitioner and S. B. Hill are too little, since their benefits cannot be varied by the manner in which the court or committee may regard the acts and rights of Henry Rogers and those claiming under him, and yet are assessed in one part of the report at $600, and in another at $75, whereas they should at least equal $150.

7. Said committee heard evidence as to the desirability of opening the proposed street in order to sell building lots thereon; and were governed in their decision by such evidence; and have reported in favor of said lay-out, principally because it will enable the petitioner and said Hill to sell off building lots thereon, and not because it will be of common convenience and necessity; which evidence was objected to by the town.

8. Said bond was never delivered to nor accepted by this town, and was not retained by the committee until after they had returned their report to court.

9. Said petition was never served upon this town. One of its selectmen signed on May 1st, 1874, without authority from the town, the endorsed acceptance of service, because he was told by the petitioner that it would simply save the expense of officer's fees, and with no idea that he was waiving any right of the town to time to prepare for its defence. The date of April 23d, on said endorsement, is not the true date, but was untruly inserted by the petitioner, and the counsel

for the town was misled thereby, and did not know that the acceptance of service was not made within twelve days of the May term of court, until during the progress of the trial before the committee.

The bond referred to was given by Charles Ives the petitioner and Willet Hemingway, was in the penal sum of $1,000, payable to the town of East Haven, and contained the following condition:—

"The condition of this obligation is such, that whereas there is now pending before the Superior Court of New Haven County an application for the laying out of a new highway in said town, between and to connect Hill street and Hemingway street at some convenient place so that its southerly terminus will be between the house of Charles Rowe and a point not more than five hundred feet distant therefrom, and so that its northerly terminus will be between the house of Samuel B. Hill and a point not exceeding five hundred feet westerly therefrom, which case is now on trial before a committee appointed by said court to hear the same; and whereas said Ives has promised and agreed, and he does by these presents promise and agree, that if said committee shall lay out said new highway in such manner that a portion of the central line of such new highway shall be the line of division between the land of said Ives and the land of Henry Rogers, or a line which will not vary very materially therefrom, and in such manner that such new highway shall substantially correspond with the easterly proposed street as laid down on the map which said Ives has used on the trial of said case, being the easterly one of the proposed roads on said map, that he, the said Ives, will thereafter, without unreasonable delay, at his, the said Ives's, sole and exclusive cost, expense and charge, suitably and in a proper manner work said road and prepare it for public travel, including a suitable bridge, or suitable and necessary bridges (in case more than one bridge shall be reasonably necessary over the stream of water that said new highway will cross). Now therefore, if said Ives shall well and truly do and perform his said promise and agreement, and save said town from all

the cost and expense of working said new road, if so laid out as aforesaid, preparatory to its being opened for public travel, then the above and foregoing obligation shall be null and void, otherwise of binding obligation."

Sundry other parties interested, either as inhabitants of East Haven or as land-owners, filed remonstrances, the grounds of which are sufficiently stated in the opinion.

At the September term of the court, 1879, the borough of Fair Haven East, situated within the town of East Haven, and which, by an amendment of its charter made by the legislature in 1878, was thereafter to make and maintain all highways within its limits, made by its burgesses the following remonstrance against the acceptance of the report of the committee:—

The undersigned, burgesses of the borough of Fair Haven East, in the town of East Haven, remonstrate in behalf of said borough against the acceptance of the report of the committee in said case for the following reasons:—(1.) Since said report was made, now nearly five years ago, a highway has been completed within the limits mentioned in the petition of said Ives in said case.—(2.) Said highway has been in use by the public nearly five years, and has been maintained by the town of East Haven as a public highway; two substantial houses have been built on it, and other lots thereon have been bought for building purposes.—(3.) Said highway being within the limits of said borough, the duty of keeping the same in repair, by reason of changes in the charter of said borough, now devolve on said borough, so that the construction of another highway as recommended in said report of the committee which would run nearly parallel to, and within from forty to one hundred and ten feet of the highway now in use, would cause great expense to said borough, and such a highway would be useless, as the one now existing within the limits named in the petition of said Ives is sufficient for every possible demand of public convenience and necessity.

At the September term of the court, 1878, to which the case had come by continuances, the town of East Haven made the following additional remonstrance:—

And for further cause of remonstrance said town says that the road in said report described as laid out and graded by said Henry Rogers has been kept open for public use, and used in fact, since the filing of said report, continuously to the present time; and meets all the wants of the public; and is within the limits specified in said application for the lay-out of a new highway; and is within one hundred and ten feet of, and in great part within a much less distance from, said highway recommended by said committee, being in one place only forty feet therefrom; and that a dwelling-house was built upon said road in 1874, and has been ever since inhabited, and would be inaccessible if said road were abandoned. Inasmuch, therefore, as for upwards of four years last past said road over said Rogers's land has been dedicated to public use and traveled over, said other road, recommended by said committee, is now, at all events, wholly useless, and would be a mere burden upon the town, of no benefit to the public; wherefore, if the court should overrule its remonstrance already filed, for any cause, then the town prays that said application be recommitted to the same or some other suitable committee to hear the parties again as to the question of common convenience and necessity.

The court after hearing the remonstrances made the following interlocutory decree:—

This court having, at the present term thereof, fully heard the petitioners and all the several parties in interest upon all the questions raised by said remonstrants, with their witnesses and counsel, and having fully heard all parties in interest upon the question of the acceptance of said report by this court, and having duly considered the same, does hereby find:—

That before the bringing of the petition the petitioner requested the selectmen of the town of East Haven to lay out the highway in the petition prayed for, and that they neglected and refused to lay out the same.

That the bond of the petitioner described in said report was, during the trial before the committee, executed and delivered to the committee in the manner stated in the report,

and that, during the trial before the committee, neither the respondent town nor any of the parties in interest made any objection to the form or sufficiency of the bond, and that no objection was ever made to it until after the report was presented to this court.

And touching the first remonstrance filed by the town of East Haven, it is found that the first and third reasons therein alleged are, in connection with the facts, insufficient in the law, and that the second of said reasons is untrue.

As to the seventh reason, (and the same reason alleged in several other remonstrances,) it is found that the committee did receive evidence when considering the question of common convenience and necessity, that the lots, adjacent to the road laid out by them, would probably be salable for building purposes at higher prices than the lots adjacent to a certain other road laid out by Henry Rogers and described in the remonstrances; such evidence being introduced and received as tending to show that the taxable grand list in the town would be so far increased, in consequence of laying out the road prayed for by said Ives, as to justify the expense of such lay-out; and that the committee did not act improperly or irregularly in receiving such evidence against the defendants' objection for irrelevancy for such purpose.

As to the eighth reason it is found that the bond was delivered to E. E. Hall, the attorney of the town in the conduct of the cause before the committee and before the court, with the request that he would hand it to the town agent; and that he never did so, but had it in court as attorney for the town; and that so much of the reason as is inconsistent with the foregoing finding is untrue, and that the facts are insufficient ground of remonstrance.

The foregoing findings as to the reasons contained in the remonstrance of the town, are to be taken to apply equally to the same reasons stated in the other remonstrances in the cause.

And as to the additional remonstrance of said town it is found that the same is insufficient; and it is further found that the remonstrance of the burgesses of Fair Haven East

is insufficient, as also the additional remonstrance of H. Rogers. And this court further finds that all the remaining reasons for rejecting the report contained in the several remonstrances, with the exception of the one in regard to alternative assessments of damages and benefits by the committee, are untrue; except the following, as to which the following special finding is made:—

The paper bearing date April 23, 1874, as an acceptance of service of the petition and citation, was signed by the two selectmen on the 1st day of May, 1874, upon the statement made to them by the petitioner that time would be thus saved in the commencement of proceedings, and for the purpose of preventing the delay in the return of the petition to court which would be necessary if the same was regularly served upon the respondents.

After the return of the petition to court, Charles A. Bray, agent for the town of East Haven, to defend all actions against them, and acting by authority of the selectmen of the town, signed the following written agreement with the petitioner:

"In the case of *Charles Ives* v. *The Town of East Haven*, now pending in the Superior Court for New Haven County, it is agreed that the judge holding the May term of said court, 1874, shall select and appoint three judicious and disinterested persons as a committee to act in said case, pursuant to sec. 29 of the statute entitled an act concerning highways and bridges. East Haven, May 16th, 1874.

CHARLES A. BRAY,
*for the Selectmen of said town,*
*and in his capacity of Special Town Agent.*
CHARLES IVES."

Upon the hearing before the committee, Henry Rogers, one of the remonstrants, alleged the want of a sufficient service of the petition, and the discrepancy between the actual time of the acceptance of service by the selectmen and the date of the paper signed by them, as a reason why the hearing should not be proceeded with.

The court finds that the allegations in the remonstrances inconsistent herewith are untrue and that upon these facts there is no sufficient ground of remonstrance.

The court finds that the committee, after viewing the ground, decided to deviate eight and a half feet, at the northerly end, from the line as to which they had heard evidence, and so laid out the road; all of which is within the limits described in the petition. Upon these facts, all allegations in the remonstrances inconsistent with them being untrue, the court overrules these grounds of remonstrance.

Upon the remonstrance of Rollin McNeil, the court finds that on the 2d day of September, 1874, McNeil and his family were absent in the state of New York and his house was vacant, and that he did not return home until the 15th day of September, 1874, when the hearing had commenced but had not progressed far; that no copy of the order of notice was at any time left at his house; that on the said 2d day of September the officer charged with the service of the order was about to leave the copy at his house, when he was informed by his partner in business that McNeil was absent and his house vacant, and he suggested to the officer to leave the copy with him, and said that he would send it at once to McNeil; that the officer accordingly left the copy with him, and that he at once sent it to McNeil, who received it on the next day; and that on his return he had full opportunity to be heard before the committee, but by advice of his counsel did not appear before them. Upon these facts the court overrules the remonstrance of said McNeil.

This court is of the opinion, and therefore decides, that the alternative assessments of damages and benefits by the committee is irregular and improper, and that the committee should make their assessments definite and certain, and that the report is in respect to damages and benefits incomplete; the court therefore re-commits the report, that the committee may complete it so far as the damages and benefits of the parties in interest therein are concerned.

The committee afterwards, at the same term of the court, made the following supplemental report:

The undersigned, the committee appointed in said cause, having made to said court at its October term, 1874, a report of our doings thereon, and said court at its September

term, 1879, having re-committed said report to said committee to be completed so far as the damages and benefits of the parties in interest therein are concerned, have attended to said duty, and we have assessed and do hereby assess the damages and benefits to the several parties, caused by the lay-out of said highway from Hill street to Hemingway street, as set forth in our said report, as follows, to wit: To the following persons we assess the sums respectively set opposite to their names, to be paid to them by the town of East Haven as damages by them sustained over and above all benefits accruing to them by the laying out of said highway, viz.: Henry Rogers, $800; Susan A. J. Kirby, $50; Rollin McNeil, $100; Edward L. Washburn, $100; Rufus Rogers, or his legal representatives, $150. And that the following persons shall pay to the town of East Haven the sums respectively set opposite to their names for the benefits accruing to them over and above all damages by them sustained, viz.: Charles Ives, $400; Samuel B. Hill, $200. And to all other persons in interest we assess the damages and benefits as equal. Dated New Haven, November 15th, 1879.

A remonstrance against the acceptance of this supplemental report was filed by the town of East Haven, on the following grounds: 1st. That the committee gave no notice of their meeting for a further hearing and consideration of the case under the interlocutory order of the court. 2d. That the original report still remained not set aside, with its former errors. 3d. That there were now two separate and inconsistent reports. 4th. That the committee had made their final assessments in view of the existence of the Rogers road, by which an unreasonable burden had been cast upon the town. 5th. That the assessments in the supplemental report were identical with the alternative assessments in the original report, and yet the land abutting the proposed road and the Rogers road had greatly declined in value.

Other parties interested severally filed remonstrances, the grounds of which were in part the same as those of the above remonstrance, or are sufficiently stated in the opinion of the court.

The court (*Culver, J.*) overruled the remonstrances, accepted the original report and the supplemental report as a modification of it, and passed a decree laying out the highway, and assessing the costs of the suit against the town of East Haven.

In the matter of costs the town of East Haven objected to the allowance of any; but the court allowed full costs, as in ordinary civil actions, except that no fees or mileage were taxed for witnesses. The town excepted.

The town of East Haven, and all the other respondents, severally filed motions in error, and brought the record before this court. The errors assigned are sufficiently stated in the opinion.

*C. Ives* and *C. Ives, Jr.*, for the petitioner.

*S. E. Baldwin*, for the town of East Haven, respondent.

*G. H. Watrous*, for H. C. Hurd, P. Fay, and A. M. Hemingway, respondents.

*E. E. Hall*, for S. B. Hill, respondent.

*C. K. Bush*, for A. B. Rose and G. A. Bradley, respondents.

*H. Rogers*, for C. Rowe, S. H. Kirby, and S. A. J. Kirby, respondents.

*H. G. Newton*, for R. McNeil, respondent.

PARK, C. J. One of the numerous questions made in this case is in regard to the mode by which the proceedings came into court. The statute of 1866 in regard to the laying out of highways by the Superior Court provides that the citation "shall be served upon one or more of the selectmen of the town within which such highway is, to appear if they see cause," &c. No such service was made in this case, but two of the five selectmen of the town of East Haven waived the service of the citation, in a writing to that effect upon the petition, at a time when but eleven days could intervene before the sitting of the court to which the petition was made

returnable, while the statute requires that a citation be served twelve days before the session. It further appears that during the term of the court to which the petition was made returnable, Charles A. Bray, who had been duly appointed special town agent "to attend to all suits brought against the town," agreed in writing with the petitioner that the court at that term might appoint a committee in the case, and that a committee was accordingly appointed, who subsequently heard the case, and made their report, which report is the subject of the present controversy.

In these circumstances the question is, was the town so in court that it is bound by the proceedings?

We do not deem it necessary to determine whether the action of the selectmen in waiving service of the petition bound the town. We can however see no good reason why highway proceedings against towns should be an exception to the general rule that parties entitled to have papers served upon them, either by reading or by a certified copy, may dispense with that formality if they choose. Time and expense are saved by so doing, without any detriment whatever resulting to the parties. But however this may be in a proceeding like the present, we think it clear that the town appeared in the case, through its authorized special agent, when he made the agreement with the petitioner for the appointment of a committee in the case. And, after a long and expensive trial had been had before the committee, in which the town participated, and a report adverse to the parties remonstrating had been made, we think it was too late to go back of the action of the town in the premises, and complain of the mode by which the proceeding came into court. This could not be done in other cases, and we see no reason why it should be done here. *Finch* v. *Ives*, 22 Conn., 101; *Bailey* v. *Town of Trumbull*, 31 Conn., 581; *Fowler* v. *Bishop*, 32 Conn., 199; *Post* v. *Williams*, 33 Conn., 147; *Woodruff* v. *Bacon*, 34 Conn., 181.

Towns are required by statute to construct and maintain necessary highways within their limits unless otherwise

provided, and although they are constructed for the general public, still this fact makes no difference in the mode of procedure when the Superior Court orders their construction. Towns are regarded as parties in highway cases as much as in others, and are as much bound by their admissions and waivers.

Chief Justice BUTLER, in the case of *Beardsley* v. *The Town of Washington*, 39 Conn., 265, treats a case of this character as governed by the same rules and principles that are applicable to other cases, and held the town bound by a waiver arising from their conduct in that case, as we hold them bound here.

The objection we have considered cannot be taken advantage of by the land-owners along the line of the road. If the town was in court by a voluntary submission to its jurisdiction, it was in court for all purposes whatsoever, and as much so as it would have been if the citation had been regularly served. The land-owners were not parties to the case in the first instance, and could not be made parties till the proceeding was pending in court; and when it was so pending by the waiver of the town, it was too late for them to make objection to a transaction that occurred before they were interested in the suit. It would be strange if such owners should be permitted to complain of want of service on the town, when the town itself, the only party respondent at the time, waived all objection to the want of service by its appearance and defence in the case. Besides, the case last cited held that such owners were themselves bound by a similar waiver growing out of their own conduct. The reasoning of that case applies with equal force to this.

It has been urged as another objection that the court did not issue an order of notice to be served on the parties particularly interested in the proceeding, and did not fix a time and place for the hearing before the committee, until a term subsequent to the one at which the committee was appointed. It is not pretended that the parties had not sufficient notice by the order to prepare their cases for trial, but the objection is placed upon the technical ground that such order of notice

and such fixing of the time and place for the trial must be made at the same term of the court at which the committee was appointed. We see no reason in this objection. The court that made the appointment was the same court that made the order. Different terms cannot make it a different court, nor affect its right to act in the matter. Some terms are much longer than others. Suppose the term of the court had continued from May till October; would the case have been any different? We think not.

A further objection is made, that the committee improperly heard evidence on the question whether the selectmen of the town had neglected and refused to lay out the road before the petition was brought. The court subsequently found this fact in the case, which rendered the finding of the committee in this respect wholly immaterial. It could not have occasioned any detriment to the cause of the remonstrants. The case of *Southington* v. *Clark*, 13 Conn., 370, fully justifies the action of the court in this respect.

We think the bond of the petitioner was properly received in evidence by the committee. It described the way as correctly as it could have been done at the time it was executed, and though it does not state the sum for which the work will be done, yet as it binds the petitioner to make the road wholly at his own cost, a statement of the sum was not necessary. It conforms sufficiently to the statute, and obviously was binding on the parties to it.

It further appears in the case that the committee made an alternative assessment of land damages and benefits to adjoining proprietors, and that for this cause the court re-committed the report in order that they might make their assessment definite and certain. No additional order of notice was made for the parties to appear before the committee and again be heard upon the question of damages and benefits, and no further testimony was heard on the subject, but the committee made a supplemental report in which the damages and benefits were definitely determined from the evidence they had previously heard. This action of the court is made the basis of several grounds of complaint.

It is said, in the first place, that the court had no power to re-commit the report, because the statute confers no authority for the purpose; that if there was anything erroneous in the report the court should have rejected it entirely, and appointed another committee to hear the case *de novo*. But we think the case of *Waterbury* v. *Darien*, 9 Conn., 252, fully sustains the action of the court in this matter. Judge WILLIAMS says, in that case—"But as the court must have had the power to re-commit the report, they must have had the power to re-commit it for a specified object."

It is said in the second place, that if the court had the power to re-commit the report, still the respondents were entitled to a hearing *de novo* on the assessment of damages and benefits. But why were they so entitled? They had been fully heard on the subject with their witnesses and counsel, and presumably nothing new could be said. All the evidence that had been heard and all the considerations that had been presented, must have been fresh in the recollection of the triers, and all that was required was to change an indefinite to a definite finding of damages and benefits. We think the court committed no error in this respect.

But it is said that, if the court committed no error here, still the committee erred in making a supplemental report on the subject. It is said that they should have changed their first report in the particular required, so that the whole case might appear in one report, and should not have left it in two reports inconsistent with each other in respect to the assessments. There can be no doubt that the course claimed by the remonstrants could have been taken by the committee, and, perhaps, it would have been the better course; still both reports must be taken together, and when so considered, in connection with the order of the court, there is no real inconsistency. The supplemental report nullified the indefinite assessment of damages and benefits made in the first report, and became a substitute for that report and as the final report superseded it.

It further appears in the case that the legislature in 1878 amended the charter of the borough of Fair Haven East, and

imposed upon the borough the burden of maintaining all highways within its limits. And, it is said that, although the borough had no interest in this proceeding till nearly four years after the report of the committee was made in the case, still, inasmuch as the highway in question is within the limits of the borough, and the borough will be required to maintain it if it should be established, the action of the legislature operated to defeat the suit. It is not easy to see how this was accomplished, or what effect the action of the legislature could have on the case. The committee had heard the parties, and had made their report a long time before the borough had become interested in the matter, and it could not therefore be said that the committee were guilty of any irregular or improper conduct in respect to the borough. How then could the court refuse to accept the report, when it was its duty to do so unless there had been irregular or improper conduct on the part of the committee?

These remarks apply with equal force to the Rogers dedicated highway. At the time the case was heard before the committee the Rogers road had just been graded and dedicated to the public, but it was not then a highway, and there was no certainty that it would ever become one, inasmuch as its existence as a highway depended upon the future action of the public in accepting it as such. It cannot be said, therefore, that the action of the committee was irregular in respect to that inchoate road, or that the court erred in accepting the report without reference to that road. The claim of the remonstrants would constitute the court the ultimate tribunal to determine in many cases whether or not it was necessary and expedient to lay out a proposed highway, when the statute declares that "no trial as to the necessity and expediency of laying out such highway shall be had before said court." Gen. Statutes of 1866, p. 499. It is said that although the committee had decided from the facts existing at the time of the hearing that the highway prayed for was necessary and expedient, still other facts concerning the way, which came into existence after the hearing was had, taken in connection with the facts heard by the com-

mittee, rendered the proposed highway unnecessary and inexpedient, and that the court ought to have so decided and to have rejected the report on this ground. If this could be done, then, of course, a case of the opposite character would have required the rejection of the report, in order that another committee might lay out the proposed highway; and so the court might be called upon in all cases to determine the necessity and expediency of the proposed way, should a considerable amount of time elapse between the report of the committee and the hearing before the court upon its acceptance; which we think cannot be done.

It is further claimed, that the order of notice issued by the court was never technically served upon Rollin McNeil, one of the land-owners along the line of the proposed road. The order required that it should be served by leaving a certified copy in the hands of the several persons named therein, or that the copy should be left at their usual place of abode. Rollin McNeil, one of the persons named in the order, was absent from his usual place of abode. He had gone with his family into the state of New York, and was there when the officer went to his dwelling-house to make service upon him. The officer found the place vacant, and was about to leave a certified copy of the order there, when he was informed by McNeil's partner in business where McNeil was. The partner requested the officer to leave the copy with him, and promised to forward it to McNeil. This was done, and McNeil received the copy the following day. And it is a fact in the case that he received the copy much sooner than he would have done had it been left at his usual place of abode. McNeil returned from New York in time amply sufficient to prepare his case for trial before the committee, but he chose not to appear before them. These are the facts, and we think it clear that there is no merit in his claim. The whole object of giving notice to the parties in interest was accomplished in his case, and he has no cause to complain.

It is further claimed that the court erred in taxing costs against the town. Full costs were allowed the petitioner, except those for witnesses. The revision of 1866 allowed

costs in highway cases, and so does the revision of 1875. But the session acts of 1875 so amended the revision of that year that no costs for attendance in court and for witnesses are now allowed in such cases. Acts of 1875, p. 63, sec. 2. There is error, therefore, in the decree of the court so far as it allows costs for the attendance of the petitioner in court, and to that extent the decree is reversed.

A few other questions are made in the case, but they are not important enough for consideration.

There is no error in the decree, except as to the matter of costs.

In this opinion the other judges concurred.

# SUPREME COURT OF ERRORS.

## HELD AT NORWICH FOR THE COUNTY OF NEW LONDON,

### ON THE FIRST TUESDAY OF SEPTEMBER, 1880.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, JS.

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MARY E. RAND AND OTHERS *vs.* CHARLES W. BUTLER, ADMINISTRATOR, AND OTHERS.

A testator bequeathed certain property, real and personal, to trustees, the income of which was to be expended for the comfortable support for life of his grandson *B*, with the following provision: "On the decease of said *B* said trustees are to transfer and deliver the property to my heirs-at-law, to be to them and their heirs and assigns forever." *B* was the only living issue of the testator at the time of the making of the will and of the death of the latter and was incapable from mental weakness of managing his own affairs. He died several years after, without issue. Upon the question whether the heirs-at-law of the testator, who were to take upon *B's* death, were the heirs at the testator's death or at *B's* death—in the former case the remainder vesting in *B* himself as sole heir—it was held:

1. That to warrant the giving to the word "heirs" any meaning different from the ordinary and settled one it must clearly appear that such was the testator's intention.
2. That such an intention could not be inferred from the facts that *B* was mentally weak, that the testator had placed the property given him for his life under a trust, and that he had used the word "heirs" in the will when *B* was himself at the time his sole heir.
3. That if the heirs-at law intended by the testator were the heirs existing at *B's* death, then the bequest was void under the statute against perpetuities, as well as at common law.
4. That the only warrantable construction was that which made the term mean the heirs existing at the testator's death.
5. That *B* was not to be excluded in ascertaining these heirs.

BILL IN EQUITY to open a decree passed by the Superior Court giving a construction to a will, and praying for a new hearing of the matter; brought to the Superior Court in New London county.

The will in question was that of John A. Fulton, formerly of the city of New London, who died in 1844. The will contained three devises and legacies to trustees for the benefit of his grandson, Thomas Bradley, which were all in the same terms, except as to the property given by them. The first one was as follows:

"I give, devise and bequeath the land and house belonging to me, situated at the corner of Richards and Huntington streets in said New London, to Ebenezer Learned of said New London, and my nephew Jonathan Perkins, of Medford in the state of Massachusetts, to be by them held in trust for the uses and purposes following: that is to say, the rents, profits, and income of said land and house, after deducting all necessary repairs, charges, and taxes, to be by them in such ways as their discretion may dictate expended for the comfortable support of my grandson, Thomas Bradley, of said New London, during his natural life, together with the income and profit of the other estate hereinafter bequeathed and devised to them, the said trustees, for that purpose. And on the decease of the said Thomas Bradley, then the said trustees are to deliver and transfer said land and house to my heirs-at-law, to be to them and their heirs and assigns forever."

The two other bequests were of personal property.

Robert Coit, of New London, had succeeded to the trust, and brought a petition to the Superior Court for advice as to the construction of the will. It was found that Thomas Bradley was, at the date of the will and at the death of the testator, his only living issue and heir, being the son of a daughter of the testator who had died several years before; that Bradley died intestate and without issue in 1876, and that he had been through life incapable, from mental deficiency, of managing his own affairs. The Superior Court advised the trustee that the heirs-at-law of the testator, who were to take the property on the death of Bradley, were those who were his heirs-at-law at the death of Bradley, and not at the death of the testator, and that Bradley consequently was not to be included as an heir-at-law. The

present petition was brought by sundry persons who were heirs-at-law of the testator, being representatives of his brothers and sisters, but issue of his nephews and nieces who were deceased at the time of Bradley's death. They had not been made parties to the former petition, and now prayed that the decree in that case be opened and a new hearing had.

The case was reserved upon these facts for the advice of this court.

*A. C. Lippitt*, and *J. C. Joy* of Boston, for the petitioners.

By the terms of the will Bradley never had any interest at law in the devised property; a legal estate therein, both in the personalty and realty, vested for his life in the trustees; and the remainders thereof vested in those persons, exclusive of Bradley, who were the testator's heirs-at-law at the time of his death. *Doe* v. *Lawson*, 3 East, 278; *Stert* v. *Platel*, 5 Bing. N. C., 434; *Nicholson* v. *Wilson*, 14 Sim., 549; *Baldwin* v. *Rogers*, 3 DeG., M. & G., 649; *Childs* v. *Russell*, 11 Met., 16; *Brown* v. *Lawrence*, 3 Cush., 390; *Abbott* v. *Bradstreet*, 3 Allen, 587. Or by the terms of the will a legal estate for Bradley's life vested in the trustees with contingent remainders to the testator's heirs-at-law. *Briden* v. *Hewlett*, 2 Mylne & K., 90; *Booth* v. *Vicars*, 1 Coll., 6; *Pinder* v. *Pinder*, 28 Beav., 44; *Chalmers* v. *North*, 28 id., 175; *In re Greenwood's Will*, 3 Giff., 390; *Lees* v. *Massey*, 3 De G., F. & J., 113. And in either case Bradley is excluded from taking as the testator's heir-at-law. *Jones* v. *Colbeck*, 8 Ves., 38; *Bird* v. *Wood*, 2 Sim. & St., 400; *Butler* v. *Bushnell*, 3 Mylne & K., 232; *Minter* v. *Wraith*, 13 Sim., 52; *Cooper* v. *Denison*, 13 id., 290; *Say* v. *Creed*, 5 Hare, 580. Under the statute, the whole estate should be distributed equally to the brothers and sisters of the deceased of the whole blood and those who legally represent them. The petitioners take by representation. Gen. Statutes, p. 373, sec. 8; 1 Swift's Dig., 115–118; *Kennedy* v. *Kennedy*, 1 Swift's System, 286; *Cook* v. *Catlin*, 25 Conn., 387.

*H. W. Murray*, of Boston, and *G. Greene, Jr.*, for the respondent heirs.

*First.* The heirs-at-law are ascertainable at the testator's death.

1. The fact that the person to whom the estate for life is given is such heir is not sufficient ground to vary the general rule. 1 Red. on Wills, ch. 9, sec. 30, art. 21, and note; *Holloway* v. *Holloway*, 5 Ves., 399; *Doe* v. *Lawson*, 3 East, 278; *Bullock* v. *Downes*, 9 H. L. Cases, 1; *Mortimore* v. *Mortimore*, L. Reps., 4 App. Cases, 448; *Abbott* v. *Bradstreet*, 3 Allen, 587, and cases cited by the court; *Gold* v. *Judson*, 21 Conn., 624; *Boydell* v. *Golightly*, 7 Jurist, 53; *Wilkinson* v. *Garrett*, 2 Coll., 643; *Ware* v. *Rowland*, 2 Phill., 635; *Urquhart* v. *Urquhart*, 13 Sim., 613; *Nicholson* v. *Wilson*, 14 id., 549; *Allen* v. *Thorp*, 7 Beav., 72; *Seiffert* v. *Badham*, 9 id., 370; *Lasbury* v. *Newport*, id., 376; *Cable* v. *Cable*, 16 id., 507; *Gorbell* v. *Davison*, 18 id., 556; *Lee* v. *Lee*, 1 Drew. & Sm., 85; *Bird* v. *Luckie*, 8 Hare, 301; *Jenkins* v. *Gower*, 2 Coll., 537; *Day* v. *Day*, 4 Irish Rep. Eq. Series, 385; *Baldwin* v. *Rogers*, 3 De G., McN. & G., 649; *Philps* v. *Evans*, 4 De G. & Smale, 188; *Mortimer* v. *Slater*, 7 L. Reps., Chan. Div., 322; *Stert* v. *Platel*, 5 Bing. N. C., 434; *Abbott* v. *Bradstreet*, 3 Allen, 587; *Gold* v. *Judson*, 21 Conn., 624.

2. To vary this general rule there must be the clearest evidence of a contrary intent in the testator. There is none in this case. *Gold* v. *Judson*, 21 Conn., 624.

3. To make the heirs ascertainable only on the death of Thomas Bradley would be to create by construction a contingent estate instead of a vested one, which is contrary to the policy of the law that remainders must be construed as vested if possible. 2 Washb. on R. Prop., book 2, ch. 4, § 1, art. 18. A legacy to a person or class to be paid or divided at a future time takes effect on the death of the testator. *Dale* v. *White*, 33 Conn., 296.

*Second.* If the gift to heirs-at-law means those who held that position at Bradley's death, it offends the statute against perpetuities. Gen. Statutes, p. 352, § 3.

1. It must not be possible that the estate *may* remain unvested beyond the allowed limit. It makes no difference if on the event, to wit, Bradley's death, the petitioners are found in fact to come within the statutory limit. Redfield on Wills, ch. 7, § 38, art. 14; 2 Washb. R. Prop., book 2, ch. 7, § 2, art. 3; *Brattle Square Church* v. *Grant*, 3 Gray, 152; *Fosdick* v. *Fosdick*, 6 Allen, 41; *Jackson* v. *Phillips*, 14 id., 572; *Jocelyn* v. *Nott*, 44 Conn., 55.

2. The gift to heirs is to a class. If one of the class offend the statute, so does the whole class. The petitioners must show that not one of the class they claim should take can offend the statute, or the bequest to them is void. 2 Washb. R. Prop. (supra); 1 Jarman on Wills, 261. The bequest must not be construed so as to make it void. It was impossible, at the testator's death, to say whether every one of those persons who, at the then future period of Thomas Bradley's death, should stand in the relation of heirs to the testator, would have been born at the date of the will, or would be the immediate descendants of persons living at the date of the will. The bequest, therefore, as construed to be a bequest to those who at Bradley's death should be the testator's heirs, is void.

3. If the bequest is void, the statute of distributions would, if the former decree had never been passed, give the personality to Thomas Bradley. 2 Washb. R. Prop. (supra); *Brattle Square Church* v. *Grant*, 3 Gray, 156.

*Third.* As to the ancestral real estate, the petitioners need no decree to enforce any rights they may have. But as to the personality, which is the bulk of the estate, they have no rights to enforce, since they are not the heirs-at-law of the testator. The petitioners are collateral relatives, whereas Thomas Bradley, the testator's grandson, was his sole heir at his death.

*W. C. Crump* and *J. Halsey*, for R. Coit, trustee.

PARK, C. J. The question in this case is, whether the expression "to my heirs-at-law" in the three devises and legacies in trust for Thomas Bradley, means the heirs-at-law

of the testator at the time of his own death or his heirs-at-law at the time of the death of Bradley. Those who contend for the latter construction claim that by clear implication Bradley is excluded from the class who take as heirs, although a grandson of the testator, and at the death of the latter his sole living issue and heir; for if he were to be included among the heirs-at-law he would, by his legal representatives, take the whole and exclude all other heirs; while the testator put the property given him under a trust for his life on account of his imbecility, and has also used the plural word "heirs" in each of the clauses in question, showing that he had in mind more than one heir.

In the case of *Gold et ux.* v. *Judson et al.*, 21 Conn., 616, it was held that to give to the word "heir" in a will a different construction from its usual and legal acceptation, the intention of the testator must be clear and decisive. According to this rule, the claim of the petitioners that Bradley should be excluded from consideration in ascertaining the heirs at the death of the testator, must fail, for there is nothing in the will that shows at all clearly that the testator gave to the word "heirs" a different meaning from that which the word ordinarily imports. The fact that the property was put into the hands of trustees for the benefit of Bradley during his life, from which it may be inferred that he regarded him, as is found to have been the fact, as incapable of managing his own affairs, is clearly insufficient of itself. And it is not materially aided by the fact that he speaks of his *heirs* in the plural number, while Bradley was his sole heir. This is the common mode of expression in wills. Hence, if this will should be so construed that the heirs must be ascertained at the death of the testator, the remainder would vest in Bradley as sole heir, and he would take the property to the exclusion of all others, and on his death the petitioners would have no interest in any part of the estate except the realty, which, being ancestral estate, all those of the blood of the testator may take by inheritance.

But if the heirs of the testator intended are those who

were such at the death of Bradley, the same result would be reached; for in that case the clauses of the will under consideration would be void by the statute against perpetuities, which declares that "no estate in fee simple, fee entail, or any less estate, shall be given by deed or will to any persons but such as are, at the time of making such deed or will, in being, or to their immediate issue or descendants." Gen. Statutes, tit. 18, ch. 6, sec. 3.

Under this statute it has been held that any conveyance by devise, bequest or grant which may by possibility violate the statute, is void, whether it does so in fact or not. In the case of *Jocelyn* v. *Nott*, 44 Conn., 55, the court say: "All estates must vest during the lifetime of some person in being or the lifetime of the issue of some person in being." And the same necessity exists by the common law, which requires that limitations by way of executory devise must be made to take effect after the death of the testator, during the life or lives of persons in being and twenty-one years afterwards, and any such devise which by possibility may not so take effect has been held to be void. Such is the common law of England, as also of Massachusetts and other of our sister states. *Brattle Square Church* v. *Grant et al.*, 3 Gray, 142; *Sears* v. *Russell et al.*, 8 Gray, 86; *Fosdick* v. *Fosdick*, 6 Allen, 41.

It follows, therefore, that if a proper construction of the will requires that the heirs of the testator should be selected on the death of Bradley, the remainder over would be void, leaving Bradley to inherit the property.

Hence we see that in either view of the case the petitioners can have no interest in the personal property, of which the estate is largely composed, and the realty, being ancestral estate, is open to them in actions at law, if they are of the blood of the testator and entitled to share in it.

We advise judgment in favor of the respondents.

In this opinion the other judges concurred, except GRANGER, J., who dissented.

JOAB B. ROGERS *vs.* MARY A. CARROLL.

A general statute provided that writs of error might be brought from the judgments of all city courts to the Superior Court. A later act repealed this statute and provided that writs of error from the judgments of city courts should be brought as provided in the charters of the several cities. The charter of the city of Norwich contained no provision for writs of error from the judgments of its city courts. Held that no writ of error would lie to the Superior Court.

And held that jurisdiction over writs of error was not given to that court by a provision of the city charter that where a party is entitled to a writ of error a motion in error may be allowed to the Superior Court.

WRIT OF ERROR from a judgment of the City Court of the city of Norwich, brought to the Superior Court in New London County. The defendant in error moved that the cause be erased from the docket on the ground that the Superior Court had no jurisdiction of the writ of error; which motion the court (*Martin, J.*,) granted, and ordered the case stricken from the docket. The plaintiff in error brought the record before this court by a motion in error.

*S. Lucas*, for the plaintiff in error.

*S. S. Thresher*, for the defendant in error.

PARK, C. J. The question presented by the record in this case is, whether the Superior Court had jurisdiction of the writ of error brought by the plaintiff to reverse a judgment of the City Court of the city of Norwich, rendered in June, 1875. Prior to the revision of 1875 there was a general statute which provided that writs of error might be brought to the Superior Court from the judgments and decrees of city courts. Gen. Statutes, 1866, page 44. By the revision of 1875 this statute was repealed, and it was provided that "writs of error from judgments and decrees of city courts shall be brought as provided in the charters of the several cities." Gen. Statutes, 1875, page 449. The charters of the city of Norwich does not provide for the bringing of writs of error in any manner. The Superior Court therefore had no

jurisdiction of this writ of error, and the cause was properly erased from the docket of the court.

The counsel for the plaintiff in error insist that the statute should be construed as conferring jurisdiction, when considered in connection with the charter of the city, which provides that "when a party is entitled to a writ of error, a motion in error may be allowed to the Superior Court, and that court shall proceed therein in the same manner as on a writ of error." But it is clear that there is nothing in the statute or charter, considered together or separately, that confers jurisdiction upon the Superior Court of such writs of error. The statute refers the subject wholly to the charter, and the charter merely authorizes motions in error where parties are entitled to writs of error.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

48 301
61 443

## Ira Main *vs.* Amasa M. Main.

Where a suit is withdrawn in term time and the defendant afterwards enters for costs, which are taxed in his favor and judgment entered up for their amount against the plaintiff, the judgment is to be regarded as rendered at the time of the withdrawal and not at that of the taxing of the costs.

Where a suit is withdrawn more than three days before the end of a term the plaintiff is not bound to give notice of the withdrawal to the defendant. The defendant having entered an appearance is regarded as in court and taking notice of any action affecting the case. If he fails to enter for costs before the close of the term he has lost his right to them.

Civil Action against the defendant as surety upon a recognizance for costs; brought by appeal to the Court of Common Pleas of New London County. The following facts were found by the court:—

On the 28th day of September, 1877, one Whitford brought an action against Ira Main, the present plaintiff, returnable before a justice of the peace on October 6th, 1877. It was

adjourned to October 16th, 1877, when it was tried and judgment given for the defendant. From this judgment the plaintiff appealed, and he, as principal, and Amasa M. Main, the defendant, as surety, entered into a recognizance for one hundred dollars, conditioned that he prosecute his appeal to effect.

The case came by the appeal to the February term, 1878, of the Court of Common Pleas of New London County, when the defendant by counsel entered, and the case came by continuance to the April term, 1878. On the 29th day of this term, being the 2d day of July, 1878, the plaintiff withdrew his action, without the actual knowledge of the defendant, who learned of it between the April term and the August term, and immediately entered for costs.

A dispute arose about the amount of costs, and the matter came before the court by motion. The question came before the court several times, but the surety, Amasa M. Main, did not appear, and had no knowledge of the hearings. At a final hearing, on July 14th, 1879, the court decided the question, and the following entry was made upon the file: "Costs taxed for the defendant, July 14th, 1879, as of July 2d, 1878. Delay found not to be due to laches of defendant." Execution was issued July 15th, 1879, and demand made upon the principal and surety.

The last day of the term was July 8th, 1878. The case did not appear upon the docket after this date, and no continuance was had, nor was it brought forward.

The present suit was brought January 18th, 1880, before a justice of the peace, returnable on January 26th, 1880, when the case was tried, and a judgment rendered for the plaintiff, from which the defendant appealed to the Court of Common Pleas of New London County. The case came, by continuance, to the April term, 1880, when it was tried, and judgment rendered for the plaintiff.

The court finds that the delay in taxing the costs, between the date of the withdrawal and July 14th, 1879, was not due to the laches of the defendant in that suit.

The hearing was to determine the amount of the costs in

controversy, and not the right of the defendant to costs. The costs were taxed to July 2d, 1878.

The defendant claimed first, that from these facts, as matter of law, the date of the withdrawal was the date of the judgment, and that hence the present suit was not brought within one year after final judgment; second, that if the proceeding in taxing costs, had on July 14th, 1879, was a final judgment, still it must be, and was, a judgment *nunc pro tunc*, and had legal relation to July 2d, 1878, and that hence this suit was not brought within one year after final judgment.

The court (*Mather, J.*,) overruled these claims and decided that final judgment, within the meaning of the statute, was rendered July 14th, 1879, and gave judgment for the plaintiff to recover the sum of one hundred dollars, with his costs.

The defendant brought the record before this court by a motion in error.

*L. Brown* and *D. G. Perkins*, for the plaintiff in error.

1 This action by statute could be brought only within one year after final judgment. Gen. Statutes, p. 495. The limitation begins to run at "final judgment;" the only meaning that can be attached to the words of the statute is that found in the definition always given by the courts. Under this strict legal construction the year must be computed from July 2d, 1878, the date of final judgment, and not from July 14th, 1879, the date of the taxing of costs. There could not be a judgment *nunc pro tunc*, since there was nothing to give it relation to July 2d, 1878.

2. If, however, a judgment was rendered July 14th, it must be a judgment *nunc pro tunc*, as of July 2d, for no other judgment could be rendered. Such a judgment is in all respects a judgment on the former date except the date of the mere act of the court; it is to all intents and purposes a judgment of the first date. The date of the judgment is therefore to be considered in this case as July 2d, 1878. *Brown* v. *Wheeler*, 18 Conn., 199; *Kelley* v. *Riley*, 106 Mass., 339; *Tapley* v. *Martin*, 116 id., 275; *Hackett* v. *Pickering*,

5 N. Hamp., 24; *Haynes* v. *Thom*, 28 id., 399; *Smith* v. *Clay*, 3 Bro., 640, note.

3. If an entry for costs was necessary to entitle the defendant to them, then he never acquired this right, since he made no legal entry, for he entered in vacation, and the judgment should be reversed for this manifest error. *Bishop* v. *Pardee*, 35 Conn., 4.

*S. Lucas* and *G. C. Ripley*, for the defendant in error.

The defendant in the court below relied on the statute of limitations, the part of which applicable to this case is as follows:—"No civil action shall be brought against any surety on any bond for costs only or recognizance for costs given in any civil action, or on the appeal of any civil cause, or bail bond, except within one year after final judgment has been rendered in the suit in which said bond or recognizance was given." Gen. Statutes, p. 495, sec. 11. The defendant claims that final judgment, within the meaning of that statute, was rendered in the suit of *Whitford* v. *Main* at the date of its withdrawal, and not when judgment in fact was rendered therein. This construction of the statute is too narrow, for if it be correct, there never was a time when the plaintiff could have brought a suit on the bond. This shows that the right of action had not then accrued. In bringing such a suit he would have to allege and prove the amount of the judgment in the other suit. He could not do that, except by reference to and by the record of the Court of Common Pleas, and there was no such record till judgment in fact was rendered; hence, by the defendant's construction of the statute, the plaintiff's right of action was barred before it was complete, and that too without any *laches* on his part. It is evident that the legislature never intended any such result, and it is familiar law that statutes of limitation do not commence to run till the plaintiff's right of action is so complete that he can maintain a suit thereon. The ruling of the court below was in harmony with the rulings of the courts of our sister states in their construction of similar statutes. *Allin* v. *Cook*, 1 Root, 54; *Sherman* v. *Wells*, 14

How. Pr. R., 522; *Champion* v. *Plymouth Congregational So.*, 42 Barb., 441; *Sherman* v. *Postley*, 45 id., 348; *Leavy* v. *Roberts*, 8 Abb. Pr. R., 310; *Jones* v. *Conoway*, 4 Yeates, 109; *Johnson* v. *Wren*, 3 Stew., 172; *Burr* v. *Engles*, 24 Ark., 283; *Banks* v. *Coyle*, 2 A. K. Marsh., 564; *Hardee* v. *Dunn*, 13 Louis. An., 602.

GRANGER, J. This is a suit against a surety upon a recognizance for costs, and by statute (Gen. Statutes, p. 495, sec. 11,) such a suit must be brought "within one year after final judgment has been rendered in the suit in which such recognizance was given." The question made in the case is, whether judgment was rendered in the suit in which this recognizance was given, on the second day of July, 1878, or on the fourteenth day of July, 1879. If rendered on the latter date the suit was brought within one year from the rendering of the judgment; if rendered on the former date the suit was brought after the expiration of the year, and the plaintiff can not recover.

It appears by the finding that the suit in which the recognizance was given was withdrawn by the plaintiff in the suit on the twenty-ninth day of the April term of the Court of Common Pleas in which it was pending, which was the 2d day of July, 1878. The term closed July 8th; the case did not appear on the docket after that date, no continuance was had, and the case was not brought forward. By statute (Gen. Statutes, p. 418, sec. 13,) a plaintiff has a right to withdraw his action at any time before the jury have rendered their verdict; in which case he must pay costs to the defendant, if the latter shall appear. A non-suit ends the case, and it can not be re-instated without notice to the other party or consent of both parties. A judgment of non-suit in such a case results from operation of law rather than from any action of the court. The court has no further jurisdiction over the parties or the action except for the purpose of taxing the costs, which is a mere incident, and may be done at any time at the convenience of the court. It is not in any proper sense a rendering of judgment, but a mere

fixing of the amount of costs, which are to be computed by rules established by statute, the act being largely clerical in its nature. Costs do not run after a withdrawal in term time, nor after notice to the defendant where the withdrawal is made, as it now may be, in vacation. If a suit is withdrawn in term time there is nothing in the statute making it necessary for the plaintiff to give the defendant notice; the presumption being that the defendant, having appeared in the case and therefore being in court, will take notice for himself of whatever takes place in court affecting his rights.

Upon these well settled principles it is clear that the judgment in this case must be regarded as rendered at the time of the withdrawal of the suit on the 2d day of July, 1878, and not on the 14th of July, 1879, when the costs were finally taxed.

But there is a ground which, it is claimed, and we think correctly, is fatal to all right of the defendant in the original suit to costs. The defendant did not enter for costs during the term at which the non-suit was entered, which was essential to his right to have a judgment for costs. *Richards* v. *Way*, Kirby, 269; *Bishop* v. *Pardee*, 35 Conn., 4.

There is error in the judgment, and it is reversed.

In this opinion the other judges concurred.



GEORGE W. SHAW AND ANOTHER *vs.* JONATHAN H. SMITH, TRUSTEE IN INSOLVENCY.

Where one contracts with another for a chattel not in existence, but to be made for him, though he pays the whole price in advance or from time to time as the work progresses, he acquires no title in the chattel until it is finished and delivered to him, unless a contrary intent is expressed.

And where the parties agree that the title shall at once vest in the buyer, so that the sale is complete as between the parties, yet the retention of possession by the maker leaves the chattel open to attachment by the creditors of the latter.

Where the maker of certain chattels fraudulently represented to the buyer that they were substantially completed and ready for delivery, and the buyer,

trusting the representation, paid the balance of the contract price, and the maker soon after made an assignment in insolvency, it was held, in an action of replevin brought for the chattels against the trustee in insolvency, that this fact could not affect the case, inasmuch as there was still no delivery of the chattels and no title that was good against the creditors of the maker.

A trustee in insolvency represents creditors, and has all the rights in such a case that creditors could have acquired by attachment.

REPLEVIN for a quantity of tools; brought to the Superior Court in the county of New London. The following facts were found by the court:

The defendant is the trustee of the insolvent estate of Joseph Corbett, assigned to him on the 26th of December, 1876, by Corbett, for the benefit of his creditors, under the provisions of the insolvent laws of the state.

Prior to this, on the 9th of September, 1876, Corbett and the plaintiffs, Shaw & Menown, entered into a written contract by which Corbett was to manufacture for the plaintiffs one thousand heads for the Wardwell sewing machine, according to certain specifications annexed to the contract, for $9,500; some to be ready for delivery on or before November 1st, 1876, and two hundred and fifty by the last day of that month; and, after that time, twenty-five per day. He was also to replace any piece that might not work on account of defect in material or not being made to gauge. Corbett was also to finish special tools for making the machine heads, according to specifications annexed, for $5,000. The plaintiffs were to deposit in a bank in Norwich, in their own names but for the use of Corbett, $2,500 on the 1st day of October, 1876, and $2,500 on November 1st, 1876, to be drawn for Corbett on the 10th day of those months if work to that amount should then have been completed, or if not completed, in proportion to the work completed; and after the deposit was exhausted the plaintiffs were to pay Corbett, on the 10th of each succeeding month, for all the machines delivered in the preceding month. A writing entitled "Specifications," signed by the parties and annexed to the contract, contained the following provisions: "The said tools and gauges to be of sufficient number and of proper quality to be capable of making fifty machines per day. The said tools

and gauges to be held in trust by the party of the first part for said Shaw & Menown, to be used by them in the manufacture of sewing machines, and all to be delivered to the said parties of the second part in working order and complete, upon the finishing of the work hereinafter specified, within ten days after written demand by said parties of the second part therefor."

Immediately after the execution of the contract, Corbett commenced to make and finish for the plaintiffs a set of special tools for the manufacture of the Wardwell sewing machine, and continued the work until the time of his assignment, when the work upon the tools ceased. These tools are the ones described in the plaintiffs' declaration.

At the time of Corbett's assignment a part only of the set of special tools was completed, a part was in process of manufacture, another part was in the rough, while towards the manufacture of still another part nothing had been done further than purchasing the material.

After the assignment the plaintiffs requested the defendant, as trustee, to complete the set of tools according to the terms of the contract, but he refused to do so.

The set of special tools, when completed, would be valuable for use in manufacturing the Wardwell sewing machine, but would be of little value for any other purpose; a small portion only could be used as general tools on other work.

The plaintiffs paid Corbett the full contract price for the set of special tools at the times and in the manner stipulated in the contract, except as the same was expressly waived by Corbett. They paid him on account of these tools, on the 9th of September, 1876, $2,500; on the 21st of October, 1876, $2,000; and on the 21st of November, 1876, $500. Corbett acknowledged the receipt of these several sums in writing, and in his receipt for the $500 expressed the same to be "in full for balance due on set of special tools as per contract of September 9th, 1876."

In the month of October, 1876, Corbett represented to the plaintiffs that the set of special tools would be completed during the following month, and when the $500 was paid he

represented that they were then substantially completed; which representation was believed by the plaintiffs to be true. But the set of special tools was not at that time substantially completed, which was well known to Corbett, and the plaintiffs were deceived by his false representation and were thereby induced to pay the $500.

No part of the set of special tools was ever delivered to the plaintiffs by Corbett, nor by the defendant as trustee, nor has Corbett, or the defendant as trustee, at any time recognized any right in the plaintiffs to the possession of them.

The entire assets of Corbett's assigned estate in the hands of the defendant, as trustee, are not more than sufficient to pay the preferred claims of his workmen.

The plaintiffs made demand, in writing, for the possession of the tools, upon the defendant, as trustee, on the 4th day of January, 1877, and after the defendant had duly qualified as trustee; but the defendant refused to deliver the tools to the plaintiffs.

Upon these facts the case was reserved for the advice of this court.

*S. Lucas*, for the plaintiffs.

1. On the finding of facts it appears that a fraud was practised upon the plaintiffs by the assignor, Corbett, whereby he obtained their money by means of representations which he knew at the time to be false. Having willfully and falsely represented to them, on the 21st of November, 1876, that the special tools were substantially completed, and the plaintiffs having acted upon those representations as true and paid him their money, he became thereby estopped from denying the truth of the representations, and the same estoppel affects the defendant as his trustee, who only succeeds to his rights, and should not be allowed to hold the fruits of his fraud.

2. The defendant received the property replevied subject to all the equities existing at the time of the assignment. The property not being held by attachment at that time, the defendant stands in the relation of a volunteer, and not as a

purchaser for value. Otherwise Corbett, by his voluntary assignment to the defendant, would be enabled to practice a double fraud upon the plaintiffs. *Palmer* v. *Thayer*, 28 Conn., 245; *Kelly* v. *Scott*, 49 N. York, 595; *Woodin* v. *Frazee*, 38 N. Y. Superior Ct., 190; *Ex parte Rockford, &c., R. R. Co.*, 1 Lowell, 345; *Winslow* v. *Story*, 2 Story, 630; *Matter of Howe*, 1 Paige, 125; *Goss* v. *Coffin*, 66 Maine, 432; *Dugan* v. *Nichols*, 125 Mass., 43; *Kenney* v. *Ingalls*, 126 id., 489; *Cook* v. *Tullis*, 18 Wall., 341; Bump on Bankruptcy (9th ed.), 494.

3. By the terms of the contract Corbett was to remain in possession of the property, and to hold it as trustee, so that actual possession by the plaintiffs was not contemplated by either party; and no delivery was necessary as between themselves to pass the title and vest it in the plaintiffs; and the plaintiffs had a right to suppose that the special tools were not only completed, but were being used for their benefit by Corbett in accordance with the terms of the contract. *Meade* v. *Smith*, 16 Conn., 360; *Hall* v. *Gaylor*, 37 id., 554; *Thompson* v. *Conover*, 32 N. Jersey Law, 466.

4. The case then stands, so far as the defendant is concerned, just as though the tools had been completed by Corbett, were in actual use by him under the contract, and were held by him in trust for the plaintiffs. The defendant being unable to complete the contract, a proper demand having been made in writing for the property, judgment should be rendered in favor of the plaintiffs to recover the property replevied, with damage for the retention and their costs.

*G. C. Ripley* and *J. Halsey*, for the defendant.

PARK, C. J. One Corbett agreed with the plaintiffs to make for them a complete set of special tools adapted to the manufacture of the Wardwell sewing machine, for a specified sum, to be paid as the work progressed. When Corbett had completed a part of the set of tools, and another part was partially completed, and still another part was in the rough, he became insolvent and made an assignment of all his property to the defendant for the benefit of his creditors.

At the time of the assignment the plaintiffs had paid him the entire contract price for the tools, although none of them had been delivered to them. The last payment of $500 was procured from them by fraudulent representations made by Corbett that the set of tools was substantially completed.

These are the principal facts, and the question is, do they make out a case for the plaintiffs?

We think it is clear that the title to none of the tools ever became vested in the plaintiffs. None of them had been delivered, accepted, or inspected by them. The tools were required by the contract to be of a certain quality, and capable of manufacturing fifty sewing machines per day. If they should not answer the contract the plaintiffs were not bound to receive them. Hence they required inspection and acceptance under the contract before title to them would pass to the plaintiffs. Indeed the plaintiffs had the right to insist that the entire set of tools should be put to the test in order to ascertain whether they were capable of manufacturing fifty sewing machines per day, before they were bound to accept any of them. The set of tools was an entirety. When completed, each tool would perform its particular function, like the different wheels and movements of a complicated machine. There is nothing in the case which tends to show that up to the time of the assignment the plaintiffs did not insist upon all their rights under the contract. Indeed it is to be presumed that they did until the contrary appears; the finding in this case therefore shows no title in the plaintiffs to any of the tools, even as between themselves and Corbett.

This is clearly the proper view of the case on principle, and it is supported by the decided cases on the subject. What the court said in the case of *Clarke et al.* v. *Spence et al.*, 4 Adol. & El., 448, is applicable here: "On the part of the plaintiffs it was not denied in argument, nor could be according to decided cases and known principles of law, that in general under a contract for the building a vessel or making any other thing not existing in specie at the time of the contract, no property vests in the party, whom for distinc-

tion we will call the purchaser, during the progress of the work, nor until the vessel or other thing is finished and delivered, or at least ready for delivery, and approved by the purchaser; and that, even where the contract contains a specification of the dimensions and other particulars of the vessel or thing, and fixes the precise mode and time of payment by months and days. The builder or maker is not bound to deliver to the purchaser the identical vessel or thing which is in progress, but may if he pleases dispose of that to some other person and deliver to the purchaser another vessel or thing, provided it answers to the specifications contained in the contract."

Judge SWIFT, in his Digest (1 Swift Dig., 379), says: "If a person contracts with another for a chattel not in existence, but to be made for him, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him."

In the case of *Williams et al.* v. *Jackman et al.*, 16 Gray, 514, Bigelow, C. J., says: "Under a contract for supplying labor and materials and making a chattel, no property passes to the vendee till the chattel is completed and delivered or ready to be delivered. This is the general rule of law. It must prevail in all cases, unless a contrary intent is expressed or clearly implied from the terms of the contract."

In the case of *McConihe* v. *The N. York & Erie R. R. Co.*, 20 N. York, 495, the plaintiff agreed, for a specified price, to build and deliver certain cars to the defendant, who was to furnish iron boxes necessary to their completion. They were completed, except so far as prevented by the default of the defendant in not furnishing the boxes, when they were destroyed by fire, in the possession of the plaintiff, and without his fault. Judge Grover, in giving the opinion of the court, says: "This was in effect an agreement for the sale of the cars, thereafter to be constructed by Mallory [the plaintiff's assignor], to the defendant, and did not vest any property in the defendant until the cars were completed and delivered." This was a case of extreme hardship, but still the court rigidly adhered to the rule of law on the subject.

See also the case of *Andrews* v. *Durant*, 1 Kernan, 35, where all the authorities on this point are cited and very ably reviewed.

Again, the tools manufactured were never taken possession of by the plaintiffs, neither does the contract contemplate that possession should be delivered to them until after certain machines should be manufactured by Corbett for them; hence a sale of these tools would be void so far as creditors were concerned, even if there had been a sale of them to the plaintiffs and title to them had passed between the parties. The assignee represents the creditors, and could make void such sale as effectually as creditors could have done had they attached the property. The assignment in this case was a statutory sequestration of the property for the benefit of all the creditors of Corbett. This doctrine has been repeatedly declared in this state, and it is too well established for controversy. *Shipman, Trustee*, v. *Etna Ins. Co. et al.*, 29 Conn., 245; *Swift* v. *Thompson*, 9 Conn., 63; *Chamberlain* v. *Thompson*, 10 Conn., 243; *Root* v. *Welch*, 28 Conn., 157; *Hall* v. *Gaylor*, 37 Conn., 550. And many other cases to the same effect might be cited.

The plaintiffs insist that the fraud by which Corbett procured the last payment of $500 from the plaintiffs, by falsely representing that the set of tools was substantially manufactured, estops him from denying the truth of those representations, and also estops the defendant, who is his assignee, from making a like denial, on the ground that the latter could take no greater rights than Corbett himself had at the time of the assignment. Hence, it is claimed, it must be taken as true that at the time the last payment was made the set of tools was substantially completed.

But would such fact in the case alter its character? Even then the set of tools would not be constructed and ready for delivery; much less would they be actually delivered, or inspected and approved as finished articles, as the cases which we have cited require. Nor would such fact in the case an-

swer the law, which requires a change of possession in order to make a sale of chattels good as against creditors.

We advise judgment for the defendant.

In this opinion the other judges concurred.

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WILLIAM J. MERRILL AND ANOTHER *vs.* ALBERT KENYON.

Where goods are sold to a person who is in fact an agent of another and on his credit, but without knowledge of the agency on the part of the seller, the latter has the right to elect to make the principal his debtor on discovering him.

And the same principle applies where the seller is informed at the time of the sale that the buyer is an agent, but is not informed who the principal is.

And the seller is not bound to make the inquiry.

And where the seller takes the promissory note of the buyer for the goods, with knowledge that he is an agent, but without knowledge who is the principal, he is not debarred thereby from electing to make the principal his debtor.

And the taking of such a note is not presumptively a payment of the debt.

ASSUMPSIT for goods sold; brought to the Court of Common Pleas, and tried to the jury on the general issue before *Mather, J.*

On the trial it was agreed that the goods for the value of which the action was brought were delivered to one George A. Hoyle, who was carrying on the business of a saloon-keeper in Norwich, ostensibly on his own account, and that the credit was given by the plaintiffs to Hoyle. It was claimed by the defendant that the plaintiffs knew that Hoyle was doing business as an agent when they sold the goods, but this was denied by the plaintiffs.

The plaintiffs claimed that at the time the goods were furnished, and for a long time afterwards, they supposed that Hoyle was the real proprietor of the place and business, and had no reason to suppose otherwise, but that subsequently they received information that led them to believe that he was only an agent, and that the real proprietor was the defendant, and that immediately upon this discovery they

ceased to look to Hoyle for payment, and elected the defendant as their debtor, and brought this suit to recover the value of the goods. The defendant denied that he was the proprietor of the saloon, or had any interest in the business, though he admitted that he was the owner of the fixtures and some of the property in the saloon. He also denied that the plaintiffs made their election of him as their debtor as soon as they discovered, as they supposed, that he was the proprietor, but continued to give credit to Hoyle.

It appeared in evidence that two negotiable notes bearing date July 25th, 1877, and payable in two and three months, had been given by Hoyle to the plaintiffs for the account of the goods which were furnished, the account commencing November 25th, 1876, and closing July 31st, 1877, which notes were still retained by the plaintiffs, and have never been surrendered or cancelled, negotiated or paid; and it was claimed by the defendant that the notes were received in payment, which was denied by the plaintiffs.

The plaintiffs requested the court in writing to charge the jury as follows:

1. If the plaintiffs did not know that Hoyle was acting as agent, while the goods were being furnished, and as soon as they discovered that he was the agent of Kenyon they elected Kenyon as their debtor instead of Hoyle, your verdict should be for the plaintiffs; and, under this head, it is for you to find as a matter of fact, when, if ever, the plaintiffs had such information as required them to make their election. The plaintiffs were not obliged to make their election on a mere rumor, but only on such information as they could rely upon.

2. If the plaintiffs knew, while they were furnishing the goods, that Hoyle was an agent, but did not know whose agent he was, the same rule applies as if they did not know that he was an agent at all.

3. Taking notes for an antecedent debt does not discharge the debt, unless it is expressly agreed between the parties that the notes shall be received as payment. The presumption is that they are not so received.

4. Even if the plaintiffs took the notes as payment, but did not have reason to know at the time that Hoyle was Kenyon's agent, then, unless the notes were paid, on discovering that fact they were still entitled to look to Kenyon.

The court did so instruct the jury.

The defendant requested, in writing, the court to charge the jury, that if the plaintiffs knew that Hoyle was agent, and then received his notes, the presumption was that they were received in payment of the original bill and that they elected Hoyle as debtor. The court declined to so charge, but did charge that if the plaintiffs knew that Hoyle was agent of Kenyon, and then received his notes, the presumption was that they elected Hoyle as their debtor.

The jury returned a verdict for the plaintiffs, and the defendant moved for a new trial for error in the charge of the court.

*S. Lucas* and *G. C. Ripley*, in support of the motion.

1. The usual inquiry, to whom was the credit given in contemplation of the parties, was not the subject of controversy in the court below, for it was agreed that the goods were delivered to Hoyle, and credit given to him. *Perry* v. *Hyde*, 10 Conn., 338.

2. The questions of fact between the parties, that appear by the motion, so far as the election of debtor is concerned, were these:—Did the plaintiffs know, when they sold and delivered the goods to Hoyle, and gave him credit for them, that he was doing business as an agent; and with like knowledge did they subsequently take his individual notes in payment? The court not only mistook the law, but by its charge deprived the defendant of the benefit of the evidence that the plaintiffs knew Hoyle was an agent, in the consideration by the jury of the question to whom was credit given, by saying to them that the same rule would apply as though the plaintiffs did not know that he was an agent at all. So that under the charge, if the jury found that the plaintiffs did know there was a principal, and yet chose to give credit to the agent, they could subsequently look to the principal.

The court also erred in stating to the jury that "even if the plaintiffs took the notes as payment, but did not have reason to know at the time that Hoyle was Kenyon's agent, then, unless the notes were paid, on discovering that fact they would still be entitled to look to Kenyon." It will be observed that the jury were given to understand that whatever might have been the plaintiffs' knowledge, or intention, or actions, all were immaterial, unless at the time they knew Hoyle was the defendant's agent. The court not only mistook the law in this, but by its charge withdrew in part the questions of fact that should have been passed upon by the jury, and deprived the defendant of the benefit of the act of the plaintiffs, performed with as full knowledge of the facts as they desired, in voluntarily discharging the original debt by taking the notes of Hoyle. *Jones* v. *Ætna Ins. Co.*, 14 Conn., 507; *Ranken* v. *Deforest*, 18 Barb., 143; *Foster* v. *Persch*, 68 N. York, 400; *Burdin* v. *Williamson*, 12 N. York Supreme Ct., 560.

3. The court also erred in refusing to instruct the jury as requested by the defendant, and instructing them that the burden of proof was upon the defendant to show that the notes were received in payment. If they were received by the plaintiffs at a time when they knew there was an agent, and the goods had not been sold to Hoyle on his credit alone, then they were notes of a third person and an agent, and the presumption was, as they were received *for the account*, that they were received in payment, and intended as a release of the principal and made it incumbent on the plaintiffs to show otherwise. *Freeman* v. *Benedict*, 37 Conn., 559; *French* v. v. *Price*, 24 Pick., 18; *Hyde* v. *Paige*, 9 Barb., 150.

*S. S. Thresher* and *F. T. Brown*, contra.

PARK, C. J. No complaint is made of that part of the charge in which the court instructed the jury that, if the plaintiffs did not know at the time of the sale that Hoyle was acting as agent, and as soon as they discovered that he was so, elected to make his principal their debtor, they had a

right to recover, and that they were not obliged to make their election upon a mere rumor, but had a right to have reliable information to act upon; but exception is taken to that part of the charge in which the judge said—"If the plaintiffs knew, while they were furnishing the goods, that Hoyle was an agent, but did not know whose agent he was, the same rule applied as if they did not know he was an agent at all."

The case of *Thompson* v. *Davenport*, 9 Barn. & Cress., 78, fully sustains this charge of the court. In that case the party buying the goods represented at the time of making the contract of sale, that he was buying them on account of certain persons residing in Scotland, but did not mention their names, and the seller did not inquire who they were, but debited the agent who purchased the goods. It was holden that the seller might afterwards recover the value of the goods from the principals. Lord Tenterden, C. J., in giving the opinion of the court, said:—"At the time of the dealing for the goods the plaintiffs were informed that McKune, who came to them to buy the goods, was dealing for another, that is, that he was an agent, but they were not informed who the principal was. They had not therefore at that time the means of making their election. It is true that they might perhaps have obtained those means if they had made further inquiry; but they made no further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that the case falls, in substance and effect, within the first proposition which I have mentioned—the case of a person not known to be an agent—and not within the second, where the buyer is not merely known to be an agent, but the name of his principal is also known." In the same case Bayley, J., remarked as follows:—"In the present case the seller knew that there was a principal; but there is no authority to show that mere knowledge that there is a principal destroys the right of the seller to look to the principal as soon as he knows who that principal is, provided he did not know who he was at the time when the purchase was originally made." In the same case Littledale, J., remarked:

"Here the agent did not communicate to the seller sufficient information to enable him to debit any other individual. The seller was in the same situation as if at the time of the contract he did not know that there was any principal besides the person with whom he was dealing, and had afterwards discovered that the goods had been purchased on account of another; and in that case it is clear that he might have charged the principal. It is said that he ought to have ascertained, by inquiry of the agent, who the principal was, but I think he was not bound to make such inquiry, and that by debiting the agent with the price of the goods he has not precluded himself from resorting to the principal whose name was not disclosed to him."

The case of *Raymond* v. *Crown & Eagle Mills*, 2 Met., 319, is to the same effect. It was there held that "there must be actual knowledge, on the part of the vendor, of the relation of the parties and their interest in the matter, to exonerate the principal by giving credit to the agent."

Complaint is also made of that part of the charge in which the judge said to the jury that "even if the plaintiffs took the notes as payment, but did not have reason to know at the time that Hoyle was the agent of the defendant, then, unless the notes were paid, on discovering that fact they were still entitled to look to the defendant."

Surely the plaintiffs would not be bound by an agreement to take the notes of Hoyle in payment without any knowledge of the fact that Hoyle was the agent of the defendant, any more than they would be bound by their charge of the goods to him believing him to be the principal. The plaintiffs were entitled to the right of an election to charge the defendant, and no agreement they might make with Hoyle, under a misapprehension of the true character of the party with whom they were dealing, could deprive them of that right. The reason why a party is not bound, when he charges the agent believing him to be the principal, is the want of knowledge that another is the buyer in fact. The same principle must prevail in a case where the agent's notes are taken without that knowledge.

And it is well settled that the taking of the promissory note of a debtor for an antecedent debt is not of itself payment. *Davidson* v. *Bridgeport*, 8 Conn., 472; *Bill* v. *Porter*, 9 Conn., 23; *Freeman* v. *Benedict*, 37 Conn., 559.

The defendant further complains of the refusal of the court to charge the jury, as requested by him, "that if the plaintiffs knew that Hoyle was an agent, and then received his notes, the presumption is that they were received in payment of the original bill, and that he elected Hoyle as his debtor."

We have already seen that the bare fact that the plaintiffs knew that Hoyle was an agent of some one in the transaction, was not enough to distinguish the case from that class of cases where such knowledge does not exist and sellers deal with agents supposing they are principals. Such being the case, it is clear that the court committed no error in refusing to charge as requested by the defendant. The cases already cited show that the facts stated create no such presumption as that claimed.

A new trial is not advised.

In this opinion the other judges concurred.

# SUPREME COURT OF ERRORS.

## HELD AT BRIDGEPORT FOR THE COUNTY OF FAIRFIELD,

ON THE FOURTH TUESDAY OF OCTOBER, 1880.

Present,

PARK, C. J., PARDEE, LOOMIS, GRANGER AND HOVEY, JS.*

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HENRY A. NICHOLS *vs.* MINA M. STANDISH AND ANOTHER.

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Obligors in a replevin bond can not escape liability on the ground of irregularities in the institution or prosecution of the replevin suits or of technical defects in the bonds themselves.

The statute (Gen. Statutes, tit. 19, ch. 17. part 15, sec. 2,) provides that no writ of replevin shall be issued until the plaintiff or some other credible person shall subscribe an affidavit, to be annexed to the writ, stating the value of the property to be replevied, and that the plaintiff is entitled to the immediate possession of it. Held that this provision is for the benefit of the defendant, and that a failure to make the affidavit does not render the proceeding void, but only voidable at his election.

The non-return of a writ of replevin is no defense to an action on the replevin bond.

DEBT on a replevin bond; brought to the Court of Common Pleas of Fairfield County, and tried before *Hall, J.* Facts found and judgment rendered for the plaintiff, and motion for a new trial by the defendants. The case is fully stated in the opinion.

*S. M. Slade* and *H. S. Sanford*, in support of the motion.

*J. C. Chamberlain*, contra.

HOVEY, J. This was an action upon a replevin bond for the sum of one thousand dollars, given by the defendant

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* Judge HOVEY of the Superior Conrt was called in to sit in place of Judge CARPENTER, who was unable to attend from illness.

Standish as principal and the defendant Reynolds as surety, in a suit in which Standish was plaintiff, and the present plaintiff was defendant. The writ of replevin was issued upon the application and affidavit of Standish, stating the true and just value of the property to be replevied, and upon the security of the bond in suit, and was in all respects regular and in accordance with the requirements of the statute, except that the affidavit was not subscribed by the affiant. Notwithstanding that irregularity the writ was placed in the hands of an officer who, by virtue of it, replevied to Standish the property it described and then delivered it to Standish's attorney, but never returned it, and it never was returned to the court to which it was made returnable. The defendants, at the trial of the present action, objected to the introduction of the writ of replevin and replevin bond in evidence, but the court admitted them. When the evidence was closed the defendants claimed that the plaintiff could not recover, because they claimed that the non-subscription of the affidavit upon which the writ of replevin was issued rendered the writ and consequently the replevin bond void, and also because the writ had not been returned to the court to which it was returnable. But the court overruled both claims, and found that the property replevied was the property of the present plaintiff, and that the defendant Standish was not entitled to the possession of it at the time the writ of replevin was issued and served, and rendered judgment in favor of the plaintiff. Whereupon the defendants filed the motion now before us for a new trial.

The first question which the motion presents is, whether the omission of the defendant Standish to subscribe the affidavit upon which the writ of replevin was issued, rendered the writ and replevin bond void. The statute provides that "no writ of replevin shall be issued until the plaintiff or some other credible person shall subscribe an affidavit stating the true and just value of the goods or chattels which it is desired to replevy, and that the plaintiff is entitled to the immediate possession of the same; which affidavit shall be annexed to the writ." These provisions were made for the

benefit of defendants in actions of replevin, and give to them the right, in all cases, to insist that each and every provision shall be strictly complied with. But a failure in any case to comply with them or either of them is merely an irregularity in procuring and issuing the replevin process, which at most makes it voidable at the election of the defendant in replevin, but does not render it void. Numerous cases are reported in which obligors in replevin bonds, when sued, have attempted to escape liability on the ground of irregularities in the institution or prosecution of the replevin proceedings, or of technical defects in the bonds themselves. But the attempts have uniformly failed. *Rowan* v. *Stratton*, 2 Bibb, 199; *Nunn* v. *Goodlett*, 5 Eng. (Ark.,) 90; *Jennisons* v. *Haire*, 29 Mich., 208; *Bigelow* v. *Cornegys*, 5 Ohio St., 256; *Roderbaugh* v. *Cady*, 1 West. L. M. (Ohio,) 599; *McDermott* v. *Isbell*, 4 Cal., 113; *Buck* v. *Lewis*, 9 Minn., 317; *Moers* v. *Parker*, 3 Mass., 310; *Wolcott* v. *Mead*, 12 Met., 517; *O'Grady* v. *Keyes*, 1 Allen, 284; *Shaw* v. *Tobias*, 3 Comst., 192; *Decker* v. *Judson*, 16 N. York, 439. In *Berrien* v. *Westervelt*, 12 Wend., 194, the court, on motion of the defendant in replevin, set aside the writ and all the proceedings thereon, upon the ground that the affidavit of ownership of property annexed to the writ was not sworn to before a proper officer. And in *Rosen* v. *Fischel*, 44 Conn., 371, this court held that the writ of replevin and replevin bond were void, upon the ground that the court to which the writ was returnable had no jurisdiction of the cause—the writ being returnable before a justice of the peace, and the damages demanded being two hundred and fifty dollars. There is, however, a manifest distinction between those cases and the case at bar. In *Rosen* v. *Fischel* the court, having no jurisdiction of the cause, had no power to render judgment for the return of the property replevied or for damages occasioned by its unlawful detention. In the case at bar the jurisdiction and power of the court were unquestionable. In *Berrien* v. *Westervelt* the action of the court was taken on motion of the party aggrieved by the replevin proceedings. But in the case at bar the action of the court was invoked by the parties

directly responsible for the irregularity of which they sought to take advantage, after the irregularity had been waived by the party who, alone, had the right to complain of it.

In the case of *Jennisons* v. *Haire*, which in all its main features was like the case at bar, it was urged in behalf of the Jennisons, who were plaintiffs in error in the Supreme Court but defendants in the court below, that it did not appear in the evidence offered in the latter court that the writ of replevin by which they got possession of the property was accompanied by an affidavit. But the Supreme Court answered the claim by saying that—"This, if true, was no ground for excluding the judgment in replevin. If the validity of the judgment as a piece of evidence in the suit on the bond depended upon whether or not the requisite affidavit on the part of the Jennisons was actually made and annexed to the writ, there is authority for saying that, in the absence of evidence showing the contrary, it would be presumed in aid of the proceedings of the Circuit Court, that one was made. But the case admits of another answer. The plaintiffs in error are estopped from making any such objection. The proceedings in the replevin suit, including the bond in question, constituted the machinery by which the property was taken from the attaching officer and passed over to the principals in the bond; and the parties who promoted and managed those proceedings cannot set up that they got the property without an affidavit or committed other irregularities, in order now to defeat a suit on the bond."

*Shaw* v. *Tobias* was also an action on a replevin bond. One ground of defence was that there was but one surety in the bond, when two sureties were required by the statute. But the court said that the provision of the statute requiring two sureties was made for the safety of the defendant in replevin; that if the bond was substantially good without the sureties and entirely satisfactory to the defendant, it would be absurd to require him to take proceedings to make it better; and that he might waive a strict compliance with the statute by the plaintiff in regard to those matters which were unimportant to himself. But that, after the plaintiff had

obtained possession of the property in dispute by acting on the bond as a lawful and valid security, neither he nor his surety ought to be permitted to get rid of it by alleging that it is not so strong or so perfect as the defendant might have required him to make it. Again the court said that "The obligor in this case does not object that the defendant has violated the statute, but that it was not complied with on his own part, and this after he or his principal has had the benefit of the bond in all respects as if the statute had been complied with. Such an objection can be of no force." The bond was, therefore, held to be valid and binding.

The rules laid down by these authorities are founded upon principles of law well established, and their soundness cannot be questioned. The result therefore is that the court below properly overruled the objection of the defendants to the introduction of the writ of replevin and the replevin bond in evidence, and correctly decided that the bond was a valid and binding security.

The decision in the case of *Persse* v. *Watrous*, 30 Conn., 139, disposes of the second and only remaining question raised by the motion, and fully sustains the action of the court below in holding that the non-return of the writ of replevin was no defence to the action upon the replevin bond.

For these reasons the motion for a new trial should be denied.

In this opinion the other judges concurred.

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## THE TOWN OF WILTON *vs.* THE TOWN OF WESTON.

The act of 1878 (Session Laws of 1878, p. 325, sec. 7,) provides that damage done by dogs to sheep in any town, proved to the satisfaction of the selectmen, shall be paid by such town, and that it may recover such damages, when paid, from the owner of the dog, if a resident of the town; but if not such resident, that then the selectmen may institute a suit against the town where he resides, unless he or such town shall on notice pay to the treasurer of the former town

the amount of such damage; and that any town which shall be obliged to pay any such damage may recover the same from the owner of the dog. Held—

1. That the statute was not void on the ground that it did not provide for an adjudication upon the fact and amount of the damage, as it is fairly implied that, if the matter is not settled without suit, the fact of the injury and the amount of the damages are to be determined in the suits for which the statute provides.
2. That in such suit the damages to be recovered are the actual damage.
3. That if the selectmen of a town pay more than the actual damage, the right of the town to recover must still be restricted to the actual damage.
4. That the act was not invalid because it required the town to assume the burden of paying the damages in the first instance and of then bringing suit to recover the amount of the owner of the dog.
5. That where the selectmen gave to a person whose sheep had been injured by dogs an order on the town treasurer, which was given and received in satisfaction of the claim, it constituted a "payment" within the meaning of the statute.

The provision for the liability of towns in such cases is one of police regulation which can not well be made effectual except through the agency of the towns. They receive the license fees which the owners of dogs are required to pay, and have besides a remedy over for what damages they pay. They have also, and throughout our legislation have had, power that could be used to prevent or diminish the nuisance.

Courts should uphold the validity of statutes where it can be done by any reasonable interpretation, even though it be not the most obvious one.

ACTION upon the statute of 1878, relating to dogs; brought originally before a justice of the peace, and, by appeal of the defendants, to the Court of Common Pleas of Fairfield County, and tried to the court before *Hall, J.* The seventh section of the statute is as follows:—

"Damage done by dogs to sheep or lambs, or cattle, proved to the satisfaction of the selectmen to have been committed in their town, shall be paid by such town, and it may recover such damages when paid from the owner or keeper of such dog or dogs, if residents of such town; but if the owner or owners shall not be residents of the town in which the damage was done, then said selectmen may institute a suit against the town or towns where such owner or owners reside, unless such owner or owners or such town or towns shall, on notice, pay to the treasurer of the town where such damage was done the amount of such damage; and any town which shall be obliged to pay any damage as aforesaid may recover the amount thereof from the owner or owners of the dog or dogs doing such damage."

The declaration alleged that on the 9th day of December, 1878, within the limits of said town of Weston, two dogs, then owned and kept by residents of said town of Wilton, attacked and killed six sheep, then the property of David D. Coley, of the value of thirty-five dollars, and that it was afterwards proved to the satisfaction of the selectmen of said town of Weston that said damage was done by dogs the owners and keepers of which were residents of said town of Wilton aforesaid; and that said damages were, on the 21st day of January, 1879, paid by said town of Weston to the said Coley, and that notice of all the facts aforesaid was afterwards given to said town of Wilton, and to the keepers and owners of said dogs, and payment was demanded of said town and of said keepers and owners respectively, of the damages so done as aforesaid; and that said town of Wilton and the owners and keepers of said dogs refused and still neglect and refuse to pay the same. Wherefore, by force of the statute in such case made and provided, said town of Wilton has become and is liable to pay to said town of Weston the amount of said damage; and a right of action has accrued to said town of Weston to recover of said town of Wilton the sums so paid for said damage, which damages have never been paid by said town of Wilton though demand has been made for the same, all of which is to the damage of said town of Weston the sum of one hundred dollars.

The defendants demurred to the declaration, claiming under the demurrer —(1.) That the statute upon which the action was founded is incomplete, imperfect and fatally defective because it does not provide that any judgment shall be rendered, nor what shall be the measure of damages in suits which selectmen may institute under it.—(2.) That the statute is opposed to natural right and justice, and therefore invalid, in so far as it makes a town responsible for damages done by dogs owned by its inhabitants, because it imposes upon a town a liability which it can in no way avoid, making it a surety for the payment of damages resulting from trespasses by others, which it can neither prevent nor punish.—(3.) That the statute is unconstitutional and void in that it, in effect, takes private property without compensation.

But the court overruled the demurrer. The defendants thereupon pleaded the general issue, and upon the hearing the court found the following facts:—

On the 9th of December, 1878, David D. Coley, of Weston, was the owner of a flock of sheep, which was on that day attacked and damaged by dogs. The damage was done in the town of Weston, amounted to $35, and was done by dogs the owners of which resided in the town of Wilton. Coley demanded payment by the town of Weston of the damage. It was proved to the satisfaction of the selectmen of Weston that the damage amounted to the sum of $35, and that it was done in Weston by dogs the owners of which lived in Wilton.

Subsequently an action was brought by Coley against the town of Weston to recover for the damage, and also to recover for damage claimed by him to have been done to his sheep by dogs on the 4th of November, 1878; which action, before trial, was settled by the parties on the 21st of January, 1879, the selectmen of Weston agreeing to pay in settlement thereof to Coley $69.12. In settlement of this action the selectmen gave Coley an order on the treasurer of the town for that sum, payable to his order, and drawn in the usual manner. The order was given by them and accepted by Coley in full satisfaction of the claims for which his suit had been brought; and upon the receipt of the order Coley made and delivered to the selectmen two receipts, one for $34.12 "in full of all demands for damage done to sheep by dogs on or about Nov. 4th, 1878," and the other for $35, "in full for damage done to sheep by dogs in said town on the 9th day of December, 1878." The damages were never otherwise paid than by the giving of the order. Whether the order was ever presented to the treasurer did not appear.

The damage done November 4th, 1878, was done by two dogs, one of which was owned by Charles E. Mann, of Wilton, and the other by Frederick Myers, of Wilton. Soon after the order and receipts were given, the selectmen of Weston presented to the selectmen of Wilton a claim of $35 for the damage done December 9th, 1878, and demanded payment, but the selectmen of Wilton refused to pay the amount.

The selectmen of Weston on the same day made demand upon Myers and Mann of payment of said damage and also of payment for the damage done to the sheep of Coley November 4th, 1878, but both Myers and Mann refused to pay for the damage, or any part of it, and denied that it was done by dogs owned by them.

Upon the foregoing facts the defendants claimed and asked the court to hold—(1.) That the giving by the selectmen of Weston of an order on its treasurer for the amount of Coley's damage, did not constitute a payment of such damage—(2.) That the court could not render judgment for the plaintiff, because the statute was incomplete and fatally defective in not providing that any or what judgment should be rendered. —(3.) That it was invalid because it made a town, and consequently every inhabitant of the town, responsible for damage done by dogs where owners reside within the town.

But the court overruled these claims and rendered judgment in favor of the plaintiffs for the sum of $35 damages. The defendants brought the record before this court by a motion in error.

*H. H. Barbour*, for the plaintiffs in error.

1. The finding does not show a payment by Weston to Coley. The court finds that there was no payment unless the giving of a town order by the selectmen to Coley, and its acceptance by him, constituted one. The design of the statute undoubtedly is to replace in the treasury of the plaintiff town the amount of money which has been taken from it. But in this case no money has been taken, for, as far as it appears, the order has not even been presented. By statute (Gen. Statutes, p. 25, sec. 1,) selectmen can only draw orders on the treasurer for payment of claims against the town. It is the treasurer, and he only, who *pays* the claims. The giving of the order was therefore in no sense a payment. The substitution of one simple contract for another is not a payment. The same debt continues in a different form. *Frink* v. *Branch*, 16 Conn., 275. One's own promissory note given in payment of an antecedent simple contract debt, and

expressly accepted as payment in full, does not prevent the creditor from suing on the original debt if the note is not paid. *Cole* v. *Sackett*, 1 Hill, 516. The mere giving of a town order is not payment, and does not prevent a resort to the original cause of action. *Davidson* v. *Bridgeport*, 8 Conn., 476.

2. The statute is incomplete and fatally defective.—(1.) There is no direction that any judgment shall be rendered in such a suit as this. While it provides that a town may "recover" from the owners of dogs doing damage, it merely gives the right to "institute a suit against the town or towns where such owner resides."—(2.) But if the right to institute a suit carries with it the right to a judgment, the omission to fix the measure of damages is a fatal defect. What shall the judgment be? For the amount which the town has paid to the owner of the damaged sheep, or the actual damage? The statute authorizes one selectman of a town to settle with a neighbor, or with himself, for damages done to his sheep by dogs owned by the resident of another town, and then in the name of his town to recover from that other town the amount paid in settlement, no matter how extravagant and unreasonable it may be; and the town sued is cut off from the right of having a very material part of the action judicially determined. By this statute the legislature has trenched upon the functions of legal tribunals, for it seeks to take away from them the power of determining the amount of a private controversy and to compel the adoption of an amount fixed by the judgment or caprice of a single individual.

3. The statute is invalid in so far as it makes a town, and, consequently, every inhabitant, responsible for damage done by dogs whose owners reside within the town. This is opposed to natural right and justice. *Welch* v. *Wadsworth*, 30 Conn., 149. It can be sustained only upon the theory that the legislature has the right to say that the property of a town, and of *A* an inhabitant thereof, shall be taken to pay *B;* the power to impose by statute upon a corporation a claim which it was never concerned in creating, against which it

protests, and which is unconnected with the ordinary functions and purposes of municipal government. But the courts have repeatedly declared that if the state should order a city or town to apply its funds or raise money by taxation to establish one of its citizens in business, or for any other object, no matter how worthy, equally removed from the proper sphere of government, the usurpation of authority would not only be plain and palpable, but the duty of the courts to declare the order void would be imperative. Cooley's Const. Lim., 491, note, 495, 531; *People* v. *Mayor &c. of Chicago*, 51 Ill., 18; *Curtis's Admr.* v. *Whipple*, 24 Wis., 350; *State ex rel. McCurdy* v. *Tappan*, 29 id., 687; *Morford* v. *Unger*, 8 Iowa, 92; *Taylor* v. *Porter*, 4 Hill, 140; *Bloodgood* v. *Mohawk & Hudson R. R. Co.*, 18 Wend., 55; *Hampshire* v. *Franklin*, 16 Mass., 86; *Lowell* v. *Boston*, 111 id., 460, 470; *Allen* v. *Inhabitants of Jay*, 60 Maine, 128; *Wells* v. *City of Weston*, 22 Misso., 387; *Kelly* v. *Marshall*, 69 Penn. St., 319; *Woodruff* v. *Neal*, 28 Conn., 169. The only cases in which the legislature can interfere with private property are thus concisely stated in the case of *Hanson* v. *Vernon*, 27 Iowa, 28:—"1. It may authorize it to be forfeited for crime or sold for the owner's debts judicially established, or in pursuance of judicial proceedings.—2. It may take it for public use under the power of eminent domain, on condition of just compensation being made in money. For any private use the legislature cannot touch the property of the citizen, even if it does make compensation.—3. It may, under peculiar circumstances, condemn it under the police power, when the property, or its use or situation, is such as to endanger the public health, welfare or safety.—4. It may be taken by virtue of the taxing power." How shall we class the taking of the property of a town and its inhabitants to pay for damages to sheep? It is not a forfeiture for crime or a levy for debt. It is not the exercise of the right of eminent domain, for that appropriates property to some specific use on making compensation. It is not a police regulation, for that could not go beyond preventing an improper use of property with reference to the due exercise

of rights and enjoyment of legal privileges by others. It is not taxation, for that is simply an apportionment of the burden of supporting the government. What is it, then, but simply and absolutely a law to forfeit one man's property to another? But it may be said that dogs are taxed, and that the town pays damages with the revenue derived therefrom. But the damages may be out of all proportion to the amount derived from taxation. Moreover, horses and cattle are taxed, but no one would dream of making a town liable for their trespasses. Liquor dealers are taxed; the town derives a large revenue from licensing them; but the strongest opponent of that traffic would hardly suggest that the town be compelled to pay the damage which is caused by their customers.

*L. Warner*, for defendants in error.

LOOMIS, J. The statute upon which this action is founded reads as follows:—[given in full on page 326.]

It is distinctly found that sheep owned by one Coley of the town of Weston, while in that town were attacked and damaged by dogs owned by Mann and Myers, residents of the town of Wilton, to the amount of thirty-five dollars, and although duly notified neither Mann and Myers nor the town of Wilton have paid the amount or any part of it to the treasurer of the town of Weston; and that prior to this suit the selectmen of Weston drew an order in due form upon the treasurer of that town, payable to Coley or his order, for the amount of the damage, which was given by the selectmen and accepted by Coley in full for his damage.

The counsel for the defendant town concedes that these facts bring the case within the terms and meaning of the statute, provided the giving of the order by the selectmen of Weston on its treasurer for the amount of Coley's damage constituted a payment of such damage. The defendant would distinguish between the order on the treasurer to pay and the actual payment.

We do not think the statute contemplates any such refinement.

By statute, (Gen. Statutes, p. 25, sec. 1,) it is made the duty of the selectmen of a town to settle all claims against it by drawing orders on the treasurer. When a claim is thus settled by the giving and acceptance of an order for the purpose, it may well be regarded as paid within the meaning of the statute in question. And besides, although the finding does not in terms say that the order was actually given and received as payment by the parties, yet in saying that it was given by the selectmen and accepted by Coley in full satisfaction, and that a receipt in full was given, we regard it as equivalent in meaning to payment.

As every element of a good claim is found to have been proved according to the provisions of the statute, judgment for the plaintiff must follow, provided there is any validity in the statute. And this brings us to the main question in the case.

The claim made in the court below and upon which the motion in error is predicated, was, "that the court could not render judgment for the plaintiff, because the statute upon which the action is based is incomplete and fatally defective, in that it does not provide that any or what judgment shall be rendered; and because it is invalid in so far as it makes a town, and consequently every inhabitant thereof, responsible for damages done by dogs where the owners reside within the town." We will consider these two objections to the statute in their order.

1. Does the statute fail to provide that any or what judgment shall be rendered?

We think not. Although it is conceded that the act was not drawn with care, and the language employed to express the intention of the legislature is not well chosen, yet the meaning can be ascertained from the words used. It is said that the statute merely authorizes the selectmen, in a case like this, "to institute a suit" as a mere amusement or threat, but with no right to recover anything, and no rule of damages. This may do by way of extravagant criticism, but it is no fair rendering of the meaning of the statute. It is true that the object of the suit is not stated in express lan-

guage, but, taking all the provisions in view and considering the subject matter and object of the statute, the meaning cannot be mistaken.

The first phrase in the section is "*damage* done by dogs." This is the subject matter for which remedies are provided, which are then specified. If the town pays for this damage then it may first be recovered of the owner or keeper of the dogs, if residents of such town; but, if not residents, then the selectmen may institute a suit against the town where the owner of the dogs resides. But what for? Obviously to recover the same damage that the town would have recovered of the owner if resident in their own town. But the implication is greatly strengthened by the statement of the condition which will prevent or defeat such suit, namely:—"unless such owner or owners or such town or towns shall on notice pay to the treasurer of the town where such damage was done, the amount of such damage." As paying "such damage" defeats the suit, the necessary implication is that "such damage" was the object of it or thing to be recovered.

And the same meaning also further appears from the last clause, which gives a remedy over:—"Any town which shall be obliged to pay any *damage* as aforesaid may recover the *amount* thereof from the owner or owners of the dog or dogs doing such damage."

In this connection another difficulty is suggested, which, as it has occasioned considerable doubt and hesitation on the part of the court, we will consider, though not directly involved in the claim of the defendant as made in the court below.

Is the damage to be recovered the actual damage proved to have been done, or the amount which the selectmen shall consider to have been done and which they shall have paid. If we must adopt the latter as the true construction, we should conclude the law to be invalid. With no provision for notice to the parties, and no provision to make the selectmen a judicial tribunal, they cannot determine and fix the rights of the parties. The first provision of the act is phrased in such a way as to give color to this claim. But on the other

hand, as we have seen, the subject matter which the statute proceeds to provide remedies for is "damage done by dogs to sheep, lambs, or cattle," which must be held to mean actual damage, found by the court before which the suit is finally instituted, if such suit shall be brought.

So far as the phrase "proved to the satisfaction of the selectmen to have been committed in their town," must be construed as submitting the question in the first instance to the selectmen for the purpose of initiating the remedial proceedings, the law assumes that they will act with sound judgment and in the interest of justice. It assumes that if the damage was committed in their town they will be satisfied of the fact, and that if they make a payment to the owner of the injured animal, it will be of the actual damage. But the action of the selectmen must be held subject to review and revision. *Abbott* v. *L'Hommedieu*, 10 W. Va., 677. If by any error they pay more than the actual damage, the right of the town to recover must be restricted to the actual damage, although it cannot in any event exceed the amount paid.

It is due to the legislature to suggest that the provision we have been considering, and which has occasioned doubt as to the validity of the statute, was probably inserted with a view to facilitate an amicable adjustment, at least as between the owner of the sheep and the several towns that might be called upon to pay for the damage. It was assumed that the selectmen where the damage might be committed, and who were to be called on in the first instance to pay, would be likely to estimate the amount as low as the truth would warrant before making payment, and that the town where the owners of the dogs doing the damage reside, in most cases would pay upon notice and demand, and would then in turn demand the amount of the owners of the dogs, and so the final liability would be ultimately placed where it properly belongs.

2. But it is further claimed that the statute is invalid in so far as it makes a town, and consequently every inhabitant thereof, responsible for damages done by dogs where the owners reside within the town.

If it be assumed that property in dogs stands on the same ground as that of property in other domestic animals, such, for instance, as the horse, we should be compelled to concede that this objection should prevail and the law should be declared invalid. But such assumption is unwarranted, as all the authorities agree. In *Blair* v. *Forehand*, 100 Mass., 140, Gray, J., says:—"Beasts which have been thoroughly tamed and are used for burden, or husbandry, or for food, such as horses, cattle, and sheep, are as truly property of intrinsic value and entitled to the same protection as any kind of goods. But dogs and cats even in a state of domestication never wholly lose their wild natures and destructive instincts, and are kept for uses which depend on retaining and calling into action these very natures and instincts, or else for the mere whim or pleasure of the owners; and therefore, although a man might have such a right of property in a dog as to maintain trespass or trover for unlawfully taking or destroying it, yet he is held, in the phrase of the books, to have 'no absolute and valuable property' therein which could be the subject of a prosecution for larceny at common law." See also *Woolf* v. *Chalker*, 31 Conn., 121.

It is found by experience that the destructive instincts of dogs, at the best of comparatively little utility to the people of the state, are so great as to render sheep raising (an industry of great benefit to the state,) practically impossible without some extraordinary legislative interposition. The act in question was therefore adopted as a measure of internal police, having the two-fold object in view of encouraging the rearing of sheep on the one hand, and of discouraging the keeping of dogs on the other; it is therefore perfectly constitutional and legitimate in its object. *Mitchell* v. *Williams*, 27 Ind., 62.

But is the act valid in its methods of accomplishing the object in view?

And this brings us to the precise point of the objection. Why require the town to assume the burden of paying the damages in the first instance, and of bringing suit to recover the amount either of the owner of the dog or of the town where he happens to reside?

The general answer is, that as a system of police regulation it cannot well be made effectual for the accomplishment of the objects except through some such agency on the part of the towns.

And as to the objection that it is contrary to natural right and justice, our answer is—

1st. By the provisions of the act the town treasury is relieved and replenished by the special tax or license fees which the keepers of all dogs are compelled to pay, upon penalty of being criminally prosecuted, or of having the dogs killed or muzzled. In the long run these license fees will in all probability amount to more than any town will be required to pay.

2d. The town called upon to pay the damages has by the same act a remedy over against the owner of the dogs doing the damage, and so finally the liability falls on the party in fault. The law assumes that this remedy over will be effectual.

3d. In further vindication of the justice of casting the burden and duty upon towns to the extent mentioned, it should be observed that towns have some responsibility in the premises, and can do something to prevent or diminish the evils complained of. The history of legislation on this subject in this state, from the early colonial statutes down to that in question, will show that dogs have been continually under the ban of the law as administered through the police powers of the towns. It is true that by the act of 1878, under which the proceedings in question were had, the powers vested in the town authorities for the destruction of dogs are more restricted than formerly. But they still remain to some extent under that act. Dogs not licensed are to be killed under the inducement of a bounty to be paid by the town; and by section eighth of the same statute every owner or keeper of a dog is required either to kill or muzzle his dog to the acceptance of the selectmen and subject to the order of the selectmen as to the removal of the muzzle.

In reaching the conclusion that the statute in question is valid, notwithstanding the weighty objections against it, we

have been guided by the safe and wholesome rule that where an act of the legislature admits of two constructions, one valid and the other invalid, courts should adopt the former and uphold the statute, if it may be done by any reasonable interpretation, though it be not the most obvious. *French* v. *Teschemaker et als.*, 24 Cal., 518; *The People* v. *San Francisco R. R. Co.*, 35 Cal., 606; *Bigelow* v. *West Wisconsin R. R. Co.*, 27 Wis., 478; *Duncombe* v. *Prindle*, 12 Iowa, 1; *Colwell* v. *May's Landing Water Power Co.*, 4 C. E. Green, 245; *Iowa Homestead Co.* v. *Webster County*, 21 Iowa, 221; *Rosevelt* v. *Godard*, 52 Barb., 533; *Hepburn* v. *Griswold*, 8 Wall., 603.

There was no error in the judgment complained of.

In this opinion PARK, C. J., and PARDEE, J., concurred; GRANGER and HOVEY, Js., dissented.

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## AUGUST BELMONT *vs.* PETER B. CORNEN.

A statute of the state of New York provides that "after a bill of foreclosure shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings shall be had at law for the recovery of the debt secured by the mortgage or any part thereof, unless authorized by the Court of Chancery." Held to pertain to the remedy only and not to enter into the contract, and therefore to have no application to proceedings in this state.

Under the laws of New York the mortgaged property is sold after foreclosure and the proceeds of the sale applied on the mortgage debt. Held that the defendant, in an action in this state to recover the balance of the mortgage debt, after a foreclosure and sale of the mortgaged property in New York, could not show that the real value of the property was greater than the amount for which it was sold.

The statute of this state with regard to the application upon the mortgage debt of the value of the property taken by the mortgagee upon a foreclosure, does not apply to the case of property foreclosed and sold under the laws of another state. The proceeds of the sale are all that the mortgagee receives under the latter proceedings, and all that he is to be charged with in determining the amount to be recovered here as the balance of the mortgage debt.

DEBT on a bond; brought to the Superior Court in Fairfield County, and tried to the jury before *Sanford, J.*

The bond was for the payment to the plaintiff of the sum of $60,000, was executed in the state of New York and there payable, and was secured by a mortgage of real estate in that state. The defendant pleaded the general issue, with notice that he should claim and offer evidence to prove—that the mortgage had been foreclosed in the state of New York and the mortgaged property sold under a decree of the court, that by the laws of New York after a foreclosure no proceedings at law upon the mortgage debt could be had without authority from the Supreme Court of that state, that no such authority had been obtained, and that the mortgage debt had been satisfied by the value of the property taken upon the foreclosure.

Upon the trial it was admitted that the bond in suit was duly executed and delivered and was upon a sufficient consideration.

The plaintiff read in evidence the exemplified copies of the record of proceedings had in the Supreme Court of the state of New York for the foreclosure of the mortgage given to secure the bond and the sale of the premises therein conveyed, and claimed to recover in this action the deficiency shown by the record to exist after the sale, with interest thereon. The defendant offered evidence of the value of the premises mortgaged and sold under the foreclosure, for the purpose of showing that at the date of the sale they were of a market value greater than the amount realized from the sale, in order that such excess of value might be deducted by the jury from the deficiency claimed to be recovered in this suit. The plaintiff objected to the admission of this testimony and the court excluded it.

The defendant read in evidence the statute of the state of New York with regard to the foreclosure of mortgages in that state, which was as follows:—"After such bill (for foreclosure) shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage or any part thereof, unless authorized by the Court of Chancery." He thereupon requested the court to charge the

jury that unless they should find that the plaintiff had obtained authority from the Supreme Court of the state of New York, (which has now the powers of the Court of Chancery,) to bring the present suit, they must find for the defendant. The court charged the jury that this suit could be maintained in this state without authority from the courts of New York, and that the plaintiff was entitled to recover the deficiency shown by the record to exist after the sale of the mortgaged premises, with interest thereon; and the jury rendered a verdict for the plaintiff to recover the sum of $23,192.53 and costs.

The defendant moved for a new trial for error in the rulings and charge of the court.

*W. F. Taylor*, and *W. S. Logan* of New York, with whom was *J. H. Olmstead*, in support of the motion, contended—1. That the contract was a New York contract and governed solely by the laws of that state, and that this action could not have been maintained there. (*Equitable Life Ins. Society* v. *Stevens*, 63 N. York, 341; *Porter* v. *Kingsbury*, 71 id., 588; *Scofield* v. *Doscher*, 72 id., 491; *Rae* v. *Beach*, 76 id., 164; *Esmond* v. *Apgar*, id., 359; *Graham* v. *Scripture*, 26 Howard Pr. R., 501; *Smith* v. *Button*, 45 id., 428.)—2. That the statute operates on the mortgage itself and is not limited to the remedy. (*Barnard, J.*, in *Scofield* v. *Doscher*, 10 Hun, 584; *Folger, J.*, in same case in 72 N. York, 491.)—3. That the contract was made by the parties in contemplation of the statute and on the faith of it. (*Sherrill* v. *Hopkins*, 1 Cowen, 108.)—4. That the court erred in not admitting evidence of the value of the property foreclosed; it constituting a reason in the courts of New York why permission to sue should be refused, that the property had been bought in by the mortgagee at an inadequate price, (*Equitable Life Ins. So.* v. *Stevens*, 63 N. York, 341,) and our statute expressly providing that in any suit on a mortgage debt after a foreclosure, the plaintiff shall recover only the balance above the actual value of the property. (Gen. Statutes, p. 358, sec. 2.)

*J. H. Perry*, with whom was *J. Hone*, of New York, contra, contended—1. That the deficiency existing after the sale could not be reduced by evidence of the market value of the property at the time of the sale. (*Dunkley* v. *Van Buren*, 3 Johns. Ch., 330; *Globe Ins. Co.* v. *Lansing*, 5 Cowen, 381; *Lansing* v. *Goelet*, 9 id., 353; *Spencer* v. *Harford*, 4 Wend., 384; *Morgan* v. *Plumb*, 9 id., 292.)—2. That the statute of the state of New York pertained solely to the remedy and could not avail the defendant here. (Rorer on Inter-State Law, 52; *Woodbridge* v. *Wright*, 3 Conn., 523; *Wood* v. *Watkinson*, 17 id., 500; *Taft* v. *Ward*, 106 Mass., 518; *Gott* v. *Dinsmore*, 111 id., 45; *Scudder* v. *Union Bank*, 91 U. States R., 412.)

LOOMIS, J. This suit is upon a bond to a citizen of the state of New York, secured by a mortgage of property there situated. Prior to this suit a bill for foreclosure had been brought in the courts of that state and a decree rendered thereon, and the mortgaged premises had been sold pursuant to such decree according to the laws of that state, and the net proceeds applied on the bond—leaving however a large amount unpaid, to recover which this suit was brought against the obligor of the bond and mortgagor residing in this state. The court below rendered judgment for the plaintiff.

The defendant's motion for a new trial presents only two questions for the consideration of this court:—

1. Whether the statute of New York creates a bar to the maintenance of the suit.

2. Whether the defendant is liable for the entire amount of the deficiency shown by the foreclosure proceedings to be still due on the bond, or whether he may show that the market value of the premises was more than they sold for, for the purpose of deducting the excess of such value over the avails of the sale, from the deficiency.

The first question depends on the effect to be given to a statute law of the state of New York, which provides that "after such bill" (that is, bill for foreclosure,) "shall be filed,

while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage or any part thereof, unless authorized by the Court of Chancery" (now the Supreme Court of the state).

The defendant requested the court to charge the jury that, unless they should find that the plaintiff had obtained authority from the Supreme Court of the state of New York to bring the present suit, they must find for the defendant. The court charged the jury that the suit could be maintained in this state without authority from the courts of New York.

Was this correct? We accept the claim of the defendant, that the nature, construction, and validity of the contract are to be governed by the laws of New York, and also concede that, according to the decisions of the courts of that state, this suit could not there be maintained. *Scofield* v. *Doscher*, 72 N. York, 491; *S. C.*, 10 Hun, 582; *Graham* v. *Scripture*, 26 Howard Pr. R., 501; *Equitable Life Ins. Society* v. *Stevens*, 63 N. York, 341. But we do not accept the conclusion which the counsel reach as a result of these two propositions.

The argument is not advanced by the fact that the New York courts would not allow this action. They must of course follow the mandate of their own statute and deny a remedy where the statute denies one. The real question remains, whether the statute inheres in the contract itself as a part of it, following it into other jurisdictions, or whether it relates only to the remedy, and so parts company with the contract at the line of the state.

It seems to me the latter is the correct view. It is the only reasonable and natural construction of the statute, whether we consider its language or its purpose.

The language is—"after such bill shall be filed &c., no *proceeding* whatever shall be had," &c. It is aimed, not at the contract or its obligation, but at the *proceeding* or *remedy* for its enforcement. And if the party would avoid the prohibition another proceeding is required as a pre-requisite—that is, he must first obtain the consent of the courts of New York, and both these proceedings obviously refer to New York courts.

It would be a most extraordinary spectacle if the legislature of one state should pass a law authorizing its own courts to issue permits to parties to bring suits in the courts of another sovereign state.

But it is said that the decisions of the courts of New York indicate that they regard the statute in question as a part of the contract. A few isolated expressions may be found giving some color for this claim. For instance in *Scofield* v. *Doscher*, 10 Hun, 582, *Folger*, *J.*, says of the provision in question, that "it is not restricted to actions against the mortgagor; it operates on the mortgage." But this was said with reference to the particular facts of that case and the policy of the law—which will be found more fully explained in the opinion given in the same case in the Court of Appeals, 72 N. York, 491. In that case it was held that the owner of a debt secured by mortgage, who holds an independent obligation or covenant for its payment given by a person other than the mortgagor, cannot enforce his claim by action during the pendency or after judgment in foreclosure. All the New York cases in interpreting the law consider its effect solely within that state. We do not think there is a decision which can fairly be cited in favor of the position of the defendant.

The object and policy of the law as explained in *Scofield* v. *Doscher*, and in *Equitable Life Insurance Society* v. *Stevens*, 63 N. York, 341, show clearly that the statute can have no extra-territorial effect. Prior to the passage of the law a separate action on the bond or other instrument secured by the mortgage was necessary, and the creditor had an absolute right to his suit at law even during the pendency of the foreclosure proceedings, and the costs on all the suits that might be brought were very heavy. The statute in question and some others were passed as parts of one system to remedy the evil by compelling the creditor, seeking redress in the courts of that state, to confine his proceedings and the consequent expenses to one tribunal and to one action. It was purely a matter of good policy and a regulation of judicial proceedings. The object was to compel the consolidation of actions, which of course could only be done in their

own courts, and yet, under the interpretation claimed by the defendant, the statute applies to cases where the consolidation would be impossible, which would work great injustice. All the authorities show that the New York courts apply the statute so as to prevent any action against other parties than the mortgagor, who may have given independent securities for the same debt. The mortgage in New York may be only a small part of the securities held for the same debt, and many other persons than the mortgagor and residents of other states may be holden to respond to the creditor until he has obtained the full amount of his debt. The actions against all could not be united in one proceeding in the state of New York. If then the creditor would appropriate the avails of his New York mortgage, he must, according to the claim made, sacrifice all his other securities, unless forsooth he applies to the New York courts to obtain liberty to sue persons that could not be sued in that state.

Again, in *Suydam* v. *Bartle*, 9 Paige, 294, it was held that where suit was first brought on bills of exchange, for payment of which a mortgage had been given, against one not an obligor in the bond, and after this foreclosure proceedings were instituted, the action first brought could not proceed without authority from the court. So that if this statute is a part of the contract and the defendant had no connection with the mortgage in the state of New York, but was otherwise obligated to pay the same debt and had first been sued in the courts of this state, (the only place where he could be sued,) and while this suit was pending the plaintiff had unwittingly filed his bill for foreclosure in New York, it would follow that these subsequent proceedings in New York could be pleaded in bar against the further maintenance of the suit first brought in this state. Such absurd results show that the defendant's claim cannot be correct.

The defendant cites the case of *Porter* v. *Kingsbury*, 71 N. York, 588, as sustaining his proposition. This was not a proceeding under the statute in question, but a complaint on an undertaking on appeal, where the code required a service of notice on the adverse party ten days before the

commencement of the action as a condition precedent. It was held that the complaint was demurrable if the ten days notice was not alleged. It seems to me that this statute relates to the remedy, and that so far as it may be an authority by analogy it is altogether against the position of the defendant.

In further confirmation of our argument we will cite two cases from Massachusetts, where the court construed another New York statute in regard to its effect in the former state. In *Taft* v. *Ward*, 106 Mass., 518, a New York statute provided that any association consisting of seven or more shareholders might sue and be sued in the name of the president or secretary and judgment be rendered against the company, and until an execution should be issued against the company and returned unsatisfied *no action should be maintained against the individual shareholders.* It was held that this statute was local as regards legal remedies for the recovery of a debt against the company, and that the individual members might be sued in Massachusetts for the debt as partners without showing any compliance with the condition mentioned in the statute. In *Gott* v. *Dinsmore*, 111 Mass., 45, a similar decision was made as applicable to the members of the Adams Express Company.

Numerous other cases might be cited, not quite so pertinent and controlling as the above, but which recognize the principle to be applied to the case at bar. At one time it was held that the extent of the remedy was to be determined by the law of the place of the contract, and in the case of *Melan* v. *Fitzjames*, 1 Bos. & Pul., 138, a suit was brought in England upon a contract made in France, where the defendant was not liable *in personam* but only *in rem*, and where no arrest could be made, and it was so held in England. But this case was soon after overruled in England. The doctrine was distinctly repudiated in this state in *Woodbridge* v. *Wright*, 3 Conn., 523, and the contrary doctrine seems now everywhere well settled. *Imlay* v. *Ellefsen*, 2 East, 453; *De la Vega* v. *Vianna*, 1 Barn. & Adol., 284; *Smith* v. *Spinolla*, 2 Johns., 198; *White* v. *Canfield*, 7 Johns., 117; *Sicard* v.

*Whale*, 11 Johns., 194; *Peck* v. *Hosier*, 14 Johns., 346; *Hinkley* v. *Marean*, 3 Mason, 88; *Wood* v. *Watkinson*, 17 Conn., 500.

We conclude that the statute in question, so far as it denies a remedy to recover the amount due on the bond, is local and can have no effect in this state.

The other question for review is, whether the evidence of the market value of the premises at the date of sale was properly excluded.

The sole purpose of this evidence was, in case the defendant could prove that the market value was more than the amount of the sale, to have the court deduct such excess from the deficiency shown to exist by the record of the foreclosure proceedings.

The foreclosure sale was conducted in accordance with the provisions of the statutes and code of civil procedure of the state of New York, and was in every respect regular. According to the decisions of the courts of New York the product of the sale, if all the proceedings are lawful, conclusively determines the amount to be credited on the bond. *Dunkley* v. *Van Buren*, 3 Johns. Ch., 330; *Globe Ins. Co.* v. *Lansing*, 5 Cowen, 381; *Lansing* v. *Goelet*, 9 Cowen, 353; *Spencer* v. *Harford*, 4 Wend., 384; *Morgan* v. *Plumb*, 9 Wend., 292.

But it was suggested in the argument that if this court should hold that the plaintiff can bring his suit here to recover the deficiency or balance due on the bond, it would follow that the deficiency would be ascertained by the rules applicable to mortgages in this state. I cannot well imagine a more perfect *non sequitur*. The principles that govern the two cases are from opposite poles.

The situs of the property mortgaged being in New York, all proceedings for foreclosure and the appropriation of the debt were of necessity in the courts of that state and under its laws, and the courts of this state have no power to reverse, revise or change what has been done. Under our law the creditor, in the event of non-payment of his debt as decreed, takes by law the thing pledged to apply on his debt. In such

case the deficiency can only be ascertained by the value of the mortgaged premises. But in the state of New York the law does not turn over to the creditor the mortgaged property, but only the net avails of a sale made under its own authority. As the creditor does not receive the property itself to apply on the debt, its market value becomes utterly immaterial. The law surely is not capable of such injustice as to compel him to credit on his bond more than it allows him to receive.

For these reasons a new trial is not advised.

In this opinion the other judges concurred.

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HARRIET A. TRUBEE *vs.* GEORGE N. MILLER.

A disseisee who has recovered possession of the premises by any lawful means may maintain trespass for mesne profits against a party who has occupied the premises as a tenant of the disseisor, although he was ignorant of the disseisee's claim of title and has in good faith paid rent to the disseisor.

The disseisor can not give to any person occupying under or taking title from him, any better rights than he had himself.

Trespass will lie for mesne profits upon the fiction of law that the disseisee after re-entry has been in continuous possession during the period of the disseisin.

TRESPASS for mesne profits; brought to the Superior Court in Fairfield County. The following facts were found by a committee:

On the 24th of October, 1873, Stephen H. Alden, who then owned in fee and was in possession of the premises described in the declaration, which were a country seat and farm in Westport in this state, known as "Compo Place," executed and delivered to the plaintiff, Harriet A. Trubee, who was his daughter, for the consideration of one dollar, a conveyance of the same in fee, the deed being recorded on the 27th of October, 1873, in the land records of Westport.

Mrs. Trubee took possession of the premises on the 24th of October, 1873, and Mr. Alden continued to occupy the same with her subsequently thereto and until about the 15th

day of February, 1874, when she went with him to the city of New York, intending to remain there a few weeks and then return.

On the 2d of April, 1874, Stephen H. Alden executed and delivered to Mrs. Georgia V. Alden a warranty deed of Compo Place, for the consideration expressed in the deed of $50,000. The only real consideration however was a mortgage, executed at the same time, of the same premises by her to him, for the amount of the purchase price mentioned in the deed, which mortgage contained a stipulation that the mortgage debt therein described was not to be paid any further than it could be obtained from the mortgage. This deed was taken by the said Georgia with full knowledge of all the facts above stated with regard to the conveyance of the property by Mr. Alden to Mrs. Trubee, and that she claimed the property as her own under that deed. The mortgage from Georgia V. Alden to Mr. Alden was never left for record. The deed from him to her was recorded April 4th, 1874.

On the 3d day of April, 1874, and during the temporary absence of Mrs. Trubee from Compo Place, the said Georgia V. Alden entered and took possession of the premises without her knowledge or consent, and continued in possession, by herself and her tenants, until the 16th day of January, 1877; and during the whole of that period Mrs. Trubee remained in Brooklyn in the state of New York.

On the 10th of July, 1874, Georgia V. Alden brought a petition in equity to the Superior Court in Fairfield County, returnable to the August term following, praying that the deed from Mr. Alden to Mrs. Trubee might be set aside and declared void, and that the title to the premises might be established in her, the said Georgia V. To this petition Mrs. Trubee filed an answer and cross bill, setting forth her title to the property, and that the deed from Mr. Alden to Georgia V. Alden was fraudulent and void, and constituted a cloud upon her title, and praying that the court decree that she should execute to her a quit-claim deed of the premises, or that the deed from Stephen H. Alden to Georgia V. Alden

be set aside and possession of the premises be decreed to her, and that execution for such possession should be issued.

Upon the petition, answer and cross bill, such proceedings were had, that after full trial the Superior Court, (the case having been taken to the Supreme Court of Errors by Georgia V. Alden upon motion in error,) on the 3d day of January, 1877, passed its decree that the deed from Stephen H. Alden to Georgia V. Alden, dated April 2d, 1874, should be set aside, and that the full title to the premises should be vested in Mrs. Trubee, and the deed of Mr. Alden to her, dated October 24th, 1873, should be fully confirmed, and that she was entitled to the immediate possession of the premises, and that an execution of ejectment therefor should be issued.

Pending this petition, on the 24th of November, 1874, Mrs. Trubee brought her action of ejectment against, and on the same day caused the same to be legally served upon, Mrs. Alden, to the Superior Court for Fairfield County, at its December term, 1874, therein demanding the seizin and possession of the premises; and upon this action such proceedings were had, that on the 5th day of April, 1877, judgment thereon was rendered in her favor against Mrs. Alden, and execution thereon was issued.

Nominal damages only were adjudged to Mrs. Trubee in the action, a remittitur of which was filed therein by her, and the same were never demanded or received by her.

The execution was duly served by a proper officer, who caused Mrs. Trubee to be put into possession of the premises and made his return thereon according to law.

On the 11th of May, 1874, Mrs. Alden leased to George N. Miller, the defendant, that portion of the premises known as the mansion house, and certain portions of the outbuildings connected therewith, and certain portions of the premises immediately surrounding the same, from June 1st, 1874, to November 1st, 1874, as a summer residence; he being then and ever since a resident of the city of New York. Miller occupied the premises during that period, at a rent of $2,500, which was fully paid by him to Mrs. Alden. Subsequently,

on the 25th of May, 1875, Mrs. Alden again leased to Miller the same premises as a summer residence, which he occupied from the 1st of June until November 1st, 1875, at a rent of $2,500, which was fully paid by him to Mrs. Alden. And on the 24th of May, 1876, Mrs. Alden again leased the premises to Miller, which he occupied from the 1st of June to Novem- 1st, 1876, at a rent of $2,000, which was fully paid by him to her. This rent was a fair and reasonable compensation for the use of the premises occupied by Miller, for the periods of his occupancy.

Mrs. Alden continued in the possession of the whole of the premises, from April 3d, 1874, until the 16th day of January, 1877, except when Miller was in the occupancy of the part mentioned, taking the rents and profits to herself. Miller had no actual knowledge of the condition of the record title, and took no pains to inquire in whom the title was, but knew in July, 1874, that the title and right to the possession of the premises were in dispute, and that there was a litigation between Mrs. Alden and Mrs. Trubee. No claim was made other than might arise upon the facts stated, and no demand was made by the plaintiff on the defendant for the use and occupation, until after she was placed in possession of the premises. Miller was never made a party to any litigation between Mrs. Trubee and Mrs. Alden.

Mrs. Trubee, on the 2d day of June, 1877, went into possession of the premises, and has ever since to the present time held full and peaceable possession thereof, except for a few hours when put out by force; and she has ever since been a resident of the state of Connecticut.

The plaintiff claimed that she was entitled to recover the sum of $7,000, for the rent, or for the use and occupation of the premises and the interest thereon, while the defendant claimed that she was not entitled to recover any sum whatever from him.

Upon these facts the case was reserved for the advice of this court.

*W. K. Seeley* and *E. W. Seymour*, for the plaintiff.

1. The remedy we have adopted is the right one. Trespass for mesne profits lies after a recovery in ejectment, and can be brought only after such a recovery. 1 Chitty Pl., 177; Tyler on Ejectment, 840; Hilliard on Rem. for Torts, book 2, sec. 152; Sedgw. on Damages, 6th ed., 135; *Morgan* v. *Varick*, 8 Wend., 587, 591; *Leland* v. *Tousey*, 6 Hill, 333. And only nominal damages are ordinarily recovered in ejectment, and these are generally remitted, as we have done here. 1 Swift Dig., 509; 1 Chitty Pl., 192; Sedgw. on Damages, 6th ed., 133; *Van Allen* v. *Rogers*, 1 Johns. Cas., 281.

2. The action of trespass for mesne profits will lie against a tenant of the disseisor after judgment in ejectment. This principle was established early in English jurisprudence, (*Holcomb* v. *Rawlins*, Cro. Eliz., 540,) but though called in question by Lord Coke, (*Liford's case*, 11 Coke, 51, and *Menvill's case*, 13 Coke, 21,) has yet been adhered to in all the other English cases, and must be regarded as thoroughly established in that country. *Doe* v. *Whitcomb*, 8 Bing., 46. It is also established in the state of New York. *Jackson* v. *Stone*, 13 Johns., 448, (quoted with approval by WILLIAMS, C. J., in *Gould* v. *Stanton*, 16 Conn., 20;) *Morgan* v. *Varick*, 8 Wend., 587, 592. Also in Massachusetts. *Emerson* v. *Thompson*, 2 Pick., 473, 486; *Washington Bank* v. *Brown*, 2 Met., 293, 295. Also in Pennsylvania. *Jeffries* v. *Zane*, 1 Miles, 287; *Storch* v. *Carr*, 28 Penn. St., 135. Also in North Carolina. *Bradley* v. *McDaniel*, 3 Jones Law R., 128. Also by the Supreme Court of the United States. *Green* v. *Biddle*, 8 Wheat., 75. The same doctrine is laid down in the text books. Tyler on Ejectment, 840; Hilliard on Rem. for Torts, book 2, sec. 153; Sedgw. on Damages, 6th ed., 143. The state of New Jersey seems to be the only one in which the contrary is held. The only case there is that of *Sanderson* v. *Price*, 1 Zabr., 637, which was decided by a divided court, two judges dissenting.

3. We were not bound to give the defendant notice of our claim of title. We had a warranty deed on record. We had also an action of ejectment pending in the court. These

facts, if they do not constitute notice, were enough to put him upon enquiry, which is sufficient. *Booth* v. *Barnum*, 9 Conn., 286; *Sumner* v. *Rhodes*, 14 id., 139; *Rowan* v. *Sharp's Rifle Co.*, 29 id., 325; *Boswell* v. *Goodwin*, 31 id., 84; *Hunt* v. *Mansfield*, id., 490; *Hamilton* v. *Nutt*, 34 id., 511; *Post* v. *Clark*, 35 id., 342; *Williamson* v. *Brown*, 15 N. York, 359; *Hinde* v. *Vattier*, 1 McLean, 110.

*J. B. Curtis* and *N. R. Hart*, for the defendant.

1. The plaintiff cannot recover in this form of action, which is trespass *quare clausum fregit*. To recover in it the plaintiff must be at the time of the entry in actual possession, or else must show an actual exclusive possession, or a title in connection with the fact that no one else was in actual exclusive possession. *Wheeler* v. *Hotchkiss*, 10 Conn., 225; *Payne* v. *Clark*, 20 id., 30; *Church* v. *Meeker*, 34 id., 421; *Sutton* v. *Lockwood*, 40 id., 318; *Cummings* v. *Noyes*, 10 Mass., 436; *Allen* v. *Thayer*, 17 id., 302. The plaintiff has in effect abandoned the ordinary mode of redress by seeking damages against the actual wrong-doer in an action of ejectment, and adopted the English mode of remitting damages, and seeking redress in an action of trespass, and that against a person as to whom she never was in possession. 1 Swift Dig., 510. We do not say an action of trespass *quare clausum* will not lie to recover mesne profits, but that it cannot be brought against this defendant, it being conceded that he was a tenant under another person, in possession at a time when the plaintiff was not in possession.

2. The defendant has already paid to the party in possession his rent. No claim or demand was made upon him for it until this suit was brought, after he had occupied for three years, and after his lease had for the third year terminated. The only relation sustained by Miller to the property was that of a tenant to the party in possession—Mrs. Alden. He never was a tenant of the plaintiff, and never entered her close, and never took the profits to himself, and never committed any trespass. Being a lessee under a lease from one in possession, claiming title, when the lessor is afterwards

ejected by title paramount, he is not liable to the real owner in an action of trespass for mesne profits. Bac. Abr., *Trespass G*, 38; *Emerson* v. *Thompson*, 2 Pick., 484, 491; *Case* v. *De Goes*, 3 Caines, 261; *Campbell* v. *Arnold*, 1 Johns., 511; *Tobey* v. *Webster*, 3 id., 461; *Sanderson* v. *Price*, 1 Zabr., 637. By the fiction of the law the disseisee is supposed to have had the freehold in him during the disseisin, but this fiction does not obtain where the party against whom mesne profits are claimed holds under a grant. *Liford's case*, 11 Coke, 51: *Menvill's case*, 13 id., 21; 1 Washb. R. Prop., book 1, ch. 5, sec. 3. The only way Miller can be made a trespasser is by relation—by putting him in Mrs. Alden's place; but the law will not do this to advance a wrong, or to defeat collateral acts which concern strangers. *Case* v. *De Goes*, 3 Caines, 262.

3. The plaintiff seeks to recover rent for the second time from Miller; it was perfectly practicable to have obtained it, or certainly to have prevented the payment of it to Mrs. Alden; at least, notice could have been given, which would have warned him of Mrs. Trubee's claim. Nothing could have been easier than to have given him notice of the claim; he would then have been put upon inquiry, and on investigation have taken such measures, by bill of interpleader or otherwise, as would have protected him in his payment. These considerations derive additional force as a defense to this action, from the fact that the action for mesne profits is an equitable one, and any equitable defense may be pleaded. *Murray* v. *Governeur*, 2 Johns. Cas., 438; *Ewalt* v. *Gray*, 6 Watts, 427. If it be that a tenant holding under a landlord in possession can be made to pay a double rent on account of his landlord's inability to respond in damages, as a penalty for a wrong to which he is a stranger, there is little safety for tenants, and certainly no equity in the rule that subjects them.

4. It would seem, on principle, that a tenant is not bound to look beyond his landlord's possession for a three months' lease. The right of possession is all that the lessee takes; he takes it independent of his lessee's title, provided

possession can be peaceably transferred. Under such circumstances how can there be trespass, which is a possessory action? *Tobey* v. *Reed*, 9 Conn., 223. If the action is to give a remedy for a wrong committed, what wrong did Miller commit? Miller's lease is for less than a year—it is a mere chattel interest. Had he purchased crops, could the plaintiff maintain an action for repayment? If a portion of the use is purchased by Miller, is there any better reason why he should pay for it twice? Would the allegation by Miller of Mrs. Trubee's title be a defense to a suit by Mrs. Alden for rent? Obviously not. The rule of law which estops the tenant from denying the title of his landlord in an action for rent, and which is not a technical one, but is founded in public convenience and sound policy, operates effectually in preventing a third party claiming title to the leasehold estate from afterwards claiming and bringing an action for mesne profits against the tenant. Taylor's Land. & Ten., §§ 629, 707; *Camp* v. *Camp*, 5 Conn., 300. The tenant being estopped by law from denying the title of his landlord, can only justify the non-payment of rent in case he is disturbed or evicted by his landlord or some other person having paramount title. Taylor's Land. & Ten., § 372; *Fletcher* v. *M'Farlane*, 12 Mass., 46; *George* v. *Putney*, 4 Cush., 351; *Kerr* v. *Shaw*, 13 Johns., 236; *Lansing* v. *Van Alstyne*, 2 Wend., 564. The defendant not having been disturbed in, or evicted from, his tenancy at any time during its continuance, either by Mrs. Alden or the plaintiff, was by the rule above mentioned compelled by law to pay his rent to Mrs. Alden, and to her alone; and having thus paid it, such payment is a full and effectual bar to the present action.

5. The action of trespass for mesne profits is a mere auxiliary to ejectment. It cannot be sustained against others than the wrong-doer ejected, and it lies to recover damages only for the disseisor's wrongful acts. Miller's not being made a party to the ejectment proceedings exempts him from liability. *Leland* v. *Tousey*, 6 Hill, 328; Adams on Ejectment, ch. 13; Runnington on Ejectment, § 12. Miller might have been made a co-defendant to the ejectment suit, or such a

suit might have been brought against him alone, and in either case he would have been liable in a suit for mesne profits. But the plaintiff elected to pursue her remedy in ejectment solely against Mrs. Alden; she is, therefore, confined to such damages for mesne profits as can be recovered from Mrs. Alden.

PARDEE, J. The defendant contends that this action is trespass *quare clausum fregit;* that possession by the plaintiff at the time of the injury is a pre-requisite to the maintenance of that action; and that this plaintiff was barred from possession during the entire time of occupancy by the defendant, and that therefore she must fail in her suit.

But, while in form this is an action of trespass, being consequent upon and supplemental to the action of ejectment, and therefore necessarily partaking of its characteristics, in effect it is to recover the rents and profits of the estate, and although the right to institute it was in suspense until the plaintiff had regained actual possession, the law then supposes the freehold to have been continuously in the rightful owner by a kind of *jus postliminii*, and gives her the action for the damages or mesne profits during the time of tortious dispossession; thus avoiding the application of the rule cited by the defendant and attaining justice through a fiction.

It was within the power of the plaintiff to include mesne profits in the judgment in the action of ejectment; and it was equally within her power to take only nominal damages for the trespass, enter a remittitur, and institute an action against the defendant for such part of the profits accruing during the time of the disseisin as he actually took to himself.

This action rests upon the plain principle that he who occupies the land of another shall compensate the owner therefor, even if he occupied by virtue of a lease from, and paid rent to, one who was apparently in possession claiming title, and whom he in good faith, but mistakenly, believed to be the rightful owner. For, as between two persons, equally without fault, each should bear the loss or risk of loss resulting from his own mistake.

This principle had judicial recognition at least as early as *Holcomb* v. *Rawlins*, Cro. Eliz., 540, determined about 1596. That was trespass *quare clausum fregit;* the defendant pleaded "that, long before, Thomas Clerk was seised in fee and let to him for years, and gives color to the plaintiff; the latter replied that he was seised until by the said Thomas Clerk disseised, who let to the defendant; that the plaintiff afterwards re-entered and the trespass mesne betwixt." The defendant demurred; judgment for the plaintiff; the court saying that by his re-entry "he is remitted to his first possession, and as if he had never been out of possession; and then all who occupied in the meantime, by what title soever they come in, shall answer unto him for their time; as if a disseisor had been disseised by another, the first disseisee re-enters, he shall in trespass punish the last disseisor; for otherwise it would be mischievous unto him, for after his re-entry he shall have no remedy for his mesne profits. And it is not to be doubted but that the disseisee after his re-entry shall punish the second disseisor and the servant of the first disseisor who occupied under his master; which was not denied by any; and by the same reason he shall punish him who comes in by title, for that is now as a trespass done unto himself."

*Doe* v. *Whitcomb*, 8 Bingham, 46, decided in 1831, was trespass for mesne profits. There was a judgment in ejectment against Simon Payne; the plaintiff had seisin by execution; the defendant had occupied the premises for a year, having been let into possession by an agent of Payne, to whom he had paid the rent. It was objected that the defendant was not thereby sufficiently connected with Payne to render him liable to this action for mesne profits. The verdict was taken for the plaintiff, with leave for the defendant to move the court on the point. *Tindal, C. J.* "We entertain no doubt on the case. The evidence was, a judgment in ejectment against Simon Payne; the execution of a writ of possession thereon; that the defendant came in under Simon Payne and had possession for a certain time, and paid rent to a certain amount. The only objection to the verdict is, that the

defendant is a stranger to the record in ejectment against Payne. The answer is, that the defendant came in under Payne while the judgment in ejectment was pending, and that he cannot hold by a better title than Payne."

*Emerson* v. *Thomson et al.*, 2 Pick., 473, was trespass for mesne profits. The plaintiff having recovered judgment against the administrators *de bonis non* of the estate of John Harris, deceased, upon March 30th, 1818, levied his execution upon certain land, and immediately made a lease thereof to Brown, who was already in possession as a purchaser from the administrators. Before the levy of the plaintiff's execution W. Thompson, the father of the defendants, had recovered judgment for the premises in a writ of *entry sur disseisin* against Brown, and on May 8th, 1818, he executed his *habere facias seisinam* and expelled Brown, then in possession under the plaintiff's lease. W. Thompson died November 16th, 1818; the defendants were his heirs at law and administrators upon his estate. On May 20th, 1819, in his latter capacity, W. Thompson, the defendant, leased the premises for one year; and it did not appear that he or any other of the defendants had at any time before entered thereon after the death of their ancestor. On May 21st, 1819, the plaintiff brought his writ of ejectment demanding seisin of, &c., "into which the said defendants have not entry but by W. T., &c., deceased, who thereof unjustly disseised the plaintiff, and from whom the same descended to the defendants, who still unjustly withhold the same," &c.; plea "that they never disseised in manner and form." Verdict of judgment for the plaintiff, with writ of seisin duly executed. Held—"that the heirs were liable in trespass for the mesne profits accruing after the commencement of the writ of entry, (and so, *it seems*, they would have been, if they had been purchasers,) but not for those accruing between the descent cast and their entry. As to those accruing between their entry and the commencement of the writ of entry; *Quære.*"

In *Green* v. *Biddle*, 8 Wheaton, 1, it is said that "nothing in short can be more clear upon principles of law and reason,

than that a law which denies to the owner of land a remedy to recover the possession of it when withheld by any person, however innocently he may have obtained it, or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to and interest in the property." In *Storch* v. *Carr*, 28 Penn. St. R., 135, it is said that "intermeddling with real estate by putting a party in possession and afterwards making a written lease of it to other parties, makes the parties so interfering liable with the parties occupying the premises for mesne profits." In *Bradley* v. *McDaniel*, 3 Jones's N. Car. Law R., 128, it is said that "one coming in as lessee to the defendant in an action of ejectment during the pendency of that action, is bound by the proceedings had therein, and consequently is liable to an action for mesne profits." In *Judson* v. *Stone*, 13 Johns., 448, it was held "that when during the pendency of an action of ejectment the defendant gives up the possession to a third person, and afterwards the plaintiff recovers judgment, such third person is liable for the mesne profits," and in *Morgan* v. *Varick*, 8 Wend., 587, "that a disseisee, after recovering possession, may maintain trespass for mesne profits against the disseisor, or his servants, or a stranger acquiring title from the disseisor."

It is true that the principle has not had the unanimous support of courts in England or this country. In *Liford's case*, 11 Coke, 51, (1615,) there is a dictum of Lord *Coke*, *C. J.*, to the effect that the disseisee after re-entry cannot recover in an action for mesne profits against the feoffee or lessee, or disseisor of the first disseisor, giving as reasons that "this fiction of the law, that the freehold continued always in the disseisee, shall not have relation to make him who comes in by title a wrong-doer *vi et armis*;" that "it is to be presumed that the feoffee has given consideration or recompense to the disseisor, and that the lessee has paid rent to him, or other consideration, and therefore in reason the disseisor is to be charged with the whole;" and in respect to

the disseisor of the disseisor that the "fiction of law as to the action extends only to the first disseisor, and if the disseisee should punish the second disseisor he would be twice charged." Lord *Coke* refers to several ancient cases in support of his opinion, acknowledging that "there was a great variety of opinions in the books" upon the point. See *Symons* v. *Symons*, Hetley, 66; Viner's Abr., *Trespass*, R. 4, pl. 5; Bro. Abr., *Trespass*, pl. 35; Keilway, 1, pl. 2; see also *Sanderson* v. *Price*, 1 Zabriskie, 637. In 2 Rol. Abr., 554, *Trespass per relation*, the law is declared to be as laid down in *Holcomb* v. *Rawlyns*, supra, in Gilbert's Tenures, 47, 50, and in Comyn's Digest, *Trespass*, B. 2. Buller in his Nisi Prius, 87, speaking of the doctrine of *Liford's case*, says "it may admit of doubt, for there are cases to the contrary, and the reason of the law seems to be with them." In *Emerson* v. *Thompson*, supra, *Wilde, J.*, says:—"So far therefore from feeling myself bound by *Liford's case* as an authority, I am of opinion that the weight of authority is opposed to the decision in that case; and that this is the opinion also of the English courts may be inferred from their well known practice in relation to the action for mesne profits consequent to a recovery in ejectment."

The record finds that in the month of July, 1874, the defendant had actual knowledge that there was litigation between Georgia V. Alden and the plaintiff as to the title to, and right to the possession of, the premises, and it is not found that he had previously paid any portion of the rent reserved for the term. Having taken no precautions against the results of a possible judicial determination that the person under whom he held had no title to the premises, and no right of possession thereof, and could confer none upon him, he is not now to be heard to complain that he has paid rent to her. Upon knowledge it was for him to be diligent in enquiry as to his rights and duties, and in protecting himself against double payment. It was not his privilege simply to pay, and then transfer all risk of loss from himself to the plaintiff.

It is not an answer to her demand that he has come under

an obligation from which he cannot relieve himself to pay rent to the disseisor; that was his voluntary act and his misfortune. Neither in law nor equity are the rights of the plaintiff, she being without fault, to be conclusively determined thereby.

Moreover, the plaintiff had placed upon record a duly executed deed of the premises to herself. From the date of such record the defendant had constructive notice as to the state of the title; from that date the plaintiff was entitled to the protection given, and the defendant was subject to the limitations imposed thereby. His payment of rent to a disseisor was without excuse or any element of equity; it has not ignorance for its justification.

But we do not think it essential to the plaintiff's right of recovery that the defendant should be chargeable with notice of her claim at the time he leased the premises of Mrs. Alden, nor that he paid the rent to his lessor in circumstances that should have put him upon enquiry, nor indeed that the plaintiff should have brought an action of ejectment to recover possession; but we base our decision upon the broad principle, clearly supported by the authorities, that a disseisee who has recovered possession of the premises from the disseisor, in whatever lawful mode, may when in possession maintain trespass for mesne profits against a tenant of the disseisor or any one else who has occupied under him, for the use and occupation of the premises, whether such occupant had any knowledge of the claim of the disseisee or had not.

It being found that the sum of $2,500 will compensate the plaintiff for the use and occupation of her land for each of the years 1874 and 1875, and $2,000 for the year 1876, the Superior Court is advised to render judgment in her favor for the aggregate of those sums, with interest upon each from the end of the term for which it is payable.

In this opinion the other judges concurred.

CHARLES S. CRANE AND ANOTHER *vs.* THE EASTERN TRANSPORTATION LINE.

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On a hearing in damages after a default or demurrer overruled, in an action on the case for an injury caused by the negligence of the defendant, the burden of proof is on the defendant to show that he was not guilty of negligence, and not on the plaintiff to show that he was so.

TRESPASS ON THE CASE against the defendants, a corporation, as common carriers, for the loss of a quantity of corn by their negligence; brought to the Superior Court in Fairfield County.

The defendants filed a demurrer to the declaration, which was overruled, and the case thereupon heard in damages before *Sanford, J.* On the hearing the court found the following facts, and made the finding a part of the record.

On the 23d of February, 1873, the defendants were engaged in the towing business, in and about the waters adjacent to the city of New York, and by virtue of an arrangement before that time made with the plaintiffs had been in the habit, when requested, of towing grain boats for them from New York and its immediate vicinity to Bridgeport, and on the day mentioned the plaintiffs requested the defendants to tow for them a canal boat, laden with corn belonging to them, from Communipaw to Bridgeport, which the defendants undertook to do.

The canal boat was then at the wharf at Communipaw, laden with the corn. The defendants with their steam tug towed the boat from Communipaw, on her way to Bridgeport, as far as Port Morris, where they were delayed; and while at Port Morris, during the night, the canal boat sank, and the entire cargo was lost. The value of the cargo was $5,007.66.

The plaintiffs offered no evidence to prove negligence on the part of the defendants, and so the court does not find them guilty of negligence. The defendants offered no evidence in the cause.

The defendants claimed, on these facts, that the judgment should be for nominal damages only. The plaintiffs claimed

that, as matter of law, upon a hearing in damages after demurrer overruled, it was incumbent upon the defendants to prove that they were not guilty of negligence; and that if they did not prove this the plaintiffs were entitled to recover the full value of the lost cargo. The defendants denied this, and claimed, as matter of law, that if the plaintiffs desired to recover more than nominal damages, they must prove that the defendants were guilty of negligence.

The court ruled in conformity with the claims of the defendants, and rendered judgment for nominal damages only. The plaintiffs brought the record before this court by a motion in error.

*W. K. Seeley* and *E. W. Seymour*, for the plaintiffs, cited 2 Swift's System, 269; 1 Swift Dig., 785; *Chapin* v. *Curtis*, 23 Conn., 388; *Sherwood* v. *Haight*, 26 id., 432; *Havens* v. *N. York & N. Haven R. R. Co.*, 28 id., 87; *Daily* v. *N. York & N. Haven R. R. Co.*, 32 id., 356; *Lamphear* v. *Buckingham*, 33 id., 237; *McAlister* v. *Clark*, id., 258; *Rose* v. *Gallup*, id., 346; *Daniels* v. *Town of Saybrook*, 34 id., 381; *Carey* v. *Day*, 36 id., 155; *Merriam* v. *City of Meriden*, 43 id., 173; *Raymond* v. *Danbury & Norwalk R. R. Co.*, id., 596; *Batchelder* v. *Bartholomew*, 44 id., 494; *Shepard* v. *N. Haven & Northampton Co.*, 45 id., 54; *Hyde* v. *Moffatt*, 16 Verm., 285; *Webb* v. *Webb*, id., 636; *Gardner* v. *Field*, 1 Gray, 153; *Bates* v. *Loomis*, 5 Wend., 134; *Hartness* v. *Boyd*, id., 563; *Foster* v. *Smith*, 10 id., 377; *Kerker* v. *Carter*, 1 Hill, 101; *East India Co.* v. *Glover*, 1 Strange, 612; *Tripp* v. *Thomas*, 3 Barn. & Cress., 427; *Cook* v. *Hartle*, 8 Car. & P., 568.

*T. E. Doolittle* and *R. E. DeForest*, for the defendants, cited *Pease* v. *Phelps*, 10 Conn., 62, 68; *Gray* v. *Finch*, 23 id., 512; *Havens* v. *N. York & N. Haven R. R. Co.*, 28 id., 69; *Daily* v. *N. York & N. Haven R. R. Co.*, 32 id., 356; *Rose* v. *Gallup*, 33 id., 346; *Carey* v. *Day*, 36 id., 152; *Batchelder* v. *Bartholomew*, 44 id., 494; *Shepard* v. *N. Haven & Northampton Co.*, 45 id., 58.

PARK, C. J. In this action the plaintiffs sought to recover the value of eight thousand and twelve bushels of corn alleged to have been lost through the negligence of the defendants in transporting the same from Jersey City in the state of New Jersey, to the city of Bridgeport in this state.

The case was entered upon the jury docket for trial, but before it was reached the defendants entered a general demurrer to the declaration, which was overruled by the court. Thereupon the defendants, instead of answering further in the case, moved for a hearing in damages, which was had. On the hearing the plaintiffs proved the number of bushels of corn belonging to them, which were lost while being transported by the defendants, and their value, amounting to $5,007.60, and then rested their case. The defendants offered no evidence, but insisted in the argument that nominal damages only should be awarded by the court, on the ground that the plaintiffs had failed to prove that the defendants were guilty of negligence in the matter. The court ruled in accordance with the defendants' claim, and gave judgment for the plaintiffs to recover nominal damages only. The correctness of this judgment we are now called upon to consider.

It has been settled by a long course of decisions in this state, that, on a hearing in damages in cases like the present, it may be shown whether or not the defendant was guilty of negligence which caused the injury complained of; and if it should be found that he was free from negligence, nominal damages only will be awarded by the court, however great may be the damages in fact; but it has in no case been definitely determined on which party rests the burden of proof in such cases. As a matter of fact, however, in every case which has come before this court, where it appears which party went forward, the defendant has assumed the burden of proving that the injury did not occur in consequence of his own negligence; and the only controversy has been respecting the defendant's right to offer such proof; the plaintiff claiming that the default, involving a non-denial of the facts, or the demurrer overruled and the neglect to plead over, as

the case happened to be, conclusively admitted the cause of action to the extent of the injury received.

This appears, not only from the cases themselves, but from the fact that if the plaintiff had assumed the burden of proof under the general issue, there would have been no ground of complaint, and the cases would never have reached this court.

In the leading case of *Havens* v. *The Hartford & New Haven R. R. Co.*, 28 Conn., 69, the controversy before this court was, whether in a hearing in damages after a demurrer overruled, the defendants had the right to show that the plaintiff contributed to the injury he received by his own negligence. In *Daily, Admr.*, v. *The New York & New Haven R. R. Co.*, 32 Conn., 356, the defendants again, in a hearing in damages after a demurrer had been overruled, offered to show that the plaintiff's intestate brought the mischief upon himself by his own negligence. In *Carey, Admr.*, v. *Day et al.*, 36 Conn., 152, the defendants assumed the burden of proof as to the non-existence of negligence on their part in a hearing in damages. Such was the case also in *McAlister* v. *Clark*, 33 Conn., 253, *Merriam* v. *The City of Meriden*, 43 Conn., 173, and *Batchelder* v. *Bartholomew*, 44 Conn., 494.

It would seem to follow from this long continued practice of the legal profession in cases of this character, from that of *Havens* v. *The New York & New Haven R. R. Co.*, in the 28th Conn. R., down to that of *Batchelder* v. *Bartholomew*, in the 44th, that the opinion of the profession has been that on a hearing in damages after a demurrer overruled, when the plaintiff shows by evidence the extent of his injury, the cause of action admitted by the demurrer and extending only to nominal damages where they are unliquidated, *prima facie* covers the whole injury which the plaintiff has proved. This practice well accords with what must be the correct doctrine in principle. Take this very case, where more than eight thousand bushels of corn was lost in one disaster. The plaintiffs bring their action to recover the value of the corn, alleging that the loss occurred through the negligence of the defendants. The defendants demur to the plaintiffs' declara-

tion. The demurrer is overruled, and the defendants neglect to plead over, thereby admitting a good cause of action for some of the loss alleged, perhaps for the value of one bushel of the eight thousand, because when the demurrer was entered and overruled it could not be known that the plaintiffs had lost more than that quantity. But when the plaintiffs prove that the whole eight thousand bushels were lost at the same time with the one, and by the same disaster, why does not the cause of action *primâ facie* extend to the whole number of bushels? In *Lamphear* v. *Buckingham*, 33 Conn., 250, Judge BUTLER says that if an action of debt is brought on a bond for a sum certain, the whole is admitted by a demurrer and neglect to plead over, and no further inquiry is had; "but in actions of tort for unliquidated damages a different rule necessarily applies. In such actions the plaintiff does not declare for a specific thing, but has an unlimited license in declaring, and may allege as much of wrong and injury and demand as much damage as he will, and recover by proving any amount however small, if sufficient to sustain the action. A defendant therefore in an action of tort is not holden to have admitted by his default the extent of the injury. It is assumed that, as the plaintiff may allege more than is true, he probably has done so, and the defendant by his default is considered as admitting the wrong to some extent, leaving that extent to be inquired into to enable the court to fix the damages, because such an inquiry is always and necessarily had in such cases." The difference between liquidated and unliquidated damages is here very clearly stated by the learned judge. In liquidated damages no further inquiry is had after demurrer overruled, but in unliquidated damages further inquiry is necessary, because the plaintiff may have, and probably has, exaggerated his injury in his declaration. But when he proves the extent of his damages to the satisfaction of the court no good reason can be shown why in principle the cause of action admitted by the demurrer does not, *primâ facie*, extend to the whole injury, leaving the defendant at liberty to contest the claim, so far as it goes beyond nominal damages. So far as this

court has expressed an opinion on this subject it has been in accordance with these views. In *Daniels* v. *Town of Saybrook*, 34 Conn., 377, the court say:—"The defendants in this case, by demurring to the declaration, defaulted as to the facts sufficiently alleged and essential to constitute a cause of action, and thereby admitted them. When the demurrer was overruled their case stood as upon default, with all the essential elements of the cause of action, and the right of the plaintiffs to recover some damages, conclusively admitted. But by the rules of law applicable to the case the allegations respecting the extent of the injury done to the plaintiffs, and the consequent amount of damages to which they were entitled, were not admitted. On the hearing in damages, therefore, it was incumbent upon the plaintiffs to show the extent to which they had been injured by the fault or negligence of the defendants, although, for the reason stated, it was not incumbent upon them to prove the exercise of ordinary care, or any other element of the cause of action. On this hearing in damages it was competent for the defendants to prove any fact or circumstance tending to show that the injury was not occasioned wholly or at all by their negligence, but was occasioned wholly or in part by the negligence of the plaintiffs. But in proving these facts the defendants assumed the burden. If they proved them the court might take them into consideration in fixing the amount of damages."

All that prevents this case from being decisive of the question here at issue is the fact that the burden of proof was not so definitely raised on the trial as it is here, although the question was involved in the decision of the case. The Superior Court found the facts on a hearing in damages after a demurrer to the declaration had been overruled. The court found that the plaintiffs received the injury while driving a vicious horse along one of the defendant's highways at a place where the road was so raised above the adjoining ground as to endanger travel, and the viciousness of the horse and the want of a sufficient railing by the side of the highway jointly contributed to produce the injury of which the plain-

tiffs complained. The court further found that the plaintiffs hired the horse at a livery stable, and did not know the viciousness of the animal, but did not find whether or not their ignorance of the character of the horse was the consequence of a want of reasonable care. The case was reserved for the advice of this court, and the question was whether substantial or nominal damages should be awarded. This court advised the Superior Court to render judgment for substantial damages, on the ground that the burden of showing that the plaintiffs were guilty of a want of reasonable care was on the defendants, and they having failed to show this the fact was to be taken against them.

What was said by the court in *Lamphear* v. *Buckingham*, supra, tends also to the same conclusion.

The defendants rely upon some expressions of the court in *Batchelder* v. *Bartholomew*, supra, in support of their claim, that the burden of proof is on the plaintiffs to show negligence in the defendants in order to recover more than nominal damages. But this question was not raised in that case, nor could it have been, for the defendants assumed the burden of proof on the trial. Whatever remarks therefore were made by the court in discussing the question whether or not the default and non-denial of the facts in that case conclusively admitted the cause of action to the extent of the injury received, must be taken to have been made in reference solely to the facts of the case and the question under discussion. *Danforth* v. *Adams*, 29 Conn., 107.

The same may be said in regard to the case of *Shepard* v. *New Haven & Northampton Co.*, 45 Conn., 54. The sole question there raised was one of variance between the proof and the declaration, and the remarks of the court were made wholly with reference to that question. These cases cannot help the defendants.

There is error in the judgment complained of.

In this opinion the other judges concurred.

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## WILLIAM DENTON *vs.* TOWN OF DANBURY.

The statute (Gen. Statutes, tit. 19, ch. 5, sec. 15,) provides that in civil actions brought before a justice of the peace an appeal shall be allowed to either party "from any judgment rendered therein upon any issue." Held not to give a right of appeal from a judgment of *respondeas ouster* upon a demurrer overruled. (Two judges dissenting.)

Where such an appeal was taken by the defendant to the Court of Common Pleas, and the plaintiff in that court amended his complaint by raising the demand for damages from $100, which was below the jurisdiction of the court, to $110 which was within its jurisdiction, it was held that the appellate court did not thereby acquire jurisdiction.

If the court had no jurisdiction before the amendment it had none to allow the amendment.

And held that the court could not acquire jurisdiction by the defendant's filing an answer to the complaint, instead of pleading to the jurisdiction.

Where a judgment of *respondeas ouster* is rendered upon a demurrer overruled, and the defendant refuses or neglects to answer over, the court should render final judgment for the plaintiff; and it is this judgment, and not that of *respondeas ouster*, from which the appeal is to be taken.

CIVIL ACTION, brought originally before a justice of the peace, and appealed by the defendant to the Court of Common Pleas of Fairfield County, and tried in that court to the jury before *Hall, J.* The jury having returned a verdict for the plaintiff, the defendant filed a motion in error, assigning as error the overruling by the court of a motion to erase the case from the docket for want of jurisdiction, made by him before the trial to the jury. The case is fully stated in the opinion.

*L. D. Brewster* and *H. B. Scott*, for the plaintiffs in error.

*W. F. Taylor* and *H. W. Taylor*, for the defendant in error.

HOVEY, J. This case comes before us upon a motion in error filed by the defendants, to reverse a judgment of the Court of Common Pleas for the county of Fairfield.

The action in which the judgment was rendered was brought originally before a justice of the peace by complaint, demanding one hundred dollars damages. The defendants

demurred to the complaint, and the justice overruled the demurrer, and ordered the defendants to answer over. The defendants, disregarding the order, moved an appeal to the Court of Common Pleas, and the justice, without hearing the parties further or rendering judgment in favor of the plaintiff for his damages and costs, allowed the appeal. The defendants entered the appeal in the appellate court at the term to which it was taken, when the plaintiff amended his complaint by filing an additional count, and the defendants made answer thereto. The cause was then continued to the next term, when the defendants moved the court to erase it from the docket, but the motion was denied. Pending the motion, the plaintiff further amended his complaint by raising the damages demanded to the sum of one hundred and ten dollars. The cause was then tried to the jury, who returned a verdict in favor of the plaintiff, and judgment was rendered upon the verdict.

The defendants assigned several errors in the proceedings of the Court of Common Pleas; but the only question raised by the assignment which requires consideration is, whether that court had jurisdiction of the cause in which the judgment complained of was rendered. If it had, there was no error in its refusal to erase the cause from the docket, and, consequently, no error in the judgment. If it had not, its refusal to erase the cause was manifestly erroneous, and the judgment also was erroneous and must be reversed.

The Court of Common Pleas, at the time the proceedings in the cause were commenced and from thence until the judgment was rendered, had original jurisdiction of those causes only in which the matter in demand exceeded one hundred dollars but did not exceed five hundred dollars, and appellate jurisdiction in causes in which the matter in demand did not exceed the former sum. The General Statutes, tit. 19, ch. 4, § 1, direct that "all causes of action at law wherein the matter in demand does not exceed one hundred dollars, shall be heard and determined by a justice of the peace, subject to the right of appeal as hereinafter provided." Section 2 of chapter 6, title 19, of the same

statutes, recognizes the right of the defendant in any such action to appeal from a judgment of *respondeat ouster* on a plea in abatement, and makes provision for the disposition of the appeal in the appellate court. And § 15 of ch. 5, tit. 19, p. 415, of the General Statutes, provides that "in all civil actions except those of summary process, brought before a justice of the peace, an appeal from any judgment rendered therein upon any issue may be had and allowed to either party." The plaintiff contends that under this provision the appeal in the present case was properly taken and allowed, and that the Court of Common Pleas acquired thereby jurisdiction of the cause. But to this claim there are insuperable objections. In the first place, if the claim should be sustained it will be in the power of the defendant in any civil action brought before a justice of the peace, to remove the cause by appeal to the Court of Common Pleas or the Superior Court before it has been heard and determined by the justice, and thus deprive that officer of an important part of his jurisdiction, and practically annul the provision hereinbefore recited, of § 1, ch. 4, tit. 19, of the General Statutes. It will also enable the defendant in any such action, by refusing or neglecting to enter his appeal in the appellate court, to prevent the plaintiff from recovering judgment in that court for his damages and costs; as, in such a case, that court would have no jurisdiction to render such a judgment or any judgment except in affirmance of the judgment rendered by the justice. Gen. Stat., tit. 19, ch. 4., § 17, p. 416. In the second place, the overruling of the demurrer to the plaintiff's complaint was not a judgment in the sense in which that term is used in the statute. It was a determination of the matter of law in favor of the plaintiff, and established his right to a judgment for his damages and costs unless the defendants pleaded or answered over, but nothing more. It required an assessment of the damages and an adjudication by the court that the plaintiff recover the sum assessed with costs, to make the judgment complete. Sir William Blackstone, in commenting upon this subject says, that "when the substance of the record is completed and copies are delivered

to the judges, the matter of law upon which the demurrer is grounded is, upon solemn argument, determined by the court and not by any trial by jury; and judgment is thereupon accordingly given. As in an action of trespass, if the defendant in his plea confesses the fact but justifies it *causâ venationis*, for that he was hunting; and to this the plaintiff demurs, that is, he admits the truth of the plea but denies the justification to be legal; now, on arguing this demurrer, if the court be of opinion that a man may not justify trespass in hunting, they will give judgment for the plaintiff; if they think that he may, then judgment is given for the defendant. Thus is an issue in law or demurrer disposed of." 3 Bla. Comm., 323. Judge Swift, speaking upon the same subject, says.—"When the pleadings close in a demurrer to the declaration, the plea, the replication, or the rejoinder, the court must always give their opinion as to the sufficiency or insufficiency of that part of the pleadings to which the demurrer is taken; for instance, if the demurrer is taken to the declaration, they must say the declaration is sufficient or insufficient, according to their opinion. If they find the matter of law or demurrer in favor of the plaintiff, they must, after deciding that point, proceed to give judgment that the plaintiff recover such sum of debt or damages as they may think just, with his cost. If the determination be in favor of the defendant, then judgment must be rendered for his costs. As for instance, in a demurrer to the declaration, the proper form of entering up the judgment is—'This court is of opinion that the plaintiff's declaration is sufficient, and therefore consider and give judgment that the plaintiff recover of the defendant the proper sum in debt or damages, with his costs;' or otherwise—'This court is of opinion that the plaintiff's declaration is insufficient, and therefore consider and give judgment that the defendant recover his cost;' and in like manner to a plea, replication, or rejoinder." 1 Sw. Dig., 783, 784.

These rules were so far modified by the legislature in 1872 as to allow a party, upon the overruling of a demurrer, to plead over and have the cause proceeded with, heard and

determined upon its merits, in the same manner as if no demurrer had been interposed; but in all other respects they remain unchanged. So that if the party entitled to plead or answer over refuses or neglects so to do, as the defendants in this case did, the court must render judgment in favor of the plaintiff for his damages and costs, if the demurrer be determined in his favor; or otherwise, in favor of the defendant and for him to recover his costs. Unless that is done no foundation is laid for an appeal to a higher court. The appeal of the defendants in this case was, therefore, a nullity, and gave to the Court of Common Pleas no jurisdiction of the cause. *Wildman* v. *Rider*, 23 Conn., 172.

The plaintiff further contends that the defendants, by answering the amended complaint filed in the Court of Common Pleas, admitted the jurisdiction of that court and rendered its proceedings as valid and as binding as they would have been if the appeal had been taken from a lawful judgment. The conclusive answer to this claim is, that the appeal being unauthorized by law and therefore void, the Court of Common Pleas could not acquire jurisdiction by the admission or consent of the defendants. For it is an inflexible rule that where jurisdiction is not conferred by law it cannot be acquired by the act or agreement of the parties. *Hart* v. *Granger*, 1 Conn., 169; *Perkins* v. *Perkins*, 7 id., 567; *Ives* v. *Finch*, 22 id., 105; *Andrews* v. *Wheaton*, 23 id., 112; *State* v. *Beecher*, 25 id., 539; *Olmstead's Appeal from Probate*, 43 id., 119; *Charter Oak Bank* v. *Reed*, 45 id., 391.

It is finally contended by the plaintiff, that the amendment of his complaint by raising the damages demanded to the sum of one hundred and ten dollars, put the case in the same position in which it would have stood if it had been brought originally to the Court of Common Pleas upon a complaint demanding that sum. But this claim cannot be sustained. The Court of Common Pleas, having no jurisdiction of the cause by the appeal, had no jurisdiction to allow the amendment, or to make any order except to dismiss the appeal and erase the cause from the docket as soon as the want of jurisdiction came to its knowledge.

The judgment complained of was, therefore, erroneous, and is reversed.

In this opinion PARDEE and GRANGER, Js., concurred.

LOOMIS, J., (dissenting.) I concede the premises upon which the reasoning contained in the majority opinion proceeds, so far as to admit that the word "judgment," when used in a statute without qualification, must be construed to mean the final or completed judgment in a cause, and not the decision of the court overruling a demurrer, or ordering the defendant to answer over after a plea in abatement. If, therefore, the statute had remained as in the Revision of 1866, p. 19, sect. 88, authorizing an appeal from the judgment of a justice of the peace rendered in any case, it would be clear that the present appeal could not be sustained. But the law controlling this case is found in the Revision of 1875, p. 415, sect. 15, which provides that "in all civil actions, except those of summary process, brought before a justice of the peace, an appeal from any judgment rendered therein upon any issue may be had and allowed to either party." Here are restrictive words qualifying the judgment and also the issue—"*any* judgment upon *any issue*." It is not easy to conceive for what purpose these words were inserted, unless to include a judgment other than the final one upon an issue other than final. The meaning of the word "judgment" is restricted and limited by the words "any issue," so that if the pleadings terminate in any distinct issue of law or fact, the decision of the court concluding the parties on that issue is a judgment that may be appealed from within the meaning of the statute.

This construction is further fortified by referring to the language of the previous statute. The act of 1871 (Session Laws, 1871, ch. 75,) provided for an appeal from the *final* judgment rendered in any action. When this act was passed and before that time appeals had been allowed on pleas of abatement under the implication contained in another statute (Revision of 1866, p. 20, sect. 91;) referring to the liability

of a defendant to pay costs, if he should appeal on a plea in abatement and fail to make good his plea, although on the merits the cause might be decided in his favor. *Russell* v. *Monson*, 33 Conn., 506.

In order to prevent the words "final judgment," as used in the act of 1871, from cutting off such appeals, the act of 1873, chapter 21, p. 135, was passed, which in express terms provided against any such construction as would prevent appeals from judgments rendered on pleas in abatement.

Now in the statutes of 1875 the omission of the word "final" before the word "judgment," and the substitution of the words—"*any* judgment on *any* issue"—while at the same time the provision in the act of 1873 entirely disappears as no longer necessary, have to my mind great significance, and render it reasonably clear that the legislature in adopting such a change must be held to have intended to allow appeals from judgments both on demurrers and pleas in abatement.

But against this construction the opinion of the majority refers to the evils that might result from it, under the statute regulating the entry of copies on appeal, which provides, in substance, that if the appellant neglects to take out and enter the copies in the higher court, the appellee, at any time during the term after the second opening of the court, may do so "and have judgment affirmed with additional costs." General Statutes, 1875, p. 416, sect. 17.

In reply I would suggest—1st. That this objection lies with equal force against allowing an appeal from the judgment of *respondeas ouster* on a plea in abatement. Yet such appeals have long been and are now allowed upon the mere implication contained in a statute providing for costs. *Russell* v. *Monson*, supra; General Statutes, 1875, p. 420, sect. 2. —2d. The objection in my mind has no force, because I do not concede that the appellate court must necessarily stop with a simple affirmance of the judgment as rendered by the justice. In giving these general directions the law naturally speaks of affirming the particular judgment rendered by the court below, because that was vacated by the appeal, and in the majority of the cases nothing more is necessary. But

if in a particular case anything further is needed to secure the rights of the appellee and to prevent the neglect of the appellant from injuring the appellee, I think the power of the court over the cause does not cease simply by affirming the judgment appealed from. The effect of the appeal is to confer on the appellate court full jurisdiction over the cause, and as incidental to this jurisdiction it may if necessary proceed to render final judgment. The statute does not prohibit such a course, and the fact that it gives the party a right to have judgment affirmed ought not to be construed as conferring only a limited jurisdiction on the higher court.

The construction which the majority opinion assumes is to be given to the statute regulating appeals seems quite likely to suggest to some litigious defendant to try the experiment of appealing from the judgment of *respondeas ouster* on a plea in abatement and purposely neglecting to enter his copies. If such a case should arise is this court prepared to accept the idea that the statute referred to must be construed to restrict the power of the appellate court to a mere repetition of a harmless order to an absent defendant to "answer over," with no power to supplement or enforce the order by proceeding to render final judgment? I should hope not.

I think there was no error in the judgment complained of.

In this opinion PARK, C. J., concurred.

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HAWLEY BRADLEY *vs.* JOHN D. VAIL, ADMINISTRATOR.

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It is no objection to a bond of recognizance when offered in evidence in a suit upon it, that it was written out after the suit was brought, by the clerk of the court who took it, from an entry made by him at the time on the docket of the court.

Such a document is a record of the court and imports verity. It is also a complete record in itself and not a part of the record of the judgment.

And as it imports verity, evidence is not admissible on the part of the defendant in a suit upon it, of a variance between the bond as extended and the original entry on the docket.

It is enough that it was duly certified by the clerk of the court in which it was taken and was in the proper custody when it was produced at the trial.

The statute with regard to civil actions (Gen Statutes, tit. 19, ch. 18, sec. 11,) provides that no suit shall be brought against a surety on a bond for costs unless within one year after final judgment in the action in which the bond was given. The statute with regard to the estates of deceased persons (Gen. Statutes, tit. 18, ch. 11, sec. 4,) provides that courts of probate shall allow not less than six nor more than eighteen months for creditors to present claims against an estate. A surety on a bond for costs died within one year after final judgment in the action and before suit was brought on the bond. Held that the former statute was superseded in its application to the case by the latter, and that the claimant had all the time allowed other creditors for presenting his claim.

It is provided by Gen. Statutes, tit. 18, ch. 11, sec. 6, that when a creditor of an estate not represented insolvent shall present his claim to the executor or administrator within the time limited by the court of probate, and he shall "disallow and refuse to pay it," the claim shall be barred unless the creditor shall bring suit "within four months after he has been notified by him that his claim is disallowed." Held that the disallowance and notice of it to the creditor are to be in terms so unequivocal that he may know with certainty when his claim, if not sued, will be barred.

In a suit on such a claim the defence that it is barred by a failure to sue within four months after disallowance and notice, cannot be made under the general issue without notice.

The plaintiff in a suit against the administrator of the estate of a surety on a bond for costs took out execution for the amount of the costs, requested the surety, then living, to pay the amount, which he neglected to do, and a year after his death had demand made upon the principal on a renewed execution which was returned unsatisfied. Held that it was not his duty to have taken other proceedings for the collection of the amount of the principal, nor to have given notice to the surety in his lifetime or to the defendant as his administrator that he was not able to collect the amount from the principal; and that the plaintiff was entitled to recover in the absence of proof (under a statute then in force but omitted from the later revision) that the costs could have been recovered out of the estate of the principal.

DEBT on a bond of recognizance for costs; brought to the Court of Common Pleas of Fairfield County, and tried to the jury on the general issue before *Hall, J.* Verdict for the plaintiff, and motion for a new trial by the defendant for errors in the rulings and charge of the court. The case is fully stated in the opinion.

*H. W. Taylor*, with whom was *W. F. Taylor*, in support of the motion.

1. The contract sued upon is one of record, and must be proved by a record. 1 Swift Dig., 376; *Starr* v. *Lyon*, 5 Conn., 540; *Town of N. Haven* v. *Rogers*, 32 id., 224; *Gregory* v. *Sherman*, 44 id., 470. The memorandum from which the document offered in evidence was made was *not* a record, it was a mere note to *aid* the clerk in perfecting his records. *Weed* v. *Weed*, 25 Conn., 344. It could have been drawn up by the clerk from his memorandum only at the term at which it was made, except by an express order of the court for that purpose. 1 Swift Dig., 785; *Wilkie* v. *Hall*, 15 Conn., 37. The recognizance was entered into by the intestate on September 18th, 1871; the present action was brought May 1st, 1879—more than eight years afterwards; and the record was not perfected till after the suit was brought.

2. If we admit that the certificate as originally drawn was a proper and legal one, still the plaintiff would have failed to prove his case, as there was a variance between his declaration and evidence. The record shows that the clerk erased the word *Brookfield* and inserted the word *Bethel* on learning that the certificate had misdescribed Osborne's residence. A record cannot be made up, altered, and perfected from mere recollection with no written memoranda to aid. *Waldo* v. *Spencer*, 4 Conn., 71; 1 Smith's Lead. Cas., (Am. ed.,) 801. Courts will not allow records to be amended without written notes, especially after years have passed. *Thatcher* v. *Miller*, 13 Mass., 270. To allow a record to be so made up and altered would violate first pinciples. It would subject our public records to continual mutilation, and affect rights which had become ascertained and vested by the most certain of all evidence—a public record.

3. A record can only be proved, either by the entire original, or by a certified copy of the whole. 1 Swift Dig., 750; 1 Greenl. Ev., § 500; Freeman on Judgments, § 412. The plaintiff neither introduced the entire original record, nor a certified copy of it, in which any mention of a bond of recognizance appeared, as was claimed by the defendant to be necessary.

4. It was a question of fact for the jury to find, whether there had been a refusal to pay the claim by the defendant, and whether the present suit was instituted within four months thereafter. It was not necessary for the defendant to prove a disallowance and refusal in terms. A refusal is the act of declining to do something. Bouvier's Law Dict., *Refusal.* It was sufficient if by his conduct and the general import of his language he had given notice of a disallowance. The defendant claims that he so refused, both by his conduct and words, and it was error in the court to usurp the functions of the jury, pass upon the question of fact and the weight of evidence thereon himself, and withdraw it from the consideration of the jury. *Occum Co.* v. *Sprague Manf. Co.*, 34 Conn., 530; *Wilson* v. *Waltersville School District,* 46 id., 400.

5. The court erred in refusing to charge the jury as requested by the defendant, that by the Revised Statutes, p. 495, sec. 11, an action on the recognizance could only be brought within one year from October 22d, 1877, and that the death of Martin K. Osborne did not alter the duty of the plaintiff in that respect; and that the defendant as administrator has the same right to require suit to be commenced within one year from that date that Martin K. Osborne would have had if he had lived. After the statute had once begun to run in favor of Martin K. Osborne, his death could work no advantage to the plaintiff nor affect the defendant's rights.

6. The court also erred in refusing to charge as requested by the defendant, that the plaintiff could not recover unless within one year after the 22d of October, 1877, he had attempted to collect the amount of the costs from Henry B. Osborne by proceedings other than such as were claimed to have been proved by the plaintiff on the trial; and that notice should have been given by the plaintiff either to Martin K. Osborne in his lifetime or to the defendant since his decease, of the plaintiff's inability to collect the same of Henry B. Osborne. It was a necessary preliminary to fix the liability of Martin K. Osborne as a bondsman that a

demand on the execution should have been made upon Henry B. Osborne within the life of the execution or its renewal, prior to any demand made upon Martin K. Osborne, (if living, or his representative after his decease,) as his bondsman. *Dutton* v. *Tracy*, 4 Conn., 365. The finding shows that the only demand made upon Henry B. Osborne was in April, 1879—a period of more than eighteen months after the cause of action accrued, and about one year after the death of Martin K. Osborne; and no notice of the demand upon Henry B. Osborne was ever given to the defendant as administrator. These facts show that no liability was fixed on Martin K. Osborne in his lifetime, or on the defendant since his decease.

*S. Tweedy*, and *A. H. Averill*, contra.

HOVEY, J. This was an action of debt upon a bond of recognizance alleged to have been entered into by Martin K. Osborne, the defendant's intestate, before the Superior Court for Fairfield County, for the prosecution of an action in that court, in which one Henry B. Osborne was plaintiff and the present plaintiff was defendant. The cause was tried to the jury in the Court of Common Pleas upon the plea of the general issue, and a verdict was rendered in favor of the plaintiff. Upon the trial the plaintiff offered in evidence a document signed by the assistant clerk of the Superior Court for Fairfield County, and sealed with the seal of that court, of which the following is a copy:

"At a Superior Court holden at Danbury, within and for the county of Fairfield, on the 4th Tuesday of August, 1871.

"Henry B. Osborne *vs.* Hawley Bradley.

"Personally appeared before said court on the 18th day of September, 1871, Martin K. Osborne, of Bethel in said county, and acknowledged himself bound and indebted to Hawley Bradley, the above named defendant, and the adverse party, in a bond of recognizance, in the sum of one hundred and fifty dollars, conditioned that the above named Henry B. Osborne shall prosecute his said action against Hawley

Bradley to effect and answer all damages in case he fail to make his plea good."

In connection with this document the plaintiff offered in evidence the docket of the Superior Court for Fairfield County, August term, 1871, in which the action of Henry B. Osborne against Hawley Bradley was entered, containing a memorandum of an order of the court for a bond for prosecution therein, and also a memorandum made by the assistant clerk of the court in the following form: "Martin K. Osborne, of Brookfield, gave bonds pros. $150, Sept. 18th."

The plaintiff also offered the testimony of the assistant clerk to prove that the Martin K. Osborne who entered into the recognizance aforesaid was the person referred to by that name in the present suit; that the memoranda on the docket were made by the witness at the time the recognizance was taken; that from the memoranda so made the witness drew up the document hereinbefore recited immediately after the present suit was commenced, and that afterwards he erased the word "Brookfield" and inserted the word "Bethel," on learning that he had incorrectly described the said Martin K. Osborne's residence.

The defendant objected to all the evidence so offered, but the objection was overruled by the court. And the defendant believing that the evidence should have been excluded and that the court erred in charging the jury, brings the questions before this court upon a motion for a new trial.

The first question presented by the motion is, whether the document offered in evidence by the plaintiff was properly admitted by the court. The defendant contends that it was inadmissible, because, he claims, first, that it was not a record; second, that it was made after the commencement of the present suit; third, that it had been materially altered, and was contradictory of the entry upon the docket; and fourth, that it was admissible only in connection with the entire record in the cause. But neither of these objections can be sustained. The document referred to was in the form

of an original record of the recognizance declared upon by the plaintiff, and, being duly certified by the assistant clerk of the Superior Court who took it, and in the proper custody when it was produced at the trial, must be regarded as a record of that court, and was admissible in evidence as such. The fact that it was not drawn up until the present action was commenced did not affect its validity. Bonds of recognizance of this description are seldom, if ever, drawn up in form at the time they are taken. As they are not contracts executed by the parties, it has always been deemed sufficient, when they are acknowledged before a court of record, for the clerk of the court or his assistant to make brief notes or memoranda upon the docket or upon the files in the cases in which they are taken, and from such notes or memoranda to draw them up in form at any time afterwards when they are wanted for use as evidence. But when drawn up, and certified by the clerk or his assistant and filed, they become matters of record, by relation, from the time they were taken and acknowledged, though not entered in the book in which judgments of the court are recorded. Dalt., c. 168; 4 Burn's Inst., 96; 2 Saund. Rep., 72, note 2. The document in question, being thus shown to be a record of the Superior Court, and not merely the certificate of an officer acting in a ministerial capacity, as was the case in *Gregory* v. *Sherman*, 44 Conn., 466, imported absolute verity, and was conclusive evidence of its own truth. It was not, therefore, competent for the defendant in the Court of. Common Pleas to question the propriety or legality of the alteration made in the recognizance as first drawn up, nor for that court to falsify the record, and, for that purpose, to look at a variance between the recognizance as finally drawn up and perfected and the memorandum of it as entered upon the docket of the Superior Court. Co. Litt., 117·*b*, 260 *a*; 1 Roll. Abr., 757; Com. Dig., *Record A;* 3 Bla. Comm., 24, 231; *Dickson* v. *Fisher*, 1 W. Black. Rep., 664.

It is a sufficient answer to the remaining objection of the defendant to the admission of the document referred to, that the record of a recognizance for prosecution forms no part of

the record of the judgment in the cause in which it is taken, but constitutes in itself a complete record. If it formed a part of the record of the judgment, a writ of error brought to reverse the judgment would be fatally defective if it did not contain a transcript of the recognizance as well as a transcript of the declaration, subsequent pleadings and judgment. Yet it can be safely asserted that no writ of error was ever brought in this state which contained a transcript of the recognizance for prosecution taken in the action in which the judgment was rendered.

This disposition of the objection to the admission of the record of the recognizance renders a consideration of the objection to the admission of the copy of the record of the judgment in the cause in which the recognizance was taken unnecessary. The record of the judgment and the record of the recognizance being two distinct records, the one might properly be proved by the record itself, and the other by the copy offered in evidence. The copy, therefore, was properly admitted.

Whether the docket of the Superior Court was admissible in evidence for the purpose for which it was offered or for any other purpose, is a question of no importance, because its admission could in no way have operated to the injury or prejudice of the defendant. Upon well-settled principles, therefore, the admission of the docket, if erroneous, furnishes no ground for a new trial. *Beers* v. *Broome*, 4 Conn., 255; *Fitch* v. *Chapman*, 10 id., 13; *Bush* v. *Keeler*, 34 id., 500; *Redfield* v. *Buck*, 35 id., 336; *Scofield* v. *Lockwood*, id., 429.

The objection to the testimony of Mr. Booth, the assistant clerk of the Superior Court, having been taken apparently under a mistaken impression of the purpose for which the testimony was offered, was not in the argument insisted upon. The testimony was offered for the purpose of establishing, among other things, the identity of the party giving the recognizance declared upon; and for that purpose it was clearly admissible.

The next objection is founded upon a supposed error in the charge to the jury upon the question whether the present

action was seasonably commenced. It is provided by statute that no action shall be brought against the surety on any bond for costs only or recognizance for costs in any civil action, except within one year after final judgment has been rendered in the suit in which such bond or recognizance was given. Gen. Stat., tit. 19, ch. 18, § 11. In the suit in which the recognizance declared upon in this case was given, judgment was rendered by the Superior Court in favor of the present plaintiff for his costs in 1875, and the judgment was affirmed on error by this court on the 22d of October, 1877. Martin K. Osborne, the recognizor, died on the 10th of April, 1878. The defendant was appointed administrator of his estate on the 20th of the same month, and on the same day accepted the trust and became qualified to act. Six months from April 20th, 1878, were limited and allowed by the court of probate for the exhibition of claims against the estate; and the plaintiff exhibited his claim to the defendant on the 16th of September, 1878. On the 12th of May, 1879, (the claim then remaining unpaid,) the present action was commenced.

The defendant claimed, and requested the court to charge the jury, that by the statute the action could be commenced only within one year from the 22d of October, 1877; that the death of Martin K. Osborne did not alter the plaintiff's duty in that respect; and that the defendant had the same right to require the action to be commenced within a year from the day named as Osborne would have had if he had continued in life. The court properly declined so to charge, and instructed the jury that Osborne having died within a year after the 22d of October, 1877, and the plaintiff having presented his claim to the defendant as his administrator within that period, and within the time limited by the court of probate, was not required by the statute to sue within one year after his right of action first accrued. This instruction seems to have been founded in part upon the idea that the plaintiff's right of action would have been barred if he had not presented his claim to the defendant for allowance within one year after the judgment in the original action was

affirmed; and to that extent it was erroneous. In all other respects it was unexceptionable; and as it led the jury to a correct result, the defendant has no cause to complain of it.

The statute of limitations, although it commenced running in the life-time of Martin K. Osborne, was arrested in its course by his death. Upon the appointment of the defendant as administrator of the estate of the deceased and his acceptance of the trust and becoming qualified to act, that statute was superseded by the statutes relating to the settlement of intestate estates; and under the provisions of those statutes the right of the plaintiff to sue the defendant would not have been barred if he had presented his claim to the defendant at any time within the period limited by the court of probate for that purpose, (whether the period limited had been six, twelve, or eighteen months,) although more than one year might then have elapsed after his right first accrued. 1 Swift Dig., 307; Gen. Stat., tit. 18, ch. 11, §§ 4, 5, 6, p. 388.

The defendant further requested the court to charge the jury that the plaintiff could not recover unless within one year he had attempted to collect the costs recovered by him in the action in which the recognizance declared upon was given, from Henry B. Osborne, the plaintiff in that action, by proceedings other than those which were proved at the trial, and that notice should have been given by the plaintiff either to the defendant's intestate in his life-time or to the defendant since his death, of his inability to collect the same from the said Henry B. Osborne. There is no statute, and we know of no rule of law or practice, which entitled the defendant to the instructions embodied in this request. The plaintiff proved at the trial that he took out execution for the costs in November, 1877; that the defendant's intestate was requested but failed to pay them in the month of December next following; that the execution was renewed in April, 1879, and, after demand made thereon of the said Henry B. Osborne, was returned unsatisfied. These proceedings, and others disclosed by the motion, established the truth of the allegations contained in the plaintiff's declaration;

and that was sufficient to entitle the plaintiff to recover, in the absence of proof, under a statute then in force but omitted from the revision of 1875, that the costs could have been had out of the said Henry B. Osborne's estate. Gen. Stat., Rev. 1866, tit. 1, § 198, p. 41; *Mix* v. *Page*, 14 Conn., 329.

In the argument of the cause to the jury counsel for the defendant, while disclaiming any express refusal by their client to pay the plaintiff's claim, insisted that his conduct and treatment of the claim—he having in conversations with the plaintiff's attorney "made no promise to pay, and thereby made no move towards paying the same"—were, in effect, a refusal to pay it, and that the present action having been commenced more than four months after such refusal, the plaintiff could not recover. It is provided in the sixth section of chapter 11, title 18, of the General Statutes, that "when the creditor of an estate not represented insolvent shall present his claim to the executor or administrator within the time limited by the court of probate or by any of the provisions of the preceding section, and he shall disallow and refuse to pay it, if such creditor shall not, within four months after he has been notified by him that his claim is disallowed, commence a suit against him for the recovery thereof, he shall be debarred of his claim against such estate." The defendant therefore had the power, at any time he chose, to bring the plaintiff's claim within the operation of this statute. But there was only one way for him to do it, and that was, not by remaining silent and omitting to promise payment of the claim or even by unreasonably delaying payment—for from neither of those circumstances could a refusal to pay be implied—but by disallowing and refusing to pay the claim, and giving notice to the plaintiff of such disallowance in terms so unequivocal that he might know with certainty when his claim if not sued would be barred. Nothing short of this would have satisfied the requirements of the statute. But the defendant himself testified that he had at no time refused to pay the claim or given notice to the plaintiff that he had disallowed it, and in the course of his cross-examination he repeated the testimony

several times; though in reply to an inquiry by his own counsel he stated that he considered it "a refusal when he made no move to pay the claim." This testimony left the argument of the defendant's counsel without any substantial basis, and warranted the statement of the court to the jury that there was no evidence whatever that the defendant had disallowed or refused to pay the plaintiff's claim. It should perhaps be added, as the point was made by the plaintiff, that if the evidence offered at the trial had tended in any degree to prove such disallowance and refusal, and had been offered for the purpose of barring the plaintiff's claim, it must, upon objection to its admission by the plaintiff, have been excluded, upon the ground that it was not admissible under the plea of the general issue, without notice that it would be relied upon as one of the defences to the suit.

For these reasons a new trial is not advised.

In this opinion the other judges concurred.

# SUPREME COURT OF ERRORS.

## HELD AT NEW HAVEN FOR THE COUNTY OF NEW HAVEN,

ON THE FIRST TUESDAY OF DECEMBER, 1880.

Present,

PARK, C. J., PARDEE, LOOMIS, GRANGER AND BEARDSLEY, JS.*

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JAMES GALLAGHER *vs.* ABNER B. DODGE AND ANOTHER.



The statute (Gen. Statutes, tit. 19, ch. 17, part 9, sec. 4,) provides that an injunction may be granted against the malicious erection by any owner or lessee of land of any structure upon it intended to annoy and injure any proprietor of adjacent land in respect to his use of the same. *A* and *B* were rivals in business and occupied adjoining stores on a city street, there being no space between the buildings. *A's* store came up to the street line; *B's* was a few feet back, with a platform occupying the intervening space. A plate glass window had some time before been placed in the wall of *A's* store, looking out over *B's* platform, and *A* used it in showing his goods to persons coming down the street on that side. *B* had a show-case made, to place upon his platform in front of this window, his object being, primarily, to display his own goods to the best advantage, and, secondarily, to cover *A's* window and to annoy and injure him in the use of his store. Held not to be a case for an injunction under the statute.

Under the statute the malicious quality of the act must be the predominant one and give it its character.

The question whether a structure was maliciously erected is to be determined rather by its character, location and use, than by an inquiry into the actual motive in the mind of the person erecting it.

And the malicious acts intended by the statute must as a general rule go beyond the petty hostilities of business competition.

CIVIL ACTION, for an injunction, under Gen. Statutes, p. 477, sec. 4, against the malicious erection of a structure intended to injure the plaintiff in the use of his property;

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* Judge BEARDSLEY of the Superior Court sat in the place of Judge CARPENTER, disabled by illness.

brought to the Superior Court in New Haven County, and tried before *Hovey, J.* The following facts were found by the court, and the finding made part of the record.

The plaintiff's building, known as No. 267 Chapel street, in the city of New Haven, is situated on the north side of that street, and its front is on the line of the street. The first floor is occupied by a store, having a large window in front. The side window mentioned in the complaint is on the west line of the plaintiff's premises. It is of plate glass, and was put in about four years ago to enable persons passing down Chapel street to the east to see the goods kept in the store, and also to admit light. Before putting it in the plaintiff asked the defendants' lessor if he had any objection to his putting in a window there, and he replied that he had none, provided it was understood that the plaintiff should gain no rights thereby as against the lessor.

The building next west of the plaintiff's is set about four feet and six inches back from the street line. Its first floor is occupied by two stores, one on the east side, the other on the west side of the building, and each store has two front windows. The east store for about six years last past has been and still is occupied by the defendants as a clothing store. Its east wall is in contact with the west wall of the plaintiff's building. Between the defendants' east window and the plaintiff's line is a space of blank wall about three and a half feet wide. There is a raised platform or broad step along the whole front of the building from the stores to the street line. Contiguous to the west side of the building is another store building owned by a third party, the front of which is on the street line.

About the first of August, 1879, one Walter Leigh, who had been a clerk in the defendants' store for eight or nine years, left their employment, and in February, 1880, hired the plaintiff's store for a year, for the purpose of carrying on therein the same business that was carried on by the defendants. When that fact became known to the defendants they ordered to be made a box called a show-case, about nine feet in height, four feet wide, and two feet deep, with a glass

front and a wooden back, and with glass on one side and wood on the other, and were about to place the same in front of the southeasterly corner of their store, and within about two inches of the plate glass window of the plaintiff, when they were restrained from so doing by the injunction of this court.

The object of the defendants in ordering the show-case was two-fold—first, to display their own goods to the best advantage, and second, to prevent the public from seeing the goods of Leigh in the plaintiff's store through his plate glass window.

They were not actuated by a malicious intent to annoy or injure the plaintiff in the use or disposition of his building; but they were not on friendly relations with Leigh, and believing that he had hired the store with the design to injure them in their business, they intended by means of the show-case to annoy and injure him in his use of the store. And the effect of the show-case, if placed and kept in the position contemplated by the defendants, would be to reduce the value of the store and to injure Leigh in his business.

As a conclusion of law from these facts the court found the issue for the defendants. The plaintiff brought the record before this court by a motion in error.

*T. E. Doolittle*, for the plaintiff.

The statute was intended to prevent the erectio of a structure, by any person, with intent to injure and annoy his neighbor. It simply applies to such cases the familiar maxim, "*Sic utere tuo, ut alienum non laedas.*" Of this maxim this court says in *Whitney* v. *Bartholomew*, 21 Conn., 217, "the maxim that every man must so use his own property as not to injure another, is known to every lawyer and approved by every moralist." The case finds that the erection of this structure was made "with the design to annoy and injure him," (the plaintiff's tenant) "in the use of the store," but without malice towards the plaintiff himself, and also that "the effect of the show-case, if placed and kept in the position contemplated by the defendants, would be to

reduce the value of the store and injure Leigh (the tenant) in his business." The case thus expressly finds that the defendants intended by means of the show-case to annoy and injure Leigh in his use of the store. An act done with intent to annoy and injure constitutes legal malice. *Twiss* v. *Baldwin*, 9 Conn., 291; *Moore* v. *Stevenson*, 27 id., 14; *Hotchkiss* v. *Porter*, 30 id., 414. So that this was a malicious erection. The structure has its foundation in legal malice, exercised towards the person in possession of the adjacent property; and its erection will injure the proprietor, as it would reduce the value of the store. No such erection would have been dreamed of by the defendants, if the plaintiff had not made a disposition of his property in a manner displeasing to the defendants, that is, leased it to Leigh. The structure has been intentionally erected with an intent to annoy and injure the adjacent proprietor in the use and disposition of his property. They virtually say to him—"You shall not lease it to Leigh; you may lease it to any one else and we will not annoy you; but if you lease it to Leigh we will injure you by the erection and maintenance of this structure;" and the case is brought within the very mischief of the statute. *Harbison* v. *White*, 46 Conn., 106.

*S. E. Baldwin*, for defendants.

LOOMIS, J. This is a petition for an injunction under the statute (Gen. Statutes, p. 477, sec. 4,) which provides that "an injunction may be granted against the malicious erection by an owner or lessee of land of any structure upon it intended to annoy and injure any proprietor of adjacent land in respect to his use or disposition of the same."

The structure which it is sought to enjoin the defendants against erecting, is a show-case in front of their store and upon their own premises, but to be so placed as to obstruct a side window in the plaintiff's store, which store projects several feet beyond that occupied by the defendants, and thus has space for a side window looking out upon the platform constructed from the front of the defendants' store to the street line. This side window is upon the line between the

premises of the two parties, and serves the occupant of the plaintiff's store both for light and for the display of his goods.

It is found that the object of the defendants in procuring the show-case was two-fold—first, to display their own goods to the best advantage; and second, to prevent the public from seeing the goods of the occupant of the plaintiff's store through his side window.

It was the right of the defendants, and the exercise of the right could not be regarded as unreasonable, to occupy the space between the front of their store and the street line in the way most advantageous to their business. They were under no obligation to consult the interests of an adjoining proprietor. So far as he was availing himself of the open space to secure to himself more light by a window looking out upon it, or an opportunity to display his goods by exposing them in the window, he was availing himself of an opportunity that he held, and must have known that he held, by mere sufferance, for the defendants' store could at any time have been built out in front up to the street line, and so as completely to darken his side window, with no invasion of his rights and no ground of complaint on his part. If possibly a building line established by the city would have prevented them from building out to the street line, the mere fact that the plaintiff's building was erected before the building line was established was one that gave him no rights against the defendants as to the open space in front of their premises. What they might have done so effectually by building out over this space they had an equal right to do in any other mode no more injurious to the adjoining proprietor. We can not see why they might not reasonably do it in the mode which they adopted.

But it is claimed that the whole character of the act as to its legality is changed by the fact that an element of malice went into it. And this brings us to the difficult question where the line shall be drawn between structures that are useful and proper in themselves, but into the erection of which a subordinate malicious motive enters, and those where

the malicious intent is the leading feature of the act, and the possible usefulness of the structure a mere incident.

The only case in which this statute has come up for construction is that of *Harbison* v. *White*, 46 Conn., 106, in which it was held that a coarse structure erected for the malicious purpose of darkening the windows of a neighbor fell within the intent of the statute, although it might serve a useful purpose in screening the defendants' premises from observation. Here the malicious purpose was altogether the predominant one, and the usefulness of the structure very limited and merely incidental. In the present case these conditions are reversed, and it is found that the primary purpose was the reasonable and proper one of displaying the defendants' goods, while the malicious part of the motive was secondary. While we are not prepared to say that this relation of the two motives should always determine the court against the granting of an injunction, and the opposite relation in favor of granting one, yet we regard the predominance of the malicious motive as generally essential to a case in which the court will think itself justified in interfering. The statute speaks of the structure intended as a "malicious erection," and one the intent of which is "to annoy and injure any proprietor of adjacent land." We think we do not go too far in saying that this malicious intent must be so predominating as a motive as to give character to the structure. It must be so manifest and positive that the real usefulness of the structure will be as manifestly subordinate and incidental. The law regards with jealousy all attempts to limit the use to which a man may put his own property. This right to use is always subject to the wholesome limitation of the common law, that every one must so use his own property as not to injure another's, and the person who violates this rule is liable to the person injured whether he has any malicious intent or not; but here the new principle is introduced, that the land owner may erect no structure on his own premises, however lawful it would otherwise be, if he does it maliciously, with intent to annoy his neighbor. The common law has always regarded the existence of malice

in the exercise or pursuit of one's legal rights as of no consequence; just as its absence is of no consequence in the cases of injury caused by wrongful acts. The inquiry into and adjudication upon a man's motives has always been regarded as beyond the domain of civil jurisprudence, which resorts to presumptions of malice from a party's acts instead of enquiring into the real inner workings of his mind. When, therefore, we enquire how far a man was actuated by malice in erecting a structure upon his own land, we are enquiring after something that it will always be very difficult to ascertain, unless we adopt, as in other cases where the courts enquire after malice, a presumption of malice from the act done. And in this view of the matter we think no rule can be laid down that is on the whole more easy of application, and more likely to be correct in its application, than that the structure intended by the statute must be one which from its character, or location, or use, must strike an ordinary beholder as manifestly erected with a leading purpose to annoy the adjoining owner or occupant in his use of his premises. If the defendant has erected a house or block on his own land, so close to the dividing line between his lot and his neighbor's as to darken the side windows of his neighbor's house, no one would say that he had done a thing that was mainly intended to annoy his neighbor, and yet in his heart there may have been a malicious delight at the damage he was doing his neighbor. In such a case the obvious propriety of such an erection should determine the question in favor of the party making it, without putting him under oath as to his motives. In the same way, if a land owner should locate a privy or pig-sty directly on his line, and as close as possible to the near parlor windows of his neighbor, or should erect a rough screen of boards before his windows to darken them, the very character and location of the structures would strike every beholder as decisive evidence of an intent to annoy, and of this intent as an entirely predominant one; and a court might very properly so determine without leaving the case to rest on proof, gen-

erally the party's own oath, that there was no malice in the case.

Applying this rule to this case it is very questionable whether any ordinary observer would not see, in the structure here complained of, one which the defendants might reasonably erect, as a proper means of exhibiting their own goods, and a proper use of the space in front of their store, which was theirs for every reasonable and legitimate use, and therefore one of which the plaintiff has no right to complain; while the intent to annoy the occupant of the plaintiff's store, though found as a fact, and though without it the show-case might not have been procured, was really subordinate to the legitimate purpose. But whether or not an ordinary observer would have so regarded the structure, the court has here found as a fact, upon what evidence it does not appear, that the primary object of the defendants was the legitimate one of displaying their goods, and the intent to annoy the neighbor only a secondary one. And we think it therefore, considering all the circumstances, a case that falls within the line, which we do not attempt to define with exactness, that divides structures that the court will not interfere with from those against which the statute intended to furnish a protection.

There is a feature of this case that we ought perhaps to notice more particularly. The occupant of the plaintiff's store and the defendants were rivals in business. It was the right of each not only to show his own wares to the best advantage, but also to prevent the other from getting any advantage in the exhibition of his to which he was not legally entitled. While such competition in all business tends to benefit the public, there are yet many things done in it that are by no means commendable, and which often belong to a low level of morality, but which are yet beyond the control of law. The act of the defendants in this case was, at the worst, of that character. So far as it was intended to annoy the occupant of the plaintiff's store it was not so much from malice, as we ordinarily understand that term, and as we think it is to be understood in the statute, as from

a spirit of competition in business—of ill will perhaps—yet not so much against the object of it as an individual as against him as a rival in business. We do not mean to say that such acts may not be carried so far as to fall within the condemnation of the statute, but we think that, to do so, they must as a general rule go quite beyond the petty hostilities of business competition.

A question was made by the defendants whether the action could be maintained by the plaintiff, as owner of the premises, while the acts complained of were directed wholly against his lessee, who was occupying the store, and whose business, it was claimed, was injured by them. In the view we have taken of the case we have not thought it necessary to consider this question. We have treated the case as if the plaintiff had himself been the occupant.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

ELI GOODRICH *vs.* CHARLES G. KIMBERLY AND ANOTHER.

A person who was part owner of a second mortgage and owner of the equity of redemption, purchased the property at a tax sale. Held that he acquired no title by the purchase superior to that of the first mortgagee.

A party thus interested, in bidding the property in at a tax sale, is merely paying the tax and not acquiring a new title.

This rule of law is not affected by the act of 1877, (Session Laws of 1877, p. 152,) which requires tax collectors, before selling mortgaged property for taxes, to give notice to the mortgagees.

BILL for a foreclosure, brought to the Court of Common Pleas of New Haven County. Cross-bill filed, and case heard before *Cowell, J.* Decree for petitioner and motion in error by respondents. The case is sufficiently stated in the opinion.

*L. Harrison* and *E. Zacher*, for plaintiffs in error.

*L. E. Munson*, for defendant in error.

BEARDSLEY, J. The finding in this case shows that Hobson, the mortgagee of the premises in question, on the 25th day of March, 1869, assigned the note for the security of which the mortgage in question was given to the petitioner. Upon familiar principles the assignment of the note carried the mortgage security with it as an incident. The formal transfer of the legal title to the mortgaged premises to the petitioner, which was not made until the 25th day of April, 1879, (the mortgage not having in the mean time been released,) did not, of course, impair the petitioner's prior right to the mortgage security, and is therefore immaterial. The respondent Edward M. Kimberly, by his warranty deed from Charles G. Kimberly of the 28th of April, 1879, took such title as the latter then had, and the only question is, was that title superior to the petitioner's rights under the mortgage.

When Charles G. Kimberly bought the property at the auction sale by the tax-collector on the 14th of March, 1878, he with his partner, Scranton, were second mortgagees of the property by virtue of Dawson's mortgage deed to them of May 17th, 1871, and he was also owner of the equity of redemption by virtue of Dawson's deed to him of January 28th, 1878, both said mortgage deed and conveyance of the equity of redemption being made in terms subject to the mortgage to Hobson, and Kimberly was also in possession of the premises by his tenant Dawson. That a person standing in such a relation to property could acquire no title to it as against a prior mortgagee by a purchase at a sale for taxes, was explicitly decided by this court in the recent case of *Middletown Savings Bank* v. *Bacharach*, 46 Conn. R., p. 513.

It is claimed, however, by the respondents, that the common law as enunciated in that case has been changed in this state by a statute requiring tax collectors to give notice to mortgagees before selling property subject to incumbrances. Acts of 1877, p. 152.

By the law as it stood until that statute was enacted no provision was made for notice to mortgagees of the sale of property for taxes except that which was to be given by

posting a notice of the sale upon the public sign-post and publishing it in the local newspaper. It is quite obvious that such notice might not reach mortgagees, especially those who lived at a distance, who might consequently be subjected to the loss of their security without any default on their part. It was to remedy this serious defect in the then existing law that this statute of 1877 was enacted. If the legislature had intended to qualify the owner of the equity of redemption to acquire, by purchase at a sale for taxes, a title to property which should divest the rights of mortgagees, that intent would certainly have been expressed in very different language from that of this statute.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

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## GEORGE TURNER *vs.* EDWARD DAVIS.

*A* was the tenant of *B* a mortgagor. *B* assigned the equity of redemption to *C* the mortgagee. *A* attorned to *C* and subsequently accepted from him a written lease agreeing to pay rent monthly, and stipulating that non-payment of rent for ten days should work a forfeiture of the lease. After the attornment and before the lease was given *C* brought suit for a foreclosure and for the possession of the premises, alleging that *B* was in possession. He obtained judgment in that suit the day after the execution and delivery of the lease to *A*, with stay of execution till the expiration of the time for redemption. After the rendition of the judgment *A* accepted a lease from *B* for the time during which execution was stayed. *A* failed to pay the first month's rent to *C*. *C* thereupon brought summary process against *A*, alleging that *A* was in possession as his tenant, and recovered judgment. Held that the last judgment was erroneous.

The principle that a person having different remedies may pursue all of them at the same time until he obtains satisfaction, has no application where the essential facts on which the different remedies depend are repugnant.

In such cases the party may have an election, but having elected and pursued to judgment one remedy, he is to be regarded as having abandoned all other remedies inconsistent therewith.

Here the decree for possession in favor of the mortgagee in the foreclosure suit against *B*, was based on his allegation that *B* was in possession; and being a

solemn judgment and later in date than the lease by the mortgagee to *A*, was to be taken as the election of the mortgagee to treat *B* and not *A* as in possession.

WRIT OF ERROR to reverse a judgment of a justice of the peace in a summary process to recover possession of leased premises; brought to the Court of Common Pleas of New Haven County and reserved for advice. The case is sufficiently stated in the opinion.

*H. S. Pardee*, for the plaintiff in error.

*C. S. Hamilton*, for the defendant in error.

GRANGER, J. This is a writ of error to reverse the judgment of a justice of the peace in a summary process proceeding, brought to the Court of Common Pleas, and by that court reserved for our advice.

The facts seem to be as follows:—Prior to April 3d, 1880, Turner, the plaintiff in error, was in possession of the premises. The property was subject to mortgages which were overdue, and he held under Woodruff, the mortgagor. On that day Turner agreed with Davis, the mortgagee, to hold under and to pay rent to him. Pursuant to that agreement they executed a written lease for one year from April 1st. That lease stipulated for monthly payment of rent, and that non-payment for ten days after due worked a forfeiture of the lease, and entitled the lessor to eject the lessee by a summary process. That proceeding was instituted for the non-payment of rent due on the 1st day of June. It seems that Davis held more than one mortgage, and that one of his mortgages was executed April 2d, 1880. The premises being thus subject to the lease that mortgage operated as an assignment of the reversion to Davis, and he was thereafter entitled to the rents. The case however was not brought on that lease. But it was competent for the parties to execute the lease of May 26th, and that lease is the foundation of the suit. If there was nothing else in the case it would be quite clear that Turner would have been the tenant of Davis under the last lease.

But it further appears that on the 14th day of April, eleven days after the attornment from Turner to Davis, Davis instituted a suit to foreclose his mortgage, alleging that *Woodruff was in the possession of the premises and claiming a judgment to eject him.* On the 27th day of May, one day after executing the lease to Turner, Davis obtained a judgment ejecting Woodruff from the premises, with stay of execution till March, 1881. On the 10th day of June Woodruff executed a lease to Turner of the premises for one year from March 28th, 1880. The summary process was commenced June 19th. Upon these facts the question was whether Turner was in law the lessee of Davis under the lease of May 26th; and that question hinges upon another, and that is, whether Davis or Woodruff was legally in possession of the premises after the judgment in the foreclosure proceeding.

As we have before intimated, had it not been for that judgment the legal possession would have been in Davis unquestionably. How is the possession affected by the judgment? Had the attornment been after the judgment the case would have been within and be governed by the case of *Lockwood* v. *Tracy*, 46 Conn., 447. In that event there would have been no inconsistency between the allegation in the complaint, conclusively established by the judgment, that Woodruff was in the possession, and the theory on which the present proceeding rests, that Turner was the tenant of Davis. As it is there is an irreconcilable inconsistency between Davis's position then and now. Then he averred and proved (and thereupon had a judgment,) that Woodruff was in the possession; now, in another forum for the same purpose, (the actual possession of the property,) and practically against the same party, he alleges that his own tenant is in possession, (which in law is his own possession,) and upon that averment has obtained a judgment. Can both judgments stand? We think not. The former judgment was applied for and rendered after the attornment. The later act being inconsistent with the former, and being a more deliberate and solemn proceeding, should be regarded

as the best evidence of his final conclusion, and as fixing his status for the purposes of the case. He elected to treat Woodruff as in possession, and invoked and obtained the aid of the court to eject him. He thereby waived and surrendered any and all rights derived from the attornment. That necessarily results from the principle that he could not occupy at one and the same time, with reference to the same subject matter, and for the accomplishment of the same object, two positions utterly inconsistent with each other.

Having obtained judicial action in his favor from one position, he could not resume the other and invoke the aid of the courts from that. The law will not permit him thus to play fast and loose. One position or the other must be a false one. Either might have been a true one in the first instance, but both could not stand together. Choosing the one he of necessity abandoned the other.

It is true the law often gives different remedies, all of which may be pursued at the same time. But they all rest substantially upon the same facts, and the remedies are not inconsistent. Where the facts upon which the different remedies depend are antagonistic—the facts alleged for the purposes of one remedy directly contradicting the facts necessary to be alleged for the purposes of the other—the party is not entitled to both, although he may have an election.

Again—after the judgment against Woodruff he executed a lease to Turner, presumably regarding the judgment as definitely fixing the rights of the parties, and thereby established the relation of landlord and tenant. Davis then controverting the facts alleged and found true in the case against Woodruff, alleges a contrary state of things in an action against Turner, which directly affects Woodruff's interest. It is certain that Woodruff could not controvert the facts established by the first judgment. With greater reason if possible Davis can not be permitted to dispute them. If Turner is in privity with Woodruff, as we think he is, the judgment must be conclusive against Davis in the present action.

We think therefore that the justice erred in holding that

the ninth paragraph of the answer, which sets up the judgment against Woodruff, and the tenth paragraph, which sets up the lease from Woodruff to Turner, were insufficient; and also in determining that Turner was the lessee of Davis under the lease of May 26th.

The Court of Common Pleas is advised to reverse the judgment.

In this opinion the other judges concurred.

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## WATTS COOKE, RECEIVER, *vs.* THE TOWN OF ORANGE.

*C* was appointed in the state of New Jersey receiver of an insolvent corporation located there, which had on hand at the time a contract with two towns of this state to construct a bridge that connected them. He obtained authority from the insolvent court in New Jersey to go on and perform the contract for the benefit of the creditors, and agreed with the committees of the towns to do so. In building the bridge he purchased the materials and paid for the work with the funds of the corporation which he held as receiver. After the bridge was completed, a Connecticut creditor of the corporation factorized one of the towns as the debtor of the corporation for a balance due for the construction of the bridge. The town was found indebted, and paid over the money to the officer on demand made upon the execution. The receiver, who was not a party to the suit, but had notice of it served upon him, gave no notice to the town not to pay, and if such notice had been given it would not have paid. In a suit brought by *W* as receiver against the town to recover the balance due on the contract which had thus been taken by the factorizing creditor of the corporation, it was held—

1. That *C* could sue in this state as receiver.
2. That the materials having been procured and the work done by him as receiver, the contract price was payable to him.
3. That it made no difference that the bridge was built under the original contract with the insolvent corporation, and that no new contract was made, there having been an agreement with the committees of the towns with him that he should go on as receiver and perform the contract.
4. That the town was not discharged by the payment of the money as garnishee to the factorizing creditor, under the statute that makes such payment a discharge of the claim of the party to whom it had been due, since the corporation which was the defendant in the factorizing suit and as whose debtor the town was factorized, was not the party to whom the money was due.
5. That the receiver was not estopped from claiming the money from the town

by reason of his neglect to notify the town not to pay over the money to the factorizing creditor.

ASSUMPSIT for money due for the building of a bridge by the plaintiff as receiver of The Watson Manufacturing Company; brought to the Court of Common Pleas in New Haven County. The defendants pleaded in abatement that the suit could not be maintained by the plaintiff, inasmuch as the Watson Manufacturing Company was a corporation located in the state of New Jersey, and the plaintiff's authority as receiver of the company was derived wholly from an appointment made by the courts of that state. To this plea the plaintiff demurred, and the court held it insufficient. The defendants then filed a general denial, with notice of the facts that will appear in the finding of the court. The issue was closed to the court and the following facts were found and the finding made a part of the record in the case.

On the 29th of May, 1876, the Watson Manufacturing Company, a corporation of the state of New Jersey and located in that state, entered into a contract in writing, under seal, with the towns of New Haven and Orange in this state, for the erection of an iron bridge over West River, which separated the two towns. About the middle of June, 1876, and before any thing had been done upon the contract, the company became insolvent, and the plaintiff, Watts Cooke, was by the proper court of New Jersey duly appointed receiver of the company. Shortly after his appointment, upon a petition of the legal number of creditors, Cooke, as receiver, was authorized to go on and complete such contracts as the company had on hand, where he should think it would be for the benefit of the estate, and he notified the towns of New Haven and Orange that the company had become insolvent, and that he would go on and complete the contract as receiver.

Immediately after sending this notice he ordered the iron in Paterson in New Jersey, and had it there made into the bridge, paying therefor partly from funds in his hands belonging to the company, and partly from money advanced by him from private funds, for which he afterwards repaid

himself by funds of the estate coming into his hands. When the bridge was completed it was shipped to New Haven, marked "Watts Cooke, Receiver." Upon its arrival it was attached by the Blake Crusher Company, a creditor of the Watson Manufacturing Company, the Crusher Company claiming the iron to be the property of the Watson Manufacturing Company.

The iron was immediately receipted for by the plaintiff, and he immediately proceeded to put up the bridge, and it was completed by him in all respects according to the contract and to the acceptance of the towns.

Upon the execution of the contract between the towns and the Watson Manufacturing Company, Samuel Johnson, first selectman of New Haven, and Benjamin F. Clarke, first selectman of Orange, were appointed by the two towns a building committee, and Johnson and Clarke managed the whole business for the towns.

After commencing work upon the contract, and while the iron was being manufactured, the plaintiff was in New Haven, and saw Johnson, and explained to him that he need have no fear about the contract, and that it would be fully completed by him as receiver, which information was communicated to Clarke by Johnson.

At the time of the attachment and the receipt the plaintiff was again in New Haven, and again saw Johnson. All the circumstances relating to the contract and the performance of it by the plaintiff as receiver were again gone over between them, and Johnson was again informed as to all the facts concerning the ownership of the iron and the insolvency of the Watson Manufacturing Company, all which facts were communicated by Johnson to Clarke.

While the iron was being manufactured at Paterson considerable correspondence passed between Johnson, acting for the two towns, and the receiver. All letters on Johnson's part were addressed to "The Watson Manufacturing Company," and all letters in reply were signed "Watts Cooke, Receiver," or "Watts Cooke, Receiver for Watson Manufacturing Company."

Neither Johnson nor Clarke ever proposed to relinquish their contract with the Watson Manufacturing Company, or release the bondsmen thereon, but they were willing and consented to have the receiver go on and finish the same, if he chose so to do, and understood that the contract was being performed by the receiver for the benefit of the creditors.

Upon the completion of the contract by the receiver, he came to New Haven and saw the selectmen of the town, and received the amount due upon the contract from New Haven, less five per cent. to be detained according to the contract. He thereupon proceeded to Orange, and there on November 15th, 1876, had an interview with its selectmen. The whole matter was then talked up. Every fact connected with the matter was explained to the selectmen, and they thereupon paid the plaintiff the sum of $2,812.60 upon the contract, being the whole amount due from Orange, less five per cent. to be detained according to the contract. The money was paid by an order upon the treasurer of the town, which order was drawn up by Clarke, first selectman, and was afterwards paid.

On the 6th day of August, 1877, when the retained balance became due, the Blake Crusher Company, as a creditor of the Watson Manufacturing Company, brought their action of debt on judgment to the Court of Common Pleas in New Haven County, at its September term, 1877, and caused this balance to be attached in the hands of the towns, by a factorizing process, as due to the Watson Manufacturing Company. The officer serving the process served a copy of it on said 6th day of August, on Samuel L. Bronson, then and ever since the attorney in this state of the plaintiff as such receiver, and also made demand on the towns to disclose, and both disclosed. The suit was continued until December 18th, 1877, when judgment was rendered by default against the Watson Manufacturing Company for $419.75. The garnishees were found indebted in $148 each, and execution was issued after bond duly filed. The officer having the execution made demand on the town of Orange, and the town thereupon paid over the sum of $148 to the officer, to be

applied on the execution. No notice was given by the plaintiff or his attorney to the town of Orange not to pay the money, and if it had been given the town would not have so paid. The officer thereupon made demand of the town of New Haven, but it refused to pay. The receiver has already paid a dividend of twenty per cent. and probably will pay five per cent. more to the creditors of the company who have proved their claims. The Blake Crusher Company not having presented or proved their claim against the estate, have received nothing. The profits realized by the receiver from the building of the bridge would have been from $700 to $800, had it not been for the expenses of litigation, caused by the three suits brought by the Blake Crusher Company.

The defendant on the trial claimed as matters of law—1st. That the plaintiff, as a foreign receiver, could not maintain this action.—2d. That the contract being with the Watson Manufacturing Company, and not with the receiver, the amount factorized was due to the company.—3d. That whatever was done under the contract by the receiver, was in legal effect done by him, not as an individual, but as agent or representative of the company.—4th. That by express provision of the contract the money was payable to the company, and was therefore liable to attachment by its creditors in this state.—5th. That the plaintiff was estopped to bring this suit to recover the money from the town of Orange, having permitted it to be paid over by the town on the execution to a creditor of the company without objection.—6th. That the town having paid the money over on execution, was protected by statute from farther liability for the debt.

The court (*Stoddard, J.*,) ruled adversely to all these claims and rendered judgment for the plaintiff as receiver to recover the full amount claimed.

The defendants brought the record before this court by a motion in error.

*H. T. Blake*, for the plaintiff in error.

1. A foreign receiver cannot maintain a suit out of his jurisdiction. *Booth* v. *Clark*, 17 How., 322; *Hope Life Ins.*

*Co.* v. *Taylor*, 2 Rob., N. Y., 278; *Farmers & Mech. Ins. Co.* v. *Needles*, 52 Misso., 17; Story Confl. Laws, § 514 *a*. This doctrine has been fully recognized in this state. *Riley* v. *Riley*, 3 Day, 74; *Upton* v. *Hubbard*, 28 Conn., 285; *Hedenberg* v. *Hedenberg*, 46 id., 37. The principle of these cases goes to the *character in which the plaintiff sues*, and applies equally, whether the cause of action arose before or after his appointment. *Hobart* v. *Conn. Turnpike Co.*, 15 Conn., 145; High on Receivers, § 158, note 2. No injustice is done by the rule. Receivers are representatives of *parties in existence*, and can sue in the name of the parties they represent, in which case any proper offsets or defenses can be made. Or they can qualify within the jurisdiction where the fund is that they seek for and then bring their suits. *Hunt* v. *Columbian Ins. Co.*, 55 Maine, 296; *Coope* v. *Bowles*, 42 Barb., 87. When our courts have relaxed this strict rule they have done so with great caution, and only when no injustice would be done and no detriment to our own citizens. But here the money sought has already been paid by the defendants under process of law to creditors of the insolvent company, whose claims have been established by repeated judgments in our own courts, in suits in which the plaintiff was more or less directly a party. It further appears that if the plaintiff recovers the money, he does not intend to pay any thing to these judgment creditors, upon the ground that they have not proved their claims in New Jersey. The receiver invokes the comity of our courts to aid him in showing contempt of their judgments, and doing injustice to our citizens. If, as the court says in *Booth* v. *Clark*, supra, our courts will not permit a foreign receiver to sue, on account of his inability to give security for the faithful administration of the fund which he seeks to take out of the jurisdiction, much less should they entertain his suit when he gives them express notice that he does *not intend* so to administer it. Moreover the suit should have been brought either by the company or by Watts Cooke personally. If the contract sued on was with the company, the suit should have been in

their name. If it was a contract with Cooke, it must have been with him either in his representative capacity or his individual capacity. If the former, the suit should have been brought in the name of the party whom he represented. If the latter, then he should have sued in his own private character. The receiver of a corporation takes all his rights of action through the corporation, and in all questions of title he represents the corporation. High on Receivers, §§ 315, 316, 318; *Curtis* v. *Leavitt*, 15 N. York, 44.

2. Waiving all questions as to the title acquired by Cooke in the property and funds of the company in New Jersey, the question arises what relation he acquired *in this state* to the contract between the town and the company—1st. The contract was an *asset* of the company in this state, the *situs* of which was here, it being a special contract made in Connecticut, with Connecticut parties, capable of execution nowhere else, and governed by our laws. It comes, therefore, within the distinction referred to in *Atwood* v. *Protection Ins. Co.*, 14 Conn., 561, between ordinary debts which have no *situs* and contracts which from their nature have locality. It is like a valuable lease of personal property situated here and not removable. Assuming that Cooke could bring property and money of the corporation into this state, and pay it out to protect or improve this asset, he did not thereby acquire a title in the asset as against creditors here. *Holcomb* v. *Phelps*, 16 Conn., 134; *Paine* v. *Lester*, 44 id., 196, 203; *Taylor* v. *Columbian Ins. Co.*, 14 Allen, 354; Story Confl. Laws, §§ 514, 514*a*. He does not acquire title to it as *assignee* in insolvency, for there has been no assignment. The whole proceeding in New Jersey was *in invitum*, and by operation of law. He is not a *bonâ fide* purchaser with his own funds; and viewed as trustee in behalf of creditors, he would hold it as property of the insolvent; all which under our laws is liable to creditors in this state. *Ensworth* v. *Davenport*, 9 Conn., 393; *Bray* v. *Wallingford*, 20 id., 419; *Naylor* v. *Fosdick*, 4 Day, 150. Hence rents from such a lease, or profits realized from such contracts, would be assets of the party having the legal title here, and as such liable to credit-

ors here. 2 Wms. Exrs., §§ 1498, 1499; *Richmondville Manf. Co.* v. *Prall*, 9 Conn., 487. The receiver's appointment makes no change in contract obligations, and no suits can be sustained by him except what could be sustained by the insolvent. High on Receivers, §§ 240, 242; *Hope Mut. Life Ins. Co.* v. *Taylor*, 2 Rob., N. Y., 278.—2d. It is not disputed that Cooke built the bridge under the contract with the company. It is not claimed that he and the towns made any new contract. He had no power from his court to make any *new contracts*, but simply to *carry out and complete* such as he might find to have been made by the company. If any thing is established by admission and by proof in this case, it is that the bridge was built under the contract with the company, and that the money sued for is part of the contract price for performing it. But the work having been done under the contract in the name of the company, and the contract never having been assigned, suit for the contract price must be brought in the name of the company. Receivers' suits are no exception to this rule. High on Receivers, § 209; *Curtis* v. *Leavitt*, 15 N. York, 44; *Freeman* v. *Perry*, 22 Conn., 617. Again, the work having been done under a special contract, suit for the contract price must be in special assumpsit, setting out the contract sued on. This action being in general assumpsit only, the court should have dismissed it on the proofs. *Welles* v. *Cowles*, 4 Conn., 182, 190.

3. As to the estoppel. The case finds that the towns when factorized disclosed that the money in their hands was due to the Watson Manufacturing Company. A copy of the garnishee process, with the officer's return, showing this disclosure, was served on Cooke's attorney, August 6th. The suit was returned to the September term of the court, and remained on the docket until December, when judgment was taken, the garnishees were found indebted, and execution was issued, and demand made on the defendants. During all this time no notice had been given to the defendants by either Cooke or his attorney that they had erred in their disclosure or that Cooke claimed the money. The case finds

that if such notice had been given the defendants would not have paid over on execution; but not having notice they did pay it in obedience to the legal process. There is no claim or pretence of bad faith on the part of the defendants. The subsequent refusal of New Haven to pay was not until after notice. We say that, under the facts so found, Cooke is estopped to sue for the amount so paid as due to himself. It is entirely unnecessary to cite authorities in support of this principle of estoppel so well settled in this state.

4. The defendants having paid the money over in good faith on execution, are protected from any further claim on it by statute. Gen. Statutes, p. 465; *Worthington* v. *Hosmer*, 1 Root, 192; *Hooper* v. *Benson*, id., 545; *Cutler* v. *Baker*, 2 Day, 498; *Culver* v. *Hall*, 20 Conn., 409, 415; *Palmer* v. *Woodward*, 28 id., 251; Story Confl. Laws, §§ 549, 550.

*S. L. Bronson* and *R. G. Osborn*, for the defendant in error.

PARK, C. J. The only real question in this case is, in regard to the capacity of the plaintiff to maintain the suit; and this question has been substantially determined by the cases of *Pond* v. *Cooke*, 45 Conn., 126, and *Blake Crusher Co.* v. *Town of New Haven*, 46 Conn., 473.

In the case of *Pond* v. *Cooke* it appeared that the Watson Manufacturing Company, a corporation located in the state of New Jersey, made a contract with the towns of New Haven and Orange for the construction of an iron bridge over West River, a stream of water dividing the two towns; that after the contract was made and before any thing was done under it the company became insolvent, and Watts Cooke was appointed a receiver by the proper court in the state of New Jersey, to settle the estate of the company, and distribute its effects *pro rata* among its creditors; that the receiver and the creditors of the estate were of opinion that it would be for the best interest of all concerned that the contract of the company with the towns named should be performed; that the receiver so informed the towns, and

that they assented; that he then purchased materials for the construction of the bridge, using for the purpose the funds of the estate, and brought the same into this state prepared for use in the erection of the bridge; and that these materials were attached by the Blake Crusher Company, a corporation located in this state, and a creditor of the Watson Manufacturing Company.

On these facts it was holden by this court that the attachment of the Blake Crusher Company was of no avail; that the property was in the hands of the receiver to be disposed of in the settlement of the estate according to the law of the state of New Jersey.

In the case of *Blake Crusher Company* v. *Town of New Haven*, it appeared that after the receiver had erected the bridge under the contract with the towns, for the benefit of all the creditors, using the funds of the estate for the purpose, the Blake Crusher Company attached, by a factorizing process, the debt due from the town of New Haven, and again it was holden by this court that the attachment was of no avail; that if the property itself could not be holden by the attachment in the first suit, the debt growing out of the disposition of the same property could not be held by the attachment.

The debt owed by the defendants in this suit grew out of the same transaction, and stands precisely like the debt in the last named case in all respects whatsoever; and if the Blake Crusher Company were unable to take from the present plaintiff the debt in that case, how can they prevent him from recovering the debt now under consideration?

But it is said that the cases of *Riley* v. *Riley*, 3 Day, 74, *Upton* v. *Hubbard*, 28 Conn., 285, and *Hedenberg* v. *Hedenberg*, 46 Conn., 37, hold that a foreign receiver or assignee cannot maintain a suit in this state for a debt which has been attached by a creditor of the foreign insolvent, and especially if such creditor is a citizen of this state. The distinction between those cases and the present was fully considered in the former cases growing out of the same transaction, and further comment is unnecessary. We will remark, however,

that if the plaintiff cannot enforce payment of the indebtedness in question, it is difficult to see by whom it can be done. The former cases hold that no creditor of the Watson Manufacturing Company can do it, and it is clear that the company itself cannot move in the matter, because they never owned the property out of which the debt arose. It was purchased by the receiver with the funds of the estate after all the assets of the company had gone into his hands. The receiver held the property in trust for all the creditors; and when it was transformed into a debt its original character attached to the indebtedness. The property was simply changed from one form into another.

It is said however by the defendants that, as the contract under which the bridge was built was the contract of the Watson Manufacturing Company and not of Watts Cooke as receiver, and as no new contract was made but all that was done by the receiver was done under that contract, it follows that the money due for the performance of the contract was due to the company and not to the receiver. There is an utter fallacy in this reasoning. Whatever rights the company had under this contract had passed to the receiver by the assignment. It is not necessary to consider the effect of this assignment as against creditors here, as there was nothing due the company from the towns. The rights of the company were not to receive money, but to go on and build the bridge and earn the money. On the failure of the company this right, in the condition of the company, was practically of little or no value as an asset. Clearly it was of no value as an asset which creditors in this state could get the benefit of by attachment. In this state of things the receiver, having obtained legal authority to go on as receiver and build the bridge, conferred fully with the committees of the two towns, so that all the facts were fully understood by them; and it is found "that they were willing and consented to have the receiver go on and finish the same, and understood that the contract was being performed by the receiver for the benefit of the creditors." Surely, upon these facts it can not be seriously contended that the contract price for the construc-

tion of the bridge was not to go to the receiver, but was open to the attachment of creditors of the insolvent company.

It is further claimed by the defendants that as they paid the debt to the officer upon the execution, they were thereby discharged from all further liability, under the statute, Gen. Statutes, p. 465, sec. 53. That statute is as follows:—"The taking of any effects or debt, by judgment of law, out of the hands of an agent, trustee or debtor of the owner thereof, by process of foreign attachment, shall forever discharge such garnishee." But this statute has reference solely to a discharge of the claim of the judgment debtor. The judgment debtor was the Watson Manufacturing Company, and that company is making no claim on these defendants. If it should do so undoubtedly the defendants could take advantage of this statute in their defence. The debt was factorized as a debt due that company. It was really a debt due the present plaintiff. The garnishee must have been factorized as the trustee or debtor of the "owner." That owner was Watts Cooke as receiver. His rights could not be affected by the proceeding.

It is again claimed that the plaintiff is estopped from asserting his rights as owner by his neglect to notify the defendants not to pay the money to the factorizing creditor. But there could be no legal obligation to give this notice, whatever it might have been fair or courteous for him to do. The law does not require every person to be on the alert to notice and warn people against claims made by others on his property. This court had already declared his right as receiver to hold against the creditors of the insolvent company the material which he had purchased as receiver for the construction of the bridge, and this of course involved his right in the same capacity to demand and receive the price which was to be paid by the towns for which it was constructed. It is almost incredible that the committees of the towns, with whom he had so much to do in the matter, and with whom he had conferred fully as to his going on as receiver to build the bridge, and who had given their assent to his doing it, should have been ignorant that he even claimed

these adjudicated rights or even in any doubt about it. If they desired to be entirely safe they could have taken a bond of indemnity from the creditor to whom the money was paid, or, under the provisions of a statute intended to meet this precise case, (Gen. Statutes, p. 464, sec. 45,) they could, when sued in an action of scire facias, have cited in the present plaintiff to defend his claim, in which case he would have been concluded by the judgment. There is nothing in this claim.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

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## SAMUEL FORBES *vs.* ROBERT ROWE.

The guaranty of a note by its indorsement in blank by a third person is that the maker will be of ability to pay it when it becomes due and that it will be collectible by the use of due diligence.

If the maker is not then of ability to pay it the guaranty is broken.

In that case no demand on the maker is necessary.

And it is not enough that he has some property that might be taken, if he has not sufficient to pay the debt.

If the maker has real estate the holder is not bound to attach it before resorting to the guarantor.

Where a note so guaranteed is payable on demand, and it is apparent in view of the purpose for which the money was borrowed that the parties did not contemplate its immediate payment, the question is—was the maker, at the time the note was payable according to the presumed intention of the parties, able to pay it, and was it then collectible by the use of due diligence?

CIVIL ACTION on the guaranty of a note; brought to the Court of Common Pleas in New Haven County, and tried to the court before *Pardee, J.* Judgment for the defendant, and motion in error by the plaintiff. The principles of law decided by the court will be sufficiently understood from the opinion without a more particular statement of the case.

*C. H. Fowler*, with whom was *D. W. Tuttle*, for the plaintiff.

*W. C. Case*, for the defendant.

BEARDSLEY, J. The contract implied by law from the endorsement in blank of a non-negotiable note is well settled by repeated decisions in this state, and is correctly set forth in the third count of the declaration. That count was sustained upon demurrer, while the first, second, and fourth counts were held to be insufficient. The first count is manifestly so, because the contract implied by law from the act of the defendant in "putting his name on the back of the note" in question is not correctly stated, and the allegations in the count do not show any legal liability on the part of the defendant. The second and fourth counts are not in strictness demurrable.

In the second count a contract is set forth which it was competent for the parties to make, and for the breach of which, if made, the defendant would have been liable.

In the fourth count the defendant is declared against as one of the makers of a promissory note.

These two counts are upon the face of them unexceptionable. The plaintiff indeed by his bill of particulars limited his right of recovery to the contract set out in the third count, but the bill of particulars did not enter into the composition of any of the counts so as to form a part of them upon the issue raised by the demurrer, as it is in strictness no part of the pleadings. *Vila* v. *Weston*, 33 Conn., 47.

It is obvious, however, that the plaintiff suffered no practical injustice by the rulings of the court below as to the sufficiency of the second and fourth counts, as under the third count of his declaration he had a full opportunity for the trial of the only cause of action which he relied upon, and hence if these were the only questions in the case we should not incline to disturb the judgment.

But we think that the court erred in granting the motion for a non-suit.

It is apparent from the terms of the note and from the purpose for which the money, for which it was given, was borrowed, that the parties did not contemplate its immediate

payment, and hence the question of fact in the case was—were the makers of the note or either of them at the time when the note was payable according to the presumed intention of the parties able to pay it, and was it then collectible by the use of due diligence? *Castle* v. *Candee*, 16 Conn., 223; *Clark* v. *Merriam*, 25 Conn., 576; *Hayes* v. *Werner*, 45 Conn., 246.

The plaintiff and the several witnesses called by him testified in substance that from the time when the note was given the makers were without property from which it could have been collected, and were not able to pay it. The plaintiff indeed testified that they had built a house, which he estimated to be worth $4,000, but he also testified that the house was upon the land of their wives, and was subject to a mortgage of $2,500.

If the makers of the note had any valuable interest in the house, the plaintiff was not required to attach real estate before resorting to the guarantors. *Welton* v. *Scott*, 4 Conn., 533.

One of the plaintiff's witnesses also testified that Davis, one of the makers, had a horse and wagon when the note was given, and had at some time received a small patrimony, but also testified that he knew of no property of the makers from which the note could have been collected. The inference from his testimony is, that the property of Davis was not of sufficient value to pay the note, or that he had parted with it before the note was payable.

No preliminary demand upon the makers, if they were insolvent, was necessary to fix the liability of the guarantor. If they were unable to pay the note when it became due, that of itself constituted a breach of the indorser's contract.

In *Welton* v. *Scott*, 4 Conn., 533, Judge HOSMER, in giving the opinion of the court, says:—"If the maker when the note falls due be insolvent, and without property sufficient to pay it, this is a breach of the warranty, and gives an immediate right of action against the indorser."

The judgment of the court below was erroneous.

In this opinion the other judges concurred.

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ERWIN D. HALL *vs.* THE CITY OF MERIDEN.

The charter of the city of Meriden provides for an "application for relief" to the Superior Court by any person aggrieved by any appraisal of damage or assessment for benefits by the city authorities in the laying out of any street or other public improvement. Held that the proceeding did not differ, in respect to the principles governing it, from an appeal from such appraisal or assessment.

And held that upon such a proceeding the Superior Court was not in any manner controlled by the action of the city authorities in the matter, but could reduce the award of damages below or raise the assessment of benefits above the amounts fixed by them.

The acceptance by the public of a highway dedicated to it is in all ordinary cases by actual use.

While there may be in some cases a constructive acceptance of a portion of a highway by an actual use of another portion, yet such constructive acceptance can exist only in a peculiar case, like that in *Alling* v. *Town of Derby*, 40 Conn., 410, where by reason of the formal character of the proceedings attending the dedication and designation of the street and acceptance by the town, and the fact that the street in question was a part of a net work of dedicated streets, a special and unusual effect was given to such actual use of a portion of the street as was made by the public.

APPLICATION for relief from an assessment of damages in favor and of benefits against the applicant in the laying out of a street by the authorities of the city of Meriden; brought to the Superior Court in New Haven County, under the provisions of the city charter. The followings facts were found by a committee:—

In the spring of 1868 Kellogg and Rust owned an extensive tract of land in the outskirts of the city of Meriden, and about that time laid it out into building lots, with streets plotted across the tract, and made a map of the same and filed it in the town clerk's office in the town of Meriden. The principal street through this tract was Crown street, which was in the line of old Crown street, then and for years before a regularly worked street in Meriden. There was in 1868, however, no connection between the old and new Crown street, since Kellogg and Rust did not own all the land up to the southerly end of old Crown street, and the connection between old Crown street and new Crown street was not

made until the proceedings of the city were had, as hereafter set forth.

On October 15th, 1868, Kellogg and Rust sold and conveyed to the plaintiff certain building lots laid out on their map, described in the deed as follows: "North on land of grantors, 220 feet, more or less; east on contemplated extension of Veteran street, 97½ feet, more or less; south on land of the heirs of Enos H. Curtis, and west on contemplated extension of Crown street, embracing lots Nos. 27, 28, 43, 44 and 45, on plot of land, as surveyed by grantors, said lines and streets being also in accordance with said survey."

The proposed new Crown street was not a straight street, but turned to the west a short distance above the plaintiff's lots. Below the land plotted out into lots on the old map, the proposed new Crown street did not run upon land of Kellogg and Rust, but upon land of the heirs of Enos H. Curtis.

Between the spring of 1868 and December 26th, 1873, the proposed new Crown street down to the turn in the same was considerably built upon; it was also considerably traveled and was used as a public street, connection with the city being had through Grant and Colony streets.

Below the turn, and on the line of the proposed street as turned, prior to December 26th, 1873, there had been no buildings erected, nor had the proposed street been worked in this part of it, nor much traveled. But at the time the plaintiff bought his lots the proposed new Crown street below the turn had been staked out, and the trees cut out in the line of it, and substantially in that condition it remained down to the fall of 1872.

Some time prior to December 26th, 1873, efforts were made to connect the new Crown street with old Crown street, and it was also proposed that the new Crown street should have no turn in it, but be continued as a straight street. Accordingly when Kellogg and Rust sold lots Nos. 38 and 55 on the old map, in the latter part of 1872, they bounded the grantees on "the line of the contemplated extension of Crown

street, wherever said line shall be established by the lawful authorities."

I find that when Kellogg and Rust laid out their land into lots, and made and filed the map, they dedicated to public use all the lands reserved on the map for streets, and that so far as new Crown street was concerned, down to the turn in the same, it had been in fact, prior to December 26th, 1873, accepted by the public. If such partial acceptance of this portion of new Crown street was in law an acceptance of the whole street as laid out on the old map, then I find a legal acceptance of the whole street as laid out on the map down to the Curtis land. But I do not find any acceptance, in fact, by the public, of that portion of new Crown street commencing and extending southerly from the turn as indicated on the old map.

Prior to December 26th, 1873, there had been no action taken by the municipal authorities of the city concerning the proposed new Crown street. About that time proceedings were commenced in the common council of the city, to lay out a new street from the south terminus of old Crown street, embracing the street heretofore called new Crown street down to the turn, but ten feet wider and extending in a straight line across the west part of the plaintiff's lots. Such proceedings were had that on the 3d of January, 1874, the city ordered the laying out of the street, and referred the matter of assessing damages and benefits to the board of compensation. It was also ordered by the city "that when the board of compensation assess the benefits and damages on south Crown street, they include in their assessment of benefits the cost of working said street." The original report was duly accepted by the city on the 5th of October, 1874, and ordered to be recorded.

If, upon the foregoing facts, the line of the street, as laid out on the old map, from the turn southerly in front of the plaintiff's lots, was on and prior to December 26th, 1873, a legal highway, then I find that the plaintiff was damaged by the laying out of the new street by the city authorities, over and above his benefits, the sum of five hundred dollars. But

if, upon such facts, the line of street as laid out on the old map, in front of the plaintiff's lots and up to the turn, was not on and prior to that time a legal highway, then I find that the damages and benefits to the plaintiff by the laying out of the street by the city were equal.

This estimate of damages and benefits is made as of the time when the street was laid out by the city. The estimates would have been the same if made as of the time of trial before the committee.

The plaintiff remonstrated against the acceptance of the report on the following grounds:—

1st. That the report does not find in full and specifically all the facts that were proved with reference to the action of the public in regard to said new Crown street below the turn.

2d. That it does find enough facts to show that the street was in fact accepted by the public below the turn, and then proceeds to decide as a question of law that it was not accepted in fact.

3d. That the report in one alternative reduces the finding of the board of compensation, whereas in law it cannot be done.

The court (*Hovey, J.*,) overruled the remonstrance and accepted the report of the committee and rendered judgment in accordance with it, that the damages and benefits to the plaintiff from the alteration and extension of the street at the time of the re-assessment of the same by the committee were equal, and that the city of Meriden recover of him its costs.

The plaintiff brought the record before this court by a motion in error.

*O. H. Platt*, for the plaintiff in error.

*First.* The Superior Court had no power to take away from the applicant the $300 already awarded him by the city. This is not an appeal, strictly speaking; it is a prayer for relief, based upon the allegation that the damages awarded him were insufficient. That it does not bring up and was not intended to bring up the question whether the damages

were too much must be obvious from a consideration of the circumstances under which damages were originally allowed. The city takes the land, and the city itself says what damages the owner shall receive. In the first instance he has no impartial tribunal before which he can try the question. The board of compensation are the officers and agents of the city. As such they hear the case, fix the damages, and make report to the common council. The council may reject the report, and may re-commit the matter to the board of compensation with instructions to reduce the amount, and its final acceptance of the report is the act of the city itself. From the very nature of the case, it cannot appeal from or review that decision. If it subsequently concludes that the damages are more than should have been awarded, it has a perfect remedy in its right at any time before opening and working the street to rescind its proceedings and commence *de novo*. By every consideration of justice it is precluded from questioning in this proceeding the propriety of the damages fixed by itself. By like considerations the land owner is entitled to inquire in an impartial tribunal whether the damages allowed him ought not to be greater. To prevent such an inquiry, or to permit the inquiry whether they were not too large, would be a great wrong. It is plain from the language of the statute also, that no reduction of the damages by the Superior Court is contemplated. It is the party "who shall feel aggrieved" for whose benefit the act is passed. He "may make written application for relief" to the term "next after the doing of the act by which he claims to be aggrieved." The court may "inquire into the allegations" of the application (which are, of course, that the damages are greater than allowed by the city) "and re-assess said damages," "and if said damages are increased," award costs against the city; "and if the damages are not increased," award costs against the applicant. Nothing is said in the whole section from which it can be inferred that a reduction of damages is contemplated or permitted.

*Second.* Upon the report of the committee the applicant is entitled to $500 damages. Two questions are left by the

committee to the decision of the court.—1st. Upon all the facts found by the committee, was the street in front of the applicant's lots a legal highway on the 26th of December, 1873?—2d. The committee having found an actual acceptance of all that portion of the street lying north of the turn, is the acceptance of the whole street to be therefrom inferred as matter of law?—1. It is uncertain what the committee meant by the phrase "legal highway." The legal right of the applicant to use it in going to his lot, the legal right of other lot-owners below the turn, and the legal right of all other persons having occasion to go to those lots for any purpose, cannot be questioned. The dedication was to the public and was complete and irrevocable. True, it was what the books call an incipient dedication, which required public use to so far complete it that the city should be bound to repair the street or liable for accidents thereon. In every sense except as to this liability it was a legal highway. The liability of the city to repair could in no way seriously affect the value of the applicant's land, and it may fairly be contended that the phrase "legal highway" should be construed to mean only such a highway as gave the applicant a legal right of access to his land. But assuming that the committee meant a highway which the city was bound to repair, (and the language used must of necessity have such construction,) we claim that, upon the facts found, such a highway did exist in front of the applicant's lots below the turn as well as above it. No question arises as to dedication. The only question is as to whether the gift had been accepted by the public, and it is submitted that very much less evidence of use will suffice to prove an acceptance of the gift than might be necessary in a case where the dedication was to be presumed from the use. The street was dedicated as a whole. It was a gift, and the larger part of it had been so used that there was no question as to the acceptance of that portion of the gift. In the absence of any fact tending to show that the public intended to use a part and reject the remainder, it must be conclusively presumed that, in the use the public actually did make of the gift, they accepted it in the same

way it had been given—as a whole. Using so much of the street as the committee finds to have been accepted, clearly indicates the intention of the public to use the whole. If only a house or two had been built near Grant street, and the actual acceptance found had been confined to a few rods at that end, the question might be more difficult. Suppose a house had been built half way from the turn to the Curtis land, and the travel thereto had been such as to compel the finding of an acceptance to that point, would it then be contended that the portion from such house to the Curtis land had not been accepted? There were several houses on the street at the time in question, and it is fair to presume that building had commenced at Grant street, and gradually extended south, and that travel kept pace with the building. Are partial acceptances of the street to be found in such case? Is the acceptance of a street by piecemeal, or as a whole, to be inferred? The facts found as clearly show that the whole street was beneficial and convenient as that any part of it was. It was located in a city, opened through unoccupied land to afford an opportunity for building. One portion was as well adapted to that purpose as another. The applicant bought his lot soon after its dedication. It is apparent that lots on the street were purchased and held for building, and not for speculation. No barrier or natural obstacle was in the way of using all the land for building purposes, or for a highway. It would seem that the beneficial character of the street in front of the applicant's lots is too plainly shown to admit of doubt. The street had been occupied as rapidly and as fully as could be reasonably expected. No one expects streets dedicated in the manner and under the circumstances of this street to be immediately worked and side-walked throughout their entire length; all that is required to show acceptance of such a street is that its occupation and use shall be the natural, common and reasonable use of such a street, increasing as the same is built upon. And when the use is shown to have been as full and complete as could have been fairly anticipated, the acceptance should be conclusively presumed. It will be observed that certain

things had been done in front of the applicant's lot, going to show an acceptance; and these facts are not to be considered as standing alone, but are to be taken in connection with what had been done in other portions of the street. The street in front of his lots had been staked out, and the trees cut down, at the time he bought his lots. There was then a visible street in front of his land. The committee finds that the street had not been worked in this part of it, *nor much traveled*, which is equivalent to finding that it had to some extent been traveled. Why should the street in front of the applicant's lots have been traveled at all, if the public intended to confine its use to the portion above the turn? Manifestly the street in front of his lots had been used and traveled whenever occasion required, but as it had not been built upon, there was not so much travel as in those portions where buildings had been erected. It will be noticed also that the city surveyor, in making his map, recognized it as a street with well defined and well known boundaries. The board of compensation and the common council, the agents of the city, and the city itself, recognized it as a highway to the extent certainly that it afforded free access to the applicant's lots, when his damages were fixed at $300. The law of Connecticut is well settled, and is stated by BUTLER, J., in *Guthrie* v. *New Haven*, 31 Conn., 321. "These principles authorize the gift, estop the giver from recalling it, and presume an acceptance by the public where it is shown to be of common convenience and necessity and therefore beneficial to them. For the purpose of showing that it is beneficial, an express acceptance by the town or other corporation within whose limits it is situated, and who are liable for its repair, the reparation of it by the officers of such corporation, or a tacit acquiescence in the open public use of it, are important; and so are the acts of individuals, such as giving it a name by which it becomes generally known, recognizing it upon maps and in directions, using it as a descriptive boundary in deeds of the adjoining land, or as a reference for locality in advertisements of property, &c., and any other acts which recognize its usefulness, and tend to show an approval of the

gift by the members of the community immediately cognizant of it; but the principal evidence of its beneficial character will be the actual use of it as a highway, without objection, by those who have occasion to use it for that purpose." Now applying that law to the facts of this case, the acceptance of the whole street is most clearly shown. That it was when dedicated as beneficial in one part as another and so continued, that a name had been given it by which it was generally known, that it was recognized upon maps, used as a descriptive boundary in deeds of adjoining land, used throughout its whole extent to a greater or less degree as fully as might be reasonably expected if accepted as a whole, or in other words actually used as a highway without objection by those who had occasion to use it for that purpose, is clearly established. The only fact lacking is, that it had not been worked in front of the applicant's lots, but this is not essential. It is not found that it had been worked in any part. Like all such streets, it had worked itself.

2. All that has been adduced to show that, upon the facts found, the street in front of the applicant's lots had become and was a legal highway, is pertinent to the question whether the partial acceptance found as a fact by the committee was in law an acceptance of the whole street, as laid out on the old map. It is not contended that in every instance where a street has been dedicated by the land-owner to public use, and there has been such a use by the public of a part that no question can be made as to the acceptance of that part, it follows, as a matter of law, that the acceptance covers the whole street. Myrtle street in controversy in *N. York, N. Haven & Hartford R. R. Co.* v. *City of New Haven*, 46 Conn., 257, seems to have been an instance where a part of the dedicated street became a highway and the remainder did not. The case at bar, however, is entirely different from that. We know of no case expressly in point. Each street must stand by itself. And the court in determining whether in a given case such a use as leaves no doubt of an acceptance of a part necessarily implies an acceptance of the whole, must look at the surrounding circumstances—must consider

the circumstances of its dedication; whether located in the city or in an unsettled country; whether made with reference to supplying building sites or to afford communication from place to place; the length of the whole street in connection with the length of the part certainly accepted; whether any natural obstacles interpose to prevent its use as a whole; whether any attempt has been made to revoke a portion of the gift, or there has been an occupation of a part of the street inconsistent with its public use; whether the street as a whole has been occupied and used as rapidly and fully as could reasonably be expected under the circumstances; the reason for its use having been greater or more complete in one part than another; with other circumstances which naturally suggest themselves. The presumption is that, unless some prominent fact exists going to show that a partial acceptance was intended, a full acceptance coinciding with the dedication must be presumed. *Hamlin* v. *City of Norwich*, 40 Conn., 13; *Derby* v. *Alling*, id., 410. If a case can ever occur in which the undoubted acceptance of the greater portion of a dedicated street legally implies the acceptance of the whole, such acceptance must be found in this case.

*R. Hicks*, for the defendant in error.

LOOMIS, J. The first question made in this case is, whether, under the charter of the city of Meriden, damages assessed by the city authorities in favor of a party whose land is taken for a city street, can be reduced upon the party's application to the Superior Court for relief. In the present case the plaintiff's damages for land taken were assessed by the board of compensation at three hundred dollars. Upon his application for relief the committee to whom the case was referred by the Superior Court, found, subject to a certain legal question to be hereafter considered, "that the damages and benefits to the plaintiff by the laying out of the street were equal."

The plaintiff contends that the Superior Court had no power to reduce the amount of damages awarded him by the

board of compensation; that it could only raise them, or leave them to stand as they were. In support of this claim the plaintiff relies, first, on the designation which the charter gives to the proceeding—that of an "application for relief," which he contends makes it differ from an ordinary appeal from such assessments; and, second, on a later provision of the same section of the charter, which provides that "if said damages are increased or said assessment of benefits is reduced," the costs shall be paid by the city, but "if the damages are not increased or assessment for benefits not reduced," the costs shall be paid by the applicant; there being no reference to, and apparently no consideration of, the case of a reduction of the damages awarded or an increase of the assessment for benefits.

This argument is not without a considerable show of reason, but we are satisfied that it ought not to prevail. The section in question in explicit terms gives the Superior Court power, on such an application, "to re-assess said damages or benefits, and give judgment accordingly." This is the only clause of the section which relates to the power given to the court in the matter, and it is precisely this power which we are endeavoring to ascertain. Of course the whole section is to be taken together in determining the meaning of any particular clause in it, and especially its meaning as a whole; but we think this clause, which expressly states what is the power and duty of the court in the matter, is the predominating one in determining the meaning of the whole. The court in this case has done only the precise thing which the charter in express terms gives it power to do.

But if we were left in serious doubt by this section of the charter, we should find aid in interpreting it from the charters of the other cities of the state. The universal rule in giving power to cities to lay out streets and assess the damages and benefits therefor, is to provide for some mode of review of the action of the city authorities in making such assessments. The proceeding in most cases is called an appeal, sometimes a complaint, in two cases an application for a re-estimate of damages and benefits, in a single other

case, as here, an application for relief; but in every case express power is given to the tribunal before which the case is carried to "re-assess" the damages and benefits; while in nearly every case there is the same provision as here with regard to the allowance of costs against the city or the applicant, according as the damages are increased or not, or the benefits reduced or not. Now it can not be that the legislature intended a totally different rule of procedure in the two cases where the proceeding is called "an application for relief," from that which is to be followed in the others. It is in every case in effect an appeal from a lower tribunal to a higher one, and must have the ordinary incident of an appeal, in its carrying up the subject of appeal for a *de novo* consideration and judgment, unaffected in any manner by the adjudication below.

This is the only reasonable view of the matter. A rule that should limit the higher tribunal in the exercise of its judgment would work in many cases very inconveniently. Suppose several parties, perhaps all the parties interested, appeal from assessments of damages in their favor as too low, and from assessments of benefits against them as too high. The total of assessments is fixed, as a general rule, with reference to the total cost of the improvement, which includes the damages to be paid. Now if all appeal, or a large number, it requires a re-adjustment of the assessments between the different parties. An addition to the damages of all would require a larger assessment of benefits; while if the total is not increased, the increase of damages to some would require the reducing of the damages of others; as would also the reducing of the assessment of benefits in favor of some require an increase of the assessment against others. This re-adjustment of the assessments could not be made if the tribunal had no power to reduce an award of damages or increase an assessment for benefits. And yet this power to re-adjust the assessments is one that is expressly given by some of the city charters in connection with the power given on appeals to re-assess, and is certainly to be regarded as given by implication in all cases where there are

several appeals from assessments made in the same matter, pending before the court at the same time.

We entertain no doubt of the power of the Superior Court in the present case to adjudge the damage sustained by the plaintiff to be balanced by the benefits received, although the city authorities had awarded him three hundred dollars as damages above his benefits.

The next question made in the case is, whether the acceptance in fact of a part of the new street by the public constitutes in law an acceptance of the whole street as laid out and opened. Upon this point we are unable to entertain a doubt. The acceptance of a street by the public is always one of fact, the law merely contributing its definition of the term. While the acceptance covers what is incidental to the street, there is yet properly no legally constructive acceptance, unless in a peculiar case which we will hereinafter consider. Thus the actual use of a street laid out eighty feet wide would be an acceptance of the street as of that width, while the same amount of use of a street laid out only forty feet wide, would be an acceptance of it as only of that width. In each of these cases the public by its use has accepted the street, but has accepted it as it was dedicated or as the use found it. But this is not so much by operation of law, as by operation of the actual use as a fact. There is no room for such an operation of the use upon a portion of an opened street that extends entirely beyond all actual use on the part of the public. It will be seen at once upon a consideration of the matter that any such rule would be one very difficult of practical application. Thus, a street is laid out by private land-owners in the suburbs of a growing city extending a mile out into the country. We will suppose it to be cleared of trees and fences, and perhaps marked by visible monuments, so as to have been opened for a street, as in the present case, but also, as here, not worked. Now the occupancy of the street by houses, and the use of it by the public in connection with the houses, would begin at the end next the city and extend very gradually outward, making perhaps a very clear acceptance of the street for a quarter of a mile,

while no use whatever is made of the street beyond. Can it be that this use so clearly limited and defined in extent can constitute a use, and by such constructive use an acceptance, of the part of the new street that is most remote from the city? If it could operate to make an acceptance of that remote part of the street, why not of a still remoter part, perhaps a mile further out, if the street had been laid out for two miles instead of one? And if it could not operate to accept a part of the street so remote, as we think it very clear that it could not, where shall the line be drawn? We see that we encounter a practical difficulty that is very serious. There is only one rule to apply in such a case, and that is the rule of actual use. Where the actual use stops there the acceptance stops, with only the qualification before suggested, that such use will take in whatever may be regarded as properly incident to it. Under this rule the use may cover in some cases a little more length of road than has been literally driven or passed over by the public. Thus, the remotest house on the new street may have been constantly traveled up to and from, by persons and vehicles, such travel in fact extending only to the gate in front of the house, while the road as opened may extend two or three rods beyond. In such a case the road may be regarded as accepted for these few rods, but not by operation of law but only as incidental to the actual use.

In the case of *Town of Derby* v. *Alling*, 40 Conn., 410, the land for a number of village streets was conveyed by the proprietors of a tract of land to the town of Derby, to be used "for public streets and highways only," with a designation of them upon a map referred to in the deed. The town had previously passed a vote declaring these streets highways on condition that they should thus be conveyed to the town. This court held that the town thus became a trustee of the land for the purpose contemplated, and that the grant operated as a dedication of the streets to the public, but that, notwithstanding the formal acceptance of the grant by the town, it was necessary that there should also be an acceptance by the public. It is however held that the acceptance

by the public, by its actual use of a portion of a street, was to be regarded as an acceptance of the street in its entirety, applying to the case the doctrine of a constructive acceptance. The court however put this expressly and wholly upon the ground that the street had been conveyed to the town as a whole, and was held by the town for the public acceptance as a whole, so that that acceptance was to be regarded as an acceptance not of a part but of the whole; such acceptance of the whole being a carrying into effect of the manifest intent of the grantors and of those for whose benefit the grant was made. It was also an incident of that case that the entire street as to which the question arose, was a part of a net work of streets, and was connected by the portion not used with a cross street to which it furnished access, the non-use being wholly owing to the steepness of a hill at that point, which made it necessary that this part of the street should be graded before it could be used. The court held the dedication by the grant to be irrevocable, making it entirely unlike the case of an ordinary dedication, which is revocable until the public have accepted it, and to the full length of which on paper, or in the intent of the party dedicating it, the actual use and so acceptance by the public has no reference. If a highway is fenced and worked by a party dedicating it to the public, and then by a fence across it the public are debarred from the use of a considerable portion of it, it would not be contended that the use of the open portion would constitute an acceptance of the part from which the public was debarred; and yet the non-use by the public of the part from which it was excluded would not be so decisive evidence that the public do not want it, and so that it is not of common convenience and necessity, as would the same non-use if the public was not thus excluded, as in this case the non-use would result from the actual preference of the public in the matter and not from compulsion.

While therefore we would not hold that there may not be a constructive acceptance of one portion of a highway by an actual use and acceptance of another portion, yet we think such constructive acceptance can exist only in a peculiar case

like that in *Town of Derby* v. *Alling*, where by reason of the formal character of the proceedings attending the dedication and designation of the streets and acceptance by the town, and the fact that the street as to which the question arises is a part of a net work of streets, a special and unusual effect is to be given to such actual use of a portion of the streets as is made by the public.

In *Guthrie* v. *Town of New Haven*, 31 Conn., 308, the court consider the general principles governing the matter of the dedication and acceptance of highways, and say (p. 321,) that "an acceptance by the public is presumed where the highway is shown to be of common convenience and necessity and therefore beneficial to them," and that "the principal evidence of its beneficial character will be the *actual use* of it as a highway, without objection, by those who have occasion to use it for that purpose." The same principle is laid down in *Green* v. *Town of Canaan*, 29 Conn., 157. And in the recent case of *N. York, N. Haven & Hartford R. R. Co.* v. *City of New Haven*, 46 Conn., 257, the court held that one of several streets embraced in an original dedication and quitclaimed by the owner of the land to a trustee for the city and afterwards by the trustee to the city, with a reference in the deeds to a map on which the streets were laid down, did not become a public highway without an actual use by the public, even though the other streets on the map were accepted by such use—and nothwithstanding a vote of the city to accept the conveyance of the streets.

We can not entertain any doubt that the actual use and acceptance by the public of the part of the highway in question can not be regarded as in law an acceptance of the part not used by the public.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

## EDWARD S. ROWLAND *vs.* ROBERT ROWE.

The plaintiff purchased soon after its date a promissory note endorsed by the defendant, payable in six months. The maker informed him at the time that the defendant was his father-in-law, and lived with him in East Haven, the town next adjoining the city of New Haven, where the plaintiff lived, and at a bank in which the note was payable; the note was also dated there. The defendant was in fact then living in East Haven, and had been for forty years. On the day that the note fell due the plaintiff left it with the bank where it was payable, instructing the cashier, who was also a notary, to protest it if not paid, and telling him that the endorser lived in East Haven. The note not being paid the notary protested it, and after enquiry of two of the clerks who lived near the line of East Haven, as to the defendant's residence, and being informed that they did not know him personally but believed he lived in East Haven, and after enquiry of some other persons who he thought might know without getting any definite information, he mailed a notice to him at that place on the afternoon of the same day. The defendant had in fact some time before, but after the purchase of the note by the plaintiff, removed to New Haven. Held that the notice of non-payment was sufficient.

The plaintiff having ascertained the truth with regard to the defendant's residence at the time of the purchase of the note, might rest upon that knowledge, and was not thereafter called to make any inquiry into the matter until some information came to him which made it his duty to do so.

The note fell due on Saturday, July 3d. The following Monday was a national holiday. On the afternoon of Tuesday the plaintiff, learning that the note remained unpaid, went to East Haven to find both maker and endorser. He there learned that the maker had left the state and that the defendant had removed to New Haven. It was then about dark, and he returned home by a direct route, which did not lead him by the residence of the defendant, he supposing that the notary had legally protested the note. At this time the business of the day was closed, the note was in the vault of the bank, which was shut, and the notary had gone to his home in an adjoining town. Held that practically and in the eye of the law the information came to the plaintiff on Wednesday the 7th, and therefore placed no obligation on him or on the notary to send a second notice. [Two judges dissenting.]

CIVIL ACTION against the defendant as endorser of a promissory note; brought to the Court of Common Pleas of New Haven County, and tried to the court, on a denial of the principal allegations, before *Stoddard, J.* The following facts were found by the court:—

The note in suit was dated at East Haven, January 1st, 1880, was signed by George A. Hubbard, was for $300, payable at the Second National Bank of the city of New Haven

six months from its date, and was endorsed by the defendant, to whose order it was made payable. Soon after it was executed Hubbard, the maker, brought it to the plaintiff's office for discount. The plaintiff enquired of him where he lived, and who Rowe, the indorser, was. Hubbard told him that he lived in East Haven, just this side of one Mr. Hughes, whose name appears hereafter, and that Rowe was his father-in-law, and boarded with him; and that Rowe was a man who owned considerable property in East Haven, and had lived there most of his lifetime. The plaintiff thereupon discounted the note, and saw nothing more of Hubbard until a day or two before the maturity of the note, when the latter informed him that he would be in to pay the note when it fell due, and if not that the money would be in the bank where the note was made payable, to meet it.

On the 3d day of July, 1880, about noon, the plaintiff took the note to the bank where it was made payable, and left it with the bank for collection, at the same time telling Mr. I. K. Ward, cashier of the bank, and the notary who protested notes for the bank, that if the note was not paid at 3 P. M., the hour the bank closed, to protest it. Ward inquired of the plaintiff where the indorser lived; the plaintiff informed him that he lived in East Haven, and boarded with the maker of the note. Up to that time the plaintiff did not know or suspect that the defendant resided elsewhere than in East Haven.

At 3 P. M., the note not being paid, Ward presented the same to the teller of the bank for payment, which was refused. He then asked two of his clerks in the bank who reside in Fair Haven, and near to the river which separates Fair Haven from East Haven, as hereinafter mentioned, and whom he believed to be pretty generally acquainted with East Haven people, where Rowe lived. They both replied that they did not know him, but believed that he lived in East Haven. Ward also went to the plaintiff's office to make further inquiries of him as to Rowe's residence, and not finding him in, inquired of his clerks, but they told him they did not know. Ward that evening mailed in the post office

in New Haven a notice, proper in form, of the non-payment of the note, prepaid, and addressed to the defendant at East Haven, Connecticut. At the time he mailed this notice he did not know or suspect that the defendant lived elsewhere than in East Haven, and did not know of any one else of whom he could obtain any information on the subject. Ward was not a resident of either the city or town of New Haven, but resided in the village of West Haven in the town of Orange. At the time the notice was mailed the defendant's name was not in the directory of the city of New Haven.

On the sixth day of July, 1880, the plaintiff went into the bank to see if Ward had received any reply to the notice of protest, and finding he had not, late in the afternoon of that day, he, with his daughter, drove to East Haven for the purpose of finding the maker of the note and the defendant, and about sundown arrived at the house of Mr. Hughes, the person spoken of by Hubbard at the time the note was discounted, and who lived in East Haven, about a mile and a half from that part of Fair Haven to which the defendant moved as hereinafter mentioned. The plaintiff inquired for Hubbard, and was informed by Hughes that he had gone to parts unknown one or two days before the maturity of the note, and that he had no property. The plaintiff then inquired for the defendant, and was told by Hughes that he had removed to Fair Haven, and was living on the corner of James and Exchange streets with a man named Jones, his son-in-law, about seventy-five rods off from the plaintiff's direct road back to New Haven, though this road was not the one in fact traveled by him on this occasion. Fair Haven is a part of the city of New Haven, and lies on the east side of the town of New Haven, has a separate post office known as the Fair Haven post office, and is situated next adjoining the town of East Haven, from which it is separated by a small river, bridged at several points from Fair Haven to East Haven. The plaintiff left Hughes's place about dark and returned by the road he had gone, and reached his home in the city of New Haven after dark, supposing that Ward, being a notary public, and cashier of the bank, had protested

the note according to law. The house in which Jones lived was then owned by the plaintiff, but the plaintiff did not know, till Hughes told him, what connection of the defendant Jones was, and had never before heard or known that the defendant lived there.

The same evening the plaintiff wrote and mailed the following letter to the defendant, and which was postmarked 11 P. M. of that day:—

"New Haven, Conn., July 7th, 1880.

"Mr. ROBERT ROWE:

"Will you please to call and see me to-day on business of importance, and oblige yours, E. S. ROWLAND."

And on the 8th of July he wrote and mailed to him a postal card requesting him to call at the Second National Bank. Both were addressed to the defendant, "Corner of James and Exchange streets, New Haven." The first was received by the defendant July 7th, and the second July 8th. Also on the 10th of July, Ward, at the request of the plaintiff, wrote the following letter to the defendant, and mailed it addressed as the foregoing letters sent by the plaintiff. The defendant received it at 12.15 P. M., July 12th.

"New Haven, Conn., July 10th, 1880.

"Mr. ROBERT ROWE:

"*Dear Sir*—The note of George A. Hubbard for $300 on which you are endorser, due and protested for non-payment on 3d inst., still remains unpaid. You will please give it your immediate attention, and oblige. Respectfully yours,

I. K. WARD, *Cashier*."

The plaintiff first informed Ward that the defendant had removed to Fair Haven at the time this letter was written, and Ward wrote and mailed it immediately upon being so informed and while the note was still lying in the bank for collection.

The defendant, who is a man sixty-five years of age, has followed, until a year or two past, the business of steamboating, and resided in East Haven from the year 1839 till February 28th, 1880, and for the last twenty-five years of that

time had lived in his own house, and Hubbard had lived with him for the last year or two prior to that date. On the last date the defendant removed to Fair Haven, intending to make that his home, and took with him his furniture, which was enough for one room, and Mrs. Jones supplied him with his meals. On March 31st, 1880, the defendant went to England on a visit, and did not return till May 11th. The defendant was a man who received but very few letters, and these he generally received, both while residing in East Haven and Fair Haven, at the steamboat dock in New Haven. These were directed "Steamboat Dock, New Haven." He had never received any letter from the Fair Haven post office up to the time of the trial, nor from the New Haven post office. The place where he resided in Fair Haven is about a mile from the Fair Haven post office and about the same from that of New Haven, and is about two miles from the East Haven post office. The defendant never used to go to either the Fair Haven, New Haven, or East Haven post offices, and he used to come to the central part of the city of New Haven only once or twice a week, and he then came to his daughter's house, or to a certain grocery store, or to a place where newspapers were sold. After his return from England he spent most of his time, especially in fair weather, working on the land where his house had stood in East Haven, for Jones, to whom he had conveyed the property.

The defendant received in East Haven on July 12th, at 11.45 A. M., the first notice of the non-payment of the note sent by Ward. It was then handed to him by his son, who had received it on Saturday, July 10th, in the afternoon, from one Forbes, to whom the postmaster had given it to be carried to the defendant. The son did not then reside with the defendant, but across the river on the East Haven side.

Upon these facts the plaintiff claimed and asked the court to rule:

1. That he had used due and reasonable diligence in endeavoring to ascertain the residence of the defendant and in sending the notice of non-payment.

2. That said Ward and the Second National Bank had

used due and reasonable diligence in endeavoring to ascertain the residence of the defendant and in sending him notice of non-payment.

3. That the plaintiff and Ward were justified, under all the circumstances, in sending the notice as it was sent.

4. That the notice as sent was due notice to the defendant of non-payment of the note, and that under all the circumstances, neither the plaintiff, nor the bank, nor Ward, was bound to send any other notice, or to any other place.

But the court overruled all these claims of the plaintiff, and rendered judgment against him. The plaintiff moved for a new trial.

*C. S. Hamilton*, in support of the motion.

1. Due diligence was used in the first instance, in sending the defendant the notice of non-payment which was mailed to him on the 3d day of July. The place of the date of a note is the place to which the notice of dishonor should be sent, unless the holder actually knows, or has good reason to suppose, that the indorser resides elsewhere. *Bank of Utica* v. *Davidson*, 5 Wend., 587; *Sasscer* v. *Whitely*, 10 Maryl., 98; *Moodie* v. *Morrall*, 1 Const. R. (S. Car.), 367; *Page* v. *Prentice*, 5 B. Monr., 7; *Godley* v. *Goodloe*, 6 Sm. & Marsh., 255; *Peters* v. *Hobbs*, 25 Ark., 67. In case of permanent removal by the indorser, between the making of the note and the dishonor, the notice should be sent to the place where the indorser resided at the time of making the note, unless the holder know, or has good reason to know, of such change of residence. *Ward* v. *Perrin*, 54 Barb., 89; *Bank of Utica* v. *Phillips*, 3 Wend., 408; *Harris* v. *Memphis Bank*, 4 Humph., 519; *McGrew* v. *Toulmin*, 2 Stew. & P., 428. If the notice is sent to the place where the indorser is reported to live it is sufficient. *Wood* v. *Corl*, 4 Met., 203. Where an indorser has intrusted his name to the maker of the note, he is bound by a notice sent to the place which the maker has told the holder, at the time of discount, is his residence. *Bank of Utica* v. *Phillips*, 3 Wend., 408; *Bank of Utica* v. *Bender*, 21 Wend., 643; *Gawtry* v. *Doane*, 51 N. York, 84. Inquiry

in good faith by the notary having the note for protest of any one person whom he has reason to believe knows where the indorser resides, is the exercise of proper care in sending the notice. *Bank of Utica* v. *Bender*, 21 Wend., 643; *Rawdon* v. *Redfield*, 2 Sandf., 178; *Belden* v. *Lamb*, 17 Conn., 441; *Hartford Bank* v. *Stedman*, 3 id., 489.

2. If due diligence was exercised in sending the notice, the fact that the plaintiff was told, late in the evening of July 6th, that the defendant had changed his residence, cannot defeat his right to recover. The statute (Gen. Statutes, p. 349, sec. 6,) allows the sending of a notice by mail, when the parties both reside in the same town. It imposes no greater diligence where the parties reside in the same town, than the common law requires where they reside in different towns. *Requa* v. *Collins*, 51 N. York, 144. Would a notice mailed by the plaintiff after he reached home in the evening of July 6th, and deposited in the New Haven post office, addressed to the defendant either at New Haven or Fair Haven, have been sent in time to bind him as indorser? If not, then the plaintiff certainly cannot be charged with not having exercised due diligence. That it was then too late for him to send such notice the authorities prove beyond all question, holding, as they do, that notice when sent by mail must be sent as early as by the first mail of the day following the dishonor, or at the very latest by the first mail which does not leave at an unreasonably early hour of that day. It can not be necessary to cite authorities to this point. And the following facts must be considered in connection with the case. The finding shows that the plaintiff was not told that the defendant had changed his residence until between sundown and dark of July 6th, and that it was after dark when he reached home, which in July would certainly be as late as 9 P. M. The letter the plaintiff wrote that night did not get into the mail till 11 P. M. And the note was in the vaults of the bank, where it could not be had that night, or in the hands of Ward in another town. But conceding that when the plaintiff was told that the defendant had changed his residence, it was not then too late to send a notice of dis-

honor, his right of recovery is not thereby barred. For the purposes of protest and sending notices of dishonor, not the plaintiff, but the bank where the note was left for collection, or Ward the notary, is regarded in law as the holder of the note. *Manchester Bank* v. *Fellows*, 28 N. Hamp., 302; *Bartlett* v. *Isbell*, 31 Conn., 296; *Warren* v. *Gilman*, 17 Maine, 360; *Greene* v. *Fouley*, 20 Ala., 322; *Bowling* v. *Harrison*, 6 How., 248. Due diligence exercised by such holder for collection will be sufficient to bind the indorser, although the notice be mis-sent, even if the owner of the note could have told such holder for collection the true residence, and neglected to do so. *Bartlett* v. *Isbell*, 31 Conn., 296; *Hartford Bank* v. *Stedman*, 3 id., 489; *Garver* v. *Downie*, 33 Cal., 176: 1 Parsons on Cont., (5th ed.,) 280. It is also apparent from the finding that the defendant received the notice sent on July 3d, quite as soon as if it had been sent July 6th, addressed simply "New Haven" or "Fair Haven," and if so he cannot complain. *McClain* v. *Waters*, 9 Dana, 55; *Bradley* v. *Davis*, 26 Maine, 45.

*W. C. Case* and *L. P. Deming*, contra.

1. The plaintiff was bound to use due diligence to discover the residence of Rowe before sending any notice whatever. The fact that the note bore date at "East Haven," and was apparently endorsed there, not only did not justify Ward in sending notice to East Haven, but relaxed in no degree the rigid requirement to use "due diligence" to discover the residence of the indorser. *Barnwell* v. *Mitchell*, 3 Conn., 106; *Bank of Utica* v. *De Mott*, 13 Johns., 432; *Wilcox* v. *Mitchell*, 4 Howard, (Miss.,) 280; *Howland* v. *Adrain*, 30 N. Jer. Law R., 41; *Lawson* v. *Farmers' Bank*, 1 Ohio St., 206. Ward did not use due diligence to learn the residence of the indorser. He inquired of two of his clerks, who did not live in East Haven, and who told him they did not know Rowe, but believed he lived in East Haven. This surely was not enough. *Bank of Utica* v. *De Mott*, 13 Johns., 432; *Stuckert* v. *Anderson*, 3 Whart., 116; *Gilchrist* v. *Donnell*, 53 Misso., 591; *Galpin* v. *Hard*, 3 McCord, 394;

*Packard* v. *Lyon*, 5 Duer, 82; *Beveridge* v. *Burgess*, 3 Campb., 262. His inquiries of the plaintiff's clerks were no part of due diligence. *Spencer* v. *Bank of Salina*, 3 Hill, 520; *Bank of Utica* v. *Davidson*, 5 Wend., 588. Ward's inquiry of the plaintiff and the information given by the plaintiff go for nothing, because in this matter Ward was simply the agent of the plaintiff, his acts were the plaintiff's acts, his *laches* the plaintiff's *laches*, the information of each the information of both, and in this branch of the discussion they are to be treated as one person. *Lawrence* v. *Miller*, 16 N. York, 235; *Greenwich Bank* v. *Degroot*, 14 N. York Supreme Ct., 210; *Dodge* v. *Freedmen's Sav. & Trust Co.*, 93 U. S. Reps., 379; Daniel on Prom. Notes, § 341, and cases cited in note. The plaintiff then should have the benefit of all the diligence used by both. We have seen what Ward's diligence was. What did the plaintiff in his own person do? Absolutely nothing. He made no effort whatever to discover the residence of Rowe at the time the note matured, but for the information he gave Ward he relied entirely upon a statement made by Hubbard six months before. This inquiry is all the diligence used by the plaintiff, and this is insufficient. *Barker* v. *Clark*, 20 Maine, 156; *Davis* v. *Williams*, Peck, (Tenn.,) 191; *Woods* v. *Neeld*, 44 Penn. St., 86; *Whitridge* v. *Rider*, 22 Maryl., 548; *Staylor* v. *Ball*, 24 id., 183. Hubbard was in his office a day or two before the note matured, but he asked him nothing about the indorser. The plaintiff not only sought no opportunity to be informed, but neglected the opportunity which presented itself. Was this "ordinary or reasonable diligence, such as men usually exercise when their interest depends upon obtaining correct information?" In making inquiry he had only to go upon the street and ask any one of a score of people living in the town of East Haven, barely a mile away, and so connected with the city of New Haven that it is difficult to tell where one leaves off and the other begins. At all events he could have sent or gone this trifling distance, and put the question beyond dispute. A significant piece of evidence that the plaintiff had not used due diligence and knew that he had not, is found in the

fact that on the 6th of July, within due time, he went to East Haven to enquire for the indorser.

2. But the statute is explicit in its requirement that "the holder or his agent shall, in due time, deposit a notice of such dishonor in the post office, with the postage prepaid, addressed to such party at the town in which he may reside." Is it not a fair construction, and indeed the only construction of this language, to say that if the holder at any time, within "due time," learns the actual residence of the indorser, he must address a notice to him at that residence? "Ignorance of change of residence excuses only so long as that ignorance continues." *Howland* v. *Adrain*, 30 N. Jers. Law R., 41. Suppose Ward, after mailing his notice on the 3d of July, addressed to the defendant at East Haven, had on his way home been informed that the defendant had actually been a resident of New Haven for months, and had paid no attention to it—had written no new notice addressed to the defendant at his actual residence—would not that have been fatal negligence on the part of Ward binding the plaintiff? Inability to discover the residence of the indorser excuses the proper service only so long as such inability continues. Chitty on Bills, 493; *Beale* v. *Parrish*, 20 N. York, 407. The plaintiff's ignorance of the indorser's residence ceased within the "due time" to give the notice prescribed by law. The plaintiff was bound to act upon this information; all the more because he was aware that the maker had absconded. He deliberately neglected his legal duty, to the detriment of the defendant, and wrote him two letters without informing him of the dishonor of the note. These letters were not notice because they contained no information. Daniel on Prom. Notes, §§ 974, 975.

PARDEE, J. It appears in this case that up to the day of the maturity of the note in question the plaintiff had neither knowledge nor reason for believing that the endorser had changed his residence. The note bore date at East Haven; there the endorser had lived for forty years, including the day upon which he made the endorsement, and this he placed

in the hands of the maker of the note, presumably with knowledge that he intended to sell it in the open note market of New Haven, and probably to a person who would have no other information as to the endorser's residence than that furnished by the note and orally given by the maker.

The plaintiff having ascertained the truth as it was at the time of the purchase might well rest upon that, and was not thereafter called to make any inquiry into the matter until some information came to him which made it his duty so to do. The holders of notes and bills are not bound to a continual watch over the movements of endorsers, unless for good cause; the question as to diligence arises only when there is reason for action.

It is found that the endorser received very few letters; from this we may infer that his business transactions were also few; that his circle of acquaintance was small; that he might transfer himself alone, without family, for the distance of two or three miles, from the house where one daughter lived into a house with another, practically from one part of New Haven to another, without knowledge of others than his nearest neighbors and most intimate friends; and in fact the change was so quietly made as to fail of recognition in the city directory.

We infer too from the finding that after as before this change he visited the same three places in the center of the city; and it is found that after his return from England in May, up to the time of the maturity of the note, he spent most of his time tilling the land about his former home in East Haven. During this time if the plaintiff had seen him in New Haven nothing would have suggested a change, he might well have assumed that the residence indicated upon the note continued, might well believe and inform the notary that he lived in East Haven; and the notary, protesting for the collecting bank, might well act upon that information, supplemented as it was by the belief of two of the bank clerks living presumably within two miles of the endorser, that he lived in East Haven, although they had no personal acquaintance with him

By the combined force of these circumstances the endorser was well held by the notice of July 3d, directed to East Haven; he had in effect told the holder that he lived there when the latter bought the note; he had never given him any reason to believe that he had changed his residence, or occasion to make other inquiry than that which was made.

Monday, July 5th, 1880, was a national holiday. On the afternoon of Tuesday, July 6th, the plaintiff, learning that the note remained unpaid, went to East Haven to find the maker and endorser. He enquired of a former neighbor, who told him that the maker was without property, and that he went to parts unknown two days before the maturity of the note; also that the endorser had removed to New Haven, and lived in a house standing about seventy-five rods off from the plaintiff's most direct route back to that city. He received this information at about dark and returned to New Haven by another than the most direct route, without seeing the defendant, supposing that the notary had protested the note according to law.

On Saturday, July 10th, he informed the notary of the endorser's change of residence, and on the same day the notary mailed a second notice of protest directed to him at New Haven.

The legal effect of the deposit of the notice in the post office on July 3d was not destroyed by the reception of this information at sundown of Tuesday, July 6th. At that hour the business of the day had closed; the note was in the vault of the bank in New Haven; the notary was at his home in an adjoining town; possession of the note was the privilege of any one required to send notice of its protest, accuracy in description being requisite. At that hour the law allowed the plaintiff to return to his home; it did not require either himself or the notary to leave their respective homes and devote the evening to the labor of notifying the endorser. Practically and in the eye of the law the information came on Wednesday, July 7th, and, if so, placed no obligation upon either the plaintiff or the notary to send a second notice; for the first was well sent upon information acquired

by due and legal diligence in inquiry. The deposit of that notice post paid in the New Haven post office, even with its erroneous address, unalterably fixed the liability of the defendant, unless the corrected information came either to the plaintiff or the notary in time to require of one of them a second notice on Tuesday, July 6th; and this did not occur.

It is said in *Lambert* v. *Gheiselin*, 9 How., 552, that "when notice is sent after the exercise of due diligence a right of action immediately accrues to the holder, and subsequent information does not render it necessary for the holder to send another."

A new trial is advised.

In this opinion PARK, C. J., and BEARDSLEY, J, concurred; LOOMIS and GRANGER, Js., dissented as to the effect of the knowledge of the defendant's place of residence acquired by the plaintiff on the 6th of July.

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HENRY C. ROWE *vs.* WILLIS M. SMITH AND ANOTHER.*

The southern boundary of the territorial proprietorship of towns touching Long Island Sound follows high water mark, crossing bays and harbors upon a straight line drawn between points upon opposite shores from one of which objects and movements can be discerned with the naked eye upon the other.

The State owns the shell and floating fisheries outside of this line.

The first section of the statute with regard to shell fisheries (Gen. Statutes, tit. 16, ch. 4, part 1, art. 1,) which speaks of a certain line between the navigable waters of one town and those of another as running "southerly" from a certain point in the divisional line upon the main land, must be taken to mean a line running *due south*.

The second section of the same statute authorizes a committee appointed by any town for the purpose to designate suitable places "in the navigable waters in such town" for planting or cultivating oysters. Held that the divisional lines between the navigable waters of one town and those of another were meridional lines extending south from the termini of the lines separating the territorial proprietorship of the towns.

A statute enacted for the purpose of authorizing the designation of oyster beds by town committees, stated that a straight line drawn in a certain direction from a certain point would strike a point where the navigable waters of two

* This case was argued at a former term, but was not decided in season to be reported in its place. It was heard by the same judges that held the present term.

towns named would meet. Held that this declaration was not to be regarded as an enactment fixing the point as in the divisional line of the towns, and that as mere declaration it was without effect.

TRESPASS for entering upon grounds in the possession of the plaintiff as an oyster bed and taking and carrying away oysters; brought originally before a justice of the peace and, by the defendant's appeal, to the Court of Common Pleas of New Haven County, and in that court tried to the jury before *Cowell, J.* Verdict for the plaintiff and motion for a new trial by the defendants. It will be difficult to make the facts of the case clearly understood without a map, but it is believed that the principles of law decided by the court will be readily understood from such a statement of the facts as is given in the opinion.

*W. C. Robinson* and *R. S. Pickett*, in support of the motion.

*J. W. Alling*, contra.

PARDEE, J. In 1875 the town of New Haven by virtue of Gen. Statutes, page 214, section two, had power to appoint a committee which could designate suitable places for planting or cultivating oysters in the navigable waters within the limits of the town. At the same time the selectmen of the town of East Haven had exclusive authority to designate for the like use the navigable waters included within a boundary line commencing upon the line of division in East Haven River between East Haven and Branford, opposite low water mark, and extending thence southerly along the line of division between the navigable waters of East Haven and Branford, to the intersection of a line so drawn as to cross the centers of Stony Island and Southwest Ledge; thence westerly along the last mentioned line to Southwest Ledge; thence northwesterly by a direct line to the line of division between the navigable waters of East Haven and Orange; thence northerly along the last mentioned line of division to a point west of the southerly limit of Morris Cove; thence easterly by the shortest line to low water mark.

The plaintiff claimed title to the *locus in quo* from a designation from the selectmen of East Haven, dated June 12th, 1875, to E. G. Bates and others, and by them transferred to him.

In 1877 the legislature passed the following special resolution:—"Resolved by this Assembly, that that part of the boundary line between the towns of New Haven and East Haven which lies south of a line drawn due west from the south-west corner of the fortification on the east side of New Haven harbor, called Fort Hale, shall be and remain as follows:—a straight line commencing at a point four hundred and thirty yards due west from the western extremity of the shore at low water mark, west of the south-west corner of the fortification aforesaid and running southwesterly through, and three-fourths of a mile below, a point two hundred and thirty yards due west of the westerly extremity of Southwest Ledge, as shown upon the map of New Haven harbor made by the United States Coast Survey, and published in 1872. Nothing herein contained shall operate to affect in any manner any question of boundaries between the towns of New Haven and Orange." Private Acts of 1877, page 107.

The plaintiff also claimed title from a designation dated June 22d, 1877, by the selectmen of East Haven, acting under this resolution and under a public act passed in 1877, (Session Laws of 1877, p. 200, ch. 95,) to George A. Cook and others, and by them transferred to him.

The defendants claimed title to it from a designation made on August 25th, 1875, by the committee of New Haven, to Sidney F. Smith and others, and by them transferred to the defendants.

By the charter of 1662 Charles II. granted lands to the corporate freemen of the colony of Connecticut. With these lands, under the name of "royalties," went the royal title to the shores of the sea. The grant in 1685 from the General Assembly to the proprietors of New Haven was in effect of land bounded upon the shore; it did not undertake to convey the title of the colony to the shores of the sea. Therefore, so far forth as territorial proprietorship is concerned, New

Haven terminated at high water mark, between Stony River on the east and Oyster River on the west, following the indentations of the coast, crossing the bay or harbor upon a line drawn between the points upon opposite shores, from one of which objects and actions can be discerned by the naked eye upon the other. At the revolution the title to the shores of the sea passed from the corporate freemen of the colony to the people of the state, and in them remains the proprietorship of fisheries, shell and floating, in its navigable waters. Towns have no ownership in or control over them. The legislature alone can create an individual proprietorship in them. This it can do directly, or through a committee, general or special, or by any other method satisfactory to itself.

The state enforces public and private justice over territory below high water mark by service of process there through the instrumentality of the town at whose front such service may become necessary, except in cases of special provision to the contrary. For this purpose lines called lines of division between towns and counties are considered as extending through navigable waters, being meridional lines drawn from the termini of lines separating territorial proprietorship in towns to the line between Connecticut and New York in Long Island Sound.

In the act cited and in others referring to the allotment of territory to individuals for oyster planting, the legislature, while recognizing the existence of boundary lines between towns in waters outside of territorial proprietorship, and making such lines of separation between private proprietorship existing by its grant, has omitted to locate them by fixed monuments. The line between East Haven and Branford is described as extending from a point at low water mark "southerly;" the line between East Haven and Orange as running "northerly." We are not to presume that the legislature intended to have any element of uncertainty as to their course, but that it used these words as having a precise signification by reason of the rule of law which makes boundary lines thus described, there being no word or monu-

ment deflecting them, due north and south lines. Thus, in *Brandt ex dem. Walton* v. *Ogden*, 1 Johns. R., 156, it was determined that "the term *northerly* in a grant, where there is no object to direct its inclination to the east or to the west, must be construed to mean *north*, and there being no object to control, it must be a *due north line.*" See also *Jackson ex dem. Woodworth* v. *Lindsay*, 3 Johns. R., 86, and *Jackson ex dem. Clark* v. *Reeves*, 3 Caines R., 293.

And as it is a matter of common knowledge that since the passage of these acts the agents of the state making grants upon valuable consideration, and individuals taking them, have recognized this rule, we find no occasion for substituting another.

And we believe that prior to the passage of these acts this rule of a meridional line had been recognized whenever there had been occasion therefor in the administration of public and private justice. Moreover, as the shore line of this state may be said to be practically east and west in its general course, the meridional line alone gives to each town its due proportion of navigable waters; it alone can be extended without intersection and consequent confusion.

In 1785 East Haven was carved from New Haven and incorporated as a town; it borders upon Branford eastwardly, upon the Sound southwardly, and upon the bay and harbor of New Haven and East River westwardly. In 1803 the legislature defined the separating line of territorial proprietorship between New Haven and East Haven as passing from the mouth of East River along the middle of the channel of the bay or harbor to an intersection with the line drawn from the shore of one town to that of the other, between points from one of which objects and actions can be seen by the naked eye from the other, which point of intersection as it existed in 1803 is to be fixed by the jury. From that point to the southern boundary of the state the western limit to navigable waters over which the state thereafter administered public and private justice through the instrumentality of East Haven, and consequently the western limit to the navigable waters of that town within the meaning of the statute

permitting an allotment of ground to individuals for the cultivation of oysters, is a meridional line.

We are not permitted to avoid the determination of the question as to the course of the lines separating what are denominated the navigable waters of the towns by accepting the suggestion that the act encouraging the planting or cultivation of oysters is to be confined in its operation to waters within lines of territorial proprietorship; that is, to waters within lines drawn from point to point in the respective towns, from one of which objects can be discerned by the eye upon the other. For one section speaks of the navigable waters of East Haven and Branford, which are upon a line drawn through Stony Island and Southwest Ledge. Now this line is about a mile from the nearest headland in East Haven or Branford; it is in Long Island Sound, far outside of territory the proprietorship of which was first in New Haven and then in East Haven by grant from the General Assembly. And the act in another section recognizes, for the purpose of allotment of territory, the existence of a line extending south through and beyond the line drawn through Stony Island and Southwest Ledge to an indefinite distance into Long Island Sound, as being a line which at every point through its whole extent separates navigable waters of East Haven from those of Branford. Again the navigable waters of the town of Orange are spoken of in another section as extending at least to a point south of a line drawn west from the southernmost point of Morris Cove. These furnish convincing evidence of legislative intent to include waters outside of territorial proprietorship, and since the enactment of this law the agents of the state have granted and taken pay for allotments outside of such line, and the purchasers have occupied them.

The statute before referred to (Gen. Statutes, p. 214, sec. 2,) authorizes any town to designate by a committee suitable places in the navigable waters thereof for the planting or cultivation of oysters. Section sixth of the same statute gives specific directions for the action of these committees, when under the power granted in the second section they

designate portions of the navigable waters between Fort Hale and Long Island Sound. Hereby the legislature which enacted the law declared that it included in the term "navigable waters in a town," waters which extend as far southwardly as Long Island Sound. It is made certain therefore, so far as the four towns of New Haven, East Haven, Branford and Orange are concerned, that in the act in question the legislature intended to and did include in the expression "navigable waters of each of those towns," waters bordering upon and within the Sound; and there is no foundation for the presumption that it intended a different meaning for other towns. Be that as it may, the specifically expressed meaning covers the *locus in quo*.

Again, the first section of the same statute restricted the power of designation by East Haven of navigable waters of the town on the south, by the east and west line through Stony Island and Southwest Ledge. The act of 1877 (Session Laws of 1877, p. 200,) removes the restriction, and the town is authorized to designate places in the "navigable waters of this state" south of that line. There can be no significance in this change of expression from the "navigable waters of the town" to the "navigable waters of the state." It is a mere accident of language; for no statute, no principle of law or rule of interpretation, creates any distinction in this respect between the waters north and those south of this arbitrary line; and we are not to presume that the legislature intended to establish one which has no foundation in law or reason. And the 21st section of the same act punishes persons taking oysters from any place designated by the committee of Branford within two miles of the shore.

The jury were instructed that the south limit of the ancient town of New Haven by the patent of 1685 was a straight line running from the mouth of Oyster River to the mouth of Stony River; that in 1875 the territory outside of that line was not included in any town; yet that the proper authorities of the towns of East Haven and New Haven then had an implied jurisdiction to designate ground for oyster purposes outside of town limits, but reasonably adjacent to

the front of such towns on the Sound, and following, outside of such limits, the boundary line between the towns extended below such limits. For the purpose of determining whether the *locus in quo* was in 1875 under the implied jurisdiction of New Haven or that of East Haven, the court gave in effect the following instructions to the jury as to the extension of the line separating these towns beyond the line drawn from Oyster River to Stony River, namely—If from off Fort Hale to the last mentioned line the dividing line is straight, it is to be prolonged directly beyond that line; but if it is not straight at or near its junction with the Oyster River and Stony River line, the jury are to follow it back a reasonable distance, get its general course and direction, and prolong it in such direction below the Oyster River line. For reasons hereinbefore given there is error in these instructions.

The court also instructed the jury to consider the first section of the statute "as a legislative declaration and *primâ facie* proof that the west boundary line of East Haven comes down the harbor so as to lie to the northwesterly of Southwest Ledge, and the jury were not at liberty to find that such west boundary line comes down the harbor in such a way as to be due north, or northeasterly or easterly of Southwest Ledge, unless upon very clear and satisfactory proof to that effect;" and secondly, that it was for the jury to locate the territory therein described, but that "the same, with the territory above it, belonged to East Haven, and that if the divisional line claimed by the defendants was through this territory the jury could not adopt and must disregard such line; for no divisional line between two towns could run through the territory of one of the towns." The statute states that a straight line drawn northwesterly from Southwest Ledge will strike a point where the navigable waters of East Haven and Orange meet. In effect the jury were told, first, that the fact that the legislature made the statement is in law *primâ facie* proof of its truth; secondly, that it is conclusive proof. In this there is error. The statute was not enacted for the purpose of changing, defining, or establishing town boundary lines; no such effect is to be given to

it by construction. The statement is therefore without the power of an enactment, and, as a declaration, is without force.

Concerning this statute the jury were further instructed "that it will be presumed that the legislature would not have given the East Haven authorities jurisdiction over grounds in Long Island Sound in front of New Haven territory, and therefore it will be presumed that the territory above said limits, from some point northwesterly of Southwest Ledge, in 1870 belonged territorially to East Haven." There is error in this. As it is within the power of the legislature to place the shell fisheries in all of its navigable waters under the control of a committee resident in any one town, the statute furnishes no basis for a presumption as to the location of town lines.

A new trial is advised.

In this opinion PARK, C. J., LOOMIS and GRANGER, JS., concurred.

CARPENTER, J., (dissenting.) I think this case should turn upon the proper construction of the statute laws of this state relating to the cultivation of oysters, and certain other statutes, grants, &c., bearing upon the question of the jurisdiction of towns over navigable waters.

The statute in force in 1875 conferred upon the selectmen of East Haven special and exclusive authority to designate for the planting and cultivation of oysters "the navigable waters included within a boundary line commencing in the line of division between East Haven and Branford, thence on said line to the intersection of a line so drawn as to cross the centers of Stony Island and Southwest Ledge, thence westerly along said last mentioned line to Southwest Ledge, thence northwesterly by a direct line to a line of division between the navigable waters of East Haven and Orange, thence northerly along said last mentioned line of division to a point west of the southerly limit of Morris Cove, thence easterly by the shortest line to low water mark, and thence

by the line of low water to the place of beginning." The concluding clause of that section confers authority upon the selectmen of Orange to designate for a like purpose any portion of the navigable waters in said town not previously designated and occupied. Gen. Statutes, p. 213, sec. 1.

The second section of the same statute reads as follows: "Any other town may appoint a committee of not more than five electors of such town, to hold office one year, and until others are chosen in their stead, which shall designate suitable places in the navigable waters in said town for planting and cultivating oysters, &c."

In 1877 the second section was repealed, and an act varying from it in some respects was enacted in its place, the waters to be affected thereby being described as "the navigable waters *in said town.*" Session Laws of 1877, p. 200. At the same time, being approved on the same day, the first section was amended by adding, after the boundaries given above, the words following:—"But the oyster ground committee of said town may designate for the same purpose any places *in the navigable waters of this state* which lie southerly of that portion of said line crossing the centers of Stony Island and Southwest Ledge, which is between the westerly boundary of Branford and the westerly boundary of the town of East Haven."

Seven days later a special act was passed, (Special Acts of 1877, p. 107,) defining the boundary lines between the towns of New Haven and East Haven as follows:—"A straight line commencing at a point four hundred and thirty yards due west from the western extremity of the shore at low water mark, west of the southwest corner of the fortification aforesaid [Fort Hale], and running southwesterly through, and three-fourths of a mile below, a point two hundred and thirty yards due west of the western extremity of Southwest Ledge, &c."

It appears from the maps in the case that the disputed premises are east of the line last described and south of the line crossing the centers of Stony Island and Southwest Ledge, so that they are included among the places assigned

to the jurisdiction of East Haven by the act of 1877 amending the first section, and are there described as *the navigable waters of this state.*"

Pursuant to that act the plaintiff acquired his title. It is very clear that at that time the authorities of East Haven had power to designate any unappropriated territory within the limits described. The plaintiff therefore acquired a good title unless the defendants acquired a title to the same premises by virtue of the action of the authorities of New Haven in 1875. That brings us to the question—what jurisdiction had the authorities of New Haven over the premises in 1875? Their jurisdiction, and all the jurisdiction they had, was derived from the second section of the statute quoted above, (Gen. Statutes, p. 214,) unless the claim of the defendants (which will be noticed hereafter) is good, that New Haven, by the patent of 1685, extended to the state line in the middle of the Sound. The question then may be stated in another form—were the premises in 1875 within the limits of New Haven, or were they "in the navigable waters in said town?"

It will be noticed that there is a distinction between the special power conferred upon the authorities of East Haven, and the general power conferred upon other towns, including New Haven. In respect to the former the first section of the statute confers jurisdiction over the "navigable waters" within certain defined limits, not being limited to the navigable waters "in the town;" so that all the waters within those boundaries were within the jurisdiction of East Haven for oyster purposes, whether they were within the chartered limits of the town or not. And the amendment of 1877 extending jurisdiction further into the Sound, describes the waters as the "navigable waters of the state," while the second section of the general statute and the act of 1877 amending it, give to New Haven jurisdiction only over the navigable waters in the town.

It may be that this difference is accidental, that the legislature did not intend to give to East Haven more extensive jurisdiction than is given to other towns, and that the

expression "navigable waters in the town" should be construed as embracing all the waters between the towns and the state line—thus practically covering the jurisdiction of towns for enforcing the laws. But if so it is difficult to assign a reason for making East Haven an exception, specially defining its powers and jurisdiction, and when referring to waters which are clearly in the Sound and outside the charter limits of any town, describing them as "navigable waters," and "navigable waters belonging to this state."

If the expression, "navigable waters in the town," as applied to other towns, gives jurisdiction to the state line, there is no significance in the fact that East Haven is made an exception, and no force in the difference in the language used, but both expressions mean practically the same thing. But if we distinguish between the "navigable waters belonging to this state" and "navigable waters in the town," holding the former to be without and the latter to be within the charter limits of towns, the meaning of the legislature is plain, and we give effect to its obvious intention.

It is true we may not be able to perceive why East Haven should be the object of special legislation in this respect, yet, if it is clearly so, we must give effect to it and presume that the legislature had good reasons for its action.

The question then recurs, was the disputed territory embraced within the navigable waters in New Haven prior to 1877? The defendants claim that it was, and the foundation of that claim is the one alluded to above, that New Haven by the grant or patent of 1685 extended to the state of New York. I do not think that claim can be sustained.

The patent of 1685 describes the southern boundary of New Haven as follows:—"On the sea or sound on the south, from the mouth of Oyster River to the mouth of Scotch Cap or Stony River."

The general rule of the common law locates that line as follows:—beginning at Oyster River and following the shore on the line of high water easterly and northerly until it comes to New Haven harbor, at a point nearly opposite Fort Hale, where objects and actions can be discerned on the

opposite shore, thence across this harbor to the shore near Fort Hale, thence southerly and easterly on the shore to Stony River. The learned counsel for the defendants admit that the common law rule will so locate the line, and that the General Assembly on several occasions has recognized that as the true line.

The line thus described is a long distance to the north of the premises in question; and if that is the true line and it is to determine the limits of the navigable waters in the town, it is decisive against the defendants' claim. I think the common law rule should prevail, unless there is something to relieve the case from the operation of the rule. I see nothing in the case that should have that effect. No act of the legislature, no judicial determination, or other fact, is brought to our notice, which will justify a departure from a well established rule of interpretation. On the contrary the rule has been applied, I believe, in every case where the question has been raised. In the patent granted to the town of Saybrook in 1685 the town is bounded "upon the sea on the south, and on Connecticut River on the east." In another patent granted to Saybrook in 1704 the eastern and southern boundaries are thus described:—"On the east or easterly with the great river of Connecticut, and on the south or southerly with the sea or sound." It was held that the eastern boundary of the town was the west margin of the river. *Pratt* v. *The State*, 5 Conn., 388. The validity of the rule is again recognized in *Church* v. *Meeker*, 34 Conn., 421.

In *Keyser* v. *Coe*, 37 Conn., 597, the Circuit Court of the United States applied the same rule of interpretation to the Warwick Patent, granted in 1631, and also to the charter of Connecticut, granted by Charles II. in 1662. This point therefore is too well established to be seriously controverted.

The limit of individual proprietorship is more circumscribed. That includes only the upland, in no case extending below high water mark, except in those instances where the owners of the upland have exercised the right of building wharves to deep water. On the other hand towns have exercised jurisdiction for certain purposes beyond the charter

limits. In the case of *Pratt* v. *The State*, (supra,) it was held that, while the charter of Saybrook extended only to the margin of Connecticut River, its jurisdiction for the service of process and enforcing the laws extended to the center of the river. In the same case and also in *Hayden* v. *Noyes*, 5 Conn., 391, it was held that the town of Lyme had jurisdiction for the same purpose to the center of the river, although its charter extended only to the east line of the channel. I suppose it also to be true that all the towns bordering on the coast have exercised similar jurisdiction over the shore and the adjacent waters. Indeed this must necessarily be so. And perhaps that jurisdiction extends to the state line, so as to bring every portion of the state within the jurisdiction of some town for political purposes.

The question then is reduced to this—did the legislature mean by the words "navigable waters in the town" the navigable waters within the charter limits, or navigable waters within the jurisdiction for the administration of civil and criminal law? I think the words were used in the more restricted sense. Such is their ordinary and obvious meaning. No one ten miles or more from the shore on the Sound off New Haven would suppose that he was in the town of New Haven in the ordinary sense of the term. "In the town" by itself means within its territorial limits. If it had been intended to embrace more, apt words would have been used expressive of that intent.

If used in the latter and broader sense their meaning is vague and indefinite. The charter limits of every town can be ascertained with reasonable certainty and with comparative ease, but the boundaries of the jurisdiction outside of those limits and over navigable waters for the purpose of executing the laws have never been determined with any degree of certainty, and are not easily ascertained. The extension of town lines into the sea is necessarily attended with considerable difficulty. A continuation of the course of those lines at the point of intersection would in many cases cause them to cross each other, and would be attended with much confusion and uncertainty. If they are to be extended

on meridian lines it must be done without precedent and without principle to sustain it. The legislature may do so, but it has not done so as yet. Hitherto in the history of the state we have experienced no practical difficulty in this respect in exercising jurisdiction for the purpose of enforcing the laws, but as soon as an attempt is made to divide up the waters of the Sound by town lines for the purpose of designating oyster grounds, the difficulties are not only apparent but serious. No data have as yet been given by which it can properly be done. The remedy should come from the legislature.

Again—this enlarged and implied jurisdiction is for the purpose of discharging certain duties devolving upon the state and not upon the towns. The state itself enforces its laws, and that fact is in nowise changed or modified by the fact that it does so through the agency of officials elected by the towns. They are the arms of the state for that purpose. The town as such has no privilege or duty which requires it to assume jurisdiction beyond its charter limits; so that when we say that towns exercise jurisdiction beyond those limits it is not strictly accurate; it is more correct to say that the state exercises jurisdiction through its agents appointed town-wise. The town as such has nothing to do with the service of civil process nor with the administration of criminal law. The election of officers in the several towns for those purposes is simply a convenient method of distributing those offices throughout the state; and the people in the towns electing them are acting more as a part of the sovereign power of the state than as inhabitants of the towns.

But again—this jurisdiction, such as it is, rests upon "ancient, invariable, and undisputed usage." *Pratt* v. *The State*, (supra). Now a jurisdiction acquired by usage is limited, not only in its nature and extent, but also in its object and purposes, to the usage creating it. There is no pretense that the usage had any other purpose than that of enforcing the laws. It had no reference whatever to the municipal affairs of the town.

The origin of this jurisdiction, its nature, its purposes, and the difficulty of defining its boundaries, afford a strong argument against the claim that the legislature had it in mind when it limited the jurisdiction of oyster committees to places in the town.

I think therefore that the oyster committee of the town of New Haven in the year 1875 had no jurisdiction beyond the ordinary and legal limits of the town. If so they had no jurisdiction over the premises in controversy, and their designation, under which the defendants claim title, is invalid.

It has not escaped my observation that some of the later statutes assume that town lines extend into the sea, and in some cases they expressly establish such lines. I think however that it will be found that they all have reference to the oyster business, and were enacted after it was discovered that it was desirable to cultivate oysters in deep water. It seems to me that those statutes clearly show that where the legislature intended to give towns jurisdiction over waters outside of their charter limits, they have said so. When they have not said so the inference is that they did not intend it. These statutes, therefore, instead of supporting the position of the court, seem to me to afford a pretty strong argument against it.

I am of the opinion, therefore, that the verdict was just and should not be disturbed.

# SUPREME COURT OF ERRORS.

## HELD AT HARTFORD, FOR THE COUNTIES OF HARTFORD, WINDHAM, MIDDLESEX, AND TOLLAND,

ON THE SECOND TUESDAY OF JANUARY, 1881.

Present,

PARK, C. J., CARPENTER, PARDEE, LOOMIS AND GRANGER, JS.

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71 378
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## ALBERT BURR *vs.* TOWN OF PLYMOUTH.

In this climate the duties of towns in respect to snow and ice upon their highways is very limited.

The fact that a highway has been rendered impassable by drifts of snow for three months is not of itself proof of negligence on the part of the town.

The question of negligence in such a case depends upon the further questions whether the town was able by reasonable effort, and at a cost within its means, to remove the snow, and whether the road is a public thoroughfare of importance and the reasonable demands of public travel required its removal.

The jury in passing upon the question of negligence are to consider all the circumstances—the character of the country as to its being exposed to drifts or otherwise; the general custom of country places, especially where there is a sparse population, of allowing such drifts to remain; and the impracticability of keeping the road clear for any length of time—making it a question in all cases as to what could reasonably be required of a town in all the circumstances.

The ordinary traveled track of a highway had been for a long time blocked by snow, and the public travel had worn a track by the side of the road along the ditch. The plaintiff took this side track with a heavy load and broke in through a crust of ice and snow that covered a wet place, and was injured. In a suit against the town, in which the defendants offered evidence to show that a path had been broken through the drift by the road contractor two days before the accident, making the ordinary track of the highway passable and safe, it was held that it was not enough that the plaintiff thought it safer and better to take the side track, if the regular track was reasonably open and safe. A town can not be liable for an error of judgment on the part of a traveler.

Held also that evidence was not admissible that, a little distance beyond where

the accident happened, and in the side track, there were logs and other obstructions, and that other persons had been injured in passing over them. The only question was as to the condition of the precise place where the plaintiff was injured, and as to the state of things which caused his injury.

The statute which makes towns liable for injuries from defective highways contemplates only compensatory damages for such injuries.

ACTION upon the statute with regard to highways, for an injury from a defective highway of the defendant town; brought to the Superior Court in Hartford County, and tried to the jury, upon the general issue, before *Hitchcock, J.*

Upon the trial the plaintiff introduced testimony to prove, and claimed that he had proved, that on the 13th day of March, 1879, about one o'clock in the afternoon, he had occasion to pass over the highway in question in the town of Plymouth, which highway it was admitted to be the duty of the town to maintain; that he drove a pair of steady horses attached to a heavy business wagon loaded with merchandise, in all about one ton weight; that he sat upon a seat in the fore end of the wagon, which was securely fastened; and that he was accustomed to drive horses, and was driving with the utmost care, with his horses on a walk. Also that the highway, and especially the wrought road, for a distance of six hundred and sixty feet, for a period of three months and more previous to the 13th of March, had been entirely blocked up with snow, and was thereby rendered impassable for teams of any sort; and that the public had been compelled thereby to adopt some other way for travel, and by use had made a well-defined track in and over the ditch by the side of the wrought way, over wet and springy ground, and over logs, stones, bushes, and other obstructions in and about the ditch. That this condition of things continued in the upper part of the six hundred and sixty feet and down to the place of the accident, at the time of the accident, but that at that time at a point a little southerly of the place of the accident, and about half the distance of the six hundred and sixty feet, the travel had returned to and followed the wrought way on the southerly half. Also that during the three months many accidents had happened to travelers upon that piece of highway on account of its unsafe condition, and

that its obstructed condition and these accidents were well known to the selectmen of the town, but that the town did nothing to put the highway into a reasonably safe condition.

The plaintiff also introduced evidence to prove, and claimed to have proved, that when he was so traveling upon the highway in a southerly direction, the wrought part of it was blocked up by snow, and thereby rendered impassable, and that he took the way which was then, and for a long time previously thereto had been, used by the public in and over the ditch, on the easterly side of the wrought way, and which then appeared to be the only way of travel, and that at about half the distance over the six hundred and sixty feet of way over the ditch, at a place where it was always wet and springy, his horses and some of the wheels of his wagon broke through the snow and ice (which had formed a crust or bridge over the place,) into the mud and water underneath, and that the struggling of his horses and the pitching of the wagon threw him violently out upon the ice, snow, and earth, dragging him for some distance, and one of the forward wheels went over his right leg, and the hind wheel over his left leg, causing severe and painful injuries, which disabled him from pursuing his ordinary business for three months, and from which injuries he claimed to have not yet fully recovered.

The plaintiff also offered evidence to prove that the highway was a thoroughfare; that it was the principal and usually traveled road between the towns of Bristol and Harwinton and other towns westerly and northerly of Harwinton, and half a mile from the village of East Plymouth, and about one mile from the village and railroad station of Terryville, and between four and five miles from Bristol; that it was a road of the shortest distance between the towns of Bristol and Harwinton, and at that season of the year was especially used by the traveling public as a road more free from mud than other roads; and that a very considerable amount of travel passed over the road at all seasons of the year. Also that he was at the time driving with his load from Goshen through Wolcottville, Harwinton and Plymouth to Bristol.

The plaintiff also offered evidence to prove that in the ditch, southerly of the place of the accident, and after it had occurred and the travel had resumed the regular wrought way, it appeared that there were some large stones and other obstructions over which the public travel had been forced to pass; and also to prove accidents which had occurred to other parties in passing over these obstructions. To the admission of this testimony the defendants objected, but the court admitted it.

The plaintiff also offered evidence to show the condition of the side path over which he passed in turning from the main road above the point of the accident, and within a few rods of it, and that other parties at other times during the same winter had met obstructions or sustained accidents at other places upon the side path. To the admission of this testimony the defendants objected, but the court admitted it.

The plaintiff did not claim that there was any structural defect in the highway, or that it was unsafe for public use, except as snow and ice had been suffered to remain and accumulate thereon, and thereby render it so.

The defendants offered evidence to prove, and claimed to have proved, that the highway at the place in question was, by reason of its situation and exposed condition to the winds from all quarters, extremely liable to drift; that it was almost impossible to prevent its doing so, or to keep it open; that frequently, when men and teams had gone through the road for the very purpose, and broken it open behind them, they were obliged with equal labor to break it through on their return; that some thirty years previous a new road at the foot of the hill over which this road runs, lying substantially between the same points, had been built for the purpose, in great part, of avoiding this liability of the impeding of winter travel on the road in question; and that such new road was still open and largely used, and especially so in winter. Also that the amount of travel over the road was very insignificant in amount; that it lay wholly outside of any villages or centers of population, in a rough, hilly, and sparsely settled place, upon the extreme outskirts of the

territory of the defendant town, and but a few rods from the Harwinton line; that it was no thoroughfare, and that almost if not quite its entire use was the accommodation of a scattered rural population living upon or near it. They further offered evidence to prove that at several times during that winter the main road had been opened at and past the place of the accident by Franklin B. Scott, the contractor, to whom the town had let a section of road, embracing the place in question, to maintain and keep in repair, and by others; that on the 11th of March the main road had been so opened by Mr. Scott, and had continued so open up to the time of the accident; that on the morning of the day of the accident Mr. Scott and others passed over the main road with teams, and that the road was well broken out, and in a condition suitable and safe for travel, and that if the plaintiff had kept it he could have passed in safety, and that there was no necessity for his turning off.

The defendants requested the court to charge the jury in writing upon various points, the only requests now important being the following:

6th. That in deciding upon the question of negligence on the part of the town, the jury should consider the means at command, the general usage, the nature of the country, whether rough, hilly, or smooth, the season of the year, the amount of travel, and all the other circumstances.

7th. That a better and safer condition of roads may reasonably be expected and required in the summer than in the spring and winter, and in populous cities than in unfrequented districts.

8th. That in this rigorous climate the duties of cities and towns in respect to snow and ice are and must be very limited, and when snow-storms cover the ground with irregular heaps, liable to constant change by the force of changing winds, it cannot be expected that the public authorities will make paths as level, and smooth, and safe, as summer roads are reasonably required to be.

9th. That in our country villages, and upon country roads, snow and ice are generally allowed to remain as they are left

by the laws of nature; volunteer forces of public-spirited citizens sometimes attend to places of more than usual peril or difficulty, but the selectmen as such seldom interfere; the peril is not such as to warrant the great expense in a sparsely settled village, or upon roads of no considerable amount of travel, of attempting a preventive or remedy; that the jury should take this into consideration in deciding upon the question as to whether the defendants are or are not liable.

10th. That if the jury should find against the defendants and come to the question of damages, then unless they find not only that the town was negligent, but that such negligence was wanton and willful, they must confine their verdict to the actual amount of damage which the plaintiff has proved that he has sustained.

The court charged the jury as follows:—

"The statute on which this action is based makes the town liable for injuries occasioned by defects in its highways; what is a defect in a highway is a question for the jury to decide. There is no question here about the structure of the road; the chief controversy of fact is, as to the snow and ice in the road, and in the ditch on the east side of the road. The defendants claim that they did not render the road really unsafe; the plaintiff says they did. One of the main subjects of inquiry is, whether, under all the circumstances of the case, the road was in a reasonably safe condition for public travel? And in considering this, it is proper for you to inquire as to its locality; its use as a road to and from business points; the need of the road for public use between such points. If you find the road, in view of all the circumstances, was reasonably safe for public travel, if you find it was all that ought in reason to be required for the safety of people traveling over it, then the town performed its duty and this action can not be maintained. If, in view of all the circumstances, you find the road was defective at the point of the injury, and not reasonably safe for public travel by reason of its defective condition from snow and ice or other obstruction, and that the injury was occasioned thereby, the

plaintiff in no way contributing to it, then the town would be liable if it had knowledge of such defective condition, and had reasonable time to repair the road or remedy the defect before the injury occurred.

"The duty to keep the road in a condition of reasonable safety, in view of all the circumstances, involves the duty of reasonable supervision of it; and if you find the road to have been in an unsafe condition for public travel by reason of the claimed defect, and that such claimed defect could have been known to the town by the exercise of reasonable supervision of the road, and the town neglected to exercise this, then it would be liable as much as if it had actual knowledge.

"If you find that the injury to the plaintiff was occasioned by a hidden defect, if the defect was of such a character that reasonable oversight would not detect it, the town would not be liable; but if the defect was of such a character that a reasonable regard paid to the road would have detected it, then the town would be liable.

"While it is the duty of a town to keep a road in a reasonably safe condition for public travel, having all the circumstances in view, people in passing over it, in view of all the circumstances, must exercise reasonable care in doing so; and it will be proper for you to inquire whether the plaintiff exercised such care upon the occasion in question. If you find he did not exercise such care as a reasonably cautious man would ordinarily have exercised, and that he contributed to his own injury by acting without such reasonable care, then he cannot recover.

"If a highway was not in a reasonably safe condition by reason of snow, ice, or other obstruction, so that the public travel was driven to the ditch or side of the road, as being better or more safe, and the town had knowledge of this, it is liable for injuries received in passing over such forced road or path, occasioned by its being defective. So it would be liable if the defective and unsafe condition had existed for a considerable time, so that knowledge on the part of the town could be reasonably presumed. And so it would be liable if it had no knowledge, if its want of knowledge arose from

the neglect of the town properly to supervise the road. And in this case, if the side track was not safe, and it was impracticable and not reasonably safe to go in the main road, so that the travel was forced, or it was deemed to be more judicious, safe and better to go on the side path, the town would be liable if you find the injury occurred without fault of the plaintiff by reason of the unsafe condition of such side path.

"If you find the plaintiff is entitled to recover, you should find such damages as the plaintiff has actually received, unless you find that there has been gross want of care, wanton neglect, wanton disregard of the road on the part of the town, and that this injury was occasioned by that without fault on the part of the plaintiff contributing to it; then you will not be confined to the damage actually received, but you may give what is called 'smart money;' you may go fully into the damages, beyond what were actually suffered."

The jury rendered a verdict for the plaintiff to recover of the defendants $1,325 damages.

The defendants moved for a new trial, for error in the rulings and charge of the court and in the refusal to charge as requested.

*A. H. Fenn* and *S. O. Prentice*, in support of the motion.

*R. D. Hubbard* and *S. P. Newell*, contra.

GRANGER, J. The first question presented upon the record is, whether the evidence offered by the plaintiff, and objected to by the defendants, was admissible.

The action was founded upon the statute relating to highways, and was for an injury received by the plaintiff upon a highway in the defendant town, the only defect in which was caused by snow and ice, no structural defect being claimed by the plaintiff. The accident happened on the 13th day of March, 1879, not upon the ordinary traveled path of the highway, nor even upon the road bed, but, as the motion states, upon "a well defined way in and over the ditch, by the side of the wrought way, over wet and springy ground,

and over logs, stones, bushes, and other obstructions in and about the ditch." The plaintiff took this side track or way because, as he claimed, the wrought way was, and for some three months had been, for a distance of six hundred and sixty feet, blocked up by snow, and thereby rendered impassable by teams; and at about half the distance over this space, at a place where it was always wet and springy, his horses and some of the wheels of his wagon broke through the snow and ice which had formed a crust or bridge over this spot, and he received the injury complained of. There seems to have been no controversy between the parties as to the time, place and manner of the accident, nor as to its being the duty of the defendant town to keep the highway in repair.

The plaintiff, after having proved, as he claimed, all the essential allegations in his declaration, also offered evidence to prove, for what purpose does not clearly appear in the motion, "that the highway for said distance of six hundred and sixty feet, until a few days previous to the time of the accident, had been blocked up and impassable on account of snow; and that in the ditch, southerly of the place of the accident, and after it had occurred and after the travel had returned to the regular wrought way, it appeared that there were some large stones and other obstructions over which the public travel had been forced to pass. He also offered to prove that accidents had happened to other parties in passing over these obstructions."

It is impossible to see the relevancy of this testimony to the question in issue between the parties, which was whether the highway at the time and place of the accident was out of repair, in such a sense as to render the town liable under the statute upon which this action is brought.

Assuming that the way in question for some time before the accident had been blockaded with snow, (and all who have lived in, or had occasion to travel through, the high towns in Litchfield County in the winter season will be ready to concur in this assumption,) it is yet to be borne in mind that the snows do not fall by the negligence of the town, and that the blockading of the roads is not the fault of the selectmen.

It is claimed however that suffering the road to be blockaded for such a length of time showed negligence in the town, and that the evidence was admissible for that purpose. Now the simple fact that some part of a road is suffered to remain blockaded by snow for even three months, would not of itself show that the town was guilty of negligence to such an extent as to render it liable for an accident for that cause alone. It should be shown that it was within the means and power of the town to remove the blockade, and that the public necessities were such as to demand such removal. It is within the observation and knowledge of every one living in this latitude, and among our hill towns, that, owing to the rigorous climate, severe snows, and often sparse population and limited resources of the towns, there must be in many of them a considerable part of some of their roads that remains blockaded during a great part of the winter, and in fact until the snows disappear by the action of the elements. It is a physical impossibility to keep the roads in winter in many towns free from a snow blockade, and whether a town is guilty of negligence in suffering such blockade to remain, depends upon a variety of circumstances, and not upon that fact by itself.

Again there was no occasion for the introduction of any such evidence. The main fact in issue was susceptible of positive and direct proof, and the plaintiff was bound to show that the highway in question was out of repair at the time of the accident. Proof that it was out of repair by reason of snow for any time previous thereto went but little way to prove that it was so out of repair at the time of the injury. Snow is not a perpetual obstruction in this climate; it disappears by natural laws, and many times suddenly, and a blockade of to-day may be removed to-morrow by the action of the elements.

Undoubtedly towns are under some duty to the public in relation to keeping highways in traveling condition in the winter. But this court has said in the case of *Congdon* v. *City of Norwich*, 37 Conn., 414, that "it is conceded that in this rigorous climate the duties of cities and towns in respect

to snow and ice are and must be very limited." And the question whether those who are bound to keep the road in repair are justly chargeable with negligence, will depend upon "all the circumstances," not upon the one fact that the road has been blockaded with snow for a longer or shorter time. The case depends upon the further questions, whether during that time there have been means and opportunity for the town to remove the obstruction by reasonable and proper effort, and at a cost within its ability to pay, and whether the road was a public thoroughfare of any considerable importance, and the reasonable demands of the public travel required the removal of the blockade of snow. So that the fact of itself—that the road had been blockaded up to within a short time of the accident did not prove, or necessarily and legitimately tend to prove, that the accident happened in consequence of the negligence of the town.

But this evidence becomes still more objectionable when taken with the other evidence offered in connection with it, that in the ditch southerly of the place of the accident and *after* it had occurred, and the travel had returned to the regular wrought way, it appeared that there were some large stones and other obstructions over which the public travel had been forced to pass, and also that accidents had occurred to other parties in passing over these obstructions. It is to be noticed that these large stones and other obstructions, whatever they might have been, were not at the place of the accident, but a few rods southerly from it, and that they did not appear till after the accident, and after the public travel had returned to the regular roadway. The accident to the plaintiff did not happen in consequence of passing over any of these obstructions; he was in no way imperiled by them; they were not at the place of the accident; wherever they were until after the accident, the plaintiff was in no way affected by them; his liability to injury was in no way increased or diminished by the fact that these obstructions existed in the ditch south of the place where he was injured, nor was he in any way affected by the fact that other parties had met with accidents in passing over these obstructions.

Nothing appears showing that the town had any knowledge of these obstructions, or of any accidents caused by them, and it was not claimed that the main road at a point a few rods southerly of the place of the accident was not in a suitable condition for use at the time of the accident. The evidence upon both points was irrelevant and inadmissible. All the cases cited by the defendants' counsel on this point go to show that the evidence should be confined to the place of the accident, or to a place so near to it as to be fairly considered the same.

The second question is, whether the requests of the defendants as to the charge to the jury ought to have been complied with. It is apparent, upon examining the charge, that it does not cover all the points and claims made in the requests, and if the requests taken as a whole, or any of them taken separately, are proper and adapted to the facts in the case as disclosed by the motion, then they should have been complied with. An examination of the requests shows pretty clearly that most, if not all of them, were taken from the language of judges of this court in delivering opinions in well considered cases, and an examination of the facts shows equally clearly that the requests were well adapted to the matter in controversy, and the defendants were entitled to have the instructions asked for in their sixth, seventh, eighth and ninth requests given to the jury. The cases of *Congdon* v. *City of Norwich* and *Landolt* v. *City of Norwich*, 37 Conn., 414 and 615, fully sustain this view.

The instruction given to the jury in relation to the side path was also incorrect. The jury were told that "if it was deemed to be more judicious, safer and better to go on the side path the town would be liable." This might be in a given case, as we think it was in this case, making the town liable for an error in judgment on the part of the traveler. It appears that the town claimed from the facts proved that the usual way was in a safe and passable condition at the time of the accident; that on the 11th of March the main road had been opened and continued open at the time of the accident which occurred on the 13th, and that on the morn-

ing of the accident Scott, the road contractor, and others, passed over the main road with teams, and that the road was well broken out and in a suitable and safe condition for travel, and that if the plaintiff had not diverged from it he could have passed in safety, and that there was no necessity for such divergence. Now if these claims of the defendants were supported by the facts as proved, clearly the town would not have been liable. Towns are not insurers of the absolute safety of travelers; they are only bound to provide reasonable and proper roads for the public travel, and are not obliged to keep the whole width of the highway free from obstructions and in good condition for being driven upon, and the jury ought to have been so instructed, and that if the usual traveled way was reasonably opened and in a safe condition, and the accident happened because the the plaintiff chose, or deemed it more judicious, to take the side path, which proved to be unsafe, the town was not liable.

Upon the question of damage there was a misdirection. The facts disclose no case demanding smart money. The tenth request of the defendants was reasonable and proper and should have been complied with, and if anything more than compensatory damages was claimed the jury should have been instructed that the damages should not be unlimited but confined within the recognized and well settled rules established in this state by numerous decisions of this court, commencing with *Linsley* v. *Bushnell*, 15 Conn., 225, and ending with *Wilson* v. *Town of Granby*, 47 Conn., 59. This is not an ordinary action of tort, but an action founded on an express statute, and we are not aware of any case in our own courts founded upon this statute where smart money has been awarded against a town. The cases of *Seger* v. *Town of Barkhamsted*, 22 Conn., 290, and *Masters* v. *Town of Warren*, 27 id., 293, went to the verge of the law on the subject of damages in cases of this sort. In neither of these cases was smart money as such claimed or awarded, but a definite rule of damages adopted. STORRS, C. J., in the opinion in the former case says that "it is not necessary to enquire whether or how far, in an action like the present, vindictive

or punitory damages are allowable." In the case of *Welch* v. *Durand*, 36 Conn., 182, BUTLER, J., in giving the opinion says:—"In what cases then may smart money be awarded in addition to the damages? The proper answer to this question deducible from that (referring to the case of *St. Peter's Church* v. *Beach*, 26 Conn., 355,) and other cases in our reports seems to be, in actions of tort founded on the malicious or wanton misconduct or culpable neglect of the defendant." The culpable neglect must be tantamount to malicious or wanton misconduct, and the action must rest upon one or the other of these elements, and no such element is embraced in the statute upon which this action is founded. The object of the statute was not to punish towns for misconduct, but to furnish a remedy to a party injured through a defect in a highway which it is made the duty of the town to keep in repair. And the whole object of the statute was to furnish a means whereby the party injured might obtain compensation for any injury he might receive, without fault on his part, by reason of any defect in the highway. The statute, prior to the revision of 1875, was that the party should recover "just damages." The word "just" is omitted in the revision, but the same idea is retained, and the same construction is to be given to the statute now as before. Damages must mean just damages, and in arriving at just damages the jury are to consider only what enters into the computation of them by well settled rules. But even if punitory or vindictive damages are to be given there should be some limit to them, and no case in our courts has gone further than allowing the plaintiff, in addition to compensation for his personal injury and suffering or loss of property, the expenses of his suit, not including the taxable costs. In this case the jury were told they might go "fully" into a consideration of the damage beyond what was actually suffered, or in other words might give smart money at their discretion. This we think cannot be vindicated upon principle, nor by any decision in this state. *Wilson* v. *Town of Granby*, 47 Conn., 59, and cases therein cited.

A new trial is advised.

In this opinion the other judges concurred.

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## EDWARD C. VINTON *vs.* WILLIAM H. MANSFIELD.

In a replevin suit against the present plaintiff, the present defendant, as surety for the plaintiff in that suit, had given bond for the payment of all damage if the plaintiff should not recover judgment and for the return of the replevied property in that event to the present plaintiff. While the suit was pending, *A*, of whom the present plaintiff had purchased the property with warranty of title, returned him the purchase money to his full satisfaction, and took back the title to the property, and by order of the court *A* was substituted as defendant in the place of the present plaintiff, and afterwards obtained judgment in his favor. Held, in a suit on the bond, that evidence was admissible on the part of the defendant of the transaction with *A*, for the purpose of showing either that the present plaintiff had no cause of action, or that he was entitled to less damages, by reason of his having received the value of the property.

It was not enough that *A*, who was substituted as defendant in the place of the present plaintiff, had suffered damage from the non-return of the property. The damage for which there could be a recovery on the bond must have been damage to the plaintiff and not to *A*.

DEBT on a replevin bond; brought to the Superior Court in Windham County, and tried to the jury before *Sanford, J.* Verdict for the plaintiff and motion for a new trial by the defendant for error in the rulings of the court. The case is sufficiently stated in the opinion.

*G. W. Phillips* and *S. H. Seward*, in support of the motion.

*T. E. Graves* and *G. F. S. Stoddard*, contra.

GRANGER, J. This is an action upon a replevin bond. Upon the trial of the case to the jury the question was upon the defendant's liability to the plaintiff upon the bond. The defendant offered to prove that before the bringing of the replevin suit in which the bond was given, which was brought by one Hall against Vinton the present plaintiff, Vinton purchased of one Amidon the property in question, that he paid therefor the sum of $350, and took from Amidon a written guaranty that he (Amidon) was the owner of the property, and covenanting to warrant and defend his (Vin-

ton's) title thereto. After Hall had replevied the property from Vinton the latter had an interview with Amidon, informed him of the replevin suit and that the property had been taken from him by virtue of it, and, reminding Amidon of his guarantee, he demanded his purchase money back. Amidon paid him back the purchase money, and Vinton thereupon notified Hall's attorney that he should no longer contest the replevin suit. It appears that Amidon obtained an order of the court to be substituted as defendant for Vinton in the replevin suit, and that he made defense and obtained judment in his favor. The property by its re-sale to him by Vinton had of course become his, and he was entitled to recover it of Hall.

By the course taken by Vinton he clearly abandoned all right and claim to the property replevied. The object of a replevin bond is to indemnify the defendant in the suit for any loss he may sustain in consequence of having the property taken from him, and if the property is not returned upon its being adjudged to be his, that all damages be paid to him resulting from the replevy. Gen. Statutes, p. 484, sec. 3.

It is a fundamental principle that a man can have but one satisfaction for any claim, and but one compensation for any injury he may receive, and whenever it appears that a party has been so satisfied or compensated he ought not to be allowed to make further claim in any court. Had this plaintiff received full satisfaction—full payment for the loss of his property? No question is made to the contrary. He bought the property for a certain sum; the vendor, on demand, when the property was taken from him, repaid him the purchase money, and he made no further claim upon anybody, but notified the plaintiff in the replevin suit that he should no longer contest the title—in substance, that he, Hall, might hold the property and do as he pleased with it, so far as he was concerned.

To have a right to recover on the replevin bond he must have sustained some damage from the replevying of the property. If he was fully satisfied in advance for any

possible damage that might have resulted from a judgment against him in case he had continued his defence, how could he be damnified by any thing that should thereafter occur in the suit? The bond was for the payment of all damage if the plaintiff in replevin should not recover judgment, and for a return of the property to him in that case. Clearly he could not, after being fully satisfied for the value of the property, be damnified by its non-return. If there was other damage besides the loss of the property, for which he could have recovered on his bond, there might not be full satisfaction of the bond by the mere return of the property. But the evidence that the plaintiff was satisfied for the value of the property would clearly be admissible in mitigation of damages, if not sufficient to show that he had no cause of action. The fact that Amidon had been admitted by the court as a defendant and was defending the suit and finally obtained judgment in his favor, could not make the present defendant liable to the present plaintiff on his bond. There must have been damage sustained by the present plaintiff and not by Amidon.

The question put to the plaintiff—"Have you been fully satisfied for the loss of the property?"—was of course admissible as a part of the evidence showing that he had no cause of action, or if any, for a less amount than he claimed. If he had in fact received no damage or had been fully compensated for all damage he had received, it was competent for the defendant to prove it by any lawful evidence, and upon that question the plaintiff was best qualified to speak. He best knew whether in equity and good conscience he had been fully satisfied for the loss he had sustained, and he ought to have been allowed, if not required, to answer the question.

The verdict is manifestly against justice and equity if the facts offered to be proved by the defendant were proved, which it is to be presumed they were. The plaintiff received back the whole amount of the purchase money, and if the verdict is to stand he receives $500 in addition, and for

nothing, so far as we can see. We cannot sanction any such result.

A new trial is advised.

In this opinion the other judges concurred.

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## NEHEMIAH T. ADAMS AND ANOTHER *vs.* JAMES W. MANNING AND ANOTHER.

The petitioners and respondents were severally owners of sundry neighboring mills and mill-sites on the same stream. At a point higher up a branch emptied into the stream, which for thirty years had, by means of a dam and wide space for flowage, been kept as a reservoir for the use of all the mills, the dam having been originally constructed and the reservoir owned by parties whose rights were in part held by one of the petitioners and by the respondents. At the end of thirty years the grantors of the respondents, who were riparian proprietors next below the reservoir, built a new dam a little below the old one, and about three feet higher, submerging the latter, which new dam the respondents claimed the right to control as to its use for detaining and discharging the water of the reservoir. The owners of the old dam made no objection to the building of the new one, believing that it would be a substitute for the old one, and of greater benefit to all parties interested. Upon a bill for an injunction against the detention and discharge of the water to the injury of the petitioners as mill owners, it was held—

1. That, as matter of law, so far as the rights of all the parties were concerned, the artificial became by long continued use the natural condition of the stream.
2. That each mill owner had acquired a right to the use of the stored water in the reasonable and customary manner of using it, having a due regard to the rights of others to a like use; and this so long as the owners of the old dam and reservoir should continue their use for storage merely.
3. That the respondents, in building the new dam and thereby preserving the reservoir, had practically continued the old reservoir in existence, with all the limitations and conditions which the law had placed upon it.
4. That the silent consent of the owners of the old dam and reservoir to the erection of the new dam by the grantors of the respondents, did not carry with it a permission to detain or draw off the water unreasonably as against them.

When controversies arise between mill-owners, each of whom has a separate right to the use of water to be drawn from a common reservoir on irregularly recurring occasions of need, the time and manner depending upon the quantity in store, the needs of others, and established custom, it is the proper office of a court of equity to call all of them before it and in one proceeding and by

one decree determine their respective rights and obligations. A separate action at law to each for each wrongful detention or discharge of the water, will not furnish adequate relief.

BILL IN EQUITY for an injunction against the unreasonable detention and discharge of water from a reservoir; brought to the Superior Court in the county of Windham. The following facts were found by a committee:

The petitioner Adams, and the petitioner Warner as administrator on the estate of Thomas Warner, deceased, are respectively owners and in possession of ancient mill-sites on a stream of water in Woodstock. On this same stream the respondents are joint owners and in possession of two ancient mill-sites situated above those of the petitioners. All these several mill-sites are quite valuable, each has a suitable dam and pondage of its own, and mills were in successful operation on each of them until, in 1875, one of the mills of the respondents was consumed by fire, and the other soon after ceased to be operated; the mills of the petitioners are still being run.

The stream is abundant during the winter and spring months, but during the summer months the supply of water would be inadequate for the wants of the mills were it not for the reservoir hereinafter mentioned. A few rods above the respondents' upper mill-site a branch from the south enters the main stream. The controversy between the parties relates to this branch. In its original condition it was of small value, but some forty or more years ago a dam of considerable size was constructed across it, whereby a reservoir was created called the south meadow reservoir, by means of which the abundant rains of the winter and spring were kept back and stored up for summer use, and by this means the branch was made of great value to the mills of both parties to this suit, and to other mills below. The parties who built this dam were grantees of one McClellan, by a deed dated July 20th, 1836. The rights of those grantees are now vested in part in the respondents and the petitioner Adams. This old dam and reservoir continued in beneficial operation until about 1867.

During the existence of this old dam there appears to have been no difficulty in so managing its gate as to accommodate and supply the wants of all the mill owners below it. None of them needed the water of the branch in winter and spring, and all needed it in the summer. All the mills had wants substantially alike, all were in operation during the day, and closed work at about the same hour at night.

In 1866 Joseph and Walter Cocking became owners in fee of land immediately below the old dam on both sides of its outlet, and about the year 1867 they built on this land a dam located about twenty rods below the old dam. The new dam was and is three and $\frac{33}{100}$ feet higher than the level of the old, and wholly submerged it. Under the flowage act the Cockings obtained a decree of court authorizing the flowage. The owners of the old dam and reservoir were not made parties to the petition, but they made no objection to the building of the new dam, nor until recently have they or any of them objected to its continued maintenance, and by thus not objecting they have given a silent consent, under the belief however that the new dam and new reservoir created by it would be, as until lately it has been, a substitute for the old, and of greater benefit to all concerned than the old were.

Until the burning of the respondents' mill in 1875 and the disuse of the one not burned, the new dam and reservoir were used in a manner convenient and satisfactory to all the riparian proprietors. The respondents and those under whom they claim title maintained the dam, and by means of it a supply of water was stored up in the wet months, and used prudently during the dry season. They took entire charge of the gate and opened it for the supply, primarily of their own mills, but when the water was needed for their own mills it was also needed by the mills below and came down to them. When not wanted by the respondents it was not wanted by the petitioners, and was stored up for times of need, and if mills were now in operation on the mill-sites of the respondents they would naturally have precisely such want of the water as would necessarily accommodate the mills below.

But after the stoppage of their own mills, they had no use for the water to carry machinery, and they soon thereafter began to control the gates in a manner unsatisfactory to the petitioners, and hence arose the contests which are the subject of this suit.

In these contests the respondents claimed to be, as they in fact were, the sole owners in fee of the existing dam, and of the ground on which it is built, and of the mill-sites below the dam. They also claimed full right of flowage by means of the dam of all the land covered with water by it, which right they had exercised without challenge or objection from 1867 down to a very recent period. They therefore asserted as against these petitioners and against all others the absolute right to take sole charge and control of the dam, and to open and close its gates without regard to the wants of the petitioners and other riparian proprietors below; they denied all obligation in the management of the gates to consult the convenience or needs of the petitioners. They also emphatically denied the right of the petitioners under any circumstances to come upon the dam or open and shut its gates in order to supply water to the mills below. They asserted these rights both by acts and words.

On several occasions when there was a good supply of water in the reservoir, the use of which had become essential to the operation of the petitioners' mills, and when the respondents were not running or preparing to run their own mills, they caused the gate to be closed and fastened down, and refused to open it themselves or allow it to be opened by the petitioners. These acts were not done wantonly or maliciously, but under an earnest and oft-repeated claim of the right absolutely to control the dam and gate, without being under obligation to consult the needs of the petitioners.

They urged as a reason for keeping the gate closed in summer that their property there was for sale, and that persons contemplating its purchase declined to buy because the reservoir was not well filled, and that if the water should be drawn off to accommodate the petitioners, purchasers would be deterred from buying.

Subject to the opinion of the court I understand the law to be that the respondents must exercise their rights reasonably, and that what in each particular case is to be done or left undone is a mixed question of law and fact dependent very much on the capacity of the stream and upon its nature, as that may have become modified by long continued use.

In this case the dam in question is not an ordinary dam to pond water for the current use of a particular mill, but obviously is a reservoir dam, by which to store water in wet seasons for use in dry seasons of the year. The branch on which the dam is built has for more than forty years past been applied for that purpose, primarily for the use of the mill-sites next below it, but secondarily for the common benefit of all the mill-sites lower down the stream; the stream was being so applied by common consent when the respondents' dam was built. The business upon the stream has grown up and adapted itself to such application. The branch is of little value if otherwise applied, but of great value to all concerned if its waters are stored up and used as they have been.

Upon these facts the question is submitted to the court whether or not the acts herein found to have been done by the respondents in shutting and fasteuing the gate of the reservoir were or were not in violation of the petitioners' rights as riparian proprietors, and whether or not by reason of such acts and the claims made in connection therewith the petitioners are entitled to the injunction prayed for, against closing the gate when water is needed for their mills below, and if so, under what qualifications.

The petitioners claimed that the respondents had not only detained the water of the reservoir unreasonably, but that they had opened the gate and allowed the water to escape when it was not needed by any one, and when they ought to have allowed it to accumulate. In regard to one of these occasions complained of, when the gates were opened in May, 1878, the respondents did not act wantonly, but opened the gate because they had an apprehension that the dam was in peril of being injured by too great pressure of water upon it.

They however asserted the absolute right to let the water escape at their own pleasure, and denied that any obligation rested upon them to maintain the dam when they themselves had no use for the water, or to open and close its gate to suit the convenience of mill owners below; and acting upon this idea of their rights they have occasionally opened the gate and allowed the water to escape when they had no occasion to use it themselves and when not needed by the mill owners below, and when its retention would have been no injury to themselves.

The petitioners did not claim that any legal obligation rested upon the respondents to continue the maintenance of their dam, but claimed that so long as they did maintain it and exercise control over it and refuse to allow any interference in the management of the gate by the mill owners below, they might reasonably be required to exercise their control so that the water might be prudently stored and not suffered to run to waste.

Upon the foregoing facts the question is submitted to the court whether in this respect the petitioners are entitled to the injunction prayed for, and if so, under what qualifications.

The petitioner Adams claimed that the rights of the original grantees under the McClellan deed still remained in existence, and that by virtue of them he had an interest in the existing reservoir and in its waters and management. The respondents claimed that the grantees under the McClellan deed consented to the building of the new dam, and that the old dam and reservoir were blotted out of existence by the building of the new dam and its use and maintenance since, and that if Adams had any rights in the old dam and reservoir they were such as had no value in the present controversy, and that after long acquiesence of his grantors in the submersion of the old dam he was not entitled to the interposition of a court of equity to protect any supposed rights of his in it.

Whether upon the foregoing facts Adams has rights in the premises which are injuriously affected by the acts complained of is submitted to the court.

The respondents are in possession of, and own in their own right in fee, the dam, gates, flume and embankments of the reservoir, and since the erection of the new dam they have been in the undisturbed and unchallenged exercise of the right of flowage by means of the dam, and have the right so to flow unless in the opinion of the court upon the facts found they have not the right to overflow the old dam.

The value of the old reservoir was small in comparison with the value of the present one, provided the present shall be used as the old one was, for the common benefit of the mill owners below. The proprietors of the old dam have never claimed any rights in the old dam until since the burning of the respondents' mill, and never until then have complained or had reason to complain that any injury had been done by overflowing the old dam. The petitioners have never expressed any desire or intention to repair the old dam, and its repair will be of no benefit to them so long as the respondents' dam shall be maintained.

Upon these facts the case was reserved for the advice of this court.

*T. E. Graves* and *J. Halsey*, for the petitioners.

1. As riparian proprietors the petitioners are entitled to a reasonable use of the stream against an unreasonable use or detention of it by the respondents. The latter had not acquired any right, by grant or prescription, to control the water. Their dam was erected in 1867. Fifteen years had not elapsed when this suit was brought. If they had used it in a manner adverse to the petitioners it must have continued fifteen years. *Parker* v. *Hotchkiss*, 25 Conn., 321; *Brace* v. *Yale*, 10 Allen, 441. The detention in this case was not to raise a head of water necessary for the operation of any machinery, and it was allowed to escape when it was not needed by any one. Such use is unreasonable, as matter of law, and can not be justified except by grant or prescriptive right. *Phillips* v. *Sherman*, 64 Maine, 171; *Clinton* v. *Myers*, 46 N. York, 511; *Thurber* v. *Martin*, 2 Gray, 394; *Gould* v. *Boston Duck Co.*, 13 id., 442. In considering this question

the local customs of the stream are proper subjects of inquiry. *Keeney & Wood Manf. Co.* v. *Union Manf. Co.*, 39 Conn., 585; *Thurber* v. *Martin*, 2 Gray, 394. It is found that "all the mills had wants substantially alike; all were in operation during the day, and closed much about the same hour at night." Also that "the dam in question is not an ordinary dam to pond water for the current use of a particular mill, but a reservoir dam, to store water in wet seasons for use in dry seasons. The branch on which the dam is built has for more than forty years past been applied for that purpose; primarily for the use of the mill-sites next below it, but secondarily for the common benefit of all the mill-sites lower down the stream. The stream was being so applied by common consent when the respondents' dam was built. The business of the stream has grown up and adapted itself to such application." The rights of the petitioners to the reasonable use of the water are not affected by the fact that they did not object to the building of the new dam. It is found that they acted "under the belief that the new dam and reservoir would be, as until lately it has been, a substitute for the old, and of greater benefit to all concerned than the old one was." Their acquiescence in the erection of the new dam might deprive them of a right to an injunction against its continuance, but never against its misuse to the prejudice of their rights. The respondents' right of flowage, however acquired, does not affect the rights of the petitioners as lower riparian proprietors.

2. The record finds that under the grant from McClellan of July 20th, 1836, the grantees built a dam about twenty rods above the one in question, and "it continued in beneficial operation until 1867," a period of over thirty years, when it was submerged by the new one, and "that there is no difficulty in managing its gate so as to accommodate and supply the wants of the mill owners below." The petitioner Adams became an owner in the old dam and reservoir in 1875. The deed was a grant and the old dam was built under the rights conveyed. The building of the old dam, and the use of it from 1836 to 1867 under the claim of right, gave the owners

of the old dam rights by prescription, as well as by grant, to have the water drawn and used as it is shown to have been done. *Brace* v. *Yale*, 10 Allen, 441. The new dam not having been erected fifteen years before suit, no rights in the old dam have been lost by any acts of the respondents or by any laches of the petitioners. *Clinton* v. *Myers*, 46 N. York, 520; *Harding* v. *Stamford Water Co.*, 41 Conn., 94.

3. An injunction is the proper remedy. A legal remedy would be inadequate to secure the petitioners in the enjoyment of their rights to have the water used as prayed for. Angell on Watercourses, §§ 444, 5, 6; 2 Story Eq. Jur., §§ 926, 7; Kerr on Injunctions, 393; *Belknap* v. *Trimble*, 3 Paige, 577; *Bullou* v. *Hopkinton*, 4 Gray, 324. In the last case Shaw, C. J., said:—"In regulating the rights of mill owners, and all others, in the use of a stream, whenever numbers of persons are interested, equity is able by one decree to regulate their respective rights, to fix the time and manner in which water may be drawn, and within what limits it shall or shall not be drawn respectively; and thus it affords a more complete and adequate remedy than can be afforded by one or many suits at law." The respondents interrupted the petitioners in the enjoyment of their rights, when it could not benefit them in any other way than by compelling the petitioners to buy their peace. Under such circumstances they have no particular claim to the favor of a court of equity. *Belknap* v. *Trimble*, 3 Paige, 605.

*J. J. Penrose* and *G. W. Phillips*, with whom was *H. Johnson*, for the respondents.

1. The granting of an injunction rests in the sound discretion of the court. *Hine* v. *Stephens*, 33 Conn., 497. No injunction should be granted except for the prevention of great and irreparable mischief, and where adequate remedy cannot be had at law. *Bigelow* v. *Hartford Bridge Co.*, 14 Conn., 580; *Whittlesey* v. *Hartford, Providence & Fishkill R. R. Co.*, 23 id., 433. It is rather the duty of the court to protect established rights than to establish new and doubtful ones. *Roath* v. *Driscoll*, 20 Conn., 539. On an application

of these principles to the facts found the petitioners are not entitled to an injunction. The respondents are the owners of the dam, the land upon which it stands, and the land flowed, and are in possession; the petitioners have neither title nor possession. The latter had no right to insist upon such use of the water as would deprive the respondents of the benefits of their ownership of the reservoir and mills below. It was not an unreasonable detention of the water for the respondents to shut their gate and keep it closed for the purpose of filling the reservoir, in case they should desire to sell their mills, as the natural stream would run over the roll way of the dam as soon as the reservoir was full, and be all the while leaking through it more or less. The finding shows that this was the sole purpose for which it was done. This instead of being to the injury of the petitioners was for their benefit. There is nothing in the finding that shows any appreciable injury to the petitioners, much more any irreparable injury that calls for the interposition of a court of equity by injunction. The finding shows that the benefits from the reservoir were purely artificial. The south branch on which it is situated was of no value without it. The petitioners then, as riparian proprietors, cannot complain of its use and management by the respondents. An action at law for damages against parties responsible, and within the jurisdiction, would have been a full and adequate remedy, and no injunction should be granted until the rights of the petitioners, if any, have been established by a judgment. Kerr on Injunctions, 199.

2. The finding shows that the opening of the gate, like the shutting of it, was not done wantonly, but because the respondents had an apprehension that the dam was in peril from too great pressure. Surely no injunction should be granted for such act. But it is found that they asserted their absolute right to let the water escape at pleasure, and denied that any obligation rested upon them to maintain the dam. No obligation did rest upon them to maintain the dam, (this is admitted by the other side,) and consequently they had a right to let the water escape. This is obvious from the find-

ing that the respondents were the absolute owners of the dam, flowage rights, and the land in fee. This being so, they had a right to control it without consulting the proprietors below, so far as any use of the water ponded by them was concerned. And this is all the finding shows that they did. Again, in this part of the case the petitioners had adequate remedy at law if any wrong was done them.

3. The old dam was abandoned and blotted out of existence with the consent of all its owners. *Taylor* v. *Hampton*, 4 McCord, 96; Washburn on Easements, 550, 559. The petitioners gained no rights in the new reservoir by virtue of ownership in the old. If the extinguishment of the old reservoir by the erection of the new was wrongful, it created a right of action for the wrong and nothing more. But it was not wrong, but, as said before, was done by consent. By long acquiescence in the submersion of the old dam neither Adams nor his grantor would be entitled to the interposition of a court of equity to protect any supposed right. Kerr on Injunctions, 202, 386. Adams's grantor had knowledge of the building of the new dam, and the consequent submersion of the old reservoir. His acquiescence in it estops Adams now. But it is denied that he has any right at all, and until a right is established at law no injunction should be granted.

PARDEE, J. Each of the petitioners is the owner of an ancient and valuable mill-site with mill in operation on a stream in the town of Woodstock; on the same stream and above these the respondents are joint owners of two like mill-sites, with an idle mill upon one and none upon the other. Above these a branch empties into the main stream; upon this, forty years since, a dam was erected for the purpose of creating a reservoir for storage which continued in beneficial use to 1867. In that year the grantors of the respondents submerged it by the erection of a dam twenty rods below, at which point they were riparian proprietors on both sides. For about eight years thereafter they and their successors, including the respondents, drew the water stored by it in such quantities and at such times as were most bene-

ficial to all the mills, for the needs of all were substantially the same. But in 1875 the respondents, having lost one mill by fire, ceased to operate the other, and on several occasions thereafter under a claim of right detained water when it was essential to the operation of the petitioners' mills, and on others allowed it to flow when it was not needed.

The petition seeks to restrain them from a repetition of these acts, and the case is reserved for the advice of this court.

Thirty years before the erection of the defendants' dam, the branch for mill purposes practically ceased to be a running stream and became a reservoir for storage, from which water was drawn at such times and in such quantities only as would best supply the special and irregularly recurring needs of mills, the detention and drawing being by the consent and to the advantage of the proprietors of the old dam and of those of the mills below as well. As a matter of law, so far as the rights of all these are concerned, the artificial became by this long continued use the natural condition of the stream; to it thus changed they had adapted their respective mills as to construction, capacity and mode of use; as an element of value in his privilege each had thus acquired a right to the use of this stored water in the reasonable, proper and customary manner and time of using it, having due regard to the rights of others to a like use; and this so long as the proprietors of the dam should continue its existence for the purposes of storage merely. In 1867, therefore, the proprietors of the old dam and reservoir had not the right to continue it in existence for storage and at their will to detain water therein or discharge it therefrom unnecessarily, unreasonably and to the injury of others; their power over it was held in strict subjection to this law of a reasonable and customary use as between themselves and other mill-owners below, which thirty years of such use had imposed upon them; and the proprietors of the new reservoir by submerging the old one practically took it to themselves and continued it in existence; but they took and continued it with all the limitations which this law had placed upon it.

Again, it is found that the respondents' grantors submerged the old dam without contract permission from, or compensation to its owners, one of whom is a petitioner; that these knew of, but did not object to the erection of the new one, remaining silent because of their belief that it would be a substitute for and more beneficial than the old one; that during eight years the successive proprietors of the new one, including the respondents, observed the established law of a reasonable use of the water of the branch as a reservoir for storage, detaining and drawing it at times and in quantities most beneficial to all proprietors; and, that only since 1875 have they violated that law. The import of this finding is that in erecting the new dam the original proprietors thereof did not assert or exercise any rights in hostility to those of the proprietors of the old dam, but intended, and designed to be understood as intending, only to make them more beneficial than before. Thus taking the old reservoir to themselves and practically continuing its existence, they took it with all the limitations which this law of use had placed upon it. The silent consent thus received carried with it no permission either to detain or draw water unreasonably as against those who gave it; these last by giving have not barred themselves from a court of equity.

Therefore upon either ground they may maintain their petition.

And, when controversies arise between mill owners, each of whom has a separate right to the use of water to be drawn from a common reservoir for storage on irregularly recurring occasions of need, the time and manner depending upon the quantity in store, the needs of others and established custom, it is the proper office of a court of equity to call all of them into its presence and in one proceeding and by one decree determine their respective rights and obligations. A separate action at law to each, for each wrongful detention or drawing, will not furnish adequate relief; practically, no relief at all.

The Superior Court is advised to command and enjoin the respondents, their servants, workmen, and agents, and all and every one of them, under a proper penalty that they do

henceforth, so long as they maintain the new dam described in the petition, altogether and absolutely desist from drawing water thereby detained except for the supply of their mills; and if they have no occasion for drawing for such use, to desist from preventing or hindering the petitioners from drawing it for the supply of their mills in the reasonable and customary mode as to time and quantity. This order not to be construed as requiring the detention of water when the existence of the dam would be thereby put in peril.

In this opinion the other judges concurred.

SETH S. COLLINS *vs.* ALANSON H. FOX.

It is the duty of the keeper of a pound to keep impounded animals in the pound and there only, unless removal is necessary to save them from injury.

Where a keeper has voluntarily removed an impounded animal from the lawful pound and put it in a private enclosure, the animal can be no longer held under the impounding, and the keeper has no rights with regard to it except to deliver it upon demand to the lawful owner.

Where therefore a constable, with knowledge that an impounded animal had been so removed, sold it at auction at the request of the keeper, it was held that the request could not protect him and that he was guilty of a trespass.

TRESPASS for taking and carrying away a horse belonging to the plaintiff, with a count in trover; brought originally before a justice of the peace and appealed by the defendant to the Superior Court in Tolland County, and tried to the court before *Hitchcock, J.* Facts found and judgment rendered for the plaintiff, and motion for a new trial by the defendant. The case is fully stated in the opinion.

*J. M. Hall* and *M. P. Yeomans*, in support of the motion.

*B. H. Bill* and *J. L. Hunter*, with whom was *H. Clark*, contra.

PARDEE, J. On June 29th, 1879, a hayward finding the plaintiff's horse running at large, impounded him in the town

pound, and notified the plaintiff of such act. On the next day the pound-keeper notified the town clerk, who on July 1st published in a newspaper a notice that he would sell the horse at public auction on July 17th; but he did not do so. On that day the pound-keeper gave notice of the impounding and that the horse belonged to the plaintiff, to the defendant, a constable of the town, who on August 6th published in a newspaper and on a sign-post notice thereof, and that he would sell the horse at public auction on August 13th. The pound-keeper kept the horse in the pound from the 29th of June to the 3d of July, when, for his own convenience in feeding and watering him, he removed him a distance of about seventy rods to his barn yard, where there was a shed for his protection, and there kept him until August 13th, when he returned him to the pound, from whence the defendant took him to the sign-post a few minutes later, with knowledge of the removal and return, and sold him at auction to the highest bidder for ten dollars, notwithstanding the protest of the plaintiff. The latter, on July 17th at the barn yard, demanded possession of the horse of the defendant, without payment or tender of fees, and it was refused. The value of the horse at the time of the sale was thirty-five dollars.

The plaintiff had notice of the impounding within twenty-four hours after it took place; the cost incurred after such notice is the result of his neglect to redeem, and he is not to be heard to complain of it. The statute (Gen. Statutes, p. 255, sec. 5,) authorized a constable of the town at the expiration of twenty days from the impounding to fix a day for the sale of the horse, and on such day to sell him at public auction at the public sign-post in the town for the purpose of paying poundage and the reasonable expenses of supporting, advertising, and selling him, giving reasonable notice of the time and place of such sale by advertisement in a newspaper printed in the county in which the town is, or in some other newspaper circulated in such town, and by posting a notice upon such sign-post.

The statute commands the selectmen of each town to erect

and maintain a sufficient pound for the impounding therein of all animals liable by law to such restraint, and to appoint a keeper thereof. It also commands the haywards to impound therein animals found at large upon the highway. There results a statutory obligation upon the keeper to keep the impounded animal in that place and in that only, unless removal is necessary to save it from injury; the selection of one place excludes the right to use another, for the obvious reason that the owner may know precisely where and to whom he can apply for leave to redeem, and that the keeper may always have it in his power to give instant possession. When therefore the keeper has voluntarily released the animal from the place in which alone it was his privilege to restrain it, and puts it in a private enclosure, he has put an end to the effect of the act of impounding, and has become the keeper of an animal belonging to another, with no right in reference thereto other than to deliver it upon demand to the owner. When therefore the defendant had knowledge of the release by the keeper, he had knowledge that he was without power or right to sell it as an impounded animal with or without the request of the keeper. Such request imposed no obligation upon him to do the act, nor can it protect him; it was a voluntary trespass with knowledge.

A new trial is not advised.

In this opinion the other judges concurred.

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CHARLES P. CARD *vs.* AMELIA F. ALEXANDER AND OTHERS.

A testator made the following bequest to his wife:—"I give to my wife *A* the sum of $400 annually out of the income of my estate during her natural life, to be in lieu and in full discharge of all right of dower; and if she shall refuse to accept the same in lieu of dower then she shall be entitled to have only her right of dower in my estate." A year and a half after the execution of the will the testator obtained a divorce from his wife for her misconduct, and four years afterwards died, leaving a large estate. By statute the wife by the divorce lost her right of dower. Held—

1. That the bequest was not to be regarded as conditioned upon her remaining the wife of the testator.
2. That the provision with regard to her not taking the bequest unless she relinquished her dower, was not to be regarded as a condition that she should be entitled to dower and so be able to relinquish it.
3. That the divorce did not, as matter of law, make the bequest void or operate as a revocation of it.

Ruling as to the order of argument, p. 494.

SUIT for advice as to the construction of a will and for the determination of the conflicting claims of the defendants in the matter; brought to the Superior Court in Windham County. The plaintiff was administrator with the will annexed. The court found the following facts.

Luther D. Alexander, the testator, of Killingly in Windham County, died March 1st, 1879, leaving the will in question, which was executed in March, 1873, and which was duly proved after his death. At the time of its execution Amelia F. Alexander, one of the respondents, was his wife. The will contained the following clause:—

"*Item* 2. I give and bequeath to my wife, Amelia F. Alexander, the sum of four hundred dollars annually, to be paid to her annually by my executor hereinafter named out of the income of my estate during her natural life, said annual payment of four hundred dollars to be in lieu of and in full discharge of all rights, claims or demand of dower on my estate, and if she shall refuse to accept the same in lieu of dower then she shall have and be entitled to have only her right of dower in one-third of my real estate."

The testator afterwards, at the August term, 1874, of the Superior Court for Windham County, obtained a divorce from the said Amelia upon the ground of "such misconduct on her part as permanently destroyed the happiness of the petitioner and defeated the purposes of the marriage relation," personal service of the petition having been made upon her.

The inventory of the testator's estate was about $120,000, consisting of about $72,000 personal, and $48,000 real estate, including that devised in the will.

The plaintiff claimed an adjudication of the conflicting claims under the clause in the will that has been stated and

prayed that the parties interested be required to set forth their respective claims for that purpose. Mrs. Alexander filed an answer, claiming the bequest made to her, while the other parties interested claimed that the legacy was rendered inoperative and void by the divorce.

Upon these facts the case was reserved for the advice of this court.

Before the argument commenced in this court *Mr. Hubbard*, counsel for the defendants other than Amelia F. Alexander, asked for a ruling of the court as to which party should go forward, the controversy being merely between different defendants. The matter was discussed by him and by *Mr. Halsey*, counsel for Mrs. Alexander. The judges ruled that as Mrs. Alexander claimed under the will and the other defendants were merely resisting her claim, she must be regarded as having the affirmative and as entitled to go forward in the argument.

*J. Halsey* and *C. E. Searls*, for the defendant Amelia F. Alexander.

The legacy given to Mrs. Alexander is absolute and unconditional, and in no way affected by the divorce. The contestants can not claim that it has become inoperative by reason of any express provision of the will; the language of the testator is explicit and unconditional, save only as modified by a reference to the right given by law to the legatee if she should continue to be his wife until his decease, to reject the gift and claim an interest in the realty. He gives a certain sum to a particular person, called by name, and further identified as the wife of the testator, and for a fixed period. The gift is not stated to have been made because she was his wife, nor upon condition that she remain such until his decease. The contestants must rest their claim upon the only other basis possible, and say that the reason and motive of the gift implied in the phraseology of the instrument, and inferred from the circumstances, were the then existing relationship of the testator and the legatee, and therefore in the word "wife," as used in this connection, and in the provision that

the bequest should be in lieu of dower, are found an implied condition to the effect that the bequest should become void, if the legatee should at any time, and for any cause whatever, cease to be the wife of the testator.

1. It will be noticed that under such claim as this the question as to the fault or misconduct of the one party or the other, and upon whose petition the divorce was granted, becomes of no consequence, and the case stands precisely as it would have stood had the position of the parties been reversed, and the legatee had obtained the divorce of her own motion for the misconduct of the testator.

2. There is nothing in the finding to indicate that the testator, at the time of making the will, anticipated any separation from his wife, or made his will with any reference thereto. "The doctrine is, that the construction of a will cannot be affected by the occurrence of contingencies against which the testator might have provided differently if they had occurred to his mind. The court can place itself only in the position of the testator, but cannot interpret the will by the light afforded by any subsequent occasion not amounting to a revocation or ademption of a gift in the will." Wigram on Wills, 52; 2 Redfield on Wills, 22.

3. If the motive of the testator and the reason of the making of the bequest are an element in the case, and the testator had any thought at the time of a possible separation in the future, we say that the motive and reason, as arrived at by a consideration of the surrounding and attendant circumstances, are not as claimed by the contestants. The divorce took place in about a year from the time of the making of the will, the testator lived nearly five years thereafter, and the will remained until his decease unchanged; she was the mother of his children, his wife for many years; the estate is very large, and the legacy but a pittance.

4. No legal inference can be drawn from the word "wife," associated with the name of the legatee, as to the motive of the testator in making the bequest, nor is there any condition implied therein. The word is descriptive of the person, and not of the character under which she takes. 1 Jarman on

Wills, (5th Am. ed.,) 598; 1 Redfield on Wills, 382; 2 Bishop on Marriage & Divorce, 26; Godolphin's Orphan's Legacy, 462; *Brett* v. *Rigden*, Plowden, 344; *Garratt* v. *Niblock*, 1 Russ. & Mylne, 629; *Woodright* v. *Wright*, 10 Mod., 370; *Parker* v. *Marchant*, 1 Y. & Coll., 290; *Bullock* v. *Zilley*, Saxton, 489. Nor can such inference be drawn from the provision as to dower. At the date of the execution of the will Mrs. Alexander was the wife of the testator, and the claim was inserted to meet a contingency which might at any moment arise, and for the occurrence of which the testator naturally provided. It by no means presupposes the retention by the legatee of the same relation or title as that borne by her at the date of the will. The relationship then existed, and the testator provided for it.

5. If, however, the language of the bequest will warrant the inference that the motive and reason of the gift were as claimed by the contestants, it will not render the bequest inoperative. If the reason for a gift does not exist, or, existing at the time, afterwards fails, the gift does not fail, and a misdescription of character does not defeat the bequest, nor render it a bequest upon condition, when there is no doubt as to the person intended, unless the character be assumed by the legatee as a fraud upon the testator. An express bequest can in no case be controlled by the reason assigned, nor rendered conditional thereby. 2 Wms. Exrs., 1087, 1155; 2 Redf. on Wills, 26; 1 Story Eq. Jur., § 183; *Schloss* v. *Stiebel*, 6 Sim., 1; *Rishton* v. *Cobb*, 9 id., 615; *Giles* v. *Giles*, 1 Keen, 685.

6. The equities of the case are entirely with the legatee, and the court will, if the language of the bequest can reasonably bear such construction, so interpret it as to sustain the gift.

*R. D. Hubbard* and *G. W. Phillips*, for the defendants other than Mrs. Alexander.

1. A divorce in this state divests each party of those executory property rights which have no basis but the coverture; such as curtesy, the husband's right to the wife's

choses in action, and dower, except where the wife is the innocent party. Bishop on Marriage & Divorce, 670. The effect upon property rights of a divorce *a vinculo* is substantially that of death. Schouler on Dom. Rel., 112, 146, 299; Tyler on Inf. & Cov., 291; Bishop on Mar. & Divorce, 654, 658, 661, 667, 670; Coke Lit., 28; *Lee* v. *Lee*, 2 Dickens, 806; *Charruaud* v. *Charruaud*, 1 N. Y. Leg. Obs., 134; *Clarke* v. *Lott*, 11 Ill., 105; *Barber* v. *Root*, 10 Mass., 263; *Harvard College* v. *Head*, 111 id., 212; *Mattocks* v. *Stearns*, 9 Verm., 326; *Townsend* v. *Griffin*, 4 Harring., 440; *Starr* v. *Pease*, 8 Conn., 541; *Wheeler* v. *Hotchkiss*, 10 id., 225. It bars dower at common law. Coke Lit., 32 *a;* Schouler on Dom. Rel., 185. The wife divorced for her own misconduct is not entitled to statutory alimony, and forfeits all right to a maintenance. *Allen* v. *Allen*, 43 Conn., 419.

2. The annuity was revoked by implication.—1st. By reason of presumed intention. An intention to revoke a bequest is to be presumed from an act done by the testator inconsistent with its standing. The implication here is necessary in order to avoid contradictory consequences. 1 Swift Dig., 455. Judge Redfield says:—"There are cases where the legatee who is to receive the benefit of a bequest survives the testator, that it will yet fail and become inoperative on the ground of some contingency upon which the vesting is made to depend. When the legacy never vests it is properly regarded as having lapsed, whether the event occurs before or after the death of the testator." 2 Redf. on Wills, 157. A legacy to a charitable institution which was dissolved in the testator's life time lapses. *Fisk* v. *Attorney-General*, Law Rep., 4 Eq. Cas., 521. A corporation is an artificial person and it was dissolved. The marriage, upon which this annuity depends, is an artificial relation, and was dissolved in the life of the testator.—2d. The position may be maintained on the ground of legal presumption, altogether independent of any voluntary action or actual purpose of the testator in the particular case. Witness the common law rule as to marriage and birth of a child. It is sometimes said to be founded on the presumption that if the will had been

made under the changed circumstances, it would not have been made as it was. 1 Redf. on Wills, 295; *Doe* v. *Lancashire*, 5 T. R., 49; *Carter* v. *Thomas*, 4 Greenl., 341; *Tyler* v. *Tyler*, 19 Ill., 151; *Carey* v. *Baughn*, 36 Iowa, 540. Here there was a tacit condition annexed to the annuity, (saying nothing now about the written one,) that it should not take effect in case of the change which occurred in his lifetime. The law pronounces this upon the ground of a "*presumptio juris et de jure*," so violent that it could not even be rebutted by parol. *Goodlittle* v. *Otway*, 2 H. Bla., 517.—3d. In the case of marriage the implied revocation rests upon the legal operation of the act of marriage. Here it rests upon the legal operation of the act of divorce; and the law goes so far as to say that it need not rest at all upon any actual intention or purpose of the testator. The cases are analogous. The reason in one may well be applied to the other. The result obtained is the same in both.

3. The annuity was to the then wife, if at his death she should be in the character to be entitled to dower, and that was the sole foundation and motive of the gift. Any other construction would manifestly defeat the intention. 2 Redf. on Wills, 27, 28; *Bent's Appeal from Probate*, 38 Conn., 26. When legacies are given to persons in the character of executors and not as marks of personal regard, such bequests are considered to be given upon an implied condition "that the parties clothe themselves with the character in respect to which the benefits were intended for them." Willard's Eq., 535. Such provision is compensatory. *Colt* v. *Colt*, 33 Conn., 280.

4. The annuity was contingent. It depended upon an event that never happened. The supposed annuitant never became entitled to it. 2 Redf. on Wills, 217, 251.

5. It was conditional and upon condition precedent. The argument is stronger in favor of a condition precedent, when a gross sum of money is to be raised out of land, than when it is a demise of land itself; when a pecuniary legacy is given, than when a residue; where the nature of the interest is such as to allow time for the performance of the act before its

usufructuary enjoyment commences, than where not; when the condition is capable of being performed instanter, than where time is requisite for its performance. 1 Jarman on Wills, 804. The condition was one the testator had a right to make, was real and substantial, and must be strictly performed. 2 Redf. on Wills, 294; 1 Story Eq. Jur., §§ 291 *et seq.; Ackerly* v. *Vernon*, Willes, 153. The words "if," "when," &c., are words which indicate that the legacy will not vest until the condition is performed. Willard's Eq., 425; *Colt* v. *Hubbard*, 33 Conn., 281. In express terms without resorting to argumentative inferences, it was a provision in lieu of dower and conditioned upon acceptance of it in satisfaction. It follows that to take under it she must survive him as his widow, or have been divorced without alimony, being the innocent party. It is a legacy to her only in the relation of wife. The plain intent was to annex to the substance of the annuity for a consideration, a condition precedent *limiting its acquisition* to the event that the then wife should be entitled to dower at his decease. Redfield says:—"It seems to be agreed that in regard to all conditions, whether in a deed or will, or in simple contracts, where the condition is in the nature of a consideration for the concession, its performance will be regarded as intended to precede the vesting of any right, and so a condition precedent." 2 Redf. on Wills, 283.

6. It was a consideration for a release or concession of dower. She must then have been entitled to dower at his death, in order to furnish the consideration required. The court is asked, notwithstanding the common law and the statute, to create by construction a right to have the annuity, which by the words of the will was made to be *in lieu of dower*. By her own misconduct she has forfeited dower and is estopped now from claiming the annuity. She gained a right of dower by marriage and lost it by her own fault. Shall she take just as much as though there had been no divorce, against the manifest intention of the testator? It is a rule "that the court will construe words with reference to events occurring during the lifetime of the testator, when

that is requisite in order to give them a sensible operation." 1 Redf. on Wills, 386, 454.

7. It was in no sense a gratuitous disposition of property in any event and cannot stand as such, but being a consideration for release of dower in terms, its acceptance must precede the vesting of any right. It was referential and substitutional. It cannot stand as a gift, but only as a substitute for the dower in case his then wife should be entitled at his death, and elect to accept it as such in full satisfaction. It was not a distinct, independent disposition of property, but subservient to the purpose of inducing its acceptance in lieu of dower, he intending to give it only in so far as it should succeed in effecting that object. A provision in a will is not to be considered a bounty, where the testator declared it to be for a relinquishment of something to which the person is entitled by law, or in discharge of some legal or equitable claim. 2 Story Eq. Jur., § 1100. At his decease the law gave her no claim, nor was he after the divorce, nor is the estate now, under any legal, equitable or moral obligation to her. If she takes it now, she must take it as a gift purely, contrary to the express provision of the testator. Relinquishment of dower is a valuable acquisition to the estate, and in this case what was made to be its equivalent if accepted by her would have been paid in full in case of a deficiency, as she would have taken as a purchaser. 2 Redf. on Wills, 364, 453. By her own wrong she lost widowhood, consequently dower at common law and by statute, and hence the right to ask for that which was only in substitution for it. The annuity was to purchase dower, and she had none to sell. The marriage was dissolved. The consideration which was the life and soul of the inducement for the annuity was gone and nothing remained. The provision was in the nature of an executory contract, the performance of which she cannot ask to have executed, because upon her part she fails to furnish and do the thing required. 2 Parsons on Cont., 528. It is a universal principle—equally a rule of law, equity and moral justice—that he who asks a specific performance must himself be in a condition to per-

form. In such cases the rights and duties of the parties are reciprocal and mutual. At the moment she lost dower, the reciprocity between them relating to this matter ceased, and the thing may be said to be like the case of a "nude pact." 1 Black. Com., 310. In one respect it resembles a gift *inter vivos*, when the gift is incomplete because of something which remains to be done to make the title complete in the donee. In such cases it is not sustained. Or like a conditional sale where no title vests until the performance of the condition. These are conditions precedent and no title passes even on delivery. Non-performance works a forfeiture of payments. It makes no difference that this is a will instead of a contract, especially as the annuity is not a bounty. *Continental Life Ins. Co.* v. *Palmer*, 42 Conn., 67. A bequest in lieu of dower and its acceptance amounts to a matter of contract. The wife is to be paid the bequest in preference to other legatees. Willard's Eq., 552.

8. The decree which dissolved the marriage contract was the act of the law. 2 Black. Com., 123. Divorce laws do not belong to the parties wholly but in part to the public. Schouler's Dom. Rel., 291. Her own wrong in the commission of such an offence against the husband as to entitle him to a divorce, prevented the performance of the condition. Any cause of divorce presupposes an offence committed by the other party.

9. Redfield lays down the doctrine that an estate by will which depends upon a condition precedent, cannot vest where the condition fails of performance for any cause. It certainly did not vest in this case. More especially is this so by reason of the fact that here the performance of the condition forms the sole consideration for the provision in the will. 2 Redf. on Wills, 289; 2 Jarman on Wills, 13. Roper on Wills (vol. 1, p. 755,) says:—"If it was not known to the testator that the condition was or would become impossible, and from the nature of the requisition it appeared to be the sole motive of the gift, then impossibility would still preclude the legatee." This doctrine runs through all the text books and decisions upon the subject. 1 Swift Dig., 94; 1 Black.

Com., 157; Willard's Eq., 524; 2 Redf. on Wills, 284; 1 Jarman on Wills, 683; 2 Story Eq. Jur., §§ 1304 *et seq.*; *Wheeler* v. *Walker*, 2 Conn., 201; *Lloyd* v. *Holly*, 8 id., 494; *Bacon* v. *Huntington*, 14 id., 92; *Collins Manf. Co.* v. *Marcy*, 25 id., 242; *Colt* v. *Colt*, 33 id., 280; *Hoyle* v. *Putnam*, 46 id., 61; *Minot* v. *Prescott*, 14 Mass., 495; *Prescott* v. *Prescott*, 7 Met., 143; *Cooper* v. *Remsen*, 3 Johns. Ch., 382; *Caw* v. *Robertson*, 1 Seld., 125; *Bramhall* v. *Ferris*, 14 N. York, 41; *Cary* v. *Bertie*, 2 Vern., 333; *Ackerly* v. *Vernon*, Willes, 153; *Roundell* v. *Currer*, 2 Brown Ch., 67; *Lester* v. *Garland*, 15 Ves., 248; *Tattersall* v. *Howell*, 2 Mer., 26; *In re Welstead*, 25 Beav., 613; *Makeown* v. *Ardagh*, 10 Irish R. (Eq. S.,) 444; *Robinson* v. *Wheelwright*, 6 De G. M. & G., 538; *Lindsay* v. *Lindsay*, Law Reps., 2 Prob. & Div. Cas., 459; *Duddy* v. *Gresham*, 39 Law Times R., N. S., 48.

CARPENTER, J. This is an application for a judicial construction of the will of Luther D. Alexander. The second clause of the will, which is the one in question, reads as follows:—

"I give and bequeath to my wife, Amelia F. Alexander, the sum of four hundred dollars annually, to be paid to her annually by my executor hereinafter named out of the income of my estate during her natural life; said annual payment of four hundred dollars to be in lieu of and in full discharge of all rights, claims or demand of dower on my estate; and if she shall refuse to accept the same in lieu of dower, then she shall have and be entitled to have only her right of dower in one third of my real estate."

The will bears date and was executed in March, 1873. In August, 1874, Luther D. Alexander was duly divorced from Amelia F. Alexander on his own petition, and died on the first day of March, 1879, leaving two children his heirs at law.

The question now presented for our consideration is, whether the second clause in the will was revoked by the divorce.

We think the bequest is absolute. The words "my wife"

are descriptive of the person, and do not import a condition that if she survives him she shall remain his wife until his death. The words which follow do not change the meaning and have little force. They simply express the testator's will that she shall not have the legacy and dower, instead of leaving it to the implication of law to the same effect. That was more satisfactory to him, and was doubtless all that he intended.

It is a will we are considering and not a contract. A bequest requires no consideration to support it. Hence the suggestion that the relinquishment of dower was in the nature of a consideration for the bequest has no special force. It is true that by accepting the bequest she would thereby have relinquished her right of dower if she had had such right, and by electing to take dower she would have waived her right to the bequest; but that does not make the one, in a legal sense, a consideration for the other. Motives or reasons for doing an act are quite distinguishable from a legal consideration essential to the validity of an act.

The counsel for the heirs however insist that she must not only be willing but able to relinquish her right of dower; that is, that she must actually have such right at the time of her husband's death. No such condition is expressed in the will, and the words used do not imply one. They afford slight if any evidence that such a condition was in his mind. If he had intended it apt words to express such an intention would doubtless have been employed. In the absence of such words we must infer that he had no such intention.

But it is contended that the divorce by operation of law revoked this bequest. No case is cited in support of this position, and we are not aware that any exists. It may be true that the divorce divested the wife of all those executory property rights which had no basis but the coverture; but that hardly reaches this case, for here the right rests mainly, not upon coverture, but upon the will; and it cannot be said that coverture was the sole motive or inducement to the will. After that was taken away it still remained true that she had been his wife, and that she was the mother of his children.

It is hardly credible that any man of ordinary sensibilities would desire to leave her destitute. Add to this the further facts, which exist in this case, that the testator was possessed of a large estate, that the provision made for the wife was a mere pittance, and that he lived nearly five years after the divorce making no change in his will, and the conclusion is well nigh irresistible that he did not intend to deprive his former wife of the provision he had made for her. There is not therefore sufficient reason for presuming that the testator intended by procuring the divorce to revoke the legacy to her; and these considerations are cogent reasons why we should not hold, as matter of law, that the divorce revoked the legacy.

Moreover the analogies of the law, so far as there are any, are against it. The death of the wife during the lifetime of the testator defeats the legacy, because it then lapses as in ordinary cases. The dissolution of a corporation legatee has the same effect. In these cases the objects of the testator's bounty cease to exist before the will takes effect. In this case she survives and is capable of taking. A more analogous case is that of marriage; and it is now well established that marriage alone will not revoke a will previously made. In order to have that effect there must be coupled with it the birth of a child or children.

We think the second clause of the will is operative, and the Superior Court is so advised.

In this opinion the other judges concurred.



SOUTH-WEST SCHOOL DISTRICT OF BOLTON *vs.* RUTH A. WILLIAMS AND ANOTHER.

Matters of a public or general interest may be proved by the declarations of deceased persons who were in a situation to have knowledge of them.

But dates or particular facts that are not in themselves matters of general knowledge, though connected with those which are, can not be thus proved.

In a controversy as to the title to land upon which a school-house had stood for many years, it was held that the date of the erection of the school-house could not be thus proved.

CIVIL ACTION to recover for an entry into and injury to a school-house belonging to the plaintiffs; brought originally before a justice of the peace and by appeal to the Superior Court in Tolland County, and there tried to the jury before *Hovey, J.* Verdict for the plaintiffs and motion for a new trial by the defendants. The case is sufficiently stated in the opinion.

*S. E. Fairfield* and *W. A. King*, in support of the motion, cited *Chapman* v. *Chapman*, 2 Conn., 348; *Higley* v. *Bidwell*, 9 id., 451; *Wooster* v. *Butler*, 13 id., 316; *Kinney* v. *Farnsworth*, 17 id., 362; 1 Stark. Ev., 69; 1 Greenl. Ev., §§ 128, 130, 138; 1 Phill. Ev., 178, 197; 1 Swift Dig., 766; Swift Ev., 123.

*B. H. Bill* and *C. Phelps*, contra.

LOOMIS, J. The complaint alleges a malicious injury by the defendants to the school-house and furniture therein belonging to the plaintiffs. The defendants' answer denies the ownership of the plaintiffs, and alleges that the school-house belonged to Ruth A. Williams, one of the defendants.

The plaintiffs in support of their title offered evidence to prove that in the year 1808 one Joseph Webster, then owner in fee of the land, made a gift of the same by parol to the plaintiffs for a school-house site, which the plaintiffs accepted, and immediately took possession and erected a school-house thereon, and have continued ever since in the exclusive possession, use and occupation under a claim of title, with the knowledge and acquiescence of said Joseph Webster and his representatives.

The defendants claimed title under the will of Joseph Webster, who died December 30th, 1809, leaving Ruth Webster, his widow, Sabra Risley, a daughter, and Ruth Webster Culver, a granddaughter, surviving. The widow died in 1826. The granddaughter in the lifetime of her mother

married Jacob Webster, and by him had one child, Ruth A., one of the defendants, to whom on the 30th of September, 1872, the land on which the school-house was situated was distributed by distributors appointed by the court of probate.

The defendants objected to the plaintiffs' evidence to show a gift of the land for a school-house site by Joseph Webster, and "requested the court to charge the jury that there had not been such an entry, nor afterwards such an occupancy of the premises by the plaintiffs, as to give them a title by possession; that the time and the manner of taking such possession, if it occurred at all before the death of Joseph Webster, was by his parol license and permission, and was not sufficient; and that from the time of his death until the death of the said Ruth Webster Culver in September, 1872, the plaintiffs could not acquire title by possession."

The court overruled the objection to the evidence and refused to charge as requested, and in both respects was so manifestly right that the defendants' counsel do not make either of the questions in this court, and therefore they require no discussion.

One other question only is presented by the motion. The counsel for the defendants called upon Ruth A. Williams, one of the defendants, as a witness, and for the purpose of proving the time when the school-house was erected by the plaintiffs, asked her—"Did your mother or great-grandmother tell you when the school-house was built—before or after the death of Joseph Webster?"—which, upon the plaintiffs' objection, was excluded by the court.

The objection was not to the fact—which is conceded to have been material—but only to the mode of proving it, namely, by the declarations of the witness's mother and great-grandmother.

In support of the claim that the evidence was admissible the defendants invoke the benefit of an exception to the general rule excluding hearsay evidence upon the ground that the matter in question was of public and general interest.

As included within this exception the authorities mention boundaries of counties, towns and other territorial divisions,

rights of common, claims of highways and ferries, and in this and some other states the boundaries of lands of individuals. But no such fact as the one now in question has ever been mentioned as proper to be included in this class.

The fallacy on the part of the defendants seems to be in assuming that because a school-house is a public building for a public purpose, the precise date of its erection must also be matter of public or general interest to be proved by traditionary evidence; and therefore one of the defendants attempts, by repeating the unsworn statement of her deceased mother or grandmother as to a date, to change this public matter of a school-house into her own private property.

And this well illustrates the danger of extending the exception so as to embrace particular facts and dates. In this case there was doubtless other and better evidence to be found in the records of the school district or from living witnesses. But however this may have been, a reference to the reason for admitting traditionary evidence in public matters will show that particular dates like this ought not to be included. The law does not dispense with the sanction of an oath and the test of cross-examination as a pre-requisite for the admission of verbal testimony, unless it discovers in the nature of the case some other sanction or test deemed equivalent for ascertaining the truth.

The matters included in the class under consideration are such that many persons are deemed cognizant of them and interested in their truth, so that there is neither the ability nor the temptation to misrepresent that exists in other cases; and the matters are presumably the subject of frequent discussion and criticism, which accomplishes in a manner the purpose of a cross-examination, while the persons whose declarations are offered in evidence must have been in a situation to know the truth. After passing such an ordeal it is reasonably safe to accept the result as established fact. But if the fact to be proved is a particular date, though connected incidentally with a public matter, it is easy to see that it could not stand out as a salient fact for contem-

poraneous criticism and discussion so as to furnish any guaranty for its correctness; so that the general rule excluding hearsay evidence applies in full force. The human memory is proverbially treacherous even in regard to very recent dates, and little reliance can be placed on the sworn testimony of living witnesses in such matters, unless they are able to associate the date given with some more striking fact.

The ruling of the court excluding the evidence is vindicated not only by the reasons we have given, but also by decided cases which are so similar to the case at bar as to be identical in principle.

In *Frazer* v. *Hunter*, 5 Cranch C. C., 470, it was held that when the question is upon a disputed boundary line the court will not permit hearsay evidence to be given that a particular object, such as a spring, was in the land of one of the parties.

In *Ireland* v. *Powell*, Peake's Ev., 14, where the question was whether a turnpike was erected within or out of the limits of the town of Wem, Mr. Justice Chambre permitted the plaintiff, who contended that it was within the town, to give evidence of general reputation that the town extended to a close called the Townend Piece, and that old people since deceased had said that such was the boundary of the town; but he would not suffer it to be proved that those persons had said that there were formerly houses where none then stood, observing that this was evidence of a particular fact and not of general reputation. See also *Cooke* v. *Banks*, 2 Car. & P., 478; *Weeks* v. *Sparke*, 1 Maule & Selw., 687. And in 1 Swift's Digest, 766, it is said that the tradition of a particular fact is not admissible.

The principle we think also derives support from certain decisions relative to hearsay evidence to prove facts of family history or pedigree, where such evidence has been excluded when offered to prove the particular place of one's birth or death. *Town of Union* v. *Town of Plainfield*, 39 Conn., 563, and cases there cited; *McCarty* v. *Deming*, 4 Lansing, 440; *Monkton* v. *Attorney-General*, 2 Russ. & M., 156.

The counsel for the plaintiffs in their brief contend that a proper construction of the will of Joseph Webster would have rendered it immaterial whether the date of building the school-house was before or after his death, because the will, if construed according to the rules laid down in *Hull* v. *Culver*, 34 Conn., 404, *McKenzie's Appeal from Probate*, 41 Conn., 607, and *Lewis* v. *Palmer*, 46 Conn., 454, would have vested an absolute title to the land in question in the widow of the testator, or at least such an absolute power of disposal as would enable the plaintiffs to gain a title by adverse possession against her alone. The court below adopted a construction of the will most favorable to the defendants, and even under such a construction the plaintiffs maintained their title. It would not therefore be important to revise the ruling on this subject if the motion had raised the question, which it does not. The defendants find no fault with this ruling; and in the result of the case the plaintiffs were not prejudiced by it, even if it was erroneous.

A new trial is not advised.

In this opinion the other judges concurred.

JOSEPH A. THOMPSON AND ANOTHER, EXECUTORS, *vs.* CYRUS WHITE AND OTHERS.

*D*, desiring to obtain *B's* endorsement of his paper, in 1862 executed to him a note for $5,000, payable to *B* or bearer in five years with interest—to which was appended an agreement signed by *D* that the note should be secured by a mortgage and both held by *M*, who should deliver them to *B* when he had endorsed paper for *D* to the amount of $5,000. This paper was at once left with *M*. In 1863 *D* executed the mortgage stipulated for, which he procured to be recorded, and left with *M* to hold for the benefit of *B* or any other person who might be entitled to the benefit of it. The defeasance of the mortgage stated the condition of the note, that *B* should endorse the paper of *D* to the amount of $5,000, and provided for the deed being void if the paper so endorsed was paid. *B* did not know until some time after that this mortgage had been executed. Within a few months after its execution *B* endorsed two

notes for *D*, one of $1,500 and one of $1,600, on which *D* got loans of those amounts from *T*. These notes ran till 1867, the interest having been paid annually, when *D* wished to borrow enough more of *T*, upon *B's* endorsement, to make $5,000. *T*, *D*, and *B* met. The interest was reckoned on the two notes to date, a new note was made for $5,000 signed by *D* and *B* as makers, the latter as surety, the old notes were cancelled, and the balance of cash paid by *T* to *D*. *T* took this note and had taken the others in the belief that the mortgage given by *D* would secure them. The respondents had severally acquired interests in the mortgaged property after the execution of the mortgage. The mortgage, with the original $5,000 note secured by it, were in 1870 delivered by *M* to *D*, who kept them until 1878, when after a controversy had arisen between the present parties, he delivered them to the attorney for the petitioners. The petitioners were executors of *T*, and sought to foreclose the mortgage in question as security for the $5,000 note taken by *T*. Since the giving of that note both *D* and *B* had become bankrupt. Held—

1. That the delivery of the note and mortgage by *D* to the petitioners could not give them a validity which they had not had before.
2. That as by the terms of the agreement of 1862 under which the note and mortgage were made and which was referred to in the defeasance, they were not to be delivered until *B* had endorsed paper for *D* to the amount of $5,000, they could not take effect, as against the respondents, until such endorsements had been made.
3. That the mortgage did not, as against the respondents, operate as security for the notes of less amount than $5,000 which *B* had endorsed.
4. That the signing of the $5,000 note by *B* as joint maker with *D*, was not the liability which by the terms of the agreement *B* was to assume and the mortgage was to secure—and though this might be sufficient between the original parties it was not so against the respondents, as to whom the condition of the mortgage could not be changed.
5. That this $5,000 note could not be regarded as in part a renewal of the two notes of $1,500 and $1,600 which were included in it, both because in the absence of any finding to that effect it could not be presumed that the parties intended such a renewal, and because it did not appear that *B* had ever been notified as endorser of the non-payment of those notes; while if he had been discharged he could not, by voluntarily assuming the liability after such discharge, give the mortgage an effect against the respondents which it otherwise would not have had.

BILL for a foreclosure, brought to the Superior Court in Tolland County. The petitioners brought the suit as executors of Samuel Thompson. The following facts were found by a committee:—

In 1862 Lebbeus Bissell, of Rockville, in this state, agreed to indorse paper for Albert Dart, also of Rockville, to an amount not exceeding $5,000 at any one time for the term of five years. For the purpose of securing Bissell Dart executed an instrument in writing as follows:—

"Rockville, August 28th, 1862.

"Five years from date I promise to pay Lebbeus Bissell or bearer five thousand dollars, value received, with interest annually. ALBERT DART."

"The condition of this obligation is—This bond or note shall be held in trust by Moses B. Bull, and shall be secured by a mortgage deed and made part and parcel of the same. When Lebbeus Bissell has endorsed to the amount of five thousand dollars for the term of five years from the date of this note, then it shall be delivered to Lebbeus Bissell or the holder of such endorsed paper. Rockville, August 28th, 1862. ALBERT DART."

On March 12th, 1863, Dart executed the mortgage of that date which the petitioners now seek to foreclose. That mortgage was recorded on the day of its date. Bissell did not know of its existence at the time; and it does not appear that he had any knowledge of it before June 27th, 1864. Its defeasance was as follows:—"The condition of this deed is such that whereas the said grantor has executed a certain bond or obligation, dated August 28th, 1862, payable to said grantee or assigns, conditioned that the said grantee endorse the notes or paper of the said grantor for the term of five years from the date of said bond, to an amount not exceeding at any one time the sum of five thousand dollars; now therefore, if said grantor shall well and truly pay said notes or paper so endorsed according to the provisions of said bond, and save the said Bissell harmless therefrom, then this deed shall be void, otherwise to remain in full force and effect."

On the 22d of April, 1863, Dart borrowed of Samuel Thompson, the petitioners' testator, $1,500, and gave his note therefor indorsed by Bissell. On the 27th of June, 1864, he borrowed of him $1,600 more on a note indorsed in like manner. How these notes were written or when they fell due was not shown. About May 1st, 1867, he desired to borrow enough more of Thompson to make the sum of $5,000. On that day Thompson, Dart and Bissell met. The

interest on the $1,500 note had been paid to April 22d, 1867, and on the $1,600 note to June 27th, 1866. Bissell was never notified as indorser of the non-payment of either of these notes. At that time there were no other notes outstanding on which Bissell had been liable as indorser. The parties however treated these notes as though he was still liable on them, computed the interest thereon to that date, and the difference between the amount and $5,000 Thompson at once loaned to Dart. Thereupon the two notes were given up and destroyed. Dart and Bissell executed and delivered to Thompson a note as follows:—

"Rockville, May 1st, 1867.

"Three years from date, I, Albert Dart as principal, and Lebbeus Bissell as surety, jointly and severally promise to pay Samuel Thompson or order five thousand dollars, with interest annually. ALBERT DART,
LEBBEUS BISSELL."

The interest on that note was paid to May 1st, 1869.

At the time this note was given there was conversation about the security. A note for $5,000 in proper form to be endorsed by Bissell was drawn, but Thompson preferred to have the joint and several note of Dart as principal and Bissell as surety, instead of a note of Dart indorsed by Bissell. Thompson inquired if the taking of the new note in the form of principal and surety as finally signed would impair the security. Some one, it did not appear who, but in the presence and hearing of all three, replied that the security would not be affected. Thereupon the $5,000 note was made and balance lent as above stated. Thompson at all times understood that he had mortgage security for his advances to Dart. It did not appear that at this time he had examined the mortgage in dispute, or knew exactly what the security was if he had any. But he did rely to some extent upon the mortgage security as well as upon the names of Dart and Bissell.

The instrument dated August 28th, 1862, was delivered to Moses B. Bull, then the town clerk of Vernon. In 1870 Dart

received it with other papers from Bull, but did not know that he had it until 1872. He retained it in his possession, but notified Thompson that he knew where it was. In 1878, after the present controversy had arisen, he delivered it to the attorney for the petitioners, but neither it nor the mortgage was ever delivered to Bissell or Thompson.

In October, 1863, Dart mortgaged to one Thrall certain real estate, including the premises, subject to the mortgage to Bissell, for $5,000. In 1864 he mortgaged a part of the premises with other property to the Willimantic Savings Institute, covenanting that all the property mortgaged was free from encumbrance. That mortgage by subsequent transfers became vested in the Merchants' Loan and Trust Company, one of the respondents. On the 10th of January, 1868, Dart mortgaged the premises free from encumbrance to the Rockville Savings Bank. This mortgage is now owned by the respondent White. In April and December following the same premises by successive mortgages were mortgaged to White. A detailed statement of the interests of the several respondents is not necessary.

In 1870 Bissell went into bankruptcy under the United States bankrupt act and afterwards obtained a discharge from all his debts. Dart went into bankruptcy in 1871, but did not obtain a discharge. He has ever since been insolvent.

None of the money lent by Thompson to Dart has been repaid to him or his executors. He died June 22d, 1875. The respondent White is in possession of the disputed premises, which are of the value of $2,500.

Upon these facts the case was reserved for the advice of this court.

*M. R. West* and *D. Marcy*, for the petitioners.

1. The mortgage does not purport to secure the bond of August 28th, 1862, but in express terms secures the notes of Dart that should be endorsed by Bissell to an amount not exceeding $5,000. It is predicated upon the liabilities arising by reason of certain notes made by Dart and endorsed by Bissell pursuant to the provisions of the bond, which provi-

sions are recited in the mortgage, and are that "the grantee endorse the notes of the grantor for the term of five years from the date of said bond to an amount not exceeding at any one time the sum of five thousand dollars," and it is upon the payment of the notes so endorsed, and the saving of Bissell harmless therefrom by the grantor, that the deed is to be void. Here, then, without further knowledge of the bond, is certain definite information of the character of the liabilities to be secured. There is also a definite limit of the liability to be incurred, namely, $5,000. There also is given such definite information as to put a person upon inquiry and as points out a precise course by which he may ascertain at any time the exact amount of such liability; and this mortgage, without other proof of the provisions of the bond, constitutes a valid incumbrance upon the land therein described for liabilities incurred within its provisions.

2. The mortgage constituted valid security for the payment of such of Dart's notes as were endorsed by Bissell pursuant to its provisions as well as security for the indemnity of Bissell for such endorsements. In *Potter* v. *Holden*, 31 Conn., 385, DUTTON, J., says, "Where creditors are not concerned, we think parties may in general make such contracts, not in violation of law, as they think proper. A mortgagor may secure an endorser for his own personal liability only, or he may secure the notes which he has endorsed. It is frequently difficult to tell which of these was intended, but there can be no doubt that the parties can do whichever they choose." And it may be added that they can do both. In this mortgage the language of the defeasance is, "Now, therefore, if said grantor shall well and truly *pay said notes or paper* so endorsed according to the provisions of said bond, and save the said Bissell harmless therefrom, then this deed shall be void." In *Jones* v. *Quinnipiack Bank*, 29 Conn., 25, language upon its face of similar import was held to constitute a mortgage for indemnity only, but in that case no fact apparent upon the face of the mortgage or found in connection with its execution and delivery or otherwise, showed that the parties ever intended that it should

operate in any other manner. In this case the mortgage refers to the bond or obligation, and the bond, upon its face, shows that it was to be secured by a mortgage, and might be delivered to the holder of the endorsed paper, and so operate as security therefor. The fact is found that the mortgage was delivered to Bull for the benefit of Bissell, *and any person who might be entitled to the benefit of the same.* These facts show that it was clearly the intention of the parties to the mortgage that it should operate as security for the notes, and it should be so construed, such construction being clearly consistent with the language used in the defeasance, and, being so construed, the holders of the notes are entitled to the benefit of the security. But if it should be held that the mortgage was given merely to indemnify Bissell for his endorsements, still inasmuch as the legal title to the mortgage, ever since its execution, has been and now is vested in Bissell, and he, by reason of bankruptcy, has been discharged from liability on all of these notes, and Dart is insolvent, the holders of the notes are in equity entitled to have such security made available for their payment. *Homer* v. *Savings Bank*, 7 Conn., 478; *New London Bank* v. *Lee*, 11 id., 112; *Thrall* v. *De Forest*, 20 id., 427; *Stearns* v. *Bates*, 46 id., 306.

3. The note of May 1st, 1867, for $5,000, signed by Dart as principal and Bissell as surety, was made by them and taken by Thompson under the understanding and belief of all the parties that it was secured by the mortgage, and in equity it should be held to be so secured; but if not, then inasmuch as the $5,000 note has never been paid, the $1,500 and $1,600 notes which were taken up and included in the $5,000 note, under that understanding and belief, will not be deemed to have been paid, but for the purpose of security for the money loaned on them, and for the purposes of this mortgage, the same liability will be regarded as still existing in respect to these two notes as existed at the time they were so surrendered, notwithstanding such surrender. No change in the form of the liability originally incurred by the endorsements, whether by the renewal of the notes, by giving others with like endorsements, or by the substitution of other

notes to which the original endorser is a party as maker, will affect the mortgage security of the endorser so long as the liability of the endorser is preserved. *Bolles* v. *Chauncey*, 8 Conn., 392; *Pond* v. *Clarke*, 14 id., 334; *Boswell* v. *Goodwin*, 31 id., 74; *Pomroy* v. *Rice*, 16 Pick., 22. The $1,500 and $1,600 notes, as made by Dart and endorsed by Bissell, were made and endorsed strictly within the provisions of the mortgage, and were intended by Dart to be, and were taken by Thompson as, secured by the mortgage, and the mortgage became a valid incumbrance for the indemnity of Bissell for his endorsement of them. The indebtedness to Thompson as the holder of these two notes has never been paid, and the liability of Bissell as the endorser of these notes has been continued in the $5,000 note as a part of the consideration thereof, and no new credit has been given by Thompson or by Bissell on account of so much of the $5,000 note as was made up by the renewal of the two notes, and so in any event the mortgage must be held as a valid incumbrance for these two notes.

4. The facts found show that Bissell was liable as endorser on the two notes at the time of their surrender—either that the notes were not then overdue, or that he had waived notice at the time of his endorsement. He had agreed to endorse for Dart to an amount not exceeding at any one time $5,000. He had mortgage security for these endorsements and also providing for his endorsement for the term of five years. The interest had been paid regularly each year on these notes. Dart, Thompson and Bissell all treated the notes as though Bissell was then liable thereon. Bissell, by the $5,000 note, agreed to pay them. From the understanding found by the committee to have been had by the parties at the time, it is evident that no new credit was intended to be given in respect to the loan secured by the two notes. It is a presumption of reason sustained by the common experience of mankind that a man will not pay a debt which is not due, nor acknowledge the existence of a debt for which he is not liable. *Breed* v. *Hillhouse*, 7 Conn., 523; *Hayes* v. *Werner*, 45 id., 246.

5. But if the notes were overdue at the time of the substitution, still the contract implied by the endorsement was such that the endorser might be held liable without the usual conditions precedent having been performed by the holder, if the endorser expressly waived the performance of those conditions, and a subsequent express promise to pay the notes made with a knowledge on the part of the endorser of the failure of such performance would be a waiver. *Breed* v. *Hillhouse*, 7 Conn., 523; *Hayes* v. *Werner*, 45 id., 246; *Hopkins* v. *Liswell*, 12 Mass., 52; *Phillips* v. *Thompson*, 2 Johns. Ch., 418. The fact that notice of the non-payment of these two notes was not given must have been known to Bissell, for he was the party to be notified, and, having full knowledge of this want of notice, he expressly promised to pay the notes and therefore waived notice. "While it is everywhere said that the endorser's liability is conditioned upon due demand and notice, it should be remembered that the condition is not a strict and absolute condition precedent, as conditions in contracts construed by the common law. The obligation of the endorser is regarded rather as voidable by non-fulfillment of these conditions than as actually avoided. The right to waive or to insist upon the performance of the conditions precedent implied in the contract of endorsement is a right personal to the endorser, and his action in the premises is conclusive upon all parties interested." 2 Daniel on Neg. Instruments, §§ 1147, 1150, 1152; *Bickerdike* v. *Bollman*, 1 T. R., 405. This principle is analogous to the one that prevails in respect to taking advantage of infancy, the statute of limitations, the statute of frauds, and the statute in relation to usury, to avoid contracts, except that in one case the contract is avoided by the non-performance of the conditions precedent unless waived by the endorser, and in the other cases the contracts are binding unless avoided by the party sought to be held by the contract. *Cahill* v. *Bigelow*, 18 Pick., 369.

*A. P. Hyde* and *W. W. Hyde*, for the respondents.

CARPENTER, J. The petitioners claim a decree upon the

familiar principle that security to a surety inures in equity to the benefit of the creditor. Our first inquiry is, therefore, whether Bissell, the surety, had any security which he could enforce against subsequent encumbrancers. Of course it is not necessary to inquire what rights he may have as against Dart.

The condition in the mortgage under consideration is as follows:—"The condition of this deed is such, that whereas the said grantor has executed a certain bond or obligation, dated August 28th, 1862, payable to the said grantee or assigns, conditioned that the said grantee endorse the notes or paper of the said grantor for the term of five years from the date of said bond, to an amount not exceeding at any one time the sum of five thousand dollars; now therefore, if the said grantor shall well and truly pay said notes or paper so endorsed according to the provisions of said bond and save the said Bissell harmless therefrom, then this deed shall be void."

The instrument thus described is not evidence of any indebtedness from Dart to Bissell. The writing was not intended as evidence of debt, but was intended as collateral security for a contingent liability. Now this writing, such as it was, was not by its terms to be delivered to Bissell until he had indorsed to the full amount of $5,000. He never did so indorse, and the writing was never in fact delivered to him, or to any holder of the indorsed paper. It remained in the hands of Bull and of Dart until three years after Thompson's death, which occurred in 1875, when, after a controversy had arisen between Dart and White, Dart delivered it to the attorney for Thompson's executors. Up to that time it was inoperative—so much dead paper. We do not think that such a delivery imparted any vitality to it.

But if it may be regarded as a good delivery they took nothing by it, because by its terms they were not entitled to it.

It is said however that the mortgage was not intended to secure that writing, but the notes or paper indorsed by Bissell. That is true with this qualification, that it was intended only to secure notes and paper indorsed according to the

terms of that writing, and by those terms the full amount of $5,000 must be indorsed before the writing could take effect, as we cannot presume that the writing was to take effect until delivered.

But it may be said that Bissell, in respect to the note signed by him, was a mere surety, and that that was in substance what the parties contemplated. That might do as between the original parties, but it will not do as between the mortgagee and subsequent incumbrancers. That would be substituting one debt, entirely different in its nature and character, for another; an absolute indebtedness for a contingent liability; and that is not allowable. *Bramhall* v. *Flood*, 41 Conn., 68; *Merrills* v. *Swift*, 18 Conn., 257.

It is further contended that the two notes were indorsed by Bissell pursuant to the arrangement, that the transaction of May 1st, 1867, was not a payment but a renewal of them, and that, notwithstanding the amount was less than was contemplated, the mortgage should in equity be regarded as securing those notes.

It looks very much as though Dart intended to induce Bissell to indorse for the full amount by providing that he should have no security before he had so indorsed. If that be so we cannot hold that to be within the mortgage which the parties have carefully excluded. But however this may be, there are two other fatal objections to this claim. First, there is no evidence that Bissell was liable on those notes when the note for $5,000 was signed by him. One note had run over four years and the other over three. It is found that Bissell had never been notified of the non-payment of either of these notes, and it does not appear that they were not then due. The burden was on the petitioners to show a then existing liability, and they have not shown it. If the indorser had been discharged by the laches of the holder the security was gone, and no waiver by the indorser would revive it. Second, it is not found, and the transaction as reported does not show, that the notes were renewed; on the contrary it shows that the parties did not intend to continue that form of liability. Presumptively the notes were overdue, and the

indorser discharged; the interest was computed on them, the indebtedness was largely increased, the old notes were destroyed and a new note taken for the increased amount, which Bissell signed as maker. In the absence of any finding to that effect we cannot presume that the parties intended by this a renewal of the old notes.

It is unnecessary to consider the other questions in the case.

Judgment is advised for the respondents.

In this opinion the other judges concurred.

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GEORGE H. WHITAKER *vs.* JAMES B. TATEM AND OTHERS.

In an action of trespass the jury returned the following verdict:—In this case the jury find the issues in favor of the plaintiff, and that he recover of the defendants *T* and *C* one hundred and seventy-five dollars—to be divided as follows: against *T* seventy-five dollars, against *C* one hundred dollars. Held not to be a legal verdict.

And held that the apportionment of the damages between the defendants was not to be taken as surplusage and the verdict held good for the whole sum against both. (Two judges dissenting.)

TRESPASS for an assault and false imprisonment; brought to the Superior Court in Windham County, and tried to the jury before *Sanford, J.* Verdict for the plaintiff against two of the defendants, and motion in error by them. The case is fully stated in the opinion.

*T. E. Graves* and *C. E. Searls*, for the plaintiffs in error.

*S. H. Seward*, with whom was *H. Johnson*, for the defendant in error.

GRANGER, J. This is an action of trespass, for assault and battery and false imprisonment, and was tried to the jury upon the general issue and notice. There were four defendants. The jury returned the following verdict:—

"In this case the jury find the issues in favor of the plaintiff as against the defendants James B. Tatem and Haskell F. Cox, and in favor of the defendants, Edward W. Warren and Calvin M. Brooks; and therefore find for the plaintiff to recover of the defendants James B. Tatem and Haskell F. Cox, the sum of one hundred and seventy-five dollars damages and his costs; the damages assessed by the jury to be divided as follows:—against James B. Tatem, seventy-five dollars ($75); against Haskell F. Cox, one hundred dollars ($100)."

The court accepted the verdict and rendered judgment for the plaintiff to recover of the defendants Tatem and Cox the sum of one hundred and seventy-five dollars and his costs. The defendants moved in arrest of judgment for the irregularity of the verdict. The case is before us upon the motion in error filed by the defendants upon the overruling of their motion in arrest.

The only question is, Was the verdict regular and legal? A majority of the court think it was clearly irregular and illegal, and that the court erred in accepting it and rendering judgment upon it. It is elementary law that verdicts must correspond with and be responsive to the issues joined in the cause. The issue in this case was whether the defendants or any of them were guilty of an act of trespass against the plaintiff, and, if so, how much damage he had sustained;—not how much damage he had sustained by the act of Tatem and how much at the hand of Cox, nor how much as a matter of equity between themselves each one ought to pay. There is no contribution between joint trespassers and the jury had no power to determine how much each one should pay. It is true the court disregarded that part of the verdict which apportions the damage and rendered judgment against both defendants for the whole sum. But this judgment does not correspond with the verdict of the jury. We think it very apparent that the jury considered the apportionment an essential part of their verdict, and it is more than probable that no verdict would have been rendered for the plaintiff had they supposed that their assess-

ment of damages between the two defendants as they returned it would be disregarded and that each would be held, as the law holds them, liable for the whole sum. And as this court said in the case of *Roberti* v. *Atwater*, 42 Conn., 270, "The verdict is faulty in substance. The issue was—had the defendant done the wrong and disseisin charged in the declaration." The jury in that case found the issue for the plaintiff, that he recover the seisin and possession, and that the defendant have until a day named to remove the barn. "It is clear (the court say further) that the jury believed that they were authorized to name a day in the future prior to which the defendant might enter upon the plaintiff's land without consent and remove the barn. It is presumed that this belief entered into and produced the verdict, and that the jury would not have agreed to any portion of it as actually rendered unless this condition had been embodied in it. To strike off this condition and allow the remnant to stand is for this court to make and record a verdict which the jurors refused to render. They practically declared themselves unable to agree upon one within legal limits and we cannot perfect that which they left thus imperfect." We think these suggestions applicable to the present case. We have no doubt that the jury believed that they had a right to apportion these damages, and that they made this an essential element in their verdict, and as we have said, might never have come to a result in favor of the plaintiff but for this belief.

Again, to sanction such a verdict would be to infringe upon the orderly and well-settled practice of the courts and encourage a species of jury-room arbitrament and assessment of damages among defendants whom they wished to favor, if there should happen to be any such. The court should have instructed the jury that the apportionment of damages was beyond their province and requested them to strike it out of the verdict, and upon their refusal so to do should have arrested the judgment.

There is error in the judgment complained of.

In this opinion CARPENTER and PARDEE, Js., concurred.

LOOMIS, J. (dissenting). I think the plaintiff has a clear legal right to retain his verdict and judgment for one hundred and seventy-five dollars damages against both defendants jointly.

In Gould's Pleading, chap. 10, sec. 57, p. 522, it is said that "a verdict finding the whole issue or the substance of it, is not vitiated by finding more; for the finding of what was not in issue is but surplusage, and *utile per inutile non vitiatur.*" This proposition is well supported by the authorities. Bacon's Abr., *Verdict, N.; Bacon* v. *Callender*, 6 Mass., 303; *Halsey* v. *Woodruff*, 9 Pick., 555; *Currier* v. *Swan*, 63 Maine, 323; *Windham* v. *Williams*, 27 Miss., 313; *O'Shea* v. *Kirker*, 4 Bosw., (N. Y.) 120.

I know of no conflicting authorities, and the principle is applicable to the case at the bar, for the verdict contains every element of a valid verdict, not only in substance but in form. The issue is directly found for the plaintiff and against both defendants jointly. The damages which the plaintiff sustained are found to have been one hundred and seventy-five dollars, and the jury find for the plaintiff to recover that entire sum of both defendants with his costs.

So far the verdict was absolutely complete and perfect and the jury had no further jurisdiction. They did however append to this formal and complete verdict, in a detached paragraph, these words: "The damages assessed by the jury to be divided as follows: against James B. Tatem seventy-five dollars; against Haskell F. Cox one hundred dollars." In so doing they transcended the limits of their duty and their jurisdiction and found "more than was involved in the issue," but under the rule above cited this part may be rejected as surplusage, and a perfect verdict will remain.

To construe the verdict as a several one against each of the defendants for the respective sums mentioned, seems to reverse the established rule by rejecting the legal part as surplusage instead of that which is illegal. All the analogies of the law forbid such a course. If, for instance, a judgment be erroneous only in part and that part be divisible, it will be reversed only as to that part. *Reynolds* v. *Reynolds*,

15 Conn., 101; *Sherwood* v. *Sherwood*, 32 Conn., 15. So also if on the whole record the law of the case is with one party, though the verdict be for the other, there may be a judgment for the former, *non obstante veredicto*. *Fitch* v. *Scott*, 1 Root, 352. In a criminal case where the court sentenced the prisoner to "pay a fine of thirty dollars," adding "which is to be paid to the treasury of New Haven County," it was held that the latter clause might be rejected as void, so that the judgment to pay the fine might stand in full force. *Barth* v. *The State*, 18 Conn., 442.

The rule as to verdicts ought to be and is less technical than that applicable to judgments, and requires that they be supported, if it may be done, by any reasonably liberal interpretation. *Huntington* v. *Ripley*, 1 Root, 321; *Simmons* v. *Rarden*, 9 Geo., 543; *Elkins* v. *Parkhurst*, 17 Verm., 105.

In this case manifest justice, as it appears from the entire record, requires that the verdict be sustained. Every element of the plaintiff's case, including the damages, is directly found by the jury, and this finding is in no wise impaired by the additional words, giving them the strictest construction against the plaintiff; but giving them a liberal construction with a view to support the verdict and they amount to no more than a recommendation on the part the jury for an equitable apportionment of the entire damages as between the defendants, who may not in a moral point of view have been responsible to the same extent, though the jury had just found them legally so by finding for the plaintiff to recover the entire sum of both.

In *Currier* v. *Swan*, supra, the jury rendered a verdict in regular form, in an action of tort against four persons, and appended to it an apportionment of the damages among the several defendants, and it was held that the attempted apportionment amounted only to a recommendation, and if it was intended as anything else it was mere surplusage, to be rejected as irregular and void.

I cannot believe the jury had any idea of having two separate judgments, because it is utterly inconsistent with the formal joint verdict they had deliberately agreed upon.

But the case of *Roberti* v. *Atwater*, 42 Conn., 266, is confidently relied upon as sustaining the majority opinion. In this case it seems that the defendant had a barn on the plaintiff's land and that the latter brought ejectment against him on that account. The jury found for the plaintiff to recover the possession, adding "and that the defendant have until June 1, 1875, to remove the barn." The fixing of a time in the future for the defendant's complete ejectment was not only repugnant to the body of the verdict, but virtually made it partly in favor of the plaintiff and partly for the defendant: and it suggests the idea that it was based on the belief that the defendant had a right to keep his barn on the premises until the time for removal specified, and if this was so, the verdict should have been wholly for the defendant, inasmuch as the plaintiff had no immediate right of possession.

But in the case at bar, unlike the above, the surplusage was not of a nature to indicate that the jury must have reasoned incorrectly or from false premises, and hence it should not vitiate the part which is clearly valid. *Gregory* v. *Frothingham*, 1 Nev., 256.

I think there was no error in the judgment complained of.

In this opinion PARK, C. J., concurred.

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## CITY OF HARTFORD *vs.* CALEB M. TALCOTT AND ANOTHER.

The charter of the city of Hartford authorizes the common council to pass an ordinance for the keeping of the streets open and safe for public use. The council passed an ordinance requiring every owner or occupant of a building or lot bordering upon a street with a paved or graded sidewalk, to remove from the walk all snow and ice within a certain time after it had fallen or formed, and imposing a penalty of two dollars for every twelve hours of neglect of the duty after notice from a policeman. The defendants who owned premises fronting upon a public street and sidewalk neglected beyond the time limited to remove snow and ice that had accumulated upon the walk and ren-

dered it unsafe, and a person passing by upon it fell and was injured, and afterwards recovered damages therefor from the city. In a suit brought by the city to recover the amount from the defendants, it was held that they were not liable.

Such a proprietor owes no duty to the public in reference to the way except to remove from it all property of his own that obstructs it and to refrain from doing any thing to render it unsafe for travelers. So far as defects in it result wholly from the operations of nature he is without responsibility for them.

It was the duty of the city to keep its streets open and safe for public travel and this duty extended to that portion used exclusively by foot passengers.

The provision of the charter authorizing the council to pass an ordinance for keeping the streets open and safe for public use, did not give it power to transfer the responsibility for injuries caused by defects from the public to an individual not responsible for their existence. All it could do was to require each proprietor or occupant to assist the city in restoring the walk to a condition of safety, with a fixed and reasonable penalty for disobedience.

But the city would remain answerable for injuries resulting either from the negligence of the proprietor or its own omission to act.

And as the ordinance provides for a fixed penalty, the city has barred itself from enforcing an indefinite liability beyond this.

CIVIL ACTION to recover of the defendants the amount of a judgment against the plaintiff city for damages for an injury caused by ice upon a sidewalk in front of their premises; brought to the Court of Common Pleas of Hartford County.

The defendants were proprietors of premises fronting on Asylum Street in the city of Hartford. Snow and ice had accumulated and for several days been allowed to remain upon the sidewalk in front, rendering the walk dangerous for persons passing over it. A foot passenger slipped upon it and was injured, and in a suit against the city recovered judgment for damages. This judgment the city paid and brought suit to recover the amount from the defendants. An ordinance of the common council of the city, important in the case, is given at length in the opinion of the court.

The case was reserved for the advice of this court.

*C. E. Perkins*, for the plaintiffs.

The question of the liability of owners of premises adjoining streets, to the city or other corporation whose duty it was to keep such streets in repair, for obstructions to travel existing by the negligence of the owners, has often arisen and been decided. The cases are well summed up in 2 Dillon on

Municipal Corporations, § 795, as follows:—"If a municipal corporation be held liable for damages sustained in consequence of the unsafe condition of the sidewalks or streets, it has a remedy over against the person by whose act or conduct the sidewalk or street was rendered unsafe, unless the corporation was itself a wrong doer as between itself and the author of the nuisance." It has been settled by many decisions that if the owner of premises in a city adjoining the highway makes an excavation in the sidewalk, and does not guard it sufficiently, and an accident occurs therefrom for which the city is made liable, he is responsible to the city therefor. *City of Chicago* v. *Robbins*, 2 Black, 418; *Robbins* v. *City of Chicago*, 4 Wall., 657; *Portland* v. *Richardson*, 54 Maine, 46; *City of Norwich* v. *Breed*, 30 Conn., 535. The general principle as laid down by these cases will probably be admitted, but the case at bar will be claimed not to come within it.

It is claimed, in the first place, that these were cases where the owner had by his act caused the obstruction. This is true in some of the cases, but in others it is not. In *City of Boston* v. *Worthington*, 10 Gray, 496, the action was brought against the tenants of a building in front of which was a cellar-way which did not have a railing to protect it as required by law. It had been in that condition for twenty years, and there was no act whatever of the defendants which caused the injury. The only claim against them was their neglect to do an act required of them by the ordinances of the city, and the court held that they were liable. There is no reason why neglect to perform a duty imposed on the defendants should not make them liable as much as the performance of an act which was a breach of their duty, and it is believed that such a distinction is nowhere made by the authorities. In fact it would seem that a neglect of a specific duty imposed by an ordinance should render a person more clearly liable than a breach of an obligation only implied by law, like that of digging a hole in the highway. In many of the cases also the liability arose, not from making a hole in the highway, but from neglect of the duty of placing proper

barriers about it. *Lowell* v. *Boston & Lowell R. R. Co.*, 23 Pick., 24; *Milford* v. *Holbrook*, 9 Allen, 17; *Churchill* v. *Holt*, 127 Mass., 165; *Portland* v. *Richardson*, 54 Maine, 46. In all the cases the liability of the defendant is based upon this neglect to perform some duty imposed upon him, either by ordinance or the common law. Now in this case there was a duty imposed upon the defendants to keep the sidewalk in front of their premises in such a condition that it was safe for travelers. This duty they neglected, and it was from such neglect that the city has been obliged to pay this money. Their liability therefore would seem to be clear.

It is claimed in the next place, that the city was also negligent, because it was also its duty to have the ice removed, and to keep the sidewalk in safe condition, and, as it did not perform its duty, it is *in pari delicto*. But this argument, if sound, would have prevented recovery in all the cases cited. The injured person never could have recovered of the city unless it had been guilty of negligence, and until a recovery had been had it could not have sued the owner of the premises. All the authorities hold that in such cases the primary duty is placed on the owner and a secondary duty only upon the city. There is no joint wrong in which both are concerned. In many of the cases this claim has been made, but without success. The leading one on the subject is *Lowell* v. *Boston & Lowell R. R. Co.*, 23 Pick., 24. The defendants there made an excavation in the road, which they had a right to do. They did not, however, put up proper barriers to protect travelers, and an injury occurred for which the town was held liable, and this suit was brought against the railroad company. This point was quite fully considered by the court and it was held that it was the duty of the defendants in the first instance to put up barriers. The town, it was true, ought to have put them up if the defendants did not, and as they omitted their duty was liable to the person injured, and the court says, (page 34:) "The defendants' agent who had the superintendence of their works was the first and principal wrong-doer. In his negligence the plaintiffs had no participation." This decision has been followed ever since in

Massachusetts and elsewhere. *Milford* v. *Holbrook*, 9 Allen, 17; *Gray* v. *Boston Gas Light Co.*, 114 Mass., 149; *Portland* v. *Richardson*, 54 Maine, 46; *Brooklyn* v. *Brooklyn City R. R. Co.*, 47 N. York, 475; *Robbins* v. *City of Chicago*, 4 Wall., 657. The only case which may be claimed to be opposed to the ones cited is *Keokuk* v. *Independent District*, 53 Iowa, 352. That was an action against a school district for not keeping the sidewalk in front of its premises in repair, whereby a person was injured, and recovered judgment against the city. The court held the defendant not liable on the curious ground that the school district was the agent of the city to keep the sidewalk in repair, and therefore its negligence was that of the city, and of course the city could not recover of any one for its own negligence. No question of joint tort was considered or decided. The distinction between that case and the one at bar is obvious.

Various authorities are cited by the defendants, holding that persons injured by falling upon ice on the sidewalks have no redress against individuals whose duty it was, under the ordinances of the city, to remove it. But none of these were cases between the city which by reason of such neglect had been obliged to pay such damages and such individuals, and the case already cited of *City of Boston* v. *Worthington*, holds that the city can maintain such action; and we know of no case that holds the contrary.

It may be also claimed that as a penalty is annexed to the breach of duty no other liability is incurred, but this principle is confined to cases like those last above referred to, which hold that private persons injured by the breach of the statute have no remedy. In a case like that at bar the breach of duty is towards the city itself; a primary obligation is laid on the owner of the land, and for such breach of duty he may well be liable to the city, though not to private persons who are injured. *Brooklyn* v. *Brooklyn City R. R. Co.*, 47 N. York, 475. Moreover in this case the ordinance is one making the leaving the ice and snow a nuisance, and our courts hold that the city is liable for its non-removal, neither of which appear to have been the case in the cases cited.

It makes this therefore like all the cases cited where the abuttor has been guilty of placing or maintaining a nuisance in the highway. It would hardly be claimed that if a person digs a hole in the highway he is liable to the city for the damages caused thereby, but that if the city passes an ordinance prohibiting it and imposing a fine, the liability to the city for damages is thereby destroyed.

*E. B. Bennett*, for the defendants.

1. The city of Hartford by its charter has assumed the exclusive control of its streets and sidewalks; the making, altering, repairing, and keeping of them safe for public use and travel. Charter, 10, 101. Incidental to this obligation is the duty of keeping its sidewalks free from snow and ice, or in such a condition as not to be unsafe for travel by reason thereof. *Congdon* v. *City of Norwich*, 37 Conn., 419; *Landolt* v. *City of Norwich*, id., 616.

2. The city ordinance relating to snow and ice provides whose duty it shall be to clear the sidewalks, when and how it shall be done, what penalties persons neglecting or refusing to perform this duty shall be liable to pay, and how the expense of clearing the sidewalk, if done by the police, shall be collected. And the police force, under the direction of the chief of police, has supervision of the whole matter. City Charter & Ordinances, 239, 240, 241.

3. The only obligation to clear the sidewalk resting on the defendants is that imposed by the city ordinance. The duty imposed is to make the sidewalk safe and convenient by removing the ice therefrom, or by covering it with sand or some other suitable substance. The liability for neglecting or refusing to perform that duty, after notice, is to pay a specified penalty; and, in case the chief of police shall cause the sidewalk to be cleared, to pay also the expense of such clearing. The duty, the offence, and the penalty, are created in the same section of the ordinance. When the right or duty is entirely the creature of the statute, and a specific remedy is provided by the statute for its enforcement, that remedy, and that only, must be pursued, unless the remedy

does not cover the entire right. 1 Addison on Torts, (D. & B., Am. ed.) ch. 1, sec. 2, art. 58; *Hartford & N. Haven R. R. Co.* v. *Kennedy*, 12 Conn., 526. The remedy provided here covers the entire right. The ordinance simply prohibits the owner of a lot adjoining the street from allowing ice to remain on the sidewalk uncovered by sand or other suitable substance, and affixes a penalty for the neglect. The penalty is the only liability. *Barden* v. *Crocker*, 10 Pick., 389; Cooley on Torts, 653. But this is not a general statute, it is only a city ordinance; and ordinances are in their nature strictly local and subordinate to the charter and general laws, and cannot enlarge or change them. 1 Dillon Mun. Corp., §§ 251, 263; *Southport* v. *Ogden*, 23 Conn., 132; *Heeney* v. *Sprague*, 11 R. Isl., 462. The city charter provides that ordinances may be enforced by imposing penalties and forfeitures of goods and chattels. Charter, 14. When the charter prescribes the manner in which by-laws are to be enforced, this constructively operates to negative the right of the corporation to proceed in any other way or to inflict any other punishment. 1 Dillon Mun. Corp., §273. The duty of keeping the streets and sidewalks safe for public use and travel being imposed on the city by its charter, it cannot by an ordinance shift this duty upon a lot-owner in such a manner as to make him liable in tort for negligence. 2 Addison on Torts (D. & B. Am. ed.) ch. 25, sec. 1, art. 1533; *City of Keokuk* v. *Independent District*, 53 Iowa, 352.

4. But by the terms of the ordinance the city has supervision of the whole business of clearing snow and ice from the sidewalk; the ordinance names the public officers whose duty it shall be, and provides in what manner they shall proceed to enforce it and collect the penalties, and finally how the sidewalk shall be cleared and the expense of such clearing collected. The record shows that in this case such supervision was not exercised. Had the police officers exercised such supervision, they would have known of the unsafe condition of the sidewalk, and would have had a reasonable opportunity to have made it safe before the injury occurred. Such clear omission of duty is negligence. *Boucher* v. *City*

*of New Haven*, 40 Conn., 460. The plaintiff having concurred in the wrong, has no right of action against the defendants. *City of Chicago* v. *Robbins*, 2 Black, 422.

5. The record shows that the injury resulted from snow and ice accumulated by natural causes on the sidewalk. The defendants are not responsible for injuries resulting from such a cause. *Kirby* v. *Boylston Market Association*, 14 Gray, 252; *Heeney* v. *Sprague*, 11 R. Isl., 461; *Flynn* v. *Canton Co.*, 40 Maryl., 325. The defendants are responsible neither for the origin nor continuance of the nuisance, and consequently are not liable in damages to the plaintiff.

PARDEE, J. The state places upon municipal corporations the burden of keeping the highways within their respective limits in a reasonably safe condition for public travel; and in cities and boroughs this duty is co-extensive with the width of the street, including that portion used by foot passengers exclusively. As both the carriage and foot-ways are for the convenience of the public and not for the especial use or benefit of adjoining proprietors under the general law, the money expended in maintaining, and in making compensation for injuries resulting from neglect to maintain them, is to be paid by the public from taxes assessed equally upon all property. The ownership of land upon a way does not carry with it the burden of an unequal contribution to either branch of these expenditures. The individual owes no duty to the public in reference to the way except to remove therefrom all property of his own which obstructs it, and to refrain from doing or placing anything thereon dangerous to the traveler. So far as defects in it result wholly from the operations of nature, the proprietor at whose front they exist is without responsibility for them. Therefore, where ice has accumulated upon the sidewalk to a dangerous extent it is the duty of the municipality to remove or cover it within a reasonable time after its formation.

The charter authorizes the council to make an ordinance regulating the keeping "open and safe for public use and travel, and free from encroachment and obstruction, the

streets, highways, passways and public grounds and places in said city." But there is in this language no grant of power to the council to change the general law and transfer the responsibility for injuries resulting from defects in the way from the public to an individual who is not responsible for their existence. The utmost reach of it is only to authorize the enactment of an ordinance requiring each proprietor upon the way to assist the city in restoring the walk to a condition of safety, with a fixed and reasonable penalty for disobedience.

The council enacted the following ordinance:—

"SEC. 11. The owner or owners, occupant or occupants, private corporation, or any person having the care of any building or lot of land bordering on any street, square or public place within the city, where there is a sidewalk graded, or graded and paved, shall cause to be removed therefrom any and all snow, sleet and ice, within two hours after the same shall have fallen, been deposited or found, or within three hours after sunrise, when the same shall have fallen in the night season.

"SEC. 12. Whenever the sidewalk or any part thereof adjoining or fronting any building or lot of land, or any street, square or public place, shall be covered with ice, it shall be the duty of the owner or owners, occupant or occupants, private corporation, or any person having the care of such building or lot, to cause such sidewalk to be made safe and convenient by removing the ice therefrom, or by covering the same with sand or some other suitable substance; and in case such owner or owners or other persons shall neglect so to do for the space of one hour during the daytime, the person or persons whose legal duty it shall be to so clear said walk and so neglecting, shall be liable to the penalty named in the succeeding section.

"SEC. 13. The owner or owners, occupant or occupants, private corporation, or any person having the care of any building or lot of land, and whose duty it is to clear the same, who shall violate any of the provisions of the eleventh or twelfth sections of this ordinance, or refuse or neglect to

comply with the same, shall pay a penalty of two dollars for every twelve hours such person, owner or owners, occupant or occupants, shall neglect to comply with said provisions, or any of them, after notice from any policeman of said city.

"SEC. 17. If any sidewalk shall remain encumbered with snow, ice or sleet, for twenty-four hours after the same has fallen or been deposited, the chief of police shall notify the owner or person having the charge or care of the lot or building bordering on such sidewalk and legally liable to clear the same; and if such sidewalk is not thoroughly cleared within twenty-four hours after such notice shall have been given, or properly covered with sand or some other suitable substance, the chief of police shall cause the same to be cleared, and collect the expense thereof of such owner or other persons: and the city attorney shall, at the request of the chief of police, collect by suit such expense as a debt due the city."

But, by passing this ordinance the city has not relieved itself from responsibility for the safety of travelers; it remains answerable for injuries resulting either from the negligence of the individual or its own omission to act. The labor performed by those who obey and the fines and expenses paid by those who do not, measure the extent of the advantages to be derived from the exercise of the power to pass it.

Moreover, there not being upon the individual any liability at common law for injuries resulting from obstructions in the way wholly the effects of natural causes, such liability is not brought into existence by force of declarations in the ordinance that the obstructions are nuisances, or that it is his duty to remove them; for, as the liability is the creation of the ordinance, it can be no greater than that specifically named therein; and as, in the one before us, the council measured it by a fine with cost of removal, the city has thereby barred itself from enforcing an unnamed and unlimited liability beyond. In the matter of statutory penalties the expression of a certainty prevents the existence of an uncertainty.

In support of his position counsel for the plaintiff has cited—*Robbins* v. *City of Chicago*, 4 Wall., 657, *Portland* v. *Richardson*, 54 Maine, 46, *Lowell* v. *Boston & Lowell R.R. Co.*, 23 Pick., 24, and *Brooklyn* v. *Brooklyn City R.R. Co.*, 47 N. York, 475,—but these are instances of excavations made and negligently left open in the way by the defendants; *Boston* v. *Worthington*, 10 Gray, 496, and *Churchill* v. *Holt*, 127 Mass., 165,—instances of cellar-ways opening into the street and negligently left unprotected—practically, daily digging and leaving open a dangerous excavation in the street; *Milford* v. *Holbrook*, 9 Allen, 17,—negligently permitting an awning to fall; *Gray* v. *Boston Gas Light Co.*, 114 Mass., 149,—negligently permitting a chimney to fall, *Norwich* v. *Breed*, 30 Conn., 535,—digging and negligently leaving unprotected an excavation on the defendant's land, but so dangerously near and open to the street as to be in effect an excavation therein. In eacll case the defendant placed a dangerous obstruction in the way, and of course for a time after doing the act was upon every principle responsible for the consequences, and that irrespective of any city ordinance.

The Court of Common Pleas is advised to render judgment for the defendants.

In this opinion the other judges concurred.

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STATE *vs.* LEONARD A. BRADLEY AND OTHERS.

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The only ground of challenge to the array at common law is partiality, fraud, or some irregular or corrupt conduct on the part of the returning officers. But under the practice in this state there is so little opportunity for such acts, that there can rarely be any ground for a challenge to the array.

Whether there can be a challenge to the array on the ground that the statute under which the jurors were selected is unconstitutional: *Quere.*

Jurors are not public officers within the meaning of the constitution and law.

It follows, therefore, that where jurors have been selected for a year, and an act

of the legislature is passed changing the mode of selecting jurors, and taking effect within the year, they may be superseded by the new jurors appointed under the act.

Also that a provision that jurors shall be not less than thirty years of age does not violate the provision of the constitution that "every elector shall be eligible to any office."

If a juror when in the discharge of his duties in court were to be regarded as an officer, yet an elector whose name is in the jury-box in his town, but has not been drawn out, would not be an officer.

A defendant would have no cause of complaint in the exclusion of a class of persons from the opportunity to become jurors, so long as the persons serving as jurors were legally qualified.

An information charged three defendants with a conspiracy to defraud a person of certain property, and that a forged deed was used as a means of accomplishing it, and that the property was obtained by the fraudulent means used. Held that the information did not charge the crime of forgery, nor that of getting goods by false pretences, but the crime of conspiracy.

It is not necessary to a conviction under a charge of conspiracy to obtain certain real estate by fraud, that it should be proved that the property had value. It is enough if it was property.

INFORMATION for a conspiracy to defraud; filed by the prosecuting attorney of the city of Hartford in the police court of the city. The information contained three counts, the second one being as follows:—

That Leonard A. Bradley, Charles E. Gager, and Albert F. Olmstead, of said city of Hartford, at and within said city, on the first day of May, 1878, did, among themselves, wickedly and unlawfully conspire, confederate and agree to cheat and defraud Thomas C. Pease of Enfield in said county, out of certain property, to wit: a certain house and lot situated on Wethersfield Avenue, in said city of Hartford, which was then owned by said Pease, and worth two thousand dollars, by the following false, fraudulent, and wicked representations, pretenses, devices, and unlawful means, to wit: that they, the defendants, should induce said Pease to exchange said real estate with the defendants for certain real estate located in Granville, in the state of Massachusetts, and to convey by deed to them his said real estate, and that in order to accomplish said exchange and trade the defendants should falsely, fraudulently and wickedly pretend, represent and say to said Pease that said real estate in Granville was worth four thousand dollars, and was subject only

to a mortgage of fourteen hundred dollars; that the same was owned by James Lyon of said Hartford; that it was located only three or four miles from the village of Westfield; that twenty-five acres of said land was well covered with heavy wood and timber; that there was on the same a fine granite house, and other buildings, all of which together could not be built for four thousand dollars; that much of said land was excellent land for raising tobacco; that other portions of said land would produce in a year hay enough to keep thirteen head of cattle, and that part was excellent pasture land; and that said Lyon had well and truly executed to said Pease a good and sufficient deed and conveyance of said real estate situated in said Granville; whereas in truth said last named real estate was not worth four thousand dollars, and not more than said mortgage of fourteen hundred dollars which was an encumbrance thereon, and was located eighteen miles from said Westfield, as the defendants then and there well knew, and no part thereof was covered with heavy wood and timber, or was good tobacco land, or good pasture land, or would produce hay enough in one year to keep thirteen head of cattle, which the defendants then and there well knew; and whereas in truth said James Lyon did not own said last named real estate nor any part thereof, and had not executed and never did execute to said Pease any deed of the same; all which the defendants then and there well knew; and all the buildings thereon were not worth over one hundred dollars, and could be built for less than four thousand dollars, as they then and there well knew. And said Attorney says that, in pursuance of said conspiracy, combination and agreement among them formed and had as aforesaid, they, the said Bradley, Gager and Olmstead, did then and there falsely, fraudulently and wickedly pretend, represent and say to said Pease that said real estate, situated in Granville, Massachusetts, was worth four thousand dollars, and was encumbered by a mortgage of fourteen hundred dollars, that the same was located only three or four miles from said Westfield, and that there was thereon a fine granite house and other buildings, all of which together

could not be built for four thousand dollars, that much of the same was excellent land for raising tobacco, and much of the same was excellent pasture land, that said real estate would produce in a year hay enough to keep thirteen head of cattle one season, that said James Lyon owned said real estate situated in said Granville, and had well and truly executed a certain deed to said Pease of said real estate, which pretended deed the defendants then and there showed and delivered to said Pease as and for a good and sufficient conveyance to him of said last named real estate, but which deed said Attorney says was only a false, fraudulent, forged, and pretended instrument, and did thereby induce said Pease to execute, and said Pease did execute and deliver to them a good and sufficient deed of the said house and lot on Wethersfield Avenue in said Hartford; and said defendants, by the aforesaid false, fraudulent, and wicked pretences, representations, devices, and unlawful means, did then and there willfully cheat and defraud him, the said Thomas C. Pease, out of his real estate, situated as aforesaid, on Wethersfield Avenue in said city of Hartford, of the value of two thousand dollars; all which is a high crime and misdemeanor, and against the peace.

The defendants were bound over to the Superior Court, and in that court demurred to the information, but the court overruled the demurrer and ordered them to answer over. They then severally pleaded "not guilty," and the case came to trial before *Sanford, J.*, and a jury.

The defendants then filed the following challenge to the array:—

The defendants challenge the array of jurors summoned for the trial of the above cause, because they say—

1st. That under the statute laws of this state the justices of the peace, selectmen, constables, and grand jurors in each town of Hartford County met according to law on the first Monday of January, 1880, and chose by ballot the number of jurors provided by law, to serve until the first Monday of January, 1881; that said jurors so chosen have not resigned their office as jurors, but still continue to be the lawfully

chosen jurors of said towns, and that the jurors upon this panel were not drawn or summoned from the jurors chosen as aforesaid, but were drawn and summoned from a body of so-called jurors chosen under the provisions of the eighty-second chapter of the public acts of 1880; and the defendants therefore say that the jurors upon this panel are not entitled to act as jurors in this cause.

2d. That said act of the General Assembly under which the jurors in this panel were chosen, drawn and summoned is unconstitutional and void, and the panel of jurors is therefore irregular and illegal and not qualified to serve in this cause.*

The court overruled the challenge, and the jury was empaneled from the jurors present with one talesman.

Upon the trial, the state having rested its case, the defendant offered in evidence a deed of the Granville property from Benajah H. Plato to James Lyon. The State's Attorney objecting to the deed on the ground that there was no proof of the signature, the defendants called Plato to prove his own signature, and asked him the single question whether the signature to the deed was his, to which he replied in the affirmative. The State's Attorney thereupon cross-examined him, and among other questions put the following: "Where is the property situated that is described in the deed? What is it, and what does it consist of?" To both of which the defendants objected, but the court in the exercise of its discretion overruled the objection, and permitted the Attorney to ask the questions and put in as a part of the evidence in the case the answers made by Plato.

*The statute referred to provided that all jurors should be not less than thirty years of age; that twice the number to which each town was entitled should be selected by the selectmen of such town in May of each year; that the judges of the Superior Court should at their annual meeting in June, appoint two persons who, with the sheriff of the county and clerk of the court for the county, should constitute a board of jury commissioners; that the commissioners should meet in July and examine the list of jurors named by the selectmen of each town in the county, and erase half the names, and that the persons whose names remained should be the jurors of such town for one year from the first day of September following. The act also provided that no verdict should be set aside solely on account of any irregularity in summoning the jury, nor for want of qualifications of any juror.

The defendants claimed and asked the court to charge the jury, that "the complaint charges the defendants with cheating and defrauding one Thomas C. Pease of certain property by means of certain false and fraudulent pretences, and the gist of the complaint is the cheating and defrauding by means of the representations and pretences alleged in the complaint." The court did not so charge, but charged as follows: "The complaint contains three counts. The first charges the crime of conspiracy to cheat and defraud Thomas C. Pease. The second count sets out all that is set out in the first count, and in addition sets out the unlawful means. The third count is for obtaining property by false pretences, but this count has been nolled by the Attorney. The first count is defective, and upon demurrer would have been held by the court insufficient, and no conviction should be had upon it, and your inquiries, therefore, will be confined to the second count. This is a count for conspiracy, and sets forth not only the unlawful means by which the accused proposed to accomplish their purpose, but also their overt acts. It was unnecessary to set forth these overt acts, for without alleging them they might be proved as matter in aggravation of the character of the conspiracy, or as evidence of the conspiracy itself. The conspiracy alleged is a conspiracy to cheat and defraud Pease out of his property. What was done in pursuance of the conspiracy is really of no consequence; they are not sought to be charged for the actual cheating and defrauding, for the offence is complete when and as soon as the agreement or conspiracy is entered into. The gist of the offense charged is not the cheating and defrauding, but the *conspiracy* or agreement to cheat and defraud."

The defendants further asked the court to charge the jury that, "in order to sustain the complaint the state must prove that the thing out of which Pease is alleged to have been cheated had some value, and in the absence of such proof there could be no cheating and no fraud, and the defendants ought not to be convicted." But the court did not so charge, but charged that, the gist of the complaint being the con-

spiracy, there could be a conviction without reference to the value of the property sought to be obtained.

The defendants further asked the court to charge the jury that "upon this complaint the defendants cannot be convicted of a conspiracy." But the court did not so charge, but charged that the second count was sufficient, and that on it the defendants might be so convicted; that it was a good count in conspiracy, notwithstanding the overt acts had been set out.

The jury returned a verdict of guilty against the defendants Bradley and Gager, and of not guilty in favor of the defendant Olmstead. Bradley and Gager moved for a new trial for error in the rulings and charge of the court, and also a motion in error.

*H. Willey* and *C. J. Cole*, in support of the motions.

*First.* The challenge to the array of jurors should have been sustained.

1. A juror is a public officer. 5 Bac. Abr., *Office and Officers, A;* Webster's and Worcester's Dictionaries, *Officer.* From a long time anterior to the adoption of our present constitution the policy of this state has been to appoint a body of men to act as jurors. Gen. Stat., 431. They are appointed under the authority of the state and are paid from the public funds.

2. The jury which tried this cause was not legally constituted, because on the first Monday of January, 1880, a body of jurors was chosen for the several towns in Hartford County to serve for one year. The act of 1880 attempted to substitute for them a new body of jurors from September 1st, 1880. This act did not attempt to increase the number of jurors, for the number remained the same; so it cannot be claimed that the new body of jurors is to be added to the old, and that together they are the jurors of the several towns. The legislature has no power to replace one set of officers by another. *State ex. rel. Birdsey* v. *Baldwin*, 45 Conn., 134.

3. The act is unconstitutional, because it provides that

"all jurors shall be electors not less than thirty years of age." Article 6th of the constitution of the state provides that "every elector shall be eligible to any office in this state, except in cases provided for in this constitution." The act is therefore in conflict with that section of the constitution.

4. The act is also unconstitutional because it provides "that no verdict shall be set aside on account of any irregularity in summoning the jury, or for want of qualifications of any juror;" while the constitution provides (Art. 1, sec. 9) that persons accused shall have a right to a trial "by an impartial jury," and (sec. 21) that "the right of trial by jury shall remain inviolate." This act provides that the jurors shall be taken from one class of electors, another class being excluded; that though the jury be summoned by a prejudiced officer in an improper manner, though the jurors be absolutely disqualified by relationship, interest, or prejudice, yet the party aggrieved shall have no remedy. Of what value is the constitutional provision that he shall have an impartial jury, if this statute is to be held valid which provides that he cannot take advantage of it?

6. The usual and only way to reach the defect is in the manner adopted in this case, by challenge to the array. *Colt* v. *Eves*, 12 Conn., 252; *State* v. *Wilson*, 38 id., 137.

*Second.* The court erred in overruling the demurrer to the complaint.

1. The first and third counts are clearly insufficient as counts for conspiracy. In sustaining those two counts as counts for conspiracy the court was clearly in error. (It is true that the judge partially overruled his own decision, but that was after evidence had been offered to the jury on all the counts.) *Lambert* v. *The People*, 9 Cowen, 578; *Commonwealth* v. *Hunt*, 4 Met., 111; *Commonwealth* v. *Eastman*, 1 Cush., 226; *Commonwealth* v. *Shedd*, 7 id., 514; *Commonwealth* v. *Wallace*, 16 Gray, 223. If not good as counts for conspiracy, they may be good counts for the constituent misdemeanor charged to have been committed. 2 Swift's Dig., 330.

2. If the second count is a count for conspiracy, as held by the court below, it is also a count for obtaining property by false pretences, and a count for uttering or publishing "a false, forged and pretended instrument," namely, a false and forged deed of Lyon to Pease. If the court below was correct we have this condition of things in one count: 1st, a charge of conspiracy; 2d, a charge of obtaining property by false pretenses—a statute offence; 3d, a charge of uttering or publishing as true a false and forged deed, a felony by statute and at common law.

3. It is charged that the defendants knowingly uttered a forged deed in pursuance of the conspiracy. If the conspiracy had been to utter a forged deed and by that means defraud Pease, setting forth the deed, the charge would be good, possibly, for conspiracy, but when the pleader went beyond that and alleged the uttering of the forged deed and the obtaining of Pease's property by means of it, the lesser crime of conspiracy would be merged not only in the felony, but also in the higher statutory crime of obtaining property by means of false pretenses. An unexecuted conspiracy is a mere intent, and it is an exceptional case where the law punishes a mere unexecuted intent. It is a self-evident proposition that an intention to do a thing is less criminal in the eye of the law than the doing of it.

4. The doctrine of merger is correctly stated as follows: "When a felony or misdemeanor is in fact committed, a conspiracy to commit such a felony or misdemeanor cannot be indicted and punished as a distinct offence. An intent to commit a misdemeanor, manifested by some overt act, is a misdemeanor, but if the intent be carried into execution, the offender can be punished for but one offence, and the greater crime absorbs the less." 2 Swift Dig., 330; *Commonwealth* v. *Kingsbury*, 5 Mass., 106. The mere agreement or conspiracy was a simple misdemeanor. The procuring the property by false pretenses in the manner charged, if criminal, was a high crime or misdemeanor at the least, possibly a felony; in either case of a higher grade than the mere conspiracy. The punishment fixed by statute is greater.

Uttering a forged deed is clearly a felony. 4 Black. Com., 249. The conspiracy therefore was merged.

5. In a charge for obtaining property by false pretenses, the mis-statements, and to whom made, must be particularly set forth, that the court may be able to judge whether the facts relied upon constitute the crime charged. Gen. Stat., 525, note; *State* v. *Jackson*, 39 Conn., 229. In a charge of conspiracy to obtain property by false pretenses the same particularity is required; therefore it follows that it is not enough for the pleader to allege that a certain deed was "false, forged, and pretended," for those are conclusions from facts. The pleader should have alleged all the facts, and the legal conclusion from these facts; the court could then have determined whether the conclusions were correct. *Hartman* v. *The Commonwealth*, 5 Penn. St., 65.

6. The information is bad also for duplicity, for if any one crime is sufficiently pleaded, there are two or three others equally well pleaded. A count in an indictment which charges two distinct offenses is bad, and the defendant on demurrer can defeat it. 1 Whart. Am. Crim. Law, §381; 1 Arch. Crim. Prac. & Pl., (Pomeroy ed.) 299 and note on p. 300; *People* v. *Wright*, 9 Wend., 193.

7. An indictment for obtaining real estate by false pretenses does not lie. *State* v. *Burrows*, 11 Ired. Law, 477; *Commonwealth* v. *Woodrun*, 4 Penn. L. Jour. Reps., 207.

*Third.* The court erred in its rulings and charge.

1. The evidence of Plato, offered by the state after it had rested, was not admissible in the discretion of the court. The accused was entitled to know when the case of the state was closed. It would have been inadmissible at any stage of the case, because there was nothing in the complaint to warrant it.

2. The court erred in charging that the second count was for conspiracy. A more manifest error than is contained in the following clause of the charge could hardly be imagined, namely—"What was done in pursuance of the conspiracy is really of no consequence; they are not sought to be charged

for the actual cheating and defrauding, for the offense is complete when and as soon as the agreement or conspiracy is entered into." True, if the offense had stopped there, but is it really of no consequence what is done in pursuance of a conspiracy? Suppose two or three persons combine together to murder, is what they do in pursuance of the conspiracy of no consequence? Does the murder amount to nothing? Does the conviction and punishment for conspiracy end it? Or is the conspiracy merged and terminated as a distinctive crime?

3. The court was asked to charge that there could be no conviction without some proof of value; the court refused, but charged "that the gist of the complaint being the conspiracy, there could be a conviction without reference to the value of the property sought to be obtained." But if there was no value there could be no fraud; if no fraud, then one element is out, and there could be no conspiracy to commit a fraud. The statute provides that the defrauding shall be out of some valuable thing; yet when we have found that the property which Pease exchanged and out of which he was alleged to be defrauded, was encumbered for $500 more than it was worth,—was worse than worthless,—and the state offers no evidence upon the subject, the court brushes it aside by saying substantially—"this charge being for conspiracy, the value of the property had nothing to do with it."

*Fourth.* The verdict is irregular, and should be set aside on motion in arrest. It is a general one of guilty on all the counts. If the rulings of the court below were correct, the jury should have rendered a verdict of not guilty of obtaining the property by false pretenses, and not guilty of uttering a forged note, and "guilty of the conspiracy." *Commonwealth* v. *Hunt*, 4 Met., 124.

*W. Hamersley*, State's Attorney, *contra.*

CARPENTER, J. The defendants were arraigned on a criminal charge. As the jury were about to be impaneled their counsel challenged the array on the ground that the act of

1880, providing a different method of selecting jurors, was unconstitutional; at least, that it was inoperative during the year 1880.

The only ground of challenge to the array at common law is partiality, corruption or fraud, or some defect in making the returns. Swift says (Digest, Vol. 2, p. 429): "But our mode of selecting jurors is such that there is no room for any partiality or corruption in the returning officers, so that it would be difficult to imagine any ground for a challenge to the array." The ground of challenge here is not partiality or fraud in the officers of the law, but the law itself and the power of the legislature are challenged. We know of no precedent for this, and it is doubtful whether it can be done. If it cannot be done, for that reason the challenge was properly disposed of by the Superior Court.

But as it is not desirable to dispose of an important question like this on technical grounds alone we are disposed to treat the challenge as a challenge for cause of each juror and consider the questions discussed on their merits. It is claimed that the statute, notwithstanding its terms providing that it should take effect September 1st, 1880, was inoperative during that year, for the reason that jurors had been selected under the old law for that year and that it was not competent for the legislature to set them aside and select others.

This claim is based on the assumption that jurors are public officers and cannot in this way be legislated out of office during the term. We think this assumption is not well founded. Although jurors serve the public and perform important duties in the administration of justice, it does not follow that they are officers within the meaning of the constitution and law. Many persons perform duties of a public nature who are not officers. Witnesses, persons assisting sheriffs and other peace officers, persons in the military service, and the like. While the duties thus performed relate to and promote the public weal, yet the persons performing them lack some of the more important official elements. A juror summoned to attend court has no certain

term of office. He may be discharged immediately with or without his consent. He may be excused from serving in any or in all cases at the will of either party, and when the term ends ordinarily his duties as a juror end for the year. The oath administered to him is not that prescribed by the constitution and laws for public officers, but is special, and is usually administered in each case, and has no binding force after the case is disposed of. These considerations serve to illustrate in some measure the difference between jurors and public officers.

But the defendants must go further and insist, not only that a juror in the discharge of his duty is an officer, but that an elector as soon as his name is in the jury box is also an officer. A very brief consideration of our method of selecting persons to serve as jurors will show the absurdity of this claim.

Out of the large body of citizens liable to be jurors a few are selected whose names are put in the jury boxes of the several towns, and from these persons required to serve from time to time are designated by chance. Whether any person thus selected will be called into actual service or not is uncertain, as many are not drawn at all. The most that can be said of him is that he is liable to be called on, but this liability is not an office. As well might it be said that the liability to have his name put in the jury box is an office. It is hardly carrying the argument one step further, as it is a mere liability in either case, differing only in degree. We are now prepared to say without further argument that the act of 1880, which excused all persons from serving as jurors, whose names were in the jury boxes prior to September 1st of that year, violated no vested rights official or otherwise.

But it is said that the act is unconstitutional because it excludes all persons under thirty years of age from serving as jurors, while the constitution provides that "every elector shall be eligible to any office, &c."

What has already been said disposes of this question. But were it otherwise we are clearly of the opinion that the defendants have no cause of complaint so long as the persons

who served as jurors were legally qualified. It is no cause for complaint that other persons legally and constitutionally qualified were not permitted to serve.

The claim that the constitution is violated in the tenth section of the act, which provides that no verdict shall be set aside for irregularity in summoning the jury or for want of qualifications, need not be considered, for, as we have seen, there is no irregularity growing out of the alleged defect in the law, and there is no pretense that the jurors who served were disqualified.

The information contains three counts. The defendants demurred and the demurrer was overruled. On the trial the jury were instructed that the first and third counts were insufficient, and their deliberations were confined to the second count. A verdict was rendered against the defendants, and they now claim that the court erred in overruling the demurrer to the second count.

That count alleges the conspiracy, the means contemplated, the acts done, and that the object was accomplished. It is claimed that it charges three offenses, conspiracy, obtaining property by false pretenses and forgery. We do not so understand it. There is no charge in legal and sufficient form of forgery. The instrument alleged to be forged is not set out, nor is it otherwise described with that particularity which the law requires. It is simply stated in general terms "that said Lyon had well and truly executed a certain deed to said Pease of said real estate, which pretended deed the defendants then and there showed and delivered to said Pease as and for a good and sufficient conveyance to him of said last named real estate, but which deed said attorney says was only a false, fraudulent, forged and pretended instrument, and did thereby induce said Pease to execute, etc." And that, not for the purpose of charging forgery, but for the purpose of showing the means resorted to for the purpose of defrauding Pease. It is one of the overt acts alleged to have been committed in pursuance of the conspiracy. As such it is unobjectionable.

It is not a new thing for conspirators to contemplate a

crime as a means to the end sought. In such cases, although the crime intended is actually committed, the conspiracy remains. Whether the parties can be punished for both is another question; they cannot complain if they are legally punished for the conspiracy.

Nor is the count defective for the reason that it sets out the fact that the parties accomplished their object, and thus substantially charges the offense of obtaining money by false pretenses. The information in this respect follows the authorized precedents. 2 Swift's Digest, 839 *et seq.;* Wharton's Precedents of Indictments and Pleas, 613, 614, 615. The English courts held that it was not necessary to allege the overt acts and the consummation of the thing intended; holding it sufficient to allege the conspiracy in general terms. That practice has been followed to some extent in this country, but the more usual course is to allege, as was done in this case, the acts done pursuant to the conspiracy and the result.

The State having rested its case, the defendants offered in evidence a deed of a certain tract of land. The State objected to the deed on the ground that there was no proof of the signature. The defendants then offered B. H. Plato to prove his own signature. On the cross-examination the State's Attorney asked the following questions: "Where is the property situated that is described in the deed?" "What was it, what did it consist of?" To both of which the defendants objected, but the court overruled the objection.

If it be conceded that the questions were not strictly cross-interrogatories, we are inclined to think that they were admissible in rebuttal, especially if the answers tended, as they might have done, to show that the deed was inoperative, and that it was within the discretionary power of the court to allow them on the cross-examination.

The court did not err in refusing to charge as requested by the defendants, that "the gist of the complaint is the cheating and defrauding by means of the representations and pretenses alleged in the complaint," and charging that

"the gist of the offense was the conspiracy or agreement to cheat and defraud." What has been said as to the sufficiency of the second count is a sufficient answer to this objection.

The defendants requested the court to charge that there could be no conviction without some proof of value. The court charged "that the gist of the complaint being the conspiracy, there could be a conviction without reference to the value of the property sought to be obtained." We see no objection to this. The property sought to be obtained was the equity of redemption in certain real estate. Presumptively it had some value. If its apparent value was sufficient to induce the defendants to enter into a conspiracy to obtain it, the jury were justified in finding the criminal intent without proof of actual value. In this offense (conspiracy to cheat and defraud) the value of the thing sought, provided it be property, is immaterial, except as it may have a bearing upon the question of guilt or innocence.

There is no error; and a new trial is denied.

In this opinion the other judges concurred.

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HENRY L. GOODWIN, ADMINISTRATOR, *vs.* THE AMERICAN NATIONAL BANK.

*P* having in the respondent bank an account as town treasurer and a private account, transferred $3,200 from the latter to the former, and afterwards an equal sum from the former to the latter, and drew $8,132 from his treasurer's account by checks payable to bearer. Later he had an additional account in the bank as executor of his father, and applied to the bank to discount his note as executor for $10,000 at four months, and offered certain stock, belonging to the estate, as security, telling the president of the bank that it would be for the benefit of those interested in the residue of the estate, of whom he was one, to pay at once certain legacies by borrowing money and holding the stock for a more favorable market. Thereupon the bank, in good faith, discounted the note and took the stock as collateral. *P* deposited the proceeds on his private account. Soon afterwards the bank paid $3,745,

from his private account, on his check in favor of a third person, and by his direction transferred $7,321 from his private account to his treasurer's account. Successive renewal notes, covering about four years, were given for the $10,000, the last of which was never taken up by him. He subsequently fled from the state, largely in default both as executor and as treasurer. Before his flight, he was publicly regarded as a man of integrity. The petitioner was appointed administrator with the will annexed in his place. On a bill in equity against the bank seeking the transfer of the stock to the petitioner as such administrator, it was held—

1. That the declared purpose for which *P* sought the $10,000 loan was a proper one, and the loan therefore one which the bank, so long as it had no knowledge of his fraudulent intent, could properly make.
2. That the bank was under no obligation to see to the application of the money.
3. That as the purpose for which the loan was sought was one that would naturally require considerable time for its accomplishment, the bank was not bound to regard as suspicious *P's* application for repeated renewals of the note.
4. That the mingling of the trust funds by *P* with his own was within his power as trustee, and was not in itself unlawful; so that the bank was under no obligation to suspect fraud from his doing it.
5. That the bank was under no obligation to regard the acts of *P* as fraudulently intended unless it had actual knowledge of such intent, or of facts which afforded convincing proof of it

The contract of a bank with a depositor is that it will pay his checks upon his funds in the bank, and if the checks are properly drawn it is bound to pay them.

The law will not charge the officers of a bank with knowledge that a depositor is committing a fraud, nor impose upon them the duty of inquiry, simply because he is drawing upon a trust account checks payable to himself, or is transferring funds from a trust account to his private account.

BILL IN EQUITY by an administrator, to compel the transfer of stock to himself as such administrator; brought to the Superior Court for Hartford County, and tried before *Beardsley, J.* The following facts were found by the court:—

Ralph Pitkin of East Hartford died in August, 1874, leaving a will and making his son, L. T. Pitkin, his sole executor. The will was duly proved in the probate court on the 26th of August, 1874, and L. T. Pitkin accepted the trust, and proceeded with the settlement of the estate. On the 29th of September, 1874, he applied to the respondent bank for the discount of a note of $10,000, of that date, signed by him as executor of Ralph Pitkin, and payable at

the bank four months after date, and offered as security for its payment seventy-five shares of the stock of the Ætna Fire Insurance Company belonging to the estate. He told the president of the bank that the heirs of the estate wanted money, and that he wished to pay certain legacies given by the will and as to the time for the payment of which he had discretion, that the stocks belonging to the estate were likely to increase in value, and that in his opinion it was better to borrow money than to sell the stocks at that time. The bank thereupon, in good faith, discounted the note, and took as security a conveyance of the seventy-five shares of stock and a power of attorney authorizing its cashier to transfer the same.

Prior to and on the 29th of September, 1874, L. T. Pitkin had three accounts with the respondent bank:—one, an individual account, which had run since March 1st, 1872, and upon which there was then due to him $1,016; one an account with him as treasurer of the town of East Hartford, which had run since November 4th, 1872, and upon which there was then due to him $1,436.51; and one, an account with him as executor, which had run since the 2d day of September, 1874, and upon which there was due to him on the 29th of September, 1874, $2,587.10, the remnant of $9,521.24 which stood to the credit of Ralph Pitkin as executor at the time of his decease in another bank, and was by L. T. Pitkin as executor of his father's estate drawn and deposited with the respondent bank. When he so deposited it he told the president of the bank that it was money which had been holden and deposited by his father as executor, but did not tell him of whom.

Upon the discount of the note for $10,000, on the 29th of September, 1874, the sum of $9,726.67, being the proceeds of the same less the interest as agreed upon, was by direction of Pitkin given to the teller of the bank and credited to his individual account.

This sum of $10,000 has never been paid, but renewal notes of the same tenor have been given, dated regularly at the expiration of periods of four months since the 29th of

September, 1874, the last of the notes bearing date the 28th of September, 1878. This note has never been taken up by Pitkin and is now holden by the bank. Upon the discount of the first and second of the renewal notes the same credit was given to Pitkin on his individual account, in paying the discount on the notes from that account. The net proceeds of the third and of the succeeding renewal notes were, by direction of Pitkin to the teller of the bank, credited to him as executor, except the fourth renewal note, as to which a different mode of bookkeeping was adopted which it is not important to detail. The discount upon all the renewal notes after the second was paid by Pitkin from the executor's account.

On the 1st of October, 1874, the bank paid Pitkin's individual check of that date, drawn for his private use and payable to the order of a person in Hartford, for the sum of $3,745. On the 8th of October, 1874, the bank paid his individual checks of that date for $7,321.87, transferring that amount, by his direction, from his individual account to the credit of his account as treasurer of East Hartford. Pitkin deposited to his individual credit on the 8th of October, 1874, $1,193.50, before the last-mentioned check was paid, and between the 1st and the 8th drew some small checks against his individual account, so that after the payment of the checks, on the 8th of October, 1874, there stood to his individual credit $786.97.

The sum of $7,321.87, when transferred as stated from the credit of his individual account to the credit of his account as treasurer, was just sufficient to meet a deficiency in the credit side of that account, created by his having drawn checks signed by himself as treasurer of East Hartford for his private use and payable to himself as bearer, which were cashed by the bank, but never to such an amount as to overdraw his account as treasurer. These checks were eleven in number, drawn between November, 1872, and October, 1873, and aggregated in amount $11,332.28. One drawn April 15th, 1873, for $200, was credited directly over to his individual account. One drawn July 3d, 1873, for

$3,000, was also credited directly over to his individual account. On the 18th of March, 1872, he drew a check for $3,200 on his individual account, which was then by his direction credited directly over to his treasurer's account. After the first discount of the $10,000 note, and before the second renewal of the note fell due on the 8th of October, 1875, various sums amounting in the aggregate to $5,767 had been credited by the bank to Pitkin's executor's account. The balance then to the credit of his executor's account was $1,260.66, and the balance to the credit of his individual account was then $798.48.

All of these transactions of Pitkin with the bank in drawing checks and making deposits were between him and the teller, and it did not appear that the attention of the president or cashier or any other officer of the bank was called to the matter, or that they had any knowledge of the transactions during the time covered by them. The respondents offered evidence to prove that it was not the practice in the bank for the president or cashier to inspect the items of the accounts of its customers, unless in consequence of overdrafts or for some other particular reason their attention was called to them.

This evidence was received subject to the objection of the petitioner. If the same is admissible, the fact is found in accordance with the evidence. All the evidence offered by the petitioner to prove the state of the accounts between Pitkin as treasurer of East Hartford and the town, and the evidence as to the checks which were drawn by him as such treasurer, and the deposits which were made by him to the credit of such account, was received subject to the objection of the respondents, and the facts in relation thereto are found subject to such objection.

Pitkin left the state in the summer of 1878, largely in default as executor, and also as treasurer of East Hartford. At that time he had overdrawn his executor's account to the amount of $749,98, which sum with interest from the first day of August, 1878, is now due to the respondents. Afterwards he was removed from his office as executor, and

the petitioner was appointed administrator on the estate with the will annexed.

Before the 1st day of October, 1878, the respondents caused the Ætna Fire Insurance stock received of Pitkin to be transferred to themselves, and have since received the dividends upon the same, amounting to $3,375.

During all the time of his transactions with the bank Pitkin was publicly reputed to be a man of integrity, and was so regarded by the officers of the bank.

The case was reserved upon these facts for the advice of this court.

*R. D. Hubbard*, for the petitioner.

1. We claim that the bank, subsequently to the first discount, acquired knowledge, or means of knowledge, that the executor was using the loan to enable himself to apply the trust fund to his private use; and after such knowledge or means of knowledge, suffered the loan to be repeatedly renewed; and thereby discharged the pledge as between the bank and the estate. The question relates to the right to hold the pledge, not for the first note discounted, but for the last. Premising that the law strives to protect the interests of the *cestuis que trust*, (*Smith* v. *Ayer*, 101 U. S. R., 327; *Colt* v. *Lasnier*, 9 Cowen, 342; *Duncan* v. *Jaudon*, 15 Wall., 175; *Collinson* v. *Lister*, 7 DeG., M. & G., 637;) we suggest the following facts: The whole discount, as soon as made, was placed on the books of the bank to the private account of Pitkin—not a cent of it to the executor's account. The very first act of the executor in the disposition of the trust fund was a breach of duty as trustee; for the obvious effect of it was to obliterate the identity and trust character of the fund, and to subject it to attachment by his creditors and to his own private uses, precisely as if it were his own individual estate. The fact that a trust estate bears on its face the marks of the trust, constitutes, and is intended by law to constitute, its safeguard and protection both as against the public and the trustee. The bank then knew that the first thing done to the fund preparatory to its use

by the executor was to take from it its trust marks, to stamp on it his own private marks, and thus to unclothe it of all the immunities and protection with which the law seeks to invest trust estates. *Ex parte Kingston*, L. R. 6 Chan. Appeals, 639; *Wormley* v. *Wormley*, 3 Wheat., 421. Further—on the 1st of October, 1874, Pitkin drew on his private account, and so out of the trust fund carried to its credit, a check of $3,745, in payment of a private debt. This mischief was the first fruit of the action of the bank in placing it to Pitkin's credit. And on the 8th of October, 1874, Pitkin drew a check for $7,321.87 on his private account in favor of himself as treasurer, and placed it immediately to his credit as treasurer on the books of the bank. And thus the bank saw the residue of the trust fund, even to the last penny, transferred to the treasurer's account and misappropriated. So much the bank knew for a certainty. It also knew another thing most pertinent to the point in hand, namely, that the loan was obtained on a pretence of paying off some legacies under the will, and that, instead of doing this, the executor was diverting the bulk of the trust fund from the uses of the estate to his own credit as town treasurer. The allowance of this transfer was a consent by the bank to the executor's fraud. *Bodenham* v. *Hoskyns*, 2 De G., M. & G., 903. Between November, 1872, and October, 1873, a period of eleven months only, he had drawn no less than eleven checks, amounting to $11,332.28, on his treasurer's account, all to himself as bearer, and all, in point of fact, for his own private use. And it was to recruit this treasurer's account, thus depleted, apparently to his own private use with the knowledge of the bank, that $7,321.87 of the trust fund was used. It needs to be added that Pitkin at this time was $7,321.87 in default to the town of East Hartford. This very $7,321.87 of trust money concealed in his private account with the knowledge of the bank, was drawn and transferred by him to cover this very defalcation. The bank did not know, nor trouble itself to learn, of this defalcation, but it did know that this was the time appointed by law for annual town meetings and for the auditing of treas-

urer's accounts. And it had, moreover, good reason to suspect that Pitkin had before drawn on his treasurer's account, as he was now drawing on these trust moneys, for his own private use. The evidence of it had passed under the eyes of the bank, and was in its files and on its books.

2. From the foregoing premises we deduce the conclusion that the bank, after the making of the loan, and before the renewals of the same, had knowledge of the fraudulent purpose of the executor, and of the fraudulent misappropriation of the trust fund; or, if it had no such knowledge in an actual sense, we claim that it had good reason to suspect fraud and was put on inquiry by the very nature of the transactions, and therefore is to be taken in law to have had actual knowledge. In other words, its ignorance was voluntary or the result of inexcusable negligence. The bank is to be taken in law to have known at the time of the several renewals of the $10,000 loan—(1) that the proceeds of the original loan were trust funds; (2) that these trust funds had been deposited in the executor's private account; (3) that $7,321.87 of these trust funds had been misapplied by the executor in fraud of the trust. The rule of law in regard to constructive knowledge is well stated as follows:—"The general rule is that notice of a fact to an agent is notice to the principal, if the agent has knowledge of it while he is acting for the principal in the course of the transaction which is in question. And this rule is applicable equally to corporations and natural persons." *Smith* v. *Ayer*, 101 U. S. R., 320. In the application of this rule, we submit—(1) That the president of the bank knew that the loan was intended for the uses of the estate, and if not so intended, that it would have been an embezzlement of trust funds. His knowledge of this fact became at once the knowledge of the bank, not because he was president, but simply because he was its agent in respect to the loan.—(2) The proceeds of the note, without being first received by the executor or in any way taken from the custody of the bank, were by the teller of the bank acting as its officer and agent, placed in the execu-

tor's private account, and constituted nearly the whole of that account. The teller's knowledge of this became also the knowledge of the bank, and this simply because he was the agent of the bank in respect to the transfer and disposition of the fund on its books.—(3) The teller knew that $7,321.87 of this trust fund standing in the executor's private account, by his own act was taken out of that account on the executor's check and credited directly to his account as treasurer. The teller himself received the check and paid it by charging the amount to his private and crediting it to the treasurer's account. The knowledge of all this, and of all entries made on the books in respect thereto, are imputable to the bank on the rule and for the reason before stated. *Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, 16 N. York, 125, 130.—(4) It is morally impossible that all the principal officers of the bank—whatever they may have not known originally—should not have subsequently come to know all the facts before mentioned, or at least have been put on inquiry in respect thereto. For the case finds that the loan had been under their manipulation, passed and repassed through their books, and been taken up and renewed every four months for a period of nearly four years. They must all have discovered, the teller himself included, and even the bookkeeper, that the loan represented in the beginning, and from the beginning, a trust estate; for on the third renewal it was carried to and thereafter continued in the executor's official account until the end. On seven successive renewals it was charged and credited to this account. For seven successive renewals checks were drawn on the trust account in payment of the interest on these renewals, and paid to the teller out of that account. With all this knowledge on the part of the agents of the bank, how can it be heard to say that, when the last loan was made, they were not only ignorant, but had learned nothing in the whole course and history of the executor's dealings with their officers which was calculated to put them on inquiry? If the bank knew, in fact, before making the renewals, or is to be taken in law to have known, that the proceeds of the first

loan, or any considerable portion thereof, had been applied by the executor to his treasurer's account, this fact alone was sufficient to put the bank on inquiry before venturing on this long line of renewed loans. Each renewal was a new loan on a new contract and a new consideration. Perry on Trusts, § 225; *Smith* v. *Ayer*, 101 U. S. R., 327; *McLeod* v. *Drummond*, 17 Ves., 170. The extraordinary length of the credits sought and given was of itself sufficient to excite suspicion and put the bank sharply on inquiry. It is to be noted here—(1) that the original loan was made for the mere temporary purposes of administration, and to a trustee, temporary by the very nature of his office; (2) that the original four months' credit had been already eight times renewed, and the executor was now at the end of three and a half years seeking and obtaining a ninth renewal. An administration is ordinarily wound up in one year. Why did not the bank before making the last renewal pause a moment for inquiry? *Duncan* v. *Jaudon*, 15 Wall., 176; *Stronghill* v. *Anstey*, 1 DeG., M. & G., 635.

3. Treating now the executor as an embezzler, and the original loan as an embezzlement on his part, and the bank as having subsequently acquired knowledge, or means of knowledge, of the uses to which the trustee had applied the proceeds of that loan, the collaterals pledged by the executor came thereby into a condition of equitable suretyship to the bank for the payment of the original debt as between the estate and the bank, and only for the original debt. 3 Leading Cases in Eq., 856. Though the suretyship were not known in the origin of the transaction, yet knowledge of it subsequently acquired will oblige the creditor to recognize thereafter the rights of suretyship as fully as if the surety had contracted as surety. *Oriental Corp.* v. *Overend*, L. R., 7 Ch. App., 142; Perry on Trusts, § 221; Hill on Trustees, 165. It follows, then, that if the assets of the estate were thus placed in suretyship for the original loan contracted by the executor for his private use, the law of suretyship attached to the transaction as between the estate and the bank; and

if the law of suretyship attached, then the collaterals stood only for the original note; and the bank by its subsequent renewals of the original loan after it had acquired knowledge of the misappropriation of the trust fund, discharged the collaterals from the obligation of suretyship. *Neimcewicz* v. *Gahn*, 3 Paige, 642; *Neimcewicz* v. *Gahn*, 11 Wend., 316; *Ayres* v. *Husted*, 15 Conn., 504; *Johns* v. *Reardon*, 11 Md., 465; *Smith* v. *Townsend*, 25 N. York, 479; *Bank* v. *Burns*, 46 id., 170.

*J. Halsey* and *L. E. Stanton*, for the respondent.

1. In the years 1872 and 1873 Pitkin had reduced his treasurer's account by about $7,300,—but there was no deficit in the account. He had not overdrawn it. This reduction was made by eleven checks, every one of which was signed as treasurer. The bank is bound to pay the drawer's checks if it has funds when the check is presented, and is liable in damages for a refusal so to pay. Morse on Banks, 249, 453, 454; *Munn* v. *Burch*, 25 Ill., 35; *Downes* v. *Phœnix Bank*, 6 Hill, 297; *Marzetti* v. *Williams*, 1 Barn. & Ad., 415; *Whitaker* v. *Bank of England*, 6 C. & P., 700; *Watts* v. *Christie*, 11 Beav., 546. On March 18th, 1872, he had drawn $3,200 from individual account and placed it in his treasurer's account. In 1873 by two of the above eleven checks, signed as treasurer, and by his directions to the teller, he returned $3,200 to the individual account. In this certainly there was nothing to notify the bank of any wrong. If he needed this $3,200 to pay town bills he could take his own money to do it and repay himself when town funds should come into his hands. The remaining nine of the above eleven checks were not credited over to any account in the bank—were payable to bearer, and the bank was bound to pay them on presentment. We submit that there was nothing to notify the bank of the slightest irregularity in any one of these eleven checks.

2. Next in order of time comes our loan of September 29th, 1874, of $10,000 to Pitkin as executor, and the pledge to us of the collateral. This loan was made upon his repre-

sentation that the same was needed for purposes of the estate. The loan was made in good faith and it and the pledge were lawful. An executor has power to sell and give good title to the personal estate and to borrow money for purposes of the estate, and to pledge its assets for security. Perry on Trusts, § 809; *Keane* v. *Robarts*, 4 Madd. Ch., 357; *McLeod* v. *Drummond*, 17 Vesey, 154; *Nugent* v. *Gifford*, 1 Atk., 463; *Meade* v. *Orrery*, 3 Atk., 235; *Whale* v. *Booth*, 4 T. R., 625; *Field* v. *Schieffelin*, 7 Johns. Ch., 150; 3 Redfield on Wills, 227; *Hough* v. *Bailey*, 32 Conn., 288; Hill on Trustees, 166; *Leitch* v. *Wells*, 48 N. York, 595.

3. If the loan was lawful we were not bound to see to the application of the money. *Farhall* v. *Farhall*, L. Rep. 7 Eq., 286; 3 Redfield on Wills, 232. The relation of banker and depositor is that of debtor and creditor, and the depositor may direct to what account his money shall be credited. *Farley* v. *Turner*, 26 Law Jour. Eq., 710. The true principle is that the lender is not responsible unless he has knowledge of the fraud. *Hough* v. *Bailey*, 32 Conn., 288. But if the title is not affected by an unknown fraud of the administrator in the sale itself, much less could the title be impaired by the fact that the administrator should afterwards waste the money which was the price of the note.

4. It is urged against us that the bank permitted him to place this discount upon the individual account and thus facilitated the fraud, but this is not true in point of fact. The bank was no party to that fraudulent act, if it was a fraud. It was his act. He had in his hands so much money. He could do what he chose with it. He could have procured bills and have deposited them in our bank or in any other. He could have distributed them among his three accounts in the respondent bank. That the respondent would have been compelled to pay his checks against these funds in whatever account deposited is too clear for dispute. In *Manhattan Co.* v. *Lydig*, 4 Johns., 377, a depositor did not hand his funds to the teller, but sent them in by a bookkeeper of a bank. The bookkeeper purloined them. Held that the bookkeeper was not agent of the bank and the

bank not liable. Again, the deposit of the proceeds of the $10,000 note in the individual account *did not aid the fraud.* If they had been put in the executor's account he could by executor's checks have devoted every dollar to his private uses. The transfer of $7,321.67 from the individual account to the treasurer's account was no fraud on the part of the bank. We had no knowledge that the treasurer's account had been improperly reduced. Pitkin could by checks on each account have drawn out in money all the deposits from all three accounts, and could afterward have put it all back into any account designated by any title he should select. *Backhouse* v. *Charlton*, L. R., 8 Ch. Div., 444; *Ex parte Kingston*, 6 L. R., Ch. App., 639. We have renewed the $10,000 note from time to time. The third and later renewals were credited, by his directions to the teller, to his executor's account, and thereafter discounts were paid from that account. Upon this account there was already a balance of $1,260.66. This entire executor account he since that date drew down, of course by executor's checks, and finally overdrew it, and owes us $749.98 upon it. We have paid the whole amount therefore of this note on executor's checks. We hold executor's vouchers for the whole. If the petitioner complains of the renewal of the note we answer that he does not show damage to the estate by such renewal. Had we refused to renew, then Pitkin could have caused the collaterals to be sold to pay it.

5. The court directly finds that the bank officers except the teller had no knowledge of these checks and deposits. It is, however, urged that we had constructive notice of the wrong, that slight circumstances are enough to charge with notice one dealing with an executor, and that an inquiry by us would have notified us of the wrong. It will perhaps be said that we had constructive knowledge of the deposit with the teller, and, as that deposit appears on the books, the bank is to be taken to know the fact of the deposit to individual account, whether the president, cashier or other officers knew it or not. But the cases do not go to this

extent. A teller is an officer to receive and pay out money. He is the agent of the depositor. The president and cashier are not bound to know everything which a teller or clerk knows. Notice to him is only notice of the precise thing about which he is employed. Notice to a director, clerk, teller or notary of a bank is not notice *at all* unless he is employed in bank business, and then only of matters as to which he represents the principal. *Manhattan Co.* v. *Lydig*, 4 Johns., 377; *Custer* v. *Bank*, 9 Penn. St., 27. Knowledge of a clerk is not knowledge of the bank. *Goodloe* v. *Godley*, 13 Sm. & Marsh., 233; *State* v. *Bank*, 6 id., 218; *Washington Bank* v. *Lewis*, 22 Pick., 24; *Fulton Bank* v. *Canal Co.*, 4 Paige, 127; *Clark* v. *Bank*, 3 Duer, 241; *Mussey* v. *Bank*, 9 Met., 306. In an action on a cashier's bond it was held that the cashier was not bound to inspect all entries and detect frauds of the teller. *Batchelor* v. *Planters' Bank*, 10 Reporter, 16. A bank held not liable for negligence of its notary. *Warren Bank* v. *Suffolk Bank*, 10 Cush., 582. The teller knew only the precise thing shown to him, namely, that Pitkin had deposited so much money. He did not know that it was the proceeds of an executor's note, nor was it his business to inquire from what note it was derived, nor to inform the president or cashier of the fact of the deposit. *Weisser* v. *Denison*, 6 Seld., 68. Mere notice to a director is no notice to a bank. *Farmers' Bank* v. *Payne*, 25 Conn., 444. The deposit of this money upon individual account was not calculated to arouse suspicion of fraud. The legatees had no suspicion of the executor's frauds till after his flight in 1878. Then, and not before, they complained that we had the same confidence in Pitkin which they had. Bankers are not responsible in such cases unless they are parties to the fraud. *Keane* v. *Robarts*, 4 Madd. Ch., 332. Even if there were suspicion of fraud we were bound to pay his checks and could not set up a *jus tertii* as a defense. *Elliot* v. *Merryman*, 1 White & Tudor's Lead. Cases, part 1, p. 99.

6. A bank is not bound to supervise the separate accounts of the depositors nor to inquire into transfers from one to

another, when there is no suspicion of fraud. *Backhouse* v. *Charlton*, L. R. 8 Ch. Div., 444. The case of *Bodenham* v. *Hoskyns*, 2 De G., M. & G. 903, has no application to the present case. There the bankers misapplied the money themselves to their own uses. Morse on Banks, p. 41. A banker with whom trust funds are deposited is not a fiduciary. He is a debtor. *Foley* v. *Hill*, 2 H. L. Cases, 28; *Bailey* v. *Finch*, L. R., 7 Q. B., 34; *In re Agra & Masterman's Bank*, 36 L. J., Ch., 151; *Pennell* v. *Deffell*, 4 De G., M. & G., 372; *Ex parte Kingston*, L. R., 6 Ch. App., 632. It was competent to show that according to the usage of the bank the president and cashier do not inspect every entry of the teller. It repels the imputation of negligence or implied knowledge of fraud. *Warren Bank* v. *Suffolk Bank*, 10 Cush., 582; *Chicopee Bank* v. *Eager*, 9 Met., 583; *Bank* v. *Page*, 9 Mass., 155; *Batchelor* v. *Bank*, 10 Reporter, 16. Pitkin was one of three hundred or more depositors in a large banking-house. It was not negligence that these transactions did not attract the attention of the officers. It would put an end to the business of a bank to require such a degree of watchfulness of it.

PARDEE, *J.* (After stating the principal facts). The petitioner insists that, inasmuch as the acts of the executor in depositing on his private account the amount of the $10,000 loan made upon his note as executor and in drawing the checks which he did upon that account, were known to the teller of the respondent bank and were recorded upon its books, the directors are to be charged with having thereby acquired actual knowledge of a fraudulent use of the money by the executor after the loan and before the first renewal thereof; if not actual knowledge such good reason for suspicion as to put them on inquiry; that the ignorance was voluntary or the result of inexcusable negligence; and that the renewal under such circumstances released the pledged asset in behalf of the legatees.

When the executor applied to the respondent for a loan, saying that it would be for the benefit of those interested in

the residue of the estate, of whom he was one, to pay the legacies at once by borrowing, pledging the shares in question as security, and holding them for a more favorable condition of the market, the declared purpose was within the power vested in him by the will, was one which the strictest law of trusts would sanction, and one for which the respondent, acting in good faith, could safely make and renew a loan upon the security of the shares. In doing this it came under no obligation to see to the proper application of the money; did not become the insurer of the estate against a devastavit. For the executor had power to borrow money for purposes connected with the discharge of his duties, and pledge the assets of the estate as security; and the title of the pledgee will be perfect even if the executor intended a fraud, if the loan was made for a purpose apparently proper, without knowledge actual or implied of such intention.

The petitioner has called our attention to *Bodenham* v. *Hoskyns*, 2 DeG., M. & G., 903, in which a trustee deposited money with the defendants in the name of the *cestui que trust;* they loaned money to him for his private uses, and induced him to repay them from the trust money; to *Colt* v. *Lanier*, 9 Cowen, 342, in which an executor with the knowledge and consent of his partner, Colt, used the funds of the estate in payment of partnership debts; to *Duncan* v. *Jaudon*, 15 Wall., 176, in which Duncan, to oblige Jaudon, loaned him money knowing it to be for his individual use and took in pledge shares which he knew belonged to an estate; to *Smith* v. *Ayer*, 101 U. States Reps. 327, in which the defendant took in pledge from an executor assets which he knew belonged to the estate for a loan which he had made to the executor, knowing it to be for his private use; and to *McLeod* v. *Drummond*, 17 Vesey, 170, in which bankers took from an executor assets which they knew belonged to the estate as security for a loan which they made to him, knowing it to be for his private use.

In each of these cases the person compelled to surrender money paid, or assets pledged to or purchased by him, acquired from one known to him to be an executor or trustee,

that which he knew to be an asset of the estate or of the trust, with actual knowledge derived from the executor or trustee himself that he intended to use the proceeds of the sale or pledge for the relief of his private necessities; and, as a rule, in cases where the pledgee or purchaser had not knowledge from the declaration of the executor or trustee, we think that courts have not decreed a forfeiture of title unless he had actual knowledge of facts which of themselves afford as convincing evidence of the fraudulent intent as if the executor or trustee had made such declaration to him; as when a trustee, confessedly borrowing for his own use, offers in pledge a certificate of stock in his name *as trustee*, with a power to transfer executed by him *as trustee*, without any accompanying oral declaration that he had only the title of trustee to the shares; as was presumably the case of *Shaw* v. *Spencer*, 100 Mass., 382. The court compelled the pledgee in such a case to accept the declaration of the certificate as the equivalent of a declaration by the person. And, inasmuch as the act of loaning to an individual for his private use and knowingly requiring of him the delivery of trust shares by way of security, is regarded as fraudulent, in the sense that it is assistance intentionally given for profit to one who is perpetrating a fraud, courts are unwilling to decree a forfeiture for fraud upon knowledge imputed to the pledgee, unless the facts in which it is found force the imputed, in degree, close up to the actual; unless indeed, to borrow a rule of evidence, they exclude all reasonable doubt as to the existence of knowledge.

But in the case before us the respondent had not at the last renewal actual knowledge that the executor had not carried into effect his expressed purpose to apply the borrowed money to the payment of legatees.

Again, Pitkin became a debtor to the estate for the money which he as executor received from the respondent, and to the town for that which as treasurer he received from the tax-collector; all this money thereby became to such a degree his own, and was to such an extent at his sole disposal, subject to his uncontrolled decision as to the place and man-

ner of temporary keeping, that he could retain both in his personal possession without mark upon either, mingle them in one deposit, transfer the deposit from one account to the other for his convenience in keeping, investing or paying, without imposing upon the respondent an obligation because of these acts to know or suspect a fraud. Neither by such holding, or deposit, or transfer, is money lost to its own fund. It is not lost nor has a fraud been perpetrated so long as it remains in his possession or at his command, with an intent to answer all demands both of the estate and town; and so long as possession and ability to answer continue in him the intent will be presumed to be united with them. And a check drawn either individually or officially, payable to order or bearer, is so nearly the equal of currency in case of transfer, and performs so many offices of payment between individuals and executors, between the latter and trustees, and between these again and individuals, without giving any evidence when presented either of the number or character of the transactions of which it has been made a part or of the payments which it has effected, that the law will not charge the officers of a bank with knowledge that a depositor has committed a fraud, nor impose upon them the duty of inquiry, because he has drawn upon a treasurer's account checks payable to himself or to bearer, or has transferred money from it to his own and from his own to it. They are not required to assume the hazard of correctly reading in each check the purpose of the drawer. The respondent directors might well suppose that the check for $3,745, drawn by Pitkin on October 1st, upon his individual account to order, effected in behalf of some of the legatees the reinvestment of their money in a form and manner known to and approved by them; and that his openly recorded act on October 8th, transferring the remaining proceeds of the loan from his individual to his treasurer's account, accomplished in behalf of other legatees and in a form and manner known to and approved by them the sale of the stock and a re-investment of their money in the safer obligations of the town; and, in short, that each of his checks as treasurer to

bearer, or to himself, or from himself to the treasurer, completed an honest transaction.

In *Central National Bank* v. *Connecticut Mutual Life Insurance Co.* (104 U. S. Reps., not yet published), A. H. Dillon, Jr., had deposited with the bank in his name as "General Agent" money which as such agent he had collected for the insurance company. Notwithstanding it had actual knowledge as to the ownership of the money, the bank charged to this account his note given for money which it had loaned to him knowing it to be for his individual use, and refused to honor his check drawn upon that account as "agent" in favor of the insurance company, the owner. In the opinion denying the right of the bank to the money the court says:—"A bank account, it is true, even when it is a trust fund and designated as such by being kept in the name of the depositor as trustee, differs from other trust funds which are permanently invested in the name of trustees for the purpose of being permanently held as such. For a bank account is made to be checked against, and represents a series of current transactions. The contract between the depositor and the bank is that the former will pay according to the checks of the latter, and when drawn in proper form the bank is bound to presume that the trustee is in course of lawfully performing his duty, and to honor them accordingly." And it is to be remembered that while we read the record of his deposits and checks in the clear light of fraud confessed by his flight, to the officers of the bank it was the record of the treasurer of his town; of a man whose integrity no one had then presumed to question. It might be a wholesome rule, if established and understood, that any omission by a trustee of the mark of the trust from either the securities or the money belonging to it, even with an honest purpose and for the briefest time, should be notice to all persons having knowledge of such act, that a fraud had been accomplished, if thereby the fidelity of trustees could be secured; but when a trustee has broken down all other barriers between himself and fraud, we fear that he will not allow a rule of law to restrain him; those for whom he acts must ever find their protection in his integrity.

Nor will the law impute to the directors knowledge of fraud accomplished or intended from the fact that the executor desired to renew and continue the loan during the period of nearly four years. His reason for borrowing was that time would increase the value of the assets offered in pledge, and therefore it would be for the benefit of those to whom the residue was given, of whom he was one, to pledge and hold rather than sell. The reason embodied a promise to settle the estate at once by the payment of debts and legacies together, with a declaration that the loan would be projected into the future; that the time taken for the settlement of the estate had nothing to do with the life of the loan; that that would depend solely upon the judgment of himself and others who, if debts and legacies were paid, were the owners of the pledged asset. And the reason referred to shares in a long-established and successful fire insurance company, which were not likely to increase in value suddenly because of unexpected profits. It is but reasonable to presume that the directors believed, as they had the right to do, that the only increase looked for was that which the general revival of the business and prosperity of the country would effect; that of necessity it was to be the result of the lapse of a considerable period of time. Therefore there was neither suggestion of danger nor ground for suspicion in the length of the loan; and as from October, 1874, to October, 1878, the shares increased somewhat in value and paid large and regular dividends, the reason assigned by Pitkin continued to the last as complete a justification of the confidence of the directors in his truthfulness as at the first. They had the right to presume that debts and legacies had been paid, and that he was seeking to secure the profits of a rising market to himself and his associate remaindermen.

Moreover, we are unable to perceive that the granting of the loan was an added temptation to fraud. For to the executor determined to commit it, upon the same representation a sale was as easy for himself and as safe for the purchaser as would have been a pledge; having the money he need make no deposit; he could pay it away for his private

use without speaking or written witness. So long as he should continue to pay the income to the legatees they were as little likely to suspect, inquire, or be informed, in one case as in the other.

Consequently, neither in law nor equity can the estate transfer the wrong and loss resulting from the betrayal of his trust by the executor from itself to the respondent.

The Superior Court is advised to dismiss the bill.

In this opinion the other judges concurred.

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THE NORWICH SAVINGS SOCIETY *vs.* THE CITY OF HARTFORD.

A city ordinance provided that all assessments for benefits should be a lien on the land benefited until paid, provided that they should not remain a lien more than three months after the assessment was completed unless the board of street commissioners should lodge with the town clerk for record a certificate duly certified by the clerk of the board describing the premises and stating the amount of the assessment and the improvement for which it was made. The chairman of the board, with the assent of the other members, instructed the clerk to make and lodge with the town clerk such certificates whenever necessary, but no vote was ever passed by the board on the subject, nor any record made by the clerk of the instructions given him by the chairman. Held that a certificate made by the clerk and lodged by him with the town clerk for record, under this general direction, and with no action by the board in the particular case, was sufficient under the ordinance.

BILL IN EQUITY to remove a cloud from a title; brought to the Superior Court in Hartford County, and heard before *Beardsley, J.* Bill dismissed and motion in error by the petitioners. The case is sufficiently stated in the opinion.

*J. Halsey* and *C. E. Gross*, for the plaintiffs in error.

*C. E. Perkins*, for the defendants in error.

GRANGER, J. This is a petition in chancery to remove a cloud upon the title of certain land of the petitioners by reason of a certificate of lien placed on the same by the city

of Hartford on account of the non-payment of an assessment for betterments. All the formal allegations in the petition were admitted and the parties were at issue only upon the question of the authority of the clerk of the board of street commissioners to execute and lodge for record the certificate of lien and its sufficiency. The Superior Court found certain facts relating to the questions at issue and dismissed the bill. The petitioners excepted to certain evidence offered by the respondents and admitted by the court, and the court allowed a bill of exceptions. The case comes before us on the petitioners' motion in error. Several errors are assigned, but the case depends upon the determination of two questions. First, was the certificate of the lien valid? Second, was the evidence excepted to admissible?

The ordinance of the city of Hartford under the provisions of which the certificate of lien was lodged for record, went into effect on the first day of April, 1873, and was as follows:—

"All assessments of betterments for any of said public improvements shall be made therefor on account of the land or property liable to assessment and specially benefited thereby. Every assessment of betterments for any of the public improvements embraced in this ordinance shall be a lien on the land on account of which said assessment is made, until the same is fully paid; provided that the same shall not remain a lien for a longer period than three months after said assessment is completed, unless the board of street commissioners shall lodge with the town clerk for record a certificate duly certified by the clerk of said board, describing the premises and the amount assessed and the improvement for which it is assessed."

The certificate of lien was filed on the 24th of February, 1875, and was as follows:

"Charles B. Penfield to City of Hartford. This may certify that an assessment of ten hundred and forty-one dollars ($1,041) for the cost of constructing a public sewer in Zion and Park streets from Ward street northerly to connect with the Park street sewer, as ordered by a resolution of the court

of common council passed September 24th, 1874, a public work or improvement, has been made on Charles B. Penfield on account of a certain piece of land situated in the city of Hartford and bounded north by Park street about 200 feet, east by Zion street 731 feet, south by Zion street continued, and west by other land of said Penfield; and that the city of Hartford claims a lien upon said land for said amount until the same shall be paid with all expenses.

HARTFORD, CONN., Feb. 24th, 1875.

GEORGE ELLIS,

*Clerk of the Board of Street Commissioners.*"

It is admitted by the petitioners that the assessment for the sewer was properly made, that the amount was just and reasonable, that the certificate is proper in form, and that it was filed within the time prescribed by the ordinance, and that George Ellis was the duly authorized clerk of the board of street commissioners; also that the petitioners took their title from Penfield subject to this lien, if it is one, and that they are now in full possession of the property under foreclosure proceedings, and that it is liable to pay the amount of the lien if it is a valid one. No equitable ground of relief is suggested by the petitioners; the property has been benefited to the amount of the assessment, and this amount is justly due the city and ought in justice to be paid unless there is a rigid rule of law that prevents a recovery. The petitioners insist that the city cannot legally recover the amount of the assessment on the ground that the certificate of lien is void.

The petitioners claim that the board of street commissioners could continue the lien after the expiration of three months only by a formal vote to that effect, which vote should be a matter of record, and that only by such a vote can the clerk of the board be authorized to make and lodge such certificate with the town clerk. The court finds that no such vote was ever passed by the board. The finding is further that the board never passed any vote, general or special, placing, claiming or continuing a lien on the premises on account of the public improvement in question or

instructing the clerk to certify, execute or lodge for record any certificate of lien, and that the matter of this particular lien was never discussed by the board or its members. But the court finds "that at the time the ordinance went into effect, the chairman of the board (Mr. Parsons) instructed and directed the clerk (George Ellis) to attend to the filing of the liens that might thereafter be required by the ordinance, and that this instruction was then given with the knowledge and consent of the board as then constituted, but that no vote was ever passed to that effect, and that from that time (April 1st, 1873,) to the date of this certificate (February 24th, 1875,) no vote, either general or special, was passed authorizing the clerk to file any certificates of liens, but the clerk filed them under the instructions given by the chairman as aforesaid."

Did the board of street commissioners misconstrue the ordinance and mistake their duty in relation to filing these liens? Was it necessary in order to make the continuance of the liens valid that there should be a general or special vote passed by the board and recorded by the clerk continuing the liens and directing him to certify and lodge them for record? This seems to be the whole question in the case. If no such vote was necessary, then the manner of filing the certificates and the action of the board in directing the clerk as to his action in the matter, might be shown by parol.

We think that a fair and reasonable construction of the ordinance in question fully warrants the action of the board of commissioners in reference to the continuance of this lien, and that no formal vote was necessary for that purpose. It is apparent that the lien is created by the ordinance and exists for three months without any action on the part of the street commissioners; the continuance of the lien beyond that period is alone dependent upon their action. What action is required by the board to perfect or continue the lien? The language is quite clear and plain. "Provided that the same shall not remain a lien for a longer period than three months after said assessment is completed unless

the board of street commissioners shall lodge with the town clerk for record a certificate duly certified by the clerk of said board describing the premises and the amount assessed and the improvement for which it is assessed." Here is no allusion to any vote of the board. If it had been the intention of the framers of the ordinance that the board should pass a formal vote continuing the lien, it is to be presumed that appropriate language would have been used clearly indicating such intention, if not expressing it in so many words. It would have been quite easy to have inserted after the word "shall" and before "lodge" the words "vote to," so that the line would read "unless the board of street commissioners shall vote to lodge, &c." The wisdom of such a provision might well be questioned as it would then be within the power of the board by a major vote to defeat all liens, or to show favoritism in any particular case, and open a door of contention in the board. The whole object of the ordinance was to secure to the city the payment of these assessments. The street commissioners are authorized to lodge the certificate. The board consists of six members. It would hardly be claimed that they must go in a body to the town clerk's office and lodge the certificate; nor that they must all be present and see a certificate drawn up and certified to by the clerk. And it is difficult to see what reason exists for putting upon the ordinance such a construction as is contended for by the petitioners. It could be of no benefit to the land owner to have the lien continued by a formal vote of the board, rather than by the method adopted; and there is no public benefit or advantage that could be derived from it. When the certificate containing the requisite information under the ordinance is lodged for record in the town clerk's office, bearing the certification of the clerk of the board, it is notice to all the world of the state of the title so far as the lien is concerned. And this is the only purpose of lodging it for record.

The course pursued by the board seems reasonable, simple, convenient and such as common sense would dictate. The lists of assessments are in charge of the clerk of the board;

he is the one above all others conversant with all their details—the persons assessed, the amounts, the property on which the assessments are laid, the dates—and of course would know when the time of lien expired and whether they were paid or not; we can conceive of no more reasonable course than the one adopted, of directing the clerk to file all liens when required by the ordinance. The chairman of the board might direct him to do this with as much propriety as to direct him to draw up a notice of the meeting of the board or any other paper that it became his duty to draw or that was within the scope of his employment.

But the petitioners contend that there is some special significance to the words "a certificate duly certified by the clerk," their claim being that there must be some action of the board to which the clerk must certify. We do not so understand the meaning of the words used. The fair import is that the clerk shall draw up a certificate stating the requisite facts, that is "describing the premises, and the amount assessed, and the improvement for which it is assessed," and that he shall sign it as clerk of the board of street commissioners. The commencement of his document is "This may certify," and at the end he appends the date, and authenticates it by signing in his official capacity "George Ellis, Clerk of the Board of Street Commissioners." This makes a certificate certified by the clerk of the board, and is unquestionably just such a certificate as is required by the ordinance to be lodged by the board with the town clerk for record. The clerk of the board by direction of the chairman in presence of the whole board very clearly had authority to make such certificate and lodge it with the town clerk, and no formal vote was necessary to empower him to do it. It is made his duty by the ordinance to certify to such an instrument, and we think it was the duty of the board of commissioners under the ordinance to see that all liens were properly continued, and it is doubtful whether they would have the right to vote to discharge one man's property from the lien and retain it upon another's. If so the board would have power to render taxation unequal, which is contrary to

all the principles of taxation. If no vote of the board was necessary in order to continue the liens and none necessary to authorize the clerk to draw up and lodge the certificate, as we think has been shown, then it is evident that no formal record of these facts became necessary, and they might well be proved by parol, if there were need that they should be proved at all. In the absence of all proof it would be presumed that the board of street commissioners, being public officers and an arm of the city government, did its duty and that the clerk also did his duty, and that in certifying and lodging this certificate he acted under the authority and direction of the board.

Furthermore this is not a judicial act of the board of such a public nature as to be considered an act of a court. Indeed these acts have none of the elements of judicial acts; there is no hearing, no parties, no judgment. They are mere ministerial acts in the line of the duty of the board and the clerk, and the board and clerk in making and lodging the certificate act as mere agents of the city in protecting its rights and securing the payment of its just dues.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

# SUPPLEMENT.

[United States Circuit Court for the District of Connecticut, May Term, 1880.]

CHARLES L. GRISWOLD *vs.* FREDERICK A. BRAGG & WIFE.

The statute of Connecticut (Gen. Statutes, tit. 18, ch. 7, sec. 17,) provides that where a defendant in an action of ejectment has, before the suit was brought, in good faith and believing that he had an absolute title, made improvements on the land, the court shall ascertain the present value of the land and the amount reasonably due the plaintiff for its use and occupation, and if the value of the improvements exceeds the amount due for use and occupation, final judgment shall not be rendered until the plaintiff shall have paid the balance to the defendant; but if the plaintiff shall elect to have the title confirmed in the defendant, the court shall ascertain what sum the defendant ought in equity to pay to the plaintiff, and on its payment may confirm the title in the defendant. Held to be a valid statute, and one which the United States Circuit Court would administer on a bill filed on the equity side of the court by a defendant in an action of ejectment.

The statute does not impair the obligation of contracts, nor deprive a person of his property without due course of law, nor deprive him of his right of trial by jury.

SHIPMAN, J. At the September term, 1879, of this court, the jury returned a verdict, in an action of ejectment, in favor of the present defendants against the present plaintiff, that they recover the seizin and possession of an undivided fourth part of a tract of land in the town of Chester. Upon motion of the defendant in the ejectment suit, judgment and execution were stayed until further order. He thereupon filed a supplemental bill on the equity side of the court. This bill, after setting out the state statute hereinafter recited, commonly called the "Betterment Act," alleges, in substance, that the plaintiff and those under whom he claims have held said land by a series of connected conveyances since 1846, which deeds purported to convey, and were intended and believed to convey, an absolute estate in fee simple, and that the plaintiff and his grantors have had uninterrupt-

ed possession since 1846, under a like belief that they had an absolute estate, and that, during this time, and before the commencement of the ejectment suit, improvements of the value of $10,000 have been made on said land by said reputed owners, in good faith, and in the like belief, and prays that the present value of said improvements, and the excess of the value thereof over the amount due to the defendants for the use and occupation of said premises, may be ascertained, to the end that the equitable relief provided by said statute may be granted. To this bill the defendants have demurred. Their title became vested in them in 1878.

The statute (Revision of 1875, p. 362, sec. 17,) provides as follows: "Final judgment shall not be rendered against any defendant in an action of ejectment, who, or whose grantors or ancestors, have in good faith, believing that he or they, as the case may be, had an absolute title to the land in question, made improvements thereon before the commencement of the action, until the court shall have ascertained the present value thereof and the amount reasonably due to the plaintiff from the defendant for the use and occupation of the premises; and, if such value of such improvements exceeds such amount due for use and occupation, final judgment shall not be rendered until the plaintiff has paid said balance to the defendant; but if the plaintiff shall elect to have the title confirmed in the defendant, and shall upon the rendition of the verdict file notice of such election with the clerk of the court, the court shall ascertain what sum ought in equity to be paid to the plaintiff by the defendant, or other parties in interest, and, on payment thereof, may confirm the title to said land in the parties paying it." The original statute was passed June 26, 1848. (Laws of Connecticut, 1848, p. 48.) It plainly appears from the act as passed, and as reproduced in the revisions of 1849 (p. 112, sec. 223,) and 1866 (p. 63, sec. 281,) that the proceeding in the state court, upon the motion of the defendant, after the verdict, is a proceeding in equity.

The question of law which is raised by the demurrer is in regard to the validity of this statute. It is not denied that

the statutes of the several states in regard to realty, except when the constitution, treaties or statutes of the United States otherwise require or provide, which are in conformity with the constitutions of the respective states, are rules of property and rules of decision in the courts of the United States, (*Bank of Hamilton* v. *Dudley's Lessee*, 2 Peters, 492); and that, if a state legislature has created a right and established a remedy in chancery to enforce such right, such remedy may be pursued in the federal courts, if it is not inconsistent with their constitution, (*Clark* v. *Smith*, 13 Pet., 195; *Ex parte Biddle*, 2 Mason, 472); and that an inability of the federal courts to proceed in the exact mode provided by a state statute need not preclude a party from the benefit of the relief which is intended to be granted, if the modes of proceeding in courts of chancery are adapted to carry into effect the statute, (*Bank of Hamilton* v. *Dudley's Lessee*, cited *supra.*) This is true, although the right which has been established by the local statute is a new right, and one previously unknown to a court of chancery in this country or in England. *Lorman* v. *Clarke*, 2 McLean, 568; *Bayerque* v. *Cohen*, 1 McAll., 113. The practice in equity is, in general, except when otherwise directed by statute or by the rules of the Supreme Court, regulated by the English chancery practice as it existed in 1842, before the adoption of the "New Rules." Equity Rule, 90; *Badger* v. *Badger*, 1 Cliff., 237; *Goodyear* v. *Rubber Co.*, 2 Cliff., 351.

The statute practically impresses upon the land of a successful plaintiff in ejectment a lien for the excess, above the amount due for use and occupation, of the present value of the improvements which have been placed on the land, before the commencement of the action, by a defendant or his ancestors or grantors, in good faith, and in the belief that he or they had an absolute title to the land in question, and forbids occupancy by the plaintiff until the lien is paid. There is a natural equity which rebels at the idea that a *bonâ fide* occupant and reputed owner of land in a newly-settled country, where unimproved land is of small value, or where skill in conveyancing has not been attained,

or where surveys have been uncertain or inaccurate, should lose the benefit of the labor and money which he had expended in the erroneous belief that his title was absolute and perfect. While it is true that improvements and permanent buildings upon land belong to the owner, yet in a comparatively newly-organized state, where titles are necessarily more uncertain than they are in England, there is an instinctive conviction that justice requires that the possessor under a defective title should have recompense for the improvements which have been made in good faith upon the land of another. The maxim, often repeated in the decisions upon the subject, "*Nemo debet locupletari ex alterius incommodo*," tersely expresses the antagonism against the enrichment of one out of the honest mistake and to the ruin of another. It is obvious that this statutory equity is not without occasional hardships. The true owner may be forced to sell his land against his will, and may sometimes be placed too much in the power of capital, but a carefully regulated and guarded statute should ordinarily be the means of doing exact justice to the owner.

It is well known that the English law made no provision for reimbursement of expenditures of this kind, as against the owner of the legal title, except by allowing the *bonâ fide* occupant to recoup the value of his improvements, when he is a defendant in a bill in equity praying for an account of rents and profits. The established theory was, that a court of equity should not go any further and "grant active relief in favor of such a *bonâ fide* possessor making permanent meliorations and improvements, by sustaining a bill, brought by him therefor, against the true owner, after he has recovered the premises at law." *Bright* v. *Bozet*, 1 Story, 478, 495. Such was the opinion of Chancellor Walworth, in *Putnam* v. *Ritchie*, 6 Paige, 390, and such may be taken to be the state of law in this country, in 1841, apart from local statutes, and of the English law then and now. In 1841 Judge Story decided, in *Bright* v. *Bozet*, in favor of the power of courts of equity to grant affirmative relief at the suit of a *bonâ fide* possessor against the true owner, and in 1843

re-stated his opinion, after an additional hearing of the same case. 2 Story, 605. The learned judge thus states his view of the law. "I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge before he is to be restored to his original rights in the land. This is the clear result of the Roman law; and it has the most persuasive equity, and, I may add, common sense and common justice for its foundation." This opinion of Judge Story, though often favorably quoted, cannot be considered as the established law of this country, apart from the statute, because it has rarely had occasion to be reviewed, inasmuch as the "betterment acts" have become the predominant statutory system of the country. The Supreme Courts of Missouri, Maryland and Oregon, states which apparently have no statute on the subject, have adopted his views. *Valle's Heirs* v. *Fleming's Heirs*, 29 Missouri, 152, (1859;) *Union Hall* v. *Morrison*, 39 Md., 281, (1873;) *Hatcher* v. *Briggs*, 6 Oregon, 31, (1876.)

The theory of the Connecticut statute is that of Judge Story, that an equitable lien is placed upon the land for the value of the improvements which the *bonâ fide* occupant has innocently made. Furthermore, the legal owner has his election either to take possession of the land by paying the lien, or to receive, in lieu of the land, the sum which the court shall ascertain to be equitably due him. The owner's title is not forced away from him, but the equitable lien of the occupant is preserved. There is no election on the part of the occupant to keep the land and thus compel the owner to abandon his title, neither is any judgment rendered against the owner for the value of the improvements, to be enforced by levy of execution. These two provisions in the statutes of Ohio and Iowa respectively were held to be unconstitu-

tional, upon the ground that they invaded the rights of private property as secured by the constitutions of the respective states. *McCoy* v. *Grandy*, 3 Ohio St. R., 463; *Childs* v. *Shower*, 18 Iowa, 261. It may be remarked that the original statute of 1848 provided that "the court shall order and decree the balance so found due to be paid." This clause is not found in the present statute, and the amount of the lien cannot, apparently, be collected by levy upon the defendant's property.

The statute is said to be unconstitutional in that it impairs the effect of conveyances, in violation of the provision of the constitution of the United States, (Art. 1, sec. 9,) which prohibits a state from passing a law impairing the obligation of contracts, and that, as regards pre-existing conveyances or estates, it is contrary to the state constitution, because it deprives a person of his property without due course of law, and deprives him of his right of trial by jury.

I do not think that it is necessary to enter into a critical examination of these constitutional provisions. The defendant's suggestions are founded upon a harsh view of the nature of the statute. It does not impair the obligation of any contract between the owner and his grantor or between the state and the owner. It interferes with no legal title. It interferes with, and is an abridgement of, the right to the immediate possession and beneficial enjoyment of property, as that right existed at common law, and, to that extent, impairs the interest which owners formerly had in lands. It cannot be said to be an unjust or unreasonable limitation of the common law right of possession, but on the contrary the provisions are reasonable. *Society* v. *Wheeler*, 2 Gall., 105; *Jackson* v. *Lamphire*, 3 Pet., 280; *Curtis* v. *Whitney*, 13 Wall., 68; *Welch* v. *Wadsworth*, 30 Conn., 149.

Discussion upon the constitutionality of this statute has not, apparently, arisen in the courts of this state. An examination of decisions elsewhere upon statutes of this class shows, that *Green* v. *Biddle*, 8 Wheat., 1, decided that the betterment act of Kentucky was unconstitutional because it was a violation of the compact between Virginia and Ken-

tucky. It may fairly be inferred, from the express views of the court, as given by Judges Story and Washington, that it disliked the statute irrespective of the contract and was not satisfied with its provisions. These dicta may properly be read in the light of the decision in *Bank of Hamilton* v. *Dudley's Lessee*, 2 Pet., 492, in which case no opinion was expressed upon the general principles of the betterment act of Ohio. The constitutionality, with relation to the constitutions of the respective states whose courts gave the decisions, or the justice of statutes similar in substance or in principle to the Connecticut statute, has been learnedly discussed and sustained in the following among other cases:— *Withington* v. *Corey*, 2 New Hamp., 115; *Whitney* v. *Richardson*, 31 Vt., 300; *Armstrong* v. *Jackson*, 1 Blackf., 374; *McCoy* v. *Grandy*, 3 Ohio St. R., 463; *Ross* v. *Irving*, 14 Ill., 171; *Childs* v. *Shower*, 18 Iowa, 261. The constitutionality of the Tennessee statute was condemned in *Nelson* v. *Allen*, 1 Yerger, 376. Judge Catron says that the question of constitutionality did not properly arise in that case, and expresses no opinion upon the point.

The demurrer is overruled.

*R. D. Hubbard* and *W. F. Willcox*, for the plaintiff.

*S. E. Baldwin*, for the defendant.

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## In re Estate of Augustus W. North.

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69 624

The seventh section of the statute with regard to intestate estates provides that "if any minor child shall die before marriage and before any legal disposition of the estate, the portion of such deceased child shall be equally divided among the surviving children and their legal representatives." Held that the portion of such deceased child was to be distributed, not as the estate of such child, but as a part of the estate of the deceased parent; and that therefore the eighth section of the statute, which provides that where an intestate leaves no children, the estate shall be distributed equally to the

brothers and sisters of the whole blood and those who legally represent them, has no application to the case.

IN the probate court of the district of New Britain; Judge CARPENTER of the Supreme Court sitting with the judge of probate.

CARPENTER, J. Augustus W. North died October 31st, 1878, intestate, leaving a widow and four children, William S. & Frederick A., children by his first wife, both of age, and James S. and Anna S., children by his second wife. Anna S., a child about two years old, died April 14th, 1879, no legal disposition having been made of the estate. The question relates to the distribution of Anna S. North's portion of the personal property of her father's estate.

There are two sections of the statute which are claimed to apply to the case. The first is Gen. Statutes, p. 373, sec. 7, and is as follows:—

"If any minor child die before marriage, and before any legal disposition of the estate, the portion of such deceased child shall be equally divided among the surviving children and their legal representatives."

In default of children and legal representatives of children, the eighth section provides for a distribution "equally to the brothers and sisters of the whole blood and those who legally represent them." And again, referring to more remote kindred, "kindred of the whole blood to take in preference to the kindred of the half blood."

The question is, shall the whole of Anna S. North's portion be distributed to the brother of the whole blood, or shall the two brothers of the half blood share in it? If the two sections apply to the case, then, to some extent, they conflict with each other, and we must determine which shall prevail or construe them together so as to harmonize them. It is insisted that the eighth section so far modifies the seventh as to require the distribution to be "among the surviving children" *of the whole blood*, and that in this way only can the harmony of the statute of distribution be preserved.

The foundation of this claim is the assumption that it is

the estate of Anna S. North, so far as her portion is concerned, that is to be distributed. Granting the premise, the reasoning is logical—that her portion of her father's estate vested in her at his death; that she formed a new root for the transmission of property; that the statute must be regarded as a summary method of distributing her estate, saving the expense of separate administration; and that therefore the eighth section vests the whole of her portion in the brother of the whole blood.

But we cannot assent to the proposition that it is her estate that is to be distributed. Although the statute speaks of it as "the portion of such deceased child," yet upon much reflection we have come to the conclusion that it means, when applied to this case, the portion of Augustus W. North's estate which would have been distributed to Anna S. North had she lived. Our reasons for this conclusion, briefly stated, are these:—

1. It makes the statute more simple, by keeping the two sections distinct, and avoids the confusion of distributing two estates in one.

2. These two sections relate to different classes of cases. The seventh is limited in terms to the distribution of estates among children; the eighth, equally explicit, is limited to the distribution of estates among collateral relatives. It was not intended or supposed that the two sections would interfere with each other.

3. To allow the eighth section to modify the seventh in the manner claimed would give an effect to the eighth section not intended or contemplated by the legislature. Collateral kindred of the whole and of the half blood do not sustain the same relation to the intestate, while all the children of the same father, even though by different mothers, are equally related to him. The legislature could not have intended that the eighth section should affect the distribution of estates among children. As this is really the distribution of the father's estate it should not be brought within the operation of the eighth section if it can be avoided; and it

can be avoided by construing the seventh section as we have indicated.

4. That construction divides the father's estate equally among all his children, which is just.

5. These two statutes, although standing side by side for nearly a century, have never been construed by the Supreme Court of this state. The question was discussed somewhat in *Howard* v. *Howard*, 19 Conn., 313, but the case did not call for a decision and it was not decided. But elsewhere the authorities sustain our position. In Massachusetts, New Hampshire and Wisconsin they have statutes similar to our seventh section, and it has been uniformly held that they do not provide for a distinct estate, but that the surviving children take by descent from the father and not from the deceased brother or sister. *Sheffield* v. *Lovering*, 12 Mass., 488; *Nash* v. *Cutter*, 16 Pick., 491; *McAffer* v. *Gilmore*, 4 N. Hamp., 391; *Crowell* v. *Clough*, 3 Foster, 207; *Prescott* v. *Carr*, 9 Foster, 453; *Perkins* v. *Simons*, 28 Wis., 90; *Wiesner* v. *Zann*, 39 Wis., 188. We are not aware of any contrary decision.

Our opinion is that the estate should be divided equally among all the surviving children of the intestate.

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NOTE TO THE CASE OF MAIN *v.* MAIN, *ante* p. 301.

The remark in the opinion, on page 306, that an entry by the defendant for costs during the term at which the nonsuit was entered was essential to his right to have a judgment for costs, was made upon the authority of the cases cited, but without noticing a later statute passed in 1874, (Gen Statutes, p. 446, sec 11,) which provides that upon the withdrawal of any civil action after the defendant has entered his appearance, a judgment for costs shall be rendered in his favor, unless waived by him. The error does not affect the judgment, as the case was decided on other grounds. The correction of the opinion makes necessary a correction of the head note, the second paragraph of which should be stricken out.

# APPENDIX.

## OBITUARY NOTICE OF CHARLES IVES.*

CHARLES IVES, of the New Haven County Bar, died, December 31st, 1880, of paralysis of the brain, after an illness of only two days' duration. He went home from his office, as usual, towards the evening of December 29th, was taken sick that night, and early in the morning of the 31st was dead. Just prior to Christmas he had been engaged in the trial of causes, both to the jury and the court, and was in the midst of a full professional practice when he was so suddenly stricken down.

MR. IVES was born September 18th, 1815. At the time of his death he had been practising law uninterruptedly for over thirty-four years.

He represented the town of New Haven in the General Assembly of 1853, and the town of East Haven, where he resided since 1860, in the General Assemblies of 1865, 1867 and 1868. In 1867 he was chairman of the judiciary committee, and in 1868 was Speaker of the House. His long professional career was eminently successful, both to his own credit and gain, and to the benefit of his clients, whose interests he served with great zeal, tenacity and fidelity.

The physical infirmities of Mr. Ives—his bent figure—his face, refined and intellectual, yet indicating the ravages of physical suffering, courageously borne long years before—his slow and difficult walk, with the aid of the inseparable canes—all these are probably known to most lawyers throughout the state. They may not know, however, the fact that, until just after his majority, he was blessed with robust and vigorous health, and with a lithe, wiry, and perfect physical frame. A severe cold, followed by a sharp sickness, with poor and misdirected medical service, prematurely developed the latent rheumatic tendencies of his system. Misfortunes seldom come singly. During his recovery, while riding out for the fresh air, the horse took fright, and he was thrown with great violence from the carriage and severely injured. This greatly aggravated the rheumatic trouble already rife in his system, and in consequence of it Mr. Ives was bed-ridden for nearly seven years. His chance of life was very small, and his friends often gave up all hopes of his recovery.

At length, however, a constitution, except for a rheumatic tendency,

* Prepared at the request of the Reporter by John W. Alling, Esq., of the New Haven Bar.

thoroughly sound, an indomitable will, a courage that never gave up, and a strong faith that he was to be and to do something worthy of note, raised him from his bed, and sent him again, though on crutches, into the world of active life. After a short period spent at Sharon Springs, White Sulphur Springs and other places, he gained sufficient strength to apply himself vigorously to work, and, for the remainder of his life, enjoyed as good health as, if not better than, most men of his age.

From boyhood to the time of his death Mr. Ives was led on by a laudable ambition to achieve something which would not soon be forgotten. He had, however, to rely entirely upon himself, for his widowed mother, so far from being able to help him, needed and received his assistance, during that part of his early life which preceded his long illness.

His first ambition, however, lay in the way of literary pursuits. For this reason, when a boy, he chose the trade of a printer, as giving him the means of a livelihood by work which, to some extent at least, he thought would assist him in the development of his literary tastes. Of course he availed himself of all the means of education, in the way of schools and debating clubs, within his reach, but of more consequence was his own zealous and vigorous study, without the aid of instructors. His long sickness did not deter him from his pursuit of literature. The rheumatic trouble did not affect the brain, and while confined to his bed he managed to prosecute his studies, and, among other things, to write various short poems, many of them of undoubted merit, which, in 1843, while still confined to his bed, he collected and published in a book entitled "Chips from the Workshop." The book had a considerable sale, and netted Mr. Ives a modest sum above the cost of publication.

Believing, however, that he was not always to be confined to his sick-bed, the necessity of doing something which he could at once coin into money turned his attention, strange to say, to the law. He commenced his legal studies before he could leave his bed, and, as soon as he could, with the assistance of sympathetic and trusting friends, he entered the Yale law school, from which he graduated in 1846. In the same year he was admitted to the bar, and at once opened a law office in New Haven, where he continued to practice until his death.

His success was assured from the first, and he soon began to enjoy a comfortable income from his professional labors. As he has often told the writer, his original idea was not to apply himself entirely to the legal profession, but to acquire by it money enough to pay his debts and necessary expenses, and to devote the remainder of his time and energy to his cherished literary ambition.

In his case, however, it was inevitable that he could not serve both masters, and that, as years went by, all his strength was needed for his

professional engagements, and the opportunity to gratify his literary ambition did not arise until just before his death.

The cases in which Mr. Ives was engaged in the Supreme Court, scattered through more than twenty-five volumes of the Connecticut Reports, and the public positions he held, have already made him known to the bar of the state as a man of professional ability, and but few words are needed on this point. It must go without question that no man in the legal profession can greatly succeed unless he greatly work, and Mr. Ives's success furnished no exception to this rule. It may be well, however, to notice briefly the special qualities of mind and character which largely contributed to his special success.

First should be mentioned his natural fitness for literary work. From the outset of his professional career Mr. Ives could always readily and aptly express his ideas, whether to his client at the office, or to the court or jury. Facility of expression, an easy command of language, sometimes so difficult for others to attain, was with Mr. Ives his birthright.

In the next place he was thoroughly honest and candid in dealing with his clients. He never encouraged the litigious spirit. He was not always able to control or restrain it, but he always made a client feel that he was as truly working for him as if he had himself been the client.

Again, Mr. Ives was a very confident man in the advocacy of his opinions. He thoroughly believed his client to have the right of the cause and that the right would prevail. He could hardly argue any interlocutory motion without adverting to the merits of the case. No judge or jury was ever in doubt about the sincerity of his opinions.

He also possessed great versatility of mind. He was quick to see the answer to the arguments from the other side, quick to see the mental reservations of a reluctant witness, and to detect the inconsistencies of a swift witness. After the professional labors of the day he could readily apply his mind to other subjects, especially those of a literary character, which were his delight.

Mr. Ives was always very kind and generous to the junior members of the bar, especially to those who had been compelled to rely upon themselves for their education. No such young lawyer went to his office in vain. At the bar meeting, called to do honor to his memory, the most touching professional tribute there paid was the ready and hearty utterance, from many young lawyers, who had had occasion to appreciate his kindness, of their feeling of personal affection and gratitude.

While Mr. Ives remained in a full and laborious practice to the end, yet, in order to attain the rest required by advancing years, he spent a portion of the winters of 1879 and 1880 at Nassau, in the island of New Providence. He wrote a series of bright and sparkling letters concern-

ing the place and its inhabitants, to a New Haven paper, and the favor with which they were received gave an additional impulse to his natural literary enthusiam, and the result was a charmingly-written book entitled "Isles of Summer, or Nassau and the Bahamas," delayed in its issue, however, by various causes, until the day after his death.

Mr. Ives was married in 1857 to Catharine M. Osborne, of New Haven, who survives him. He left three children, two daughters, and a son, who bears his name, and is a promising young lawyer of the New Haven bar.

Mr. Ives led a consistent Christian life, and was from his early manhood and through life a communicant in the Congregational denomination.

One of the resolutions adopted by the bar in his memory is altogether too apt and fitting to be omitted from this notice:

"*Resolved*, That in the death of Charles Ives, Esq., the President of this Bar, the profession has to deplore the loss of one of its oldest and foremost members. A ready speaker, careful in the preparation of his cases, vigilant to protect the interests of his clients, always at his post and punctual to every engagement, his place is one which it will be difficult to fill, and his life furnishes a signal example to his younger brethren of what can be accomplished by earnest endeavor and faithful application to the duties of their calling."

## OBITUARY NOTICE OF GIDEON H. HOLLISTER.*

GIDEON HIRAM HOLLISTER was born at Washington, in this state, on the 14th of December, 1817, and died at Litchfield, March 24th, 1881. At Yale College, whence he graduated in 1840, he ranked among the foremost writers and speakers of his time, was class poet, editor of the Yale Literary Magazine, and first president of the Linonian Society—the highest of society honors at a time when those honors were very highly considered. Studying with Judge Seymour in Litchfield, he was admitted to the bar in 1842, and, after a brief stay in Woodbury, came to Litchfield. There, in 1843, he was appointed clerk of the courts, a position which he held, a single year excepted, till 1852, though all the time in active practice at the bar.

Mr. Hollister became a State Senator in 1856; was instrumental in procuring the election of the Hon. James Dixon to the U. S. Senate, and, during the many years in which Mr. Dixon was a power in Con-

* Prepared at the request of the Reporter by George A. Hickox, Esq., of the Litchfield Bar.

necticut politics, exercised great political influence in the western part of the state. In 1868 he was sent Minister to Hayti, and on his return lived for several years at Stratford, practicing law in Bridgeport. He returned to Litchfield in 1876, and represented that town in the legislature of 1880.

In 1855 he published a history of Connecticut, and at the time of his death had partly completed a revision of that work. In 1866 he published a volume of poems, showing marked power, and greatly increasing his literary reputation.

Mr. Hollister was not learned in the law; he seldom read text-books, and was little familiar with decisions, though thoroughly grounded in the elementary principles of the science. The books he loved were the English classics; he eschewed trash, but read and re-read the great writers of our tongue, from Chaucer to Tennyson, with a persistent interest, not common in these days when literature is so very light, and when books which need to be studied are seldom opened. As a lawyer his strength lay in the trial of matters of fact to a jury, in which he had few equals.

In cross-examination he was wonderfully adroit. Most witnesses, consciously or unconsciously, incline to swear with the examiner, against the cross-examiner. This stumbling-block of natural antagonism he avoided with great skill. A studiously polite and considerate manner allayed hostility; and, if the antagonism was proof against kind treatment, he would often lead the witness the way he wished by seeming to desire him to take the opposite direction. When severe he was terribly severe, but shunned indiscriminate severity—rarely attacking a witness harshly unless under circumstances which would fully justify him with the court and jury.

Mr. Hollister's delivery was slow; his manner impressive; his action dignified and effective; and he had in remarkable degree the advocate's power of portraying parties and witnesses with such a subtle coloring of apt words as impressed his own bias upon juries without their being at all aware of the effect his art produced. At times he was magnificent, though, like all born orators, often disappointing. When at his best he overflowed with wit, pressed his attack with terrific weight and vigor, and electrified his hearers with passages of exceeding beauty and eloquence. His skill with the pen had a marked effect upon his spoken utterances, giving them all the variety, correctness, and elegance of good writing. No doubt, also, his thorough acquaintance with Shakespeare and Tennyson, with Burke and Webster, contributed largely to the formation of a style of such unusual excellence; but more, perhaps, was due to powers and aptitudes such as nature has bestowed upon few.

Mr. Hollister was a most interesting man in conversation. His original way of treating every-day subjects, of illuminating dull facts with

irresistible flashes of wit, and of illustrating men and things with touches of poetical fancy, gave him a truly wonderful power of fascination by talk. Nor was he in the least overbearing in conversation, as is often the case with good talkers, but added the influence of unfailing politeness to marvelous powers of persuasion, such as one must have felt to appreciate.

## OBITUARY NOTICE OF CHIEF JUSTICE SEYMOUR.

Hon. Origen Storrs Seymour, Ex-Chief Justice of the Supreme Court of the State, died at Litchfield, where he was born and had always resided, on the 12th of August, 1881, in the seventy-eighth year of his age.

Judge Seymour was a man of very rare qualities of mind and heart. It is safe to assert that no member of the Connecticut Bar ever drew to himself in larger measure the respect and affection of his professional brethren and the confidence and esteem of the public at large.

Judge Seymour was born February 9th, 1804. His father was Ozias Seymour, for many years sheriff of Litchfield County. His grandfather, Maj. Moses Seymour, bore a distinguished part in the Revolutionary War. Gov. Horatio Seymour of New York, Senator Horatio Seymour of Vermont, and many other noted public men of the name, were his family relatives. He graduated at Yale College in the class of 1824. His college standing was very good, although from weakness of eyes he was compelled much of the time to depend on having his lessons read to him by others. After his graduation he studied law and was admitted to the bar of Litchfield County in 1826. He entered into partnership with Mr. George C. Woodruff, and soon rose to a leading position in the very able bar then practicing in that county. He frequently represented the town of Litchfield in the legislature, and was elected Speaker of the House in 1850. In 1851 he was elected to Congress, and again in 1853. In 1855, on the reorganization of the courts, he was elected by the General Assembly one of the four new judges of the Superior Court. His eight years, term expired in 1863, just after a severe and bitter political contest growing out of the civil war, between the Republican party, which favored the prosecution of the war, and the Democratic party, which favored a peace, in which the former had carried the state. Judge Seymour had been from early life and always remained a member of the Democratic party, and though he had given great satisfaction as a judge, there had grown up, in the heated state of public feeling, a distrust on the part of the

prevailing party of all judges who adhered to the Democratic party, especially in view of very important legal questions that might come before the courts, with regard to measures taken in support of the war. In this state of things Judges Seymour and Waldo, two of the most upright judges that ever sat upon a bench, and whose thorough loyalty no one could seriously question, were dropped and the vacancies filled by new appointments. Judge Seymour at once resumed practice at the bar, going into partnership with his son, Edward W. Seymour, then a leading lawyer in Litchfield.

In 1864 and again in 1865 Judge Seymour was nominated for Governor by his party, but the favorable turn of the war and the passage of a constitutional amendment allowing soldiers to vote in the army gave the Republican candidate a large majority in both years. In 1870 a Republican legislature atoned in some measure for the injustice before done him by electing him with great unanimity a judge of the Supreme Court. In 1873, upon the death of Chief Justice Butler, he was elected Chief Justice, and held that position till he retired under the constitutional limitation as to age in 1874. It is a fact worthy of notice that he was elected to a seat upon the benches of the Superior and Supreme courts and finally to the chief-justiceship by legislatures that were opposed to him in politics.

After his retirement from the bench Judge Seymour was almost constantly employed in the hearing of causes as a referee. He had the public confidence in so high a degree that his services in this character were sought from every part of the state. In 1876 he was chairman of the commission whose labors finally settled the long disputed boundary between this state and New York. He also did a public work of great value as the presiding member of the commission which prepared the new code of practice which was adopted by the legislature in 1879. He gave much careful thought and labor to the matter and it was largely the influence of his name that led to its adoption. After its enactment he delivered public lectures at Hartford and before the Yale Law School in explanation of it.

Judge Seymour was a man of great judicial capacity. His mind worked without friction. It was saturated with legal principles, the result of a thorough digestion of what he read rather than of extensive reading. With this knowledge of legal principles he had a remarkably sound judgment in applying them. There was no feature of his mind more noticeable than his common sense. He had a perfect comprehension of fine legal distinctions, but no fondness for mere legal casuistry. He had a strong sense of justice, and while versed in technicalities could never willingly sacrifice justice to them.

But it was the moral qualities of the man that drew to him the public esteem in so large measure, and which entered so largely into his judicial character. He was a man of the most absolute integrity;

he was perfectly fair-minded; was conscientious in the highest degree; patient in listening to testimony and argument, even when a good excuse might have been found, if ever, for impatience and inattention; he was of the most unruffled temper; he was full of kindness and sympathy, the only criticism to which he was open on the bench being that he was too unwilling to give a party the pain which an adverse decision would sometimes inflict, but his convictions were clear and decided and his conscience gave them the authority to which they were entitled. Without the slightest descent from self-respect and independence, he yet conciliated every one with whom he came in contact by the kindliness of his manner and the manifest goodness of his heart. The younger members of the profession, who came before him in the trial or argument of causes, have reason to remember with gratitude the friendly interest which he took in them.

He was a man wholly without pretension. He was never opinionated. He had no self-assertion. It would hardly be possible for one to be more utterly unassuming than he. It was in a great measure this lack of all assumption that gave him such a hold upon the plain people about him. Juries always trusted him when at the bar. All who knew him felt certain of him as a man of "simplicity and godly sincerity." His simplicity of manner was but the natural garb of the simplicity of his heart.

Yet with all he had a rare shrewdness. He was a good judge of human character and motives. He could not be imposed upon by pretences and plausibilities. He saw through such artifices as quickly as through sophistries in argument.

He had a great love of nature. The beautiful landscape on which he daily looked was like daily food to him. There were few things that he enjoyed more than driving with friends over the charming region about Litchfield and calling their attention to the beauty of the scenery. He loved flowers. His growing crops, the ripening fruit upon his trees, were watched with less of pecuniary interest than of an almost poetic enthusiasm.

And he was a thoroughly religious man. He was helped to this by his fine spiritual nature, which was indeed the foundation of his whole character. He was from early manhood a communicant in the Episcopal Church, and in the parish with which he was connected was one of the most active members, always representing it as delegate in the conventions of the diocese, and for several years past representing the laymen of the diocese in the national triennial conventions of the church. He was always very liberal in his gifts to religious and charitable objects.

Judge Seymour was married on the 5th day of October, 1830, to Miss Lucy Morris Woodruff, a daughter of Gen. Morris Woodruff, a prominent citizen of Litchfield, and sister of his law partner George C.

Woodruff, Esq. She survives him, with three of their sons, Edward W. and Morris W. Seymour, who are in the practice of law at Bridgeport in this state, and Rev. Storrs O. Seymour, who is now rector of St. Michael's parish at Litchfield. He suffered a great affliction in the loss of an only daughter three years before his own death.

On the 5th day of October, 1880, Judge Seymour and his wife celebrated their golden wedding amidst their relatives and friends, many attending from all parts of the state and some from other states. The occasion was one of exceeding interest. It brought into deserved notice the charming home life which, with its support and solace and inspiration, had underlain his laborious professional and public life. Throughout the day, which was hallowed by a tender and impressive communion service at the church in the morning, the venerable pair, serene and saintly, received the homage of reverence and affection; while nature, loved of them both, seemed eager to show her gratitude by an unmeasured tribute of flowers. The autumn day was suggestive of the receding year and of ripened lives, and to him it proved far more than the golden bound of the half century. Before the next autumn came he had passed, in the beauty of his life's completeness, from the earthly into the eternal years.

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In the Superior Court at its next session in Litchfield, before Judge Loomis, Ex-Governor Andrews, in presenting the resolutions of the bar of the county on the occasion of the death of Judge Seymour, addressed the court as follows:—

"A great sorrow has fallen on the bar. Only a short time ago he, who by age, by service and fame, had long been our leader, passed from our midst forever.

"My brethren have assigned to me the honorable duty of presenting to the court a testimonial of their respect for the deceased and their grief at his loss, and of asking that it be spread on the records."

[The resolutions were here read by the clerk.]

"Judge Seymour died on the morning of the 12th of August last, at about the hour of one o'clock. His death was not unexpected, yet as the day dawned and his fellow citizens came to know that he was no more, a solemn and profound grief settled upon the whole community. The court-house in which so large a part of his life had been spent was appropriately draped. His professional brethren from this county and from other parts of the state attended his funeral. And as we came back from his grave—the solemn words of the burial service still lingering in our ears—one sentiment seemed to pervade us all: that the good man whose death we so much deplored had not wholly died; that he still lived in our remembrance of his warm and steady friendships and social virtues, in those legal judgments, exhibiting his vast attainments in the law, which, among others, have given to the Con-

necticut Reports the character of a commanding authority, and in those labors by which the avenues where all men are compelled to seek justice have been, in some measure, freed from their clogs and pit-falls. In these things he still lives, and in these things not only we but succeeding generations shall hold speech with him. *Vivit enim, vivetque semper; atque etiam latius in memoriâ hominum et sermone versabitur, postquam ab oculis recessit.*"

[After giving at some length the principal events of the life of the judge, Gov. Andrews proceeded as follows:]

"This is the record of an exceedingly active, busy and useful life. How brief it seems, and yet how wide it reaches. Justice is the soft but enduring band which holds men together in organized society. It is the great interest of men on earth, and whoever ministers at her altar or contributes anything to make the foundations of her temple more firm or to raise its dome nearer to the skies, joins his name and fame to that which must be as enduring as the frame of human society. Throughout a long life our deceased friend wrought with zeal and fidelity in this work.

"Those of us who practiced before Judge Seymour while he was on the bench know how well fitted he was for that high position. In the first place he was eminently learned—learned in the books, and his memory was wonderfully stored with that learning which comes from experience. In his long practice at the bar and service on the bench nothing had escaped him. No case was so complicated nor was any difficulty so great but somewhere in his memory there was a precedent or a rule to solve it. And then he knew how to use his learning. This is a great gift. He had that many-sided faculty which enabled him to adapt means to ends, to compare, modify, adjust, and reconcile the testimony of witnesses, and amid a multitude of conflicting and contradictory statements to find where the truth lay. He was a man of the strictest integrity, and what is more, he possessed the perfect confidence of the community. He received every one of his judicial appointments from his political opponents. It is not enough for a judge to be honest. No one can come up to the measure of a good judge unless he is believed to be such. It is this belief which gives power to the sword he bears.

"And then he had great patience and kindness of heart and charity for the weaknesses of men. Moreover he was a steady believer in liberty, as defined by the first John Winthrop, the privilege 'to do that only which is good and just and honest.' In the history of all the great men who have adorned the bench in our state I can hardly name one who possessed more useful faculties for that high magistracy or possessed them in larger degree than Judge Seymour.

"With judges such as he it matters little who controls the other departments of government. 'Let us repose, secure, under the shade

of a learned, impartial and trusted magistracy, and we need no more.'"

Judge Loomis replied as follows:—

"Before ordering to be recorded on the records of this court the resolutions of the bar of this county relative to the late Judge Seymour, my heart prompts me to add a few words of tribute—poor and inadequate as they may be to do justice to his memory.

"I well and gratefully remember the lasting impression made by his kindness seventeen years ago, when, for the first time, a young and inexperienced judge, I came to preside over this court, oppressed with despondent feelings and distrustful of my own qualifications for this high office. On that occasion his kind and friendly greeting and his generous words of commendation and encouragement greatly cheered me in my work and will never be forgotten by me. From that day until the day of his death it was my high privilege to enjoy his personal friendship and to be the recipient of his kindness, encouragement and hospitality.

"With the sentiments contained in the resolutions now before the court and with all the words of eulogy here uttered in regard to the personal, professional and official character of Judge Seymour, I fully concur. Glowing tributes have been elsewhere given, indeed they seem to have come spontaneously from every part of our state, all in perfect accord. And not only does the profession to which he belonged and of which he was the head and most radiant example, award him the high praise, but he shared also the confidence, affection and reverence of the people generally. And yet I know of no man who has taken less pains to court public favor by using the common artifices that are supposed to gain it. This strong attachment on the part of the people for him is however explainable on the principle that he who sincerely shows himself friendly will have friends.

"Judge Seymour was eminently and proverbially kind to all—high or low, rich or poor. His every act and look and word gave evidence of this. It was the recognition of this trait that called forth the facetious and perhaps rather extravagant remark that I once heard from a lawyer in this state, to the effect that if Judge Seymour decided a case against a man, the latter always thought he had won the case.

"Such a lively tenderness for the feeling of others I have rarely, if ever, witnessed in any man. He was sincerely friendly, generous and self-sacrificing and thoroughly good. But while he had warm attachments, yet, as a judge, we can say of him that his friendships never perverted his judgments. No man's friendship availed him with the court, and no man's displeasure prejudiced his cause. On the bench he presided with dignity, utterly devoid of ostentation or display. His legal opinions, while a member of the Supreme Court, are celebrated for their point, simplicity and common sense, as well as for a clear comprehension of all the law and facts connected with or bearing upon the case.

Obituary Notice of Chief Justice Seymour.

"In every relation which he sustained, whether private, professional or official, I would characterize him as of spotless purity of life and motive, of grave yet kind and gentle manners, of unwearied patience of application, of clear, vigorous and healthy understanding, and of a passionless judgment which sought truth for its own sake.

"Another thing not yet mentioned always excited my admiration. His heart and sympathies, always fresh and enthusiastic, were finely attuned in harmony with all that is beautiful or grand in the realm of nature. In walking or riding with him I have often noticed how his emotions would kindle and glow as he drank in the glories of some vast landscape; and at the same time with all the poetic fervor and appreciation of a Burns, he would notice and expatiate on the beauty of some humble wayside flower.

"But I refrain from any further attempt to describe his many merits. Surely it is not necessary before these, his professional associates and neighbors, in this, his native town, to whose historic scroll, luminous before with a constellation of great and illustrious men, his name and memory will add a new and never-fading star.

"In conclusion I wish to say this to the members of the Litchfield county bar. You have a rich legacy in his precious memory. This lofty idea of personal and professional character will ever be with you beckoning you onward and upward. All may not reach such eminence and such honor; but all, inspired by his illustrious example, may honor their high calling and profession. What will endure longest and glow brightest is not his extensive legal attainments, nor his high intellectual abilities, but rather his spotless justice, virtue and goodness. All history shows that virtue is the true immortalizer. The truly good are the truly great. A lawyer is the servant of his fellow men for the attainment of justice. If there is lowliness in the idea of being a servant, what loftiness in the object! If the lawyer is the servant of earth, at the same time he may be the minister of Heaven."

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At a meeting of the Hartford Bar, called upon the occasion of Judge Seymour's death, the venerable Judge Waldo, who himself died a few weeks after, presented some appropriate resolutions, and in remarking upon them referred in touching terms to the long and intimate friendship existing between himself and Judge Seymour, while on the bench of the Superior Court together and earlier during their public life at Washington, and closed by saying that in all the long years he had known him he knew of no stain upon his life or blemish upon his character.

Ex-Governor Hubbard spoke as follows:

"I think we can all say, in very truth and soberness, and with nothing of extravagance in eulogy, that we have just lost the foremost, undeniably the foremost lawyer, and, take him for all in all, the noblest citizen of our state.

"He possessed, to begin with, an intellect which, if not brilliant or original, was receptive and absorbent in a very high degree, and which not only held and assimilated its stores, but weighed them, as it were, in balances. Besides this judicial temper of mind, he brought to the bench very ample attainments in the science of the law, a large and varied experience in practice at the bar, and a certain sinewy common sense which added to his other attainments a practical working value that nothing else could have given. I hardly need add—what would naturally result from the premises—that he had a large measure of what is known amongst lawyers as judicial wisdom, that supreme endowment of a judge.

"Accordingly, though possessed of a discriminating intellect, he did not suffer it to become too subtle and absolute in the applications of legal science to the varied and ever varying affairs of men. He had an abundance of case learning, but was not a case lawyer. His opinions rarely failed to reach the very heart of a cause, were always simple and direct both in manner and matter, and never overlaid with a parade of learning, though never reached without much care and research.

"Neither did he ever attempt to display his quickness of parts by running ahead of the evidence or argument in a cause, as the manner of some is, and prejudging the conclusion by hasty prepossessions. He was well aware that it is a thousand times easier to lodge a truth in the mind than to dislodge an error. He seemed to realize that the learning of the bar is as indispensable to the bench as the learning of the bench to justice, and that, as Lord Bacon says—perhaps somewhat too absolutely—"it is no grace to a judge first to find that which he might in due time have learned from the bar." In a word, he was never so quick-witted as to distance the cause, nor on the other hand so dull-witted as to get distanced by it.

"I have never known a judge who was more scrupulously watchful of the movements of a trial, more intent on the precise matter in hand, more completely *totus in illis*. His wits were never wool-gathering, and he abstained from bringing his epistolary and judicial faculty into hotchpot during a hearing. He never lacked in attention, even when counsel lacked in force or precision. He used, as you all remember, to take very few notes of evidence; but his ears and memory were marvelously alert to all the disclosures of the cause. He had a habit of listening to an argument with closed eyes—owing, I suppose, to weakness of vision; but how sleepless his attention and reason were! and how those shut eyes of his used to open with mild surprise, sometimes with expressive reproach, at any perversion of fact or law or any other abuse either in matter or manner of the just liberties of argument.

"He seemed to me to possess in a marked degree what we are accustomed to call the judicial conscience. His moral sense was keen and discriminating, and he had a quick scent for the discovery of fraud, falsehood and oppression in the entanglements of a cause. He was made

up for a great chancellor. Such an office he would have filled to its full, and made it illustrious with the noble ethics of equity law carried home to the business of men.

"And this leads me to say a word of his recent services as a law reformer. You would have said in advance that he was the last lawyer in the state to rebel against an old hereditary bondage of the law. Like the man in the iron mask, he had got used to it and lived and grown old in it. But he saw and felt, what some of our best lawyers have found it so difficult to see and feel—that the law has remained for centuries a dead and cowardly conservatism, rusted and crusted all over with what Burke in the glamour of his eloquence calls 'the awful hoar of innumerable ages.' How bold and courageous he was for reform, and yet how careful, discreet and wise, let our new system of civil procedure testify. By this work more than by all else he has done he has left his mark on the jurisprudence of the state. The fame of the best lawyer ordinarily goes with him into his coffin; but I cannot doubt that this service of his rendered to law reform will make his name and fame abide in honor when the lives of the rest of us shall be as a watch in the night that is past.

"And now, in conclusion, this half century of just and useful life-work done, this race of honor run and won, not without sweat and toil, we commend with one accord and a common love, grief and homage, this Christian sleeper to the hospitable bosom of our common mother, till the day break and the shadows flee away; and so, in the saintly language of the saintly Fuller: 'We leave our good judge to receive a just reward of his integrity from the Judge of judges at the great assize of the world.'"

Mr. William Hamersley, State's Attorney, after describing the qualities indispensable to a great lawyer and judge, said:—

"It is the rare combination of qualities which make the true lawyer that determines the professional rank of Judge Seymour. In describing the typical lawyer we give the truest description of his character. As advocate, counsellor, judge, legislator for church and state and nation, we find him true to this high standard.

"And beyond all this, he had the gift of impressing his acts with a rare kindness of heart. His way through life was not only sternly true, but at every step it flowers with kindly thoughts and generous acts.

"Wonder has often been expressed that during his last years, at an age we are accustomed to associate with a dread of change, he should have devoted himself with the enthusiasm of youth to promoting reforms in the law. Such a course is not really strange in view of his life and character; but it serves to illustrate most strongly both his full comprehension of the nature of his profession and his high appreciation of its duties."

Mr. Henry C. Robinson, after remarking that he could not recall the occasion when the Hartford Bar had met for greater mourning, and

referring to some incidents of the life of Judge Seymour, spoke as follows:—

"Sixty years ago, a student at Yale, he encountered obstacles in the way of study which would have disheartened most young men. He was almost entirely deprived of eyesight, and for many terms his lessons were learned chiefly from the lips of his room-mate. But with this immense limitation he took away almost the highest academic honor.

"Perhaps in that very discipline he developed his remarkable memory, which has so often excited our wonder, and which enabled him almost without note or memorandum to carry the details of testimony and the links of reasoning in his retentive mind. It was not just such a memory as Lord Macaulay's, which he was proud to claim was so exact that, were every printed copy of Paradise Lost and Pilgrim's Progress destroyed, he could reproduce them both without the loss of a word. But it was a memory which sifted out the waste of testimony and argument, often so extensive and dreary, and held, as in crystal, things which were relevant and controlling.

"Judge Seymour brought to the bench and bar absolute purity of purpose, great natural justice, sharp insight, and large comprehensiveness. To these he added the drill of constant intellectual exercise, the thorough study of judicial investigations, and the constantly renewed view of elemental principles.

"Judge Seymour's closing years are worthy of description by the pen of a John Wilson, there was in them so much of pathos and tenderness and beauty; living on the green hills of Litchfield, drinking in the beauties of every sunset and cloud and wild flower, loved by every neighbor, revered by a leading profession, honored by a State, fresh in the power of every intellectual faculty, and at last his long day of usefulness sinking in a short twilight, and ministered to in his weakness by hands of uncommon love."

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An appreciative sketch of the Judge's character was contributed to one of the public journals by Greene Kendrick, Esq., of the Waterbury bar, from which the following extract is taken:—

"On whatever side Judge Seymour touched life,—whether in a civil, political, judicial or religious relation, his integrity was not faint-hued, but manly, in-grained, and sharply defined. Theoretic morals and the easy, shifting standard of modern honesty found in him neither an admirer nor a follower. He lived, to borrow the words of a quaint writer, by old ethics and classical rules of honor. To his mind right and wrong were *realities*, they were no mere relative terms of indefinite application. His probity of character was of so exact and even a type that it might almost be styled mathematical.

"To appreciate fully Judge Seymour's character one must have seen

him among his acquaintances, his professional brethren and friends. It was once said of Scott by a day-laborer, that he spoke to every man as if he had been a blood-relation. The same remark may be applied to Judge Seymour with a peculiar fitness. He belonged to that class of men, of which every age yields far too scanty a supply, 'born to be loved, honored and esteemed.' His character was simple and his heart was warm. A bearing ever courteous gave him a dignity and a veritable nobility of nature; hence, he reaped a large harvest of men's confidence and affections.

"No chilling haughtiness of manner or severe gravity of deportment in him repelled either stranger or friend. The variety and extent of his knowledge was a rich fund of instruction to all who sought to avail themselves of his counsel. He possessed that sweetness of temper, that genial sympathy which ever caused his visitor to leave his presence with a lighter step. When the ear heard him it blessed him; and when the eye saw him, it gave witness to him.

"At the bar, on the bench, in every position which Judge Seymour was called to adorn, he was unpretentious, unaffected, unselfish. The description of the typical lawyer, given by himself on retiring from the bench in 1874, seemed aptly to illustrate his own character. 'If,' he remarked, 'one has mind, industry, learning and culture, he shows it; his temper and disposition will show themselves. If he has integrity and truthfulness in him, they will appear. If, on the contrary, he is a sham, everybody will see it.'

"A life extending over more than three-quarters of a century brought Judge Seymour to a full knowledge of the significance of life, of what earth affords and what manhood means. He formed in himself a precedent of real greatness. His manly practice at the bar, his patience and suavity on the bench, his tender sympathies with the unfortunate and afflicted, his gentlemanly deportment everywhere and on all occasions, his hospitality, his generosity, his integrity, his incorruptibility, form, in a sentence, the picture of his life, as recently delineated by one who knew and who appreciated his friendship and his worth."

## OBITUARY NOTICE OF LOREN P. WALDO.

Loren Pinckney Waldo died September 8th, 1881; at Hartford, where he had long resided, in the eightieth year of his age. He was born at Canterbury in this state February 2d, 1802. Of French descent in the paternal line and (as his name indicates) of Waldensian blood, he inherited the energy and resolution, the love of civil and religious freedom, and the inflexible honesty which characterized him. His

school education was completed when he was fourteen years of age. From that age to twenty-one he taught school every winter, devoting the rest of the time to labor on the farm in support of his father's family, the poor health of his father making it necessary that he and a brother should assume the entire family support. He however devoted all his leisure-time to study, and during this period mastered the higher branches of mathematics then taught, and acquired a good knowledge of the Latin language. He also thoroughly studied Hedge's Logic in the fields, in the brief intervals of labor, and for two years before he became of age read law during the winter evenings.

At twenty-one he left home with nothing but the clothes he wore and entered the law-office of his uncle, John Parish, in the town of Tolland, pursuing his studies and at the same time earning his living till he was admitted to the bar in Tolland County in September, 1825, at the age of twenty-three.

On the 22d of November of the same year he married Frances Elizabeth Eldridge of Tolland, and soon after removed to Somers in the same county and began the business of his profession.

Few men have commenced life under greater disadvantages, few have encountered such obstacles with equal courage and persistence, or have been more successful in surmounting them. His brave struggles for an education and his well-known integrity recommended him to public confidence and respect, and he soon obtained a good degree of prosperity in his business. In all his labors and trials at that time and throughout life he was sustained and cheered by his wife, a noble woman, whom he survived not many years.

He was postmaster in Somers for two years, and also one of the superintendents of public schools. For a considerable time he taught a private class of young men who were qualifying themselves for teaching. His interest in the cause of education was great and continued through life. He was also a zealous advocate of the cause of temperance, and practised throughout life total abstinence from all intoxicating liquors.

In 1830 he removed to Tolland, where he resided until 1863. During this time he represented that town in the General Assembly in the years 1832, 1833, 1834, 1839, 1847, and 1848. He was State's Attorney from 1837 until 1849, and was Judge of Probate for the district of Tolland in the years 1842 and 1843. In 1847 he was chosen by the legislature one of a committee of three for the revision of the statutes of the state, since known as the revision of 1849. He was also afterwards appointed one of the committee which made the revision of 1866.

In 1849 Mr. Waldo was elected by the democratic party, to which he belonged through life, to represent the first district, comprising the counties of Hartford and Tolland, in the thirty-first Congress of the United States. He was distinguished in Congress as elsewhere for his

untiring industry, and won universal respect and confidence by his faithfulness and integrity. At the expiration of his term he was appointed Commissioner of the School Fund for this state. During the administration of President Pierce he was appointed Commissioner of Pensions, in which service he continued until elected a judge of the Superior Court for a term of eight years. At the expiration of this term, having with Judge (afterwards Chief Justice) Seymour failed of a reelection on political grounds in circumstances which are explained in the obituary sketch of Judge Seymour next preceding, he removed to the city of Hartford, where he pursued his profession until his death, in partnership with Ex-Governor Hubbard and Alvin P. Hyde, his son-in-law.

Judge Waldo was a man of religious convictions and life. In early life he joined the Congregational Church of Canterbury, and during his residence in Hartford was a constant and devout attendant upon and communicant in the South Congregational Church in that city, although he had come to reject some of the tenets of the Calvinist creed and to hold the theological views of the conservative Unitarians. His unsectarian and Christian spirit made him not only a sympathetic attendant upon the public worship there, but a cordial participant in the Christian activities of the church.

The love of music was very strong in Judge Waldo throughout his life. In his earlier years he was a fine singer and to the last his deep bass voice was heard in the congregational hymns in public worship.

At a meeting of the Hartford Bar, called upon the occasion of Judge Waldo's death, the following admirable sketch of his character and tribute to his memory was given by Ex-Governor Hubbard.

GOVERNOR HUBBARD'S ADDRESS.

I have long had—I hope I may never cease to have—some of my choicest personal friends amongst my brethren of the bar. And so, as one after another has fallen from our ranks, I have occasionally, as a kind of pious duty, attempted a word or two of tribute. But to-day I hesitate. I have just come from chambers which lack a familiar presence, and where stands in its mute eloquence a vacant desk. If I were to consult my own feelings I, too, should remain mute. But when the whole bar is met to utter its common grief for one who has been to us all friend, father and brother in one, how can I, who have known him so long and loved him so well, refuse to break my silence with a few broken words?

I have known Judge Waldo ever since my admission to the bar. For the last fourteen years I have been connected with him in business, and during all those years have been not only in daily but in intimate relations with him. Let me, then, measuring my words by my knowledge of the man, attempt a passing estimate of his professional and personal character.

He was not a man of large general knowledge nor of very extensive literary culture. I have heard him say that he never attended school after he was fourteen years old, and only two months after he was thirteen, and that he studied Hedge's Logic while at work in the potato field. But he had a marvelous genius of industry, and by force of this he came up out of the common school into the profession, and through the profession into distinguished stations in the state and general government.

Neither was he a brilliant lawyer. In a strict sense I hesitate to call him an eminently learned one. But his acquirements were very ample in all the common learning of the profession; and in particular branches, such as municipal, statutory, probate and practice law, and especially in that great field of elementary law which governs the common affairs of common life, he had few superiors. His opinions on these subjects had an almost judicial authority with the community; and so it resulted that not a few of the differences between man and man which in bad hands itch and fester into law suits, sometimes into hereditary enmities, were composed almost at the outbreak by his sagacious counsels and friendly mediations.

He lacked somewhat the qualities which give reputation to an advocate; that one-sidedness, or rather many-sidedness of intellect which lights up one side of a cause and casts the other in shadow, as the sun kindles in turn one hemisphere and darkens the other; that light artillery of wit, satire, invective and technical assault which always worries and sometimes wastes an antagonist; that deadly insight—Rufus Choate once called it an "instinct for the carotid"—which discovers as it were by intuition an adversary's weak point and drives through it by strategy, surprise or main force. Some natures there are that seem strongest in repose; others that like an athlete need the point of an enemy's weapon to sting them into strength. His nature was not at all of this make and temper. Quite the contrary. The whole drift of his mind and the whole moral constitution of the man tended to the things which make for peace. He had little taste, therefore, for the hot and heady contentions of the forum, little stomach for its duels of wits and stormy antagonisms.

As a natural consequence his field of practice was more largely that of a counsellor than of an advocate. This office is seemingly more humble than the other, but not, let me add, one whit less responsible, and I have sometimes thought, of higher grade and value, for it accomplishes some of the best professional results by reason and without the expense of bad blood and litigation. And then, besides all and above all, it comes home closer than any other to the conscience of a client, and, if well exercised, tries his reins and discovers whereof he is made. It is not unfrequently the great and solemn confessional of the law which carries with sealed lips the cares, and fears and perplexities of

men, the peace and honor of families, the successions of children and of children's children, the casuistries and restitutions of the living and the anxieties and testaments of the dying. With what religious fidelity and good conscience our friend discharged this almost priestly function I have no need to tell; the name and fame of it are still fresh amongst us. More than any other man I have ever known in the profession—as much as any I have known even in the sacred calling—he was a peace-maker amongst men, a pacificator of their strifes and quarrels.

In a word, his practice represented not so much the battles and sieges of professional warfare as its truces, diplomacies and treaties of peace.

I have spoken of our friend as a counsellor. Let me now say a word of him as a judge. Without possessing great boldness of purpose or the highest range of intellect, he had—what else his mind might possibly have lacked—a most admirable poise for the judicial office and a very delicate appreciation of natural equities. He took pleasure in determining the controversies of men by the standard of the judicial conscience. He delighted less in the cast-iron forms and rules of law than in the flexible modes and "uncovenanted mercies" of chancery. Accordingly he used to stretch the administration of law as near as might be—a legal doctrinaire might say perhaps too near—to the lines of equity, and the lines of equity as near as possible to the lines of good conscience.

No judge was ever more patient and painstaking in investigation, more steady in temper, more courteous in bearing, more dispassionate in judgment, in a word, more clear and conscientious in his great function as a minister of justice. When he put on his office he put off affection and favor, as if always mindful that the measures we mete to others are to be meted to us in turn. We have had abler judges on our bench, without doubt, but never one I think more hard-working, faithful and useful.

I have already said that our deceased brother was greater as a counsellor and judge than as an advocate; let me now add that as a man he was greater than either, and equal, I think, to the best.

Without anything whatever of pretension, his life was a pattern of all those things which are honest and of good report amongst men. His industry was incessant; rest with him was rust; and he husbanded every day and hour of his life as if lent him on a usury for good. His chief purpose was not to gain riches or applause, but to walk justly in all things. Such qualities as these sometimes engender something of censoriousness in judgment, something of austerity in morals, but none of these things tended in the least to narrow the breadth of his social life or freeze up any of its warm currents. On the other hand, he was full of the gentlest humanities, singularly free from evil-speaking, and as large and tender almost as a woman in his love and sympathies.

Frugal and temperate in his habits, afflicted with neither poverty nor

wealth, his manhood was passed in the practice of all those virtues which conduce so largely to the health both of body and of mind; and he ripened at last into an old age that was almost youthful. If gray hairs be, as is so often said, a crown of glory, the crown is not seldom set with thorns; for with old age there come in the order of nature I know not what infirmities of temper, what physical dishonors like as it were a moth fretting a garment, what darkenings of the sun and the moon and the stars, what vain struggles by spent swimmers against the swift current, what enforced marches with reverted eyes and sealed orders into the land of shadows.

Nothing of all this in the declining years of our friend. The day was far spent and the night at hand, yet he was as trustful and even-tempered as a child. Nothing barren or wintry in this old age of his—I speak that which I have myself seen—but everything ripe and genial; as when the mellow autumn sets in upon the toil and scorch and sweat of summer, and, though verdure and flower and the voice of the bird are gone, yet the song of labor is on the hillsides, and the harvests gather themselves into garners, and the wasting foliage flushes into purple, and the sloping sun yellows into gold. All this perhaps I have little need to relate, for you have seen it all under your own eyes; only I may add that with this disappearing old man disappears a life which would be thought as gentle as good old George Herbert's, if as gentle a pen as good old Isaac Walton's could be found to sketch it. You may easily find greater men, but where a better, a more white-souled one?

I have thus given you my idea, founded on much observation, of the character of our deceased brother. 'Tis a friendly portrait, I will not deny—I would not have it otherwise—but true, I hope, to the modesty of nature.

I cannot close without calling to mind in a common memory those other patriarchs of our profession, the fellows of the deceased in age and rank—the roll of them I will not call—who have passed away since yesterday, as it were, leaving behind them—am I not right, or does affection mislead my judgment?—no successors of equal rank and stature. The last of that great patriarchate is gone. The roll closes.

"Abiit ad plures."

And now as I look over our broken ranks, and my eyes miss this white-haired and venerable leader, this loved and fatherly presence gone hence where go the judges and counsellors of the earth till the heavens be no more, may I not here and now, before our ranks close again and we move on and leave our dead comrade behind—some short marches only behind—may I not here and now, in the presence of this brotherhood which knew him best and loved him most, borrow for my last words that golden benediction of our Supreme Counsellor and Judge—Blessed are the peacemakers, for they shall be called the children of God.

## Obituary Notice of Loren P. Waldo.

The following extract from the sermon delivered at Judge Waldo's funeral by his pastor, Rev. Dr. Parker, gives a most felicitous sketch of his character, especially in its moral and religious aspects.

### FROM THE SERMON OF REV. DR. PARKER.

Seventeen years ago Judge Waldo came with his family into this parish and entered into communion with us in this congregation and society. He has been with us until now, in all simplicity, sincerity, integrity, serviceableness, and honor. During that time no one has manifested a truer, livelier interest in the welfare and prosperity of this religious society, no one has contributed more generously of all things to its support, no one has been more personally identified with its various services and activities.

Till within a recent period his venerable figure was regularly seen in the Sunday-school, and up to the time of his last sickness he was a regular attendant upon all the public services for worship. How much he loved, prized and enjoyed the services of this sanctuary can hardly be told, the reason being, I suppose, that he put so much interest into them.

Speaking now as pastor of this congregation, I testify of his great and signal services to us, of our great and grievous loss in his death, of our universal esteem, respect, reverence, and affection for him. His was the towering form and commanding figure in this congregation even to the last. His counsels were as freely given as they were wise and prudent. Even in his old age he was a tower of strength to pastor and people.

Of my own personal indebtedness to him, friendship and affection for him, I cannot trust myself to speak. So has he dwelt with us here, going in and out before us in all humility, uprightness, purity, peaceableness, and godliness. And as in this congregation, so in this community, and so in the face of all with whom, anywhere, he has held relations, social or professional. There is but one testimony. It is multitudinous, but absolutely in unison. He was good all through—thoroughly good. For faithfulness, truthfulness and integrity, and for purity of life, the name of Judge Waldo is a synonym. But goodness means more than any combination of these qualities. Goodness is that supreme spirit which organizes all such separate virtues into a lovely, kindly, beautiful unity of character. This goodness was his pre-eminently. And it shone out more conspicuously, perhaps by reason of the fact that Judge Waldo was a particularly plain and simple-minded man—of a transparent nature. What was in him shone out clearly, in word and deed.

Moreover he was what we may venture to describe as an old-fashioned man in many of his manners and habits. This he was by Puritan birth and training, by early conditions of life, by temperament and educa-

tion. So that his goodness was manifested in certain quaint forms that were all the more delightful, as suggesting and perpetuating a type of manners, stately, yet benignant, dignified, yet simple, which was more prevalent among our fathers, in the grand old homespun age of New England which Dr. Bushnell has described.

If one stands in the nave of the cathedral of Cologne, he sees on one side two splendid windows of modern design, and opposite, two windows of older device. Both are beautiful, as the same light streams through them, but to most the older windows, by reason of their ancient and quaint patterns, are the more attractive and pleasing. And somewhat so we may compare the old men like Judge Waldo, in whom ancestral manners and habits have been preserved, with others who have grown up in new conditions of life when the same light and glory irradiate them.

It has often been my privilege and pleasure to hear Judge Waldo talk, in a free way, of the conditions, pursuits and struggles of his early life. He unconsciously showed in such conversations when and how the foundations of his success in life were laid. Quitting the school at the age of fourteen to help out the meager support of the family, taking upon him the burdens that belong to mature life, with an unquenchable thirst for knowledge, studying by fire-light of evenings, and in the intervals of hard field-labor, teaching school from district to district in winters, and boarding from house to house, teaching private classes, studying law at evening after work-days, borrowing money to purchase law books, and so struggling and fighting his way—he came at last to the point of marrying the noble woman who was his help-meet almost through life, and starting in his profession with nothing. Such was his heritage and discipline in youth—worth more to him probably than a princely fortune would have been. It was a charming story to hear from the old man's lips, as he told it with kindling eye and kindling spirit. That courage, perseverance, fidelity, integrity, and diligence were sustained throughout life, giving him success in business, the unbounded confidence and honor of men, and above all a character that no storms could shake. "The child was father of the man."

Of Judge Waldo's religious character I forbear to speak much. I should be ashamed to defend it. I should insult this congregation and this company of lawyers, and this community, and his memory, by stooping to suggest that notwithstanding some doctrinal variations from orthodoxy he was a Christian man.

The orthodoxy or unorthodoxy has nothing to do with it. Such characters as his demonstrate this. Would to God, gentlemen, that you and I and all who hear me this day, and all Christian men and ministers, were as good Christians as he was. His notions and opinions, never obtruded, and always held with equal modesty and firmness, were his own. His spirit was that which all good men and women have in

common, from the time of righteous Abel until now: the spirit which pervades and unites the blessed company of all faithful people. But enough. It seems but a little while since we brought hither the body of his beloved wife. Her, too, we all knew and loved. That kindly face, those gentle eyes full of the pleasant light of a most lovely spirit, some of us will never forget. A mother in Israel!

And now his body awaits burial. Can we ever forget that tall frame, that white head, that rugged but often radiant face, that honest voice, that benignant aspect, that kindly courteousness of the gracious gentleman, that patriarchal simplicity of life? "The memory of the just is blessed." "The hoary head is a crown of glory, if it be found in the way of righteousness."

Farewell! oh friend and father, well-beloved! Farewell.

## OBITUARY NOTICE OF SAMUEL INGHAM.*

Although the distinguished gentleman whose name stands at the head of this article was not personally known to many of the present members of our profession in Connecticut, yet he was for many years so conspicuous a figure in the public affairs of his native state that it is eminently proper that some record of his character should be made here.

SAMUEL INGHAM was born in Hebron, Connecticut, September 5th, 1793, and died in Essex, in the same state, November 10th, 1881. All the education he received previous to his professional studies was gleaned from the common schools. He studied law in the office of Governor Mattocks at Peacham, Vermont, and with the late Judge Gilbert in Hebron, in this state. He was admitted to the bar in Tolland County, Connecticut, in 1815. He practised his profession during the first four years in Canaan, Vermont, and Jewett City, Connecticut. In 1819 he removed to Essex (then a part of the town of Saybrook) where he continued to reside until his death.

From 1828 to 1834 Mr. Ingham represented Saybrook in the lower house of the legislature. In 1834 he was Speaker. He was re-elected in 1835 and again made Speaker. At the same election he was chosen a member of Congress, but of course, on being officially notified of his election to Congress, he vacated his seat in the state legislature. He

*Prepared at the request of the Reporter by Hon. William D. Shipman, now of the New York Bar.

was re-elected to Congress in 1837, and served for two years as chairman of the committee on naval affairs. In 1839 he was again a candidate for Congress, but was defeated at the polls by the late Chief Justice Storrs. His failure to be returned to Congress was a source of great regret, not only to his friends at home, but to the members of that body, over which he had repeatedly presided as chairman of the committee of the whole, with great skill and ability, during some of its most stormy and protracted sessions. Had he been re-elected he would undoubtedly have been the candidate of his party for Speaker, the third federal office in power and dignity; a position for which he was eminently fitted.

In 1848 and 1850 Mr. Ingham was a member of the state senate. In 1851 he was returned to the lower branch of the legislature and elected Speaker.

For nine years he was State Attorney for Middlesex county, and for four Judge of the County Court. He was also tendered a seat on the bench of the Superior Court and Supreme Court of Errors, but declined.

From 1858 to 1861 he was Commissioner of Customs in the treasury department at Washington.

Mr. Ingham was also four times a candidate for Governor of the state, receiving the full vote of his party, but failed through the defeat of the latter.

This long career in connection with prominent public office naturally suggests enquiry touching the personal and professional character of the man who, for nearly forty years, filled so large a space in the eye of the public. It will be interesting to note some of the characteristics of the times in which he lived. Born during the first administration of Washington, and coming to the bar at the close of the second war with Great Britain, his youth and early manhood covered a period in which our political institutions were being formed, and the foundations of the federal government laid. The conduct of public affairs involved the discussion and settlement of great questions on which preceding history shed but a feeble light. But the public men of that day were distinguished by high personal qualities and eminent public virtues. Such an atmosphere was favorable to the development of sterling traits in rising and thoughtful young minds.

When Mr. Ingham came to the bar, and during the most active part of his professional life, he was brought into contact with many able and accomplished lawyers, both on the bench and in the forum. But it was an age of simple habits, small libraries, small fees and limited resources. No marked success was to be obtained except by constant, self-reliant labor and upright conduct. These habits and qualities Mr. Ingham illustrated throughout his long life, and they made him honorably conspicuous at the bar and in public station. Though he was without the advantage of a university education, though he was

neither a polished orator nor an elegant writer, he rose to eminence in public affairs, and became, in one respect at least, a formidable power at the bar. It cannot be said that, in the discussion of legal questions, he exhibited what a distinguished lawyer has called "deadly precision"; for his mind was distinguished rather for its robust sense than for acute or exact reasoning. But in his best days he had few equals as an advocate before the jury; a function far more important in his time than at the present day. With a gigantic frame, an imposing presence, a powerful voice, rendered effective by deep and unaffected emotion, aroused by sympathy with and zeal for his cause and his client, he often made a powerful impression which carried conviction to the minds he was addressing.

It can be truly said of Mr. Ingham that he was, under Providence, the architect of his own fortunes, and rose to prominence by his own merits. From 1819 to the end of his life he resided in a country village, in a rural county, where there was no circle of powerful friends to accelerate his advancement in public or professional life. He sprung from an humble origin. What honors he received, therefore, did not come by gift or inheritance, but were won by manly personal effort.

Mr. Ingham's private character was without a stain. His habits were simple and unostentatious. For the last twenty years of his life he was an earnest and consistent member of the Episcopal Church, and, until his health failed, a regular and devout attendant on its ministrations and a liberal contributor to its support.

Dying at an advanced age, and after years of retirement from active life, Mr. Ingham's departure made no ripple on the stream of human affairs, whose current sets steadily towards the grave, and drops into its silence and darkness the distinguished and the obscure. But those who remember him in his full vigor, will not soon forget the massive, antique figure which has so quietly passed away.

# INDEX TO THE FORTY-EIGHTH VOLUME.

## CONFLICT OF LAWS.



## CONSPIRACY.



## CONSTITUTIONAL LAW.

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## HUSBAND AND WIFE.



## INSURANCE (FIRE).



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## PLEADING.



See INSOLVENCY, 1; INSURANCE (LIFE,) 1; PRESENTATION OF CLAIM, 2.

## POSSESSION, (RETENTION OF).

See RETENTION OF POSSESSION.

## POUND.

## PRESENTATION OF CLAIM.

1. It is provided by Gen. Statutes, tit. 18, ch. 11, sec. 6, that when a creditor of an estate not represented insolvent shall present his claim to the executor or administrator within the time limited by the court of probate, and he shall "disallow and refuse to pay it," the claim shall be barred unless the creditor shall bring suit "within four months after he has been notified by him that his claim is disallowed." Held that the disallowance and notice of it to the creditor are to be in terms so unequivocal that he may know with certainty when his claim, if not sued, will be barred. *Bradley* v. *Vail.* 376
2. In a suit on such a claim the defence that it is barred by a failure to sue within four months after disallowance and notice, cannot be made under the general issue without notice. *ib.*
3. The statute with regard to civil actions (Gen Statutes, tit. 19, ch. 18, sec. 11,) provides that no suit shall be brought against a surety on a bond for costs unless within one year after final judgment in the action in which the bond was given. The statute with regard to the estates of deceased persons (Gen. Statutes, tit. 18, ch. 11, sec. 4,) provides that courts of probate shall allow not less than six nor more than eighteen months for creditors to present claims against an estate. A surety on a bond for costs died within one year after final judgment in the action and before suit was brought on the bond. Held that the former statute was superseded in its application to the case by the latter, and that the claimant had all the time allowed other creditors for presenting his claim. *ib.*

## PRINCIPAL AND AGENT.

1. A builder made a written contract to furnish the materials and build a house for the defendant according to definite plans and specifications and for a fixed sum, all the materials and work to be accepted by an architect named, who was to superintend the construction. The builder, under the direction of the architect, did certain work variant from and in addition to the specifications, which increased the cost and value of the house. Held that the ordering of this work was beyond the scope of the architect's agency, and that the defendant was not liable to the builder for it. *Starkweather* v. *Goodman.* 101
2. Where goods are sold to a person who is in fact an agent of another and on his credit, but without knowledge of the agency on the part of the seller, the latter has the right to elect to make the principal his debtor on discovering him. *Merrill* v. *Kenyon.* 314
3. And the same principle applies where the seller is informed at the time of the sale that the buyer is an agent, but is not informed who the principal is. *ib.*
4. And the seller is not bound to make the inquiry. *ib.*
5. And where the seller takes the promissory note of the buyer for the goods, with knowledge that he is an agent, but without knowledge who is the principal, he is not debarred thereby from electing to make the principal his debtor. *ib.*

## PRIVILEGED COMMUNICATION.

See ATTORNEY 1.

## PROMISSORY NOTE.

See NOTES AND BILLS.

## RAILROAD.

A statute provides for taxing railroads one per cent. upon a certain valuation of their franchise and property, with a provision that when only part of a railroad lies in this state the company owning such road shall pay one per cent. on such proportion of the valuation as the length of its road lying in this state bears to the entire length of the road. A corporation owning a railroad that ran from the southern line of this state to the Massachusetts line on the north, took a perpetual lease, upon a fixed rent, of two Massachusetts roads, one connecting at the state line with its own road, and the other with the latter at its northern terminus, and thereafter the two roads in Massachusetts were operated and maintained by the Connecticut corporation as if they were its own property and the three roads were one entire road. Held that the Connecticut corporation was not to be regarded as "owning" the Massachusetts roads within the meaning of the statute, and that it was not therefore entitled to a deduction from the valuation of its property on account of them. *State of Connecticut* v. *Housatonic Railroad Co.* 44

## RECEIVER.

*C* was appointed in the state of New Jersey receiver of an insolvent corporation located there, which had on hand at the time a contract with two towns of this state to construct a bridge that connected them. He obtained authority from the insolvent court in New Jersey to go on and perform the contract for the benefit of the creditors, and agreed with the committees of the towns to do so. In building the bridge he purchased the materials and paid for the work with the funds of the corporation which he held as receiver. After the bridge was completed, a Connecticut creditor of the corporation factorized one of the towns as the debtor of the corporation for a balance due for the construction of the bridge. The town was found indebted, and paid over the money to the officer on demand

## WRIT OF ERROR.

# TABLE OF THE CASES CITED IN THE OPINIONS.

Ex. G. a. a.