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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

STATE OF CONNECTICUT.

JULY, 1903–JUNE, 1904.

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JUDGES

OF THE

SUPREME COURT OF ERRORS

DURING THE TIME OF THE WITHIN DECISIONS.

HON. DAVID TORRANCE, CHIEF JUSTICE.
HON. SIMEON E. BALDWIN, ASSOCIATE JUSTICE.
HON. WILLIAM HAMERSLEY, " "
HON. FREDERICK B. HALL, " "
HON. SAMUEL O. PRENTICE, " "

JUDGES OF THE SUPERIOR COURT.

HON. JOHN M. THAYER.
HON. SILAS A. ROBINSON.
HON. GEORGE W. WHEELER.
HON. RALPH WHEELER.
HON. MILTON A. SHUMWAY.
HON. WILLIAM T. ELMER.
HON. ALBERTO T. RORABACK.
HON. EDWIN B. GAGER.
HON. WILLIAM S. CASE.

ATTORNEY-GENERAL.

HON. WILLIAM A. KING.

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The Statute Book referred to in this volume as the General Statutes, unless otherwise indicated, is the Revision of 1902.

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

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TABLE OF THE CASES REPORTED.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT.

THE BERLIN IRON BRIDGE COMPANY *vs.* THE AMERICAN BRIDGE COMPANY.

First Judicial District, Hartford, May Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and RORABACK, Js.

The defendant purchased the plaintiff's plant and business, and agreed to reimburse it for expenditures theretofore actually made by it upon its uncompleted contracts, which the defendant assumed. *Held* that the plaintiff's right of recovery was not limited to expenditures made in the partial performance of such contracts, but included expenses incurred by its engineering department in making estimates, and the salaries and traveling expenses of its agents while negotiating and securing the contracts.

These expenditures, charged as "contracting expenses," were not given in detail, but were estimated, under a long-standing general-average rule of the plaintiff, at five per cent. of the contract prices, a method which the experienced officers of the plaintiff testified was proper and necessary and led to substantially correct results. Upon evidence of this character and tendency the trial court found that the sums called for by these estimates were actually expended by the plaintiff. *Held* that this conclusion, whether regarded as one of law or of fact, was fully warranted.

Another item, charged by the plaintiff on its cost book under the head of "pool expenses," was for sums paid by it to unsuccessful bidders upon these contracts, under a mutual agreement that the successful

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bidder should pay to each of the unsuccessful ones a certain percentage of the former's estimated profit. No question was made as to the validity of the "pool" agreement, or payments made thereunder, but the defendant contended that such payments were not covered by its promise of reimbursement. *Held* that such contention was not well founded.

The plaintiff guaranteed that the contracts turned over by it to the defendant would net the latter a clear profit of at least fifteen per cent. of the "shop cost" of performing them; and another clause declared that this term included "labor, material, and general shop expense, f. o. b. cars at works of the plaintiff." The trial court ruled that shop cost or expenses incurred elsewhere than at the works of the plaintiff in Connecticut and Pennsylvania were not to be included in determining the amount of the shop cost of the contracts assumed by the defendant. *Held* that this ruling was correct and in accord with the limited meaning which the parties themselves had seen fit to place upon these words.

Argued May 6th—decided July 24th, 1903.

ACTION to recover money claimed to be due under a contract, brought to the Superior Court in Hartford County and tried to the court, *Ralph Wheeler, J.*; judgment for the plaintiff for $32,860, and appeal by the defendant. *No error.*

Charles E. Perkins, for the appellant (defendant).

William Waldo Hyde and *Arthur L. Shipman*, for the appellee (plaintiff).

TORRANCE, C. J. The Berlin Iron Bridge Company and two of its stockholders are named as plaintiffs in this case, but as in the trial court the corporation was treated as sole plaintiff it will be so treated here, and the word plaintiff as hereinafter used will mean said corporation.

The defendant is a New Jersey corporation. In March, 1900, the plaintiff entered into a written contract (hereinafter called contract *A*) with one I. Gifford Ladd, in which it agreed, among other things, to sell and convey to him or his nominees or assigns, on or before May 1st, 1900, all its property and estate of every kind, and to go out of the bridge-building business. Subsequently the defendant became the nominee or assignee of Ladd, and succeeded to all his rights

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and became subject to all his obligations under said contract, and ultimately, in May, 1900, became the owner of all the property of the plaintiff. As a part of said transaction the plaintiff and the defendant entered into certain written contracts, one dated May 11th, 1900, called hereinafter contract *B*, and one dated as of June 1st, 1900, hereinafter called contract *C*.

In these contracts the parties, among other things, agreed that the defendant should assume certain uncompleted contracts of the plaintiff, and should pay to it whatever money the plaintiff had actually expended thereon prior to May 12th, 1900; and the plaintiff guaranteed that the amount so expended by it was $305,682.95, which is hereinafter referred to as the "guaranteed sum." The defendant agreed to pay ninety per cent. of said guaranteed sum upon certain conditions, and did so. The remaining ten per cent. has not been paid, and to recover that, with interest, this suit is brought.

In the court below the defendant claimed that the plaintiff had charged in said guaranteed sum more than it was rightfully entitled to charge as against the defendant, and that by reason thereof the defendant, in paying said ninety per cent., had paid more than it was obligated to pay; and the case was, without objection, tried upon the assumption that the defendant had the right to make this claim and to have it tried and determined in the court below. Whether in this case, and upon the pleadings therein, the claim thus made and tried was a permissible one, if proper objection to it had been made, may perhaps admit of some doubt; but under the circumstances we shall treat the case as court and counsel have heretofore treated it, namely, as one in which said claim was properly made.

The parts of said three contracts having any material bearing upon the questions in this case are the following: In contract *A* it was provided, in case of the consummation of the sale and purchase therein contemplated, that Ladd, or "his nominees or assigns," should assume the uncompleted contracts of the plaintiff upon a basis that would "net" to them "a clear profit in any event of not less than fifteen per centum

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of the total shop cost of performing such contracts." In contract *B* the plaintiff guaranteed that said contracts would net to the defendant "a clear profit in any event of not less than fifteen per cent. of the shop cost of performing such contracts," and the parties agreed in said contract that "the term 'shop cost' shall include labor, material, and general shop expense f. o. b. cars at works of the party of the first part." Contract *B* also provided that a certain committee, appointed therein with power to determine and appraise the value and profits of the contracts assumed by the defendant, should "within thirty days determine the value and probable profits of such contracts in its opinion." It further provided that if said committee should "certify that in its opinion such contracts will not net a clear profit of at least fifteen per cent.," then the plaintiff was to pay the defendant "in cash the estimated difference; but any contract not so appraised and estimated by the committee shall be deemed to fully comply with the guaranty" of the plaintiff above specified. Contract *C* recited that the parties had agreed "to defer the valuation or appraisal" of the contracts assumed by the defendant, "and to provide for the payment of the expenditures represented to have been made thereon" by the plaintiff, "less a proportion thereof to be retained" by the defendant as thereinafter provided. It also contained this provision: that the plaintiff "represents and guarantees that the amount of expenditures actually made" by it "prior to May 12th, 1900," upon the contracts of the plaintiff assumed by the defendant, "after deducting any moneys received" by the plaintiff "on account of such contracts prior to said date, is the sum of $305,682.95"; and a further provision that the defendant would pay ninety per cent. of said sum in three equal instalments on or before specified dates "provided the Bridge Company (the defendant) shall have on said dates respectively collected out of said contracts so assumed sufficient moneys to cover said payments." Contract *C* further provided that "the 10 per cent. balance shall be retained by the Bridge Company (the defendant) as a guaranty fund until the committee appointed" by contract *B* "shall certify

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that in its opinion the said contracts so assumed will net to the Bridge Company an average clear profit in any event of at least fifteen per cent. of the total shop cost of performing the same, as guaranteed in said original agreement (*i. e.* in contract *B*), and thereupon shall be paid by the Bridge Company to the party of the first part (the plaintiff) as hereinafter provided. The said committee may determine and appraise the profits of such contracts, or any of them, either before or after the complete performance thereof." It further provided in effect that if the committee should not certify that the contracts assumed would net the guaranteed profit, and upon performance such contracts should not net such profit, or if the committee should certify that said contracts would not net the guaranteed profit, "specifying the amount of the appraised deficiency, then and in either event the amount of said guaranty fund so reserved shall from time to time be applied by the Bridge Company (the defendant) to the payment of any deficiency in such guaranteed profit of fifteen per cent. resulting from the performance of such contracts, or so determined by said committee. Any surplus of such guaranty fund thereafter remaining shall be paid over" to the plaintiff.

The trial court found, in substance, (1) that the plaintiff actually expended upon the contracts turned over to the defendant the guaranteed sum; (2) that rightfully included in this sum were two sums expended by the plaintiff in procuring said contracts, namely, one amounting to $32,736.63, called "contracting expense," and the other amounting to $13,026, entered in plaintiff's books under the heads of "Pool," "Loop," "L," "S," or "Special," as is hereinafter more fully explained; (3) that the defendant "netted" from the contracts turned over to it "a much greater sum than fifteen per cent. of the total shop cost of performing the same"; (4) that the defendant owed to the plaintiff the sum of $30,568.29 (being ten per cent. of said guaranteed sum), with interest.

The errors assigned are four in number. The fourth relates to the refusal of the court below to amend the record as re-

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quested; but inasmuch as we think that the questions of law raised by the first three reasons of appeal are fairly presented upon the record as it stands, it will be unnecessary to consider the fourth assignment. The other assignments will be considered in their order.

The first alleges that the trial court erred in including in the guaranteed sum the amount called "contracting expenses." The material facts bearing upon this question are the following: Under each of the contracts assumed by the defendant, the plaintiff had charged in the guaranteed sum a certain sum as "contracting expense." This expense was the ordinary expense incurred by the plaintiff in obtaining those contracts. It includes, mainly, the salary and traveling expenses of the agent who procured them, while engaged in procuring them, and the ordinary expenses of the engineers in the estimating department, while engaged in making an estimate upon them. Such expense cannot ordinarily be well distributed to each individual contract "except by an average per cent." It was the rule of the plaintiff, adopted after years of experience had shown them that it led to substantially correct results, to allow as "contracting expense" five per cent. of the amount of the contract obtained. That rule was followed by the plaintiff in the case of the contracts turned over to the defendant. No detailed items of such contracting expense were put in evidence in the court below. In the case of each of the contracts turned over to the defendant the contracting expense thereon, estimated in the manner above indicated, was entered in the cost books of the plaintiff at the time the contract was obtained. No testimony was offered tending to show that such charge was improper or excessive. "Testimony of officers of the plaintiff company having long experience in its business and full knowledge of the cost of its work and expenses in all its departments, and expert in manufacturing methods and business, was admitted, tending to show the propriety and necessity of charging such contracting expenses as above stated, by a general average, and the substantial correctness of the charge made, and that the average ordinary expense of selling or

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procuring its contracts for a long series of years prior to the date of the turning over of the contracts in question to the defendant was five per cent. of the contract prices. Upon all the evidence adduced, being of the tendency above stated, whether of officers or others, it is found by the court that the sum of $32,736.63 had been actually expended by the plaintiff upon the contracts turned over to the defendant, for the ordinary expenses" of procuring the contracts.

Upon these facts the defendant claimed that as it was only liable under contracts *B* and *C* to repay the plaintiff the amounts which the plaintiff proved it had "actually expended in the part performance of said contracts," the "mere charge of a percentage of five per cent. on the amount to be paid for their performance, ascertained merely from an experience of witnesses, was not sufficient legal evidence that said amounts had been really or actually expended on such performance, and that such sums should not be included in the aforesaid" guaranteed sum.

As we understand this contention it appears to be based upon two claims: (1) that the defendant, upon the contracts turned over to it, had agreed to repay to the plaintiff only the expenditures actually made by the plaintiff "in the part performance of said contracts," and not those made by the plaintiff in procuring them; (2) that the facts found did not warrant the court below in holding that the "contracting expense" was money actually expended upon said contracts, within the meaning of contracts *B* and *C*.

We think that neither claim is well founded. The first claim is based upon the contention that the defendant in contracts *B* and *C* has agreed, not to repay the amount of expenditures actually made upon the contracts taken over, but only to repay the amount of expenditures actually made by the plaintiff in part performance of said contracts, a very different proposition.

The construction here contended for is not, we think, the true one. It limits the amount to be repaid to expenditures of a particular kind, when the agreement itself contains no such limitation. The agreement provides for the repayment of all

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actual expenditures. When the agreement was made, the "contracting expense" objected to stood charged on the plaintiff's books, and subject to the inspection of the defendant, as a part of the expenditures actually made upon the contracts taken over; it was just as much an expenditure actually made upon said contracts as were the sums expended in part performance of them; and we think that when the defendant agreed to take the benefit of the contracts, and to repay the amount actually expended upon them, he agreed to repay the sums actually expended in procuring said contracts.

As to the second claim, we think the record fails to show that the trial court erred in its conclusion that the contracting expense was "an expenditure actually made" by the plaintiff upon the contracts turned over, within the meaning of contracts *B* and *C*. It is found, in effect, that an expense of the nature indicated by the finding was in fact incurred in procuring the contracts; that the method adopted to ascertain the amount of such actual expense was a proper and necessary one; and that by that method such amount could be ascertained with reasonable certainty. We think the conclusions of the trial court upon this part of the case, whether regarded as conclusions of law or of fact, are fully warranted by the record.

The second assignment alleges that the trial court erred in holding that the amounts charged in the guaranteed sum as "Pool," "Loop," "L," "S," or "Special," were properly so chargeable.

The facts found bearing upon the questions involved in this reason of appeal are these: The terms "Pool," "Loop," "L," and "S," have the same meaning. As annexed to certain of the contracts turned over to the defendant, those terms meant that an actual expenditure in procuring those contracts was incurred by the plaintiff under the following circumstances: The plaintiff and other corporations put in bids for said contracts, and it was agreed by all the bidders, including the plaintiff, that the successful bidder should pay to the unsuccessful bidders a certain part of the profits which it was estimated the successful bidder might receive from

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the completion of the contract. The bids were made in view of such an agreement. In all the contracts turned over to the defendant, with which the above terms are connected, the plaintiff was the successful bidder, and in pursuance of said agreement paid to the unsuccessful bidders a sum total of $12,091, as set forth in detail in a schedule appearing in the record, and charged the same as part of said guaranteed sum, and this was allowed by the trial court.

As the legal validity of the above-mentioned agreement between the plaintiff and other bidders upon contracts is not questioned by either party, we will, for the purposes of this case, assume that said agreement was a valid one.

The term "Special" meant that the agent in procuring a contract had incurred some unusual expenses in so doing, which the plaintiff had paid. In procuring some of the contracts taken over by the defendant, the plaintiff had paid and charged, as "Special," expenses amounting to $1,035. This was charged in the guaranteed sum and allowed by the court below.

These expenditures, like the contracting expense hereinbefore referred to, were a part of the price the plaintiff had actually paid for the contracts turned over to the defendant, which expenditures presumably would have been repaid to the plaintiff, had it completed the contracts, by the profits arising from such performance. The defendant has taken the benefit of all these contracts, and it knew or might have known, before it assumed them, just what the plaintiff had actually expended upon them up to May 12th, 1900, and it agreed to repay such expenditure. Upon the facts found, and upon the construction hereinbefore put upon contracts *B* and *C*, we think the trial court was justified in holding that the sums last above-mentioned were properly chargeable in said guaranteed sum.

In the remaining reason of appeal it is alleged, in substance, that the trial court erred in its construction of the phrase "shop cost" as it occurs in contracts *A*, *B*, and *C*, in the guaranty of profits.

To understand the claim of the defendant and the ruling

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of the court below thereon, upon this part of the case, it is necessary to state the substance of some part of the facts found. Prior to entering into contracts *A*, *B*, and *C*, the plaintiff had works of its own at East Berlin in this State, and had also begun to establish works in Pennsylvania, and by said contracts these works in both States were to be turned over to the defendant. Prior also to May, 1900, the plaintiff, in order to enable it to perform the uncompleted contracts subsequently assumed by the defendant, had made subcontracts with other parties, having works of their own, to furnish and prepare material and to perform labor necessary to be done in performing the uncompleted contracts assumed by the defendant, all of which materials, whether work was done upon them or not, were to be sent directly to the places where the uncompleted contracts were to be performed. It was under such circumstances that the plaintiff guaranteed to the defendant that the transferred contracts would net to the defendant a certain profit of the shop cost of performing them. In contract *A* the guaranty is upon "the total shop cost," in contract *B* it is upon the "shop cost," while in contract *C* it is upon "the total shop cost as guaranteed" in contract *B*. The parties themselves have in contract *B* agreed upon the meaning of the words "shop cost," as used in said three contracts. They there say that "the term 'shop cost' shall include labor, material, and general shop expense f. o. b. cars at works of party of the first part," *i. e.* of the plaintiff.

The defendant claimed that under the head of "shop cost," as used in these three contracts, "shipments of structural iron and steel work direct from mills to sites of erection, and also all subcontracts, for carrying out the transferred contracts, should be included in determining the amount of shop cost of the contracts transferred . . . to the defendant; and that the expression 'f. o. b. cars at works of the party of the first part' was to be considered as a provision that freight was not to be included in shop cost." The trial court overruled this claim and held, in effect, that "shop cost," as used in these three contracts, meant shop cost

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only at the works of the plaintiff in this State and in Pennsylvania, and not at the works of other parties.

We think this ruling was correct. The parties themselves have said what "shop cost" should mean, and we see no good reason why that meaning should not prevail. In plain terms they limit that meaning to shop cost at the works of the plaintiff, and not elsewhere. Doubtless their definition greatly narrows the meaning which the words "shop cost," or "total shop cost," would bear in the absence of such definition; but they had the right to adopt such a definition, and having done so they are bound by it.

There is no error.

In this opinion the other judges concurred.

CHARLES S. MERSICK, TRUSTEE, ET AL. *vs.* THE HARTFORD AND WEST HARTFORD HORSE RAILROAD COMPANY.

First Judicial District, Hartford, May Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

In distributing the avails of a sale of the property of an insolvent railroad company, courts of equity have sometimes given a preference to the claims of supply-creditors and other unsecured creditors, over those of the mortgage bondholders. Such a preference rests upon the ground that the current income of the railroad, which by common consent is ordinarily and properly used to pay such debts, has been diverted to the benefit of the mortgagees or their security. Whatever may be said as to the soundness of this doctrine, it certainly has no application where—as in the present instance—there has been no diversion of income. Under such circumstances the mortgage bondholders are not to be deprived of their right to priority of payment.

The mortgage in question authorized the trustee for the bondholders, upon default in the payment of interest, to take possession of and operate the railroad, and provided that he should be reimbursed for his outlays, which were to "constitute a first lien upon the mortgaged property." *Held* that a payment made by the trustee upon taking possession, covering the wages of employees for the

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three months previous, was a reasonable expense incurred in his trust and properly allowed as a preferred claim, since it appeared as a fact in the case that but for such payment it would have been impracticable for the trustee to have continued the operation of the railroad.

While in possession, the trustee operated a leased line in connection with the railroad in question. *Held* that the lessor's claim for rent during the trustee's possession, but for such period only, was properly allowed as a preferred claim.

Nearly a year before the trustee took possession, one *P* had advanced money to the railroad company at its request to pay its taxes. *Held* that *P* was not thereby subrogated to the rights of the State, nor did he acquire any claim upon the property which took precedence over that of the bondholders.

Argued May 7th—decided July 24th, 1903.

APPEAL from the judgment of the Superior Court of Hartford County (*Case*, J.), in receivership and foreclosure proceedings, establishing the order in which the claims of intervening creditors should be paid out of the proceeds of the foreclosure sale. *Error and cause remanded.*

The defendant company was organized under the laws of this State, with power to equip and operate by electricity a street railroad between certain points in Hartford and West Hartford. On the 1st of August, 1894, said company mortgaged all its property and franchises to the plaintiff, State treasurer, as trustee, to secure the payment of its bonds of the par value of $315,000. On the 1st of August, 1897, the railroad company made default of payment of interest on said bonds, and no interest has since been paid thereon. On the 4th of February, 1899, the plaintiff trustee, at the request of certain of the bondholders, and in accordance with the terms of the mortgage, assumed the possession and management of the road, and placed James T. Patterson, one of the bondholders, in control, as his, the plaintiff's, agent. On the 4th of March, 1899, the plaintiff trustee commenced an action for the foreclosure of the mortgage and the appointment of a receiver, and on that day said Patterson was appointed temporary receiver, and on the 9th of June, 1899, permanent receiver, of the property described in the mortgage. On the 16th of June, 1899, the Superior Court

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rendered judgment that unless the defendant company should, on or before the 5th of July, 1899, pay the receiver the sum of $345,628.53, with interest and costs, said property should be sold as an entirety, at public auction, on the 1st of August, 1899. On the 1st of August the receiver, in accordance with said judgment, sold said property for $20,000 in cash, to Samuel D. Coykendall, Henry C. Soop, and Edward S. Greeley, and the Superior Court, on the 6th of October, 1899, passed an order accepting and approving the receiver's report of the sale, and confirming the sale. After the purchase of said property the said Coykendall, Soop, and Greeley, organized "The Farmington Street Railway Company," and conveyed to it the property so purchased at the foreclosure sale, and said Farmington Street Railway Company, upon its application, showing that it had become the owner of all the bonds described in the complaint, was permitted to join, as a party plaintiff, in this action. The said James T. Patterson, and other claimants to the avails of said sale, were, upon their several applications, permitted to intervene as parties, and upon the facts hereinafter stated, found by the commissioners appointed by the court, the following claims were allowed, and, by the judgment ordering the distribution of said fund, directed to be paid in the following order:—

1. Of the State treasurer for taxes for the year 1898,	$ 1,038.87
2. Of railroad commissioners for salaries,	11.46
3. Claims for expenses of receivership, and of State treasurer while in possession of property,	980.00
4. Of W. J. Carroll, assignee, for labor performed within three months from appointment of receiver,	56.64
	$2,086.97

5. Of certain named intervening supply-creditors, as a class, for supplies es-

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Amount brought forward	$2,086.97
sential to the operation of the road, furnished by them to the defendant company after January 1st, 1898, and prior to February 4th, 1899, amounting to	$4,196.47
6. Of the plaintiff Mersick, trustee, consisting of these items:	4,304.04
(*a*) $2,855.96 paid for wages of employees from November 12th, 1898, to February 4th, 1899.	
(*b*) $1,448.08 paid for wages of employees and running expenses while trustee was in possession.	
7. Of James T. Patterson, consisting of these items:	16,303.55
(*a*) $3,956.52 advanced to pay taxes, April 12th, 1898.	
(*b*) $11,031.65 advanced in April, 1898, to pay employees and other pressing claims against the company.	
(*c*) $138.46 rent of Plainville line from February 4th to March 4th, 1899.	
(*d*) $1,176.92, rent of Plainville line from June 18th, 1898, to February 4th, 1899.	
Total of claims ordered paid,	$26,891.03

That the first four claims above named, amounting to $2,086.97, are entitled to priority of payment over the bondholders, is not questioned.

As to the first item of the Mersick claim ($2,855.96), it is found that when he took possession of the railroad there had been a strike of the employees because their wages had not been paid, and that it was practically impossible for the trustee to resume the operation of the road without first paying these employees their wages then due, to said amount, for the period named in said item, and that at the request of

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the trustee that amount was advanced by Patterson and paid to the employees entitled to the same.

The amount ($1,448.08) named in the second item of the Mersick claim was, at the request of the trustee, advanced by Patterson, and used for the purposes stated in that item.

As to the first item of the Patterson claim ($3,956.52), it is found he paid said sum to the State treasurer for taxes due April 15th, 1898, upon an understanding with the railroad company that he might hold the same as a preferred claim against the company, to the same extent that the State treasurer would have held it, had the amount not been paid.

As to the second item of the Patterson claim ($11,031.65), it appears that in April, 1898, Patterson advanced said sum to the railroad company to pay the employees of the company, and also certain pressing claims some of which had been put in suit, and upon others of which suits were threatened, under an arrangement with the company that he should receive assignments of the claims and of the wages to be paid by the money so advanced by him. Under said arrangement he received certain assignments of wages, dated from December 11th, 1897, to April 12th, 1898, amounting to $3,389.16; assignments of wages by pay rolls dated from September 3d to November 5th, 1898, amounting to $2,803.72; and assignments of accounts dated April 21st to May 19th, 1898, amounting to $473.53; or a total of $6,666.41.

Concerning the third item of said claim ($138.46), it is found that Patterson owned a line of street railway from Farmington to Plainville, built upon the right of way of the defendant company, under a contract by which the railroad company was to pay him $1,800 a year rent, and that said sum is for the rent due under said contract from February 4th to March 4th, 1899.

The fourth item ($1,176.92) is for rent due under said contract from June 18th, 1898, to February 4th, 1899.

It is stated in the judgment-file that the value of the property sold by order of court, as above stated, was, at the time of such sale, in excess of $150,000. It appears that

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there was no evidence or admission of parties that said property was worth more than $20,000, excepting that the petition of one of the intervening parties, containing such an allegation, was demurred to by the Farmington Street Railway Company, and said demurrer was sustained.

From the judgment directing the distribution and payment of the proceeds of the sale of the mortgaged property, the Farmington Street Railway Company appeals, upon the grounds, in substance, that the trial court erred in giving preference to said claims of the intervening supply-creditors, and to said claims of Mersick and Patterson, over the claims of said Farmington Street Railway Company, as the owner of all the bonds secured by the mortgage, and that the court also erred in basing its judgment, in any part, upon the fact stated in the judgment, that the value of the mortgaged property, at the time of the sale, was in excess of $150,000.

The plaintiff Mersick, trustee, appeals upon the grounds that his claim should have been directed to be paid in the same order of preference as the charge of $980 for expenses of the receiver and the trustee, and if not ordered to be so paid, it should have been directed to be paid in the same order of preference as said class of supply-claims.

James T. Patterson appeals upon the grounds that his claims for $3,956.52 for money advanced to pay taxes, should have been given the same rank in order of payment as the State taxes named in the judgment, and that the remainder of his claim should have been directed to be paid in full after payment of the expenses of the receivership, and the State taxes, and the preferred claims for labor, and that if not ordered to be so paid, it should have been directed to be paid in the same order of preference as said class of supply-claims.

Edward D. Robbins, for the Farmington Street Railway Co.

Howard H. Knapp, for Charles S. Mersick, trustee, and James T. Patterson.

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Henry G. Newton, with whom was *Harrison Hewitt*, for the Atlantic Refining Co. *et al.*

Joseph P. Tuttle, for John S. Parsons & Co. *et al.*

HALL, J. The mortgage to the plaintiff trustee was executed and recorded in accordance with the laws of this State permitting a street railway company to so mortgage all its property, including its franchise, to secure the payment of its bonds, and providing for the foreclosure of such mortgage in the same manner as ordinary mortgages of real estate. General Statutes, § 3848; *Whittlesey* v. *Hartford, P. & F. R. Co.*, 23 Conn. 421, 435.

The funds in the hands of the receiver represent the *corpus* of the property thus mortgaged. They are the proceeds of a sale of the mortgaged property, under a judgment in an action instituted by the trustee of the bondholders, as their authorized representative, after he had taken possession of the railroad in accordance with the provisions of the mortgage. In this action he asked for the appointment of a receiver and for a foreclosure by sale.

By the judgment of the Superior Court distributing these funds, the mortgagees of the railroad company receive no part of the proceeds of such foreclosure sale, made by the receiver by order of court and approved and confirmed by the court; but the entire avails of the sale, after the payment of the expenses of the receiver and trustee, and certain unquestioned claims, are applied to the payment of the unsecured claims of the intervening supply-creditors, and of Mersick and Patterson, before described, all of which were contracted since the execution of the mortgage and before possession was taken for the bondholders.

It is the claim of the Farmington Street Railway Company, one of the appellants—which was made a coplaintiff in the foreclosure suit since the commencement of that action, and is now the owner of all the bonds secured by the mortgage—that neither the said supply-creditors, nor Mersick or Patterson, are entitled to payment of their claims from

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the proceeds of the sale of the mortgaged property, until after payment of the mortgage debt; while said intervening supply-creditors, and Mersick and Patterson, insist that their claims should take precedence, in order of payment, over the claims of the bondholders.

As supporting this claim of the supply-creditors, and of Mersick and Patterson, and as sustaining the judgment of distribution in so far as it gives priority to the supply-claims, and to certain items of the claims of Mersick and of Patterson, the leading case of *Fosdick* v. *Schall*, 99 U. S. 235, and numerous other cases which are said to follow the rule laid down in that case, are cited.

Assuming that the doctrine of *Fosdick* v. *Schall*, regarding the respective rights of the mortgagees and of the unsecured creditors of a railroad company as to priority of payment from the mortgaged property, or from the proceeds of its sale, at the time the trustee for the bondholders, or a receiver, takes possession of the railroad, is the law of this State, it becomes important to ascertain, first, just what was decided in that case, and second, whether the rule as there laid down is applicable to the facts of the present case.

Fosdick v. *Schall* was decided in 1878. In the opinion by Chief Justice Waite (p. 252) it is said: "The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the

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future current receipts before anything derived from that source goes to the mortgagees. . . . This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not unfrequently materially increased. . . . Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. . . . Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion."

In *Burnham* v. *Bowen*, 111 U. S. 776, decided in 1884, it was held that a debt for current expenses and payable from current earnings, the mortgage interest being then in arrear,

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was a charge in equity on the continuing income "as well that which came into the hands of the court after the receiver was appointed as that before," and that a diversion of the current income for the improvement of the mortgaged property, by the trustee in possession or by the receiver, created in equity a charge on the property for its restoration in favor of the current-debt creditor. The opinion concludes with the statement that it was only intended to decide what was decided in *Fosdick* v. *Schall*, "that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

In *St. Louis, etc., R. Co.* v. *Cleveland, etc., Ry. Co.*, 125 U. S. 658, 673, decided in 1888, the court, speaking by Justice Matthews, said: "But here there is no question in respect to current income. The fund in court is the proceeds of the sale of the property, and represents its *corpus;* and it cannot be claimed that ordinarily the unsecured debts of an insolvent railroad company can take precedence in the distribution of the proceeds of a sale of the property itself over those creditors who are secured by prior and express liens." After stating that there are cases where, owing to special circumstances, unsecured creditors may be entitled to priority of payment, even from the proceeds of a sale of the *corpus* of the property, citing *Fosdick* v. *Schall*, *Burnham* v. *Bowen*, and other decisions of the Supreme Court, the court says: "The rule governing in all these cases was stated by Chief Justice Waite in *Burnham* v. *Bowen* as follows" (quoting the concluding words of the opinion in that case, as above stated), and adding: "There has been no departure from this rule in any of the cases cited; it has been adhered to and reaffirmed in them all."

In *Kneeland* v. *American Loan & Trust Co.*, 136 U. S. 89, 97, decided in 1890, it is said: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. . . . One holding a mortgage debt upon a railroad has the same

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right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. . . . No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced."

In *Virginia & Alabama Coal Co.* v. *Central Railroad & Banking Co.*, 170 U. S. 355, 365, 368, decided in 1898, it was said that where the claim for supplies furnished to continue a railroad as a going concern was, as between the party furnishing them and the holders of bonds secured by a mortgage, a charge in equity on the continuing income, it was immaterial, "in determining the right to be compensated out of the surplus earnings of the receivership, whether or not during the operation of the railroad by the company there had been a diversion of income for the benefit of the mortgage bondholders;" and further, that "the dominant feature of the doctrine, as applied in *Burnham* v. *Bowen*, is that where expenditures have been made which were essentially necessary to enable the road to be operated as a continuing business, and it was the expectation of the creditors that the indebtedness created would be paid out of the current earnings of the company, a superior equity arises in favor of the material man as against the mortgage bonds in the income arising both before and after the appointment of a receiver from the operation of the property."

The cases above cited, and others upon the same subject, are reviewed in the recent cases of *Lackawanna Iron & Coal Co.* v. *Farmers' Loan & Trust Co.*, 176 U. S. 298, 313, and *Southern Ry. Co.* v. *Carnegie Steel Co.*, ibid. 257, 285, decided in 1900, in the latter of which the court, in the opinion by Justice Harlan, says: "It may be safely affirmed, upon the authority of former decisions, that a railroad mortgagee when accepting his security impliedly agrees that the current debts of a railroad company contracted in the ordinary course

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of its business shall be paid out of current receipts before he has any claim upon such income; . . . and that when current earnings are used for the benefit of the mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of any funds thus improperly diverted from their primary use."

Debts contracted not in the ordinary course of the operation of a railroad, but for the purposes of construction, are not entitled to priority of payment over the mortgage debt, under the rule in *Fosdick* v. *Schall*, 99 U. S. 235; *Wood* v. *Guarantee T. & S. Deposit Co.*, 128 id. 416; *Lackawanna Iron & Coal Co.* v. *Farmers' Loan & Trust Co.*, 176 id. 298.

From the language quoted from the cases above cited, it would appear that the foundation principle of the rule of *Fosdick* v. *Schall*, and the other cases referred to, by which a certain preference is given a particular class of unsecured creditors over the mortgagees of a railroad, is an agreement upon the part of such mortgagees, in accepting such security for the payment of the bonds, that current debts contracted in the ordinary course of the business of the railroad company shall be paid from the current earnings of the railroad before such mortgagees shall have any claim upon such income. It is by virtue of this implied agreement that the current debts, as between the supply-creditors and the mortgagees, become a charge in equity upon the continuing income, both before and after the appointment of a receiver, and whether or not there has been a previous diversion of the income for the benefit of the mortgagee.

But the superior equity springing from such implied agreement, in favor of the current-debt creditors, is in the current income derived from the mortgaged property, and not in the body of the mortgaged property itself. None of the cases above referred to go so far as to imply an agreement upon the part of the mortgagees, in accepting their security, that the body of the mortgaged property may be used to pay the current expenses of operating the railroad. The power of a court of equity to apply the *corpus* of mortgaged property to the payment of such unsecured claims

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against the railroad company, is always made to rest upon the fact that in some manner the mortgagees have received the benefit of those earnings, which, by their implied agreement, should have been applied to the payment of current expenses.

We are not prepared to accept as law the rule which seems to have been adopted in some of the cases cited by counsel, that those who have rendered services or furnished supplies to keep a railroad in operation, even after the mortgage interest is in arrear and the bondholders have the right to take possession under their mortgage, are entitled to priority of payment over the mortgagees, from the *corpus* of the mortgaged property, or the proceeds of the sale thereof, when there has been no diversion of the earnings of the railroad to the benefit of the bondholders.

Assuming, without deciding, that the doctrine of *Fosdick* v. *Schall* is applicable to a street railroad like that of the defendants, how does it affect the rights of these intervening creditors? They are not asking that income in the hands of the receiver be used to pay their claims. There are no earnings of the railroad in his hands. The expense of operating the road during the receivership has exceeded the receipts. To entitle the intervenors to payment from the proceeds of the sale of the mortgaged property, it must therefore be shown that there has in some manner been a diversion of the current income for the benefit of the mortgagees.

But it does not appear that the mortgagees have received any part of the income of the road which should have been devoted to the payment of these claims, or that the action of the bondholders in taking possession of the road has prevented the payment of these claims from the earnings of the railroad. On the contrary, it appears that no interest has been paid on the bonds from the earnings of the railroad since August 1st, 1896, and that since that time the receipts from the road have been inadequate for the payment of the ordinary operating expenses, and that large sums have been borrowed by the company to enable it to meet its current

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obligations. There has been no diversion and there can be no restoration. The claims of the supply-creditors, and the principal part of the Patterson claim, are not debts of the bondholders, but of the railroad company, contracted either upon the credit of the company itself or upon the credit of its earnings. As there has been no diversion of such earnings for the benefit of the bondholders, there can be no payment of such claims, under the doctrine of *Fosdick* v. *Schall*, from the mortgaged property or the money derived from its sale, until the mortgage debt is satisfied.

The claims described in the above statement of facts are entitled to priority of payment from the proceeds of the sale, over the bonds, only as below stated.

The first four claims named, amounting to $2,086.97, are, as we understand, conceded to be privileged. As the last of these four unquestioned claims is the only one allowed by the trial court as a preferred labor claim, under General Statutes, § 1051, it is unnecessary to decide whether, under that statute, such a labor claim would be entitled to priority of payment from the proceeds of the sale of the mortgaged property, over the mortgage debt.

For the reason already stated—that there has been no diversion of income—none of the claims of said class of supply-creditors, amounting to $4,196.47, are entitled to preference over the mortgage bonds.

The entire claim of Mersick, trustee, amounting to $4,304.04, is entitled to priority over the bonds, and should be paid as expenses properly incurred by the trustee while in possession of the mortgaged property for the benefit of the bondholders, and should stand in the same rank as to preference as the item of $980, expenses of receiver and trustee.

It appears from the record that the second item of said claim of Mersick ($1,448.08) was money paid by the trustee for wages of employees while the trustee was in possession, at the request of the bondholders, and under the mortgage which expressly empowered him to "operate and conduct the business of said railroad company." No question is made as to the reasonableness of the amount so paid.

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The first item of Mersick's claim ($2,855.96) was money paid employees for wages covering a period of about three months before the trustee took possession.

It is said that these claims of Mersick are made for the benefit of Patterson. The finding is that both these sums were advanced by Patterson at the request of Mersick. We must therefore treat them as money paid out by Mersick.

The mortgage deed under which Mersick as trustee took possession expressly provides that "the trustee shall be entitled to be reimbursed for all outlays of whatever sort or nature to be incurred in this trust," and that his "compensation and disbursements shall constitute a first lien upon the mortgaged property." That this outlay for wages due employees before the trustee took possession was a reasonable outlay and incurred in the trust, we must regard as determined by the finding that "it was practically impossible to resume the operation of said railroad" without first paying said "striking employees the wages then due them."

Of the claim of James T. Patterson, only the third item ($138.46) for rent of the Plainville line during the period the trustee was in possession, is entitled to priority of payment over the mortgage debt. That was a debt properly incurred by the trustee. As we read the finding, the trustee, while in possession through his agent Patterson, operated the Plainville line in connection with and for the benefit of the mortgaged property, and under a contract to pay the above sum as rent. Upon the facts this item of $138.46 must be regarded as an expense properly incurred by the trustee while in possession for the bondholders, and should rank in order of payment with the other expenses of the trustee and receiver.

The first item of the Patterson claim, $3,956.52, money advanced April 14th, 1898, to the railroad company to pay taxes, is not a preferred claim over the mortgage bonds. Patterson was under no obligation to pay these taxes, and it does not appear that he was either requested or authorized to do so by the bondholders. It was the duty of the railroad company to pay the taxes, and Patterson, at the request of

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the company, paid its debt. The railroad company could not, by their agreement with Patterson, give him a lien or claim upon the body of the mortgaged property which would take precedence over that of the bondholders. The transaction was a loan by Patterson to the company, and he did not thereby acquire such lien upon the mortgaged property as the State may have had. *Sperry* v. *Butler*, 75 Conn. 369, 372.

For the reasons already given, neither the second item of the Patterson claim ($11,031.65), money advanced by him to the company in April, 1898, to pay wages of employees and other pressing claims against the company, nor the fourth item of said claim ($1,176.92), for rent of Plainville line prior to the time the trustee took possession, are privileged claims over those of the bondholders.

After payment to the receiver of the sums which may be allowed for his services and expenses, and to the plaintiff trustee of the costs and proper expenses of this appeal, and of the claims as above directed, the remainder of the fund should be paid to said Farmington Street Railway Company.

Apparently the finding in the judgment-file, that the value of the mortgaged property at the time of the sale exceeded $150,000, is not sustained by the record, from which it appears that no evidence was offered upon that subject, and that the demurrer to the pleading containing such an allegation was sustained.

There is error in the judgment distributing the proceeds of the sale of the mortgaged property, and said judgment is set aside, and the case remanded for the entry of a judgment distributing said funds in accordance with the law as above stated.

In this opinion the other judges concurred.

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0-78 Conn. 426

WILLIAM S. WELLS ET AL. *vs.* THE HARTFORD MANILLA COMPANY.

First Judicial District, Hartford, May Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A breach of an executory contract by anticipation occurs only when there is a distinct, unequivocal, and absolute refusal to perform the promise by one party, before the time for its performance has arrived, and an equally clear acquiescence in or acceptance of such renunciation by the other. In other words, the contract remains a subsisting one until the parties have mutually elected to treat it as broken, and have given unmistakable evidence of such election.

In December, 1899, the Burgess Sulphite Fibre Company agreed, in writing, to furnish, and the defendant to receive, 1,300 tons of paper pulp, to be shipped as the defendant might order it, "but in any event all to be shipped before January 1st, 1901." Up to April 1st, 1900, the defendant had ordered and received something less than 300 tons, and then telegraphed and wrote the Fibre Company not to ship more until ordered, as it, the defendant, had more pulp than it could then use. Subsequent correspondence developed a claim on the part of the defendant that under some oral understanding with an agent of the Fibre Company it was bound to take only so much pulp as it might need in its business, a claim repudiated by the Fibre Company, who insisted that the full amount must be taken within the time limited, and urged the defendant to renew its shipping orders and at shorter intervals. After further correspondence, in which the defendant explained that it could not dispose of its product upon a dull and falling market, that it had a large supply of raw material on hand, but hoped before long to be able to take and use a large amount of pulp, and the Fibre Company again complained of the defendant's failure to order further shipments and to pay for the pulp already shipped, the Fibre Company, on July 17th, 1900, brought suit against the defendant, which a few days later was placed in the hands of a receiver upon complaint of the plaintiffs. The receiver declined to take the undelivered balance of the pulp, and closed out the business and sold the property of the defendant without doing so. *Held:* —

1. That upon these facts there was no such distinct and absolute refusal by the defendant to take the balance of the pulp within the time limited, as was necessary in order to constitute a breach of the contract by anticipation, and therefore no valid claim for

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damages for such a breach existed when the receiver was appointed.

2. That the receiver was not bound to adopt the contract, and his election to abandon it did not, under the circumstances disclosed in the record, entitle the Fibre Company to have its claim for damages, which was based on the loss of prospective profits, allowed as a general claim against the estate.

It would seem, however, that such an after-accruing claim might properly be allowed, payable out of any balance left in the receiver's hands after the satisfaction of general claims existing at the date of his appointment, and before such balance is returned by the receiver to the debtor; and especially so in a case where there are difficulties in the way of a complete remedy by suit.

Argued May 8th—decided July 24th, 1903.

APPEAL by the receiver of the defendant from a judgment of the Superior Court in Hartford County (*Roraback, J.*), in receivership proceedings, allowing a creditor's claim for damages for the defendant's breach of contract to receive merchandise ordered by it. *Error and cause remanded.*

December 15th, 1899, the Burgess Sulphite Fibre Company, manufacturer of paper pulp, and the Hartford Manilla Company, manufacturer of paper, entered into a written contract, known as contract *A*, by which the first-named company agreed to furnish, and the last-named company to receive, 1,300 tons of sulphite pulp of a designated standard, at the price of $2.25 per 100 pounds, f. o. b. Woodland Switch Station, Burnside, Conn., or National Paper Mill, Ballston, N. Y. The contract contained the following provision: "Shipments as ordered, but in any event all to be shipped before Jan. 1, 1901."

The same day another contract, known as contract *B*, for 220 tons of bleached sulphite pulp was made. The price agreed upon was $3 per 100 air dry pounds. The conditions as to delivery were identical with those contained in contract *A*.

Between the date of the contract and April 2d, 1900. 278½ tons of pulp were ordered and delivered under contract *A*. Some payments were made on account of these deliveries, but at the time of the appointment of the receiver

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for the Manilla Company $4,178.13 was due and unpaid for such delivered pulp.

After April 2d, 1900, no shipments were made, by reason of the Manilla Company's orders to that effect, although the Fibre Company was willing and anxious to make them and urged that the necessary orders therefor be given.

About March 1st a controversy arose between the parties as to the Manilla Company's obligations under the contract, the controversy being precipitated by the fact that the latter company was only ordering shipments at the rate of one car a week, while the contract amount averaged two cars a week and the original expectation of the parties was that such should be the rate of shipment. A falling market for pulp, and a diminishing and suspended business by the Manilla Company, aggravated the situation. The Fibre Company conceded that its vendee had the right to order shipments at its pleasure, as long as a reasonable time was given to fill the entire order, but its correspondence urging increased shipments developed a claim on the part of the Manilla Company that by verbal agreement it was not to be held to order more pulp in the whole than its business needs required. Correspondence followed until April 3d, when the Manilla Company telegraphed that it was overcrowded with pulp, and directed shipments to stop. A letter which supplemented the telegram assigned, as the reason for the cessation of shipments, that the mill was shut down and that seven carloads of pulp were already on hand, and added: "Do not ship us any more until we order it forward. We cannot take in another pound." The correspondence between the parties, as to the vendee's right under a verbal agreement to limit the total of its orders to it needs, continued. The Fibre Company admitted the Manilla Company's right to suspend orders for the time being, but insisted upon the latter's duty to receive the whole amount ordered, and to give its orders therefor in a reasonable time. The latter company contended for its right to limit its total orders as indicated, but at all times admitted its obligation to take from the Fibre Company all the pulp it, the Manilla

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Company, used, and repeatedly stated that it was so doing and intended to do so. May 16th the Manilla Company wrote that the situation at the mill was somewhat improved, that it was running practically half time and working off the accumulated stock of material. Meanwhile the Manilla Company had fallen behind in its payments, and that matter, also, became the subject of correspondence. May 26th, in a letter urging prompt payment, the Fibre Company wrote as follows: "We note that we have made no shipments on your contract of December 15th since April 2d. We would appreciate your shipping orders in accordance with conditions of contract at an early date." May 31st the Fibre Company wrote a still more urgent letter, calling attention to the suspension of shipping orders, reciting what shipments had been made, and concluding as follows: "We would, therefore, repeat the request that we have made you several times, to favor us with shipping instructions at an early date, so that we may govern our shipments in accordance with your requirements so far as possible. We presume it would be much more satisfactory to you to have this go forward at regular intervals, instead of holding it for shipment during the last few months." June 6th the Manilla Company acknowledged this letter, and wrote: "We propose, however, to take all the sulphite which we use, at contract price, during the year 1900, of you." June 8th the Fibre Company replied, saying, among other things: "Your attitude in regard to taking the fibre which you agreed to take is inexplicable to us, and we trust, therefore, that we may have the pleasure of meeting you in New York, as suggested in ours of June 5th, so that we may talk matters over and see just where we are." June 19th the Fibre Company wrote again, urging payment of its account, and adding: "We want you to pay as you have agreed to pay, and to call on us for shipment at the rate you have agreed to take, and which we have bound ourselves to ship." June 23d the Manilla Company replied as follows: "Yours of the 19th inst. at hand. As we have already explained to you, that on account of the product of our mill having been taken by one concern, and that product having

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been shut off without notice, and being obliged to depend on an open market (a falling and dull market) for our orders, and with a large supply of raw material on hand, you can readily understand why we have not been able to order and consume more sulphite. We are having some orders, but are still running short time. We hope to be able to run full time very soon, and also hope to use a large quantity of sulphite. We have already stated to you that we are buying sulphite from you only, and shall continue to take all our supply from you. If you are inclined to treat us fairly, as you have expressed, we think this explanation of the case should be accepted and satisfactory to you." Subsequently two letters passed with relation to the unpaid account, when, on July 2d, the Fibre Company wrote threatening suit if payment was not promptly made. In this letter was contained this sentence: "In the meantime you are taking no fibre whatever on your contracts as you agreed to take." July 17th the Fibre Company brought suit. July 31st a receiver was appointed for the Manilla Company upon the complaint of William Wells and Company, dated July 28th. No pulp was ordered by or delivered to either the Manilla Company or its receiver after April 2d. The receiver refused to receive the undelivered balance of said pulp, and closed out the business and sold the property of the company without doing so.

None of the bleached pulp called for by contract *B* was ever ordered or shipped. Prior to April 17th the Fibre Company were unable to furnish it. On that day it wrote the Manilla Company that the mill for its production had started, and asking for shipping orders. None were given.

The court allowed as a preferred claim the costs of said suit, to wit, $66.20, and a general claim of $9,144.13, in which was included said sum of $4,178.13, and the sum of $4,966, being the amount assessed as damages "by reason of the failure of the Hartford Manilla Company to receive the balance of 1,241½ tons of pulp" called for by the two contracts, said damages being assessed at $4 per ton.

The appeal was taken from the allowance of said $4,966 only.

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Edward D. Robbins, for the appellant (M. S. Chapman, receiver).

Charles H. Briscoe and *John R. Buck*, for the appellee (Burgess Sulphite Fibre Co.).

PRENTICE, J. The allowance of that portion of the claim of the Burgess Sulphite Fibre Company appealed from, is supported before us in argument upon two grounds, to wit: (1) that there was such a breach of the contracts, before the appointment of the receiver, that the claimant was then entitled to maintain an action thereon against the Manilla Company and recover full damages as for contract broken; and (2) that the refusal of the receiver to abide by the contracts after his qualification, itself furnished a basis for the allowance.

The first contention assumes the existence of a matured claim prior to the receivership proceedings. If this assumption is correct, the right to an allowance of the claim follows. The claimant's brief makes the date of the breach April 3d, when the telegram stopping shipments was sent. "This refusal to receive any more goods," the brief says, "gave the Fibre Company the right to bring suit immediately for damage on the whole contract, and to recover whatever damages it might be able to show it had suffered by reason of not being permitted to deliver the goods under the contract down to January 1st, 1901."

This contention, we think, is not well founded, whether it be made as of April 3d, or any other subsequent date prior to the appointment of the receiver. The contracts called for no regularity in the vendee's demands for the pulp. It did not forbid suspensions of such demands. Shipments were, by the express provisions of the agreement, to be made as ordered, the only limitation being that the whole amount was to be shipped before January 1st, 1901. This limitation naturally implied that the orders for shipments should be so given that they might be reasonably filled before January 1st, 1901. There could by no possibility be implied there-

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from an agreement that the vendee should so make his orders that shipments might be made at a uniform rate during the term, or that there should be no periods within which shipments should be suspended. The parties may have anticipated a uniform demand, but they did not contract for it, and the contracts control. As five of the thirteen and one half months covered by the agreements remained, when the receiver was appointed, it is clear that the vendee had not at that date by anything it had done, whether by way of delaying or suspending shipments, as distinguished from what it had said, acted in excess of its rights under the contracts or in violation of their terms. Neither had it put itself in a position or created a situation for the parties which rendered performance of the contracts impossible. So much we understand the claimant to concede.

If any conditions were created which authorized a suit by the Fibre Company as for contract broken, it was because of a renunciation of the contracts by the Manilla Company, of such a character and under such circumstances as to amount in law to a breach by anticipation. This brings us to a consideration of the law upon that subject.

In *Hochster* v. *De La Tour*, 2 E. & B. 678, Lord Campbell promulgated the doctrine that a party to an executory contract might, before the time for its execution had arrived, break it by a renunciation of it communicated to the other party. Two years later the same judge, in passing upon the facts of a similar case to which the same doctrine was sought to be applied, took occasion to intimate that the renunciation, to be effectual, must be an unequivocal one, and refused to treat the contract as a broken one within the meaning of the rule laid down in *Hochster* v. *De La Tour*, for the reason that the promisee had, after the promisor's renunciation, continued to insist upon performance. *Avery* v. *Bowden*, 5 E. & B. 714. The doctrine thus enunciated by Lord Campbell has been the subject of much discussion, sometimes with approval, sometimes with disapproval, and sometimes in a noncommittal attitude. The result of this discussion has been that the later English cases and the de-

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cisions of the United States Supreme Court are in harmony in their approval of the principles thus laid down. This approval, however, has been accorded only in view of important limitations to be placed upon the general doctrine that there may be a breach by a refusal to perform in advance of the time of performance. The necessity for these limitations did not escape Lord Campbell's attention, as the case of *Avery* v. *Bowden*, 5 E. & B. 714, clearly shows; but their importance has since that case been more emphasized, and the unreason of the rule, without them, more clearly recognized. These limitations are that the renunciation must consist in "a distinct and unequivocal absolute refusal to perform the promise," and that it "must be treated and acted upon as such by the party to whom the promise was made." It is held that a mere assertion that the party will be unable or will refuse to perform his contract is not sufficient, and that if the promisee afterwards continues to urge or demand a compliance with the contract he has not put himself in a position to sue for a breach. *Smoot's Case*, 15 Wall. 36, 48; *Dingley* v. *Oler*, 117 U. S. 490; *Roehm* v. *Horst*, 178 id. 1; *Johnstone* v. *Milling*, L. R. 16 Q. B. 460, 467.

In the case last cited, Lord Esher gives an interesting summary of the result of the English cases and the theory which underlies them, as follows: "In those cases the doctrine relied on has been expressed in various terms more or less accurately; but I think that in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract is that a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, as far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the

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contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue."

These limitations contained in the rule prevent a party to a contract from occupying an equivocal position with respect to it. The contract remains a subsisting one until the parties have mutually elected to treat it otherwise, and have given unmistakable evidence of such an election. A renunciation does not create a breach; there must be an adoption of the renunciation. The renunciation must be so distinct that its purpose is manifest, and so absolute that the intention to no longer abide by the terms of the contract is beyond question. The acquiescence therein must be as patent. There must be no opportunity left to the promisee to thereafter insist upon performance, if that shall prove more advantageous, or sue for damages for a breach, if events shall render that course the more promising.

So far as State jurisdictions are concerned, Lord Campbell's rule has been adopted with more or less careful statement, in several: *Windmuller* v. *Pope*, 107 N. Y. 674; *Gray* v. *Green*, 9 Hun, 334; *Zuck & Henry* v. *McClure & Co.*, 98 Pa. St. 541; *Roebling's Sons' Co.* v. *Lock Stitch Fence Co.*, 130

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Ill. 660; *Crabtree* v. *Messersmith*, 19 Iowa, 179; *Hume* v. *Conduitt*, 76 Ind. 598; *Platt* v. *Bland*, 26 Mich. 173; *Davis* v. *Grand Rapids School-Furniture Co.*, 41 W. Va. 717. Dissenting views are expressed in *Daniels* v. *Newton*, 114 Mass. 530; *Stanford* v. *McGill*, 6 N. Dak. 536.

In this State the question is an open one. Although the principle adopted by the English and the United States Supreme Court is not one of the clearest logic, nevertheless, when taken with its limitations, it has such support in practical considerations and in strong legal reasons and authority, that we have no hesitation in adopting it as the law of this State. Without its limitations, we conceive that it has no basis in reason, or otherwise.

It remains to apply the rule to the facts in the case at bar. In doing so we are met at the outset with the inquiry as to whether the Manilla Company ever made "a distinct and unequivocal absolute refusal to perform" its agreement. On April 3d it telegraphed to stop shipments, assigning as a reason that it was overcrowded with pulp. This telegram was followed by a letter confirming it. This letter gave the added instructions not to ship more "until we order it forward. We cannot take in another pound." This action was, as we have seen, clearly within the company's rights under the contract, and there is nothing in either telegram or letter to suggest a refusal to abide by the contract. Clearly there was here no renunciation as claimed. The subsequent conduct of the Fibre Company plainly discloses that it had no such understanding, and as plainly that it had no disposition to treat the contract as broken. Three months pass during which the Manilla Company sends no shipping orders. This of itself was no breach of the contract. Covering the same period, however, there is an extended and instructive correspondence. From it, taken in connection with the failure to send shipping directions, it might well have been surmised that the 1,570 tons of ordered pulp would not be called for before January 1st, 1901; but that remained a subject for surmise; it never became a certainty. The Manilla Company never refused to take any

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additional pulp; it never said it would refuse to take the whole amount. It was continually saying that it was proposing to take all that its business needs demanded. The most that it ever said was that it would refuse to take more than this amount. But who can say, or rather who could then say, that the needs of its business would not exhaust the whole order. We may strongly suspect—the Fibre Company may have had a suspicion amounting to a firm belief on its part—that such would not prove to be the case, but suspicion and belief are not substitutes for certainty. The suspicion or belief that the Manilla Company would not call for its entire order could only furnish the foundation for the inference, more or less strong, that the statement of the company, that it would not take more pulp than it could use, would in the end result in a breach of the contract. To use this inference of a probable future breach as the equivalent of a present, absolute, unequivocal renunciation of the contract, or refusal to abide by it, is plainly without justification. The trouble with the claimant's position in this regard is that it attempts to transform suspicion, belief, and inference, into things distinct, certain, and absolute, and thus create an unequivocal and absolute renunciation of an agreement out of imaginings and conclusions. This both the letter and spirit of the rule forbids. The facts in the case of *Dingley* v. *Oler*, 117 U. S. 490, furnish a striking analogy to those in the present case, and the conclusion of the court in that case, that there had not been a distinct and unequivocal renunciation, and the reasoning on which the conclusion is based, are peculiarly instructive.

These conclusions render it unnecessary to inquire whether the claimant ever treated or acted upon the contract as a broken one. It is clear that it never did so prior to the receiver's appointment, unless it was in the bringing of its suit on July 17th. In view of the scant information which the record contains concerning the character of that suit, it would be idle to discuss the possible questions which might be presented.

We have next to consider whether the conduct of the

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receiver in refusing to adopt the contract and carry out its provisions furnishes a justification for the judgment appealed from.

With respect to this aspect of the case, it is to be observed at the outset that the court has expressly and most explicitly based its judgment of allowance upon a claim matured and existing at the time of the receiver's appointment. Both the memorandum of judgment and the judgment-file are careful to emphasize this fact. There has been no allowance of an after-accruing claim. Without noticing the possible consequences of this situation upon the claimant's contention now under review, let us consider that contention upon its merits.

The claimant, upon the authority of adjudicated cases, admits that the receiver, after his appointment, was not bound to adopt the contract, but had the right, subject to the control of the court, to abandon it, if in his opinion it would be undesirable or unprofitable to adopt it. *United States Trust Co.* v. *Wabash Western Ry. Co.*, 150 U. S. 287, 299; *Dushane* v. *Beall*, 161 id. 516; *Central Trust Co.* v. *East Tennessee Land Co.*, 79 Fed. Rep. 19; *Commonwealth* v. *Franklin Ins. Co.*, 115 Mass. 278; *New Hampshire Trust Co.* v. *Taggart*, 68 N. H. 557; *Spencer* v. *World's Columbian Exposition*, 163 Ill. 117; *Woodruff* v. *Erie Ry. Co.*, 93 N. Y. 609; *Scott* v. *Rainier Power & Ry. Co.*, 13 Wash. 108.

It contends, however, that a receiver who thus elects to abandon an executory contract binds the estate in his hands to respond for any damages such abandonment may occasion to the other party. This is interpreted to mean that such party is entitled to the allowance of a general claim against the estate to the extent of his damage. This conclusion, if sound, would seem to reduce the privilege of election, which a receiver admittedly enjoys, to microscopic proportions in most cases. Save in those comparatively rare ones where specific performance would for equitable reasons be decreed, the privilege of a receiver would thus be hard to distinguish from that which the ordinary individual or corporation enjoys. Ordinarily a contracting party is privileged to break his

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contract and pay the resulting damage. The Manilla Company was privileged to do that with respect to this contract. Evidently the rights of receivers in this regard, which the courts have been so solicitous to preserve, are not of so shadowy a character.

We do not, however, wish to be understood as saying that there may not be frequent cases where the act of a receiver in not adopting an executory contract would entail such injury upon the other party to the contract, by reason of what he had already done under it and relying upon the faith that it would be carried out, that a claim against the estate would, upon the principles of equity and good conscience which underlie receivership proceedings, be recognized and allowed. There are, however, no such elements of damage in this case. The claim of the Fibre Company is based upon the loss of prospective profits. The loss was the loss of a good bargain. The damage claimed and allowed was the value of that bargain. The Fibre Company secured a contract with the Manilla Company for the sale of a quantity of pulp, at a price several dollars a ton in excess of its market price when the receiver was appointed. The receiver naturally did not regard that as a contract profitable for his estate to adopt. His conduct in not adopting it deprived the vendor of an opportunity to sell 1,200 tons of pulp for something like $5,000 more than it was then worth, and pocket the profit. No other element of damage appears in the case.

In such a case the privilege of the receiver in acting for the best interest of the estate and its creditors, not only extends to the right to elect what contracts he will adopt, but also to make the election without at least subjecting the fund required for the satisfaction of existing claims of creditors to a charge for damages. In other words, the consequences of the election, under such circumstances, may not become the occasion for the allowance of a general claim entitling the claimant to share with other creditors the assets of the estate. Otherwise, there might be danger that a portion of an estate which was needed to pay creditors whose claims were already fixed ones might thus be exhausted to

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their injury. If, however, the condition of an estate was such that the allowance of a claim of this character would not encroach upon the assets necessary to satisfy other creditors, and there was to remain in the hands of the receiver a balance after the expenses of settlement and claims were paid, quite a different situation would present itself, to which other considerations would apply. *Chemical Nat. Bank* v. *Hartford Deposit Co.*, 161 U. S. 1. The questions which such a situation would present are suggested in the last cited case. That case decides that a right of action would exist against the contracting party, if it continued to have legal existence, and thereby any balance left after the receiver's settlement be held to answer to the claim. See also *Pahquioque Bank* v. *Bethel Bank*, 36 Conn. 325. An equally pertinent question is not decided, and that is whether a claim such as we have been considering could not be properly allowed, payable out of any balance left in the receiver's hands after the satisfaction of the general claims, and before such balance is paid over by the receiver to the contracting party. That such a course could and ought to be pursued in a case where there are difficulties in the way of a complete remedy by suit, seems clear. Beyond this the question calls for no consideration in this case.

The practical effect of these principles, it is plain to see, is that claims existing at the time of the receiver's appointment have a priority over after-accruing ones of the kind under discussion, arising from the permissible acts of a receiver in his efforts to safeguard the interests of the estate in his hands and thereby protect the interests of creditors. The other party to a disavowed contract will not thus be deprived of his rights to compensation for any wrong done him, to be obtained in some manner, unless by the obtaining of them he would divert to himself that which by a higher right belongs to others. His rights are simply subordinated to those of others standing in a higher position.

The equity of this is apparent. No one suffers unless the insufficiency of assets compels it. If such insufficiency exists, creditors holding claims the liability for which is fixed

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when the receiver is appointed are not obliged in any degree to yield to others who seek to secure to themselves profits which the future, by reason of a good bargain, might have in store for them.

The claimant's brief urges that the privilege of election which a receiver has is one which he may exercise only by the authority or approval of the court, and that any not so authorized or approved would be ineffectual to protect the estate from its consequences. It is unnecessary to consider this claim further than to observe that there is nothing in the record to suggest that this receiver's action in the premises was either in excess of authority, or unapproved, and that such a situation is not to be presumed.

There is error in the allowance of that portion of the claim appealed from, and the cause is remanded for a correction of the judgment in accordance with that conclusion.

In this opinion the other judges concurred.

CHARLOTTE TEMPLE *vs.* EDWIN H. BUSH.

Third Judicial District, New Haven, June Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

The power of the court to grant a nonsuit, if in its opinion a *prima facie* case has not been made out (General Statutes, § 761), is a salutary safeguard against the presentation of frivolous claims to the jury.

Evidence that the president of an insolvent corporation who had been authorized to use its funds to make such settlements with its creditors as he could, told one of them that she need not worry about her notes, as there would be money enough to pay them when all claims were settled, does not tend to prove that he assumed a personal liability to her, or was subject to a trust in her favor. Nor does his promise to pay the interest upon a mortgage on her house tend to prove that he had money in his hands due to her.

An oral promise by an officer of a corporation to pay personally one of its creditors in full, if the company's funds proved insufficient, is within the statute of frauds, General Statutes, § 1089.

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Whether a reason of appeal founded on the exclusion of evidence, too general to satisfy the requirements of General Statutes, § 798, in ordinary cases, would be sufficient in an appeal from the refusal to set aside a judgment of nonsuit, *quære*.

Submitted on briefs June 2d—decided July 24th, 1903.

ACTION for money had and received to the plaintiff's use; brought to the Court of Common Pleas for Fairfield County and tried to the jury before *Curtis, J.* When the plaintiff's evidence was all in the defendant moved for a nonsuit, which was granted, and a motion subsequently made to set aside the nonsuit was denied. *No error.*

John J. Walsh and *Joseph A. Gray*, for the appellant (plaintiff).

John H. Light and *William F. Tammany*, for the appellee (defendant).

BALDWIN, J. The power of the court, under General Statutes, § 761, to grant a nonsuit, after the production of the plaintiff's evidence, if of opinion that a *prima facie* case has not been made out, is a salutary safeguard against the presentation of frivolous claims to the consideration of a jury. In the case at bar it was admitted or proved that the defendant, being the president and managing officer of an insolvent corporation, and in control of its funds, was authorized by the corporation and its other officers to use them in making the best settlement which he could effect with its creditors; and that the plaintiff held two of its notes. It was alleged by the plaintiff and denied by the defendant, that part of these funds were placed in his possession for the purpose of paying these notes in full, under an agreement to that effect between him and all the creditors. The plaintiff offered evidence that the defendant told her, before the creditors had entered into any such agreement, that she need not worry about her notes, for there would be enough to pay them in full when all the claims were settled.

This was properly excluded. Such declarations had no

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legitimate tendency to strengthen or to support the claim that he assumed a personal liability to the plaintiff, or was subject to a trust in her favor. His responsibility, at that stage of the transaction, was solely to the company, and at most his remarks only indicated his opinion that he should be able, as its agent, to effect such settlements with its other creditors as would enable him to pay her in full.

Evidence was introduced that all the creditors agreed that certain notes, including the plaintiff's, should be paid in full; that the others would accept 75 per cent. of their claims in full settlement; and that it should be left with the defendant to make these payments, he orally undertaking to supply any balance himself, in case of a deficiency. She also testified that afterwards, when taxed by her with having money in his hands reserved to pay her notes, he denied it, but promised to pay the interest on a mortgage upon her house as long as her mother lived.

No reasonable inference could be drawn from this promise that he had or admitted that he had in his hands moneys due to the plaintiff. His oral undertaking to supply further funds himself to complete the payment of her notes, in case of any deficiency of those of the company, could not avail her by reason of the statute of frauds. General Statutes, § 1089. It was vital to her case to show that funds were placed in his hands to pay her notes; and of this there was, in point of law, no substantial evidence. *Cook* v. *Morris*, 66 Conn. 196, 208.

The reason of appeal founded on the exclusion of evidence did not describe in any way the evidence excluded. Such an assignment of error would have been too general to satisfy the statute, in an ordinary case. General Statutes, § 798. Without deciding whether it can be considered sufficient upon an appeal in a case of nonsuit, we have thought proper to give it full consideration, in view of the possibility of the institution of another action.

There is no error.

In this opinion the other judges concurred.

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WILMOT C. WHEELER *vs.* HARRY S. YOUNG ET AL.

Third Judicial District, New Haven, June Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Deeds recorded within a reasonable time take effect according to the time when they were actually delivered.

Where one, by reason of his negligent failure to examine the land records, is induced to purchase real estate from a grantor who has no title, and another, immediately after the grantor has acquired title from the owner of record, purchases the same property in good faith, for value, and without negligence or notice, the latter's title must, under our registry law, prevail over that of the former.

The doctrine that one who has conveyed land with covenants of warranty, before acquiring title, is estopped from questioning the validity of such conveyance after he acquires title, cannot be carried so far as to give the first grantee priority over the second.

Under the registry law of this State every person taking a conveyance of an interest in land is conclusively presumed to know those facts which are apparent on the land records concerning the chain of title of the property in question.

One who purchases land without an examination of the record title is negligent in contemplation of law.

The purchaser of land is chargeable, however, only with notice of recorded conveyances made by the owner during the time he holds the record title. He is not obliged nor expected to search for possible conveyances made by strangers to the title.

Argued June 2d—decided July 24th, 1903.

ACTION to foreclose a mortgage and for other equitable relief, brought to the Superior Court in Fairfield County and tried to the court, *George W. Wheeler, J.*; facts found and judgment rendered for the defendant Young, upon his cross-complaint, and appeal by the plaintiff. *Error, judgment reversed and cause remanded.*

John C. Chamberlain, for the appellant (plaintiff).

John Cullinan, Jr., for the appellee (defendant Young).

HALL, J. The plaintiff asks for a judgment of foreclosure under a mortgage which on the 13th of December, 1900, was

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assigned to him by Burr & Knapp, real estate and mortgage brokers of Bridgeport. Burr & Knapp as mortgagees received the mortgage from Charles B. and Edward H. Marsh, builders in Bridgeport, under the firm name of Marsh Brothers, on the 26th of October, 1900, to secure the payment of a loan of $3,500 made by them, on that day, to Marsh Brothers. The mortgage was recorded on said 26th of October at 3:01 P. M. Burr & Knapp took no other security for said loan, and Marsh Brothers are insolvent. Both Burr & Knapp and the plaintiff took said mortgage in good faith, for value, in reliance upon the certificate of an attorney that the premises were free and clear of all incumbrance, and that the legal title at the time said mortgage was given was in Marsh Brothers, and without knowledge of any prior conveyance by Marsh Brothers to the grantor of the defendant Young, or of any incumbrance upon said property prior to their mortgage of October 26th. Marsh Brothers obtained title to the premises described in the mortgage by a quitclaim deed from Orange Merwin of Bridgeport, which was executed on the 1st of May, 1900, but not delivered until the 26th of October, 1900, when it was recorded at 3:05 P. M. On the same day Marsh Brothers paid to Merwin the purchase price for said property.

Apparently there was no evidence presented at the trial, other than the facts herein stated, showing the precise time on the 26th of October when either the deed from Merwin to Marsh Brothers, or the mortgage from Marsh Brothers to Burr & Knapp, was actually delivered, or showing whether or not they were delivered at the same time and together given to the town clerk to be recorded.

Orange Merwin acquired title from Marsh Brothers by deed executed and recorded September 8th, 1899. The defendant Harry S. Young, who is now in possession of the mortgaged premises, claims under a deed from Alfred Young dated January 2d, 1901. Alfred Young claimed title under a warrantee deed from Marsh Brothers dated April 30th, 1900, delivered and recorded on the 7th of July, 1900. Marsh Brothers had, on the 21st of April, 1900, agreed with

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said Alfred Young to sell him the lot described in the mortgage, and which was then owned by Merwin, and to erect a house thereon for $4,600, for which Alfred Young was to transfer to Marsh Brothers a cottage valued at $3,800, on which there was a mortgage of $2,800, and was to give a mortgage back, upon the premises purchased, for the remainder of the $4,600. In accordance with such agreement Alfred Young conveyed the cottage, and on April 30th, 1900, gave to Charles B. Marsh a mortgage upon the lot in question for $3,500, upon Marsh's promise not to use it until the house was completed, which mortgage Marsh, on the same day, assigned to one Mary E. Beardsley, one of the defendants.

Alfred Young caused no search to be made of the land records to ascertain the true state of the title to said land, before receiving said deed from Marsh Brothers, but relied upon the statement of Charles B. Marsh that they had acquired title to said land. Young was in the employ of Marsh Brothers and did as Charles B. Marsh directed, intending no fraud toward any one.

Marsh Brothers commenced the erection of a house upon said lot in May, 1900, which was apparently completed on the 26th of October, 1900, and Merwin on said day gave his said deed to Marsh Brothers as aforesaid to enable them to carry out their said agreement with Alfred Young, which was known to Merwin, and on his business records Merwin treated the sale as a sale to Young.

The plaintiff has purchased for $1,750 the mortgage so assigned by Marsh Brothers to Mary E. Beardsley.

Upon these facts the defendant Young claims title to the premises in question, and by his cross-complaint asks that the mortgage of October 26th, sought to be foreclosed, be declared void.

No question is made and none can be made, upon the facts before us, but that the mortgage deed to Burr & Knapp, and the Merwin deed to Marsh Brothers, both of which were delivered on the 26th of October as above stated, and were received for record by 3:05 P. M. of the same day, were left

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for record within a reasonable time after they were delivered. The mere fact that the deed of Merwin to Marsh Brothers appears to have been received for record four minutes later than the mortgage of the latter to Burr & Knapp, would not justify a conclusion, especially under the circumstances of this case, that Marsh Brothers had not received their deed from Merwin at the time of the delivery of the mortgage to Burr & Knapp, and that for that reason Burr & Knapp took nothing by their mortgage. Deeds recorded within a reasonable time take effect according to the time they were actually delivered. *Hartford Bldg. & Loan Asso.* v. *Goldreyer*, 71 Conn. 95, 100; *Goodsell* v. *Sullivan*, 40 id. 83, 85; *Beers* v. *Hawley*, 2 id. 467, 469. The deed and mortgage were delivered on the same day. The mortgage recites the ownership by the mortgagor at the time of its delivery of the same property described in the deed. Looking at the record of the two deeds, the mortgage therefore indicates upon its face that it was delivered after or at the same time with the Merwin deed. The Merwin deed, confessedly, not having been recorded when the mortgage was delivered, Burr & Knapp would be presumed to have ascertained that it had been delivered before they made the loan of $3,500, and the information which they received to that effect does not appear to have been false. As between the parties to this case and in the absence of any evidence to the contrary—unless the slight difference in the time the two deeds were received for record can properly be regarded as conflicting evidence—the Merwin deed must, under the circumstances, be regarded as having been delivered either before, or at the same time with, the mortgage, and especially since no one appears to have been deceived to his injury by the fact that the Merwin deed, which bore an earlier date than the mortgage, appears to have been received for record four minutes later than the mortgage.

But we do not understand that the trial court held that the Merwin deed was in fact delivered after the mortgage, or held that it did not sufficiently appear that the Merwin deed was delivered first, but decided that by the common-

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law doctrine of estoppel the title acquired by Marsh Brothers from Merwin on the 26th of October inured to the benefit of Alfred Young, the first purchaser from Marsh Brothers, the moment Marsh Brothers acquired their title, even assuming that the deed from Merwin was delivered before the mortgage, and decided that the title having thus vested in Young there remained nothing which Marsh Brothers could convey to Burr & Knapp by the mortgage, or which Burr & Knapp could assign to the plaintiff.

The rule referred to is, that where one without title has conveyed with covenants of warranty, and has afterwards acquired title, he is estopped from asserting his want of title at the time of making such first conveyance; and the contention of the defendant is, in effect, that under this rule, upon the facts before us, not only Marsh Brothers, but their mortgagees, Burr & Knapp, are estopped from denying that Marsh Brothers had title at the time of their conveyance to Young on July 7th, 1900.

To carry this doctrine to the extent of giving priority to the title of one who from his negligent failure to examine the records has been induced to purchase land of a person having no title, over that of one who without negligence, in good faith and for value, and without knowledge of such prior deed, has purchased, after his grantor has acquired title from one having both the legal and record title, is opposed to the principles of equity and to the spirit of our registry laws. *Bingham* v. *Kirkland*, 34 N. J. Eq. 229, 234; *Calder* v. *Chapman*, 52 Pa. St. 359; *Farmers' L. & T. Co.* v. *Maltby*, 8 Paige (N. Y.), 361; *Way* v. *Arnold*, 18 Ga. 181; *Salisbury Savings Society* v. *Cutting*, 50 Conn. 113, and reporter's note, p. 122.

The doctrine of estoppel is one which, when properly applied, "concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak." *Van Rensselaer* v. *Kearney*, 11 How. 297, 326. "As understood and applied in modern times, there is nothing harsh or unjust in the law of estoppels. It cannot be used but to

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subserve the cause of justice and right." *Buckingham* v. *Hanna*, 2 Ohio St. 551, 559. "To allow a title to pass by conveyance, executed and recorded before it is acquired, may, therefore, be a surprise on subsequent purchasers, against which it is not in their power to guard, and is contrary to the equity which is the chief aim of the doctrine of estoppel as molded by the liberality of modern times." 2 Smith's Lead. Cases, 7th Amer. Ed., page 701, s. p. 634.

It may be said that such estoppel by deed is not an equitable doctrine, but is a rule of the common law based upon the recitals or covenants of the deed. We reply, that as a rule of law it has been so far modified by the registry laws as to be no longer applicable to cases where its enforcement would work such an injustice as to give priority to the title of one who negligently failed to examine the records before purchasing of a grantor having no title, or who purchased at the risk that his grantor might thereafter acquire title, over that of a subsequent purchaser in good faith and in reliance upon the title as it appeared of record. "The whole system of registering deeds of land would become of no value if a purchaser could not rely upon the records as he finds them." *Kinney* v. *Whiton*, 44 Conn. 262, 270; *Whiting* v. *Gaylord*, 66 id. 337, 349. In the case above cited of *Salisbury Savings Society* v. *Cutting*, 50 Conn. 113, the question of whether a deed with covenants of title, given before the grantor acquired title to the land conveyed, and placed on record, would prevail over a deed given after the title was acquired, to a purchaser taking it in good faith and without knowledge of the first deed, was left an open question. The case was decided upon the ground that the second grantee was neither a purchaser for value nor, because of certain facts found, a purchaser without notice of the title of the first grantee. The note to the case by the reporter, the late Mr. Hooker, contains an able discussion of the question left undecided by the court, in which he reaches the conclusion that the deed of the subsequent *bona fide* purchaser for value and without knowledge of the prior deed, must prevail, under our registry laws, over that of the prior recorded deed of the negligent

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grantee. We think his reasoning is convincing, and is especially applicable to the facts of the present case.

The plaintiff here asks for the enforcement of the registry laws. He says that from September 8th, 1899, until October 26th, 1900, both the legal and the record title to this property was in Orange Merwin, and that on said 26th of October his, the plaintiff's, assignors, Burr & Knapp, purchased from those who on the same day acquired title from Merwin. The defendant asks for the enforcement of the law of estoppel, by which he claims that neither Burr & Knapp, nor the plaintiff, should be permitted to assert that Merwin had title, and that Marsh Brothers had no title, from September 8th, 1899, until October 26th, 1900.

In inquiring which of the two grantees, Young or Burr & Knapp, has acted in good faith and without negligence in purchasing from Marsh Brothers, and which is entitled to priority of title under the registry laws, we must examine their conduct in connection with certain facts, with a knowledge of which they are charged by our registry laws.

The effect given by the law of this State to the proper record of conveyances of land has been very clearly declared in the recent case of *Beach* v. *Osborne*, 74 Conn. 405, 412–415. We said in that case, as conclusions from the authorities there cited, "that every person who takes a conveyance of an interest in real estate is conclusively presumed to know those facts which are apparent upon the land records concerning the chain of title of the property described in the conveyance, and . . . that this presumption of knowledge is for all legal purposes the same in effect as actual knowledge;" that "this presumed knowledge is present at every step he takes, at every act he does," and that his good faith and belief must be "consistent with actual knowledge of the facts affecting his title which are apparent upon the land records;" that "one who fails to examine to see what the records disclose concerning the title to the land he proposes to take, is, in the eye of the law, negligent; and equity does not as a general rule relieve from the consequences of one's own negligence."

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Applying these principles to this case, we find that Alfred Young, in the eye of the law knew, when he purchased from Marsh Brothers, that they had no title, but that Marsh Brothers on the 8th of September, 1899, had conveyed to Merwin, and that the title was still in Merwin, and that it so appeared upon the public records. In contemplation of law, therefore, he did not act in good faith, but was negligent in making such purchase without having first examined to see what the records disclosed concerning the title to the land he proposed to purchase. When Burr & Knapp took their mortgage from Marsh Brothers on the 26th of October, they knew that the title to the mortgaged property had been in Merwin from September 8th, 1899, until October 26th, 1900. Since they had no reason to suppose that one having no title to the property would convey it during that period, they had no occasion to search the records to ascertain whether Marsh Brothers had made any conveyance during that period. They were only required to search against each owner during the time he held the record title. The deed of Marsh Brothers to Young was not in the line of record title, and Burr & Knapp were not charged with knowledge of its existence. See *Bingham* v. *Kirkland*, 34 N. J. Eq. 229, and the other cases above cited. It is said, however, that the Merwin deed was not on record when Burr & Knapp took their mortgage on the 26th of October. But the Merwin deed was not in fact delivered until that day, and Burr & Knapp had no reason to think that a deed delivered on that day, and before their mortgage was delivered, that is, before 3:01 P. M., ought to be recorded when their mortgage was delivered, nor was there any reason why they should require it to be recorded before accepting the mortgage. The records showed a good title in Merwin up to the time of the delivery of the mortgage deed. Burr & Knapp had only to satisfy themselves that a deed had been given by Merwin to Marsh Brothers that day, which was the fact, and that no conveyance had been made by Marsh Brothers since they received their deed from Merwin, which was also true. As the deed of Marsh Brothers to Young and the

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mortgage back by Young to Charles B. Marsh were not incumbrances upon the title of record, the information given to Burr & Knapp by the searcher, that "the premises were free and clear of all incumbrance and the legal title in Marsh Brothers," was entirely consistent with the facts as they appeared by the records concerning the chain of title, and the fact that Marsh Brothers had that day acquired title from Merwin. The facts before us show that Burr & Knapp acted in good faith, and without negligence, and without knowledge of the Young deed, and that having on the 26th of October taken a mortgage from those, who on that day had received a deed from the legal owners, and the owners of record, their mortgage is valid. As Alfred Young had no title superior to the Burr & Knapp mortgage when he conveyed to the defendant Young on January 2d, 1901, the defendant Young by his deed of that date took no title superior to the mortgage. The plaintiff is entitled to a judgment of foreclosure.

There is error in the judgment of the trial court and it is reversed, and the case remanded for the entry of a judgment of foreclosure in favor of the plaintiff.

In this opinion the other judges concurred.

Bridget O'Brien *vs.* Brotherhood of the Union.

Third Judicial District, New Haven, June Term, 1903.
Torrance, C. J., Baldwin, Hamersley, Hall and Prentice, Js.

The rules of a fraternal order provided that the death-benefits of a member dying from certain specified diseases, within 183 days from the date of his admission, should be $5, and in all other cases $500; that members might be expelled for nonpayment of dues, in which case they forfeited all right and interest in the benefit-fund; and that no member expelled should be reinstated except upon making the regular, formal application required of new members. *Held*:—

1. That the contract of admission involved an agreement upon the

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part of the candidate to pay the prescribed dues, and to accept the rules of the order governing the administration of the benefit-fund and the expulsion and reinstatement of members; and upon the part of the order, to pay the specified death-benefits.

2. That the same contract arose whenever a former member was reinstated after expulsion.

3. That the failure of the order to observe its own rules in expelling one of its members became of no practical importance in the present instance, inasmuch as it appeared that the expelled member had elected to treat the action taken as effective, and had been exempted from the payment of dues for a least two months prior to his application for reinstatement.

4. That the reinstated member having died from one of the specified diseases within 183 days after his reinstatement, his beneficiary was entitled to a death-benefit of $5 only.

Argued June 2d—decided July 24th, 1903.

ACTION against a fraternal society to recover death-benefits, brought to the Court of Common Pleas in Fairfield County and tried to the court, *Curtis, J.*; facts found and judgment rendered for the plaintiff, and appeal by the defendant. *Error and judgment reversed.*

John J. Phelan, for the appellant (defendant).

Thomas M. Cullinan, for the appellee (plaintiff).

HAMERSLEY, J. The plaintiff seeks to recover the sum of $500 claimed to be due her by force of a contract between the defendant association and its dead member, one Daniel P. Conklin. The defendant is a secret fraternal society or order, organized under the laws of Pennsylvania. The contract in question is the one which arose between the defendant and Conklin upon his becoming a beneficial member of the order, and its nature is determined by the following facts which appear from the finding of the trial court, including the laws, forms, and rules of the defendant, made a part of the record:—

The order is governed by an organization called the supreme circle. Membership is acquired through local circles subject, in States where, as appears to be the case in this

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State, no grand body exists, to the direct jurisdiction of the supreme circle. The supreme circle administers a fund called "The Funeral Benefit Fund of the Supreme Circle." Each member of this fund complying with the rules of the order is entitled at his death to the payment of a death benefit. The amount of this benefit is determined by § 15 of Art. XVI of the laws of the supreme circle, as follows: "The death benefit of a member of this Fund dying within 183 days from date of admission, with nephritis (Bright's Disease), phthisis, phthisis pulmonalis (consumption), or valvular disease of the heart, shall be five dollars and no more. In all other cases it shall be five hundred dollars." No one can be admitted as a beneficial member of the order unless he is "in sound bodily health, and between the ages of 18 and 45 years." Any person duly admitted by initiation, reinstatement or admission by card, as a beneficial member in a local circle, shall thereby become a member of the funeral benefit fund of the supreme circle. The candidate for admission in the local circle must make written application upon the application-blank for admission into the funeral benefit fund, acknowledging his familiarity with § 15 of Art. XVI of the supreme laws, and accepting membership in the fund on these conditions; and before admission must execute an agreement with the supreme circle upon the registration-blank, whereby he again acknowledges his familiarity with § 15 and his acceptance of membership in the fund on these conditions. The only contribution to the fund required of members is the payment of 50 cents a month, or, under certain conditions, of 60 cents a month. Members may be expelled for nonpayment of the monthly dues, and for various causes set forth in the laws. A member suspended or expelled from membership in a local circle, for any cause, shall forfeit membership in the fund. No member expelled from the fund shall be again admitted or reinstated, without again making application on the application-blank and executing the agreement on the registration-blank. The officer of the supreme circle, called the supreme scroll keeper, keeps the register of the members of the funeral benefit

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fund, recording their admission, expulsion and reinstatement. The officer of the local circle, called the Hon. scroll keeper, certifies to the supreme scroll keeper, from the records of the circle, the admission of members and their suspension or expulsion. When a member is registered by the supreme scroll keeper, the local circle remains responsible for the monthly payment of his dues until he is expelled or suspended, and if it fails for one month to make this payment, the circle may be expelled, and all its members thereby forfeit membership in the fund. The death benefit is payable to the beneficiary named by the member in his application, or, if there is no such beneficiary, to certain relatives of the deceased, as prescribed by their rules; or, if there are no such relatives, to the legal heirs of the deceased.

We think it clear that the contract arising upon the admission of a beneficial member involves, on the part of the defendant, an agreement to pay, upon the death of a member, to his beneficiary, the sum of $5 in case he dies from any one of the diseases named within 183 days from the date of his admission; and in case he does not die from one of those diseases, or dies after the expiration of the 183 days, to pay to his beneficiary the sum of $500. It involves, on the part of the member, an agreement to pay his circle the monthly dues required, and his acceptance of the laws of the order relating to the administration of the funeral benefit fund and expulsion from the fund; and the same contract arises whenever a former member is reinstated after suspension or expulsion.

It further appears that Conklin was duly entered on the register of the supreme circle as a member of the funeral benefit fund, through admission as a beneficial member of the Ferris Bishop Circle, No. 6, on February 20th, 1899; that he did not pay his dues for the months of July, August, September and October, 1900, as required by the laws. At a meeting of the local circle held October 15th, 1900, record was made of Conklin's suspension for nonpayment of dues. On October 29th the Hon. scroll keeper certified to the supreme scroll keeper the expulsion of Conklin for nonpayment

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of dues, and on October 31st the supreme scroll keeper recorded the expulsion. On December 3d, 1900, Conklin attended a meeting of his circle, and paid his indebtedness to the circle for the funeral benefit fund dues up to the time of his expulsion, including the dues for October, which were payable on the 15th of that month, being the date of the last stated meeting for the month. Having thus made good his standing in the circle, he afterwards, on January 21st, 1901, made application for reinstatement in the funeral benefit fund, signing, as required, the application-blank, was elected to membership of the fund by the circle, executed the requisite agreement with the supreme circle upon the registration-blank, and paid the registration fee. The written application and agreement were duly forwarded to the supreme scroll keeper, and by him duly recorded February 1st, 1901, the written agreement being retained by the supreme circle as its laws require when the admission of a member is registered. July 1st, 1901, Conklin died of phthisis pulmonalis, and proofs of his death were duly made out and presented to the supreme circle.

Upon this state of facts it is clear that the plaintiff is entitled to recover $5, and is not entitled to recover $500.

Upon the trial, the validity—under the rules of the order—of Conklin's expulsion from the funeral benefit fund was contested. In respect to this claim the court found the following facts: At the meeting of the circle held October 15th, 1900, the Hon. register called off the name of Conklin for nonpayment of assessment for the funeral benefit fund of the supreme circle, and then entered in his funeral benefit fund book of the supreme circle the suspension of Conklin on that day; the Hon. scroll keeper entered in his book at said meeting the suspension of Conklin for nonpayment of dues; no action was taken at said meeting in reference to said Conklin, by vote or otherwise, and the entries in said books were based on the action of the Hon. register.

From these facts, in connection with the other facts appearing in the finding, the court drew the conclusion that Conklin, at the time of his death, had been a member of

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the funeral benefit fund for more than 183 consecutive days.

In this we think the court erred. It was the duty of the Hon. register to keep an accurate account between the circle and each member, to notify each member monthly of his indebtedness to the funeral benefit fund, and at the end of each semi-annual term to report to the circle the names of all members liable to suspension. It was the duty of the Hon. scroll keeper to keep an accurate record of the proceedings of the circle. By the supreme laws, a person suspended from membership in a circle forfeits membership in the fund, unless he gives immediate notice of appeal upon receiving notice of the suspension; the suspension without appeal apparently operates as expulsion from the fund. It was the duty of the circle to transmit to the supreme circle all expulsions as soon as the action took place, and this duty devolved on the Hon. scroll keeper, acting for the circle. Assuming, however, that the failure to take an actual vote at the meeting of the circle rendered its action in transmitting his expulsion to the supreme circle unlawful, and that Conklin did not have immediate notice of this action, yet it clearly appears that on the following December 3d he did have notice of his suspension from the circle, and consequent expulsion from the fund, and did not appeal from this action but elected to accept it and received the benefit of exemption from payment of dues for the succeeding months; and on the following January 21st, still retaining the benefit of non-membership during the months of November and December, applied for reinstatement in the funeral benefit fund, and entered into a written agreement with the supreme circle whereby the benefits of non-membership from the date of his expulsion to that of his reinstatement was secured to him, and the date of his admission to membership in the fund, as an expelled member reinstated, was conclusively determined as between him and the supreme circle. Notwithstanding any failure to follow the rules of the order in the expulsion of Conklin on October 15th, he has, by his subsequent acts, severed the membership acquired by his

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initiation, and acquired a new membership by his reinstatement. His right, therefore, to a death-benefit depends on the agreement he made with the supreme circle on January 21st, 1901. By that agreement the amount of the benefit is fixed at $5, in case he dies within 183 days from its date. It appears that the registration-blank upon which this agreement was executed contains an addition to the words "within 183 days from the date of admission to this fund," of the words, "or, if expelled, then from the date of reinstatement." It is immaterial whether the use of this addition was authorized or not. The words add nothing to the force of § 15 of the funeral benefit fund laws. They are merely a gloss, accurately expressing the meaning of that section.

There is no occasion to consider questions arising upon other defenses made by the defendant. Upon the facts as found by the court, the plaintiff is entitled to a judgment for $5, and is not entitled to a judgment for $500.

No question as to costs is properly presented by this appeal.

The judgment of the Court of Common Pleas is reversed. A further hearing, limited to the question of costs, may be had and judgment rendered in accordance with this opinion.

In this opinion the other judges concurred.

THE TOWN OF MERIDEN ET AL. *vs.* ALFRED S. BENNETT ET AL.

Third Judicial District, New Haven, June Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

For the purpose of removing a grade-crossing, the railroad commissioners are given the right (General Statutes, §§ 3705, 3713, 3714) to determine what alterations or removals shall be made in the crossing, its approaches, the method of crossing, and the location of the highway or railroad. *Held* that this involved the power to discontinue an existing highway and to lay out a new and substitute highway for the one so discontinued.

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The length or extent of new highway necessary to be constructed in the removal of grade-crossings must depend upon the circumstances of each case, and is left to the reasonable judgment of the railroad commissioners, which is reviewable upon appeal to the Superior Court.

Section 2056 provides that the selectmen of any town may discontinue any highway therein "except when laid out by a court or the General Assembly." *Held* that a new highway laid out by the railroad commissioners under the statutes relating to the elimination of grade-crossings, was one laid out by the General Assembly, within the meaning of this section.

The fact that the order for the layout of the new or substitute highway was passed by the railroad commissioners with the approval and consent of the selectmen of the town, does not render it any less the order of the commissioners, nor does it make the layout of the new highway the act of the town.

Argued June 2d—decided July 24th, 1903.

ACTION in the nature of an appeal from an order of the county commissioners directing the town of Meriden to repair an alleged highway, brought to the Superior Court in New Haven County and reserved by that court, *Elmer, J.*, upon an agreed statement of facts, for the advice of this court. *Judgment advised for the defendants.*

George A. Fay and *William L. Bennett*, for the plaintiffs.

Charles Kleiner and *D. W. Coleman*, for the defendants.

HALL, J. On the 19th of July, 1901, the defendants in this proceeding, who are six citizens of the town of Cheshire, brought a complaint to the county commissioners of New Haven county, under General Statutes, § 2021, alleging that a certain highway in the town of Meriden, extending from a point near Hough's Mills, so-called, northeasterly along the east bank of the Quinnipiac River to the River Road, so-called, was out of repair, obstructed and impassable. This complaint came before the county commissioners on the 24th of September, 1901, and by continuance to the 3d of October, 1901, when the parties were heard, and on the 17th of May, 1902, the county commissioners found that said

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highway was out of repair and obstructed, by reason of the embankments upon which the work was constructed having fallen in, and for other reasons, and ordered the selectmen of Meriden to repair said road by rebuilding said embankments and removing said obstructions, on or before the 1st of July, 1902.

The present action is an appeal to the Superior Court by the town of Meriden and one of its citizens, from such order, under General Statutes, § 2024.

The reasons for such appeal, as stated in said proceedings, are:—

1. "Said so-called public road or highway was not, at the time of said hearing before said board, and at the time of said decision, a public road or highway. 2. Said so-called public road or highway was, by the selectmen of the town of Meriden, on the 1st day of August, 1901, duly and legally discontinued as a public road or highway, which action of the selectmen was on the 2d day of October, 1901, duly approved by the town of Meriden. 3. At the time of said hearing and said order, said so-called public road or highway had been legally discontinued."

In support of the first of these reasons of appeal, it is contended by the plaintiffs that the railroad commissioners, in ordering, on the 25th of June, 1889, as hereinafter described, that the location of a certain highway be changed so that it should not cross the tracks of the Meriden, Waterbury and Connecticut River Railroad Company, at Hough's Mills, but should be connected with other existing highways, by a new highway, of which the highway ordered to be repaired is a part,—exceeded their powers.

In support of the second and third reasons of appeal the plaintiffs claim: (1) That said new highway, a part of which was ordered by the county commissioners to be repaired, was not in fact laid out by the railroad commissioners, but was laid out by an agreement between the said railroad company and the selectmen of Meriden; and (2) that, whether laid out by the railroad commissioners or by the selectmen under such agreement, it was within the

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power of the selectmen of Meriden to discontinue that part of said new highway within their town, since such highway was not laid out either "by a court or the General Assembly," within the meaning of General Statutes, § 2056, which provides that "the selectmen of any town may, with its approbation, by a writing signed by them, discontinue any highway, or private way therein, except when laid out by a court or the general assembly."

With reference to these reasons of appeal, and said claims of the plaintiffs, the following facts were, in substance, found by the Superior Court, by agreement of the parties.

The highway, the northerly part of which has been ordered repaired, and the whole of which we shall call "the new highway," extends for a distance of about two thirds of a mile along the easterly side of the Quinnipiac River, about one half of it being in the town of Meriden and the remainder in the adjacent town of Cheshire, from a highway at its northern terminus called the "River Road," to a highway at its southern or western terminus called the "Cheshire Road." Said River Road crosses the Quinnipiac River and the Meriden, Waterbury and Connecticut River Railroad, at a point near the northern terminus of the new highway, and extends southerly along the west bank of the river, crossing the Cheshire Road, which also crosses the river and the railroad, at a point near the southern or western terminus of the new highway.

In June, 1887, the Meriden, Waterbury and Connecticut River Railroad Company submitted to the railroad commissioners, for their approval, the layout of its road along the west bank of the Quinnipiac River between the river and River Road, by which the railroad would not only cross the River Road and the Cheshire Road, at the points above described, but would also cross, at grade, at a point near "Hough's Mills" about midway between said two crossings of the River and Cheshire roads, another road, which may be designated as the "Hough's Mill Road," running from the town of Cheshire westerly across the river and into the town of Meriden, and connecting with the River Road a

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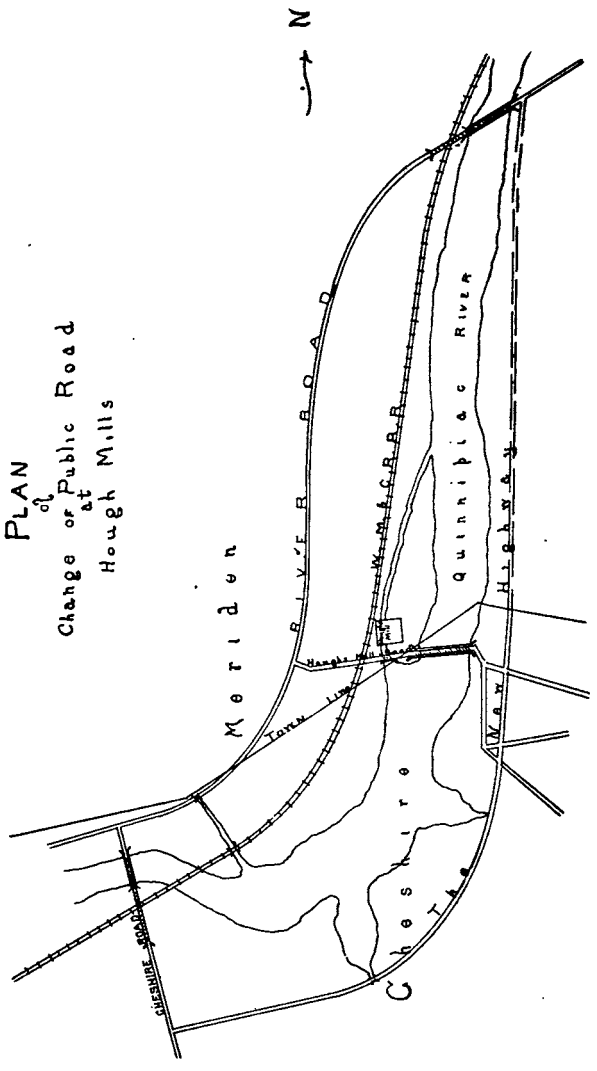

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short distance west of said proposed crossing of the Hough's Mill Road. Said Hough's Mill Road was in general use between said towns.

On June 30th, 1887, the railroad commissioners, by their order in regard to the streets and highways proposed to be crossed at grade by said railroad, "declined" to accept said proposed layout and location, but by their said order authorized the railroad company "to so alter the location of said streets and highways, and to raise or lower the same at said crossings as to cross over or under the same, as may be agreed upon with the selectmen of the towns, . . . or in case of failure to agree," then as might thereafter be ordered by the railroad commissioners. The town of Meriden was a party to said proceedings. Thereupon, in June, 1888, the town of Meriden discontinued a portion of said Hough's Mill Road on the west side of the river, from the point where said road connects with the River Road to a point 112 feet easterly, near Hough's Mills, including that part of said highway which was to be crossed by the railroad. The town of Cheshire appealed from said action of the town, and by agreement of the parties a judgment was rendered setting aside such discontinuance. While said appeal was pending the railroad company constructed its railroad at grade over said discontinued portion of the Hough's Mill Road.

In May, 1889, the directors of the Meriden, Waterbury and Connecticut River Railroad Company, acting apparently under General Statutes, § 3713, brought an application to the railroad commissioners, alleging that public safety and convenience required an alteration in the method of crossing, and in the location of said Hough's Mill Road. The towns of Meriden and Cheshire appeared by their selectmen and were heard in said proceeding, and the railroad commissioners, on the 25th of June, 1889, made this order: "Now, therefore, on consideration, with the approval and consent of the selectmen of both of said towns, we do authorize and empower said railroad company to change the location of said highway, so that the same shall not cross said track at said

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Hough's Mills, but shall be connected with other existing highways by a new highway (the new highway in question) 60 feet in width to be laid out and located in the place and manner delineated on a map thereof on file in this office. . . . Said highway to be constructed and finished to the satisfaction of the selectmen of said towns of Meriden and Cheshire, or in case said company cannot agree with said selectmen, then to the satisfaction of this board. And when said new highway is completed the existing crossing at Hough's Mills to be closed at right of way of said railroad." The railroad commissioners having refused a request of the railroad company for a modification of this order, the railroad company complied with the same.

On the 12th of May, 1891, the railroad company brought its application to the railroad commissioners, alleging that it had constructed said new highway in a good and substantial manner, and to the acceptance of the town of Cheshire, but that the town of Meriden unjustly refused to accept the same, and that it was unable to agree with the selectmen of Meriden as to its acceptance, and asking the railroad commissioners to inspect the road, and, on finding it properly constructed, to direct it to be opened and the existing crossing at Hough's Mills to be closed as a highway. The towns of Meriden and Cheshire were made parties to this proceeding.

The town of Meriden objected, at the hearing, to the acceptance of the new highway, mainly upon the ground that the retaining walls and a culvert were not properly constructed. The railroad commissioners, on July 2d, 1891, found that while there was a question as to the sufficiency of said wall, it would be unreasonable to require it to be rebuilt at that time; that the location of the Hough's Mill Road had been changed in accordance with their order of June 25th, 1889, and that the new highway had been constructed and finished to the satisfaction of the board; and directed it to be forthwith opened to public travel, and the crossing at Hough's Mills to be thereupon closed. The crossing at Hough's Mills was thereupon closed, and the new highway was opened and used as a public highway until

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about the year 1898, when that part of the same situated in the town of Meriden became dangerously defective and out of repair, and was closed to travel by the selectmen of Meriden.

On the 1st of August, 1901—after the commencement of the proceedings by citizens of the town of Cheshire to compel said road to be repaired, from the decision in which proceeding the present action is an appeal, and before the hearing upon said proceeding—the selectmen of Meriden, by a writing signed by them, resolved that so much of said new highway as lay within the town of Meriden be, and that the same was thereby, discontinued; and on the 2d of October, 1901, the town of Meriden, at a duly called meeting, voted "that the doings of the selectmen" in closing such part of the new highway "be approved."

Whether we regard the order of the railroad commissioners of June 25th, 1889, directing a change of the location of the Hough's Mill Road, so that it should connect with the River Road and the Cheshire Road by the new highway delineated on the map, and the order of July 2d, 1901, confirming that of June 25th, as made by virtue of the authority conferred upon the railroad commissioners by General Statutes, § 3705, or § 3713, or § 3714, the facts above stated fail to show that the railroad commissioners exceeded their powers in directing the railroad company to construct the new highway. Section 3489 (Rev. 1888), under which the application of the railroad directors of May 17th, 1889, and the order of June 25th, 1889, seem to have been made, expressly empowers the railroad commissioners, for the purpose of removing a crossing at grade, of a highway and a railroad, to determine "what alterations or removals shall be made," "in such crossing, its approaches, the method of crossing, the location of the highway or railroad." Equally extensive powers, as to the elimination of such grade-crossings, are conferred upon the railroad commissioners, although by different language, by the other two sections referred to.

But it is said that the railroad commissioners have laid out a new highway, and that they have no authority to do

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so under these statutes, and that their power is limited to the alteration of an existing highway or of its location, and that such power does not include the right "to determine whether a new highway shall exist, and that public convenience and necessity demand its existence"; and as supporting this contention, we are referred to the case of *Fairfield's Appeal*, 57 Conn. 167, 171, and to the following language of this court in the case of *State's Attorney* v. *Branford*, 59 id. 402, 407: "It cannot be claimed that the commissioners have authority under the statute above recited (Public Acts, 1884, Chap. 100, § 1), or by any other statute, to lay out any new highway as an independent matter. They have no such power. They cannot interfere with the general powers of towns and selectmen to lay out all the needed new highways within their town limits." But the new highway in question was not laid out "as an independent matter." While in one sense it was a new road, it was in fact laid out as a substitute, in connection with parts of the River Road and the Cheshire Road, for, and as serving with said portions of said two roads, the purposes of that part of the Hough's Mill Road which was discontinued in order to remove a railroad crossing. It was manifestly laid out as a necessary and proper way of accommodating that public travel which had before been over the Hough's Mill crossing, by rendering the River Road and Cheshire Road crossings available for such travel. Both of the cases just cited hold that the railroad commissioners are empowered by statute to construct short portions of new highways as alterations of discontinued ways. This court said in *Cullen* v. *New York, N. H. & H. R. Co.*, 66 Conn. 211, 222: "It has always been the policy of the State to allow railroad companies, with the approval of the railroad commissioners, to lay out and construct their roads in the best possible line, and if necessary for this purpose to change the course of existing highways. . . . Such a change may result in the discontinuance of a part of a highway and the substitution of a new section of road, or the diversion of travel upon another existing highway."

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The length of the new highway in question does not, necessarily and as a matter of law, render the order of the commissioners directing its construction invalid. The amount of new highway necessary to be constructed in altering or changing the location of existing ways, in order to remove or avoid railroad crossings, must necessarily depend to a great extent upon the circumstances of each particular case, and is left to the reasonable judgment of the railroad commissioners, reviewable upon appeal to the Superior Court. *Bristol* v. *New England R. Co.*, 70 Conn. 305, 319; *Suffield* v. *New Haven & N. Co.*, 53 id. 367, 370; *Waterbury* v. *Hartford, P. & F. R. Co.*, 27 id. 146, 155.

With reference to the powers conferred upon railroad commissioners by § 3713, we said in *Cullen* v. *New York, N. H. & H. R. Co.*, 66 Conn. 223: "Their authority sometimes trenches upon what would otherwise be within the exclusive jurisdiction of some particular municipality, and wherever it does, the latter must give way, for so only could any general policy of administration be carried out. . . . As highways must give place to railroads where both cannot occupy the same ground, so municipal control and management of highways must yield, at times, to State control and management, when safety of railway operation is in question."

The new highway was laid out and constructed by the railroad company under an order of the railroad commissioners, and not merely by the consent of the towns. The writing of June 25th, 1889, signed by the railroad commissioners, authorizing and empowering the railroad company to close Hough's Mill Road and to change its location, so that by the new highway it should be made to connect with the River and Cheshire roads, was a judgment of the railroad commissioners upon the matters alleged in the petition of the railroad directors, and was a determination by them, under the statutes, after a hearing and "on consideration," of precisely what alterations should be made in the discontinuance of old highways and in the substitution therefor of new ones, in order to remove the Hough's Mill

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crossing. The fact that the entire decision rendered by the railroad commissioners was "with the approval and consent of the selectmen of both of said towns," does not render it any the less the order of the commissioners. *New Haven S. S. M. Co.* v. *New Haven*, 72 Conn. 276, 283; see also form of order in *Cullen* v. *New York, N. H. & H. R. Co.*, 66 Conn. 213; nor does it make the laying out of the new highway any more the act of the towns, than it does the closing of the Hough's Mill Road on the removal of the grade-crossing. If anything further is required to show that the new highway has become the substituted highway, by direction of the railroad commissioners, it is found in the language of their order of July 2d, 1891, in which they say: "We therefore direct it (the new highway) to be forthwith opened to public travel, and that the crossing at Hough's Mills be thereupon closed."

The act of the railroad commissioners in changing the location of a portion of the Hough's Mill Road so that that road should connect with the River and the Cheshire roads, by the new highway, was the act of the State, and the selectmen of Meriden had no power, under § 2056, to discontinue the portion of said highway within that town.

The railroad commissioners, in discontinuing certain highways and in substituting others therefor, in the removal of grade-crossings, under the general statutes referred to, like commissioners appointed by a special act of the legislature to remove particular grade-crossings, act by the supreme power of the State, and as the instrumentalities of the State itself. *New York & N. E. R. Co.'s Appeal*, 62 Conn. 527, 535.

The taking of the land for the new highway is an appropriation of the same by the State, for the purposes of a highway, necessary for the abolition of a public nuisance, and is an exercise of the paramount authority of the State through the agency of the railroad commissioners. *Bristol* v. *New England R. Co.*, 70 Conn. 315, 317. Provision is made in the statutes for the payment of damages resulting from such taking.

By the statutes referred to, and others of a similar charac-

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ter, the State has established a tribunal to determine when and in what manner grade-crossings shall be removed. *Westbrook's Appeal*, 57 Conn. 95, 101. "Whether or not public safety requires any change of a highway at a grade-crossing, to the end that such crossing may be removed, is a question that the legislature has entrusted solely to the railroad commissioners as an original one, and to the Superior Court only by an appeal from their doings. . . . No appeal having been taken from the decision of the commissioners, that question was *res adjudicata*." *State's Attorney* v. *Branford*, 59 Conn. 402, 411. This language is equally applicable to the decision of such tribunal as to what changes, if any, are to be made at such a grade-crossing.

In *Waterbury* v. *Hartford, P. & F. R. Co.*, 27 Conn. 146, 154, the defendant had occupied about a mile of a public highway through a deep gorge, and with the approval of the commissioners of the railroad had substituted therefor another highway. Upon an application by the plaintiff town for a mandamus to compel a restoration of the road taken, or the construction of another highway in place of that thus substituted, this court, in denying the application, said: "The mile of the old highway taken became, as is agreed, a part of the established railroad track; and this was done by the legislature itself; for it was done by the commissioners who represented the legislature. . . . What was done was authorized by the charter, and directed under it by the agents of the government as necessary for the public safety, and when executed was obligatory and irrevocable save by the government itself." As to whether there should be a highway or a railroad through the gorge, the court said: "The legislature have decided the question by their commissioners."

A highway laid out by "special delegated authority of the legislature" is laid out by the General Assembly, within the meaning of the exception in § 2056. In *Simmons* v. *Eastford*, 30 Conn. 286, 289, it was held that a highway laid out by a turnpike company, under authority from the legislature, was laid out by the General Assembly, and that the portion of such highway within the limits of the defendant town, which

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by an agreement with the turnpike company, confirmed by the General Assembly, had been assumed by the town as a public highway, could not be discontinued by the selectmen of said town, under § 2056. As was said in that case, such limitation of the powers of the selectmen under this statute "is necessary to prevent a conflict of action between the selectmen and the General Assembly or the courts." It is necessary, in the present case, to prevent such a conflict between the selectmen and the railroad commissioners in the important work of the removal of grade-crossings.

Conceding for the purposes of this case that the new highway was not laid out by a "court," within the meaning of that word in said section, it was laid out by the General Assembly, and no part of it, therefore, was discontinued by the action of the selectmen of Meriden and the vote of the town approving such action.

Section 2078 provides a method for the discontinuance of highways which cannot be discontinued by selectmen under § 2056.

Judgment is advised for the defendants (appellees).

Costs will be taxed in this court in favor of the defendants.

In this opinion the other judges concurred.

SARAH B. BASSETT *vs.* THE CITY OF NEW HAVEN.

SAME *vs.* SAME.

Third Judicial District, New Haven, June Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

An assessment of sewer benefits upon the abutting property-owners at a uniform sum per front foot is not necessarily illegal or unjust. Such a method ought not to be adopted arbitrarily nor applied without discrimination; but cases not infrequently exist in which the accruing benefits can be as accurately and satisfactorily determined by this rule as by any other. If the front-foot rule, so-called, is applied because, in the judgment and discretion of the assessing

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authority, it will work substantial justice to all interests concerned, and the results reached under its application are in fact proportional and just, the abutting landowners have no cause of complaint.

About 1871 the defendant planned a general sewer system, estimated the probable cost of its construction, including main sewers, branches and outlets, and, upon the supposition that two thirds of this would be paid by abutting owners, divided that portion of the cost by the total frontage, obtaining $1.75 per front foot as a result. Since that time it has been the practice of the proper municipal authority, after hearing the parties interested and inspecting the premises, to accept and adopt these figures and lay the assessment accordingly, except in instances where from the character or situation of the property, or the nature of its use, the owners were not, in its judgment, benefited to so great an extent; and in such instances to exercise its judgment in determining the amount of the assessment. In the present case this practice was followed, and the figures as originally made were adopted by the assessing body. *Held* that there was nothing arbitrary or illegal in the method or manner of making the assessment appealed from, and inasmuch as the Superior Court had found that these respective amounts were in fact proportional and just, the assessments were properly confirmed.

The defendant's charter provides (12 Special Laws, p. 1150, § 135) that in estimating special benefits for the construction of a particular sewer, the cost of the main or trunk sewer, into or through which the particular sewer empties or is discharged, may be considered; but that the whole amount assessed as benefits shall in no case exceed the cost of the work or improvement (12 Special Laws, p. 1139, § 85). *Held* that under these provisions the aggregate amount assessed as benefits for a particular sewer might, in certain instances, exceed its cost.

The plaintiff contended that the assessments in question were in reality made by the board of compensation, and not by the court of common council as required by the city charter (12 Special Laws, p. 1150, § 135). *Held* that this assumption was negatived by the finding, inasmuch as the common council's adoption of the report of the board of compensation was in itself a sufficient exercise of the council's own judgment and discretion in the premises.

Argued June 3d—decided July 24th, 1903.

APPLICATIONS for relief from sewer assessments, brought to the Superior Court in New Haven County; facts found and judgments rendered confirming the assessment in each case (*Case, J.*), and appeals for alleged errors in the rulings of the court. *No error.*

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John K. Beach, with whom was *John W. Bristol*, for the appellant (plaintiff).

Leonard M. Daggett, for the appellee (defendant).

PRENTICE, J. These two cases were tried below and argued before us together. As they involve substantially the same state of facts and the same questions of law, save in one minor particular, they may now be considered by us in a like manner.

In April, 1897, the court of common council of the defendant city, after compliance with the necessary preliminary action, awarded a contract for the construction of a sewer extending through Shelton Avenue and Ivy and Newhall streets, and connecting at the corner of Newhall and Division streets with a sewer already built, through which, and other laterals and mains, service to the outlet, two miles distant from Newhall Street, was obtained. The construction having been completed prior to May 31st, 1898, the assessment of benefits therefor was referred to the bureau of compensation. This board, after due notice and hearing, made its report. This report took the form of three reports, in which the assessments made against the abutting landowners upon the three streets through which the sewer extended were separated, each report dealing only with the assessments made against the landowners upon a single street. The applicant, being a landowner upon Shelton Avenue and Ivy Street, had assessments made against her in the reports involving those portions of the sewer. These reports were afterwards accepted by the court of common council, whereupon the applicant began these proceedings, praying that the several assessments made against her be annulled. The first case in the order of the docket grows out of the Ivy Street assessment; the second out of the Shelton Avenue assessment.

The total cost of the sewer was $16,288.81. The assessments along Shelton Avenue amounted to $5,733.36; along Ivy Street to $2,854.62; and along Newhall Street to $3,271.67; the total amount being $11,859.65.

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By an apportionment, made at the time of the trial of the appeals in the Superior Court, of the cost of the sewer, which was an entire gross sum and so carried upon the books of the director of public works, it appeared that the cost of the Shelton Avenue portion of the sewer was $5,623.79.

All the assessments along the entire length of the sewer were made at the uniform rate of $1.75 per front foot, except that a 75-foot allowance was made upon one side of corner lots. At the corner of Shelton Avenue and Ivy Street this allowance was made on the Ivy Street side.

"About the year 1871, a general sewerage system was planned for the city of New Haven, in accordance with which plan the sewers in said city have since been constructed. At that time an estimate was made of the probable cost of the sewer system so planned, including main sewers, outlets, and lateral, or branch sewers, and such total estimated cost was divided into three equal parts. Upon the supposition that one of such third parts would be met by the city from general taxation, and that the other two thirds would be paid by the owners of property adjoining the streets in which such sewers might be constructed, the two thirds of such total estimated cost was divided by the total frontage of land in the city upon the streets in which sewers might be constructed, and the result thus obtained was approximately $1.75 per front foot. Said computation was made by the city engineer and by those by whom said general plan was devised, and said result, namely, $1.75 per front foot, was adopted by them as a guiding basis upon which assessments for sewers might be figured, in the expectation that, if the assessments were so figured, it would result in the city paying a third of the total cost of the sewerage system, the property-owners on one side of the street paying a third, and the owners on the other side a third.

"Since said plan was devised, and said computation made, it has been the practice for the department of public works, through the city engineer, to furnish to the board, or bureau of compensation, when about to make an assessment of benefits for a sewer, a map of the street, or streets, upon which

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such sewer, or sewers, have been constructed, showing the names of those owning property on each side of such street or streets, and their respective frontages, and also showing in figures upon each of such lots what the amount of the assessment would be if it should be laid at the rate of $1.75 per front foot."

It has been the practice of the members of said bureau, "after hearing the parties interested, and after an inspection of the premises, to accept and adopt the computation so made by the city engineer, and lay the assessments accordingly, except in particular instances where, by reason of the situation of property, irregularity of dimensions, character of the property, or of its use, or other circumstances, the owners of such property were not, in the judgment of the bureau, benefited by the construction of a sewer as much as $1.75 per front foot, or to so great an extent as were the owners of property not presenting such unusual features. In such particular instances, it was the practice of the board to exercise its judgment in determining to what extent the owners of such property should be assessed."

This practice was followed in the making of the assessments in question, and the figures entered by the city engineer upon his map of the work as the result of his computations at the rate of $1.75 per front foot were, without change, adopted by the bureau of compensation as the assessments against the property-owners.

The applicant's property against which the assessments were laid is outlying, undeveloped property, and on the market for sale.

The appeals assign, as reasons therefor, the overruling of certain claims that the assessments in question were illegal and unauthorized, for substantially the following reasons: (1) that they were not laid in accordance with the city charter; (2) that they were not laid with reference to special benefits received; (3) that they were not proportional or reasonable parts of the expense of the work; (4) that the authority laying them did not assess upon the applicant and the other landowners a proportional and reasonable part of

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the expense of construction, and did not estimate the particular amount of such expense to be paid by them; (5) that the assessments were calculated as a proportional part of the estimated cost of the entire city sewer system, constructed and to be constructed; (6) that the assessments were not fixed with reference to the cost of the sewer in the street in question, but with reference to the total estimated cost of the whole city system; and (7) that the rule of assessment adopted was one of uniform assessment per front foot throughout the city.

These reasons relate in part to the manner of assessment, and in part to the results arrived at. In so far as they relate to the results, the finding effectually negatives them. It is distinctly found that the sewer in each street in fact benefited the land assessed to the amount of the assessment, and more; that the total amount assessed upon the owners of property upon the three streets was a proportional and reasonable part of the cost of construction of the sewer, and the total sum assessed upon the property-owners by each of the three reports likewise a proportional and reasonable part of the expense of said construction, and that the particular amount of such expense so estimated to be paid by the complainant upon such assessment was a reasonable and proportional part of the expense of the construction of said sewer. This finding conclusively disposes of any claim based upon a disproportionate and excessive assessment.

The results having thus been found to be correct ones, we have only to consider the objections urged as to the methods by which they were reached. These latter objections, as they are stated, naturally fall into two general groups, to wit: those which urge that the assessments were not made with reference to special benefits, and those which insist that they were not laid solely with regard to the particular public work in question. The charter provides that, in estimating the reasonable part of the expense of any sewer for the purposes of assessment, the cost of constructing any main or trunk sewer into and through which such other sewer is discharged may be taken into consideration. Save as the assessing

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authority may have acted under this grant of power, the objections of the second form do not, in the present case, differ in principle from those of the first, and call for no separate discussion. Broadly stated, all the applicant's objections to the method of assessment resolve themselves into a single general objection, to the effect that the assessments in question were laid by the application of a front-foot rule determined upon and adopted arbitrarily and upon the basis of an entire city sewerage system, and not laid, as the charter clearly requires, upon the basis of special benefits received from the public work in question.

The fallacy of the argument in support of this contention exists in the assumptions of fact that are made. We look through the record in vain for support for the assumed proposition that the assessments were not in fact made with a sole regard for the special benefits deemed by the assessing authority to have accrued from the construction of the line of sewer which was the occasion of the assessment. A front-foot assessment was indeed made, but such assessments are not by any means necessarily inconsistent with an application of the special benefit rule. Common knowledge proves that not infrequently the front-foot rule furnishes as fair an expression of the proportionate benefits received as any other process. It is true that the bureau of compensation used as "a guiding basis" for their action a scheme long since worked out by others, and a schedule mathematically prepared according to such scheme. But it by no means appears that this scheme and schedule were adopted and applied arbitrarily, and without a preliminary finding that the special benefits would be fairly and justly apportioned in the situation in hand by their application. It is true, also, that this scheme was originally formulated with a regard for the entire proposed system of city sewerage and its estimated cost. That fact, however, has no significance, save as a tribute to the foresight of the originators of the scheme, if it appears that the results worked out by them, taking a broad view of the whole city situation, in fact accomplished in this particular instance what it was designed to accomplish, and did in fact represent a correct

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assessment of the cost of this particular line of sewer based upon special benefits. The adoption and application, in the laying of assessments, of a rule of any sort and from whatever source derived, is not in violation of a requirement that they be laid with regard to special benefits, if that rule is, in the discretion and judgment of the assessing authority, chosen for the reason that it leads to the required result. The supreme requisite of an assessment proportioned to special benefits is, in the absence of specific legislative directions, the exercise of judgment and discretion by the assessing authority in the choice of means or otherwise, to the end that the required results may be reached. Given such results and such an exercise of judgment and discretion in reaching them, no assessment can be successfully assailed upon the ground that it is not made upon the basis of special benefits.

The findings of fact in these cases plainly disclose that whatever rule was adopted was not adopted as an arbitrary one, or as one which the bureau of compensation was bound to apply, but as one which appealed to the judgment of its members as one fairly leading, as it did in fact, to the results to be secured, to wit: an assessment of a proportional and reasonable part of the expense of the public work in hand, upon the basis of special benefits. The parties interested were heard, the premises inspected, and neither the frontage method nor the $1.75 rate adopted until it appeared, as the result of such hearing and examination, that their adoption would lead to the required result. The finding with regard to the method pursued by the bureau of compensation clearly negatives any other assumption.

A few incidental questions demand a passing consideration. We have treated the court's finding as to the results of the assessments made as stating the fact. The applicant, however, takes issue with this portion of the finding, and contends that as a matter of law it cannot be true that the assessments laid embodied a distribution of a reasonable and proportional share of the expense of the construction of the sewer in question upon the property-owners specially bene-

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fited thereby, and made upon the basis of the special benefits accruing to each, and urges that necessarily, and as a matter of law, the assessments as made and upon the basis adopted must have produced and did produce disproportionate results, and results excessive as to the applicant.

It is quite clear that so sweeping a general statement cannot be justified. The court has found nothing which could not readily be true.

The applicant's brief objects to the assessments, for the reason that they were actually laid by the bureau of compensation, after reference to it by the court of common council, and not by the original and independent action of said court. The finding negatives such an assumption. It is found that the court of common council passed upon and adopted the report which the bureau of compensation made to it. In so doing it exercised its judgment and discretion and the assessments made became its assessments.

The assessment made against the applicant's land fronting on Shelton Avenue is particularly objected to as being in violation of that provision of the city charter which directs that the whole amount of assessments for benefits, by reason of any work or improvement, shall in no case exceed the cost thereof. 12 Special Laws, p. 1139, § 85. It appears that the total assessments along said avenue, which were separated into an independent report, amounted to $5,733.36, while the computed cost of that portion of the entire line of sewer was $5,623.79.

This contention is beset with two difficulties. In the first place the charter provides, as we have seen, that in estimating the reasonable part of the expense of any sewer for the purposes of assessment "the cost of constructing any main or trunk sewer, into or through which such other sewer is discharged, may be taken into consideration." 12 Special Laws, p. 1150, § 135. In the present case the newly-constructed sewer sought the harbor through two miles of other sewers, some of which cost as high as $38 per foot to construct. In the second place there remain the facts that the newly-constructed sewer was one not limited to

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Shelton Avenue, and that the cost of the entire sewer exceeded by several thousand dollars the assessments made on its account. As it is unnecessary to accumulate justifications for the assessment, there is no need to follow the applicant's nicely critical argument, which seeks to give significance to the separation of assessment reports, which for some reason was resorted to.

There is no error.

In this opinion the other judges concurred.

The Empire Transportation Company *vs.* Frank P. Johnson.

Third Judicial District, New Haven, June Term, 1903.
Torrance, C. J., Baldwin, Hamersley, Hall and Prentice, Js.

It is error to award damages for a threatened injury only, in the absence of any act of omission or commission.

A threatened but groundless action of replevin will not be enjoined, if it is apparent from the allegations of the complaint that the anticipated injury, if committed, can be measured and redressed in the replevin action itself, or in an action on the replevin bond.

A mere allegation that the loss or injury will be irreparable, if an injunction is not granted, is not enough: facts must be stated showing that such apprehension is well founded.

The owner of freight barges, who is wrongfully deprived of their use for a time in his transportation business, can ordinarily charter or hire others to take their place, and thus fulfil his contracts. Under such circumstances his injury is not, and in the nature of things cannot be, so subtle or extraordinary as to be incapable of measurement and redress in an action at law for damages.

Argued June 3d—decided July 24th, 1903.

Action to restrain the defendant from replevying certain coal barges, brought to and tried by the Court of Common Pleas in New Haven County (*Hubbard, J.*), upon a demurrer to the complaint; demurrer overruled and judgment for plaintiff, from which the defendant appealed. *Error, judgment set aside and cause remanded.*

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James H. Webb and *John Wurts*, for the appellant (defendant).

Prentice W. Chase, for the appellee (plaintiff).

PRENTICE, J. The complaint prays for damages and an injunction restraining the defendant from instituting replevin proceedings to recover the possession of certain coal barges. The defendant demurred to the complaint, which demurrer the court overruled. The defendant thereafter refusing to answer over, judgment was rendered in favor of the plaintiff to recover $1 damages, and for a permanent injunction as prayed for.

There are two reasons of appeal, to wit: (1) that the court erred in overruling said demurrer, and (2) that the court erred in rendering a judgment for damages.

The second claim of error is clearly well founded. The complaint seeks to restrain a threatened act. No act is alleged to have been committed or duty omitted, and no damage caused. There was no foundation, therefore, for a judgment in damages. *Foot* v. *Edwards*, 3 Blatch. (U. S.) 313; *Wildman* v. *Wildman*, 70 Conn. 700.

There remains to be considered the propriety of the action of the court in overruling the demurrer. In so far as the demurrer related to the prayer for damages, no further comment is necessary. In so far as it challenged the plaintiff's right to equitable relief by way of injunction, something further needs to be said.

The complaint, dated March 20th, 1903, alleges that the defendant was threatening to institute replevin proceedings against the plaintiff to obtain possession of five coal barges, two of them lying upon the bottom of New Haven harbor near to the plaintiff's dock, and three being in the plaintiff's service, and all claimed to have been purchased by the former of the latter, but never delivered. The allegations of the first eight paragraphs of the complaint which, and which alone, deal with this aspect of the case, under the admissions involved in the demurrer, demonstrate that the present

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defendant must have inevitably failed in any attempt to replevy the barges in question. The sufficiency of the plaintiff's legal defense thereto is apparent.

Thus far the complaint discloses that the defendant was threatening to begin a baseless replevin action to recover the barges. The balance of the complaint is confined to a statement of the damage which would result to the plaintiff in its business if the replevy was made. The resort to equitable intervention is sought to be justified upon the ground of the extent and nature of this prospective damage. It is not suggested that the defendant, in the course of action he was threatening to pursue, was actuated by malice, wantonness, or bad faith. There is no allegation that in the progress of the proceedings at law the plaintiff would be deprived of the benefit of any claim or defense of purely equitable cognizance. It is not claimed that the barges were in any sense unique, or possessed of any peculiar or extraordinary value either in themselves or to the plaintiff. The plaintiff rests his right to the equitable relief prayed for, upon the sole ground that his loss of the use of the three barges above water, which would result from their replevy, would entail upon him pecuniary injury of such a character and magnitude that the defendant ought not, in equity and good conscience, to be permitted to resort to the process at law prescribed by statute for the recovery of goods or chattels by one who claims that they are wrongfully detained from him.

The allegations made in support of this contention are, in substance, that the plaintiff is a corporation engaged in the business of transportation on the waters of Long Island Sound and elsewhere; that it daily uses in said business a large number of coal barges, including the three in question; that prior to the date of the writ it had, "in calculating the necessity of its carrying capacity, considered as available the three said coal barges, and had entered into various undertakings wherein said barges were essential to the carrying on of its business"; that the period of time during which said threatened replevin action would be pending would be the most active period of the year in the plaintiff's business,

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and that if said writ of replevin issued the plaintiff would be deprived of the use of said three barges, with the result that it would thereby be irreparably damaged through its inability to transport the freight necessary to carry on its usual business, its inability to supply the demands of patrons and perform its contracts, with the attendant loss of earnings and patronage, both temporary and permanent, and its subjection to litigation.

The language in which these results are portrayed is somewhat strong, and the resulting injury is declared to be irreparable. The mere allegation that irreparable injury would ensue is, however, not sufficient, unless facts are stated showing the apprehension to be well founded. *Blaine* v. *Brady*, 64 Md. 373; *Balfe* v. *Lammers*, 109 Ind. 347; *Thompson* v. *Williams*, 54 N. Car. 176; *Watson* v. *Ferrell*, 34 W. Va. 406; *Branch Turnpike Co.* v. *Supervisors of Yuba Co.*, 13 Cal. 190.

The facts stated, shorn of the color which is given to them, resolve themselves into this: that the plaintiff, having made business arrangements and contracts with a regard to the carrying capacity of "a large number of coal barges," would be deprived of the use of three of this large number if the defendant should carry out his purpose to replevy them. There is no allegation that coal barges were not obtainable in plenty in substitution for those replevied; none that the service which they were expected to perform could not readily be procured to be performed by means of charter parties or contracts of affreightment. In the absence of such or similar allegations, it cannot be presumed that coal barges were so rare or so hard to secure, and that barge transportation was so out of the reach of the plaintiff, that the payment of a reasonable compensation, either as freight charges or demise rentals, would not have fully supplied the lack of the three in question, and prevented all the dire consequences resulting from their replevy, which are so glowingly pictured in the complaint. Without this presumption, it would appear from the complaint that the only injury to the plaintiff that such replevy

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could portend, was one substantially measured by the additional expense which might be incurred in the ways indicated. Such injury could not in the nature of things be either so extraordinary as not to be the subject of adequate compensation in damages, or of such a nature as to elude discovery or ascertainment, or be incapable of measurement by pecuniary standards. Nor would the means of redress and satisfaction be wanting. The statutory provisions regulating proceedings in replevin furnished that, through the bond required to be given. The anticipated injury could not, therefore, have been in any sense irreparable. Neither could it have partaken in any other way of the peculiar nature of some injuries which, as being not susceptible of adequate redress at law, courts of equity seek to prevent. Special equitable features are entirely lacking. The situation discloses nothing but the ordinary elements of business interference and pecuniary damage, which so commonly attend the causes of litigation at law, and which courts of law are intended to redress and are capable of fully and completely redressing. Of the circumstances of this case it might well be said, as was well said in another cause, that if courts of equity should interfere in such cases they would draw to themselves the greater part of the litigation properly belonging to courts of law. *Francis* v. *Flinn*, 118 U. S. 385.

There is error, the judgment is set aside, and the cause remanded with directions that said demurrer be sustained.

In this opinion the other judges concurred.

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JAMES J. GEARY *vs.* THE CITY OF NEW HAVEN.

Third Judicial District, New Haven, June Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

The plaintiff agreed with the defendant to build the substructure of a bridge. The contract provided that "the dimensions of piers and abutments shall be as shown on the plans." Upon one of these a perpendicular line indicated the distance from high-water to the bottom of the foundation of the west pier as "twenty-six feet no inches, plus or minus." The plan also showed approximate estimates of masonry. The contract stipulated that the west pier should be founded on rock bottom, and further, that the agreed price of $14 per cubic yard should be full compensation for completing the work, also for "all loss or damage arising from . . . any unforeseen obstructions or difficulties." In the performance of the work it was found necessary to dredge to the depth of thirty-three feet nine inches for the foundation of the west pier, and the committee found that the work below the twenty-six foot line was worth fifty per cent. more than that above. The plaintiff claimed to recover for all work below said line as extra work. *Held*:—

1. That the plans so referred to were correctly treated as a part of the contract.
2. That the work below the twenty-six foot level was included by the terms of the contract, and therefore the plaintiff was not entitled to recover for it as extra work.

The proper way to correct errors in the admission or rejection of evidence by a committee, is by filing in the trial court a written remonstrance to the acceptance of the report, distinctly stating the alleged erroneous rulings as grounds of the remonstrance. The errors, if any, may then be corrected, and the case recommitted for further hearing or finding.

The statutes and rules concerning motions to the trial judge to correct his finding, or applications to the Supreme Court to rectify an appeal, do not authorize a motion to the trial court, or an application to the Supreme Court, to add to a finding made by a committee or auditor.

Argued June 4th—decided July 24th, 1903.

ACTION to recover for extra work and labor in building the substructure of a bridge, brought to the Superior Court in New Haven County and referred to a committee by whom the facts were found and reported; the plaintiff filed remon-

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strances to the acceptance of the amended and supplemental reports, which were overruled (*Thayer, J.*) and judgment was rendered for the defendant, from which the plaintiff appealed. *No error.*

Hobart L. Hotchkiss, with whom was *Harry W. Asher*, for the appellant (plaintiff).

William H. Ely and *Richard J. Goodman*, for the appellee (defendant).

HALL, J. In May, 1896, the plaintiff entered into a written agreement with the city and town of New Haven "to furnish all the necessary materials and labor, and to construct and erect in a substantial and workmanlike manner the substructure for a bridge on Grand Avenue, over the Quinnipiac river, . . . of the dimensions, in the manner, and under the conditions" specified in said agreement, which was made a part of the complaint. By the contract the work was to be completed on the 12th of October, 1896. It was in fact completed on or about the 15th of September, 1897.

The plaintiff claims to be entitled to recover for extra labor and materials, for damages sustained from delays caused by the defendant, and for the use by the defendant of a temporary bridge constructed by the plaintiff.

The total amount of the plaintiff's bill of particulars, comprising twelve items, is $45,423.21.

The defendant filed an answer denying that the plaintiff had performed any extra work, and that the delays were the defendant's fault, and alleging that the delays were caused by the plaintiff's own incompetency and inferior work. Thereupon the case was referred to a committee to hear the evidence and report the facts to the court.

The committee reported specifically the facts established by the evidence and relevant to the issues, and practically found in favor of the defendant upon all the controverted and material questions of fact relating to each item of the bill of particulars, excepting as below stated regarding the

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first item; and also fully set forth in his report the objections and rulings upon all questions of evidence.

The plaintiff filed a remonstrance to the committee's report, which was overruled by the court. Thereupon he claimed to be entitled to recover upon the report as accepted, under the first item of his bill of particulars, the sum of $1,029.

The overruling of this claim raises the principal question presented by this appeal.

The following is the first item of the bill of particulars:

"To extra work done and materials furnished in the construction of the west rest-pier as ordered by the city engineer, said work consisting of additional masonry required in going down from a depth of 26 feet below mean high-water, as the original plan called for, to a depth of 33 feet, 9 inches, which is the present foundation, $13,352.

"This includes the dredging, and towing of material, and all incidentals.

242 cubic yards of masonry (extra) .	$5,082.00
2,600 cubic yards dredging, . .	5,200.00
Vessel, pumping, and divers, and recutting of stone, &c.	3,070.00
	$13,352.00"

The bridge in question is a drawbridge. The pier upon which the draw span rests is referred to as the center pier, and the two upon which the ends of the draw rest—the westerly one of which is called in the above item the "west rest pier," —are called the east and west piers.

It is the plaintiff's contention that by the written contract and plans he agreed to build said west pier to a depth below high-water mark of twenty-six feet only, at the contract price of $14 for each cubic yard of masonry; that he was required to construct it to a depth of thirty-three feet and nine inches below high-water mark; that the building of the pier below the twenty-six foot line was much more expensive per cubic yard than the building of it above that line; and that under the report of the committee he is entitled to recover the ex-

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tra expense, above $14 per cubic yard, for the building of the pier below said twenty-six foot line.

The committee reports that it was found necessary to dredge to the depth of thirty-three feet and nine inches for the foundation of said west pier; that the construction of the masonry below the twenty-six foot line was worth fifty per cent. more than that above the line, and that the 147 cubic yards of masonry below that line was worth $21 per cubic yard for construction, amounting, after deducting the sum of $14 per cubic yard already paid the plaintiff for the construction below the twenty-six foot line, to the sum of $1,029.

The committee further finds that "there was no extra work done or materials furnished in the construction of the west rest-pier as ordered by the city engineer, as set forth in item No. 1 (of bill of particulars), unless as a conclusion of law from the facts hereinbefore stated the work on the west rest-pier below the 26 feet mentioned in the plans must be held as extra work; and if as a conclusion of law the court holds that the plaintiff is entitled to extra compensation, . . . the amount due is $1,029."

Whether the plaintiff is entitled to recover for extra work under this item becomes, therefore, a question of construction of the written contract.

As sustaining his claim, that by the provisions of the contract the work below the twenty-six foot line is extra, the plaintiff calls our attention, among other things, to this language of the contract: under the head of *Masonry:* "The dimensions of piers and abutments shall be as shown on the plans on file in the office of the city engineer;" and under the head of *General Provisions:* "All work embraced in this contract shall be built truly to the line and gradient throughout in a first-class manner, and according to the plans and directions furnished from time to time by the engineer."

The plaintiff claims that it appears by the map, *Exhibit C*, one of the plans referred to by the above language, that at a depth of twenty-six feet below high-water mark a rock foundation would be found upon which this west pier could be con-

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structed. With regard to this map, thus made a part of the contract, the committee finds that the city engineer prepared a map or plan, drawn to a scale, of the work to be done under the contract, which showed, among other things, "the substructure of the new bridge to be constructed, and in that connection perpendicular lines measured from high-water downwards. In that connection a perpendicular line in connection with the center pier indicated forty feet, no inches, from high-water to bottom of timber foundation, and a horizontal line at the bottom, marked 'Approximate depth of timber foundation if founded on rock.' In connection with the east rest-pier a perpendicular line indicated thirty-two feet, no inches, plus or minus, from high-water to foundation, the words plus or minus being indicated by a sign . . . In connection with the west rest-pier a perpendicular line indicated twenty-six feet, no inches, plus or minus, from high-water to bottom of foundation. The plan also showed approximate estimates of masonry . . . in each of the three piers." It is found that this plan, *Exhibit C*, was referred to in the advertisement for bids, and was examined by and explained to the plaintiff.

As to the significance of the signs plus and minus after the figures, as above stated, and of the statement that certain estimates and figures were approximate, the finding of the committee is that "these signs and words are used by engineers in drawing plans to inform those bidding for a job that the figures are not exact, and show that the exact depth at which a suitable foundation can be found cannot be given by the engineer, but that they may vary;" and that "the plans as drawn did, in fact, indicate, in the ordinary, proper way, that the figures on the plans were not exact, and conveyed that information."

Even the measurements, statements and signs upon this map (*Exhibit C*), considered apart from certain written provisions of the contract pertinent to them, and especially when examined in connection with the above facts from the committee's report, fail, therefore, to show that the undertaking of the plaintiff was to build the west pier but twenty-

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six feet below high-water mark. On the contrary, the perpendicular line at the side of the west pier, evidently designed to extend from high-water mark to rock foundation, the signs showing that the given measurements of that line were not intended to be exact, the statement that the given depth of the rock foundation of the center pier and the given estimates of the masonry of the three piers were approximate, seem to indicate rather that the pier in question was to be built either to a rock foundation—the depth of which below high-water was uncertain—or to some other foundation, the depth of which was uncertain.

But turning to the written contract we find it expressly provides that the east, west, and center piers are to be founded on rock bottom, except that the center pier may be founded on such hard gravel bottom, acceptable to the engineer, as may be found before rock is encountered.

Again, with regard to the payment which the plaintiff is to receive, the contract contains this provision: "The said party of the second part (the plaintiff) hereby agrees to receive the following price as full compensation for furnishing all labor and materials in building and in all respects completing the aforesaid work in the manner and under the conditions before specified; also, all loss or damage arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the work, and for well and faithfully completing the same, and the whole thereof, in the manner hereinbefore specified, viz.: . . . For each cubic yard of masonry in the pivot (center) pier, the sum of fourteen dollars, ($14.00). . . For each cubic yard of masonry in the new piers at each end of the draw span (east and west piers), the sum of fourteen dollars, ($14.00). (The charge of $14 per cubic yard of masonry included the expense of excavation, etc., charged as separate items in the first item of the bill of particulars.)

The contract further provides that the engineer "shall have the power also, with the consent of the joint committee (Committee on Bridges of the Board of Public Works of

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the city, and the selectmen of the town of New Haven), to vary, extend, or diminish the quantity of the work during its progress, without vitiating the contract."

After dredging thirty-three feet and nine inches for the west pier foundation, it was in fact, though with the consent of the engineer, founded on other than rock bottom. While the plaintiff excavated seven feet and nine inches below the estimated depth for that pier, it is found that by reason of having been required to dredge less than the estimated depths for the east and center piers, the total depth of dredging for the three piers, in excess of the estimated depth, was one foot and eleven inches, and the excess of the actual amount of masonry in the three piers, over the estimated amount, was sixteen and sixty-four hundredths cubic yards.

All these facts, showing that the written contract, of which the map, *Exhibit C*, was properly held to be a part, provides for the building of the west pier to rock bottom; that the depth of such foundation was uncertain; that the amount of masonry was only estimated approximately upon the plans; that no different price was fixed for construction below than for that above the estimated depth; and that the contract price for construction, instead of being a gross sum for a definite or estimated amount of masonry, was a certain sum for each cubic yard,—furnish sufficient reasons for sustaining the decision of the trial court, that the work on the west pier below the said twenty-six foot line was not extra work for which the plaintiff was entitled to compensation above the fixed contract price of $14 per cubic yard, and that having been paid that price for the claimed extra work he could not recover under the first item of the bill of particulars.

The remaining items of the bill of particulars do not require discussion. The allegations of fact upon which they are based have been conclusively decided by the committee adversely to the plaintiff.

Numerous reasons of appeal are assigned, based upon the action of the trial court in overruling the plaintiff's remon-

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strance to the committee's report, and in denying certain motions of the plaintiff concerning a correction of the record. Generally, the grounds of the remonstrance were that the committee had failed to specifically and properly report the facts relevant to the issues and established by the evidence, and to make various exhibits a part of his report, and to properly state the objections and rulings upon evidence.

There appears to be no good reason for stating these grounds in detail here. They were all properly overruled by the trial court; many of them because the facts alleged in the remonstrance were not proved, and others because the alleged facts were insufficient. The court correctly ruled that the committee had adopted the right method of reporting the facts and of stating his rulings upon questions of evidence.

Another reason of appeal is that the trial court did not sustain plaintiff's exceptions to rulings upon questions of evidence, taken upon the trial before the committee, and did not reject the committee's report on account of said rulings.

It does not appear that the trial court was asked to decide whether the rulings of the committee upon questions of evidence were correct, or was asked to reject the report on account of such rulings, or that the court did decide these questions of evidence.

The proper way of correcting errors in the admission or rejection of evidence, in a trial before a committee, is by a written remonstrance to the acceptance of the committee's report, filed in the trial court, where such errors, if there are any, may be corrected, and the case may be recommitted for a further hearing or finding; and in such remonstrance the claimed erroneous rulings should be distinctly stated as grounds of remonstrance. *Kennedy* v. *Scovil*, 14 Conn. 61, 71; *Maples* v. *Avery*, 6 id. 20, 23; *Redfield* v. *Davis*, ibid. 439, 443.

In the remonstrance filed and decided by the trial court, the plaintiff complains, not of the rulings of the committee upon questions of evidence, but only of the manner in

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which the rulings were stated in the report. While, therefore, we are not called upon to review these rulings of the committee, we deem it proper to say that we have examined them, and that we are satisfied that they are correct, and that they present no questions which require discussion here.

The facts which the plaintiff, by his motion to the Superior Court, and his application to this court, asked to have added to the finding of the committee, were of an evidential character, and were not necessary to enable the plaintiff to present, either to the Superior Court or this court, all proper questions of law arising upon the committee's report or upon this appeal. The granting of such a motion or such an application, to add to a finding made by a committee or auditor, is not authorized by our statutes or rules concerning motions to a trial judge to correct his finding, or applications to this court to rectify an appeal.

There is no error.

In this opinion the other judges concurred.

THE STATE *vs.* FRANK NUSSENHOLTZ.

Third Judicial District, New Haven, June Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Evidence that a witness has been arrested is not admissible for the purpose of attacking his character; especially if the witness is the accused, who has not put his character in issue by offering evidence in respect to it.

The accused, testifying in his own behalf, was asked if he had been arrested before; he answered, "I was arrested; I was not guilty." The court ordered the last four words to be stricken out. *Held* that the error in admitting the evidence, which was aggravated by striking out the claim of innocence, entitled the defendant to a new trial.

The word "wilfully," when used in the definition of a statutory crime, ordinarily implies knowledge that the act is forbidden, and therefore an evil intent to violate the law.

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State v. Nussenholtz.

General Statutes, § 1346, makes it punishable to wilfully sell, or offer to sell, the flesh of any calf which is less than four weeks old when killed. *Held* that knowledge upon the part of the accused, that the flesh sold by him was of the forbidden kind, was an essential element of the offense; and that an instruction which authorized the jury to convict merely upon finding an actual sale of the forbidden flesh, regardless of the seller's knowledge or intent, was reversible error.

Argued June 5th—decided July 24th, 1903.

INFORMATION for wilfully selling veal less than four weeks old, brought by appeal of the accused to the Criminal Court of Common Pleas in New Haven County and tried to the jury before *Hubbard, J.*; verdict and judgment of guilty, and appeal by the accused for alleged error in the rulings and charge of the court. *Error and new trial granted.*

Jacob B. Ullman, for the appellant (the accused).

Robert J. Woodruff, Prosecuting Attorney, for the appellee (the State).

TORRANCE, C. J. In this case we think that two of the assignments of error are well taken, and entitle the defendant to a new trial. One relates to certain rulings upon evidence, and the other to a certain part of the charge to the jury. The assignment relating to the rulings upon evidence is based on these facts: The defendant became a witness in his own behalf, and upon his cross-examination was asked if he had ever before been arrested. To this question he objected, but the court ordered him to answer it, and thereupon he did so, saying, "I was arrested; I was not guilty." The court, apparently of its own motion, then ordered the words "I was not guilty" to be stricken out, and the statement of arrest to stand.

We think the trial court erred in this, and that the error was harmful to the defendant. The question was apparently permitted on the supposition that, if answered in the affirmative, such answer would tend to prove such past misconduct on the part of the defendant as would injuriously affect his

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character. On no other supposition was the question permissible. But clearly such answer had, legitimately, no such tendency. Arrests are frequently made upon groundless charges; and a mere charge of misconduct, such as may be impliedly involved in the mere fact of arrest, ought not to be used as the basis of an inference that the charge is true. Both the question and any possible answer to it were, under the circumstances, clearly irrelevant, and should have been ruled out.

Moreover, the defendant was the accused as well as a witness, and although his character as witness was open to attack in this case, his character as accused was not, inasmuch as he had offered no evidence of good character; and yet, by the action of the trial court in this matter, the State was allowed to attack the defendant's character both as a witness and as a man; for the fact of arrest was in no way limited to its effect upon his character as a witness, but was received as affecting his character generally, and the jury were nowhere told that it could not be used to affect his character as a man. Under these circumstances we think that the action of the court in admitting this evidence, coupled with its order striking out the claim of innocence, entitles the defendant to a new trial.

The other material error assigned relates to a certain part of the charge. The statute upon which this case was brought provides, among other things, that "every person who shall wilfully sell, or offer to sell, . . . the flesh of any calf which was less than four weeks old when killed," shall be punished by fine or imprisonment as therein provided. Public Acts of 1901, Chap. 154 (General Statutes, § 1346). The accused was charged with selling the flesh of a calf in violation of this statute. In construing the statute the court charged the jury as follows: "The accused is charged here with wilfully selling. The court would advise you that by wilfully selling is meant deliberately selling; it is not a question of motive; a man's motive does not enter into the account in an offense where it is simply necessary that the act of violation be wilful." The court here seems to construe the stat-

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ute as if it did not contain the word "wilfully." The jury are, in effect, told that if the accused did in fact sell or offer to sell flesh of the forbidden kind he was guilty, even if he in good faith and on sufficient grounds believed it was not flesh of that kind; in other words, that his knowledge that the flesh was of the forbidden kind was not an element of the statutory crime. This would undoubtedly be the true construction if the word "wilfully" had been omitted, but we think it is not the true construction of the statute as it now reads. The case turns upon the question of intent. With what intent must a sale be made to make the seller guilty under the statute? Is a mere intent to make the sale sufficient, or must it be an intent to make the sale and also to violate the law? *A*, knowingly having in his possession flesh of the forbidden kind, sells it. Clearly his intent is two fold: (1) to sell the flesh, (2) to sell it in violation of law. *B*, having in his possession flesh of the forbidden kind, but blamelessly, without knowledge that it is so, sells it. Clearly his intent is simply to sell and nothing more. *A* may be said to have an evil intent, a guilty intent; *B* an innocent intent, or at least not an evil intent. Unquestionably *A* is guilty. Is *B* also guilty? That is the controlling question in this part of the case. It is quite true that guilty knowledge, or evil or guilty intent, is, speaking generally, an essential element of crimes at common law; but it is also true that in very many statutory crimes guilty knowledge or intent is not an essential element. "Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule and a statute may relate to such a subject-matter and may be so framed as to make an act criminal, whether there has been any intention to break the law or otherwise to do wrong or not." *The Queen* v. *Tolson*, L. R. 23 Q. B. Div. 168, 172. The statutory crimes considered in the cases of *State* v. *Kinkead*, 57 Conn. 173, and *State* v. *Turner*, 60 id. 222, are crimes of this latter sort. In the former the defendant was prosecuted for allowing a minor to loiter on premises where the defendant kept intoxicating liquor for

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sale, and in the latter the defendant was prosecuted for entering without permission, upon the enclosed land of another for the purpose of fishing; in both it was held that guilty knowledge or guilty intent was not an essential element of the crime; and there are very many cases of this kind in the books. It is also true, however, that in quite a number of statutory crimes guilty knowledge or guilty intent is either expressly or by implication made an element of the crime. An instance of this kind is found in the case of *Myers* v. *State*, 1 Conn. 502, where the letting of a carriage for hire on Sunday, from a belief that it was to be used in a case of necessity or charity, when no such case existed, was held to be no offense within the statute. It is for the legislature to determine whether the legality or illegality of a given act shall depend upon the knowledge or the ignorance of the doer; and it thus becomes a question of construction in such cases whether guilty knowledge or guilty intent constitutes an element of the statutory crime.

In the statutory crimes considered in the *Kinkead* and *Turner* cases, *supra*, neither the word "wilfully," nor any word of like import was used; certain acts were forbidden, and doing them was made punishable, whether the doer had or had not knowledge of the facts that made his act a violation of law; but the statute here in question contains the word "wilfully," and its presence there means something and cannot fairly be regarded as surplusage; but if it means "voluntarily," only, it is mere surplusage, for that is already implied in the words "shall sell." The statute does not merely say if any one "shall sell" flesh of the forbidden kind, he shall be punished; it says if any one "shall wilfully sell" such flesh, he shall be punished. To "wilfully" sell diseased meat ordinarily means to sell it with knowledge of its condition; and so, in the statute here in question, we think the expression "shall wilfully sell" means to sell with knowledge that the flesh is of the forbidden kind: a sale made with guilty knowledge and therefore with an evil intent to violate the law.

This is the sense ordinarily given to the words "wilful"

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or "wilfully," in statutes creating a criminal offense, unless it clearly appears that they were used in a different sense. They are held to imply the doing of the forbidden act purposely in violation of law. *State* v. *Whitener*, 93 N. Car. 590; *State* v. *Smith*, 52 Wis. 134; *Commonwealth* v. *Kneeland*, 20 Pick. 206, 220; *State* v. *Clark*, 29 N. J. L. 96; *Folwell* v. *State*, 49 id. 31; *Evans* v. *United States*, 153 U. S. 584; *Felton* v. *United States*, 96 id. 699, 702; *Potter* v. *United States*, 155 id. 438. In this view of the law we think the court below erred in its charge. The jury were told, in effect, that guilty knowledge on the part of the defendant was not an essential element of the statutory crime.

As the other questions raised on the appeal are not likely to arise again upon a retrial, it is unnecessary to consider them.

There is error and a new trial is granted.

In this opinion the other judges concurred.

THE STATE *vs.* MATTHEW MCMAHON.

Third Judicial District, New Haven, June Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A by-law of the city of Meriden, authorized by its charter, provided that the owner, occupant, or person in charge of a building or lot of land adjoining a sidewalk in said city, should cause the snow falling on such walk to be removed, and the ice thereon to be covered with sand or other suitable substance, within six hours after the same had fallen or formed, under penalty of a fine for neglect. *Held* that the by-law was not void for uncertainty or vagueness, and did not violate any constitutional right of the landowner or occupant.

In creating a municipal corporation it is within the constitutional power of the legislature to define and enforce the duties of citizens to each other and to the State, and therefore to impose upon landowners fronting upon sidewalks the burden of keeping such walks free from snow and ice and safe for public travel.

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A law passed apparently for the purpose of defining and enforcing the duties of citizens may, however, be unconstitutional and void, because in reality it takes private property for public use without compensation, or arbitrarily discriminates against certain citizens in distributing a public burden; but it will not be adjudged invalid simply because the service required is unpaid, or is incident to certain employments or to the ownership of certain kinds of property. By reason of the inherent conditions of citizenship, every citizen is bound to render some gratuitous service to the State; all that he can insist upon is that such service shall be reasonable in view of the exigencies which require it.

The theory that all taxation must be equal and uniform is not a fundamental maxim of government limiting legislative power, unless embodied in the Constitution. The Constitution of this State contains no such provision, and therefore the burden imposed upon certain landowners by the by-law in question—even if it can fairly be regarded as a tax—is not unconstitutional merely because it does not affect equally and alike every resident or property-owner of the city.

Argued June 5th—decided July 24th, 1903.

CRIMINAL prosecution against an occupant of real estate for neglect to remove snow from his sidewalk, in violation of a city ordinance, brought by appeal of the accused to the Criminal Court of Common Pleas in New Haven County and reserved by that court, *Cable*, *J.*, upon a demurrer to the information, for the advice of this court. *Judgment overruling demurrer advised.*

Cornelius J. Danaher, for the accused.

Robert J. Woodruff, Prosecuting Attorney, for the State.

HAMERSLEY, J. The common council of the city of Meriden passed a by-law containing the following provisions: "Sec. 7. Whenever the sidewalk fronting or adjoining any lot of land in the city of Meriden shall be wholly or partially covered with snow or ice, it shall be the duty of the owner or occupant of such building or lot of land, or persons having charge thereof, to cause said sidewalk to be made safe and convenient . . . by removing said snow or ice therefrom

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within six hours after the accumulation of the same thereon, or, in the case of ice, by covering the same with sand or other suitable substance, the same to be done within six hours after the accumulation of said ice. . . . Sec. 8. Any person failing or neglecting to comply with the provisions of the foregoing section shall forfeit and pay a fine of $10 to the treasurer of the city for the use of the city, and any failure or neglect to comply with the provisions of said section shall be a misdemeanor, and it shall be the duty of the city attorney to prosecute any person so failing and neglecting to comply therewith."

The legislature authorized the common council of the city of Meriden to enact by-laws "to compel the occupants, persons in charge, or the owners of lands or buildings, to remove snow and ice from the sidewalks and gutters in front of such land or buildings, and to keep such sidewalks safe for public travel," and to impose fines for violation of such by-laws; and to prescribe the mode of enforcing the fines by action of debt, or by prosecution as in case of misdemeanor. 8 Special Laws, p. 307; 12 id., p. 747.

This is a prosecution by the city attorney for a violation of the by-law above quoted. The defendant demurred to the information on two grounds only: because said by-law is vague and indefinite, and because it violates the State and Federal constitutions, and is therefore void. The case is reserved for the advice of this court as to what judgment should be rendered upon this demurrer.

The offense for which the defendant is prosecuted is not described in the by-law in terms so vague and indefinite as to render it for that reason invalid.

The other ground of demurrer presents this question: Does the legislature in enacting a law which makes it the duty of all inhabitants of a city—being owners, or agents of owners, of land abutting on sidewalks within the city limits—to aid in keeping those sidewalks safe for the common use, by removing, or otherwise rendering harmless, accumulations of snow and ice on the sidewalks in front of their respective premises, violate any constitutional provision? It is true,

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as claimed by the defendant, that this question in its present form is now presented to us for the first time. But we think that the trend of our decisions, in cases involving similar considerations, leads naturally if not necessarily to a negative answer. *State* v. *Wordin*, 56 Conn. 216, 226; *Levick* v. *Norton*, 51 id. 461, 469; *Yale College* v. *New Haven*, 57 id. 1–9; *Lewis* v. *New Britain*, 52 id. 568; *Hartford* v. *Talcott*, 48 id. 525, 534.

We are referred to decisions in other States where such legislation has been held void. *Ottawa* v. *Spencer*, 40 Ill. 211; *Gridley* v. *Bloomington*, 88 id. 554; *State* v. *Jackman*, 69 N. H. 318. The argument which leads to such a conclusion would seem to be this: The State imposes upon cities the duty of constructing and maintaining, in condition safe for public travel, highways within their limits. It punishes a neglect of this duty by appropriate penalties, including a liability to pay damages to a person injured by means of a defect in a highway existing through such neglect. The repair, as well as the construction of highways, is a public improvement, and contributions by individuals for that purpose, through enforced labor or payment of money, is a tax. Such tax may be collected from a limited taxing district including those only whose property is specially benefited by the public improvement, or from a taxing district including the whole city; but in either case the tax must be laid upon a principle of uniformity and equality. Sidewalks are a part of the highway, and cannot be distinguished in respect to their construction, maintenance and care, from the rest of the highway. The general duty of maintaining highways in a condition safe for public travel has been construed as including the duty of removing or rendering harmless accumulations of snow and ice upon sidewalks; therefore such removal is a repair of a highway and a public improvement, for which no individual can be taxed unless upon a principle of uniformity and equality. Requiring each owner of land abutting on a sidewalk to remove the snow and ice accumulated on the walk in front of his premises is a violation of this principle, whether the requirement be regarded as an

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assessment for special benefits or as a general tax. Even if the requirement to remove snow and ice from a sidewalk cannot be regarded as a tax, yet it is certainly a burden, and a purely public burden cannot be laid upon a private individual, except as authorized in cases to exercise the right of eminent domain, or by virtue of proper proceedings to enforce special assessments or special taxation. *Chicago* v. *O'Brien*, 111 Ill. 532, 537. As an exercise of the right of eminent domain, the requirement takes private property for public use without compensation; moreover, the requirement imposes a burden and creates a duty which does not bear on all citizens alike, and violates the principle of impartial equality which pervades the Constitution. *State* v. *Jackman*, 69 N. H. 318.

In deference to the high character and acknowledged authority of the courts which have taken this view, we have carefully considered these decisions, but we cannot accede to all the assumptions on which the conclusion reached seems to be founded. The constitutions of the States where this view is taken contain provisions adopting as a fundamental maxim some theory of uniformity and equality in taxation, and purporting to limit the field of taxation by requiring all laws imposing taxes to conform in respect to the subjects of taxation, the modes of valuation, and stress of the tax, to this theory of uniformity and equality. Our own Constitution contains no such provisions. On the contrary it distinctly secures the right of the people to tax themselves through their representatives, and recognizes the duty of exercising the power of taxation wisely and only for the public good, as a legislative duty for the performance of which the General Assembly is responsible to its constituency, and recognizes the power of considering the conditions of population or property, the theories and maxims of political economy or moral philosophy which may affect taxation, and of determining what, on the whole, is a wise and fair mode of distributing the burden, as a legislative power which the judicial department is by express provision forbidden to exercise. Nor is the aphorism "taxation must be equal and

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uniform" embodied as a fundamental maxim in the United States Constitution, restricting the power of taxation vested in Congress or the State legislatures. Such an aphorism, whatever view may be taken of its meaning and practical effect, is not a fundamental maxim of government, limiting the legislative power, unless embodied in the State Constitution. *State* v. *Travelers Ins. Co.*, 73 Conn. 255, 262; *Travelers Ins. Co.* v. *Connecticut*, 185 U. S. 364; *Sharpless* v. *Mayor*, 21 Pa. St. 147, 161. Possibly this difference in constitutional provisions may have influenced the view taken as to the real nature of the legislation in question. In several States, however, whose constitutions contained in some form the maxim of uniformity and equality in taxation, the courts have regarded legislation of this kind as not an exercise of taxing power within the range of that maxim, but simply as prescribing certain duties for all citizens in respect to the preservation of public safety, reasonable in respect of the burden imposed, and such as the State may prescribe without violating the constitutional guaranties enacted for the protection of personal liberty and rights of property from arbitrary and discriminating legislation. *Goddard, Petitioner*, 16 Pick. 504; *Carthage* v. *Frederick*, 122 N. Y. 268; *Reinken* v. *Fuehring*, 130 Ind. 382.

The legislation is not exempt from the general guaranties of the Constitution simply because it relates to those subjects of legislation commonly classed under the indefinite though convenient phrase of "police power." The whole legislative power is committed to the General Assembly subject to the restrictions contained in the Constitution, and no manifestation of that power is exempt from these fundamental limitations. A law which takes private property for public use without compensation is equally void, whether it is classed as an exercise of educational power in building a schoolhouse, or of police power in the destruction of property dangerous to health. Clothing infected with disease may be destroyed without compensation to its owner, not because the law authorizing it is a police regulation and so exempt from constitutional limitation, but because no right of prop-

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erty is invaded by such destruction. So a law defining the duties of citizens to each other, or to the State, which gives special privileges to one man or set of men, or arbitrarily discriminates against certain citizens, is void, whether the duties prescribed relate to police regulations or any other subject. The law under discussion clearly belongs to this class of legislation, namely: defining and enforcing the duties citizens owe to each other and to the State. It is largely for the purpose of securing such legislation that governments are organized and legislative power is granted. The duties of citizens, as defined by the legislature, may differ according to status, occupation, or temporary relation, without involving arbitrary partiality or discrimination. The duty of a bailee to his bailor is made much more onerous by the fact that the bailee is an innkeeper or common carrier. The duty of a principal to answer for the acts of his agent is far more oppressive when the principal and agent stand in the relation of master and servant. Throughout the whole range of duties the legislature may properly, upon considerations of public policy or general advantage, enlarge or limit the obligations resting upon men engaged in certain employments or standing to each other in certain relations. The same is true of the duties or limitations attached to the ownership of land, which the legislature may and does from time to time modify; but a law for this purpose is clearly not void because it applies only to persons owning land. So there are many duties a citizen owes the State which it is the province of the legislature to define and enforce, although they may involve some limitation of freedom of action and the expenditure of some time or effort. Such duties must depend largely upon conditions and circumstances that change. Illustrations of this are given by Chief Justice Shaw in *Goddard, Petitioner*, 16 Pick. 504, and others will readily suggest themselves. Defining and enforcing such duties is and always has been an appropriate and necessary exercise of legislative power. It is true, an Act nominally for such purpose may in substance and in fact be a confiscation of property, or an arbitrary and partial discrimination between citizens equal be-

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fore the law, and if so the Act is void. It is sometimes said that in determining the invalidity of such an Act the court merely passes upon a question of degree. This is not quite true. The extent of trouble involved in connection with the conditions and circumstances under which the stress of the duty may fall upon each as related to the character of the common good to be served, its importance, necessity, and the conditions affecting its accomplishment, is rather a legislative than a judicial question. Every citizen is bound by the inherent conditions of citizenship to render some unpaid service to the State, reasonable in view of the exigencies which require such service. A law which simply defines and enforces this duty is valid. Its wisdom and expediency are questions for the legislature. Whether a law apparently enacted for this purpose is void because in reality it takes private property for public use without compensation, or arbitrarily discriminates against certain citizens in distributing a public burden, is a judicial question. The law is not confiscation simply because the services required are unpaid, nor is it partial and arbitrary discrimination simply because the services required are incident to certain employments or to the ownership of certain kinds of property. The two laws are distinct, and the distinction can ordinarily be more satisfactorily ascertained through the exercise of practical common sense than by any indulgence in theoretical subtleties.

The inhabitants of the city of Meriden form a corporate community, clothed with special privileges and endowed with special powers for their common welfare and profit. These powers and privileges relate to the inhabitants as owners and occupiers of the land within the prescribed limits of the city. The creation of such a community for such a purpose necessarily involves special limitations as to the action of individuals, the use of property, the incidents, or powers and duties, attached to the ownership of property, and is the occasion for the springing up of a variety of special duties which the inhabitants owe to each other and to the territorial corporation of which they are members. It is the province of the legislature in creating such a community to define and

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enforce the limitations in the use of property, of the right of property, or the incidents attaching to ownership, and of the duties, individual and corporate, involved in its creation. For this purpose it may entrust to the inhabitants the enforcement, through by-laws passed by them, of the duties defined in the charter of the corporation. When a city is entrusted with exclusive power over the construction and maintenance of highways within its limits, its streets are something more than the "King's highway." While they serve as avenues of public travel, that travel is mainly incident to the use and enjoyment of the land within the city limits. They are the entrance to every piece of abutting land, without which the land would be comparatively valueless. Practically the owners and occupiers of land abutting on the city street are the inhabitants of the city. The relation between the land in a city's limits and the network of streets, essential to the value and use of that land, is a peculiar one, and naturally attaches to the ownership of city lots special privileges and duties. In constructing sidewalks it is more convenient to place them within the lines of the highway, and so when laid they form a part of the highway. But the power and duty of building and maintaining highways does not necessarily include the duty of building and maintaining sidewalks. The construction of a sidewalk, like the establishment of a building line, may well be independent of the construction of a street, and in most cities sidewalks, because they are more closely related to the adjoining land and serve more directly the use of that land, are made the subject of separate rules and are constructed in pursuance of separate authority. A city covering a very few square miles of territory may readily have five hundred miles of sidewalks. To keep these walks clean and safe will promote the public health and safety, and also contribute to the value of every abutting piece of land to which they form the necessary entrance and whose owners and occupiers represent substantially the inhabitants of the city. A purely corporate oversight of these walks could not adequately meet all the emergencies affecting their cleanliness and safety, especially those emer-

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gencies of storm and cold which in this climate render constant oversight and immediate remedy imperative. The inhabitants of a city, being the owners and occupiers of abutting land, are the ones, and practically the only ones, in a situation to render the aid convenient if not necessary to effectually secure that cleanliness and safety which promotes alike the general welfare and their personal interests. The rendition of this aid involves a slight burden, insignificant in comparison with the benefits secured. We think it clear that in requiring such aid the legislature acts within its legitimate legislative province of defining and enforcing the duties arising under such conditions. A law which merely accomplishes this purpose is valid.

To say that it is possible for the legislature, under cover of a law purporting to be of this kind, to accomplish actual confiscation of property, or the subjection of citizens to partial and arbitrary discriminations, is to state a proposition which may be sound but is not relevant to the facts of this case. To say that a law defining the duties of citizens in serving the State, is necessarily a violation of the constitutional guaranties against the confiscation of property and partial and arbitrary discriminations, because the service is unpaid, or is one that all citizens are not in a situation to render, is to state a proposition which is radically unsound. Such a theory of selfish immunity from all duties inherent in citizenship is supported by no principle of political ethics, and cannot safely be reduced to practice under any government.

The by-law upon which the information is founded is not void for the reasons assigned in the demurrer.

The Criminal Court of Common Pleas is advised to overrule the demurrer and render judgment accordingly.

In this opinion the other judges concurred.

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THE BARLOW BROTHERS COMPANY *vs.* JOHN W. GAFFNEY ET AL.

Third Judicial District, New Haven, June Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

General Statutes, § 4137, relating to mechanics' liens, provides that no person except the original contractor, or a "subcontractor" whose contract with such original contractor is in writing and has been assented to in writing by the owner, shall be entitled to a lien, unless he shall give written notice to the owner within sixty days after he ceases to furnish labor and material; but that no agreement with, or consent of, the owner, should be necessary for a subcontractor who had no such written contract, or for any "person who furnishes materials or renders services by virtue of a contract with the original contractor or with any subcontractor." *Held* that the plaintiff, to whom a subcontractor sublet or turned over his portion of the work, might give the prescribed notice to the owner, and thereupon be entitled to a lien, although he did not obtain the assent of the owner to his contract with such subcontractor.

Whether the plaintiff could be regarded as a "subcontractor" within the meaning of the statute, *quære*.

The right to a lien is given by statute, and courts are powerless to change the conditions upon which it depends.

Before the plaintiff gave notice of his claim, the original contractor had paid the subcontractor in full. *Held* that such payment did not defeat the plaintiff's lien.

The history of the statutes relating to mechanics' liens briefly reviewed.

Submitted on briefs June 5th—decided July 24th, 1903.

ACTION upon a bond substituted for a mechanic's lien, brought to the Superior Court in New Haven County where the plaintiff's demurrer to the answer was overruled (*Gager, J.*) and judgment was subsequently rendered (*Ralph Wheeler, J.*) for the defendants, upon the admissions of the reply; from which the plaintiff appealed. *Error, judgment set aside and cause remanded.*

Nathaniel R. Bronson, Edwin S. Hunt and *Wilson H. Pierce*, for the appellant (plaintiff).

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Lucien F. Burpee and *Terrence F. Carmody*, for the appellees (defendants).

TORRANCE, C. J. The bond in suit was made by John W. Gaffney and Company as principals and the other defendants as sureties, and was given for the release of a mechanic's lien claimed by the plaintiff upon certain premises in Waterbury. The condition of the bond recited the facts upon which the lien was claimed, and ended with these words: "Now, therefore, if said John W. Gaffney & Company shall well and truly pay to the said Barlow Brothers Company all that money that may be justly and legally due it, with interest and costs, under said mechanic's lien, this bond shall be void, otherwise good and valid." The sum claimed by way of lien is $1,225, and the answer admits, in substance, that if the lien is a valid one, this sum, with interest, is due upon the bond.

The controlling facts relating to the validity of the lien are these: On the 3d of January, 1902, Gaffney and Company entered into a written contract with an ecclesiastical corporation of Waterbury, owning land there, to erect and complete a building on said land; and on the 6th day of the same month Gaffney and Company contracted with a corporation, called the Seeley and Upham Company, to do the plumbing on said building. Subsequently, in January, 1902, the Seeley and Upham Company sublet said plumbing contract to the plaintiff. The plaintiff completed said plumbing work on the 30th of August, 1902, but has been paid nothing thereon. Gaffney and Company claim to have paid the Seeley and Upham Company in full for said plumbing, on August 28th, 1902. On the 27th of September, 1902, the plaintiff gave written notice to the ecclesiastical corporation, as required by law, of its intention to claim a lien upon said building and land for said plumbing, and three days later filed its certificate of lien as required by law. When said certificate was filed there was due to Gaffney and Company from said ecclesiastical corporation the sum of about $5,000.

On the sole ground that in doing this plumbing work the

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plaintiff was a subcontractor of the Seeley and Upham Company, the trial court held that the plaintiff, under our law, was not entitled to a lien; and whether it erred or not in so holding is the main question in the case. The answer to this question depends upon the construction of our statutes relating to mechanics' liens.

The statutes specially bearing upon this question are now to be found in §§ 4135 and 4137 of the General Statutes. Section 4135 provides, among other things, as follows: "If any person shall have a claim . . . for materials furnished or services rendered in the construction" of any building, "and such claim shall be by virtue of an agreement with or by consent of the owner of the land upon which such building is erected . . . or of some person having authority from or rightfully acting for such owner in procuring such labor or materials, such building with the land on which it stands shall be subject to the payment of such claim. Such claim shall be a lien on such land" and building. Section 4137 provides, among other things, as follows: "No person other than the original contractor for the construction . . . of the building, or a subcontractor, whose contract with such original contractor is in writing, and has been assented to in writing by the other party to such original contract, shall be entitled to claim any such lien, unless he shall, after commencing, and not later than sixty days after ceasing, to furnish materials or render services for such construction, . . . give written notice to the owner of such building that he has furnished or commenced to furnish materials, or rendered or commenced to render services, and intends to claim a lien therefor on said building. . . . No subcontractor, without a written contract complying with the provisions of this section, and no person who furnishes material or renders services by virtue of a contract with the original contractor or with any subcontractor, shall be required to obtain an agreement with, or the consent of, the owner of the land, as provided in § 4135, to enable him to claim a lien under this section."

Legislation of the kind here in question appears to have begun in this State in 1836. It extended at first only to

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buildings erected in cities, in favor of original contractor having claims exceeding $200. Public Acts of 1836, Chap. 76. In 1839 it was extended to any dwelling-house or other building, and to subcontractors having a claim of $50 or more and having an agreement in writing with the original contractor, assented to in writing by the proprietor of the building and land. Public Acts of 1839, Chap. 29. The legislation of this kind between 1836 and 1855 was embodied in Chap. 76 of the Public Acts of the latter year. That Act provided, among other things, that the claim of the mechanic need only exceed the sum of $25; and that any person having such a claim for materials furnished or services rendered in the erection of the building should have a lien; but it also provided that no person except the original contractor should have a lien, unless within sixty days from the time he began to furnish materials and render services he notified the owner of such fact and that he intended to claim a lien therefor. It also provided that the clause as to notice should not apply to the original contractor, "nor to any subcontractor whose contract with such original contractor is in writing, and has been assented to in writing by the other party to such original contract."

The law as embodied in the Act of 1855 remained the law upon this subject, without any change which it is material to note, down to the Revision of 1875. In 1875 the important provision requiring the claim to be "by virtue of an agreement with or by consent of the owner," or his agent, was added by Chap. 15 of the Public Acts of that year. In 1879 it was provided that "no subcontractor, with or without a written contract, shall be required to obtain an agreement with, or the consent of such owner, to his procuring or furnishing such labor or materials, to enable such subcontractor to claim a lien." Public Acts of 1879, Chap. 43. In the Revision of 1888 (§ 3020) the above provision appears in this form: "No subcontractor, with or without a written contract complying with the provisions of this section [as to being in writing and assented to in writing by the owner of the land], shall be required to obtain an agreement with, or the consent

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of, the owner of the land, as provided in section 3018, to enable him to claim a lien under this section." By Acts passed in 1899 and 1901 this provision was amended to read as follows: "No subcontractor, with or without a written contract complying with the provisions of this section, and no person who furnishes material or renders services by virtue of a contract with the original contractor or with any subcontractor, shall be required to obtain an agreement with, or the consent of, the owner of the land, as provided in section 3018 of the General Statutes, to enable him to claim a lien under this section." Public Acts of 1899, Chap. 121; id. 1901, Chap. 80. This is substantially the form in which this provision appears in § 4137 of the Revision of 1902, hereinbefore recited.

Speaking generally, it may be said that our statutes give a mechanic's lien to two classes of persons: (1) to those whose claim is by virtue of an agreement with the owner of the land and building, or by his "consent," and consequently with his knowledge and allowance; (2) to those having a claim of the statutory description but without any such agreement or consent. In the first class, whoever else it may include, come (*a*) the original contractor; (*b*) any contractor with him by virtue of a written contract assented to in writing by the owner; and (*c*) any one having the statutory claim by consent of the owner. In the second class, whoever else it may include, come (*a*) all contractors with the original contractor, under contracts not assented to in writing by the owner, and (*b*) all persons whose claim is by virtue of a contract with any such subcontractor. Persons in the second class must give the notice required by § 4137 of the General Statutes, while those in the first class need give no such notice.

Without deciding the point, it may be conceded, for the purposes of this case, that the word "subcontractor," as used in § 4137, means one who comes in under the original contractor, and not one who comes in under such a subcontractor. *Spaulding* v. *Thompson Eccl. Society*, 27 Conn. 573, 577. We think the plaintiff comes within the second of the above

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classes, and is entitled to a lien. The Seeley and Upham Company may be regarded, for the purposes of this case, as a subcontractor within the meaning of the statute; and the admitted fact is, that the plaintiff did the plumbing in and about the building under a contract with such subcontractor. We think the plaintiff must be regarded as a person who furnished materials and rendered services in the construction of the building "by virtue of a contract with a subcontractor," and thus comes within the letter and, we also think, within the spirit of our existing statutes relating to mechanics' liens.

The case of *Alderman* v. *Hartford & N. Y. Trans. Co.*, 66 Conn. 47, relied upon to some extent in the court below and in this court as sustaining the claim of the defendant, was decided in March, 1895, before the amendments of 1899 and 1901 allowed a person having the statutory claim "by virtue of a contract with any subcontractor" to have a lien; and we think there is nothing in the opinion in that case which sustains the defendant's claim, or is inconsistent with the views expressed in this case.

Another point made in the case is that the plaintiff's lien is defeated by the fact that the original contractor paid the Seeley and Upham Company in full for the plumbing work on the 28th of August, 1902. That fact was alleged in the answer, and denied in the reply, and whether it is true or not does not appear from the record. Assuming, however, without deciding, that such payment was made, it does not we think defeat the plaintiff's lien. The plaintiff's right to a lien is given solely by statute, and is not made to depend in any way upon the act of the original contractor in paying or not paying his immediate subcontractor. The legislative conditions upon which the plaintiff's right to a lien is made to depend do not include such an act, and if the court should make such an act one of these conditions, that would be an act of judicial legislation rather than one of construction and interpretation. If the original contractor is, under the present law, unprotected, in that he may be compelled to pay twice for the same work and materials, the fault is not with

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the plaintiff, and the remedy must be sought in the legislature and not in the courts.

There is error, the judgment is set aside and the cause remanded to be proceeded with according to law.

In this opinion the other judges concurred.

SUSSMAN GOLDREYER *vs.* PATRICK J. CRONAN.

Third Judicial District, New Haven, June Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A clerical mistake in recording the judgment of a court of record may be corrected at any time upon proper notice to the parties in interest; but the rendition of a judgment for too small a sum is a judicial error, not a clerical mistake, and can be corrected, as a rule, only during the term in which the erroneous judgment was rendered.

In the present case the trial court rendered judgment in favor of the plaintiff for $300 and costs, which was accurately although informally recorded, and at a subsequent term granted the motion of the plaintiff that the judgment be corrected by adding interest amounting to $100. *Held* that this was not the correction of a clerical mistake, but the substitution of one judgment for another, which the court was powerless to do after the close of the term in which the first judgment was rendered.

The finding on appeal stated that the trial court "by oversight, inadvertence and mistake, accidentally omitted to add the interest" in awarding the original judgment. *Held* that this did not show a clerical mistake in recording the judgment, but a mistake of the judge in its rendition.

Argued June 9th—decided July 24th, 1903.

APPEAL from the Court of Common Pleas in New Haven County, *Bishop, J.*, assigning error in granting an oral motion of the plaintiff to correct the judgment by adding interest thereto. *Error; judgment set aside and cause remanded.*

James P. Pigott, for the appellant (defendant).

Charles S. Hamilton, for the appellee (plaintiff).

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TORRANCE, C. J. The complaint in this case alleged that the defendant owed the plaintiff divers sums of money, the amount of one of the items being $300. The trial court allowed this item and disallowed the others. The case was tried at the November term of the court in 1902, and decided at the January term, 1903, the precise date of judgment being the 26th day of February, 1903. On that day the judge filed in court a paper called "memoranda on which judgment is based," which, after reciting the substance of the evidence in the case, stated that the court allowed the $300 dollar item and disallowed the others, and ended with these words: "Judgment for plaintiff to recover $300, and costs. *J. Bishop, Judge.*" On that same day the following entry was made on the file in said case: "Judgment for the plaintiff to recover $300. New Haven, February 26th, 1903. *J. Bishop, Judge.*"

It does not appear that any formal judgment in accordance with said memoranda was ever entered up, but on the 11th of March, 1903, the court ordered judgment for $400.50 in favor of the plaintiff to be formally entered up, and this was done under the following circumstances, as stated in the finding: "On March 2d, 1903, the plaintiff and defendant appeared in court, and Judge Julius C. Cable, one of the judges of the court, directed the clerk to call in Judge Bishop to hold said court. Said court was duly opened by the sheriff, and thereupon the plaintiff orally moved that the judgment be corrected by adding interest. The defendant objected to such correction on the ground that the January term of said court had ended, and the March term begun; and further, that if the court had jurisdiction the plaintiff was not in law entitled to such interest; and further, that the plaintiff by his failure to prosecute his suit with due diligence waived whatever right if any he had to interest on the judgment. On March 11th, 1903, the court granted said motion of the plaintiff, and corrected said judgment, and added the interest, amounting to $100.50."

It will thus be seen that the judge, through said signed memoranda, announced in effect that he found the damages

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to be $300, and that he rendered judgment for the plaintiff for that amount only, and costs of suit. After this the case was not continued to the next term, nor was it held for further consideration or advisement, nor was any further action of the court necessary to entitle the plaintiff to the entry of a formal judgment in his favor for $300 damages and costs.

Assuming for the present that the entry of judgment thus made was a true entry of the judgment actually rendered, we must regard the judgment, for the purposes of this case, as one finally disposing of the case until set aside or annulled by some competent court of review. "The memorandum . . . must be regarded as the final act of the judge, the act which exhausted the *residuum* of power over the cause after final adjournment." *Sturdevant* v. *Stanton*, 47 Conn. 579, 581. The case was finally disposed of at the January term of the court, 1903.

Under these circumstances we think that what the trial court did in this case in March must be regarded as having been done at the March term of the court, 1903 (which by law began on the second day of that month), and not as done at, or as of, the preceding January term. The case, then, must be regarded as one in which a final judgment at one term was, at a subsequent term, set aside and another judgment substituted therefor; and the ultimate controlling question in the case is whether the court had the power to do this.

The plaintiff claims that on the 26th of February, 1903, the court did in fact render judgment for $400.50, but that by a clerical mistake a different and a smaller amount was entered up. If the record sustains this claim, it may be conceded, for the purposes of this case, that the court had the power to correct the mistake at the succeeding term; or at least that a new trial would not be granted on account of its action in so doing. Mistakes merely clerical, by which the judgment as recorded fails to agree with the judgment in fact rendered, may be corrected at a term subsequent to that in which the judgment was rendered, upon proper notice to all concerned. Over its recorded judgments the

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court may exercise two powers: (1) the power to correct and amend the record so that it shall truly show what the judicial action in fact was; (2) the power to set aside, annul and vacate such judgments. It is well settled that these powers may be exercised during the term in which the judgment is rendered, and, speaking generally, that the first can be exercised at any subsequent term; while as a rule the second cannot be so exercised, save under exceptional circumstances. *Tyler* v. *Aspinwall*, 73 Conn. 493; *Wilkie* v. *Hall*, 15 id. 32, 37; *Weed* v. *Weed*, 25 id. 337; *Hall* v. *Paine*, 47 id. 429; *Sturdevant* v. *Stanton*, 47 id. 579; *Bronson* v. *Schulten*, 104 U. S. 410; *Foster* v. *Redfield*, 50 Vt. 285; *Maryland Steel Co.* v. *Marney*, 91 Md. 360, 46 Atl. Rep. 1077; 1 Black on Judg., Chap. 9, §§ 153, 158, and cases there cited.

The case thus turns upon the question whether the claimed mistake was a judicial one, in failing to include interest in the judgment as rendered, or a clerical one, in failing to include interest in the judgment as recorded. If the mistake was of the former kind the court, upon the facts found, had no power to correct the mistake at the March term. The claim that the mistake was a clerical one is based entirely upon the following part of the finding: Upon the facts found in the paper called "memoranda on which judgment is based," the court found the issues for the plaintiff "and allowed the item of $300, but in entering the judgment, by oversight, inadvertence, and mistake, accidentally omitted to add thereto the interest from the time it fell due to the date of the rendition of the judgment." This is the only finding upon this point, and, when read in the light of the other parts of the record, we do not think it supports the contention that the mistake was a mere clerical one. What does the phrase "in entering the judgment," as used in this finding, mean? It can only mean the act of the judge in making the memoranda signed by him; for the record does not show that any other "entry" of the February judgment was ever made by anybody at the January term of court. It may be conceded that the fair inference from this finding is that the

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court intended to include interest in the judgment to be rendered, and to enter such judgment in said memoranda; but the question is, does the record show that the court did in fact render such judgment? The finding, as we have seen, is in effect that in making the signed memoranda the judge by mistake failed to include interest; but it does not say that judgment as actually rendered did in fact include interest; and the record nowhere explicitly states that important fact. A judgment, speaking generally, is the determination or sentence of the law speaking through the court; and it does not exist as a legal entity until pronounced, expressed, or made known, in some appropriate way. It may be expressed orally, or in writing, or in both of these ways, in accordance with the customs and usages of the court in which the judgment is rendered.

In the case at bar the February judgment was pronounced in writing only in and by the signed memoranda of the judge. There is no finding that it was ever otherwise pronounced or made known. Before that entry was made the judgment had no existence; when it was made, the judgment first came into being. The entry of it was thus the only expression of it, the only declaration of it, ever made by the judge. It was both pronounced and entered up, so to speak, in the same words and at the same moment. Of necessity, then, the judgment "entered up" was the same as the judgment actually pronounced. It thus clearly appears from the record, outside of the finding now under consideration, that the entry of the judgment made by the judge is a true record of the judgment actually rendered, and cannot, in the nature of things, be other than a true record; and we think there is nothing in that finding absolutely inconsistent with this conclusion. When read in the light of the other facts found, all that the finding can fairly be said to mean is, that the court, by mistake, accidentally failed to include interest in its signed memoranda; and that is equivalent to saying that the court failed to include interest in its judgment, and also in its record of it. We think any other view of the finding is untenable in view of the other facts set forth in the record.

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It follows that the court in March had no power to correct, amend, or change the February judgment.

There is error, the March judgment is set aside, and the cause is remanded that judgment may be entered up as of February 26th, 1903, for $300 and costs.

In this opinion the other judges concurred.

CHARLES Y. BEACH'S APPEAL FROM PROBATE.

Third Judicial District, New Haven, June Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Upon application to a Court of Probate for the appointment of an administrator on the estate of a nonresident, the existence of property within the probate district, belonging to the deceased at the time of his death, is essential to the jurisdiction of the court, and must be established to its satisfaction before it can make the appointment.

While questions of contested title cannot be finally settled by the Court of Probate, they must nevertheless be determined so far as may be necessary to justify the court in exercising its jurisdiction. For this purpose it may be sufficient to find an apparent ownership, in the case of tangible property, or an apparent liability to the intestate from some person, if the alleged property be a chose in action.

The mere claim of the applicant for administration, wholly unsupported by any evidential fact, that certain land in this State standing in the name of the decedent's son was purchased with his father's money or with money of his estate, and is recoverable from said son by the estate, is not evidence of the existence of property within the State sufficient to justify the court in appointing an administrator, though the object of the application is to enable such administrator to bring suit for the recovery of the land, or its value, from the son.

Argued June 9th—decided July 24th, 1903.

APPEAL from a decree of the Court of Probate for the district of New Haven appointing an administrator, taken to and reserved by the Superior Court in New Haven County, *Elmer, J.*, upon an agreed statement of facts, for the advice of this court. *Judgment advised for appellant.*

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The material facts agreed to and found by the trial court are in substance these: 1. Upon the death on January 10th, 1893, of Calvin B. Camp, father of Mary E. Camp, the applicant for administration in these proceedings, said Mary E. Camp became entitled to some $7,000 by reason of the failure of her father to account, as guardian, for money which came into his possession in 1868, he owning a life estate in the same and she owning the fee or *corpus*; her brother and sister each become entitled to about the same sum on the same grounds. Camp died utterly insolvent, having misappropriated and lost his children's money. In 1868 Calvin B. Camp was appointed guardian of each of these three children, by the proper court in New York, and gave a guardian's bond to each child in the sum of $10,000, for the faithful performance of his duty, with Moses S. Beach and one Merritt as sureties. The youngest of Camp's children became of age in 1876. 2. Between 1888 and 1891 the three children were engaged in litigation against their father, seeking, by means of an accounting in a probate court in New York, to secure possession of the money which came into his possession in 1868; which litigation failed because they were not entitled to possession of the *corpus*, or any part thereof, until their father's death. Moses S. Beach knew of this litigation. 3. Moses S. Beach died July 25th, 1892, domiciled in New York, leaving a widow and five children. He left personal property amounting to about $7,500, and real estate in Arkansas valued at about $200,000. By reason of his being surety on the guardian bonds of 1868, his estate was liable to Camp's three children for the amounts due them upon their father's death. (This liability is assumed for the purposes of this case.) 4. Moses S. Beach's estate was fully administered and settled in the New York court having jurisdiction thereof, the final account of the administrator being accepted and approved May 13th, 1895. On April 28th, 1893, and after the death of Camp, legal notice was given to the creditors of Beach's estate to present their claims. Camp's three children knew of Beach's death soon after it occurred, were then resident and domiciled in New York, and presented no claim against his estate. 5. Upon Camp's death in

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1893, an accounting between his executor and his three children was commenced in the surrogate's court in New York, and decrees fixing the amount due each child were entered December 19th, 1896, and these decrees were affirmed, upon appeal, February 15th, 1901. Beach's administrator had knowledge of this litigation and of the claim against the bondsmen. 6. Said Moses S. Beach had at all times, in his own name, and owned and controlled by him, and left at his decease, property of a value more than equal to all his outstanding indebtedness and the amount of the claims based by the said three children of said Calvin B. Camp upon said bonds. 7. Subsequent to February 15th, 1901, Camp's children inquired of two daughters of Beach concerning the location of any property belonging to Beach at his death, without success. Said children did not have actual knowledge of the location of the Arkansas real estate until apprised thereof in these proceedings. 8. In the years 1891 and 1892 the said Charles Y. Beach purchased large amounts of real estate both in New Haven and Bridgeport, prior to which said dates he had owned no real estate in either of said cities. 9. At no time has there been any tangible real or personal estate standing in the name of Moses S. Beach and situated in the probate district of New Haven or the State of Connecticut. 10. On May 9th, 1902, Mary E. Camp applied for administration as a creditor of said deceased, and on July 3d, 1902, said Court of Probate of New Haven passed an order appointing an administrator, from which this appeal was taken by said Charles Y. Beach, now a resident of Massachusetts. 11. Moses S. Beach at his decease left no property of any kind in this State, unless the claims advanced by the appellee upon the above facts, as hereinafter set forth, constitute such property. 12. Upon the above facts the appellee claims as follows, to wit: (*a*) that said real estate mentioned in paragraph 8 was purchased by the appellant with money belonging either to said Moses S. Beach in his lifetime, or to his estate; (*b*) that said real estate belongs now to the estate of said Moses S. Beach, at least to the extent necessary to pay the judgment of said Mary E. Camp against the estate

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of Calvin B. Camp and any other claims that may be duly presented against the estate of Moses S. Beach, and that therefore said claims and choses in action constitute property sufficient to give the Court of Probate jurisdiction under the statute (§ 318); the sole purpose of the appointment of the administrator being to bring suit against Charles Y. Beach for a conveyance of said real estate to said administrator, or for its value in money, for the purpose of answering to said claims. The appellant contends that upon the above facts neither the Court of Probate for New Haven nor the Superior Court has jurisdiction to appoint an administrator.

A. Heaton Robertson and *James E. Wheeler*, for the applicant for administration.

Goodwin Stoddard and *Arthur M. Marsh*, for Charles Y. Beach.

HAMERSLEY, J. This is an application to the Court of Probate for the appointment of an administrator on the intestate estate of Moses S. Beach, made by Mary E. Camp who claims to be a creditor. Upon her application the Court of Probate passed an order appointing James E. Wheeler administrator. Charles Y. Beach being a son of Moses S. Beach appealed from this order to the Superior Court.

The reasons of appeal are set forth in the appeal itself as follows: Moses S. Beach died on July 25th, 1892, resident and domiciled in the State of New York. He left no property in the probate district of New Haven or in the State of Connecticut, and his estate was long since fully administered and settled in the courts of New York having jurisdiction thereof.

Upon this appeal the Superior Court had full jurisdiction of the subject-matter, namely, the appointment of an administrator upon the estate of Moses S. Beach; and within the issues presented by the appeal the court tries the cause *de novo*.

The issues in this case are these: Was Moses S. Beach at

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the time of his death an inhabitant of this State? Did he leave property in this State? The appeal alleges that he was not an inhabitant and did not leave property in this State. These allegations by our practice are taken as denied, in the absence of any further pleading. If the court finds that the intestate did not live in this State and did not leave property here, the appellant is entitled to judgment and the probate order must be set aside.

There appears to have been no actual trial, but the parties agreed upon a statement of facts, and these facts are found by the court and the case reserved for the advice of this court as to the judgment to be rendered on the facts thus found.

It is clear that the facts found by the court do not prove that Moses S. Beach at the time of his death left any property in this State. The purchase by his son of land in Bridgeport and New Haven during the year preceding his death and the year of his death, furnishes no presumption that the father had any interest in the land so purchased; and the other facts found by the court, in connection with this fact, raise no such presumption. Moreover, the court expressly finds that at his death Moses S. Beach had no tangible property, real or personal, in this State, and had no property whatever in this State, unless the advancement of the claims of the appellee, upon the facts found, constitute property within the meaning of the statute. This question is the only material question of law arising in the cause as presented by the reservation, and its decision must determine the judgment the Superior Court shall render.

The administration of estates of deceased persons is within the general jurisdiction of the Superior Court, unless exclusive jurisdiction is committed to some other court. *Mack's Appeal*, 71 Conn. 122, 132. By statute that jurisdiction is committed, and its exercise in the first instance confined, to the Court of Probate, which is an inferior court of limited jurisdiction. The death of the person whose estate is sought to be administered is a jurisdictional fact. Unless this fact exists there is no jurisdiction of the subject-matter. The

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existence of property within the probate district, belonging to the deceased at the time of death, is a fact necessary to the appointment of an administrator upon the estate of a nonresident, by that Court of Probate, and is in a sense a jurisdictional fact. Whether it is a jurisdictional fact in the same sense as the fact of death, and the nature of the difference, if any, are questions which need not be considered in this case. It is enough for present purposes that the existence of property within the limits of the district is a fact which must be established to the satisfaction of the Court of Probate before it can properly appoint an administrator, and that upon appeal this fact may be, as it is in this case, the material fact in issue before the Superior Court.

This fact comprises two facts: the existence of property within the district, and the ownership of that property by the intestate at his death. Property, as used in the statute, includes not only land and tangible personal property, but a chose in action. A thing which is the subject of legal ownership is property, whether that thing is in possession of the owner or is in possession of another and the owner has only a bare right to reduce the thing to possession by means of an action. 2 Blackstone's Comm., 389, 397.

In the case of property in possession, its existence within the district is a fact which can ordinarily be easily and certainly ascertained; but the fact of its ownership by the intestate at his death is one which may be doubtful and difficult to settle. If land stood in the name of the intestate, or tangible personal property was in his actual possession at the time of his death, these insignia of ownership would ordinarily justify the Court of Probate in finding the fact, and it might not in such case be necessary or proper to determine a question of contested title. It has no power to try such a question except as it is necessarily incident to its appointment of an administrator, and then its determination is not binding beyond the necessities of the purpose for which it is made. It is therefore sufficient that the intestate was the apparent owner of the property.

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In the case of property in action the same two facts must be proved; but here the two facts are more closely related and are ordinarily proved by the same evidence. A promissory note is evidence that the payor has promised to deliver his money to the possession of the payee on the maturity of the note, and is also evidence that the payee is the owner of the property or chose in action thus proved to exist. And in general, proof of the existence of a chose in action also proves its ownership; and so, in proving the existence and the ownership of property in action, the same rule of evidence applies as in proving the ownership of property in possession. Questions of contested title cannot be finally settled by the Court of Probate, but may be considered and must be determined so far as is necessary to enable the court to exercise its jurisdiction in the appointment of an administrator. For that purpose it must find that property, either in possession or in action, owned by the nonresident intestate, existed within the district at his death. For that purpose it may be sufficient to find, in the case of tangible property, an apparent ownership in the intestate, or in the case of property in action, an apparent liability to the intestate from some person under such circumstances that the situs of the property or chose in action is within the district. The law, as thus stated, has been firmly established by our decisions. *Hartford & N. H. R. Co.* v. *Andrews*, 36 Conn. 213; *Chamberlin's Appeal*, 70 id. 363; *Mack's Appeal*, 71 id. 122. How far a Court of Probate may properly consider the merits of a contested title, in determining the fact of an apparent ownership, is a matter immaterial to the present decision. In every case that fact must be passed upon, and if the Court of Probate, or Superior Court upon appeal, violates the principles of law in finding, or refusing to find, that fact, an error is committed.

It follows conclusively from this state of the law that the claims advanced by the appellee, upon the facts found by the Superior Court, do not constitute property. The distinction between an apparent liability from Charles Y. Beach to his father at the time of his father's death, and a mere claim, advanced ten years afterwards by an applicant for adminis-

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tration, that there was such a liability, is obvious. The former is property within the meaning of the statute; the latter may or may not be evidence tending to prove, but certainly does not constitute, property within any meaning that word can be used to express. "Claim" in its primary meaning is used to indicate the assertion of an existing right. In its secondary meaning it may be used to indicate the right itself. In our decisions on this subject, "claim" may have been used in its secondary meaning to indicate a chose in action, but such use of the word cannot justify the inference that because the right is property, a mere pretension to the right is property; nor can it justify an interpolation of language not used in the statute, so that it shall read: "when a person living out of the State shall die intestate, leaving property within the State (or when any person shall claim that a nonresident intestate left property within the State), administration may be granted," etc. General Statutes, § 318.

It may be that the appellee intended to insist that the claim or assertion, by an applicant for administration, that the intestate owned property within the district, is conclusive evidence of that fact. Allusion was made in argument to the practice of granting administration upon the mere assertion of the applicant. Undoubtedly our probate courts, in matters which are not contested, do find facts upon evidence which would have slight weight in case of a contest; but upon a trial of the issue—did the intestate own property within the district at his death?—neither the Court of Probate nor the Superior Court can lawfully give controlling or even any weight to the mere assertions of the applicant, of facts outside his knowledge and inconsistent with the facts found by the court.

We deem it clear that the claims advanced by the appellee, upon the facts found by the court, do not constitute property within the meaning of the statute, and that the conclusion of the court that the intestate left no property in the district, if said claims advanced by appellee do not constitute property, is a proper and lawful conclusion, from all the facts found.

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The Superior Court is advised to render judgment for the appellant, setting aside the order of the Court or Probate.

In this opinion the other judges concurred.

The New Haven Manufacturing Company *vs.* The New Haven Pulp and Board Company.

Third Judicial District, New Haven, June Term, 1903.
Torrance, C. J., Baldwin, Hamersley, Hall and Prentice, Js.

The plaintiff alleged that on a certain day the defendant, by its note, promised to pay to the order of *D* a certain sum at a given time and place, "for value received;" and this was admitted by the defendant in its answer. *Held* that such admission did not preclude the defendant from proving the other paragraphs of its answer, which averred that the note was delivered conditionally and was not in fact given for value received.

A compromise agreement by which each party absolutely undertakes to do certain things for the benefit of the other is upon a valuable consideration.

Having agreed, by way of compromise, to give *D* $1,500 in cash and its note for $3,000, in settlement of *D's* claim of $5,100 for certain engines and machines, the defendant mailed its check for $1,500, stating that it was sent "as per our understanding" and "to complete payment for paper machine." A second letter, accompanying the note, stated that it was "tendered in payment" for beating engines, it "being understood that before the note becomes due we will have had ample time to determine whether the beaters fill our requirements according so specifications and guaranty." *D* acknowledged the receipt of the check and note "in settlement of our account, as per agreement." In an action upon the note brought by *D's* indorsee, it was *held*:—

1. That the language of the second letter could not fairly be construed as a tender of the note upon condition, but rather as an attempted qualification of the manner in which the note was to be held and used by *D*.
2. That if, by accepting the note, *D* could be considered as having assented to the attempted modification, such modification would not attach to the note itself, but would merely create a collateral obligation on his part to respond in damages or submit to a recoupment, in case of a violation of its terms.
3. That there could be no recoupment in the present case, inasmuch as

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the defendant had made no such claim in its answer, having seen fit to rely solely on a conditional delivery of the note.

There was no direct, positive testimony of the indorsement of the note by *D*, the payee, but it appeared from certain evidence that *D*'s agent, while negotiating with the plaintiff in behalf of *D* for the purchase of certain machinery, left the note with the plaintiff to be credited to *D*, and that it was so credited. *Held* that the trial court might well infer from this that the note when so accepted was properly indorsed.

The legal title to a note which is indorsed to a bank for collection and after protest is returned to such indorser, is in the latter, who has the right to cancel his indorsement to the bank. His failure to exercise this right is immaterial, as his possession of the note is sufficient evidence of ownership to support a suit.

The fact that a suit on a note is brought by counsel retained by a third party at his own expense is immaterial. If the holder of the note sees fit to put it into the hands of counsel thus employed, and makes no objection to the action, such counsel may properly represent him in the proceeding.

Argued June 9th—decided July 24th, 1903.

ACTION by the indorsee against the maker of a negotiable note, brought to the Superior Court in New Haven County and tried to the court, *Thayer, J.*; judgment for plaintiff, and appeal by the defendant. *No error.*

George D. Watrous and *Henry H. Townshend*, for the appellant (defendant).

John K. Beach, for the appellee (plaintiff).

BALDWIN, J. The substantial defense set up to this action is that the note was delivered to the payee on an express condition that its payment should be contingent on the acceptance of certain engines, which it had sold to the defendant with a warranty that they should work satisfactorily, and which proved unsatisfactory.

The complaint follows *Form* 213 in the Practice Book (p. 128), alleging in paragraph 1 that the defendant, on a day stated, by its note, promised to pay to the order of the Downingtown Manufacturing Company a certain sum at a certain place and time, for value received. This paragraph

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was admitted by the answer, and it is contended that by this admission the defendant was precluded from setting up such a defense.

The answer in this respect had no other effect than to admit the due execution and delivery of the note described. Its other paragraphs, in which the defendant averred that the note was delivered conditionally, and was not in fact given for value received, remained proper subjects of proof.

Three beater engines and a certain paper machine were furnished to the defendant by the Downingtown Manufacturing Company, under contracts of purchase. The price of the engines was $3,000, and they were "guaranteed" to "do the defendant's work satisfactorily." The defendant, upon trying them in its factory, was not satisfied with their working. Subsequently, at a time when the Downingtown Manufacturing Company claimed that about $5,100 was due to it on the contracts, it was orally agreed by way of compromise between it, acting through a Mr. Miller, and the defendant, that the latter should pay and the former would accept, in full settlement of all accounts, $1,500 in cash and $3,000 payable by a two months' note drawn to the order of the Downingtown Manufacturing Company, and that certain new parts for the paper machine should also be furnished without further charge. The defendant thereupon sent by mail a letter, with a check for $1,500. and another letter referring to the check as sent "as *per* our understanding with Mr. Miller . . . to complete payment for paper machine." The second letter enclosed the note in suit, stating that it was "tendered in payment for beating engines, it being understood that before the note becomes due we will have had ample time to determine whether the beaters fill our requirements according to specifications and guaranty, which would mean that we could use them economically, or without a large daily loss to ourselves in consumption of power. We will work at this matter faithfully in our endeavor to overcome the present difficulty, and we hope that for our mutual interests we may succeed in so doing." The Downingtown Manufacturing Company replied by a letter

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acknowledging the receipt of "check for $1,500 and note for $3,000, in settlement of our account, as *per* agreement had with the writer."

The terms of the note were, in fact, conformable to that agreement, and the new parts for the paper machine were subsequently furnished and accepted. Unless, then, the letter enclosing the note so far qualified its delivery that the Downingtown Manufacturing Company had no right to treat it as sent in pursuance of the previous agreement, that agreement was fully executed, and there was thus an accord and satisfaction of an unliquidated demand.

A compromise agreement by which each party absolutely undertakes to do certain things for the benefit of the other is upon a valuable consideration. The promise of the defendant to pay $1,500 and give the note was a valuable consideration for that of the Downingtown Manufacturing Company to furnish the new parts of the paper machine and accept the money and note in full settlement. It may be assumed to have been the intention of the parties that no settlement was to be effected, and that the original claim of the company would remain the same until each company had performed its part of the agreement. But it nevertheless became the legal duty of each to make such performance. See *Goodrich* v. *Stanley*, 24 Conn. 613, 621.

The defendant endeavored in its letter enclosing the note to add new terms to this contract. If the tender had been made on the express condition that the note should be retained by the payee until its maturity, and should become void if before that time the maker determined that the engines were not such as the payee had bound itself to furnish, a different question would be presented. *Potter* v. *Douglass*, 44 Conn. 541. But the letter transmitting the note first made a direct tender of it "in payment for beater engines," and then sought to create a new "understanding" in addition to that previously reached with Mr. Miller. This was not put forward as a qualification of the tender, but of the manner in which the note was to be held or used. The tender remained unqualified and unconditioned. It was made to pay a debt,

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and if it should be accepted, that debt would necessarily be extinguished. Whether the note itself should ever be paid or not was immaterial as to the discharge of the original demand.

In making such a tender the defendant was fulfilling a contract duty. The Downingtown Manufacturing Company therefore had a right to accept it, as it did, as made under the contract with Mr. Miller, without thereby assenting to any modification of that contract which would in effect vary the obligation expressed by the note. *C. & C. Electric Motor Co.* v. *D. Frisbie & Co.*, 66 Conn. 67, 95.

But were this not so, and could the company be considered as having, by accepting the note, assented to the proposed modification of the contract of settlement, the defense set up in the answer would have been unavailing, even if that company had been the plaintiff in the action. The answer avers that the note was delivered "upon the express condition that it should be applied, when due, in payment for three duplex beating engines," provided they were found before that time to work satisfactorily. This allegation was not supported by the proof. The letter enclosing the note tendered it expressly in payment for these engines. The "understanding" which it then proceeded to state, if agreed to by the Downingtown Manufacturing Company, would at most have created on its part a collateral obligation to respond in damages or submit to a recoupment, should the engines prove to work badly. Such an obligation certainly would not have affected the note if indorsed to a holder in due course. It could not therefore be treated as part of the note itself. That would remain unconditional, and while, if sued on by the payee, it might be met by a counterclaim, it could be met by nothing else. In the case at bar nothing has been pleaded by way of counterclaim. The answer must stand or fall on the ground of a conditional delivery of the note in suit.

As this defense would be untenable, were the Downingtown Manufacturing Company the plaintiff, it is unnecessary to inquire whether the circumstances attending the indorsement were such as to make the New Haven Manufacturing

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Company a holder in due course. The note being a negotiable one, General Statutes, § 631, does not apply, and the indorsee had at least the rights of the payee.

Exception is taken to the finding that the note was indorsed by the payee, as having been made without evidence. As to this, the record shows that the note, when presented by the plaintiff, bore an indorsement of the name of the Downingtown Manufacturing Company, purporting to have been made by one Tutton in its behalf. There is a statement marked "proven," in the defendant's draft finding, that no evidence was offered as to the indorsement, or as to the authority of Mr. Tutton to indorse commercial paper in the name of the company. Obviously this statement was understood by the trial judge as referring to direct, positive testimony; for the evidence certified in support of the defendant's exception, contains testimony to the effect that Mr. Tutton, while negotiating with the plaintiff in behalf of the Downingtown Manufacturing Company for the purchase of certain machinery, left the note with the plaintiff to be credited to the former company; and that it was so credited. A finding is to be favorably construed in support of the judgment. *Cunningham Lumber Co.* v. *Mayo*, 75 Conn. 335. It will not be presumed, therefore, that the trial judge, in accepting this statement in the draft finding as correct, meant more than that there was no positive testimony to this point. He might, nevertheless, well infer from this certified evidence that the note when so accepted was properly indorsed.

The note had been indorsed by the plaintiff before maturity to a bank, and deposited with it for collection. It was protested, and then returned to the plaintiff. When produced at the trial, it bore this indorsement to the bank uncancelled. The defendant contends that, upon these facts, it appears that the bank has the legal title and was the only proper party to sue.

The bank received the title for the sole benefit of the plaintiff. When it returned the note protested, the plaintiff became an indorsee in possession and invested with the rights belonging to all holders of commercial paper. General Stat-

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utes, § 4170. One of these was to cancel the indorsement which it had made. General Statutes, § 4218. Whether it exercised this right or not was immaterial. Its mere possession of the note was sufficient evidence of ownership to support the suit. General Statutes, § 4221; *Dugan* v. *United States*, 3 Wheat. 172.

It appeared upon the trial that the suit was brought by counsel retained by the Downingtown Manufacturing Company and at its sole expense, there being no intention on its part to look to the plaintiff for reimbursement. This is immaterial. The plaintiff having put its note, for the purposes of the suit, into the hands of the counsel thus employed, and making no objection to the institution and maintenance of the action, they had a right to represent it in the proceeding.

There are other reasons of appeal, which need not be noticed, in view of the grounds on which our judgment is based.

There is no error.

In this opinion the other judges concurred.

William A. Miles and Company *vs.* The Odd Fellows Mutual Aid Association.

Third Judicial District, New Haven, June Term, 1903.
Torrance, C. J., Baldwin, Hamersley, Hall and Prentice, Js.

Public Acts of 1895, Chap. 255, as amended in 1897 and in 1899, provides that all benefits due from a fraternal society, organized and carried on for the sole interest of its members and their beneficiaries, and not for profit, which has a lodge system "with a ritualistic form of work," shall be exempt from attachment. *Held:*—

1. That benefits due from a mutual aid association which had no ritual of its own were not exempt from attachment.
2. That it was immaterial that all the members of such association were also members of an order which did have the prescribed ritual.

Submitted on briefs June 9th—decided July 24th, 1903.

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ACTION in the nature of a *scire facias* against a corporation as a garnishee, brought to the Court of Common Pleas for New Haven County. Answer that the garnishee owed nothing to the original defendant, except certain moneys which it had paid into court, due to her as a beneficiary, designated by a member of the association to receive a certain pecuniary benefit upon his death; and that this fund was exempt from attachment. Demurrer to the answer sustained (*Cable, J.*), and judgment for plaintiff. *No error.*

Cornelius J. Danaher, for the appellant (defendant).

E. P. Arvine and *George E. Beers*, for the appellee (plaintiff).

BALDWIN, J. Process of foreign attachment was served upon the defendant in October, 1901, as debtor to one Ida Oefinger. Its answer states that it is "an association composed exclusively of members in good standing in any duly constituted lodge of Odd Fellows in the New England States, or of members in good standing in any lodge of the order who reside in the State of Connecticut, which association is organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, having a lodge system, and a representative form of government, having provisions for the payment of benefits in case of death or disability of its members, and having among its objects the creation of a fund from which shall be paid to such beneficiaries as its members may designate and its board of directors approve a sum not exceeding $2,000. Said society of Odd Fellows is an association having a lodge system, with a ritual, and a representative form of government." The defendant, when garnisheed, owed Ida Oefinger $750 as a benefit which had accrued to her, by the death of one of its members, as a duly designated beneficiary. The only question is whether this debt was by statute exempt from attachment.

This depends on the law as it stood in October, 1901, when, if ever, the attachment was effected.

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In 1895, "An Act concerning Secret or Fraternal Societies" was passed, the main purpose of which was to regulate the relations of such societies to the insurance department of the State. The term "secret or fraternal society," it was declared in § 1, was used as including, among others, any "corporation, society, or voluntary association organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, having a lodge system, with a ritualistic form of work and a representative form of government, and making provision for the payment of benefits in case of death." Provided certain papers were filed with the insurance commissioner (and in such case only) any such society was authorized to do business in the State, and, by § 7, all benefits becoming due from a society so authorized were exempted from attachment. The Act, by § 11, was not to apply "to the societies of Masons or Odd Fellows located in this State, nor to associations composed exclusively of their respective members." In 1899, by an Act entitled "An Act concerning Fraternal Insurance Societies," there was added to § 11 a proviso that § 7 should "apply to all fraternal societies legally doing business in this State." Public Acts of 1895, p. 595, Chap. 255; id. 1897, pp. 826, 830, 831, Chapters 107, 112, 113; id. 1899, p. 1050, Chap. 117.

This Act of 1899 began by declaring that the proviso should read "provided, however, that section seven of this act" (i. e. the Act of 1895) "shall apply to all fraternal beneficial societies legally doing business in this State;" adding, however, "so that said section as amended shall read as follows;" and in the amended section as then recited the word "beneficial" did not appear. The effect of the amendment having been thus explicitly stated, the Act must be treated as if it applied to fraternal societies, whether properly described as "beneficial" or not.

This leaves the meaning of the term "fraternal," under the Act of 1895, to be settled by its other provisions. These define it precisely. It must, by § 1, have "a lodge system, with a ritualistic form of work." The answer alleges that the defendant has a lodge system, but does not aver that it

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has a ritualistic form of work. That its members are all Odd Fellows, and that the Odd Fellows constitute a society having a lodge system with a ritual, is of no consequence. Connecticut societies of Odd Fellows were expressly excluded by § 11 from the operation of the Act of 1895, as well as associations composed exclusively of the members of such societies. The defendant is not such an association, for it admits members of any lodge of Odd Fellows existing in New England; but it is excluded under § 1 of the Act, on the broader ground of its failure to come within the statutory definition, for want of a ritual of its own.

It would serve no useful purpose to inquire whether the Revision of 1902 has changed or preserved the law in this respect. If it has preserved it, the demurrer was properly sustained. If it changed it, the demurrer was also properly sustained, for the rights of the parties became unalterably fixed during the year preceding that when the Revision took effect.

There is no error.

In this opinion the other judges concurred.

Celia Hart *vs.* Anna C. Knapp.

Third Judicial District, New Haven, June Term, 1903.
Torrance, C. J., Baldwin, Hamersley, Hall and Prentice, Js.

Ordinarily it is not incumbent upon the trial court, in charging the jury, to call their attention to specific portions of the evidence as supporting or refuting a particular claim; it is enough, certainly, if they are instructed to take into account all the evidence bearing upon disputed points in the case.

A woman of full age who voluntarily lives in adultery with a man known by her to be married, thereby winning his affections and causing him to abandon his wife, cannot escape all liability in damages to the latter merely because the husband solicited, induced, or persuaded her to such adulterous intercourse.

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Solicitation, inducement, or persuasion, however powerful or alluring, do not constitute duress.

"Seduction," when used with reference to the conduct of a man toward a woman, implies an enticement of her by him to the surrender of her chastity by means of some art, influence, promise or deception calculated to accomplish that object, including the yielding of her person to him.

Submitted on briefs June 2d—decided October 7th, 1903.

ACTION to recover damages for alienating the affections of the plaintiff's husband, brought to the Superior Court in Fairfield County and tried to the jury before *Ralph Wheeler, J.;* verdict and judgment for the plaintiff, and appeal by the defendant. *No error.*

Howard W. Taylor, for the appellant (defendant).

Henry A. Purdy, for the appellee (plaintiff).

TORRANCE, C. J. The complaint, among other things, alleges, in substance, that prior to its date the defendant had alienated the affections of Hart, the plaintiff's husband, had committed adultery with him, had caused him to abandon the plaintiff, and had ever since lived in adultery with him. All this the defendant denied.

The evidence for the plaintiff tended to prove all the allegations of her complaint, and especially that the defendant had done all the things charged against her, "by her acts, blandishments, and seductions." The defendant herself did not testify in the case, but the evidence offered in her behalf tended to prove that shortly after the marriage of the plaintiff to Hart, he remained away from the plaintiff for some time by reason of some disagreement; that prior to his acquaintance with the defendant he was of intemperate habits, and had taken the Keely cure in 1896; that he had on occasions remained away from home till late in the night, and had become neglectful of his wife and failed to provide adequate support for her; that any affection that might exist on the part of the defendant for Hart was begun and prolonged by his advances and addresses; that there had been no criminal

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intercourse between the defendant and him; and that after the plaintiff had separated from her husband, "she had met him and made some proposition looking toward his helping her get some money from the defendant."

No exceptions to the evidence on either side appear to have been taken.

The only errors assigned relate to the action of the court in refusing to charge four certain requests made by the defendant. One of these relates to the claim that the plaintiff consented to and connived at the conduct of her husband with the defendant, for the purpose of bringing an action against the defendant for damages; and the defendant says the court did not charge that this, if true, barred a recovery.

This contention is not borne out by the record. The jury are distinctly and emphatically told, substantially in the language of the request, that if the plaintiff "acquiesced and approved of her husband visiting the defendant with the intended purpose" imputed in the request, she could not recover; and that if she consented to the adulterous intercourse between the defendant and Hart, she could not recover. There is nothing in the charge upon the point of connivance of which the defendant can justly complain.

Another of the requests asked the court to tell the jury that "in considering whether the plaintiff connived at the alleged misconduct of her husband," they might take into account certain specific portions of the evidence upon that point. The court did not in terms so charge; but the jury were properly instructed to take into account all proper evidence bearing upon disputed points in the case; and this, under the circumstances, was enough. It was their duty to do so without being told, and they undoubtedly did so. There is nothing to show that the defendant was harmed by the failure of the court to call the attention of the jury to that portion of the evidence stated in the request.

The other two requests were in substance as follows: If the jury find "that the defendant did not seduce the plaintiff's husband, but, upon the contrary, that the plaintiff's husband seduced the defendant, then the plaintiff cannot re-

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cover." If the jury find that the defendant was not the "active or aggressive party who brought about the 'adulterous intercourse' between herself and the plaintiff's husband," but that "the defendant was the victim of the wiles, blandishments and intrigues of plaintiff's husband," the plaintiff cannot recover.

These two requests cover substantially the same grounds and may be considered together. The court did not charge these requests, but upon this point charged as follows: "The defendant, if she committed adultery with the husband of the plaintiff, is liable for damages in the action, whether the husband sought and solicited the defendant, or the defendant the husband of the plaintiff." The court further added, that "if the defendant was an active, persuading party in the alienation of affection" that fact might be considered on the question of punitive damages.

This part of the charge, although the defendant complains of it in the brief, is not assigned for error; indeed no part of the charge as actually given is assigned for error. The only errors assigned on this part of the case relate to the action of the court in refusing to charge the two requests last above mentioned.

It may perhaps be doubted whether there was sufficient evidence in the case to justify the defendant in making these requests. Certainly the record discloses very little evidence of that kind.

The evidence for the plaintiff tended strongly to show that the defendant "was an active or aggressive party" in bringing about the state of things complained of by the plaintiff; while, apparently, the only evidence to the contrary was that of the husband, to the effect "that any affection that might exist on the part of the defendant" for him, "was begun and prolonged" by him. For the purposes of discussion, however, we will assume that there was evidence of the kind in question before the jury.

The plaintiff claimed to have proved her case, and if that claim was sustained by the jury, she was entitled to recover in this action. *Foot* v. *Card*, 58 Conn. 1. Her case was

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based upon these facts: that the defendant had committed adultery with Hart, had thereafter continuously lived in adultery with him at her home, and had thereby won his affections from the plaintiff and caused him to abandon her. To meet this case the defendant, in these requests, asks the court to say to the jury that if the husband seduced her, and she was the victim of his wiles, that would be a complete bar to this action; and the question is whether this is so.

The question is one of first impression in this State, and, so far as we are aware, it has not been passed upon elsewhere in a case just like the present, and must therefore be determined upon principle rather than precedent. The lack of precedent is not surprising. The right of the injured wife to bring an action of this kind was not recognized in any of the States until recently, and is still denied in many of them. Our own case of *Foot* v. *Card*, 58 Conn. 1, one of the pioneer cases of this kind, was decided in 1889. We are of opinion that the facts assumed in the requests, even if true, constitute no bar to the plaintiff's action. The defense embodied in the requests is based upon the hypothesis that the defendant is guilty of the things charged against her. She thus, hypothetically, admits that she committed adultery with Hart, has long lived in adultery with him at her home, and that as a result of this Hart has abandoned his wife for her. She was a widow, of full age, with full knowledge that Hart was the husband of the plaintiff. She admits, hypothetically, that she engaged with him in a great wrong to the plaintiff. She knew that her course of conduct with him would probably lead him to abandon his wife. "There can be no surer means adopted to estrange husband and wife and stifle all affections that ever existed between them, than the existence of improper relations, especially of a criminal nature, between one of them and another party." *Shufeldt* v. *Shufeldt*, 86 Md. 519, 525. She now claims, in effect, that because the husband seduced her she is absolved from liability for her own wrongs against the wife. The word "seduce," when used with reference to the conduct of a man toward a woman, is "universally understood to mean an en-

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ticement of her on his part to the surrender of her chastity, by means of some art, influence, promise or deception calculated to accomplish that object, and to include the yielding of her person to him." *State* v. *Bierce*, 27 Conn. 319, 321. When, therefore, the defendant says that the husband seduced her, that is merely saying that he first solicited, enticed and persuaded her to adulterous intercourse with him, and that she yielded to his persuasion. She yielded to him first, and then continued to live in adultery with him at her home, although for aught that appears she might easily have gotten rid of him had she chosen to do so. In what she did with the husband she did with full knowledge that it was wrongful, and that it would, as the plaintiff claims it did, result in harm to the plaintiff. The gist of the defense set up in the requests is that the defendant did a great wrong by the persuasion of the husband. We know of no rule of law, civil or criminal, that absolves her from liability for such wrong because of such persuasion. Solicitation, persuasion, enticement, temptation, however urgent, powerful or alluring, do not constitute duress. In law, so far as regards the plaintiff, what the defendant did with Hart, she did of her own free will; and she is responsible to the wife for the results of her conduct with the husband, even if it be true that he persuaded her to do what she did, and "was the active or aggressive party" in procuring her to do so.

In actions for criminal conversation at common law, the fact that the wife was, so to speak, the seductress was of no avail as a defense; *Egbert* v. *Greenwalt*, 44 Mich. 245; *Bigaouette* v. *Paulet*, 134 Mass. 123; *Bedan* v. *Turney*, 99 Cal. 649; *Moore* v. *Hammons*, 119 Ind. 510; *Kroessin* v. *Keller*, 60 Minn. 372; although in some cases it has been admitted as bearing upon the quantum of damages. *Sieber* v. *Pettit*, 200 Pa. St. 58.

Some of the reasons given for applying such a rule in such actions may not exist in actions brought by the wife to vindicate her rights to the society and affections of her husband; but it is difficult to see why an analogous rule should not be applied in a case like the present to the

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defense that the husband was the seducer. It may be that in cases like that of *Kroessin* v. *Keller*, 60 Minn. 372, an action by a married woman against one of her own sex simply for an act of adultery with the husband, and alleging neither alienation of his affections, nor neglect or abandonment of the plaintiff, the fact that the husband was the seducer should be held to be a defense, as is suggested in that case; but we have no occasion here and now to decide such a question, for the case at bar is not at all like the Minnesota case. Upon principle we think the facts set up in the requests do not constitute a defense in the present case, and we know of no decision of any court of last resort to the contrary.

There is no error.

In this opinion the other judges concurred.

THE DIME SAVINGS BANK OF WATERBURY *vs.* PAUL F. MCALENNEY ET AL.

Third Judicial District, New Haven, June Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

In order to justify a finding that a claim was duly presented against the estate of a deceased person, it is not enough that at some unknown time and in some unknown way within the period limited for such presentation the executor derived knowledge of the existence of the claim from the creditor. It must at least appear that the creditor has said or done something for the purpose of acquiring a status for his claim which would entitle it to share in the assets of the estate.

The plaintiff held a note and mortgage deed made by *C*, of whose will the defendant was executor and also the sole legatee and devisee. After *C*'s death the defendant paid interest on the note to the plaintiff for several years, until it was discovered that the mortgage was void inasmuch as *C* never had any title to the land. *Held* that these payments of interest did not tend so much to prove the due presentation of the note against the estate, as they did an in-

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tention of the parties to continue the loan on the strength of the supposedly valid mortgage security.

Submitted on briefs June 3d—decided October 7th, 1903.

ACTION to recover damages for breach of covenant, or in lieu thereof the amount of a mortgage note, brought to the Superior Court in New Haven County, where a demurrer to the substituted complaint was overruled (*Ralph Wheeler, J.*) and the case was tried to the court, *Shumway, J.*; facts found, judgment rendered for the plaintiff, and appeal by the defendant. *Error and judgment reversed.*

February 29th, 1888, Joseph Cassidy of Waterbury owed the plaintiff $1,800, as evidenced by his note therefor payable on demand, with interest semi-annually in advance. On that day, to secure said note, he executed to the plaintiff a mortgage deed of a certain piece of land in his possession, which mortgage contained the usual covenants of a warrantee deed. Said note is still owned by the plaintiff and unpaid. January 19th, 1890, Cassidy died, still possessed of the land and leaving an estate, consisting mostly of realty, which estate amounted to more than $20,000 over and above all debts and liabilities. He left a will in which he gave all his property to the defendant McAlenney. McAlenney was named executor, and qualified. He inventoried the mortgaged premises, entered into possession of them, and settled the estate. Six months from and after February 5th, 1890, were limited for the presentation of claims. In March, 1891, McAlenney began to pay the interest upon said mortgage note as it accrued, and continued to do so until March, 1895. During all this time both McAlenney and the plaintiff believed that the latter's mortgage was a valid one. Shortly after March, 1895, McAlenney became aware of a defect in his title which he had theretofore believed to be a good one, and so notified the plaintiff. Litigation was soon begun, which, in March, 1897, terminated in the successful assertion by another of a title paramount to that of Cassidy at the date of the mortgage, the acquisition by that person of the possession of the land, and an adjudication that Cassidy had

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no interest therein at the time of his mortgage to the defendant, and that said mortgage was void and of no effect. November 22d, 1898, and again later, the plaintiff exhibited to the defendant as executor its claim against the estate for the amount of its damages arising from said eviction and from the breach of the covenant of warranty contained in said mortgage. The executor refusing payment, the present action was begun on said day. The substituted complaint, upon which the trial was had, alleged not only the exhibitions of claim above recited, but also that the plaintiff had exhibited its claim upon the note to the executor within the six months limited for the presentation of claims. The other pertinent facts are sufficiently stated in the opinion.

Nathaniel R. Bronson and *Cornelius J. Danaher*, for the appellants (defendants).

Edward F. Cole, for the appellee (plaintiff).

PRENTICE, J. This action was originally brought against the defendant in his individual capacity. After a demurrer to the complaint had been sustained in part, a substitute complaint was filed. This having been demurred to with the same result as before, the defendant in his capacity as executor was cited in as a party defendant, and another complaint substituted. Another demurrer followed, which was overruled. After the pleadings had passed through sundry other vicissitudes unimportant to notice, an answer was filed and the case went to trial to the jury. After the evidence was closed the case was taken from the jury and submitted to the court for decision.

The last substituted complaint, in a single count, was apparently framed for the purpose of furnishing a basis for a judgment either for the amount due upon the note, or for the damages arising from a breach of the covenant of warranty contained in the mortgage deed, as the proof might warrant. No exception was taken to its form, and we therefore need take none.

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The court, from the evidence, found that no exhibition of a claim for a breach of warranty had been seasonably made, and therefore adjudged that the plaintiff was not entitled to recover for such breach. It was, however, found that within the time limited for the presentation of claims against the estate, the plaintiff exhibited its claim under the note to the defendant executor. Judgment was accordingly rendered against him in that capacity for the amount of said note and interest.

It is difficult to discover from the record and the transcript of the proceedings which is before us, in connection with the appeal, what right the court had to render a judgment such as was rendered. In its demurrer filed to the second special defense in the answer, the plaintiff expressly declared that the cause of action sued upon was one based upon the eviction, and none other. This statement was more than once reiterated during the trial. When the case was taken from the jury and submitted to the court for decision, it was conceded by all concerned that the plaintiff could have judgment only in the event that there had been a proper and seasonable presentation of the claim for the breach of warranty, and the sole question submitted was, as we read the record, upon this point. Upon this question the court ruled adversely to the plaintiff, but proceeded to find what counsel had disclaimed his ability to prove, to wit, a due presentation of a claim upon the note, and to render a judgment therefor. As the appellant, however, has, in his appeal, failed to clearly take advantage of this aspect of the case, we pass to a consideration of other questions involved.

The subordinate facts from which the court's conclusion that there had been a due presentation of the claim under the note was drawn, are stated in the finding as follows: "It did not appear from the evidence precisely at what time nor in what manner the existence of the note secured by the mortgage given by said Cassidy to the plaintiff bank was made known to the defendant, or when or in what manner said note was presented to him as executor as a claim against the estate. I find that soon after administration of the estate

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was granted to the defendant the existence of the note as a claim against the estate was made known to him by said plaintiff bank, and the defendant began in March, 1891, to pay the interest on said note, and continued to pay the same until March, 1895; and as a conclusion therefrom I find the allegation in paragraph 18 of the substituted complaint to be true."

An examination of this statement, taken in connection with the facts disclosed by the record, shows that the fact of exhibition within the meaning and intent of the law was found upon the following subordinate facts alone: (1) knowledge on the part of the executor of the existence of the claim; (2) the derivation of such knowledge from the plaintiff; and (3) payment of interest on the note for the four years named. With respect to the first two of these subordinate facts, it will be noticed that there is no finding of any act done or word spoken by the plaintiff, or by any one in its behalf, which was either actuated by a purpose to put this note in a position to claim payment out of the estate, or which evidenced, or was intended to evidence, any such purpose. The finding is barren of fact or incident transpiring prior to the expiration of the time limited for the presentation of claims indicative of an intention on the plaintiff's part to establish for its claim a status which should entitle it to share in the division of the assets of the estate. All that appears is that at some time unknown and in some way unknown, either with or without purpose, knowledge of the existence of the claim passed from the plaintiff to the executor. This we have heretofore held is not enough. *Brown & Bros.* v. *Brown*, 56 Conn. 249; *Pike* v. *Thorp*, 44 id. 450.

So far as the interest payments are concerned, neither these nor anything in connection with or attending them could by any possibility amount to a seasonable exhibition of a claim based upon the mortgage note, or the legal equivalent of such exhibition, since the first payment was not made until seven months after the time limited for the presentation of claims had expired, and the plaintiff's claim became barred. Conduct which began in March, 1891, was too late to be ef-

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fective in accomplishing a presentation prior to August 6th, 1890.

As evidence of a prior presentation, these interest payments—made as they were by one who was the equity owner as well as the executor, and made apparently for the most part, if not wholly, after the settlement of the estate—could have no significance, since they were more in consonance with an intention on the part of the parties that the mortgage loan was to remain a continuing one than one that it was to be paid out of the estate in settlement.

It follows that the court, in finding the essential fact of a seasonable exhibition by the plaintiff to the defendant executor of its claim under the note, must have either misconceived the legal requirements of such an exhibition, or found the fact without evidence.

There is error and the judgment is reversed.

In this opinion the other judges concurred.

ISAAC A. NORTHROP *vs.* FRANK CHASE ET AL.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

It is no defense to a suit to foreclose a mortgage, that an action upon the note to secure which the mortgage was given is barred by the statute of limitations.

In a suit to foreclose a mortgage the defendant pleaded, among other things, that the mortgagor and his successors in title had been in adverse possession of the mortgaged premises for more than fifteen years after the date of the mortgage, without recognizing its existence. *Held* that under a denial of the truth of this averment the plaintiff could prove a part payment of the mortgage debt, or any other act of the mortgagor within said period, recognizing the continued existence of the mortgage, without specially pleading such payment or acts in his reply.

The question as to what was decided in another action, if admissible, must be proved by the record or a duly authenticated copy; it cannot be shown by the statement of a witness.

Argued October 6th—decided December 18th, 1903.

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ACTION to foreclose mortgages of real estate, brought to and tried by the Court of Common Pleas in Litchfield County, *Welch, J.*; judgment for defendants, and appeal by plaintiff. *No error.*

Charles W. Murphy, for the appellant (plaintiff).

John H. Roraback and *John F. Addis*, for the appellees (defendants).

HALL, J. The complaint, dated November 4th, 1901, alleges in the first count that on the 27th of December, 1858, Perry Chase mortgaged certain described land to Isaac Northrop to secure the payment of a note of said Perry Chase for $200, dated December 24th, 1858, payable to said Isaac Northrop on demand with interest. The second count describes another mortgage dated October 10th, 1867, between the same parties and apparently upon the same land, to secure the payment of a similar note between said parties for $166.39, dated October 10th, 1867. The plaintiff is alleged to be the owner of said notes under the will of Isaac Northrop, who died in 1868.

The defendants, who are the heirs of Perry Chase, the maker of said notes, who died in 1899, allege by separate defenses to both counts of the complaint, first, adverse possession of the mortgaged premises by the mortgagor and his successors, for more than fifteen years after the date of the mortgages, without recognizing the existence of the mortgages; second, that the right of action upon the notes accrued more than seventeen years prior to the commencement of this action and to the death of the maker of the notes; third, that the right of action to foreclose the mortgages accrued more than twenty years before the commencement of the action and the death of the mortgagor; and fourth, that said Perry Chase prior to his death fully paid and discharged both of said notes and mortgages.

The plaintiff in his reply denied the averments of each of said four defenses; and to said first, second and third defenses

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made a further reply, to the effect that within fifteen years said Perry Chase had paid and promised to pay interest upon said notes, and in consideration of the plaintiff's forbearance to foreclose said mortgages had promised to convey his title to said premises to the plaintiff at the commencement of the year 1900.

The trial court sustained the defendants' demurrer to said special reply upon the ground, among others, that it contained no matter in avoidance.

The mere fact that an action at law upon the notes was barred by the statute of limitations, as set forth in the second defense to both counts, constituted no defense to the action to foreclose the mortgages. *Belknap* v. *Gleason*, 11 Conn. 160, 163; *Hough* v. *Bailey*, 32 id. 288.

Such facts alleged in the special reply as showed a payment by the mortgagor within fifteen years of any part of the mortgage debt, or the performance by him of any act recognizing the continued existence of the mortgage, might have been proved by the plaintiff, under his denial of the first defense of the answer, without specially pleading them by way of reply. But upon the trial of the case the court found the fourth defense proven, and that "said notes were both paid in full by the said Perry Chase prior to the year 1878." The plaintiff can therefore have suffered no injury from the ruling sustaining the defendants' demurrer to the reply, unless the court committed some error in the trial of the issue as to the payment of the notes.

The only such error assigned is, that the court upon the defendants' objection excluded the question: "What did the court decide as to whether Mr. Chase owed the debt or not," when asked of the plaintiff by his counsel for the purpose of showing "that at the trial of a certain action at law against this plaintiff, in which a garnishee process had been served on said Perry Chase as his debtor, the court had decided from the facts that said Chase was indebted to this plaintiff."

The ruling was correct. If such judgment between other parties was admissible for any purpose in this action, the proper way of proving it was by the record of the court in

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which it was rendered, or a duly authenticated copy of such record. *Waterbury Lumber & Coal Co.* v. *Hinckley*, 75 Conn. 187, 190.

There is no error.

In this opinion the other judges concurred.

EDWIN A. BUCK, ADMINISTRATOR, *vs.* GEORGE LINCOLN ET AL.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

By his will, executed in 1875, a testator gave the use of certain real estate to his widow for life, and then to *E*, his son's wife, for her life. In the next sentence he provided that "in case" the son survived *E* he was to have the use of the property during his life, "and the balance or residue of said property after such users have terminated, I give, devise and bequeath to the heirs at law" of said son. In a suit to construe the will it was *held*: —

1. That the devise in remainder to the heirs of the son could not properly be regarded as contingent upon his surviving his wife, but must be construed as an independent and absolute gift as fully as if it had been the subject of a separate sentence.
2. That inasmuch as the son's "heirs" might be other than his "immediate issue or descendants," the devise in remainder was void under the then existing statute against perpetuities (Rev. 1875, p. 352, § 3).

Argued October 6th—decided December 18th, 1903.

ACTION to determine the construction of the will of Walter Ashley, deceased, brought to the Superior Court in Windham County, *Shumway*, *J.*, and reserved, upon an agreed statement of facts, for the advice of this court.

The will and codicil, after giving to the testator's widow the life use of all his estate, made these provisions: —

"I do give, devise, and bequeath to my daughter Sarah E.

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Shew one half of all my property at the expiration of my wife's life estate in the same (except that portion which is situated in Willimantic village) to be her own estate and the estate of her heirs forever.

"I . . . give, devise, and bequeath to Ellen M. Ashley, wife of my son Charles R. Ashley, the use and improvement of all my real estate situated in Willimantic village and also of one half of all my other property real and personal wheresoever situated. All my said property being subjected to the life use of Martha Ashley, my wife, by the provisions of this said will, and the use thereof to the said Ellen M. is to commence at the expiration of the said life use of my wife, and to continue during the natural life of the said Ellen M.

"In case the said Charles R. Ashley should survive the said Ellen, then the use of said property is to continue to be enjoyed by him during his natural life, and the balance or residue of said property after such users have terminated, I give, devise and bequeath to the heirs-at-law of the said Charles R. Ashley. I do also hereby authorize and empower the said Charles R. Ashley, acting as my executor, to sell or convey any part or the whole of the property, real or personal, named in the said will and this codicil as to him may seem for the best interests of said estate, and the avails of such sale or sales, if she be living at the time, and I do also confer like power and authority upon any person who may succeed the said Charles R. Ashley in said executorship."

The testator died in 1877, leaving as his sole heirs at law his two children above named. Shortly afterwards Sarah E. Shew, by a proper deed, conveyed to Charles R. Ashley, all her right, title, and interest in all the real estate left by the deceased. The testator's widow died in 1895. Charles R. Ashley died testate in July, 1900. His widow Ellen M. Ashley died a few days afterwards. There remains in the possession of the plaintiff as administrator of Walter Ashley, deceased, as undistributed estate, part of the real estate left by him in Willimantic, and this suit was brought to ascertain to whom it of right belonged.

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William A. King, for the plaintiff.

Lewis Sperry, for George Lincoln et al.

Charles E. Perkins and *Huber Clark*, for Elizabeth D. Johnson et al.

BALDWIN, J. The devise in remainder to the heirs at law of Charles R. Ashley cannot properly be regarded as contingent upon his surviving his wife. The provision that it was to take effect in enjoyment only after all the "users" previously given (two of which had no connection with that contingency) had terminated, and the presumption that the testator intended to dispose of his entire estate, show that it should be construed as an independent and absolute gift as fully as if it had been the subject of a separate sentence.

This remainder took effect in right, if at all, on the death of the testator. It was created in favor of the heirs at law of a person then in being. As they could not be ascertained until the death of that person, and might be other than his children, it is settled by a long line of decisions that the devise was void under the then existing statute against perpetuities. *Tingier* v. *Chamberlin*, 71 Conn. 466, 469. This did not impair the validity of the several life estates in the Willimantic lands; but the remainder limited after them being one that could not lawfully be created, the reversion in those lands, and in the residue of his real estate, became intestate estate of Walter Ashley upon his decease. As such the title passed to his two children in equal shares.

This result frustrated the main scheme of the will, which was to give, after his wife's decease, the Willimantic property and half the residue of his estate to his son, or those claiming under him. To divide the reversion as intestate estate would be to give to Mrs. Shew, besides her own testamentary share, half of that intended for her brother and his family.

Whether the doctrine applies that, where it is impossible to execute the main purpose of a will, by reason of the fail-

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ure of a provision for one line of natural descent, and gross inequality would result were the provisions for other lines to be allowed to stand, all must fall together so as to let the law work out, by the rules of inheritance and distribution, that equality which the will was designed but failed to secure (see *White* v. *Allen*, *post*, p. 185), there is no occasion to enquire, for whatever Mrs. Shew inherited, as well as all that she may have acquired by devise, she conveyed in fee simple to her brother. At the date of that conveyance, and before its execution, he and she together owned, either in reversion or remainder, or in both ways, all of the testator's lands. The deed therefore invested him with an absolute title to them, subject to the life estates. His will gave to his wife, in fee simple, all the real estate of which he should die seized and possessed, or to which he might be entitled at the time of his decease. These terms covered all the Willimantic lands.

For the reasons above stated, the Superior Court is advised that said lands passed to the widow of Charles R. Ashley under said devise, and upon her decease became part of her estate.

No costs will be taxed in this court in favor of or against any party.

In this opinion the other judges concurred.

THE TOWN OF OLD SAYBROOK *vs.* THE TOWN OF MILFORD.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

It cannot be held, as matter of law, that a woman in feeble health, with three young children to maintain, is debarred by statute from receiving aid from the town, merely because she has $10 a month at her command for the support of herself and children.

In an action by one town against another to recover for necessary sup-

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plies furnished to a mother and her three young children, it appeared that the plaintiff's selectmen gave the required statutory notice to the defendant, and then, in a postscript, stated that the woman's husband had deserted her, that he was supposed to be in Milford, and that he ought to be arrested and made to support his family. The defendant replied, denying its liability, but offering to do all it could to aid the plaintiff; and stated that as a result of its action the husband had been arrested and had agreed to send his wife $4 per week for six months. The receipt of this letter was acknowledged and from time to time thereafter the plaintiff's selectmen informed the defendant by letter as to the condition of the wife and children and what was being done for their support. *Held* that there was nothing in this correspondence which could in reason or in law be deemed to limit the scope and effect of the original notice.

One item in the plaintiff's bill of particulars was for $3.60 for clothing supplied to the family. *Held* that even if it could be assumed that all of the clothing was for a baby a few weeks old who was born after the statutory notice had been given to the defendant, the case would merely call for the application of the maxim *de minimis non curat lex*.

This court will not find reversible error upon pure assumptions as to what the trial court may have done.

Whether the limitation upon the amount which one town can recover of another for necessary support furnished paupers, under § 2485, extends to and includes the medical treatment required to be provided by § 2478, *quære*.

Whether the limitation of § 2485, to a stated sum per week, is one that applies to each and every week, or permits the amount unexpended in one week to apply to the over-expenditure in another, *quære*.

In a suit to recover the expense of necessary support furnished to a family, the town is not obliged to show precisely what sum was expended for each member, and that such amount did not exceed the statutory limitation. The family may well be treated as a group of persons and dealt with collectively.

Argued October 6th—decided December 18th, 1903.

ACTION to recover for supplies furnished paupers, brought to the Superior Court in Middlesex County where the plaintiff's demurrer to the second defense of the answer was sustained (*Ralph Wheeler, J.*) and the cause was afterwards tried to the court, *Thayer, J.*; facts found and judgment rendered for the plaintiff, and appeal by the defendant. *No error.*

One Collins, having a settlement in the defendant town,

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but residing in the plaintiff town with his family consisting of his wife and three small children aged six, five and three years, respectively, on or about December 5th, 1900, deserted his family, leaving them in the plaintiff town poor and unable to support themselves. On or about December 9th they, being in this condition, applied to the plaintiff town for support, and on that date the town began to furnish them with necessary support, which was continued until November 15th, 1901. Within five days after said December 9th, the selectmen of the plaintiff sent by mail to the defendant the written notice outlined in the opinion, and thereupon followed the correspondence also outlined in the opinion. Collins' enforced weekly contributions therein referred to, amounted to $164 in the whole. The plaintiff never informed the defendant of the extent to which it was furnishing support, or of the amount of its bill, until July 8th, 1901, when an itemized account to date was sent. Neither this bill nor any other information in the matter was ever requested. The items on the debit side of the plaintiff's bill of particulars amounted to $371.99. Two credits were given: one the $164 paid by Collins, and the other $42.50 paid by one Pratt, the boarder referred to in the opinion, leaving $165.49 due, for which sum, with interest, the plaintiff claimed to recover.

The other pertinent facts are sufficiently stated in the opinion.

William B. Stoddard and *Robert C. Stoddard*, for the appellant (defendant).

William J. Brennan, for the appellee (plaintiff).

PRENTICE, J. The reasons of appeal which relate to the action of the court in sustaining the demurrer to portions of the second defense, need not be considered. Upon the trial the defendant was unrestricted in his proof of the facts alleged in such defense, and all the questions of law involved were then passed upon and made grounds of appeal.

The appellant contends that the persons to whom the sup-

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port was furnished by the plaintiff were not paupers within the meaning of the statute. The finding expressly negatives this contention. It is found that they were, during the whole period in question, poor and unable to support themselves, and that all that was furnished was necessary.

It is claimed that the facts detailed in the finding show that the court was led to the above conclusions by an erroneous view of the law. The family to which the aid was given consisted of the wife and three small children—the oldest being six years old. The period covered by the bill of particulars is practically ten months. The family was in receipt from the absent husband of $4 a week, the wife—who was in feeble health and delivered of another child at the end of four months—managed to earn fifty cents a week a part of the time, and a boarder—who by reason of Mrs. Collins's ill health was secured by the plaintiff's selectmen to do the heavy work about the house—contributed $2.50 a week for seventeen weeks. This income for the ten months, therefore, did not exceed $226.50. Of this amount, $84.75 was required to pay necessary doctor's and nurse's bills, leaving $131.75. It may be safely assumed that the $2.50 a week received from the boarder represented little profit. The resources of the family available for its support thus became reduced to a scant $100 or less. We are not prepared to say that we have upon our statute books a law so rigid or so harsh that a woman in feeble health, with three small children to house, clothe and feed, who has $10 a month at her command, cannot in these times as a matter of law satisfy the conditions entitling her to share in public beneficence.

It is next claimed, on behalf of the defendant, that the plaintiff neglected to give the required notice, and therefore cannot recover. The notice contained in the plaintiff's letter of December 12th was clearly a sufficient one, as counsel in argument conceded. *Washington* v. *Kent*, 38 Conn. 249; *Windham* v. *Lebanon*, 51 id. 319; *Bethlehem* v. *Watertown*, ibid. 490. It is said, however, that the accompanying postscript and subsequent correspondence operated to limit the

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notice and preclude recovery for any expenditure incurred in excess of the husband's forced contributions of $4 a week. The letter of December 12th distinctly notified the defendant that the family of Clinton L. Collins, consisting of the wife and three small children, were in the town on expense, and that the plaintiff would look to the defendant as the town of their settlement for reimbursement "for all legal charges for their support." The postscript gave the defendant information concerning the husband and his desertion of the family and present whereabouts, the names of persons from whom information concerning his settlement could be obtained, a request for advice as to what course should be pursued, and a suggestion that he should be arrested and made to support his family. The defendant replied under date of December 15th, disclaiming knowledge of Collins' residence, and advising the plaintiff that as the result of legal proceedings begun against him he had entered into an agreement to pay $4 a week for six months toward the support of his family. In reply to this letter, plaintiff on the 18th wrote at some length discussing the subject of settlement and the condition in which the family were. In the letter it was said that the writer, the plaintiff's first selectman, had directed the grocer aud marketman to furnish supplies not to exceed $4 per week, adding: "Section 3304 of the General Statutes (Rev. 1888) permits us to furnish and collect $3 per week for the mother and $4.50 for the three children." On January 1st, 1901, the plaintiff's first selectman wrote a letter in the course of which he said that he did not know exactly what the charges to date had been, but thought that they did not exceed $8, as the good people of the town, learning of the case, had furnished many supplies. The letter added: "We shall have to supply fuel, and I suppose pay the rent, which is $3 per month. As long as the family have no sickness, I think that $4 per week will maintain them." Here correspondence seems to have terminated until about the middle of June, when the plaintiff wrote, giving information of the birth of a child three weeks before, reminding the defendant of the early expiration of Collins' pledge of

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contribution, and asking if an itemized bill of expenses to date was desired. On July 8th, apparently without reply to the letter of June, such bill was sent. Subsequent correspondence was occupied with an attempt on the one hand to enforce, and on the other to escape, payment of the plaintiff's bill, which did not cease to accumulate until November 15th, 1901.

We fail to discover in this correspondence anything which in reason or law can be held to limit the scope and effect of the original notice. Any attempt to give such an effect to the plaintiff's letters, written in the most kindly and informing spirit, or even to the expressions of personal opinion therein, ignores the purpose underlying the statutory requirement of notice, and assumes for them a technical character which they do not and ought not to possess. *Hamden* v. *Bethany*, 43 Conn. 212.

But it is urged that no notice was given of the birth of the baby born on May 23d, until three weeks later, and that no notice such as the statute requires was then or afterwards given that aid was being furnished to it, and as a consequence that the court erred in allowing the plaintiff to recover for supplies furnished to this child.

This claim assumes that supplies were so furnished. The finding does not so state, and we know of no presumption that a new-born child does not, during the first four months of its existence, draw its sustenance from its mother. We know that it needs clothing, but we do not know that the plaintiff had to provide any for it. The bill of particulars indeed discloses that clothing was supplied to the family to the amount of $3.60. If it all went to the child, the record would only disclose a case for the application by us of the maxim *De minimis non curat lex.* We need not pause to state other answers to this too refined claim.

The defendant further claims that the court erred in including in its judgment items for support furnished between December 9th, 1900, and January 14th, 1901, while the complaint only seeks to recover for support furnished after January 14th. We fail to discover in the record any foun-

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dation for the assumption here made. The finding indeed states that the plaintiff began to furnish support on or about December 9th. It does not, however, appear that it has sued to recover, or has recovered, for support furnished farther back than January 15th, 1901. That is the date of the first item in the bill of particulars. We know that Collins began his weekly contributions on December 15th. It is quite supposable that these contributions were sufficient to meet the needs of the family until the middle of January, and that therefore no charge was included in the bill of particulars until that date. Such a supposition would go far to explain another claim of error made as to credits. But whether so or not, we are not justified in finding error upon pure assumptions as to what the court may have done.

Objection is made that the court erred in not crediting upon the plaintiff's account $192 as having been paid by Collins under his agreement and its extension, instead of $164, as credited. The court has expressly found that $164 was the total amount of these payments. There is nothing sufficiently found, as to the number of payments made within the time embraced in the bill of particulars, to justify a conclusion upon mathematical calculation that the court committed any mistake, even if that matter, relating to a question of fact, was before us for review.

Included in the bill of particulars is an item of $6 paid to a physician for attendance upon Mrs. Collins during her confinement, another of $30 paid for three weeks nursing upon that occasion, and another of $48.75 paid a physician for fourteen weeks attendance upon the second child at a later period. The defendant claimed that the plaintiff could not recover the whole of these several sums, since thereby the statutory limitation of $3 a week for the mother and $1.50 a week for each child was exceeded.

This claim assumes that the limitation contained in § 2485 of the General Statutes extends not only to the support provided to be furnished by that section, but also to the medical treatment required to be provided by § 2478.

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It also assumes that the limitation, which is one as to the rate per week for which there may be recovery, is one which may be applied to dissected partial periods or single weeks, so that the expenditure for no week or selected group of weeks can furnish a basis of recovery in excess of the prescribed sum.

It is unnecessary to discuss the correctness of these assumptions, since the plaintiff and Mrs. Collins were, subsequent to her confinement, in receipt of other income in excess of the amount of the items in question, which came without restriction and which they were at liberty to apply as they pleased. They were free to appropriate these moneys to the payment of doctors and nurses, and to call upon the defendant to reimburse for all other necessities required within the statutory limits. The defendant is asked to pay only $165.49, covering about forty-two weeks of support, being at the rate of scarcely $4 a week, as against the $7.50 permitted by statute to the family, not including the child born on May 23d. It is not in a position to successfully invoke the protection of the statute upon any view of its meaning or application.

The remaining reasons of appeal require only a passing notice. One objects to the judgment, upon the ground that on December 12th, when the notice was sent, the plaintiff was not actually furnishing support to the family. The finding expressly states the contrary. Another objects because no evidence was introduced showing that what was furnished was necessary for the support of the family. The finding is explicit in saying that all that was furnished was necessary. We are not to assume that the court found this fact without evidence. Another objection appears to be indicated, although not clearly stated, to the effect that the plaintiff must fail in its action for the reason that it did not show precisely what in amount was furnished to each member of the family, and that the amount to each did not exceed the statutory limitation. This claim appears to have been wisely abandoned in the brief. Clearly the plaintiff was under no such impossible duty as would thus be im-

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posed. It acted as it rightfully might and reasonably must, in treating the family as a group of persons connected by such ties as justified their being dealt with collectively and not individually.

There is no error.

In this opinion the other judges concurred.

AMOS KEEFE *vs.* THE TOWN OF UNION.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Under the provisions of General Statutes, §§ 2517 to 2552, relating to health officers, a town is liable for the reasonable value of services rendered and expenses incurred, at the request of its town health officer, in guarding quarantined premises during the prevalence of smallpox therein, and in furnishing necessary articles for the use of those afflicted with the disease.

Argued October 6th—decided December 18th, 1903.

ACTION to recover for services and expenses while guarding and caring for persons ill with smallpox, pursuant to direction of the town health officer, brought to the Superior Court in Tolland County where a demurrer to the complaint was overruled (*Elmer, J.*) and the cause was afterwards tried to the court, *Gager, J.*; facts found and judgment rendered for the plaintiff, and appeal by the defendant. *No error.*

Joel H. Reed, for the appellant (defendant).

Charles E. Searls, for the appellee (plaintiff).

HALL, J. The plaintiff seeks by this action to recover compensation from the defendant town for services rendered and expenses incurred by him in January and February, 1902, at the direction of the town health officer, in guarding

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and taking charge of certain premises in said town, and of the occupants thereof, among whom were two persons sick with smallpox, and also a number of workmen employed in loading and drawing lumber in a lot about a mile from said premises, all of whom had been quarantined in said premises by said town health officer.

It appears from the finding that at first two men were employed by the selectmen and paid by the town to guard the house day and night, to make the quarantine effective. After a few days the health officer discharged these two men and employed the plaintiff, under an arrangement that the workmen occupying the quarantined premises might during the day go to the wood-lot, where they had been working, and return to the house at night, in charge of the plaintiff, who was to guard the house and men and see that the quarantine was strictly observed. Whether this arrangement was approved by or known to the selectmen does not appear, nor does it appear that any greater expense was thereby incurred than would have been had the persons employed by the selectmen continued to guard the quarantined house. The said house was distant from any other house, upon an unfrequented road, and said workmen could safely pass from it to the wood-lot and return without endangering the public.

Under this arrangement the plaintiff, by direction of the health officer, took full charge of the house and its inmates for forty-eight days, and until the quarantine was raised, taking care that the workmen went directly to and from the house and wood-lot, and that no other person entered the house or left it. He also furnished, at the expense of the town, the provisions and other necessaries for the inmates of the house.

Nothing was said by the health officer to the plaintiff regarding payment for such services, but the plaintiff expected to receive reasonable compensation therefor, from the town.

The items of the bill of particulars were for services in guarding the quarantined premises for fifty-eight days; use of plaintiff's team and cash paid for telephoning, $116; and mat-

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tress and bedding for use of patients, $15. The court found that $111.40 was a reasonable compensation for such services and expenditures, and rendered judgment for the plaintiff for that sum.

The defendant claims that the health officer had no authority to bind the town by his contract for such services and expenditures.

As early as 1711 it was by Act of the General Court made the duty of the selectmen of each town to take all proper steps to prevent the spread of contagious diseases, and they were empowered by warrant of two assistants or justices of the peace to place in a separate house persons sick or suspected to be infected with the smallpox, and to take care of and provide nurses for such sick and infected persons, at the charge of such persons if they were able, otherwise at the expense of the town to which they belonged, and to perform other described duties to prevent the spread of disease. Col. Rec. 1706–1716, p. 231.

In 1760 the civil authority and selectmen of any town, in case they judged it expedient to grant permission for the innoculation of persons, were required to assign a place or house where it could be carried on, and to provide nurses to care for the persons infected; for which service a "meet recompence" was to be paid to said authority and selectmen by those concerned. Conn. Laws, 1750–1770, p. 298.

In 1805 it was enacted that the civil authority and selectmen of the several towns in the State should be "the board of health, in their respective towns," with all the powers and authority for preventing malignant and infectious disease delegated to the civil authorities and selectmen, or to the selectmen, and with power to appoint health officers or a health committee; and that among other things it should be the duty of such board, officers, or committee, to cause to be removed all nuisances and sources of filth, within the limits of their town, which in their judgment would endanger the lives or health of the inhabitants, the expense thereof to be paid by the persons causing the same, and, if not known, by the town. It was also provided by this Act that all penalties or fines

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incurred for any violation of said Act, or any regulation of the board of health, should be paid to the town and constitute a fund for the payment of the contingent expenses of the board and for the relief of poor persons of the town affected with infectious disease. General Statutes, Rev. 1808, p. 616.

In 1828 the boards of health in the several towns were required to adopt suitable measures for the vaccination of all the inhabitants of their respective towns, the expense thereof to be paid from the public treasury of the town. General Statutes, Compilation of 1835, p. 497.

An Act passed in 1866 provided that the board of health in any town might appoint such health officers and health committees as it deemed expedient, and delegate to them the powers possessed by the board. Public Acts of 1866, Chap. 5, p. 6.

In the Revision of 1875, pp. 258, 260, the town board of health is described as consisting of the justices of the peace and selectmen of each town, and is given all the power necessary and proper for preserving the public health and preventing the spread of malignant diseases; and is, among other things, specially empowered to order any person, "whom they may have reasonable ground to believe to be infected with any malignant, infectious, or contagious disease, into confinement in any place to be designated by said board, there to remain so long as said board shall judge necessary."

In 1878 an Act was passed providing for the appointment by the governor, with the advice of the senate, of a state board of health, to consist of six persons, of whom three were to be physicians and one a lawyer; and among its duties are those of taking "cognizance of the interests of health and life among the people of this State," and of investigating and inquiring respecting the causes of disease, and causing proper sanitary information in its possession to be promptly forwarded to the local health authorities of any city, borough, town or county in the State. The salary of the secretary, and certain expenses of such board, are paid by the State. Public Acts of 1878, pp. 349, 350.

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Chapter 14 of the Public Acts of 1882, p. 125, provides for the addition to the town boards of health of "such reputable physicians resident in said town as shall be chosen for that purpose by said justices and selectmen."

In 1886 (Public Acts of 1886, Chap. 59, p. 582) it was enacted that the town boards of health should meet annually on a fixed day and elect officers of the board; and in 1887 (Public Acts of 1887, Chap. 65, p. 694) that the officers, so annually elected, should include a health officer or committee endowed with all the powers of the board, and that in case any town board should fail to elect such health officer or committee, the state board of health might appoint as health officer any reputable physician with full powers of the board, at a salary of not less than $50 a year, to be paid by the treasurer of the town.

The Act of 1893 (Public Acts of 1893, Chap. 248, p. 399) abolished all town boards of health, and provided that the judges of the Superior Court should appoint for each county a health officer to hold office for four years, to be paid by the State, who should appoint for each town some "discreet person, learned in medical and sanitary science, to be health officer for said town," and to exercise in such town—except within the limits of cities and boroughs empowered by charter to appoint health boards or officers—all the powers and duties by law vested in and imposed upon town boards of health, or health officers or committees. Such town health officers are required to report their doings annually to the town in which they are respectively appointed, such reports to be published "with other town reports," and to report to the county health officer and to the state board of health. Such town officer is to be paid by the treasurer of the town "not less than three dollars for each day of actual service, with his necessary expenses, on the approval of his bill by the county health officer."

Chapter 162 of the Public Acts of 1895, p. 527, empowers the town health officer to cause swampy depressions where there are unhealthy conditions, to be filled up, under the direction of the selectmen, the expenses incurred thereby, with

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certain limitations, to be paid by the treasurer of the town, upon the order of the selectmen.

Chapter 145 of the Public Acts of 1895, p. 519, provides for the appointment by the common council of any city or the court of burgesses of any borough, upon the nomination of the mayor or warden, of some "discreet person learned in medical and sanitary science" to be health officer for such city or borough, with "all the rights and authority," and "subject to all the duties," provided by law for the board of health or health committee of such city or borough; and in case of the failure of such city or borough authorities to so appoint, for the appointment of such city or borough health officers by the health officer of the county in which such city or borough is situated; the compensation of such health officers to be fixed by such common council or burgesses, and if not so fixed to be not less than $3 for each day of actual service, with his necessary expenses, on approval of his bill by the county health officer.

These are the principal legislative enactments prior to 1902 concerning the powers and duties of health boards, health officers, and health committees, in this State, their appointment and compensation, and the liability of towns for the expense incurred by such boards and officers in the performance of their duties.

The Revision of 1902 contains substantially the same provisions concerning the appointment and compensation of the state board of health, and of the county, city and town health officers, as are found in the Acts of 1878, 1893 and 1895, above referred to; and in relation to the powers and duties of such town and city health officers, substantially the same provisions as are contained in the several Acts before referred to describing the powers and duties of health boards, and of the officers and committees appointed by such boards.

Section 2548 of the Revision of 1902 contains the provision that all fines and penalties for violations of health laws and regulations shall be paid to the town, city or borough in which the offense is committed; but the provision that such

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money shall be a fund for the use of the health officers is omitted.

From this legislation it will be seen that it has long been the policy of this State to require its towns and other municipalities to take, at their own expense, such measures within their respective limits as were deemed necessary to preserve the public health and prevent the spread of disease; and that for the accomplishment of that object, such acts as those described in the plaintiff's bill of particulars have always been required to be performed, in such towns, either by the selectmen, or by a board of health composed either of officers of the town, or of such officers and others chosen by them, or by one or more health officers, or a health committee, appointed either by such board or in some other manner, to be the health officer or officers for such town; and that such compensation as has been paid such health officers for their services, and the expense properly incurred by them in the performance of their duties, has been required to be paid by the town for which such officers were appointed and acted.

The State has required such duties to be performed by its towns and cities and by their respective health officers, not so much upon the ground that the prevention of disease is a matter of local interest, and that such duties are strictly municipal in their character, by the performance of which such towns and cities are benefited in their corporate capacity, as for the reason that the preservation of the public health is deemed to be a matter of interest to the entire State, and the duty so imposed upon the municipalities is deemed to be of a public and governmental nature, in the performance of which such towns and cities, and their health boards and officers acting for them, are governmental agencies acting for the benefit of the public. *Davock* v. *Moore*, 105 Mich. 120, 128.

This policy of the State was not changed by the Act of 1893. The principal purpose of that Act was "the creation of a single responsible officer in each town who should be charged with the important duties imposed upon health officers" (*Braman* v. *New London*, 74 Conn. 695, 697), and

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who, by being "learned in medical and sanitary science," would be qualified to perform such duties; and this purpose it was thought could best be accomplished by abolishing town boards of health and changing the method of appointing town health officers.

Clearly it was not intended, by so changing the manner of appointment of town health officers, to relieve the towns from the expense of the measures required by law to be taken in such towns for the preservation of health, since the provisions of the earlier statutes requiring towns to pay such expense still remain in force, and the Act of 1893 further provides that each town shall pay for the services and necessary expenses of its health officer.

The defendant is not relieved from liability by the fact that its health officer is no longer appointed either by the town or the town officers. For the accomplishment of such a public object as the preservation of the public health and the prevention of the spread of disease, it is competent for the legislature either to itself appoint, or to direct the manner of appointment of persons to act as town health officers, in order that the officers chosen may be qualified to adopt the best measures and render the greatest assistance in the performance of the public duty placed upon such towns; and it is also within the power of the legislature to impose the expense necessarily incurred by such health officers, in the performance of their duties, upon the municipalities for which they are respectively appointed, and the inhabitants of which are especially benefited by the acts of such health officers. *State ex rel. Bulkeley* v. *Williams*, 68 Conn. 131, 148.

The word "expenses," in the provision of the Act of 1893 (§ 2522) that the necessary expenses of the town health officer shall be paid by the town treasurer upon the approval of his bill by the county health officer, means something due the health officer. *Heublein* v. *New Haven*, 75 Conn. 545, 547. The sum due the plaintiff has not been paid by the health officer, nor is it claimed that he has incurred any personal obligation to pay it. It was not the purpose of this

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provision that bills for services rendered at the direction of a health officer must be paid by him, or that they should be paid only when approved by the county health officer.

The rule exempting municipalities from liability for the negligent acts of their officers or servants while engaged in the performance of a governmental duty does not, as seems to be argued, relieve them from paying the expense incurred in the performance of such a duty.

The services rendered by the plaintiff, at the direction of the health officer, were by such officer, and apparently by the selectmen, deemed necessary for preventing the spread of a malignant disease. They were such services as under the statute the health officer had power to order to be performed, and as were intended to be performed under his direction. Unless such health officer possesses the power to bind the town for the payment for such services, it might be impossible for him to perform the duties which the law requires him to perform. We think he has such power, and that, in the absence of any express provision in the statute for the payment for such services, it is clearly implied by the language defining the duties and powers of a town health officer and expressly giving to him "all the powers necessary and proper for preserving the public health and preventing the spread of diseases" in the town for which he is appointed, that such town is liable for the payment of a reasonable compensation for such services and expenses as are described in the plaintiff's bill of particulars, when ordered by its health officer. *Elliott* v. *Kalkaska Supervisors*, 58 Mich. 452; *Labrie* v. *Manchester*, 59 N. H. 120; *Lynde* v. *Rockland*, 66 Me. 309.

The bill of particulars is sufficiently specific to cover the items included in the judgment.

There is no error.

In this opinion the other judges concurred.

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THE TOWN OF EAST GRANBY *vs.* THE HARTFORD ELECTRIC LIGHT COMPANY.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

In 1899 the defendant's property in East Granby, consisting of a partially completed water-power and electric plant, was assessed at a valuation of $16,600 under the following items: "Mills, stores and manufactories $15,000, dwellings $800, land $800." Prior to October, 1900, the defendant had completed and was operating its plant, the electricity produced by the water-power being transmitted by wires for use in Hartford. In that year it handed in the tax list of its property on the ordinary printed form, writing the numerals "20" before the printed words "Acres of land," and "$800" in the adjoining column under the printed head of "Owner's valuation." It also wrote under the heading of "Owner's valuation," but up and down instead of across the sheet, "The same as last year." The assessors, without any notice to the defendant, completed the list by writing "Plant of the Hartford Electric Light Co. $100,000"; and the present action was brought to collect the tax laid upon the list as thus completed. *Held*:—

1. That it did not appear, either from the finding of the court or from the evidence presented in the record, that the assessors had added any property to the list as filed by the defendant, and therefore the notice required by statute (§ 2307) to be given to the defendant in case of such addition, was unnecessary.
2. That the description of the property as the "Plant of the Hartford Electric Light Co.," was, in connection with the other descriptive words in the list and abstract, sufficient for the purposes of taxation.
3. That although the defendant's dam and reservoir were partly in Bloomfield, the water-power created was "used and appropriated" in East Granby, within the meaning of § 2345.
4. That the abstract of the tax list of 1900, in connection with the lists themselves, were properly admitted to prove the allegation that the property in question had been duly assessed at $100,000 and so set in the list.

Whether the list filed by the defendant in 1900 met the requirements of the statute (§ 2303), *quære*.

Argued October 7th—decided December 18th, 1903.

ACTION to recover a tax, brought to and tried by the

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Superior Court in Hartford County, *Roraback, J.;* judgment for plaintiff, and appeal by defendant. *No error.*

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

Theodore M. Maltbie, for the appellee (plaintiff).

HALL, J. On October 1st, 1900, the defendant owned taxable property in the plaintiff town consisting of land, buildings and machinery for producing electricity, and a water-power with a dam and reservoir on the Farmington River, one half of the dam being in the plaintiff town and the remainder in the town of Bloomfield; all of which was then completed and in operation for said purpose, and was the only property then owned by defendant in the plaintiff town. Said water-power was used only for the purpose of operating such machinery. The electricity produced was transmitted to and used in Hartford.

On October 1st, 1899, the defendant owned said land but had not completed the erection of said dam and buildings and the placing of the machinery, and that year the defendant's property in said town was assessed at $16,600, being entered in the abstract of tax lists for that year, as stated in the finding, as "20 acres of land $800; buildings $800; mills, manufactories, electric plant, $15,000."

On October 1st, 1900, the defendant filed with the assessors of the plaintiff town what it claims is such a tax list as is described in §§ 3802, 3803 of the General Statutes of 1888 (§§ 2296, 2297 of the Revision of 1902). It was the ordinary printed form for that purpose, upon which the court finds were written before the printed words "Acres of land," the figures "20," and against that item in the column for valuation, the figures "$800"; and transversely across said blank and apparently applying to all the other items printed upon it, the words "The same as last year," no value of such other items of property being stated upon said blank.

After receiving this so-called tax list, the assessors "completed the same by writing thereon the words 'Plant of the

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Hartford Electric Light Co., $100,000.'" This item was entered against the defendant's name upon the plaintiff's abstract of tax lists for 1900, lodged in the town clerk's office, as "Mills, Stores, and Manufactories, Plant of Electric Light Company, $100,000." No notice of such action of the assessors was given to the defendant until the bill for said tax was presented for payment.

The defendant contends that these facts show that by their action the assessors added to the list given in by the defendant, property not contained in its list, and that the failure of the assessors to give to the defendant the notice of such addition, required by § 3812 of the General Statutes of 1888 (§ 2307 of the Revision of 1902), rendered the tax sought to be collected invalid.

Said sections provide that the assessors may add to the list of any resident, or of any non-resident who has given in such a list as is required of residents, any taxable property which the assessors have reason to believe is owned by him, and is omitted from his list, but that they shall within a certain time give written notice to him of such addition.

The argument of the defendant is, that the facts show that the Hartford Electric Light Company, on October 1st, 1900, handed in a valid list, in which it described its taxable property in the plaintiff town as twenty acres of land, and gave its valuation as "the same as last year"; and that the assessors by writing upon such list, and also against the defendant's name upon the abstract of lists, the words "Plant of the Hartford Electric Light Co., $100,000," added to said list other property than said twenty acres of land, and that therefore, to render the tax valid, the notice should have been given as prescribed by the section of the statute referred to.

Whether we consider the facts as stated in the finding or as established by the evidence before us—and it appears that the defendant offered no evidence upon the trial—they fail to sustain the defendant's claim. It clearly appears, both from the finding of the court and from an inspection of the list itself, that the words "Same as last year" were not written by the defendant upon its list for the purpose of

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stating its valuation of the twenty acres of land. If such valuation had already been given as $800, why add "Same as last year"? The owner is not required to give his valuation of the land described in his list, although it is proper for him to do so.

From both the finding and the evidence it is manifest that the words "Same as last year" were used by the defendant to describe, by reference either to the tax records or to the defendant's list of the previous year, all its property taxable in the town on October 1st, 1900, embraced in the printed items upon the blank form, excepting perhaps the twenty acres of land, and very likely these words were intended as a statement also, by such reference, of the owner's valuation of such property.

Assuming, without deciding, that such a list meets the requirements of §§ 3802, 3803 of the General Statutes of 1888 (§§ 2296, 2297 of the Revision of 1902), it does not appear from the record that the property placed by the assessors in the defendant's list, and in the abstract of lists for 1900, was not the same as the property listed and taxed as defendant's taxable property in the previous year. The tax list of 1899 was not laid in evidence at the trial, although the abstract of the lists for that year appears to have been. The plaintiff was not required to produce the list or abstract of 1899 in order to make out a *prima facie* case. There is no presumption that the property described in the list and abstract of 1900 as "Plant of the Hartford Electric Light Co." was not contained and so described in the list of 1899. On the contrary, from the facts proved by the plaintiff and in the absence of opposing evidence, the presumption is rather that the assessors acted regularly and properly, and that the property described in the list of 1900 is the same as that listed and taxed in 1899. It was proper for the assessors in perfecting the lists to examine both the lists and the abstracts of the previous year. Revision of 1888, § 3813; General Statutes of 1902, § 2308. As the defendant claimed that the property described in the list of 1900 was neither the same as that placed in that

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list by the defendant, nor the same as that listed in the previous year, and that the tax in question was therefore invalid for want of notice of an addition to its list, the defendant was required, in order to meet the *prima facie* case established by the plaintiff, to present some evidence to support such claim.

Under § 3812 of the Revision of 1888 (General Statutes of 1902, § 2307) the defendant was not entitled to notice of an increase by the assessors of the valuation of the property described in the list, over the owner's valuation given in such list, or over the valuation of the same property in the previous year. *Goddard* v. *Seymour*, 30 Conn. 394, 398; *Monroe* v. *New Canaan*, 43 id. 309, 312. The fact that the defendant's property was assessed at $16,600 in 1899 and at $100,000 in 1900 does not, upon the facts in this case, show that the assessors added to the list of 1900 property not described in that list by the defendant, or property not described in the list of the previous year. The facts and evidence before us do not show that the defendant was entitled to the notice prescribed by the section of the statute above referred to.

The description of defendant's property in the list and abstract of 1900, as "Plant of the Hartford Electric Light Co., $100,000," was, with the other descriptive words with which these words were connected in the tax list and abstract, a sufficient description of property for the purposes of taxation. *Monroe* v. *New Canaan*, 43 Conn. 309, 311; *Lewis* v. *Eastford*, 44 id. 477. If it is described in the same words as in the tax record of the previous year to which the defendant referred by the words "Same as last year," the defendant cannot be heard to complain.

Although the defendant's dam and reservoir were located partly in the town of Bloomfield, the water-power created was used and appropriated in the plaintiff town within the meaning of § 3850 of the Revision of 1888 (General Statutes of 1902, § 2345), and all the property taxed was, apparently, properly taxed under the statutes regulating the taxation of such property, as located in the latter town.

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The abstract of the tax lists of 1900, which by § 3815 of the Revision of 1888 (General Statutes of 1902, § 2310) the assessors are directed to make and lodge with the town clerk, were properly received in evidence, in connection with the lists themselves, as proof of the allegation of the complaint that the property in question had been duly and properly assessed at $100,000 and so set in the assessment list.

The court properly denied the defendant's motion for further corrections of the finding.

There is no error.

In this opinion the other judges concurred.

THE STATE EX REL. CHARLES P. HOWARD *vs.* THE HARTFORD STREET RAILWAY COMPANY.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, JS.

Final judgment rendered upon the merits of an application for a peremptory writ of mandamus comes within the principle of *res judicata*, and is a bar to another application for the same writ by the same party under the same circumstances.

The city of Hartford applied for such a writ to compel the defendant to remove a cross-over switch it had constructed at a point not authorized by the municipal council, and final judgment upon the merits was rendered in favor of the defendant. *Held* that such judgment was a bar to another application for the same writ by the relator, a citizen of Hartford, merely to enforce his rights as one of the public.

While a street-railway company which does not adhere in all particulars to the plan for the construction of its line adopted by the local municipal authorities, may, at their instance, be required to conform thereto (§ 3824), it does not necessarily follow that its disobedience in a mere matter of detail—in this instance the location of a cross-over switch some distance from the place indicated on the plan—is, for that sole reason, a public nuisance abatable by an adjoining proprietor who suffers special annoyance therefrom. If such an-

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noyance is in its nature a necessary incident to the use of the highway for public travel, the street-railway company is not liable, although the annoyance happens to fall with greater stress upon such proprietor on account of his proximity to the switch. It is the nature of the annoyance, and not the disobedience of the street-railway company, which determines its liability to those who happen to suffer most from the annoyance.

If, owing to physical or other conditions existing at that point, the annoyance caused to the adjoining proprietor is so peculiar and exceptional, and so injurious to the quiet enjoyment of his home, as to constitute an invasion of his property rights, he may then be entitled to equitable relief, but not to a writ of mandamus. Such private right could not be enforced, however, without establishing the absolute illegality of the structure at the point in question.

Argued October 7th—decided December 18th, 1903.

APPLICATION for a writ of mandamus requiring the defendant to remove a cross-over switch, brought to and tried by the Superior Court in Hartford County, *Roraback, J.*, after motions to quash the application and alternative writ, as well as a demurrer to the return and one to the reply, had been overruled (*Thayer, J.*); facts found and judgment rendered for the defendant, from which the relator appealed. *No error.*

Edward B. Bennett, for the appellant (relator).

Lucius F. Robinson, with whom were *John T. Robinson* and *M. Toscan Bennett*, for the appellee (defendant).

HAMERSLEY, J. The relator claims a right to pursue this writ of mandamus on two distinct grounds: first, by reason of his interest as a citizen of Hartford in the enforcement of the legal duty the defendant owes specially to that portion of the public represented by the city of Hartford; second, by reason of his interest as a stranger suffering special damage from the defendant's failure to perform the corporate duty alleged.

The defendant in its return alleged a former judgment of the Superior Court denying a peremptory writ to enforce the precise, specific duty the relator now seeks to enforce. The

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return in connection with the reply also put in issue certain material facts. Upon the trial below the defendant claimed that the former judgment constituted a bar to the relator's right to pursue this writ on the first ground, and that upon the facts admitted and found by the court the relator could not maintain the action upon the second ground. The trial court supported these claims of the defendant, and if this action is correct the judgment denying the peremptory writ must stand.

The history of this case and the material facts as shown by the record before us may be briefly stated thus: The defendant was authorized by the legislature to construct and operate a double-track electric railway through Farmington Avenue in connection with a system of street railways authorized in the city of Hartford. In 1899 the defendant presented to the mayor and common council of the city of Hartford a plan showing the location and mode of constructing and operating the double-track railway it was authorized to construct in Farmington Avenue. This plan, as modified by the addition of certain conditions to be performed by the defendant, was adopted. The statute (Public Acts of 1893, Chap. 169, §§ 2, 3) forbade the defendant to depart from this plan in constructing its railway, and gave to the city council control over the placing of the tracks in accordance with the plan, and power to order the removal of tracks not so placed, and authorized the enforcement of such order by writ of mandamus. *Hartford* v. *Hartford Street Ry. Co.*, 73 Conn. 327, 336. The plan thus adopted prescribed the precise portion of the highway to be occupied by the railroad structure, and provided that this structure should be built with four cross-over switches, so-called, connecting the two tracks, so that in case of necessity a car on one track might be transferred to the other track. This mode of constructing a double-track railroad is necessary to the safest operation of the road and to the most efficient service of public convenience. The site where each crossover was to be placed was designated by the plan.

The defendant constructed its railroad in accordance with

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the plan, except that one cross-over switch was built 950 feet east of Sigourney Street and in front of No. 116 Farmington Avenue, instead of 420 feet east of Sigourney Street, as required by the plan. The city council, in accordance with the provisions of the statute, ordered the defendant to remove this switch, and applied for a peremptory writ of mandamus commanding the defendant to obey this order. The mandate prayed for is thus stated in the alternative writ: "It is hereby required and enjoined of you, the said Hartford Street Railway Company, that before the first Tuesday of May, 1900, you remove said cross-over located on Farmington Avenue in front of No. 116, as required by the said order of the mayor and court of common council of said city of Hartford, and in all respects to obey said order and conform to the laws of this State in regard thereto." With the exception of the date of performance this is the same mandate asked for in the case now before us.

The defendant moved to quash the alternative writ, and upon this motion being granted by the Superior Court the city of Hartford appealed to this court.

We held that this difference in the location of the switch was enough to prevent the defendant from claiming a construction in substantial accordance with the plan, as against an order of the council enforcing its power of control; that mandamus would lie on application of the city to compel obedience to this order; and that the facts showing the legal duty of the defendant to obey the order were sufficiently alleged; and thereupon we reversed the judgment rendered on the motion to quash, and remanded the cause for further proceedings in the Superior Court. *Hartford* v. *Hartford Street Ry. Co.*, 73 Conn. 327.

The defendant then made return, and the case was tried upon issues of fact. The trial court found the issues of fact in favor of the defendant, and further found that in view of all the facts a writ of peremptory mandamus, even if legally permissible, ought not to issue, and for this reason dismissed the alternative writ.

Upon appeal by the city from this judgment, we held that

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in refusing to issue a peremptory writ the court did not pass the limits of its legal discretion, and that its action was not reviewable. In this connection we said: "The writ of peremptory mandamus is an extraordinary remedy. Like other extraordinary remedies it can be applied only under exceptional conditions, and must to a certain extent be subject to judicial discretion. *Daly* v. *Dimock*, 55 Conn. 579, 590; *Chesbro* v. *Babcock*, 59 id. 213, 217. It appears from the finding, that the duty imposed upon the defendant by law depends upon a construction of the language used in the vote of the court of common council approving the location, which cannot be said to be free from doubt until authoritatively established; that the interest of the city in the removal of the track in question, whether pertaining to it as a private corporation or as representative of public interest (except its vital interest in the prompt obedience of this defendant corporation to its lawful orders), was not substantial. On the contrary, it appeared that the track in its present position served rather than injured the public interests; that the track was placed by the defendant in pursuance of the direction and approval of the city officials charged by law with the execution of the orders of the council in respect to highways, in the well-grounded belief that as thus placed it complied with the directions of the court of common council. Such conditions do not necessarily exclude discretion. Certainly, extreme caution should be used in denying a writ which the court may lawfully issue, but we cannot say that in this case there has been such a plain misconception of sound discretion as would render the judgment erroneous. Some of the other errors assigned invite question. Apparently full effect was not given to the scope of our former decision; but the errors are not material in view of the ground on which the judgment stands." *Hartford* v. *Hartford Street Ry. Co.*, 74 Conn. 194, 196.

The real parties to this former action were the city of Hartford—a territorial municipal corporation acting specially in behalf of that portion of the public composed of its inhabitants—and the present defendant. The cause of action tried

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and determined involved the right of this portion of the public to a peremptory writ of mandamus compelling the defendant to obey the order of the city council. The court has adjudged that such right does not exist. Whether this conclusion is reached because it has found that no duty of obedience has been violated, or because it has found that such enforcement of a nominal duty would work injustice to the defendant without benefit to the public and would therefore be inequitable, it is a final adjudication of the real cause of action upon its merits. No question of a possible right upon a change of circumstances, to again apply for a writ orginally denied because its issue would be inequitable, is involved in this case. An adjudication of an application for a peremptory writ of mandamus upon its merits comes within the principle of *res judicata*, and is a bar to another application for the same writ by the same party. *Regina* v. *Pickles*, 3 Q. B. 599, note. In so far as each inhabitant of the city of Hartford was entitled to make the application made by the city, the relator, as such inhabitant, was a party to that application and is barred by the judgment therein. If the application be regarded as an ordinary action by the city in its corporate capacity, each inhabitant is by our law regarded as a party to the suit. *Beardsley* v. *Smith*, 16 Conn. 368, 380.

The application of the relator as a citizen of Hartford, in the present case, alleges substantially the same facts and asks for the same writ denied by the former judgment, and that judgment is a bar to this action.

Mandamus will never issue to enforce a private right. To justify its issue to compel a private corporation to do a particular act, it must appear that the act is in the nature of a corporate act specially commanded by law; and in general it will issue only at the instance of the public or of some person entitled to represent the public, including the individual in respect to whom the act commanded is to be done, or of some person who, though a stranger to the corporation and to the public interest, suffers an infraction of his private right at the hands of the corporation in doing the act forbidden or not doing the act commanded; and in this latter case

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the mandamus compelling performance of the corporate duty should be an effective remedy for the infraction of the private right, and must be the only full and adequate remedy for that infraction. *American Asylum* v. *Phœnix Bank*, 4 Conn. 172, 178; *Tobey* v. *Hakes*, 54 id. 274, 275.

The second ground on which the relator claims the right to pursue this writ involves the application of these general principles to the facts alleged by the relator and found by the court. The grievance of Mr. Howard (the relator) against the defendant, for which he claims a right of legal redress, is this: Mr. Howard occupies No. 116 Farmington Avenue as the home of himself and family. The defendant's railroad tracks placed on Farmington Avenue in front of his residence are constructed with a cross-over switch, and, by reason of the proximity of his home to the railroad tracks thus constructed, the noise and vibration caused by the defendant in running its cars over these tracks is an annoyance to said Howard, causes great discomfort to him and his family, and greatly disturbs and interferes with the comfort and quiet enjoyment of his home. Assuming that the annoyance thus suffered by Mr. Howard is one for which the defendant is legally liable to him, we do not think that it furnishes—in connection with the other facts found—legal reason for the issue at the instance of Mr. Howard of the peremptory writ of mandamus he asks for in his application.

The relator's argument in support of his contention is based mainly, if not wholly, upon the assumption that inasmuch as the construction of the railroad tracks with four cross-over switches, authorized by the legislature and approved by the city council, differed in detail of execution from the plan approved by the council, in that one cross-over switch connected the two tracks at a point 500 feet distant from that indicated on the plan, that particular switch was, when placed on the street, and has ever since remained, a public nuisance in the sense of being an unlawful obstruction or encroachment upon the highway. The relator's argument is, that the switch being a public nuisance of this kind, the annoyance suffered by him is a special damage caused by the

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nuisance, entitling him to its abatement, and therefore he has a legal right to demand the issue of a writ of mandamus commanding the defendant to obey the order of the city council.

Whether this argument is sound or not, we think the assumption on which it is based is incorrect. It may be that a railroad structure of this kind placed in the highway is an unlawful obstruction unless its location and mode of construction is submitted to and approved by the council, and it may be that after such approval a road can be located and constructed in such utter disregard of the plan approved as to be in effect a road built without submission or approval. But it cannot be that a railroad authorized by the legislature, approved in its location and mode of construction by the council, and built in substantial accord with that approval, is a public nuisance merely because in some detail of construction there is a departure from the plan approved. And it cannot be that a particular part of the structure so built, which differs in detail from the mode of construction indicated by the plan, is for that reason only a public nuisance, although the difference may be sufficient to justify the council in ordering the part to be removed and the construction made to conform to the plan. For instance, in the plan before us the railroad ties are required to be of oak or chestnut wood and the steel rails to be of a specific weight. Can it be that any tie of a different wood, or any rail of a different weight, is for that reason only an unlawful obstruction on a highway, and so for that reason a public nuisance? Such effect cannot reasonably be given to the legislation regulating the novel and peculiar situation arising from the relation of the defendant corporation and the city to each other and the highways. That legislation recognizes a railroad structure as a part of the highway furthering the identical public use of common travel for which the highway was established, unless authorized for a different purpose, or constructed and operated so as to be perverted to a different purpose and to invade property rights without compensation. *Canastota Knife Co.* v. *Newington Tramway Co.*, 69 Conn. 146, 154; *New York, N. H. & H. R. Co.* v. *Fair Haven & W. R. Co.*, 70 id. 610, 615.

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It provides for the construction and maintenance of highways, thus combining facilities for travel in vehicles requiring a tramway for their use and in those which do not, by two agents of the State, viz., the municipality and the railroad corporation, and regulates their relations to each other and to the highway. Before commencing the construction of the tramway, they must come to an agreement as to the mode of construction and any conditions of assent to the particular plan involving obligations on the part of the railroad company such as the municipality may properly require. In directing construction in accordance with the plan thus agreed upon and adopted, the municipality is the superior and the railroad company is the subordinate; and the legislation provides modes of enforcing obedience to the lawful orders of the superior; but it does not, as by legislative mandate, command the parties to follow the precise mode of construction indicated in the plan. On the contrary, the whole discretion as to mode of construction, whether in adopting a plan or in executing one adopted, is vested in the parties. In making the discretion of the railroad subject to that of the city, and providing efficient means whereby the latter can enforce obedience, the law makes full provision for any departure from the plan, in detail of construction, by the railroad without assent of the city, but does not directly or impliedly declare that, by the mere fact of such departure, the tramway or any part of it ceases to be a constituent part of the highway, facilitating its use for public travel, and becomes a mere lawless obstruction to that travel. If the railroad company in some detail of construction departs from the plan adopted, the city has the power to compel conformity, but is not necessarily bound to do so. It is within its discretion to ratify the variation by a formal change of the plan in the manner provided, if not by informal acquiescence; and even when the council has issued an order of conformity, the city is not necessarily bound to enforce that order, either by writ of mandamus as authorized by the statute, or by itself doing the work at the expense of the company. It is still within its discretion to ratify the change.

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It may be doubtful whether the duty resting on the railroad company, of exact conformity with the plan in detail of construction, is a corporate duty that can be enforced by mandamus except at the instance of the city, as specially authorized by statute. There certainly is an apparent distinction between the duty thus subject to the discretion of the city, and that absolute corporate duty created by legislative command, to do or not to do a specific thing. It is not, however, necessary to the determination of the present case to solve that doubt, and we leave the question an open one.

The annoyance of which the relator complains is that caused by public travel in a public highway. The highway is lawfully constructed with a double-track railroad for the accommodation of that travel. The railroad is constructed with cross-over switches found to be a reasonable construction for the safety and convenience of that travel. The aggravation of noise and vibration, when this travel passes over a cross-over switch, is the precise annoyance which the relator alleges as entitling him to legal redress against the defendant. It is found, and it is obvious, that such annoyance is incident to the public use of the highway, and the defendant, either as a private corporation or as agent of the State in maintaining the highway fit for that use, is not liable to the person so annoyed. It further appears that the annoyance from travel passing over a cross-over switch is felt most keenly by those living in close proximity to the switch, and that if the defendant obeys an outstanding order of the city council the relator will for the time being be relieved from the stress of the annoyance.

The defendant is not liable for an annoyance of this kind, because such annoyance is an incident to the use of the highway for public travel, and is not made liable because, through its disobedience of the council's orders, it happens to fall with greater stress upon the relator than upon his neighbors. It is the nature of the annoyance as a necessary incident to the public use of the street, and not the defendant's obedience to the council's order, which determines its

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liability to those who happen to suffer most by the annoyance.

The relator seems to claim that the annoyance suffered by him is not merely an ordinary incident to the use by the public of a highway constructed with a double-track tramway and a cross-over switch, but that owing to physical or other conditions existing at this particular place it is peculiar and exceptional, and so injurious to his right to the quiet enjoyment of his home that the legislature in authorizing a street railway cannot be held to have authorized its construction in such manner at this place, or that the legislature itself cannot authorize such an invasion of his rights of property without compensation.

If this claim is well founded the relator has a grievance against the defendant and is entitled to legal redress; but such right does not entitle him to a writ of mandamus commanding the railroad to obey the order of the city council. His private right cannot be enforced without establishing the absolute illegality of such construction of the highway at this point, whether built with or without the joint action of the defendant and the city council; this question is not involved in an application for the writ; that is based upon the defendant's failure, in thus constructing the road, to conform with the agreement between itself and the city, adopted for defining the mode of construction.

If it appears that the defendant has conformed to the agreement, notwithstanding the construction invades the clear legal right of the relator, the writ asked for cannot issue.

Moreover, if, pending the application, the city council sees fit to exercise its power and discretion by rescinding the order, the writ cannot issue. There is, then, nothing upon which it can operate, although the invasion of the plaintiff's rights remains unchanged.

An ordinary action in equity will, however, furnish a complete remedy for testing the existence of such a wrong to the relator and giving the relator full and adequate redress; this of itself is a conclusive answer to any application for the extraordinary remedy by writ of mandamus.

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These considerations go to the root of the relator's right; the law is so that neither upon the facts found by the trial court, nor upon any state of facts claimed or suggested by counsel, can this writ of mandamus be issued at the instance of the relator. It is therefore needless to consider other errors assigned.

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

In this opinion the other judges concurred.

JOHN H. WHITE ET AL., TRUSTEES, *vs.* JULIA P. ALLEN ET AL.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

P, a testator, whose will was executed in 1872 and who died in 1879, gave the residue of his estate to trustees, the income of which was to be paid over to his widow and others during her life, and thereafter to the testator's four sisters, *A*, *B*, *C* and *D*, in equal portions, during their respective lives. On the death of either *B* or *C* (both of whom were childless), her share of the income was to be paid to her surviving sisters, equally, and on the death of *A* or *D* their respective portions were to be paid to their children during the lifetime of said children, the issue of each child taking the part of any deceased parent. Upon the decease of the last of said children the remainder was to be transferred in fee to the grandchildren of *A* and *D*, or their issue or legal representatives, according to the law of descent. *A* died in 1888, *B* in 1889 and *C* in 1902; *D* is still living. In a suit by the trustees to determine the construction of the will, it was *held*:—

1. That inasmuch as the provision for the payment of income to the children of *A* and *D*, and to the issue of any of such children as might die, rendered it possible for the income to go to those who were not "the immediate issue or descendants" of such as were in existence at the time of making the will, that feature of the trust was void as a violation of the statute against perpetuities (Rev. of 1866, p. 536, § 4) in force until after *P*'s death in 1879.
2. That the gifts of income to the issue of *A* and *D*, who took as purchasers and not by inheritance, were contingent and did not vest in them upon the death of *P*.

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3. That the scheme of equality, so clearly marked out by the testator, would be defeated, if the other provisions of the trust which were to go into effect upon the decease of *A* or *D*, as well as the gift over of the remainder in fee, were to be upheld apart from the illegal clause; and therefore, upon the decease of A in 1888, the whole trust terminated and the property constituting the trust fund was ready for division as intestate estate of *P*.

Where several independent testamentary trusts are created, the illegal ones may be cut off and the valid ones permitted to stand, thus effectuating the intent of the testator as far as the law will permit.

For the purpose of applying the rule against perpetuities, both men and women are considered capable of having issue as long as they live.

Argued October 8th—decided December 18th, 1903.

SUIT to determine the construction of the will of William S. Pierson of Windsor, deceased, brought to and reserved by the Superior Court in Hartford County, *Shumway, J.*, upon an agreed statement of facts, for the advice of this court.

Edward M. Yeomans, for the plaintiffs.

Joseph L. Barbour, for Julia P. Allen et al.

John R. Buck and *Arthur F. Eggleston*, for Julia S. Coffin et al.

PRENTICE, J. William S. Pierson died April 18th, 1879, leaving a considerable estate, consisting of both real and personal property, and a will executed March 25th, 1872, which was subsequently duly probated. His sole heirs at law were his four sisters, Nancy S. Spalding, Lydia P. Dexter, Olivia Pierson and Julia P. Allen, and his widow. His estate was duly settled and all claims and legacies paid. The widow died in 1896. In his will the testator, after making provision for his widow and others, gave all the residue and remainder of his estate to trustees. This trust required that the principal thereof, save some small amounts, be held by the trustees, and out of the income therefrom certain sums be paid quarterly or annually to the widow and other persons so long as the widow should live, and that at

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her death certain persons should be paid specified sums of money. These provisions of the trust, which embody gifts to numerous persons and purposes, need not be more fully stated, as they have, as far as appears, been fully complied with and do not concern the present controversy.

The questions which give rise to this application grow out of a paragraph of the will, which, for convenience sake, we will designate as paragraph 14, although unnumbered in the instrument itself. This paragraph, which relates to said trust and follows the provisions already referred to, is as follows: —

"After the payment of my debts and the cost and charges of the execution of these trusts, of the insurance and taxes on my property and estate, and for carrying out and fulfilling of the bequests and directions herein, out of my property and estate or the income thereof, my executors and trustees shall pay the residue and remainder of the rents, interest and profits of my property and estate annually in equal portions, subject to the limitation hereinafter made, to my sisters, Nancy S. Spaulding, Lydia P. Dexter, Olivia Pierson and Julia P. Allen, during the term of their natural lives, and on the death either the said Nancy or Olivia the portion of the said Nancy or Olivia shall be paid to the survivors of my sisters in equal portions, and on the death of said Lydia or Julia their respective portions shall be paid to the children of said Lydia or Julia, the issue of said children taking the part of any deceased parent, for and during the natural lives of all the children of said Lydia and Julia, and on the death of all the said children of said Lydia and Julia, my executors and trustees shall pay, assign, transfer and set over all my property and estate to the grandchildren of my said sisters, Lydia and Julia, or their issue or legal representatives, according to the law of descent or distribution to be and to belong to them and their heirs forever."

The plaintiffs are the successors of the original trustees, and now have in their hands over $400,000 belonging to the principal of said fund and subject to the operation of the provisions of said paragraph.

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Said Lydia P. Dexter died May 19th, 1888; said Nancy S. Spalding, December 2d, 1889; and said Olivia Pierson, April 3d, 1902. Said Julia P. Allen is still alive.

Mrs. Dexter left two children, to wit, Julia S. Coffin, born in 1839, and Annie P. Allen, born in 1842. A son, Edwin D. Dexter, born in 1846, died January 26th, 1886, leaving one child, born January 15th, 1869, who now survives. Mrs. Coffin, at her mother's death, had four children, born, respectively, November 9th, 1862, April 25th, 1868, January 15th, 1871, and December 2d, 1873. All are now alive. Annie P. Allen, at the time of her mother's death, had one child, now alive, born May 8th, 1865.

Nancy S. Spalding and Olivia Pierson died childless.

Julia P. Allen has four children, born, respectively, February 11th, 1851, January 8th, 1860, January 1st, 1863, and April 29th, 1865; and five grandchildren, born, respectively, May 4th, 1887, July 18th, 1888, June 29th, 1890, April 13th, 1895, and June 2d, 1901.

Certain of the questions presented have arisen or assumed importance by reason of this family history. The complaint states thirteen questions concerning which the advice of the Superior Court, and, upon the reservation, our advice, is asked. We deem it unnecessary to give a direct answer to any of these questions, since they all, in our opinion, involve the unwarranted assumption that the trust, in so far as it was embraced in said paragraph, remained a continuing one after the death of Mrs. Dexter in 1888.

The gifts over, after the deaths of Lydia and Julia, have been attacked by counsel representing the interests of the latter and her children as being in contravention of the statute against perpetuities. Counsel for the Dexter interests, while concurring in the invalidity of the gift over of the Allen share, have sought to defend that of the Dexter share. Neither counsel has raised any question as to the validity of any of the antecedent provisions of the trust. In this they have quite likely been prompted by a prudence born of a desire to best subserve their clients' interests under somewhat uncertain conditions. No claim has been made and no

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brief filed on behalf of the estate of the testator, or the estates of Nancy S. Spalding or Olivia, from which sources such a claim would most naturally come. We cannot, however, overlook the patent fact that the testator has sought to make beneficiaries of the annually accruing income out of grandchildren of Lydia and Julia, which grandchildren might be the children of children not born to Lydia or Julia until subsequent to the time of the making of the will. (See Title XXXVII, Chap. 1, § 4, of the Revision of 1866, for the statute as it was until after the testator's death.)

It is true that no children were in fact born to either Mrs. Dexter or Mrs. Allen after the execution of the will. That fact, however, is of no consequence. The law recognizes such an event as having been among the possibilities. "For the purpose of applying the rule against perpetuties, both men and women are considered capable of having issue so long as they live." *Jee* v. *Audley*, 1 Cox Ch. 324; *In re Sayer's Trusts*, L. R. 6 Eq. 318, 319; 71 Law Times, 186; Gray on Perpetuties, §§ 215, 376. The law looks forward from the time the limitation is made to see what may be, not backward to see what has been. It regards the possible, not the actual. *Rand* v. *Butler*, 48 Conn. 293; *Tingier* v. *Chamberlin*, 71 id. 466; *Thomas* v. *Gregg*, 76 Md. 169. The will gives portions of the income, in the event of the death of either Lydia or Julia, to their respective children, without limitation to those then living, and then provides that the issue of any deceased child should take the share of its parent. Clearly here is a possibility that persons not the immediate issue or descendants of persons in being at the time of the making of the will would take. This result would not be avoided by construing this provision to apply only to cases where children of Lydia or Julia had died prior to their parent's death leaving issue surviving at the time of such death.

The gift of income to the issue of the children of Lydia and Julia cannot be supported upon the ground that they take by inheritance and not by purchase. The argument and conclusions in *Andrews* v. *Rice*, 53 Conn. 566, and *Landers* v. *Dell*, 61 id. 189, are decisive upon this point. The

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gifts of income to the issue of Lydia and Julia are clearly contingent, and did not vest in them upon the death of the testator. They are, furthermore, gifts for life only and not of estates of inheritance.

There remains to be considered the results upon the trust embraced in paragraph 14, to which these conclusions lead. In *Kennedy* v. *Hoy*, 105 N. Y. 134, 137, the rule governing this class of cases is stated as follows: "Where in a will some trusts are legal and others illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion were held legal and other portions illegal, or if manifest injustice would result to the beneficiaries under the will, or some of them, by holding one trust legal and the others illegal, then all the trusts must be construed together, and all must be held to be illegal, and fall together. But when several trusts are created, and they are independent of each other, each trust complete in itself, and the legal can be separated from the illegal and upheld without doing injustice, or defeating what the testator might in the emergency be presumed to wish, the illegal trust may be cut off and the legal permitted to stand, and thus the intention of the testator be effectuated so far as the law will permit." This rule has been followed in a number of New York cases: *Benedict* v. *Webb*, 98 N. Y. 460; *Underwood* v. *Curtis*, 127 id. 523; *Tilden* v. *Green*, 130 id. 29.

As applied to cases in which the connection between the legal and the illegal provisions is of such a character that the avoidance of the illegal and the execution of the legal would inevitably result in the destruction of the testator's testamentary scheme and defeat his main purpose and intent, the principles of the New York cases were recognized in *Fosdick* v. *Fosdick*, 6 Allen, 41, and *Thomas* v. *Gregg*, 76 Md. 169, and have received our approval upon several occasions. *Andrews* v. *Rice*, 53 Conn. 566; *Morris* v. *Bolles*, 65 id. 45; *Ketchum* v. *Corse*, ibid. 85.

The testator's scheme, to effectuate which this will was made, and his purpose and intent therein in so far as the

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estate coming within the purview of paragraph 14 is concerned, are apparent. He had provided for his widow and such other persons and objects as he desired to remember. Certain of these provisions were made prior to the gift of the residue of the estate in trust. Others were involved in the trust. The latter, however, were of such a character that they would all be satisfied either immediately or upon the death of the widow. The most important benefactions contemplated by the testator remained to be bestowed. A large estate remained to be disposed of. The testator's four sisters and their descendants were chosen as the recipients. Paragraph 14 contains the testator's directions as to the manner of bestowal. The scheme adopted involved the continuance of the trust in the residue of the estate after the widow's death and until the last of the children of his sisters had died, and the division at that time of the principal fund. All interest under the trust prior to the widow's death, save such as had otherwise been disposed of, all right to its income thereafter, and all right to the principal of the fund upon final distribution, was confined to the sisters and their descendants. Two of the sisters were childless, one was a spinster, and the other was well along in years. The other two were married and had children. With these facts in mind, the testator formulated the provisions of paragraph 14. It needs only a hasty study of these provisions to convince one that the testator, whatever may be said of the legal precision of the language employed, had the distinct purpose in mind of accomplishing strict equality and impartiality in the bestowal of his benefactions, not only as between his sisters but also as between their several stocks. This scheme of equality is attempted to be so fully marked out that it extends not only to the stocks but to the members comprising each stock in each successive generation until the final division, and then in that division. For fear that some inequality in this regard might be accomplished, "issue" of deceased children, and "issue or legal representatives" of grandchildren, are substituted for the deceased. Greater solicitude for equality, based upon the

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system of blood succession recognized by law, could scarcely be evinced. Nowhere else in the will is there shown any purpose to depart from this controlling plan and purpose. The provision of the paragraph following, that Julia, by reason of her being "so situated as to require a certain income," should have the first right to $2,000 of annual income, cannot, under the circumstances, be fairly so regarded.

We have now to consider the effect upon the will of an avoidance of all gifts of income to the issue of children, the remaining provisions of the will being allowed to stand. When Mrs. Dexter died, one of her children had already died leaving a child then surviving. This child, we have seen, was forbidden by the statute from taking the share intended for her by the testator. Herein the testator's intent was defeated and the scheme of his will frustrated. Whether the result of this inability to take be said to be that the other children of Mrs. Dexter would take a larger share, or that income would accumulate in the hands of the trustees, or that there arose a partial intestacy, the consequence in either case was a more or less magnified failure of the scheme of equality. By a rare good fortune none other of the seven children of Mrs. Dexter and Mrs. Allen have as yet died. As their ages range from sixty-four to thirty-eight, it is apparent that the time is not far distant when their number will again be invaded by death with the same result as in the former case. As time passes the number of those who are living to take their appointed shares will be reduced to a few. Possibly that few will belong to one branch of the family, the other thereby being deprived of all benefits from the income. Eventually there will be one survivor only to take, the rights represented by all the others having lapsed. It is unnecessary to solve, or even attempt to state, all the problems which this history might develop. It is only pertinent to appreciate how thoroughly the testator's plan in the creation of his trust would by such a process be overthrown and his will made to accomplish that which he most ardently strove to avoid. A more complete shipwreck of a testamentary scheme could scarcely be im-

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agined, and it would be inevitable. The inexorable law of life and death would furnish the necessary conditions.

These observations make it certain that the provisions of paragraph 14 are all a part of one entire comprehensive testamentary scheme, and that many of the provisions of that scheme are so connected and interwoven with the illegal gift of income to the issue of the children of Lydia and Julia, and so inseparable from it, that the whole of the scheme, in so far as it is so connected and inseparable, must be declared illegal, if the testator's wishes and purposes are not to be defeated. The illegal provision is so connected with otherwise legal provisions, that, borrowing the language of *Andrews* v. *Rice*, the latter "cannot be separated and carried into effect without involving consequences substantially and materially different from what the testator intended." They must, for that reason, as we said in that case, fall with the illegal provision. *Andrews* v. *Rice*, 53 Conn. 566, 571; *Ketchum* v. *Corse*, 65 id. 85.

It remains to inquire to what extent the connection between the illegal gift and the other provisions of paragraph 14 is of such a character that the latter cannot be upheld. It is our duty to sustain the provisions of the will to the fullest extent that we can, and thereby carry into effect the testator's intent. Until Mrs. Dexter or Mrs. Allen should die, the illegal provision could have no untoward effect upon the testator's purpose. It bore no relation to existing conditions. As soon as Mrs. Dexter died, the situation became changed. The illegal provision at once inevitably became a menace to the testator's purpose and plan. The provisions of the trust in favor of the four sisters of the testator, contained in paragraph 14, in so far as they relate to the time antecedent to Mrs. Dexter's death, may therefore be fairly held to be separable from and independent of the illegal provision, and so upheld. Those which relate to time subsequent to her death, cannot be separated and upheld without thereby defeating the testator's purpose, and must therefore be declared void.

The gift over of the trust fund is so clearly dependent upon

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the precedent provisions that it must for that reason, if for no other, be declared void. *Proctor* v. *Bishop*, 2 H. Bl. 358; *Ketchum* v. *Corse*, 65 Conn. 85.

The Superior Court is advised that the gift over of the trust fund to the grandchildren of Lydia and Julia or their issue or legal representatives, as contained in paragraph 14 of said will, was void from the beginning; that upon the death of Mrs. Dexter the trust to pay income to the sisters of the testator, or any of them, or to their children or descendants, or any of them, also contained in said paragraph, terminated, and that thereupon the trust fund was ready for division to those entitled to receive it as its distributees as the intestate estate of the testator.

No costs in this court will be taxed.

In this opinion the other judges concurred.

BRADLEY N. FOGIL *vs.* WILLIAM H. BOODY.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A party's claim for damages or other relief, while open to demurrer, is not subject to a formal denial. The claim is, however, denied in effect, by a general denial of the allegations constituting the alleged cause of action.

Where the amount of a pecuniary demand is unliquidated or in dispute, it is not open to the defendant, under a general denial, to prove that he paid and that the plaintiff received a sum less than that claimed, upon condition that it should be taken as payment in full. Such a transaction operates as an accord and satisfaction, which must be specially pleaded.

Argued October 9th—decided December 18th, 1903.

ACTION to recover a balance claimed to be due as wages, brought by appeal from a justice of the peace to the Court of Common Pleas in Hartford County and tried to the jury before *Coats, J.*; verdict and judgment for the plaintiff, and appeal by the defendant. *No error.*

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George B. Thayer, for the appellant (defendant).

A. Storrs Campbell, for the appellee (plaintiff).

TORRANCE, C. J. The amended complaint in this case alleged, (1) that in May, 1902, the defendant hired the plaintiff by the month at the rate of $25; (2) that the plaintiff entered upon said contract and continued to work five months at said rate per month, when he was discharged by the defendant; (3) that the defendant paid the plaintiff $100; (4) that the plaintiff claims a balance due of $25, for which amount with costs he prays judgment.

The answer denied the first two paragraphs, admitted the third, and was silent as to the fourth.

At the opening of the trial the defendant moved to amend his answer so as to deny the fourth paragraph, but the court ruled that such amendment was unnecessary; and this ruling is assigned for error. The amended complaint, as required by the Practice Act, contained, (1) a statement of the facts constituting the cause of action, and (2) a demand for the relief to which plaintiff supposed himself to be entitled. General Statutes, § 607. The cause of action was stated in the first three paragraphs of the complaint, and the demand for relief was stated in the last.

Issues of fact may be taken upon the allegations constituting the cause of action, but no such issues can be taken upon the statement of the demand for relief. It may be demurred to, but not denied by way of answer. The defendant denied the existence of the cause of action alleged, and thereby in effect denied the right of the plaintiff to the relief sought; and this gave him all he sought to obtain by his motion to amend his answer. The trial court did not err in refusing to allow the amendment.

The other errors assigned relate to a single point, namely, whether under the pleadings the defendant was entitled to prove that the plaintiff had accepted and received a certain sum of money from the defendant upon the condition that it should be in full of his claim. It was admitted by the plead-

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ings that the defendant had paid the plaintiff $100. The evidence tended to show, (1) that when the defendant discharged the plaintiff there was a dispute between them as to the amount then due to the plaintiff, the plaintiff claiming that it was $59.75, the defendant that it was only $34.75; and (2) that the defendant then paid said last-named sum to the plaintiff, which was part of the $100 admitted to have been paid. The defendant offered evidence tending to prove that said sum of $34.75 was paid to and accepted by the plaintiff upon condition that it should be in full for his services and in full of all accounts. In other words, he offered evidence tending to prove a state of facts which had the effect and operation of an accord and satisfaction.

Where a claim is unliquidated or in dispute, the payment of a sum less than the amount claimed, upon condition that it shall be taken in full payment of the claim, operates as an accord and satisfaction, if received and retained by the creditor, even though he protests at the time that the amount paid is not all that is due or that he does not accept it in full of his claim. *Potter* v. *Douglass*, 44 Conn. 541; *Bull* v. *Bull*, 43 id. 455; 1 Cyc. of L. & P., p. 333, and cases there cited. The trial court held that the defense thus attempted to be proved by the defendant was not available to him, because he had not, as required by the rule under the Practice Act, specially pleaded it. That rule provides that under an answer by way of general denial, as here, no facts can be proved "except such as show that the plaintiff's statements of fact are untrue"; and that such a defense as the one attempted to be set up by the defendant must be specially pleaded. Rules Under the Practice Act, 4, § 6. The defendant failed to comply with this rule, and when met by it made no attempt to conform to it, and the trial court very properly held that the defense was not available to him.

There is no error.

In this opinion the other judges concurred.

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JOSEPH M. FISHEL ET AL. *vs.* GIOVANI MOTTA ET UX.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A plaintiff who avers that a deed was fraudulent and void as against him, assumes, under a general denial, the burden of proving such allegation.

Mere proof that the parties to the deed were husband and wife, and that it was made by the husband when he owed $150 to the plaintiff, which is still unpaid, does not necessarily and as matter of law establish fraud either actual or constructive. The wife may have given value for the land, or the husband may have had large means and been but slightly indebted.

While the relation of husband and wife affords special opportunity for fraudulent transfers of property, and requires that deeds between them should be subject to rigorous scrutiny, yet there is no presumption of law in this State that such deeds are without consideration.

Argued October 9th—decided December 18th, 1903.

ACTION to foreclose a judgment lien, brought to the Court of Common Pleas in Hartford County and tried to the court, *Coats, J.*; facts found and judgment rendered for the defendants, and appeal by the plaintiffs. *No error.*

Thomas G. Vail, for the appellants (plaintiffs).

Joseph P. Tuttle, for the appellees (defendants).

TORRANCE, C. J. In January, 1901, the plaintiffs brought a suit against the defendant Motta, in which they attached whatever interest he then had in the land covered by the judgment lien sought to be foreclosed in the present suit. Subsequently, in April, 1901, they obtained judgment against him in the attachment suit, and upon that judgment filed the lien here in question. When the attachment was made, however, the record title to the land attached stood in the name of Motta's wife.

The complaint in this case, after alleging that the plaintiffs

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had thus obtained judgment against Motta in the attachment suit, and had acquired a judgment lien upon the land attached, alleged in paragraph five that Motta, prior to the attachment, had conveyed his interest in the attached land to Ross, who on the same day conveyed his interest therein to Motta's wife, and that "said conveyances were without consideration and done with intent to avoid the debt owing to the plaintiffs." Paragraph five of the complaint was denied in the answer, and whether said conveyances were without consideration, or were made to avoid the debt of the plaintiffs, were really the only contested facts in the case. Upon the facts found the trial court held that these contested facts were not proved, and therefore not true; and the question upon this appeal is whether it erred in so holding.

The controlling facts are these: In March, 1900, Motta owned an interest in fee in the land in question, and on that day conveyed it to his wife, through Ross, as alleged in the complaint. "Ross gave nothing and received nothing on account of said deeds, except such title and interest as was conveyed to him by the husband and immediately reconveyed by him to the wife." The sole purpose of said conveyances was to convey all the interest of Motta to his wife, and it was so understood and intended by all parties thereto. At the time said conveyances were made Motta was indebted to the plaintiffs in the sum of $151, and between that time and June 26th, 1900, became further indebted to them in the sum of a little over $60. Said indebtedness remains wholly unpaid. "No other evidence, except such as should be inferred from the foregoing facts, was offered in support of the allegations of paragraph five of the complaint."

If the conveyance to the wife was, to her knowledge, made to avoid the payment of the plaintiffs' debt, it was void as to them. *Hawes* v. *Mooney*, 39 Conn. 37; *Bassett* v. *McKenna*, 52 id. 437. If made without any such purpose, but without consideration, and when the husband was considerably indebted and insolvent, it was void as to the plaintiffs. *Redfield* v. *Buck*, 35 Conn. 328; *Paulk* v. *Cooke*, 39 id. 566;

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Quinnipiac Brewing Co. v. *Fitzgibbons*, 71 id. 80. In the former case it would be void for actual fraud, participated in by the wife; and in the latter for what is called, for want of a better name, constructive fraud. Such conveyances are regarded as valid between the immediate parties to them, but void as to creditors; consequently a creditor may for certain purposes, if necessary, treat the land so conveyed as if no conveyance had been made. 1 Swift's Digest, 282.

The complaint in this case alleged that the title to the land, when it was attached, stood in the name of the wife by reason of a conveyance from the husband, and then alleged that such conveyance by reason of fraud was void as to the plaintiffs. The allegations of fraud were thus made an essential part of the plaintiffs' case. They asserted that certain facts existed which made the conveyance to the wife void as to them. The defendants denied that any such facts existed. The general and elementary rule is that as between two such parties the burden of proof rests upon him who asserts the existence of the facts, and not upon him who denies their existence. The former, and not the latter, must finally satisfy the trier of the truth of the facts asserted. Under this rule, and upon the pleadings in this case, it was the duty of the plaintiffs to satisfy the trier that the facts alleged as to fraud existed. If they failed to sustain this burden the court was justified in finding that the facts alleged to exist did not exist. Upon the facts found, and all the legitimate inferences to be drawn therefrom, the court was not satisfied that the plaintiffs had sustained the burden of proof. The plaintiffs now say, in effect, that the trier ought to have been satisfied, and committed an error of law in not being satisfied, that fraud had been proved.

There is nothing in the record to justify such a claim. No evidence apparently was offered, and no facts are found, warranting the conclusion that fraud, either actual or constructive, existed. There was no proof of actual fraud, and no proof of constructive fraud save the fact that the parties to the deed were husband and wife, and that it was made while the husband owed a debt to the plaintiffs which he

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has not yet paid. We cannot say, as matter of law, that the court erred in not holding the conveyance to have been constructively fraudulent upon these meagre facts alone. It was not proved that the conveyance, so far as the wife was concerned, was without consideration; nor that the husband, when it was made, was considerably indebted in proportion to his remaining means of payment, nor that he was insolvent and unable to pay his debts.

The plaintiffs claim that in conveyances between husband and wife, as here, there is, in the absence of evidence to the contrary, a legal presumption of want of consideration; and that upon the facts in this case, under such a rule of presumption, want of consideration was proved. Such a rule makes the mere relation of husband and wife in such cases, as matter of law, in the absence of any evidence to the contrary, *prima facie* proof of want of consideration.

That the relation of husband and wife gives special opportunities for fraudulent transfers of property, and that conveyances between them "should be subjected to a rigorous scrutiny," are considerations to be addressed to the trier in passing upon the question of want of consideration. *Gilligan* v. *Lord*, 51 Conn. 562, 567; *Norwalk* v. *Ireland*, 68 id. 1; *Throckmorton* v. *Chapman*, 65 id. 441. Any presumption of want of consideration in such cases is one of fact having simply the force of an argument. "The difference between a presumption of fact and one of law, as these terms are commonly used, is that the former may be, the latter must be, regarded by the trier." *Ward* v. *Metropolitan Life Ins. Co.*, 66 Conn. 227, 239. We are not aware of the existence in the law of this State of any such legal presumption as the plaintiffs claim.

There is no error.

In this opinion the other judges concurred.

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DWIGHT D. MONROE *vs.* THE HARTFORD STREET RAILWAY COMPANY.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

In an action against a street-railway company to recover damages for negligently running its trolley-car into and injuring the plaintiff's milk wagon, the defendant claimed that the plaintiff's driver had violated a city ordinance in "leaving" his horses in the street unhitched, and that such violation, if found to be the proximate cause of the injury, was a bar to his recovery. *Held:*—

1. That an absence of the driver, although temporary, which took him out of sight and hearing of the horses and beyond prompt reach in case of need, constituted a "leaving" of the horses within the meaning of the ordinance.
2. That it was not essential to a violation of the ordinance that the driver's conduct, in leaving his horses unhitched, should have been negligent. It was enough that the violation, whether attended with negligence or not, was the proximate cause of the injury.
3. That inasmuch as it appeared from the record that the violation of the ordinance in question was, or might have been, the proximate cause of the injury, an instruction which authorized the jury to find that there had been no violation, provided they first found that there had been no negligence on the driver's part, was inaccurate and misleading.

While the admission of an insignificant bit of irrelevant evidence on cross-examination will not ordinarily be ground for a new trial, it may have that effect if the jury is permitted, under the instructions of the court, to make a wrongful application of it.

Argued October 13th—decided December 18th, 1903.

ACTION to recover damages for negligently running into and injuring the plaintiff's milk wagon, brought to the Court of Common Pleas in Hartford County and tried to the jury before *Coats, J.;* verdict and judgment for the plaintiff, and appeal by the defendant. *Error and new trial granted.*

The plaintiff was the owner of a pair of horses and wagon, used for the daily delivery of milk upon a route including Asylum Avenue in the city of Hartford, which was driven by his servant, Brewer.

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The defendant operated an electric railroad upon Asylum Avenue.

At the time of the injury complained of, the plaintiff's team was standing across Asylum Avenue with the wagon upon the tracks of defendant's railroad, the plaintiff's servant, Brewer, being at that time in the kitchen of a neighboring house occupied by one Pattenden. While thus standing the wagon was struck by a car of defendant, thrown off the track, and the wagon and its contents injured.

The complaint charges the defendant with negligence, in that it "negligently struck said wagon as it was standing stationary on said tracks," while "running a car at a high rate of speed."

The testimony affecting the claimed negligence of the defendant's motorman in permitting the car to strike the wagon, as well as the testimony affecting the claimed negligence of Brewer in permitting his team to stand across the tracks, was somewhat contradictory. It appeared that the plaintiff's horses were gentle, intelligent, accustomed to the milk route and to standing unattended in front of houses of customers while the driver delivered the milk put up in bottles; that in this instance Brewer left the horses unhitched and unattended while he was in Pattenden's house for the purpose of delivering milk and immediately returning as usual; that he remained in the house for the purpose of looking up and settling Pattenden's milk account, consuming much more time than usual, and on coming out of the house heard the crash of collision.

The evidence was conflicting as to the actual time spent in the house; Brewer stating it was ten or fifteen minutes, and other witnesses estimating it was a less time.

The defendant claimed that the conduct of Brewer, in thus leaving the horses and remaining in Pattenden's house, was negligence contributing to the accident, and also constituted a violation of law contributing to the injury; and that such illegal conduct, if found to be a proximate cause of the injury, was a conclusive bar to the plaintiff's right to recover, and not merely evidence of contributory negligence;

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and, in this connection, produced in evidence an ordinance of the city of Hartford which declared that "leaving any horse unhitched . . . within any street or thoroughfare of said city" was a nuisance, punishable by a fine of $5.

The plaintiff controverted these claims, and in addition to the evidence above mentioned produced evidence tending to prove that the horses were so trained that they could take pretty good care of themselves in the street without a driver, and could swing the wagon round in the street better than it could be done by some drivers.

In view of these claims upon this state of the evidence, the trial court instructed the jury as follows: "There is another element which enters, or may enter, into this case so as to affect the verdict which you can lawfully render in this case. This aspect of the case arises out of the ordinance of the city of Hartford relative to leaving any horse unhitched. Now, there is some ambiguity in the language of the ordinance in respect to the particular portion of the ordinance on which the claim in this case is made, which reads as follows: 'Permitting any animal to go at large in any highway or public place in the city or leaving any horse unhitched, or permitting any animal, wagon, or cart to stand upon or over any cross-walk, by the person having control at the time of the same, within any street or thoroughfare of said city,'—and the ordinance declares that a nuisance and forbids it. I instruct you that that part of the ordinance applies to leaving a horse unhitched within any street or thoroughfare of said city,—that is, the city of Hartford. Such an ordinance must receive reasonable interpretation. It is not true as matter of law, that in order to be free from a violation of the ordinance a person having a horse on the street is obliged to hold the reins in his hand or hold the horse by the bit all the time that the horse remains unhitched on the street, but the horse must not be allowed to remain unhitched without at the same time being in the effective control of some person. What is effective control will largely depend upon the facts of the particular case. If the horse is timid and inexperienced a different kind of control

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would be required than would be required in the case of a horse which is reliable and trained to submit to the control of his attendant. It is for you to determine under the circumstances of this case whether the horses were left by the driver, Brewer, unhitched and beyond his control. If you find that the horses remained on the street unhitched but at the same time under the effective control of the driver, then there was no violation of the ordinance and the claim of a violation falls to the ground. If you find that there was a violation of the ordinance, you will then inquire whether that violation directly contributed to the injury, and, if you find that the ordinance was violated by the driver and the violation directly contributed to the injury, the law is so that the plaintiff cannot recover in this action and your verdict should be for the defendant."

The reasons of appeal, among others, assign errors in the portion of the charge above quoted, and in the admission of evidence.

John T. Robinson, for the appellant (defendant).

Edward M. Day and *George B. Thayer*, for the appellee (plaintiff).

HAMERSLEY, J. The purpose of the city ordinance is obvious. It assumes that any horse in a city street without a driver or keeper is a source of danger to the person and property of those using the street, unless the horse is hitched, and that injury to such persons may be the natural result of leaving an unhitched horse in a city street. For the protection of such persons and the prevention of such injuries, it makes the act of leaving any unhitched horse in a city street a misdemeanor punishable by a fine. *State* v. *Keenan*, 57 Conn. 286.

It is also obvious that the evil provided against includes not only the permanent or indefinite abandonment of a horse, but those temporary departures which are most likely to frequently occur if not forbidden. The meaning of the lan-

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guage used to accomplish this obvious purpose is clear. There can be no reasonable doubt as to the meaning of "unhitched," used in this connection, and very little as to "leaving." Certainly going away from the horse beyond sight, hearing, and reasonably immediate reach, is "leaving" it within the meaning of the ordinance. When an unhitched horse has been thus left, the ordinance has been violated, whether the horse is gentle and well trained or not.

In his charge the trial judge adds to the ordinance a condition of violation not expressed by its language nor included in its purpose, and tells the jury that it is not enough to find that the horse is unhitched in the highway, and that it has been left in this condition by its driver, but they must also determine whether the horse unhitched, and so left by its driver, is still within his control, and that the kind of control which a driver may retain over a horse he has left unhitched in the street is a question of fact for them to settle. The court says: "It is for you to determine under the circumstances of this case whether the horses were left by the driver, Brewer, unhitched *and beyond his control.*" The kind of control which the jury are thus invited to find from the particular circumstances of the case, appears to be that which a driver may be said to possess over horses after he has left them and until his return, when the horses have been accustomed to stand still while so left. Possibly the trial judge may have intended merely to instruct the jury that Brewer did not leave the horses, within the meaning of the statute, if in fact he remained so near as to substantially retain the physical ability to watch their movements and intervene at once in case of necessity. But certainly the jury might, and probably did, understand him differently. Reading this passage in connection with the remainder of the charge, the state of the evidence, and the claims made, it seems clear that the jury must have understood the court to instruct them that leaving the horses unhitched did not violate the statute, unless, under all the circumstances of the particular leaving, they should be satisfied that his conduct was negligent; in other words, the jury was practically in-

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structed that the ordinance only prohibited negligently leaving a horse unhitched in the street.

This instruction, in view of the state of the evidence and claims made, was inaccurate and inadequate. It was, however, harmless, if a violation of the ordinance could not be a proximate cause of the injury alleged, and a new trial should not be granted unless it is clear as a matter of law that when a driver has left his horse in the street unhitched, and a collision between his team and another vehicle occurs directly after he has left them and near the place where he has left them, this unlawful act of his may be a proximate cause of the injury inflicted by the collision. We think it clear that such an unlawful act may be a proximate cause of such injury.

There is some real and more apparent conflict of opinion in the many cases treating of the relation between an illegal act and a coincident injury. In doing an unlawful act a person does not necessarily put himself outside the protection of the law. He is not barred of redress for an injury suffered by himself, nor liable for an injury suffered by another, merely because he is a lawbreaker.

In actions to recover for injuries not intentionally inflicted but resulting from a breach of duty which another owes to the party injured—commonly classed as actions for negligence—the fact that the plaintiff or defendant at the time of the injury was a lawbreaker may possibly be relevant as an incidental circumstance, but is otherwise immaterial unless the act of violating the law is in itself a breach of duty to the party injured in respect to the injury suffered. Ordinarily, in actions of this kind, the breach of duty is a failure to exercise, in conduct liable to be dangerous to others, that care which a man of ordinary prudence would exercise under the particular circumstances of the case. But the State regards certain acts as so liable to injure others as to justify their absolute prohibition. In such case doing the forbidden act is a breach of duty in respect to those who may be injured thereby.

The cause of action which arises upon an injury resulting

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from a breach of duty in respect to the party injured in neglecting to use that care which the law requires under the particular circumstances of the case, for the protection of those liable to be injured by such neglect, is the same as the cause of action arising upon an injury resulting from a breach of duty in respect to the person injured in doing an act forbidden by statute, for the protection of those liable to be injured through such act. The main distinction lies in the method of proof. In the former case, the breach of duty must be established by showing a want of due care under all the circumstances; in the latter case it may be established by proving the commission of the illegal act. In both cases two questions are presented. First, was there a breach of duty in respect to any person liable to be injured by the conduct proved? Second, was this breach of duty a proximate cause of the injury alleged? And the principles which determine the relation of the negligent conduct in the one case, or the illegal act in the other, to the resulting injury as a proximate cause, are the same. This view of the law is fully established by our decision in *Broschart* v. *Tuttle*, 59 Conn. 1.

Applying the principles which determine the causal relation between a negligent act and the following injury, to the admitted facts in the present case, it is apparent that the illegal act was not necessarily a mere independent concomitant or condition of the collision, but might well be a contributing cause, and might be, according as the jury should find the attendant or surrounding circumstances, a proximate cause of the injury. "Cause" and "consequence" are correlative terms. One implies the other. When an event is followed in natural sequence by a result it is adapted to produce, or aid in producing, that result is a consequence of the event, and the event is the cause of the result.

It is the nature of a horse, whether vicious or not, when at large in a public highway, to be a source of danger to those using the highway; and the unlawful act of letting a horse into the highway is adapted to aid in producing an injury received by a child playing in a highway from a horse thus

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left loose, and the unlawful act may be the cause, and proximate cause, of such injury. *Baldwin* v. *Ensign*, 49 Conn. 113, 115. It is the nature of a horse harnessed to a wagon and left without any keeper or restraint in a city street, to be a source of danger to those using the street, and when the driver of a team used in delivering ice from house to house negligently leaves his horses unrestrained while going from the sidewalk to the adjoining post-office for his mail, and the horses thus released from control go on their way through the street, that negligent act of the driver may be the cause, and proximate cause, of an injury received through the collision of the ice-cart with another vehicle in the street. *Loomis* v. *Hollister*, 75 Conn. 718.

And so the illegal act of leaving horses, harnessed to a wagon, unhitched, is adapted to aid in producing a collision resulting from the horses, thus left unrestrained, pursuing their own way through the street. It is for this very reason that the State makes the act illegal. When the resulting collision follows such illegal act in natural sequence, the act is a cause of the collision, and if the sequence is direct and unbroken by any independent, intervening cause, may be the proximate cause. Whether or not, under all the circumstances of the case, it is the proximate cause, is a question of fact for the jury under proper instructions from the court.

The fact that the plaintiff's servant had violated the city ordinance was, therefore, one upon which the plaintiff's right of recovery might depend, and the error of the trial court in the instructions given upon the meaning of that ordinance was material and harmful.

Upon the trial the defendant produced as a witness one John H. Carlson, who was formerly in its employ and was in charge of the car as motorman at the time of the collision. Carlson testified to facts and circumstances tending to show that his conduct was not negligent. Upon cross-examination the plaintiff drew from him an admission that, while employed by defendant as motorman upon another line, he had some trouble in respect to his management of a car. The defendant objected to the questions by which this ad-

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mission was obtained, and duly excepted to the ruling of the court admitting the questions.

The fact elicited by the plaintiff's questions was plainly irrelevant and immaterial, and we do not see how in this case such questioning could serve any legitimate purpose of cross-examination. But if the only effect of the error was the admission of an insignificant bit of irrelevant and immaterial testimony, it is not ground for a new trial. Inevitably such testimony to some extent creeps into most trials, and the granting of new trials for such errors would not further, but would seriously obstruct, a just determination of the rights of litigants. If, however, as is claimed by defendant, the course of proceedings as detailed in the record shows that the evidence was admitted under such circumstances that the jury might properly infer an instruction from the court that in determining the only negligence alleged, that is, a failure to exercise ordinary care in the management of a car at the time of accident, they were at liberty to consider facts tending to prove negligence in the selection of competent servants, the error would be a fatal one. It is unnecessary to consider whether this claim of the defendant is fairly supported by the record, inasmuch as a new trial must be granted for error in the charge.

The other errors assigned in the appeal do not call for special mention.

There is error, the judgment of the Court of Common Pleas is set aside, and a new trial is granted.

In this opinion the other judges concurred.

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DAVID PALMER *vs.* HENRY E. SMITH.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

In an action for the use of a horse, tried on the general issue, the defendant offered evidence that he was to have its use for its keep. *Held* that he had the burden of proving that there was an agreement to that effect.

No papers should ordinarily be left in the file delivered to the jury except such as may properly serve to enlighten them as to the issues upon which they are to pass.

A written notice of the withdrawal of the original attorney for one of the parties ought not to go to the jury. It cannot, however, be supposed to have influenced their verdict, if they were instructed by the court to pay no regard to the attorney's withdrawal.

Upon an appeal from a justice the plaintiff and appellee recovered judgment in the Court of Common Pleas, but for a smaller amount. *Held* that the court was not absolutely bound, under General Statutes, § 770, to disallow him costs, but might exercise its judicial discretion in the matter.

Submitted on briefs October 13th—decided December 18th, 1903.

SUIT for compensation for the use of a horse, brought originally before a justice of the peace who gave judgment for the plaintiff to recover $43 and costs. The defendant appealed to the Court of Common Pleas for Hartford County, where the cause was tried, on a general denial, to the jury, *Coats, J.*, and a verdict rendered in favor of the plaintiff for $36.75. Judgment having been rendered for this amount, the defendant appealed to this court. *No error.*

Seymour C. Loomis, for the appellant (defendant).

Hugh M. Alcorn, for the appellee (plaintiff).

* BALDWIN, J. . . . The original attorney for the defendant had withdrawn from the case shortly before the

* A portion of the opinion dealing with matters of evidence of little general interest has been omitted. The opinion in full is on file in the Court of Common Pleas in Hartford County. *Reporter.*

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trial in the Court of Common Pleas. On the final argument, the plaintiff's counsel alluded to this, adding that the attorney had withdrawn because he found that there was no defense that could be made out. The court thereupon observed that these remarks were improper, and instructed the jury to pay no regard to them nor to the fact of the withdrawal. In handing the papers in the case to the jury, when they retired to consider as to their verdict, the written notice of withdrawal, which was among them, was left in the file, notwithstanding the objection of the defendant.

It would have been better to remove it. No papers should ordinarily be left in the file delivered to the jury except such as may properly serve to enlighten them as to the issues upon which they are to pass. But as in the case at bar they were expressly cautioned not to take into consideration the withdrawal of the attorney, it cannot be supposed that the putting in their hands of the paper evidencing it had any effect upon the verdict rendered.

General Statutes, § 770, provides that on an appeal in any civil action from the judgment of a justice of the peace, "if the appellant shall obtain a more favorable judgment, the court may, at its discretion, tax costs on the appeal in his favor, and tax no costs on the appeal in favor of the appellee, although the appellee shall obtain judgment in the appellate court." Error is assigned in allowing costs to the plaintiff, who was the appellee in the Court of Common Pleas, when the judgment there was for a less sum than that recovered before the justice of the peace. The Court of Common Pleas was not absolutely bound on this account to tax no costs in his favor. It was a matter of judicial discretion, and we see nothing to indicate that the discretion was not well exercised.

There is no error.

In this opinion the other judges concurred.

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EDWARD A. FREEMAN, ADMINISTRATOR, *vs.* THE BRISTOL SAVINGS BANK.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

By his will *W* left to a trustee about $400,000 worth of personal property, including stocks, bonds, notes, book-accounts, farming utensils, cattle and horses, the net income of which was to be paid to the testator's son, *J*, with a direction that in "so far as practicable" the trustee should allow *J* to have "the management and possession" of the trust estate, and should be exempt from any liability on account of loss sustained while such estate, or any part of it, was so "managed, controlled, or in the possession" of *J*, "or for any loss by investment or reinvestment" by the trustee. At *J's* death legacies to the testator's grandchildren were to be paid from the trust estate, if it was sufficient, and if not, from real estate of which *J* was given the life use. Certificates of stock were turned over by the trustee to *J*, who pledged some of them to the defendant bank to secure loans made by it to him. *J* stated to the bank that he intended to use the money—and he did in fact use it or a large part of it—to pay for subscriptions to the increased capital stock of a manufacturing company named after *W* and in which *W's* estate was largely interested. The stock thus subscribed for was issued to *J*, who turned over 2,200 shares of it to the trustee, and he in turn transferred it, after *J's* death, to the plaintiff as executor on *W's* estate. In his account in the Probate Court, the trustee credited himself with securities turned over to *J* "for reinvestment," and charged himself with the 2,200 shares of the manufacturing company's stock. The bank, after *J's* death, offered to surrender the stocks pledged to it, if the plaintiff would pay what remained due upon *J's* notes; but the plaintiff refused to do this and sued the defendant for a conversion of the stocks. *Held:*—

1. That the provision respecting *J's* management and possession was not limited to the live stock, farming utensils and other tangible property, but applied to every part of the trust estate.
2. That the trustee was authorized not only to turn over the shares of stock in dispute to *J* to manage, but also for sale and reinvestment in such manner as the trustee in his "best judgment and discretion" might approve; and for that purpose might make *J* the agent of the estate.
3. That the fact that the bank was not in privity with those through whom the plaintiff acquired the manufacturing company stock,

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was immaterial, inasmuch as the defense set forth in the answer did not rest upon contract relations, but upon acts creating rights of property which could only be divested through judicial action on equitable terms.

4. That whether the pledges made by *J* to the bank were valid in all respects or not, the plaintiff could not equitably retain the 2,200 shares of the manufacturing company stock, which resulted from the bank's loans to *J*, and at the same time, while refusing to pay the balance still due thereon, force the bank to respond for the value of the stocks which *J* had pledged to it to secure such loans.

5. That the statements made by *J* to the bank, of his intended use of the borrowed money, were properly received, as well as evidence that the bank knew that *W*'s estate was largely interested in said manufacturing company and loaned the money in the belief that it was to be used for the purpose stated by *J*.

A testamentary power of sale, standing alone and unaided by other provisions in the will, does not authorize a mortgage or pledge.

Argued October 13th—decided December 18th, 1903.

SUIT by an administrator with the will annexed, of the estate of Elisha N. Welch, for a conversion of certain shares of stock belonging to the estate, brought to the Superior Court in Hartford County where a demurrer to the answer was overruled (*Roraback, J.*) and the case tried on the merits to the court, *Shumway, J.*; facts found and judgment for the defendant. *No error.*

The testator, who belonged in Bristol and died in 1887, left three children, two daughters and one son. He owned a large amount of stock in the E. N. Welch Manufacturing Company, of Bristol, a corporation which was named after him. His son, James H. Welch, was also a stockholder in it. In the original will it was provided that enough more stock in the company should be distributed to the son, to give him, with his own shares, a controlling interest.

By the fifth codicil to the will, revoking a prior absolute gift of a third of his residuary estate to his son, James H. Welch, there was devised to him a life estate in any real estate that might form part of said third; and "all the stocks, bonds, notes, book accounts, farming utensils, and cattle or horses, and all other personal estate of any kind and nature wherever situated, and all interests therein which by the

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terms and conditions of said original will was given or bequeathed to said James H. Welch, or which would, except for his codicil, pass or be distributed to him under said will," were bequeathed to the testator's brother, in trust, "to manage, hold, sell, invest, and reinvest the same and all accumulations thereof upon his best judgment and discretion, and from the rents, uses, and income of the same for and during the life of said James H. Welch to pay over to him for the personal use and support of himself and children annually all of said rents, uses and income from said personal estate received or collected by said trustee after deducting the expenses of managing said estate and doing the business necessary to carry out the conditions of said trust." A subsequent clause contained this provision: "I direct that my said trustee shall, as far as practicable, allow my son, said James H. Welch, to have the management and possession of said personal estate held in trust, and I hereby provide and direct that the said trustee shall not in any way or to any amount be held responsible to any person or by any tribunal for any damage or loss that may be sustained to any part of said trust estate while said estate is managed, controlled, or in the possession of my said son James H. Welch, or for any loss by investment or reinvestment by said trustee." On the decease of James H. Welch, legacies of $25,000 apiece were given to the testator's grandchildren other than Alex Stanley, "to be taken from this trust estate if there be sufficient amount remaining in the hands of my said trustee at that time; but should there not be a sufficient amount of these trust funds at that time to make each of said grandchildren (other than said Alex Stanley) living at this time equal to the amount given in said original will to said Alex Stanley then, in such case, I hereby give, devise, and bequeath to each of said grandchildren now living other than said Alex Stanley from the real estate the use of which is herein given to my said son James H. Welch during his life a sufficient quantity of said real estate in amount to make each of them equal to the amount given said Alex Stanley in said original will including the amount

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received from the said trust estate." Then followed these provisions: "At the death of my said son James H. Welch, and after all the provisions in this codicil in relation to the grandchildren herein provided for have been fully complied with and carried out, then I direct that all the real estate, the use of which is herein given to my son James H. Welch, and all the personal estate held in trust by the provisions of this codicil which may remain after paying all the expenses for settling the trust estate and the management of the same, and all bequests and legacies to the grandchildren, shall become a part of the residuum of my estate, to be disposed of as hereinafter specified. . . . In case of the resignation or death of my said trustee I hereby direct that another trustee be appointed by the Probate Court for the district of Bristol, and if practicable such an one as may be recommended by my trustee herein named. And I give to the said trustee or trustees so appointed as successor or successors to my original trustee the same rights and powers in regard to said trust estate and the property belonging thereto as are given to the original trustee in this codicil and direct that said successor or successors shall not be required to give any probate bond for the faithful performance of his duties as trustee neither shall he or they be held responsible to any person or by any tribunal for any loss or damage sustained by said trust estate (while acting in good faith) which may be sustained by reason of any investment or reinvestment of the property not proving successful nor for any loss or damage to the estate while the property is in the possession or control of my said son James H. Welch."

The residuum of the testator's estate was given to his two daughters, after payment of a legacy therefrom of $40,000 to his nephew, George W. Mitchell.

James H. Welch had two sons at the date of the codicil.

The testator's brother renounced the trust, and George W. Mitchell was appointed to execute it, and received personal estate amounting to about $400,000 in value. In this was included live-stock and farming implements of the value of $3,564, on a farm devised to James H. Welch for life,

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which stock and implements were put and remained in his possession. In 1893 the E. N. Welch Manufacturing Company became financially embarrassed. James H. Welch and his two sisters each were shareholders, and signed an agreement reciting that James H. Welch desired to pledge to the Bristol National Bank certain insurance stocks then held by George W. Mitchell as trustee for him under their father's will, as collateral for a line of discounts to be granted on the company's notes to the amount of $45,000; requesting said trustee to pledge them for that purpose; and agreeing to indemnify him against any loss from so doing.

Subsequently the company was reorganized, and the capital stock, which had been $100,000 at the testator's death, was increased by the addition of $100,000 of common stock and $100,000 of preferred stock. James H. Welch agreed to the issue of the latter and to become a subscriber to it to the amount of $92,250, on condition that he should be given the sole control of the company and made its president. To assist in providing means for paying for this preferred stock, he borrowed $48,000 from time to time in 1900, 1901 and 1902, on his own notes from the defendant bank; giving it, as collateral, certificates for shares in sundry corporations in the name of George W. Mitchell, trustee, with blank powers of attorney indorsed on each signed by said trustee, who had delivered them to him in that condition. The defendant made the loans in good faith for the purposes above stated, knowing the terms of the will and codicils, and believing that they authorized the trustee to deliver said certificates to James H. Welch to be so used. A large part of the $48,000 was used by James H. Welch for said purpose; and $10,000 of it was used to pay a subscription he had also made to the common stock of the E. N. Welch Manufacturing Company. In the trustee's account rendered to the Court of Probate in 1903, he credited himself with a large amount of the trust stocks as having been from time to time "turned over to James H. Welch for reinvestment." Among the stocks so entered were those so pledged to the defendant, the last entry of

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turning over such stocks being a credit of $17,168, under date of January 20th, 1902. The last of said notes given by James H. Welch to the bank was for $10,000, dated January 17th, 1902. Said trustee's account charged the trustee, under date of August 25th, 1900, with "202 shares E. N. Welch Mfg. Co. common stock, returned by James H. Welch, $5,050," and under date of January 20th, 1902, with "2000 shares E. N. Welch Mfg. Co. preferred stock returned by James H. Welch, $50,000." In fact, these shares (which were of the par value so stated), were all transferred to the trustee by James H. Welch on January 20th, 1902. Subsequently they were transferred by the trustee to the plaintiff, as part of the trust estate.

James H. Welch died on January 27th, 1902. Soon afterwards the stocks pledged by him to the defendant were transferred by it to its own name. Their value considerably exceeded its claim on its loans.

The residue of the stock in the E. N. Welch Manufacturing Company subscribed for by James H. Welch remains in his name.

Theodore M. Maltbie, for the appellant (plaintiff).

Charles E. Perkins and *Josiah H. Peck*, for the appellee (defendant).

BALDWIN, J. The trustee under the will of Elisha N. Welch was empowered to "manage, invest and reinvest" the trust property "upon his best judgment and discretion," and directed "as far as practicable" to allow James H. Welch "to have the management and possession" of it with an exemption of liability on account of any loss to any part of the estate occurring while it might be "managed, controlled, or in the possession of" James H. Welch, or by reinvestment. It is contended that the testator only intended to provide for putting his son in control of the animals and utensils upon his farm. The terms used are too broad to admit of such a construction. They apply equally to every part of the estate.

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The trustee had therefore special testamentary authority to entrust the stocks in dispute to James H. Welch for management. He could also entrust them to him for sale and reinvestment in such manner as might be approved by his (the trustee's) "best judgment and discretion," and make him for that purpose the agent of the estate. In his account rendered to the Court of Probate, after the death of the latter, the trustee credits himself with them as delivered to him for reinvestment, and debits himself with other stocks received from him, including 2,000 shares of preferred stock and 202 shares of common stock in the E. N. Welch Manufacturing Company, to the value of $55,050. The facts found show that these stocks cost James H. Welch that amount, it being their par value, and that the loans by the defendant were made and largely used to assist in paying for them. Except from the account rendered to the Court of Probate, it does not appear that when the trustee delivered the stocks in controversy to James H. Welch, he authorized him to use them for purposes of reinvestment. The account, however, states that he received them for that purpose, and, with its debit entries, operates as a full ratification of what he did.

A testamentary power of sale, standing alone and unaided by other provisions in the will, does not authorize a mortgage or pledge. *O'Brien* v. *Flint*, 74 Conn. 502, 505. But by the will now under consideration not only was the trustee given the full title to the estate, and a large discretion as to its reinvestment, but he was directed to turn over the control of the whole property, so far as practicable to James H. Welch, without accountability for losses due to the latter's disposition of it. In determining what the provision means, the circumstances surrounding the testator when he made the will and codicil are to be taken into account. *Fritsche* v. *Fritsche*, 75 Conn. 285.

It is not improbable that he may have anticipated what afterwards happened to the manufacturing company which bore his name and in which a considerable portion of his property was invested. When the working capital of such a

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concern is found inadequate, an issue of new shares is naturally thought of; and, if issued, they must ordinarily be taken by those already interested in it. By his original will he had provided for putting the control of the company in the hands of his son. By the codicil, he enabled the trustee to furnish him means that he could use, if he thought proper, in supporting its credit or enlarging its business. The language employed is entitled to a liberal construction to carry into effect the general intention of the testator, which is sufficiently manifest, to throw the power and responsibility of control upon the son as to whatever part of the estate the trustee might deem it reasonable and proper to turn over to his keeping. It received such a construction from those interested in the residuary estate when they united, in 1893, with James H. Welch in requesting the trustee to pledge some of the stocks to procure discounts of the company's notes. The other stocks, pledged later to the defendant, were made over to it under whatever authority the trustee could give, and also whatever power the will conferred upon the *cestui que trust*. These pledges, whether properly or improperly made, resulted in the acquisition for the trust estate of two large blocks of the company's stock. The plaintiff has received them as part of it. He has, so far as appears, never offered to return them to the trustee, or to transfer them to the defendant, but holds them now as part of the testator's residuary estate. If he can also force the defendant to respond for the value of the securities received in pledge, he will enjoy the fruits of the loans made upon them, without recompensing either borrower or lender. The defendant has offered to surrender to him the stocks pledged, on his paying what is still due on the notes of James H. Welch, as security for which it received them. He can ask, under the circumstances which have been stated, for nothing more.

The appellant contends that the bank can take no benefit from his acquisition of these stocks, for want of privity between it and those through whom they came to him, citing *Baxter* v. *Camp*, 71 Conn. 245, 249, 71 Amer. State Rep.

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169. But while the complaint presents a simple cause of action at law, the answer, admitting all the averments to be true, sets up in avoidance the circumstances to which reference has been made. Such a defense does not rest on privity of contract, but on acts which, independently of any contract relations between the parties to this proceeding, have created rights of property which can only be divested through judicial action on equitable terms.

It is immaterial to the issues in this suit that the new shares in the E. N. Welch Manufacturing Company, now held by the plaintiff, were subscribed for by James H. Welch in his own name, in view of the fact that he transferred them to the trustee.

It is unnecessary to determine whether the pledges to the defendant were valid in all respects. They certainly gave it the means of acquiring the legal title to the stocks, which it holds. The plaintiff cannot treat the acquisition of it, or the refusal to transfer the stocks to him without payment of the loans to secure which they were pledged, as a conversion, while he is holding, as part of the testator's estate, other stocks procured with the money lent, and to pay for which the loans were sought and made.

Evidence that James H. Welch, when he applied for these loans, informed the defendant that he wanted the money to put into the E. N. Welch Manufacturing Company; that the defendant lent it believing it was to be so used in paying for preferred stock in it subscribed for by James H. Welch; that the estate of the testator was largely interested in the corporation; and that the defendant knew this, was all properly admitted. It was relevant to the issues raised upon the answer, and tended directly to support the defendant's lien upon the stocks pledged, by showing that, when it received them, it acted in good faith and with knowledge of facts which had a material bearing on the question of the right to make the pledge.

There is no error.

In this opinion the other judges concurred.

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MATTHEW GRIFFIN ET UX. *vs.* WILLIAM M. FERRIS ET AL.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A twofold obligation is assumed by the vendee of goods purchased under a bill of conditional sale which requires weekly payments and a settlement in full within one year. For a default in either respect the vendor may retake the goods, if the contract so provides.

Argued October 14th—decided December 18th, 1903.

REPLEVIN for a range, brought by the defendants' appeal from a judgment of a justice of the peace to the Court of Common Pleas for Hartford County and tried to the jury before *Coats, J.*; verdict and judgment for the plaintiffs, and appeal by the defendants. *Error and new trial granted.*

Herbert O. Bowers, for the appellants (defendants).

Harry M. Burke, for the appellees (plaintiffs).

BALDWIN, J. This case was properly treated by the trial court as turning upon the construction to be given to the following paper, which the plaintiffs delivered to the defendants:—

"Mr. and Mrs. Matthew Griffin,

Bought of Ferris Brothers,
Received of Ferris Brothers,

of South Manchester, Conn., on the 9th day of August, 1900, the following goods, to wit: 1 No. 8–18–6 Richmond range and shelf; also bill of goods to January 1, 1902, bal. $25.08; also charge of stovepipe, etc., January 11, 1902; also pipe and moving expenses, for which said goods I hereby agree to pay said Ferris Brothers the sum of $25.08 as follows: to be paid weekly, account to be settled in full in twelve months.

"It is further agreed as part of the consideration of this investment that said goods shall be at the risk of said vendee,

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but the title and ownership thereof shall remain in said Ferris Brothers until the price shall be fully paid and this agreement canceled, and that said price shall be paid at Ferris Brothers' store, and that in case any such partial payment shall not be made when due, said Ferris Brothers, or their agents, may take said goods into their possession and for use of and for damage to said goods may retain any payment made before such delinquency. The vendee, however, to have the privilege of retaining said goods on the immediate payment of the whole purchase price.

"Mrs. Matthew Griffin."

The goods in question were part of those above described, and were replevied in July, 1902, part of the balance of $25.08 then remaining unpaid and several weeks having elapsed during which no payments on account had been made. The jury were instructed that the words "account to be settled in full in twelve months," gave the plaintiffs an absolute right to their possession for twelve months from the delivery of the paper. This charge virtually denied any effect to the words next preceding those quoted, "to be paid weekly." All these words were written by the defendants upon a printed blank. The obligation thereby assumed by the plaintiffs was twofold: to pay something every week until all should be paid, and to pay all within twelve months. Any default in either respect gave the defendants an immediate right to resume possession.

There is error and a new trial is granted.

In this opinion the other judges concurred.

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SYLVESTER W. SKINNER *vs.* HATTIE I. HALE.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Where a husband or wife becomes the assignee and owner of a mortgage made by the other, this does not of itself extinguish the mortgage, or merge it in the legal estate either of them may have in the mortgaged premises.

Whether under our statutes enlarging the capacity of married women to sue and be sued, a husband who acquires such a mortgage by assignment can, during coverture, enforce his rights as mortgagee against his wife, *quære*.

Owing to the legal nature of the union between husband and wife, it has been generally considered that in a case of a mere joint occupancy with her husband a wife could not hold adversely to him.

To bar a mortgagee's right to foreclosure upon the ground of adverse possession, the mortgagor must have either disclaimed to hold under or subject to the mortgage and have asserted title in himself alone, or the character of his possession must have been such as to operate as a notice of a disclaimer of the mortgagee's title and assertion of his own.

The facts in the present case reviewed and *held* not to show any possession by the wife (the mortgagor) which was hostile or adverse to the rights of the husband as assignee of the mortgagee.

Argued October 14th—decided December 18th, 1903.

ACTION to foreclose a mortgage of real estate, brought to the Superior Court in Hartford County where a demurrer to the complaint was overruled (*Roraback, J.*) and the cause was afterwards tried to the court, *Shumway, J.*; facts found and judgment rendered for the plaintiff, and appeal by the defendant. *No error.*

Herbert O. Bowers, for the appellant (defendant).

J. Gilbert Calhoun, for the appellee (plaintiff).

TORRANCE, C. J. The plaintiff, Sylvester W. Skinner, was the husband of Lizzie M. Skinner deceased, and the defendant, Hattie I. Hale, is the daughter and sole heir at

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law of said deceased. The complaint alleged that the plaintiff was the owner of the mortgage sought to be foreclosed and of the note secured thereby, and the court has found that this was true.

The answer consisted of two defenses. In the first, certain paragraphs of the complaint were admitted and others were denied, and those denied were found to be true. The second defense was this: "The cause of action set forth in the plaintiff's complaint did not arise within fifteen years next before the commencement of this action." Upon the facts found the court held that the action was not barred, and whether it erred in so holding is the principal question upon this appeal. The facts found relating to this question are in substance the following: The plaintiff and his wife were married in this State in 1861, and thereafter lived together continuously here until the death of the wife in 1900. In November, 1873, the wife was the sole owner of the land sought to be foreclosed, and on the third day of that month she and the plaintiff gave to Newton P. Skinner their joint and several promissory note for $1,700, payable to him on demand with interest, and secured said note by a mortgage deed of said land of the wife. Said note and mortgage were made and executed by the plaintiff and his wife jointly, but the plaintiff joined in their execution at the request of the wife and for her accommodation. The money loaned upon said note and mortgage was used by the wife for the benefit of her separate estate. Between the date of said note and mortgage and the time of their transfer to the husband, as hereinafter stated, the interest on said note was regularly paid, and two payments of $200 each had been made upon the principal. In January, 1887, Newton P. Skinner, for a valuable consideration moving from the plaintiff, sold and conveyed to him the said note and mortgage, and the plaintiff is now the actual and *bona fide* owner of the same. In September, 1900, Lizzie M. Skinner, the wife of the plaintiff, died intestate, leaving the defendant as her only heir at law, and the estate of the decedent was fully settled in the Court

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of Probate prior to the commencement of the present suit. From the time when the plaintiff became the owner of said note and mortgage, in January, 1887, down to the commencement of this action in July, 1902, no steps were taken by him to collect the note, nor to enforce his rights under said mortgage. In January, 1887, the plaintiff and his wife were living in a house upon the land covered by the mortgage, which was and continued to be their home until the death of the wife.

Upon the facts found, it is clear that, as between the plaintiff and his wife, the loan secured by the mortgage was made to her and not to him, and that, as between them, it was her duty to pay the loan. Whether the land mortgaged was "the sole and separate" estate of the wife is not found, though it is found that she was "the sole owner." Whether the plaintiff had, as husband, any estate in the land mortgaged, is not perhaps clear from the finding, nor is the fact that he had or had not any such estate important in this case. It is clear that the plaintiff, in 1887, became, by assignment upon valuable consideration, the owner of the note and mortgage, and is still the *bona fide* owner and holder thereof; and it is also clear that at the time of the assignment the mortgage did not become merged in any legal estate which the plaintiff had or may have had in the land mortgaged; nor in the legal estate of the wife in said land, for the mortgage was not bought by nor for her; nor has any such merger taken place since. In cases of this kind "courts of equity will always keep the estates separate and uphold the mortgage, when it is required by the justice of the case or the intent of the parties." *Goodwin* v. *Keney*, 47 Conn. 486, 493; *Hart* v. *Chase*, 46 id. 207; *Ensign* v. *Batterson*, 68 id. 298, 304. The further rule, also, that where one spouse becomes by assignment the owner of a mortgage made by the other this does not of itself extinguish the mortgage, seems to be now well settled. *Cormerais* v. *Wesselhoeft*, 114 Mass. 550; *Fowle* v. *Torrey*, 135 id. 87, 94; 20 Am. & Eng. Ency. of Law, 1068, and cases cited therein. Indeed, no claim of merger or of

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extinguishment is now made by the defendant, though it was made in the demurrer that was overruled.

Under these circumstances, by the assignment, the husband became in effect the mortgagee of the land, with all the rights of the assignor to enforce payment of the mortgage debt, except so far as those rights were modified by the fact that the mortgagor was his wife. The defendant admits that if the plaintiff, during, and because of, coverture, could not enforce his rights as mortgagee, his right to foreclose the defendant is not barred by lapse of time; but she earnestly contends that under our statutes enlarging the capacity of married women to sue and be sued, the right of the plaintiff to sue his wife upon the note, and to foreclose the mortgage, was not suspended during coverture.

Whether or not the law upon this point is as the defendant contends, it is not necessary to decide in this case; for even if we assume it to be so, we do not think the facts found show any such adverse possession on the part of the wife as would support the second defense in this case. For the purposes of the argument, then, it will be assumed that the right of the husband to foreclose the wife was not suspended during coverture.

The defendant also claims that a wife living with her husband, in the joint possession of land, can as matter of law hold adversely to him. It has been held by this court that a married woman occupying land with her husband, where he makes no claim to such land, may hold adversely to a third person, and thereby acquire a title by such possession as against such third person; *Clark* v. *Gilbert*, 39 Conn. 94; but whether in case of a mere joint occupancy with her husband, a wife can hold adversely to him, is a different question. Owing to the legal nature of the union between husband and wife it has generally been held that she could not. 1 Amer. & Eng. Ency. of Law, 820, and cases there cited. It has also been said of such a case that "two contemporaneous possessions of the same property, each adverse to the other, is a legal absurdity not conceivable." *Gafford* v. *Strauss*, 89 Ala. 283, 286. It is unnecessary to decide

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this question in this case, for, assuming that a wife can, as matter of law, hold adversely to her husband in a case like the present, the important question is whether the plaintiff's wife did in fact do so. In discussing that question it will be assumed that, as matter of law, a wife can hold adversely to her husband.

Though there is no statute of limitations applicable to actions of foreclosure or redemption, courts of equity have adopted rules of limitation in such cases, and ordinarily the period that would bar a remedy at law upon the deed or note will be held to bar a remedy in equity. *Jeffery* v. *Fitch*, 46 Conn. 601, 605. It is well settled that the right to foreclose, or to redeem, a mortgage, may be lost by the lapse of a period of fifteen years. *Haskell* v. *Bailey*, 22 Conn. 569; *Jarvis* v. *Woodruff*, ibid. 548; *Hough* v. *Bailey*, 32 id. 288; *Hanford* v. *Fitch*, 41 id. 486. If, for instance, the mortgagee, after the right to foreclose accrues, suffers the mortgagor to remain in the exclusive possession of the land for fifteen years or more, without any act by the mortgagor recognizing the continued existence of the mortgage, the right to foreclose will ordinarily be barred. *Haskell* v. *Bailey*, 22 Conn. 569. The rule of limitation is applied in such a case upon the theory that such an occupancy is adverse to the mortgagee, and in denial of his rights. If, with knowledge of such an occupancy, he chooses to sleep upon his rights for fifteen years, a court of equity will not aid him to enforce them. Where, however, the occupancy of the mortgagor is either expressly or impliedly in subordination to the rights of the mortgagee, and not in denial of them, such occupancy, however long continued, will be no bar to an action of foreclosure. If the occupancy of the mortgagor is with the consent and agreement of the mortgagee, or the mortgagor by any conduct or act expressly or impliedly recognizes the continued existence of the mortgage, the possession is not hostile nor adverse to the mortgagee. 2 Swift's Dig. pp. 188, 189; *Hough* v. *Bailey*, 32 Conn. 288; *Moore* v. *Clark*, 40 N. J. Eq. 152, 153. In short, to bar the right to foreclose, the possession of the mortgagor must be hostile and adverse

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to the mortgagee; and it is never this until the mortgagor either disclaims holding under or subject to the mortgage and asserts title in himself alone, or the character of his possession is such as of itself gives notice that he repudiates the title of the mortgagee and asserts title in himself. *Holmes* v. *Turner's Falls Co.*, 150 Mass. 535.

Applying these principles to the case at bar, we think the facts found fail to show that the wife held or claimed to hold the mortgaged premises adversely to the rights of her husband as mortgagee. Until she denied his rights by her words or her conduct, he had no occasion to enforce them, nor any reason to suppose he would lose them by failing to do so for fifteen years. *Huntington* v. *Whaley*, 29 Conn. 391, 397. The fact that she paid no interest nor any part of the principal, nor was ever called upon to do so, is fully explained and accounted for by the facts found. The mortgagee was her husband and the land mortgaged was the home where she lived with him. He held the legal title to the land and she the equity of redemption. Both were in possession of the premises and in the enjoyment of the rents and profits thereof equally, each with the consent of the other. Neither appeared to have, nor claimed to have, any exclusive possession. Under these circumstances it cannot be said that either held, or intended to hold, adversely to the other, or that either denied or repudiated the rights of the other. Upon the facts found we think the plaintiff's right to bring an action of foreclosure was not barred.

The defendant demurred to the complaint on the ground that upon its face it appeared that the cause of action was barred and the court overruled the demurrer. Assuming, without deciding, that advantage of the statutes of limitation can be taken in this way, we think the complaint did not show that the cause of action was barred. Besides, in view of the facts found relating to this matter, the ruling upon the demurrer, even if erroneous, was harmless.

There is no error.

In this opinion the other judges concurred.

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THOMAS F. DEVINE *vs.* HENRY O. WARNER.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, JS.

While the buyer may "accept and actually receive" the goods, within the meaning of the statute of frauds (General Statutes, § 1090), under a sale which is not accompanied by manual delivery or actual change of custody, yet the proof in such cases should be clear and unequivocal, and establish an actual change of the relation of the parties to the property. Something more is required, as proof of receipt and acceptance, than mere words indicative of the parties' assent to the agreement of sale. There must be a delivery by the vendor and a receipt by the vendee, with the intention to vest in the vendee the possession and right of possession, discharged of all liens for the price, and an actual acceptance by the vendee of the goods, at least as the goods purchased, if not as its owner by virtue of the purchase.

The written memorandum required by the statute of frauds need not necessarily be comprised in a single document, nor drawn up in any particular form. It is sufficient if the terms of the contract can be made out from memoranda of the party to be charged therewith, or from his correspondence; but such writings must be connected by mutual reference, and without the aid of oral testimony to supply any defects or omissions in the written evidence.

It is competent for the jury to find that the plaintiff was the actual and *bona fide* owner of the chose in action on which the suit was brought, from the instrument of assignment itself and the uncontradicted testimony of the parties thereto. Nor is an instruction to that effect erroneous, merely because the jury are also told that if they believe this evidence they "should find" a valid assignment.

It cannot be said, as matter of law, that the assignee of a chose in action is not the *bona fide* owner thereof, merely because the instrument of assignment requires him to return to the assignor a portion of the amount which he may recover on the claim.

A judgment exceeding the amount demanded but within the court's jurisdictional limit, is not void, although it may be erroneous.

Submitted on briefs October 14th—decided December 18th, 1903.

ACTION to recover damages for breach of contract, brought to the District Court of Waterbury and tried to the jury before *Peasley, Deputy-Judge;* verdict and judgment for plaintiff, and appeal by the defendant. *No error.*

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James Huntington, *Arthur D. Warner* and *John F. Addis*, for the appellant (defendant).

John O'Neill, for the appellee (plaintiff).

HALL, J. The plaintiff claimed to have proved, in the trial court, that with his assistance, his brother, John J. Devine, in the season of 1899, raised a crop of tobacco upon their father's land in Suffield, which crop in the fall of that year John J. Devine sold to the defendant at an agreed price; and that the defendant having afterwards refused to take the tobacco or to pay for it, John J. Devine was compelled, by reason of a fall in the market price of such tobacco, to sell it for $528.53 less than the price agreed upon with the defendant. The plaintiff, as the *bona fide* owner of such right of action, by assignment from his brother, John J. Devine, sues to recover said sum.

As showing that the defendant purchased the tobacco, and accepted and actually received it, the plaintiff claimed to have proved these facts: The defendant on September 22d, 1899, having examined the tobacco in the barns in which it was hanging on poles, agreed with John J. Devine to purchase the entire crop at twenty cents a pound, and thereupon, under date of September 22d, 1899, made this entry in a note-book in which he made entries of the tobacco which he purchased, and upon the inside of the front cover of which the defendant had written his name: "John J. Devine, four acres at twenty cents"; and showed said entry to John J. Devine, and said to him with reference to the tobacco: "Let it hang until it is cured; then take it down and strap it into bundles, putting about forty pounds to the bundle. Then, when it is stripped, notify me." John J. Devine did as thus directed, and about the 24th of November, 1899, wrote the defendant that the tobacco was ready for shipment and that he (Devine) thought that with this tobacco and that of a neighbor, which the defendant had purchased, a car might be filled. The defendant wrote in reply, that he would be at Devine's place the first of the following week. On November 28th, 1899, the defend-

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ant, after he had examined the tobacco as it lay in bundles on the floor of Devine's barn, said to Devine: "You have done your part well. I am going to load one or two cars with tobacco I have purchased here in Suffield, and if I can take this tobacco in one of these cars I will send for it; but if I cannot take it away with me on this trip and a damp spell comes on, open up the sheds so as to let the dampness get in and dampen the bundles, and pile the tobacco up into one or two large piles. In case I don't take it this week it will keep better in one pile than it would spread out only one bundle high." At the end of the week the defendant not having sent for the tobacco, John J. Devine placed it in piles and opened the barns as directed. For several weeks after said last interview the defendant was ill and unable to attend to business. On January 26th, 1900, Devine wrote to the defendant that he was anxious to get the tobacco off of his hands; that he needed the money, and that if he (the defendant) could see his way clear to take the tobacco soon, he would appreciate the favor. On the next day the defendant wrote in reply that he was ill and that he would see Devine as soon as he was able. On February 8th, 1900, the defendant with his hired man, Lathrop, went to the place where the tobacco was piled, and Lathrop went in and inquired of Devine if his tobacco was for sale. Devine replied that he had already sold it. Having reported this answer to the defendant, Lathrop, at the defendant's direction, returned and asked Devine who the purchaser was. Devine replied H. O. Warner (the defendant). The defendant and Lathrop thereupon went into the barns and examined the tobacco, and said to Devine that it was a bad lot of tobacco; and the defendant informed Devine that he would not take the tobacco or pay for it. The market price of this grade of tobacco had since the preceding September dropped eight or ten cents a pound.

Of the defendant's first three reasons of appeal, it need only be said, (1) that—excepting as it appears that the court charged the jury as to the plaintiff's right to maintain this action, to which we shall refer later—the record does not disclose that the trial court held that the plaintiff "acquired

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any right or title in the subject-matter of this action by reason of Exhibit 3 (the written assignment) and the evidence connected therewith"; (2) that the denial of defendant's motion for a nonsuit is not reviewable; and (3) that as the record contains no statement of the evidence—except in the finding of facts certain evidence is stated in connection with the rulings of the court as to its admissibility—we cannot review the action of the trial court in overruling defendant's motion to set aside the verdict as against the weight of evidence.

Regarding the acceptance and receipt of the tobacco necessary to meet the requirements of the statute of frauds, General Statutes, § 1090, the court charged the jury "that while it is true that there may be an acceptance and actual receipt of goods by the vendee, pursuant to a sale unaccompanied by a manual delivery or actual change of custody,—as in cases where the vendee is already in possession or the vendor retains the custody as bailee of the vendee, thus assuming a new relation to the goods,—yet the law requires that the proof in such cases should be clear and unequivocal and establish an actual change of the relation of the parties to the property"; that "as a receipt implies a delivery, there must have been a delivery by the vendor and receipt by the vendee of the tobacco, with an intention on the part of the parties to vest in the vendee the possession and right of possession, and discharged of all lien for the price, and an actual acceptance by the vendee of the tobacco, at least as the goods purchased, if not as its owner by virtue of the purchase"; and that the statute required something more by way of proof of a receipt and acceptance than "mere words indicative merely of the parties' assent to the agreement of sale." This part of the charge complies with the instructions which, upon a former appeal of this case and upon similar facts, we said should have been given to the jury upon the question of the acceptance and receipt required by the statute of frauds. *Devine* v. *Warner*, 75 Conn. 375, 379.

Concerning the written memorandum required by the statute, and the evidence offered as to such memorandum, the court charged the jury as follows: "It is not necessary

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that the written memorandum required by the statute of frauds should be comprised in a single document, nor that it should be drawn up in any particular form. It is sufficient if the contract can be made out in all its terms from any writings of the defendant, or from his correspondence. But it must all be collected from the writings, provided the several writings are so connected by mutual reference or otherwise that there can be no uncertainty as to the meaning and effect of them all when taken together and viewed as a whole, but this connection of the several writings cannot be established by oral testimony offered to supply any defects or omissions in the written evidence. Unless you find that there is such a mutual reference between the letters of the defendant and the entry in his memorandum book that without the aid of the oral evidence which has been listened to by you in this case, you will be unable to consider his letters as a part of his written memorandum. If you should find that there is such a mutual reference and that, as read together, the contract can be understood by you in all its terms, from the letters and the book memorandum, and that the name of the defendant on the fly leaf of the book was intended by the defendant as his signature to the memorandum, then the memorandum is a sufficient compliance with the statute of frauds."

One of the reasons of appeal is that the court erred in so charging the jury. Evidently the error intended to be thus assigned is, not that the court erred in not taking this question entirely away from the jury, or in failing to charge them that the book and letters contained no written memorandum of the agreement signed by the parties to be charged therewith, sufficient, as a matter of law, to answer the requirements of the statute of frauds; for the defendant not only failed to request the court to instruct the jury that the claimed memorandum and signature were, as a matter of law, insufficient under the statute, but, in his written requests to charge, referred to the question, of whether such a memorandum duly signed had been proved, as one of fact for the jury. The claim in the defendant's brief respecting

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this reason of appeal is, not that the court erred in submitting to the jury, as one of fact, the question of whether a duly signed memorandum had been proved, but in not correctly instructing the jury as to the rule of law to be applied in deciding such question of fact. The law applicable to the questions of fact was correctly stated by the trial court. 1 Swift's Dig. s. p. 236; *Nichols* v. *Johnson*, 10 Conn. 192, 198.

Having instructed the jury that to be the equitable and *bona fide* owner of a chose in action, within the meaning of General Statutes, § 631, "one must be the real owner of it, the one to whom the equities belong," the court further said to the jury that the evidence that the plaintiff was the actual and good faith owner was in "the instrument of assignment and the testimony of the Devine brothers," and added: "If you believe their testimony, which is uncontradicted and is the only testimony on the subject, it is within your province to find and you should find that the plaintiff has such an interest, that he has complied with the requirements of the statute."

The only ground stated in the defendant's brief for the claim that the court erred in so charging the jury, is that by this language it "passed upon a material question of fact that was entirely within the province of the jury."

The record does not purport to give all the testimony of the Devine brothers. It is not claimed that the evidence showing the plaintiff's ownership of the right of action was contradicted. It appears from the finding that the plaintiff claimed to have shown that, having assisted his brother in raising the crop of tobacco, it was in good faith agreed between them, after the defendant had refused to pay for the tobacco, that the claim should be assigned to the plaintiff for the purposes and upon the terms stated in a written assignment in these words: "Suffield, April 7, 1900. In the fall of 1899 I sold a crop of tobacco in my barns in Suffield to H. O. Warner of New Milford for twenty cents per pound. I subsequently sold this tobacco for twelve and three-quarters cents per pound, making a loss to me of about

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$523.53. For value received I hereby assign, sell, and transfer to my brother, Thomas F. Devine, who is to endeavor to recover the claim by legal process or otherwise. After deducting the expenses, the remainder is to be divided into three equal parts, two of which are to be returned to me, the remaining third he is to keep. John J. Devine."

It does not appear that the court erred in charging the jury, as it in effect did, that the uncontradicted evidence of these facts, if believed by the jury, was sufficient proof that the plaintiff was the *bona fide* owner of the chose in action upon which the suit was brought. *Devine* v. *Warner*, 75 Conn. 375, 381; *Metropolitan Life Ins. Co.* v. *Fuller*, 61 id. 252, 262.

The complaint asked for $600 damages. The verdict and judgment were for $633.90. The judgment in excess of the damages claimed was not void, since the court had jurisdiction to render a judgment for that sum. *Chaffee* v. *Hooper*, 54 Vt. 513. It is not assigned as a reason of appeal that the judgment was erroneous because it exceeded the damages claimed, and therefore we need not consider that question.

There is no error.

In this opinion the other judges concurred.

CHARLES H. NETTLETON, EXECUTOR, APPEAL FROM PROBATE.

* First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

The exaction of some form of death duty has existed from ancient times as an established and well known mode of taxation, and the right to impose such duties was therefore included in the broad power of taxation vested by our Constitution in the General Assembly.

* Transferred from third judicial district.

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With the exception of the rule of apportionment in laying direct taxes, and of geographical uniformity in laying indirect taxes, contained in the Federal Constitution, there is no provision either in that instrument or in the Constitution of this State which defines or limits the method or manner in which the power of taxation may be exercised by the legislative department. Accordingly, a statute of this State imposing taxes is not to be adjudged unconstitutional because it happens, under certain circumstances, to bear unequally, or because its classification is arbitrary, provided it does not violate some independent constitutional prohibition or restraint.

While the succession tax law, so-called (General Statutes, §§ 2367 to 2377), in imposing death duties, makes an arbitrary distinction between estates of $10,000 and those of a greater amount, so that a legacy in an estate of $10,000 or less pays no tax, while a legacy of the same amount in an estate of more than $10,000 is taxed, yet the Act is not unconstitutional upon that ground, since it is obvious that such distinction is a mere incident to the operation of a statute enacted solely for the purposes of taxation, and is not an attempt, either in form or substance, to exercise the power of hostile discrimination against any class of citizens which is forbidden alike by the State and Federal constitutions.

Argued October 14th—decided December 18th, 1903.

APPEAL from an order and decree of the Court of Probate for the district of Meriden fixing the amount of an inheritance tax and directing its payment to the State, taken to the Superior Court in New Haven County and reserved by that court, *George W. Wheeler, J.*, for the advice of this court. *Superior Court advised to dismiss the appeal.*

The Court of Probate for said district of Meriden made the following order:—

"Estate of Owen B. Arnold, late of Meriden, in said district, deceased.

"It appearing to the court from the inventory of the above estate that the total property of said estate at the time of said inventory was as follows, to wit:

Real estate, ...	$8,900.00
Personal property, ...	242,738.87
Total, ...	$251,638.87

"And it further appearing that for the purpose of fixing

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the inheritance tax upon said estate the amount of said inventory is subject to the following deductions:

(*a.*) Foreign assets,	$75,832.00
(*b.*) Statutory exemption,	10,000.00
(*c.*) Debts and expenses of administration,	9,121.13
(*d.*) United States internal revenue tax,	4,492.78
Total,	$99,445.91

leaving a balance subject to the inheritance tax of $152,192.96.

"And it further appearing that the legacies given under said will are to St. Andrew's parish, Meriden," etc.; "and that none of said legatees are within the relation of parent, husband, wife, lineal descendant, or legally adopted child of the testator.

"And it further appearing that by the provisions of section 2368 of the General Statutes of Connecticut, Revision of 1902, all of such legacies are subject to a succession tax of 3 per cent. of their value.

"Now, therefore, it is hereby ordered that Charles H. Nettleton, executor under the will of said Owen B. Arnold, shall forthwith pay to the Treasurer of the State of Connecticut the sum of $4,565.79, being the amount of said succession tax, together with interest thereon at the rate of 9 per cent. per annum from the 12th day of September, 1901, being one year after the qualification of such executor, said interest amounting to $674.39."

The material sections of the General Statutes governing this action of the Court of Probate are given in the note.*

*§ 2367. The estate of every deceased person, to the amount of ten thousand dollars, and, in addition to said amount, all gifts of paintings, pictures, books, engravings, bronzes, curios, bric-a-brac, arms, and armor, and collections of articles of beauty or interest, made by will to any corporation or institution located in this state for free exhibition and preservation for public benefit, shall be exempt from payment of any succession tax; and, after deducting ten thousand dollars and all such gifts for free public exhibition, the rest of the estate of every deceased person shall be subject to the taxes in § 2368 provided.

§ 2368. In all such estates any property within the jurisdiction of

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The executor appealed from this order to the Superior Court. His reasons of appeal consist of an allegation that the legislative Act, under which the Court of Probate di-

this state, and any interest therein, whether tangible or intangible, and whether belonging to parties in this state or not, which shall pass by will or by the inheritance laws of this state to the parent or parents, husband, wife, or lineal descendants, or legally adopted child of the deceased person, shall be liable to a tax of one-half of one per cent. of its value for the use of the state; and any such estate or interest therein which shall so pass to collateral kindred, or to strangers to the blood, or to any corporation, voluntary association, or society, shall be liable to a tax of three per cent. of its value for the use of the state. All executors and administrators shall be liable for all such taxes with interest thereon at the rate of nine per cent. per annum, from the time when said taxes shall become payable until the same shall have been paid as hereinafter directed.

§ 2369. The court of probate having jurisdiction of the settlement of any estate shall, within ten days after the filing of a will or the application for letters of administration, if in its opinion said estate exceeds in value said sum of ten thousand dollars, send to the treasurer of the state a certificate of the filing of such will or application, and shall within ten days after the return and acceptance of the inventory and appraisal of any such estate send a certified copy of said inventory and appraisal to the treasurer of the state, together with his certificate as to the correctness in his opinion of said inventory and appraisal; and if no new appraisal is made as hereinafter provided the valuation therein given shall be taken as the basis for computing said taxes. The said court of probate shall, on the application of the treasurer of the state, or any person interested in the succession thereof, and within four months after granting administration, appoint three disinterested persons who shall view and appraise such property at its actual value for the purposes of said tax, and make return thereof to said court, and on the acceptance of said return, after public notice and hearing, the valuation therein made shall be binding upon the persons interested and upon the state. If any executor or administrator shall neglect or refuse to return an inventory and appraisal within the time now required by law, unless said time shall have been extended by said court for cause, after hearing and such notice as the court of probate may require, the said court of probate may remove said executor or administrator, and appoint another person administrator with the will annexed, or administrator, as the case may be.

§ 2371. Where any estate or an annuity is bequeathed or devised to any person for life or any limited period, with remainder over to another or others, and all the beneficiaries are within the same class, the tax shall be computed on, and paid as aforesaid out of, the principal sum of property so bequeathed or devised. Where a life estate or

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rected the executor to pay the succession tax in question, is null and void; and assigns four grounds of invalidity. These grounds, briefly stated in their appropriate order, are:

an annuity is bequeathed or devised to a parent or parents, husband, wife, or lineal descendants, and remainder over to collateral kindred, or to strangers to the blood, or to a corporation, voluntary association, or society, then the tax of one-half of one per cent. shall be paid out of the principal sum or estate so bequeathed or devised for life, or constituting the fund producing said annuity, and the remaining two and one-half per cent. due from collateral kindred or strangers to the blood shall be paid out of the said principal sum or estate at the expiration of the particular estate or annuity. And where a life estate or annuity is bequeathed or devised to collateral kindred or strangers to the blood, or to a corporation, voluntary association, or society, with remainder to parent, or parents, husband, wife, or lineal descendants, or legally adopted child, a tax of three per cent. shall be paid as aforesaid to the treasurer of the state out of the principal sum or estate, or fund producing said annuity; on the termination of said life estate or annuity the treasurer of the state shall refund and pay to the person or persons entitled to the remainder five-sixths of said tax. The said court of probate shall send to the treasurer of the state a certificate of the date of the death of said life tenant or annuitant within ten days after the same has come to its knowledge.

§ 2372. All administrators or executors shall have power to sell so much of the estate as will enable them to pay said tax. In case specific estate or property is bequeathed or devised to any person, unless the legatee or devisee shall pay to the executor the amount of the tax due thereon by the provisions of § 2368, the executor shall sell said property or so much thereof as may be necessary to pay said tax and the fees and expenses of said sale.

§ 2374. The court of probate, having either principal or ancillary jurisdiction of the settlement of the estate of the decedent, shall have jurisdiction to hear and determine all questions in relation to said tax that may arise affecting any devise, legacy, or inheritance under § 2368, subject to appeal as in other cases, and the state treasurer shall represent the interests of the state in any such proceeding.

§ 2375. No final settlement of the account of any executor or administrator shall be accepted or allowed by any court of probate unless it shall show, and the judge of said court shall find, that all taxes, imposed by the provisions of § 2368 upon any property or interest belonging to the state to be settled by said account, shall have been paid, and the receipt of the treasurer of the state for such tax shall be the proper voucher for such payment.

§ 2377. Sections 2367 to 2376, both inclusive, shall not apply to the estates of any persons deceased before June first, 1897; but the estates of all persons who died before July first, 1893, and on or after August

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(1) The Act exceeds the legislative power of taxation. (2) The Act violates the Fourteenth Amendment of the Constitution of the United States. (3) The Act transcends the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems. (4) The Act violates the fundamental principles of the social compact.

The State treasurer appeared on behalf of the State and demurred to the reasons of appeal.

Upon stipulation and agreement of the parties the Superior Court reserved the questions of law arising in said cause, and upon the appellant's reasons of appeal, and the appellee's demurrer, and what judgment should be rendered, for the advice of this court.

Edward A. Harriman, for Charles H. Nettleton, executor.

Donald T. Warner and *William A. King*, Attorney-General, for the State.

HAMERSLEY, J. Are §§ 2367 to 2377 inclusive, of the General Statutes, which constitute the Act of the legislature under which the decree of the Court of Probate was passed, null and void, for any one of the reasons assigned by the appellant?

If the Act exceeds the legislative power of taxation, it violates the provisions of our State Constitution; it is not law; the person subjected to such taxation is deprived of his property by a means not clearly warranted by the law of the land, that is, without due process of law, and the person thus deprived of property without due process of law may invoke the national protection afforded through the Fourteenth

first, 1889, shall be subject to the provisions of chapter 180 of the public acts of 1889; and the estates of all persons who died before June first, 1897, and on or after July first, 1893, shall be subject to the provisions of said chapter 180 as modified by chapter 257 of the public acts of 1893. Said chapters 180 and 257 are continued in force for the purposes in this section expressed.

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Amendment; and so the first and second grounds of invalidity are closely related and may more conveniently be treated as one ground.

The Act may exceed the legislative power of taxation because the particular exaction imposed is not within the scope of that power as vested in the General Assembly by the Constitution, or because the Act, in laying a tax within the scope of that power, lays it in such manner or for such purpose as to violate some provision or limitation of the Constitution.

The Act imposes death duties and prescribes their amount and the machinery convenient for their collection. A tax of this kind has been defined as "an exaction made by the State in the regulation of the right of devolution of property of decedents, which is created by law, and which the law may restrain or regulate." *In the Matter of Sherman*, 153 N. Y. 1, 4.

Some form of death duty has been used as a mode of taxation from ancient times. When the Constitution of the United States was adopted death duties had been in use in England, as well as elsewhere, and were an established mode of taxation known to the people, who, in the exercise of the sovereignty vested in them, enacted that fundamental law. The imposition of death duties must therefore have been included in the broad power of taxation granted to the legislature by the Constitution. This is true of the Constitution of our State.

Soon after the organization of the Federal government Congress imposed death duties, and has used this mode of taxation at intervals until the present time. The same mode of taxation has been practiced by many of the State legislatures.

Such laws have been frequently attacked as unconstitutional, but their validity is too firmly established by many decisions to be now questioned. It is sufficient to refer to the leading case of *Knowlton* v. *Moore*, 178 U. S. 41. In the opinion announced by Mr. Justice White the whole subject is discussed with exhaustive fullness, and the proposition that death duties are an established mode of taxation and

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clearly within the power of taxation granted to the legislature is demonstrated.

If, therefore, the Act under discussion exceeds the legislative power, it must be because in the manner of laying the tax or the purpose of its imposition some provision of our Constitution is violated. The only provision of our Constitution to which this Act can be claimed to be obnoxious, is that which results by clear implication from the declaration of rights contained in Article I, and which secures to every citizen equal protection in the enjoyment of those civil rights common to all, and which stamps with invalidity laws which select any person or persons for gratuitous privileges or for arbitrary and hostile discrimination in the imposition of burdens or limitations on their harmless action. *State* v. *Conlon*, 65 Conn. 478, 489.

The constitutions of many of the States contain, in some form, the maxim "taxation should be equal and uniform." This maxim may be apposite and useful if addressed to the conscience and judgment of legislators in exercising the power of taxation, but when it was incorporated into a constitution as a limitation on that power, which courts might be called upon to interpret and enforce, it became a fruitful source of litigation which taxed the ingenuity of courts. This difficulty was most keenly felt when courts were called upon to reconcile the unquestioned power of taxation, through the imposition of death duties, with the constitutional provision requiring uniformity and equality in taxation. Such legislation generally involved, and in some instances to a marked degree, the violation of the rule of uniformity in rate and of equality in operation. The difficulty was overcome partly through an application of the theory, found useful in other tax troubles, that the rule of equality did not apply to the people as a whole, or to property in general, but only to persons and property after they had been classified for purposes of taxation.

More reliance, however, was placed upon the theory that imposition of death duties is not taxation within the meaning of the troublesome maxim; that inasmuch as the process by

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which the State assumes the care of property upon the death of its owner and secures its distribution to the objects designated by him in his will, or to the persons designated by the law of intestacy, is the creature of statute, which the State may alter or abrogate at pleasure, therefore the power of its owner to so transfer property, through his death, and of his legatee or the distributee of his estate to so receive the property, is a privilege granted by the State, which may properly dictate the terms on which the privilege may be enjoyed. Upon this theory, laws for collecting taxes by way of death duties, which disregard uniformity in rate and involve gross inequality in operation, have been held valid by courts of last resort in States whose constitutions require uniformity and equality in taxation.

Upon appeal in such a case the United States Supreme Court has not questioned this interpretation by State courts, and, accepting that interpretation, has held that the State tax involving the greatest inequality was not obnoxious to the Fourteenth Amendment, because the State Constitution contained no provision prohibiting the exercise of taxation in this manner. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283.

Such considerations are of comparatively slight importance in determining the validity of a tax imposed by the United States Congress or by the General Assembly of this State. With the exception of the rule of apportionment in laying direct taxes, and of geographical uniformity in laying indirect taxes, prescribed for Congress, neither the Constitution of the United States nor that of this State adopts any maxim prescribing or defining the manner of taxation for the purpose of thus limiting, through constitutional prohibition, the exercise of that power; neither Constitution contains the general maxim, "taxation must be uniform and equal." And so when the validity of an Act of Congress imposing death duties is challenged, the Federal court is not concerned with the unequal operation of the law, unless as a consideration throwing light on the intention of the legislature in using language of a doubtful

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meaning; as where one construction would increase a gross inequality in operation to an inequality so profound that a court would not be justified in an inference of such legislative intent not expressed in language too clear to permit any reasonable doubt.

It is not concerned with that distinction between death duties and other forms of taxation relied upon by State courts, in excepting this form of taxation from a constitutional rule of equality, for Congress did not make, and cannot alter, the statutes conferring the privilege of transferring or receiving property through will or intestacy, upon the death of its owner. *Knowlton* v. *Moore*, 178 U. S. 41.

It is concerned with these questions: Are death duties taxation within the power granted to the legislature? If so, is this particular tax so laid as to be obnoxious to some independent provision of the Constitution, as, for instance, the one clearly implied from the relations between the National and State governments, which forbids the one to tax governmental means essential to the existence of the other; or is it laid with the purpose and effect of invading some right of person or property guaranteed by the Constitution?

In *Black* v. *State*, 113 Wis. 205, the case mainly relied upon by the executor, the court was clearly influenced, not only in its decision of the points involved but also in the collateral discussion, by a provision in the Wisconsin Constistitution commanding the legislature to so exercise its granted power of taxation that all taxation should be uniform and equal; a provision which to this extent subjected the legislative discretion to judicial control. There is no occasion to comment on the departure from lines of construction, followed by courts in some other States whose constitutions contain a similar provision, which is indicated in the opinions of the judges concurring in the results reached in this case.

The grounds on which the Act of Congress of 1898, imposing death duties, was held valid in *Knowlton* v. *Moore*, 178 U. S. 41, demonstrate the validity of our State law

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under discussion. It is, however, seriously claimed that the State law is obnoxious to the provision of our State Constitution above mentioned, and therefore we will consider that claim.

Plainly the provision is not violated unless the Act selects some person or persons for arbitrary or hostile discrimination in the imposition of burdens. The Act imposes an indirect tax or duty of the kind known as death duties; that is, an exaction to be paid to the State upon the occasion of death and the consequent transfer of ownership in the property of the decedent, through the intervening custody and administration of the law, to the persons designated by the law, through the statutes regulating wills, descents, and distribution. Such exaction is due and collectible during the interim that the property is in the custody of the law; that is, after death has destroyed the possession of its owner and before final possession is given to the new owners designated by the law.

If the tax is laid upon the property after it has passed into the possession of the new owner, to be paid by him, it is not a death duty but a tax on property. It is evident that all death duties are an exaction taken from the estate of a decedent in the custody of the law, and that the stress of the tax must fall in some form, and more or less directly, on those who receive, at the hands of the law, the estate thus depleted. It is immaterial to the essence of this tax how its amount is computed; whether by one calculation upon the whole estate flowing to all beneficiaries, or through several calculations upon separate, distinct portions of the estate flowing to distinct beneficiaries. However computed, the tax is an exaction from the estate of the decedent, the stress of which incidently falls on the legatees or distributees with more or less equal or unequal burden, according to the policy adopted by the State in fixing the scope of the exaction, the mode of ascertaining its amount, and of enforcing its collection.

Nor is it material to the essence of the tax at what time it is ascertained and collected during the passage of the

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property, through the channel of the law, from the dead to the living; whether the property is tapped as it falls from the lifeless hand, or midway in its course, or as it passes into the grip of the new owner; whether it is called a probate, a succession, or a legacy tax. Such nomenclature is convenient; its distinctions may be important for clear discussion of the policy of death duties and the mode of using this form of taxation, and an accurate conception of them may serve to throw light upon the actual intent of the legislature, when language of doubtful meaning is used, in determining the amount and manner of enforcing the tax. But they are of no practical importance in this case, and we do not consider the questionable claim that the Act before us imposes a legacy tax as distinguished from a tax on the estate. It may be conceded, for the purposes of argument, that the duty imposed is more accurately termed a legacy tax.

Stripped of matter immaterial to the present case, the Act reads as follows: In all estates any property which shall pass by will or by inheritance laws to lineal descendants, shall be liable to a tax of one half of one per cent. of its value for the use of the State; and any property which shall so pass to collateral kindred, shall be liable to a tax of three per cent. All administrators shall be liable for such taxes to be paid within one year after their qualification, with interest thereon at the rate of nine per cent. per annum, after said taxes are due. The estate of every deceased person to the amount of $10,000 shall be exempt from payment of any succession tax; and, after deducting $10,000, the rest of the estate of every deceased person shall be subject to the taxes above provided.

The practical effect of the Act, as construed by the appellant, is this: A legacy of $1,000 in estates of $10,000 is exempt from the death duty, while a legacy of $1,000 in estates of $11,000 and upwards is subject to that duty. As an incident to this exemption the stress of the duty or tax, as imposed by the Act, falls upon those persons who happen to receive legacies from estates exceeding $10,000 in value as distinguished from those persons who receive leg-

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acies of the same amount from estates valued at $10,000 or less.

The precise claim of the appellant, as we understand it, is that this incidental inequality in the operation of the tax is an arbitrary distinction, which transforms the Act from one of legitimate taxation to a legislative decree selecting the persons described as subjects of legislative hostility, in violation of the fundamental law which protects the personality of all citizens from arbitrary and hostile discrimination.

We see no merit in this claim. It is true that a distinction between estates of $10,000 and those of more than $10,000, for the imposition of death duties, whether computed upon the estates as a whole or upon the separate legacies derived from them, is arbitrary; it is not true that laying such a tax is an arbitrary and hostile discrimination against any person.

Taxation is necessarily arbitrary. The general legislative design, that taxation shall bear as equally as practicable upon all persons in proportion to their ability, is, and must be, influenced and moulded by various and conflicting considerations incapable of systematic codification. And every manifestation of that design, in selecting some and excluding other subjects and modes of taxation, is essentially arbitrary; that is, it must depend upon legislative will controlled only by legislative judgment and conscience. The arbitrary selection essential to taxation is controlled by legislative, but not by judicial, discretion, and this is substantially true of every manifestation of a clearly granted legislative power. It is when the Constitution adopts as fundamental law a general principle regulating the mode of exercising some particular manifestation of legislative power, such as the law regulating the mode of imposing taxes by the supreme mandate "taxation must be equal," that the legislative discretion is subjected to judicial control. The distinctions affirmed by courts in seeking some tenable theory of judicial action, when called upon to reconcile the essential inequality of taxation with some judicial enforcement of such indefinable supreme mandate, have no necessary connection with

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the validity of taxation under a constitution which does not make this general maxim a supreme law controlling legislative discretion in the performance of a legislative duty.

The appellant seems to have lost sight of the distinction between a constitutional principle which runs with a particular legislative power, prescribing the manner of its exercise and so involving the subjection of legislative discretion to judicial control, and a constitutional principle independent of any legislative power, which defines the field of personal liberty and rights of property that no manifestation of legislative power can invade. It is a principle of the latter kind that must be invoked in the present case.

The question, then, is this: Is an imposition of death duties, with an exemption of estates of $10,000, an invasion of that constitutional principle which protects every citizen, standing alone or with others, from oppressive legislation against his personality, and limited in operation to him? Is it an exercise of that despotic power of punishing citizens on account of their personality, which the Constitution has excluded from the grant of legislative power, and so, void because it is not legislation? Clearly it is not. The stress of a tax may fall on the fortunate persons who happen to be recipients of legacies in an estate exceeding $10,000, and the value of the property bequeathed to them, as the subject of a property tax, may have no apparent relation to the considerations influencing the legislature in imposing a death duty in this matter. But these facts furnish no argument for holding that the law, under the cloak of taxation, is in reality an attempt to select these legatees for personal and hostile discrimination. When taxation is attacked, not because it violates a constitutional principle regulating the mode of taxation, but because it violates an independent constitutional provision defining the limits of legislative power, the fact that the stress of the tax may in some instances happen to fall in such manner that a tax directly laid for the accomplishment of such a result might be obnoxious to the constitutional provision, does not necessarily change legitimate taxation into the exercise of a forbidden power. This dis-

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tinction is illustrated in *Knowlton* v. *Moore*, 178 U. S. 41, and is strongly illustrated in the sequels to that case: *Plummer* v. *Coler*, 178 U. S. 115, 119; *Murdock* v. *Ward*, ibid. 139; *Synder* v. *Bettman*, 190 id. 249.

By clear implication from the provisions of the United States Constitution, and the relations created by it between the governments of the several States and the National government, most of the means and instrumentalities essential to the existence of the one, as an independent government, are not subject to, but are protected from, the hostile attack by the other; the power to cripple and destroy such instrumentalities of State governments is not within the legislative power granted to Congress, and the power to so attack such instrumentalities of the National government is not within the legislative power granted to State legislatures.

In *Knowlton* v. *Moore*, 178 U. S. 41, it was claimed that inasmuch as the States alone could create and regulate the rights in respect to property arising upon the death of its owner, the Act of Congress imposing death duties tended to cripple the State in the exercise of its governmental powers and was therefore void. The court held that death duties, independently of any theoretical distinction between rights to property arising upon the death of its owner and other property rights, were an established mode of taxation and clearly within the power granted to Congress, and that any incidental effect the Act might have upon a State's regulation of inheritances did not invalidate it.

In *Plummer* v. *Coler*, 178 U. S. 115, it was held that the mere fact that estates of decedents might consist in whole or in part of United States bonds did not render a State law imposing death duties, whose amount might be determined by the value of such bonds, invalid; that the possibility of its incidental operation in remotely affecting the value of United States bonds was insufficient to stamp it as an attempt to impair the borrowing power of the United States, which is a means essential to its existence.

In *Synder* v. *Bettman*, 190 U. S. 249, a legacy tax, under an Act of Congress imposing death duties, was computed and

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collected by the executors upon a legacy to the city of Springfield in the State of Ohio for its corporate and public purposes. The executor paid to the State one tenth of this legacy, and the city of Springfield received the legacy thus decimated. The claim was, that this practical operation of the Act made it in reality an attempt by Congress to cripple the instrumentalities of a State government, and so to exercise a legislative power not granted. It was held that the death duty was not a tax upon property or person, and the mode of fixing its amount was within the discretion of Congress, and that the incidental operation of the tax, in this case, was not sufficient to change the character of the legislation.

The same distinction was illustrated in *Travelers Ins. Co.* v. *Connecticut*, 185 U. S. 364, 371, in determining whether legislative discrimination in imposing a tax clearly within its power of taxation, whose incidental operation might in some instances bear more heavily on nonresidents than on residents, was in reality an exercise of that power of hostile discrimination against citizens of other States which is excluded from the range of State legislative power by the Federal Constitution. Such illustrations might be multiplied.

The general principle of constitutional construction they support may be thus stated: When a law confined to the exercise of some particular legislative power, whose manner of exercise necessarily rests in legislative discretion not limited by any constitutional mandate controlling the mode of exercising that particular power, is challenged as obnoxious to some independent constitutional provision defining or limiting the range of all legislative power, the attempt to exercise the forbidden power must clearly appear; the mere form of the law is immaterial, if in substance and reality there is an exercise of the forbidden power. On the other hand, a mere incident of its operation not being of its substance and insignificant in harmful result, although theoretically akin to results which might be accomplished through a direct exercise of the forbidden power, does not change the character of the law as a legitimate exercise of legislative power.

Applying this principle to the present case, it is obvious

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that the ultimate burden of the tax that falls on persons who are legatees in estates exceeding $10,000 and not on persons who are legatees in estates of $10,000 or less, is a mere incident to the operation of a law enacted solely for the purposes of taxation and clearly within the legislative power of taxation, and is not an attempt, either in form, substance, or purpose, to exercise that power of favoring some persons and punishing others, at the mere will of the legislature, which the Constitution excludes from the grant of legislative power.

We think this is the true test of the appellant's claim, and, thus tested, it is without merit. The law is not a classification of property for the purpose of taxation, which is subject to judicial control. The tax is not on property, and in this State the legislature is not compelled to use such classification for the exercise of its taxing power, because the equality in operation of any particular tax is a consideration addressed to the legislature and not to the court.

The law is not a classification of persons for the purpose of imposing an appropriate burden on a particular class. The tax is not on persons; if the stress of the tax is felt more heavily by some than by others, it is not due to legislative selection but to the mere accident of changing circumstances; no person, nor set of persons, is selected arbitrarily or otherwise for legislative favor or punishment. The law is simply and purely an imposition of an indirect tax or duty, not differing in harmful operation from other taxes, regulated in its scope and amount as the legislature deems best for the public interest. And it is wholly immaterial whether or not it would be practicable for the legislature to select as a distinct class or set of persons the individuals on whom the ultimate stress of the duty laid by this law may fall, and impose a similar tax on them of such amount or in such manner that a law imposing that tax would cease to be taxation and would be an exercise of that forbidden and despotic power by which the personal equality of all citizens before the law may be destroyed.

This case, as well as every similar case, turns on its sub-

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ordination to one of two constitutional principles, equally vital, independent of each other, occasionally apparently conflicting, but, ordinarily, with the exercise of common sense, easily distinguishable in their application to a particular case. The one erects a complete protection to that field excepted from any grant of legislative power marked by the circle which the Constitution draws around those civil rights belonging to every person by virtue of his citizenship; beyond this line legislative, governmental power cannot pass. The other secures to the legislature, within the limits of granted powers, an absolute discretion, in their conscientious exercise for the use of which it is responsible to its constituents; the people have made this principle essential to the free representative government established by them.

There is nothing in the statute to justify an attack upon it on the third and fourth grounds assigned; the views of a majority of the court on the point of law involved are expressed in *State* v. *Travelers Ins. Co.*, 73 Conn. 255. It is sufficient to refer to that case.

The Superior Court is advised to sustain the demurrer and render judgment dismissing the appeal. Appellee is entitled to costs.

In this opinion the other judges concurred.

CHARLES P. COGSWELL *vs.* THE SECOND NATIONAL BANK OF NORWICH.

Second Judicial District, Norwich, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A national bank is not exempt from the operation of State laws, provided they do not impair its efficiency in performing those functions by which it was designed to serve the United States, nor trench upon the field occupied by the legislation of Congress.

The special provisions made by Congress for the winding up of national banks—by receivers appointed under authority of the United States—were not designed to exclude proceedings within the ordi-

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nary jurisdiction of courts of equity, to enforce rights of a solvent national bank against those who have mismanaged or are mismanaging its affairs.

Accordingly, where the charter of such a bank has expired and its affairs are being wound up by its officers who, acting in the interest of another bank, are wrongfully and fraudulently appropriating or wasting its property and especially certain assets which had previously been charged off and set apart with the approval of the Comptroller of the Currency as a trust fund for the benefit of the then existing stockholders, it is within the power of the Superior Court, in rendering final judgment upon an application of one or more of the stockholders interested in such trust fund, to appoint a receiver to wind up the affairs of the bank and to collect and pay over the assets so charged off to the persons entitled to receive them.

Whether the appointment of a temporary receiver for that purpose, by a judge of the Superior Court in chambers, prior to the return day, would be in violation of the Revised Statutes of the United States, § 5242, forbidding a State court to issue any attachment, injunction or execution against such a bank or its property before final judgment in the suit, *quære*.

In the present case such an appointment was made on May 5th, during vacation, but no appeal was taken from the order, nor was it made a reason of appeal after final judgment. In June following, the temporary receiver so appointed died, and a second temporary receiver to fill the vacancy was appointed by the Superior Court. *Held* that the real purpose and effect of the June appointment was to recover the bank's assets, already in the custody of the court, from the personal representatives of the deceased receiver; and that the appointment was an act beneficial to the bank, the equity and validity of which it was in no position to challenge—upon the ground that the Federal statute above mentioned was violated—after so long a tacit acquiescence in the order of May 5th.

It is not necessary that a cause should be determined upon its merits before a temporary receiver is appointed.

When judicial authority is vested by statute in a judge of a court, its exercise at chambers is the exercise of the judicial authority of that court.

For the proper liquidation of its affairs, a national bank exists after the termination of its charter period, and for such purpose may sue and be sued.

An objection because of a claimed defect of parties should be taken in the trial court. It is too late to raise the objection here for the first time.

An objection that a stockholder's complaint against the corporation fails to aver any effort to obtain redress from his fellow stockholders, or from the directors, must be raised by special demurrer.

Argued October 20th—decided December 18th, 1903.

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ACTION for the appointment of a receiver to wind up the affairs of a national banking association, and to collect certain assets which, as alleged, its managers had wrongfully charged off or disposed of; brought to the Superior Court for New London County. An application for the appointment of a temporary receiver was made to *Hon. John M. Thayer*, a judge of the court, in vacation, by whom a plea in abatement and to the jurisdiction, and afterwards a demurrer to the application, were overruled and the application granted. On the coming in of the Superior Court, a demurrer to the complaint was filed, pending which the temporary receiver, after having filed an application for confirmation and a permanent appointment, died, and a successor was appointed (*Robinson, J.*) as temporary receiver. Three days later the demurrer was overruled (*Robinson, J.*) and, the defendant refusing to plead over, this temporary appointment was made permanent. *No error.*

William H. Shields and *Donald G. Perkins*, for the appellant (defendant).

Solomon Lucas and *Gardiner Greene*, for the appellee (plaintiff).

BALDWIN, J. That a national banking association derives its franchise from the United States does not exempt it from subjection to such State laws as do not impair its efficiency in performing those functions by which it was designed to serve the United States, nor trench upon a field occupied by Congressional legislation. *National Bank* v. *Commonwealth*, 9 Wall. 353, 362; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283, 287; *Easton* v. *Iowa*, 188 id. 220, 238. Jurisdiction of suits by or against such associations, "except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business

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when such suits may be begun." 22 U. S. Stat. at Large, p. 163, § 4. For the purpose of all actions by or against them, at law or in equity, they are to "be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State," saving only " the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." 25 U. S. Stat. at Large, p. 436, § 4. For winding-up proceedings, in case of insolvency or certain other defaults on the part of the corporation, Congress has made special provision by means of a receiver appointed under authority of the United States. U. S. Rev. Stat. §§ 5141, 5191, 5201, 5205, 5208, 5234; 19 U. S. Stat. at Large, p. 63; *Cook County National Bank* v. *United States*, 107 U. S. 445, 448. These statutes were not designed to exclude proceedings within the ordinary jurisdiction of courts of equity, to enforce rights of a solvent national bank against those who have mismanaged or are mismanaging its affairs. *Richmond* v. *Irons*, 121 U. S. 27, 48.

The complaint in the case at bar is by a shareholder in the national banking association known as the Second National Bank of Norwich. The bank is the sole defendant. It is alleged that in 1900 its capital was reduced from 3,000 to 2,000 shares and certain of its choses in action charged off and set apart by direction of the Comptroller of the Currency for the benefit of those who up to that date had been the holders of the 3,000 shares, of whom the plaintiff is one; that certain property was held by certain trustees in trust for the payment of said choses in action; that the bank, in 1901, sued these trustees for an accounting; that in 1902 one Jerome and one Perkins obtained control of the affairs of the bank, for the purpose, among other things, of defeating said suit and preventing such an accounting, and did in fact afterwards succeed in effecting a withdrawal of the suit; that they made a fraudulent sale of the choses in action secured by the trust fund, for an inadequate consideration;

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that they are wrongfully appropriating or wasting all the property of the bank in confederacy with certain others, and particularly with the Thames Loan and Trust Company to which they have transferred its banking house and principal business; that the defendant's charter expired by limitation on February 24th, 1903, and it now exists only for purposes of liquidation; and that the confederates named are arranging to transfer all its assets and use its good will "to serve the interest of said Thames Loan and Trust Company; and the winding up of the affairs of the defendant bank will be delayed and its funds will get intermingled with the funds of the said Thames Loan and Trust Company; and the plaintiff is in great danger of irreparable injury and loss of property, will be subjected to great expense in litigation to ascertain what disposition has been made of the assets of the defendant bank and of those charged off as aforesaid, and by confusion of accounts it will be at least very difficult if not impossible to ascertain the exact facts, unless relieved by the interposition of this honorable court as a court of equity and a receiver is appointed, and the plaintiff is without adequate remedy at law."

The sole claim is that, by way of equitable relief, "a receiver be appointed of the defendant bank with the power to wind up its affairs under the eye of this court; and to collect the assets of said defendant bank that were charged off as aforesaid; and pay them to such as are entitled to receive them."

We have no occasion to inquire whether there was error in any of the proceedings had before the judge of the Superior Court in vacation, for none is assigned in the reasons of appeal.

The Superior Court was first called upon to act at a regular session by the application of Charles W. Carter, the temporary receiver, appointed in vacation, made in pursuance of directions given in the order appointing him, for a confirmation of such appointment and also for appointment as permanent receiver. Before it was heard the applicant died, and the plaintiff filed another application suggesting

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the death, and asking for the immediate appointment of some one else as a permanent receiver. A series of written objections to either a temporary or a permanent appointment, filed by the defendant, were all overruled, and a temporary receiver appointed.

The first of these objections was that the court, under General Statutes, § 1052, had no jurisdiction or power to make any appointment. That section provides that ". . . if any receiver . . . dies, the court that appointed him, or, if such court is not actually in session, a judge thereof, may fill the vacancy." When judicial authority is vested by statute in a judge of the Superior Court, its exercise at chambers is the exercise of the judicial authority of that court. *New Milford Water Co.* v. *Watson*, 75 Conn. 237, 241. The appointment of Carter as temporary receiver was, therefore, within the meaning of the section cited, made by the Superior Court. The plaintiff's application was made after a demurrer to his complaint had been filed, and before a hearing upon it. The court found that the exigencies of the case required the appointment of a temporary receiver to fill the vacancy occasioned by death. It was manifestly proper, under such circumstances, to appoint no permanent receiver until the merits of the complaint had been finally determined; and there is nothing in the Rules of Court, p. 23, § 51, to forbid it.

The next objection taken, which was that no receiver, either temporary or permanent, could be appointed before disposing of the demurrer, was properly overruled. If a temporary receiver could never be appointed before a decision on the merits of the cause, the field of equitable relief would be greatly and unreasonably narrowed.

The third objection was founded on U. S. Rev. Stat. § 5242, which reads as follows: "All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of

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money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court."

In view of these provisions the defendant's claim was that no receiver, either temporary or permanent, to take possession of its property, could be appointed before final judgment in the cause, inasmuch as the appointment would operate as an equitable execution, and be tantamount to an injunction touching the disposition of its property.

The decretal part of the order of appointment made by the Superior Court, on June 23d, 1903, after overruling these objections, was couched in these terms:—

"1. That the Honorable Lewis Sperry, of South Windsor in this State, be and he is hereby appointed to fill such vacancy, as temporary receiver of the Second National Bank of Norwich, and the assets and property thereof and of the assets charged off, as in the complaint in said action alleged, until further order of this court or a judge thereof, with full power and authority to take possession and charge of the property, affairs, and assets of said defendant corporation, and to wind up its affairs, and of the assets and property charged off as in the complaint in this action is alleged, under the direction of the court or a judge thereof.

"2. That the said Lewis Sperry be required to furnish a bond in the sum of ten thousand dollars with good and sufficient surety to be approved by this court or a judge thereof, and to file the same with the clerk of the Superior Court for said County of New London.

"3. From and after the filing and acceptance of said bond, said temporary receiver is hereby authorized and directed to take possession of all the property and assets of said the Second National Bank of Norwich and of the assets charged off

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as aforesaid and the proceeds thereof, and to proceed under the direction of this court with the winding up of the affairs of said banking association, and the collecting of said charged-off assets, until further order of the court in the premises, and the officers and liquidating committee of said Second National Bank and the administrator of the estate of said Charles W. Carter are hereby ordered, upon demand of said receiver, to deliver to him all property and assets of said defendant bank and said charged-off assets."

The statute which has been quoted forbids the issue of any attachment, injunction, or execution under authority of a State court against any national banking association whether solvent or insolvent. *Pacific National Bank* v. *Mixter*, 124 U. S. 721, 727. But was the order complained of process of that nature, when considered in view of the exigencies which in the judgment of the court made it proper, and of the effect which it could practically have? The original order of appointment was made at chambers on May 5th, 1903. It contained directions to the temporary receiver to take possession of the defendant's assets, and to its officers and liquidating committee to deliver them to him on demand, similar to those in the order of June 23d. These directions, it must be presumed, in the absence of anything in the record to the contrary, were promptly obeyed. The order superseded the power of the directors to proceed with the liquidation of the affairs of the bank, as effectually as if they had been in terms enjoined against so doing. *Bank of Bethel* v. *Pahquiogue Bank*, 14 Wall. 383, 400. When, then, the first temporary receiver died, it is to be assumed that he had in his hands all the defendant's assets. His death necessarily threw them into the possession of the administrator upon his estate. The real purpose and effect of the order, therefore, was to recover them, as speedily as possible, from his personal representatives, so that they could be held and disposed of, under the supervision of the court, for the benefit of all who were legally entitled to participate in the proceeds. If, therefore, the order passed in chambers can be considered as erroneous, because in violation of the

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Act of Congress, it does not follow that the order appointing the second receiver was. That deprived the defendant of the possession of nothing, for it then held nothing in its possession. It sequestered no assets in favor of any particular creditor; for the plaintiff, though suing alone, in effect sued for the benefit of all those similarly interested in the funds, and of all creditors who might come in and show a right to share in any of the assets held by the receiver. *Richmond* v. *Irons*, 121 U. S. 27, 44. In its mandate for the delivery of the defendant's property to the receiver by its officers and liquidating committee and the administrator of the estate of Charles W. Carter, the reference to its officers and liquidating committee did it no harm, since the former order, which ran against them in the same way, had long before been fully executed. The court issued its process to preserve a fund, already in its hands under a decree to which no exception has been taken, from risk of loss by the accident of death. It was an act for the benefit of the bank, the equity and validity of which it was in no position to deny on the ground in question, after so long a tacit acquiescence in the order of May 5th, and which, as it did not affect it injuriously, would not, even if erroneous, support the appeal. General Statutes, § 802.

The fourth objection was that the bank had no corporate existence for the purpose of being sued in this action. Under 22 U. S. Stat. at Large, p. 164, § 7, national banking associations, upon the expiration of the term for which they are incorporated, do not cease to exist, but their franchise is "extended for the sole purpose of liquidating their affairs until such affairs are finally closed." For the proper liquidation of their affairs, it is obviously necessary that they should retain the capacity of suing and being sued, and the statutory extension of the franchise accomplishes that result.

The fifth objection was that the Superior Court had no power to appoint a receiver to wind up a national bank, at the instance of a stockholder. This is true so far as concerns such causes of action as are by Act of Congress made the foundation of winding-up proceedings to be brought

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under the authority of the United States. For other causes of action Congress has left the State courts free to grant relief of that nature whenever the general rules of equity may be deemed to call for it. *Merchants & Planters National Bank* v. *Trustees*, 63 Ga. 549; 65 id. 603; *Elwood* v. *First National Bank*, 41 Kan. 475. The plaintiff sues not merely as a shareholder but as a *cestui que trust* with respect to a specific fund. His general rights as a stockholder had also been enlarged by the expiration of the term of full corporate activity of the bank. It was no longer a going concern. It was kept in life only that its affairs might be wound up, and his complaint stated a case which sufficiently justified him in seeking to have it wound up and the special trust fund administered by others than those who were found in control.

The sixth objection was that the alleged special trust fund never existed, because the directors had no authority to create it. No proof appears to have been offered in support of this contention, and it seems to have been rested solely on what is disclosed on the face of the complaint. It is there averred that the fund was set apart for the benefit of the original shareholders at the time when they consented to a reduction of capital, and by direction of the comptroller of the currency. No reduction of capital could have been made without the approval of that officer (U. S. Rev. Stat. § 5143), and it was fairly within his authority to condition his approval on the adoption of such measures as he might think proper to do justice to the holders of the original shares.

The seventh, and last, objection taken, was that there was adequate remedy at law. This was manifestly untenable. The plaintiff was suing both as a *cestui que trust*, and as a shareholder. As a *cestui que trust* he was but one of many similarly situated in respect to a special trust fund, and for his general rights as a shareholder he could claim the assistance of the courts only because the corporation was controlled by those acting in bad faith, and so could not or would not sue for its own protection.

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Error is next assigned in overruling the demurrer to the complaint. The causes of demurrer specified were identical with the fourth, fifth, sixth, and seventh objections made to the appointment of a temporary receiver. They were properly held insufficient for the reasons already stated.

The only remaining reason of appeal is a general claim of error in rendering the final judgment and appointing a permanent receiver. The complaint having been adjudged sufficient and the defendant having refused to plead over, it was proper to grant the relief asked for in the plaintiff's claim so far as it might appear to be sanctioned by the principles of equity, upon the facts admitted by the demurrer.

An action brought to secure the appointment of a receiver must show some equity for the enforcement of which such an appointment furnishes an appropriate means. An equity of this nature, growing out of matters of trust, fraud, and account, is sufficiently alleged. *Barber* v. *International Co. of Mexico*, 73 Conn. 587, 593, 594. The claim for relief, though in form single, is in effect threefold. What it demands, to restate it in proper order (and there was no demurrer to it for formal defects), is, first, that the fund set apart for the benefit of the plaintiff and the other original stockholders be recovered and duly applied; second, that the affairs of the defendant be wound up under the direction of the court instead of that of those who had gained the control of it and were using their power for improper purposes; and third, that a receiver be appointed to accomplish these ends. If the appointment as made operated as an execution, attachment or injunction, within the meaning of U. S. Rev. Stat. § 5242, it was not in violation of that section, since not made before but as part of the final judgment in the cause.

It is contended that the judgment was unwarranted on account of a defect of parties. Even had this objection been taken in the trial court, it would not have been fatal. General Statutes, § 622. Having been taken here for the first time, it comes too late. No party is absent whose presence is absolutely indispensable.

Nor is there anything in the claim that the complaint

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fails to show any effort by the plaintiff to get redress within the corporation by an appeal to his fellow stockholders or to the directors. This point could only have been raised on a special demurrer, and no such cause of demurrer was assigned.

There is no error.

In this opinion the other judges concurred.

ELVIRA BLAKESLEE, ADMINISTRATRIX, *vs.* EGBERT E. PARDEE, ADMINISTRATOR, ET AL.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A testator gave two thirds of all the personal property, and one third of all the real estate, which he might own at his death, to his wife in fee; to a sister he gave $2,000; to his mother (who died before him) the use or income of $6,000 during her lifetime, and the principal thereof at her decease, to his brothers and sisters, equally, in fee; and the residue of his estate he gave to his brothers and sisters in equal parts, the issue of those dying before the testator to take their parent's share. By a codicil he gave to his wife certain real estate, specifically; to a nephew (*G*) and a niece (*J*), children of his sister *E*, small pecuniary legacies, declaring that these amounts were all they were to receive from his estate; and to certain charities $20,000. The final clause of the codicil provided that his will should remain as it was "except the provision I have made in this will which shall stand first, after all this will has been executed." In a suit to construe the will and codicil it was *held*:—

1. That the death of the testator's mother before him did not invalidate the gift over of the $6,000 to his brothers and sisters; especially as the codicil, which was executed after her death, made no change in such gift.

2. That while it was possible the testator might have intended by the obscure, final clause of his codicil, to create a preference or priority in the payment of the legacies given in the codicil, he certainly did not intend to reduce the actual *quantum* or amount of his personal property upon which his wife's two thirds was to be calculated, by the amount ($20,200) of the pecuniary legacies given in the codicil.

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3. That the widow was entitled, not to two thirds of the gross amount of personal estate left by the testator, but to two thirds of the net amount of such estate; that is, the amount left after the payment of debts and the expenses of settlement.
4. That if this net personal estate should prove insufficient to pay the general and pecuniary legacies, real estate not specifically devised might be sold and the proceeds used to supply the deficiency.
5. That the widow was entitled to take the specific devise in the codicil, and, in addition thereto, one third of all the real estate, including in such total said specific devise but excluding that portion of the realty which might be required for the satisfaction of legacies.
6. That *G* and *J* were not entitled to take in right of their mother (*E*), who had predeceased the testator, since the codicil clearly cut them off from any participation in the estate beyond their two small legacies; and that their brother succeeded to his mother's share.

Submitted on briefs October 27th—decided December 18th, 1903.

SUIT to determine the construction of the will of Alfred E. Blakeslee of New Haven, deceased, brought to and reserved by the Superior Court in New Haven County, *Shumway, J.*, upon a finding of facts, for the advice of this court.

March 7th, 1901, Alfred E. Blakeslee of New Haven died possessed of an estate consisting of about $69,000 in personal, and $64,654 in real, estate. He left a will dated December 26th, 1885, and a codicil thereto executed March 19th, 1895. This will and codicil, which were duly probated, were, omitting their formal parts, as follows:—

WILL.

"First. I give and bequeath to my wife Elvira Blakeslee of said town of New Haven, two thirds of all the personal property of whatever kind, of which I may die possessed; the same to be hers absolutely.

"Second. I give, devise and bequeath to my said wife Elvira Blakeslee and to her heirs and assigns, one third of all the real estate of whatever kind and wherever located, which I may own at the time of my death; and I direct that she have the choice in selecting said one third of my real estate based upon the appraisal thereof, and also that the same be accepted in lieu of dower.

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"Third. I give and bequeath absolutely to my sister Jane E. Pardee of Watertown in the State of Connecticut, the sum of two thousand dollars in money.

"Fourth. I hereby give and bequeath to my mother Electa Clinton of the town of Watertown in the State of Connecticut, the use, income and profit, for and during her natural life, of the sum of six thousand dollars; and in case said use income and profit should not equal the sum of six dollars per week or the sum of $312 per annum, then I hereby authorize and direct that so much of the principal of said sum of six thousand be used and appropriated as shall net for my said mother the sum of six dollars per week.

"Fifth. I give, bequeath and devise all the rest, residue and remainder of my estate, both personal and real, to my sisters Elizabeth Barnes and Jane E. Pardee, both of Watertown in the State of Connecticut and to my brother Allen T. Blakeslee of Northfield, Connecticut, and George F. Blakeslee of Plymouth, Connecticut, in equal parts, their heirs and assigns; and in case either should be dead at the time of my decease leaving issue then I will that such issue take the share which the ancestor would have taken, if living.

"Sixth. After the death of my mother, I give and bequeath to my brothers and sisters named in the fifth clause of this will, and on the same conditions in case of the death of either, all the rest, residue and remainder of the six thousand dollars, set aside for her benefit by the fourth paragraph of this instrument, to them and their heirs."

CODICIL.

"First. I give and bequeath to my wife Elvira Blakeslee of said Town of New Haven, all my rights in house, barn and lot 1497 West Chapel Street, corner of Hotchkiss Street, also all the furniture and all contents in said house, also the horse and carriages and contents in said barn, the same to be hers absolutely.

"Second. I give only to my niece Mrs. Jennie Skilton wife of Julius Skilton Watertown Conn. one hundred dollars this is all she is to have from my estate.

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"Third. I give only to my nephew George A. Barnes one hundred dollars if his present wife is living her name before marriage Hattie Johnson, if she is not living the time of my death, he shall share the same as my other nieces and nephews.

"Fourth. I give to the Young Men's Christian Association $5,000. I give to the Welcome Hall Mission $5,000. I give to New Haven Orphan Asylum $2,000; I give to Home for the Friendless $3,000; I give Ladies Seamen Friend Society $3,000; I give Young Woman's Christian Association $2,000 all located in the City of New Haven.

"Will made December 26th, 1885, to be the same, except the provision I have made in this will which shall stand first, after all this will has been executed."

The wife, Elvira Blakeslee, survived her husband, qualified as administratrix, and as such administratrix is the plaintiff.

Electa Clinton died before the testator and on February 24th, 1887.

Elizabeth Barnes died August 12th, 1890, leaving three children, the defendants Harry E. Barnes, George H. Barnes and Mrs. Jennie Skilton, all of whom now survive.

Jane E. Pardee has died since the testator's death, the defendant Egbert E. Pardee being the duly qualified administrator of her estate.

The wife of George A. Barnes, mentioned in the third paragraph of the codicil, was living at the testator's death.

Upon the settlement of the administration account there remained in the hands of the administratrix, after the payment of debts and the expenses of settlement, personal estate amounting to $56,101.25. This amount was exclusive of $10,816.18, the proceeds of the sale of certain real estate.

A. Heaton Robertson and *Albert F. Welles*, for Elvira Blakeslee.

John O'Neill, for Egbert E. Pardee.

Charles G. Root, for Harry E. Barnes.

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PRENTICE, J. The gifts of personalty contained in this will and codicil—the residuary clause aside—consist of one specific bequest of chattels, several pecuniary legacies, and one general legacy not pecuniary. Concerning the specific bequest, which is contained in the first paragraph of the codicil, no question arises. In order to determine the amount of the pecuniary legacies it is necessary to inquire whether or not the gift made in the sixth paragraph of the will is an operative one. The death of the life tenant prior to the testator's did not invalidate the gift over. *Healy* v. *Healy*, 70 Conn. 467, 471. The subsequent execution of the codicil without revocation of the provisions of this paragraph indicates, rather than otherwise, the testator's intention that the gift should stand. The paragraph, therefore, contains a valid pecuniary legacy of $6,000, making the total of such legacies $28,200.

The general legacy not pecuniary is one to the testator's wife of "two thirds of all the personal property of whatever kind of which I may die possessed." An important question is presented as to the measure of this bequest. The widow claims that she is entitled to two thirds of the gross amount of the personal estate; the residuary beneficiaries, that she is only entitled to two thirds of the amount of personal property remaining after the payment of all claims and the expenses attending the settlement of the estate and the satisfaction of all the legacies. We think that she is entitled to two thirds of the net personal estate; that is, two thirds of the personal estate less the amount of claims presented and allowed and the expenses of settlement. A gift "of all of which one may die possessed" carries only the net amount of the estate. In like manner a gift of two thirds carries two thirds of the same total. There is no peculiar significance to be attached to the testator's choice of words. In their connection they can have no other effect than would the words "of all my personal estate" used in their stead. Legacies stand in a very different relation to the estate from debts and expenses of settlement. The latter are a charge upon the property left by the deceased, and until their amount

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is ascertained the amount of the estate for the purposes of division cannot be determined. Legacies are parcels of the distributable estate. Their amount may be expressed in precise figures, or they may be determinable upon an established basis of computation. In either event they comprise a part of the estate which is under division.

It is urged, however, that the closing paragraph of the codicil requires that the provisions of the codicil be first executed before the will begins to operate, with the effect that the personal estate with respect to which the will speaks is the personal estate less the amount of the legacies in the codicil. The language of this paragraph of the codicil is singularly obscure, and the intention sought to be expressed peculiarly uncertain. Fortunately, however, there is no need to seek to fathom the mystery, since it is quite clear that the extreme construction indicated is unwarranted either by the language or apparent intention. Possibly the testator intended to give a priority to the gifts in the codicil, so that they should be paid in full in any event, and to confirm the will as modified. Quite certainly he intended to do nothing more favorable to the claim of the residuary beneficiaries. As the gifts contained in the codicil are all to be paid, the obscure phraseology has no further present interest.

This method of ascertaining the amount of the widow's share of the personalty, under the first paragraph of the will, entitles her to approximately $37,000, if we are correct in our calculations. This amount, together with the amount of the pecuniary legacies, gives a total in excess of the personal estate. We have next to consider the results attending this situation.

The pecuniary legacies are by statute charged upon the real estate, of which the testator left sufficient not specifically devised to more than satisfy all the legacies of whatever character. General Statutes, §295. "Where a testator has charged one or more legacies upon the real estate, and other legacies are not so charged, if the personal estate proves insufficient to pay them all, the legacies

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charged on the real estate shall be paid thereout; or if they have been paid out of the personal estate, the other legacies, as to so much, shall stand in their place as a charge upon the land." *Aldrich* v. *Cooper* (note), 2 Leading Cases in Equity, 228, 242; *Hanby* v. *Roberts*, Amb. 127; *Masters* v. *Masters*, 1 P. Wms. 421; *Bligh* v. *Darnley*, 2 id. 619; *Allen* v. *Allen*, 3 Wall. Jr. (U. S. C. C.) 289. This recognized principle renders it unnecessary to inquire as to what priorities there might be between the several legacies, and as to whether or not that to the widow was one with which the real estate stood charged. The general legacy to the widow and the several pecuniary legacies are all payable out of the estate, the proceeds of the sale of real estate not specifically devised—in so far as the same may be needed to supply the deficiency of personal property—being used for that purpose.

The widow is confessedly entitled to the real estate specifically devised to her in the first paragraph of the codicil.

This devise is cumulative to that contained in the second paragraph of the will, which is to be construed as one third in value of all the testator's real estate, including that specifically devised in the codicil. This result flows alike from the natural meaning of the language employed, the presumption of law, and the apparent intention of the testator. *Hollister* v. *Shaw*, 46 Conn. 248; *Wainwright* v. *Tuckerman*, 120 Mass. 232; *Dickinson* v. *Overton*, 57 N. J. Eq. 26; *Manifold's Appeal*, 126 Pa. St. 508.

In determining, however, the amount of the testator's realty for the purpose of the above computation, there should not be included in the total that which the provisions of the will require to be converted into money and used as personalty in the satisfaction of legacies. The real estate, within the meaning of this part of the will, is to be regarded as that and that only which by the terms of the will pass as realty. The testator's intention would quite certainly be violated upon any other construction. He evidently meant that his widow should have the premises specifically devised and one third of what real estate remained to be divided.

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He could scarcely have intended that the real estate which should be needed to satisfy debts and legacies, including in the last the major part to the widow, should be used again for her benefit by increasing the total upon the basis of which the proportionate share which should come to her in the form of realty should be determined. The amount of real estate required to be sold and the proceeds thereof used for the satisfaction of legacies is not, therefore, to be included in this total.

Paragraphs second and third of the codicil were clearly intended to cut off Mrs. Skilton and George A. Barnes—the former in any event, and the latter in the contingency named—from any participation in the estate beyond the two small legacies left them. As a result, their brother Harry is entitled to receive the share to which their mother, if living, would be entitled under the fifth and sixth paragraphs of the will. This result is in harmony with the general scheme of equal benefactions to the brothers and sisters and of the substitution of children for any deceased brother or sister, thus preserving the equality among the several stocks. The removal of Mrs. Skilton and George, by the direction of the testator, from the class of persons entitled to take in the event of Elizabeth Barnes' death, was to the same effect as their removal by death would have been. *Bolles* v. *Smith*, 39 Conn. 217, 218.

The Superior Court is advised:—

1. That the gift of $6,000, as contained in the sixth paragraph of the will, is valid.

2. That the widow, under the first paragraph of the will, takes two thirds of all the personal estate less the amount of the debts and expenses of settling the estate.

3. That if the personal estate remaining after the payment of debts and expenses of settlement proves insufficient to pay the general and pecuniary legacies, proceeds of the sale of real estate be used to supply the deficiency.

4. That the widow is, under the second paragraph of the will, entitled to take, in addition to the lands specifically devised to her in the codicil, one third of all the real es-

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tate, said property specifically devised to her being included in the total used as the basis of calculation, and so much of the realty as is required for the satisfaction of legacies being excluded.

5. That Harry E. Barnes is entitled to receive the full share which his mother, Elizabeth Barnes, if living, would receive under the provisions of paragraphs fifth and sixth of the will.

No costs will be taxed in this court in favor of any party.

In this opinion the other judges concurred.

BENJAMIN R. KELSEY *vs.* JOHN C. PUNDERFORD ET AL.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

The Act of 1899 (General Statutes, § 627) allows a plaintiff who sues upon the so-called common counts for work and labor done, materials furnished, goods sold and delivered, and money had and received, to add a special count or counts showing fully his cause of action. *Held:* —

1. That this authorized the insertion, in a complaint containing such common counts, of a special count alleging that the plaintiff's title to the claim sued upon was acquired by assignment.
2. That such a count, if originally omitted, might be inserted by way of amendment, under the provisions of § 639, without regard to any amendment of the common counts to conform thereto.

It is not the office of a bill of particulars to supply necessary allegations of the complaint, but only to set forth "the item or items" of the plaintiff's claim.

A special count, alleging in detail the facts stated in a bill of particulars which the court had stricken from the files, must be regarded as a practical substitute for such bill.

Argued October 28th—decided December 18th, 1903.

ACTION upon the common counts, brought to the Superior

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Court in New Haven County where the plaintiff's bill of particulars was stricken from the files (*Gager, J.*), a proposed amendment of the complaint was disallowed (*George W. Wheeler, J.*), and judgment of nonsuit was rendered, from which plaintiff appealed. *Error and cause remanded for allowance of proposed amendment.*

The original complaint dated July 28th, 1902, and returnable the first Tuesday of September of that year, contained only the common counts as given in *Form* 85, Practice Book, page 60, and without any allegation of an assignment to the plaintiff of the claim sued upon.

On the 18th of December, 1902, the plaintiff filed the following statement, which is described as "Plaintiff's Bill of Particulars": "The defendants to plaintiff, Dr. To the sum of one thousand dollars ($1,000) paid by plaintiff and Charles E. Hoadley, of Waterbury, to John C. Punderford as the duly authorized agent of the defendant, Nannie Waddingham, to sell certain real estate owned by the said Nannie Waddingham, situated in the town of Orange, Connecticut, and known as the Waddingham property, and which sum was in part payment for the purchase of said property, and which purchase was not completed, but was abandoned. The interest of the said Charles E. Hoadley in said sum of one thousand dollars ($1,000) has been assigned by him for a valuable consideration to the plaintiff, who is the actual and *bona fide* owner of the debt herein described."

In March, 1903, the court (*Gager, J.*), upon the defendants' motion, struck the bill of particulars from the files, upon the ground that it was not within the scope of any of the common counts as the complaint then stood.

In May, 1903, the plaintiff asked leave to file the following count: "1. On the 29th day of June, 1902, the defendant Waddingham, acting therein by her agent, John C. Punderford, duly authorized for that purpose, agreed to sell and convey to the plaintiff and Charles E. Hoadley, on the 10th day of July, 1902, by a good and sufficient deed, certain premises then owned by the said Waddingham, consisting of a tract of land, with a dwelling-house thereon, sit-

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uated in the town of Orange, and known as the Waddingham property, for the sum of twenty-six thousand dollars ($26,000). 2. On said day the plaintiff, Kelsey, and the said Hoadley paid to the said Punderford as agent aforesaid the sum of one thousand dollars ($1,000) in part payment of said property, pursuant to said agreement. 3. On said 10th day of July, 1902, the plaintiff and the said Hoadley were ready to purchase said property, and to receive a deed therefor, and to pay said sum of twenty-six thousand dollars, according to said agreement. 4. On said date the defendant Waddingham refused and neglected to convey said premises to the plaintiff and to the said Hoadley by a good and sufficient deed therefor, according to the terms of said agreement. 5. Thereupon the contract existing between said parties for the sale and purchase of said premises was mutually abandoned. 6. The defendants still retain said sum of one thousand dollars ($1,000), and refuse to pay the same to the plaintiff. 7. On the 10th day of July, 1902, the said Hoadley assigned and transferred for a valuable consideration all his interest in said contract and in and to said sum of one thousand dollars ($1,000) to the plaintiff, and he is now the actual and *bona fide* owner of the same."

The court (*George W. Wheeler, J.*) refused to permit said count to be filed, upon the ground that the common counts were not an appropriate statement of plaintiff's cause of action as set forth in said proposed count.

Judgment of nonsuit having been afterwards rendered (*Elmer, J.*), the plaintiff appealed, alleging as reasons of appeal the striking off of said bill of particulars and the refusal to permit said amendment.

Robert L. Munger, for the appellant (plaintiff).

James H. Webb, for the appellee (defendant).

HALL, J. The plaintiff should have been permitted to amend his complaint by filing the proposed new count.

It appears from the memorandum of the trial judge that

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the motion to so amend was denied, "not as a matter of discretion, but on the authority of *Goodrich* v. *Alfred*, 72 Conn. 257." In that case, which was an action upon a contract of sale, it was held that as the plaintiff had sued only in his individual capacity, and as the complaint contained no allegation of any assignment of the claim sued upon, or that the plaintiff was the actual and *bona fide* owner of it, that part of the common counts relative to sales was not—in the absence of a motion to make the plaintiff as trustee a party plaintiff, and then to amend the complaint by alleging that as such trustee he was the actual and *bona fide* owner of such claim—an appropriate general statement of a right of action owned by the plaintiff as trustee for another by virtue of an assignment from a third person. It was also suggested that the same rule might not apply to an action for money had and received.

In discussing questions relating to the common counts in the form in which they appear in *Form* 85, Practice Book, page 60, in the cases of *New York Breweries Corporation* v. *Baker*, 68 Conn. 337, 343, and *Dunnett* v. *Thornton*, 73 id. 1, and in several other cases, this court has in effect said, that without a bill of particulars or further statement of the cause of action, they neither contain a common count good at common law, since they do not, and under the Practice Act cannot, contain the fictitious promise essential to the common-law common count, nor are they such a complete and particular statement of the facts constituting the cause of action as is required by the Practice Act; that the use of this incomplete form is only allowable under Rule 2, § 1, and Rule 4, § 1, of Rules under the Practice Act (Practice Book, pages 12 and 15), adopted by the judges of the Superior Court, by authority of § 33 of the Practice Act, in order to give effect to its real purpose; that these so-called counts can only be used in the commencement of an action, and then only when some one of them is an appropriate general statement of the real cause of action; that they can never be used as a single count for the separate statement of a cause of action; that

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when a proper bill of particulars is duly filed, only those of the common counts applicable thereto remain in the complaint; and that when, by way of amendment, such a substitute complaint or complete statement of the facts showing the cause of action, as is required by the Practice Act in other cases, is duly filed, the common counts drop out of the case.

These are, generally, the rules and principles which have been applied by this court in determining the use which may be made of this form of complaint, and the character of the bill of particulars or further statement which may be afterwards filed when such form of complaint is properly used.

But the case of *Goodrich* v. *Alfred*, 72 Conn. 257, was decided in the trial court in April, 1899, and the cases above referred to—except the case of *Dunnett* v. *Thornton*, 73 Conn. 1, which was decided by this court in May, 1900—assume only to state the law and rules of court in force prior to August, 1899. In that year an Act was passed which took effect August 1st, and which provided that the form of complaint denominated the common counts, in the Rules under the Practice Act, might "be used for the commencement of an action in all cases where any of these counts is a general statement of the cause of action, and may also be used in the same complaint in connection with and joined to special counts whenever the said action is brought to recover for work and labor done when the contract is claimed to have been fully performed, for materials furnished, goods sold and delivered, and for money had and received. But before any default shall be entered, or judgment shall be rendered thereon, the plaintiff shall furnish a bill of particulars of the item or items of his claim, and, when filed in court, all paragraphs not appropriate to said bill of particulars shall by the filing thereof be deemed to be stricken out of the complaint." Public Acts of 1899, p. 1062, Chap. 139.

The language of the original rule under the Practice Act (Rule 2, § 1), restricting the use of such common counts to the commencement of an action, and when one of

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the so-called counts was an appropriate general statement of the cause of action, was omitted in the revised rules which went into effect September 1st, 1899, and the original rule was changed to conform to the provisions of the Act of 1899. Rules of Court (Ed. of 1899), p. 41, § 129.

In speaking of the right of a plaintiff under the Act of 1899 and the new rules, to amend his complaint in an action commenced with such common counts, we said in *Dunnett* v. *Thornton*, 73 Conn. 1, 8, 9: "Under the rule (§ 129) and statutes now in force, *Form* 85, like any other insufficient statement, may be amended by supplying the omitted material facts and, like every complaint, may be amended by adding facts which may support additional causes of action. The extent of such amendment depends on the law regulating amendments, which the rule does not alter. . . . No substantial question of pleading ought to arise under the rule in its present form. When a plaintiff uses *Form* 85 the rule relieves him, for a limited time, from the penalties incident to the use of such a defective statement; but he must amend so as to have a proper complaint, and the extent of the amendment is governed by the general law, not by the rule. . . . The permissibility of the amendment must be governed by the rules that control an amendment to any complaint, and the sufficiency and propriety of the complaint as amended must be determined like that of every other complaint."

The provisions of the Act of 1899 appear, in nearly the same language, in § 627 of the Revision of 1902, which was in force when the present action was commenced. As this action was brought to recover for money had and received, the plaintiff, by the law and rules then in force, was permitted, in commencing the action, to join, had he chosen to do so, the incomplete common counts with a special count fully stating the facts showing his cause of action, and, after having filed a bill of particulars under such common counts, of "the item or items" of his claim, to have the paragraphs of the common counts appropriate to the bill of particulars remain, as a separate count or counts in the complaint, with the

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special count. If he failed to file such a bill of particulars, judgment could be rendered in his favor upon the special count only.

If the special count could have properly been originally joined with such common counts, the court could have allowed it to be joined afterwards by way of amendment. General Statutes, § 639.

As the plaintiff is now permitted in certain cases to add a special count to the so-called common counts, there seems to be no good reason why he should be prevented from doing so merely because of the absence in the common counts of the proper allegation of the assignment and ownership of the claim sued upon, which is contained in the special count, and whether or not the plaintiff also seeks to amend such defect in the common counts.

It is unnecessary to inquire whether, under the law and rules in force prior to the Act of 1899, the paragraph of the common counts relative to money had and received is such an appropriate general statement of the plaintiff's cause of action in this case as to allow the filing of the special count in question. Under the present law the court might properly have permitted it to be filed.

In the absence of an amendment of the complaint adding proper allegations of the assignment to the plaintiff of the claim sued upon, or of an application to join Hoadley as a coplaintiff, the bill of particulars containing a statement of such assignment was not improperly stricken from the files. It was not the office of the bill of particulars to supply necessary allegations of the complaint (*Forbes* v. *Rowe*, 48 Conn. 413), but only to state "the item or items of his (the plaintiff's) claim." Whether it might properly have been filed as a statement of the facts constituting the cause of action, is not a question for discussion, since, if so considered, the new count, containing a more complete statement of such facts, must be regarded as a substitute for the first statement. *Goodrich* v. *Stanton*, 71 Conn. 418, 424.

There was error in denying the plaintiff's motion to amend the complaint by filing the additional count, and the case is

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remanded with direction to vacate said order and allow said amendment.

Error and case remanded.

In this opinion the other judges concurred.

JAMES D. PICKLES *vs.* THE CITY OF ANSONIA.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

In an action to recover damages resulting from the change of grade of a city street, the plaintiff was permitted to put in evidence the records of the city council showing petitions of taxpayers for the grading and working of the street, and for an order requiring curbs, gutters, sidewalks and crosswalks to be laid, as well as the action taken by the municipal authorities in relation thereto. *Held* that the admission of this evidence, even if erroneous, was harmless, inasmuch as it appeared that upon the trial the defendant admitted the existence of the highway and making the change of grade in front of the plaintiff's premises, and that the real controversy was as to the amount of special benefits accruing to the plaintiff from the change. Nor, under the circumstances, could the defendant complain of the court's charge, which treated the work done by the city as a change of grade rather than the original construction and working of a new highway.

It is no defense to such an action that the plaintiff bought his land after the change of grade had been ordered.

Evidence of the amount paid by the plaintiff for building a retaining wall and regrading his front yard, is admissible as tending to prove the proper cost of such work.

Any elevation or depression of the existing surface of an established highway which has never been brought to a uniform grade, resulting from an attempt to establish such a grade, is a change of grade which, if injurious, will support an action.

Private improvements made by the plaintiff's neighbors after the change of grade, are not such special benefits as can be applied in reduction of the special damages suffered by him.

To make out a *prima facie* case in an action for damages caused by a change of grade, the plaintiff is not required to prove that he received no special benefits from the change. Having proved the injury to his property, it becomes the duty of the defendant

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to prove such special benefits as are claimed to offset or reduce the damages suffered by the plaintiff. In no other sense, however, is the burden of proof upon the defendant as to the matter of special benefits; nor is it necessary to plead the existence of such benefits as a special defense. Moreover, the plaintiff must satisfy the trier by a fair preponderance of the whole evidence that he has suffered special damages to an amount in excess of any special benefits received.

Nevertheless, if the defendant, by its pleadings and in its requests to charge the jury, treated its claim of special benefits as a matter of affirmative defense, and the court substantially or exactly complied with all the requests of the defendant on that point, it cannot complain of a charge that it must prove, by a fair preponderance of evidence, such new facts set up in its special defense as it relied upon; and that if the jury were satisfied by a fair preponderance of the evidence that the plaintiff had received special benefits exceeding or equaling his special damages, he could not recover.

Argued October 28th—decided December 18th, 1903.

ACTION to recover special damage for injury to the land of the plaintiff adjoining a highway, resulting from a change of grade, brought to the Superior Court in New Haven County and tried to the jury before *Robinson, J.*; verdict and judgment for the plaintiff, and appeal by the defendant. *No error.*

Charles S. Hamilton, for the appellant (defendant).

Frederick W. Holden, for the appellee (plaintiff).

HALL, J. The finding of facts shows that upon the trial the plaintiff offered evidence to prove that he was the owner of land, with a dwelling-house thereon, on the corner of Myrtle Avenue and Clover Street, in the city of Ansonia, and that in 1901, under an order of the common council, passed in 1895, establishing a grade of Myrtle Avenue, the defendant changed the then existing grade of that street by cutting it down so as to leave a perpendicular bank in front of the plaintiff's premises ranging in height from three to nine feet, requiring the plaintiff to build a wall in front of his property in order to protect it, at an expense

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of $455; that he was obliged to regrade his front yard at an expense of $75; that the change of grade diminished the market value of his property $700; and that although the present action was not commenced until May 22d, 1902, the defendant had caused no assessment of the benefits and damages resulting from such change to be made, as required by its charter. The plaintiff had a verdict for $547.50.

Against the defendant's objection, the plaintiff, for the purpose of proving an allegation of the complaint that the defendant voted to so change the grade of the street in front of the plaintiff's property, was permitted to lay in evidence certain records of the board of aldermen and councilmen of the city, showing the petitions of certain taxpayers that Myrtle Avenue be graded and worked, and curbs, gutters, sidewalks and crosswalks be ordered laid, and showing the action of the city authorities in relation to said matters.

There was no harmful error in the rulings admitting these records. It appears from the finding, not only that no attempt was made at the trial to show that the city did not establish and work the grade of Myrtle Avenue, as claimed by the plaintiff, but that the defendant admitted that in 1901 the city caused the grade to be changed in front of the plaintiff's property, and that the real controversy at the trial was upon the question of whether there were not special benefits accruing to the plaintiff from the change, exceeding or equaling the damage, or which should be applied in reduction of the damages.

It was no defense to this action that the plaintiff purchased the property with knowledge that the order establishing such grade had already been made. He had the right, when so purchasing, to expect that when the street was actually worked to such established grade he would be paid for any special damage to his property caused by such change. No right of action existed until the damage had been actually sustained. *Gilpin* v. *Ansonia*, 68 Conn. 72, 82.

No claim was made that the plaintiff could recover the cost

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of the sidewalk, curb and gutter, so ordered to be laid in front of his premises, and the court, as requested, charged the jury that there could be no recovery for such expenses.

The testimony of the plaintiff as to the cost of building the stone wall, and regrading the front yard, was properly received as evidence of expense necessarily incurred by reason of the change of grade. No ground of objection to this testimony appears to have been stated, except that evidence of the cost of the grading was irrelevant and immaterial. After the plaintiff had shown the amount and character of the work and that it was necessary, and was performed by a suitable person, proof of the amount paid therefor was some evidence of the proper cost of such work. *Sanford* v. *Peck*, 63 Conn. 486, 493. The proper cost of such necessary work is included in the term "special damages," as used in § 2703 of the General Statutes of 1888 (Revision of 1902, § 2051); *Platt* v. *Milford*, 66 Conn. 320, 334; and the court instructed the jury that the plaintiff could only recover for such changes and expenses as were made reasonably necessary by the change of grade.

In stating to the jury what constituted a change of the grade of a highway, the court said: "The term grade is used in this statute not to signify a level precisely established by mathematical points and lines, but the surface of the highway as it in fact exists; and any elevation or depression of this surface by municipal authorities, resulting from an attempt to establish a grade, is a change of grade, which, if damages result, will support an action. So I say to you, any elevation or depression of the natural surface of an established highway which has never been brought to a uniform grade, resulting from an attempt to establish such a grade, is a change of grade, which if injurious will support an action." *McGar* v. *Bristol*, 71 Conn. 652, 656, is a sufficient authority for the correctness of this instruction.

It is claimed that this language was inappropriate and inapplicable to the facts of the case, since the evidence showed that such grading of Myrtle Avenue was a part of the original construction and working of a new highway.

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It is sufficient to say of this claim that it overlooks the fact, stated in the finding, that upon the trial in the Superior Court the defendant admitted that Myrtle Avenue had been a public highway for more than fifteen years, and that in 1901 the city of Ansonia changed the grade of such highway in front of and adjacent to the plaintiff's property.

The court correctly instructed the jury that private improvements subsequently made by the plaintiff's neighbors, in their property, were not such special benefits as could be applied in reduction of the damages sustained by the plaintiff by the change of grade, and that the special benefits available for such reduction were the local and peculiar benefits received by the plaintiff from such change. *Cook* v. *Ansonia*, 66 Conn. 413, 431; *Trinity College* v. *Hartford*, 32 id. 452, 478.

One of the errors assigned is, that the court charged the jury incorrectly as to the burden of proof of special benefits, in instructing them that if they found that any special benefits had accrued to the plaintiff from the change of grade they should be deducted from the damages found, and that if they were satisfied "by a fair preponderance of evidence" that the plaintiff had received special benefits, either greater than or equal to his damages, the plaintiff could not recover; and in charging the jury that the burden of establishing by a fair preponderance of evidence such new facts, set up in the three defenses, as it was intended to claim anything from, was upon the defendant. The court stated to the jury that the defendant had not attempted to prove the new matter set up in the first and second defenses, but that it claimed to have established the new matter set up in the third defense. The facts specially pleaded in the third defense were that the benefits, accruing from the change of grade, were greater than the damages sustained by the plaintiff, by reason of improving the value and usefulness of his premises. The only requests made by the defendant to charge the jury upon the question of the burden of proof were: "(1) The burden of proof is upon the plaintiff to show the nature and extent of the damages suf-

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fered by reason of the alleged change of grade. (2) If upon the whole the benefits to the plaintiff were equal to or greater than the damages suffered, the plaintiff cannot recover." The first was charged in the language of the request. The closing remark of the court to the jury was that if they were satisfied by a fair preponderance of evidence that the plaintiff had suffered special damages from the change of grade and had received no special benefit therefrom, they should render a verdict for the plaintiff for the amount of such damages; but if they found the plaintiff had suffered some special damages and received some benefits, they should deduct the benefits, if less than the damages, and render a verdict for the balance; but if the benefits equaled or exceeded the damages, the verdict should be for the defendant.

Inasmuch as the defendant's requests to charge, upon the question of the burden of proof, seem to have been complied with, and as the defendant, both by its answer and its claims to the court, treated the matter of special benefits as a special defense, the facts of which were to be established by the defendant, it has no good reason to complain of the charge upon that subject. In a case of this character, however, the claim that there are special benefits accruing to the plaintiff's property by reason of a change in the grade of a highway, which should be considered in determining the amount of the plaintiff's damage resulting from such change, is not one which must necessarily be pleaded and proved as a special defense. But to make out a *prima facie* case, the plaintiff was not required to prove that he received no special benefits from the change of grade. Having proved the alleged injuries to his property, caused by the change of grade made by the municipality, it became the duty of the defendant to prove such special benefits as it claimed diminished the damage proved, or showed that the plaintiff had really sustained no damage. In this sense, only, could it properly be said that the burden of proving the special benefits rested upon the defendant. *Baxter* v. *Camp*, 71 Conn. 245, 252.

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The motion for a new trial for verdict against evidence was properly denied. The finding shows that it was not the claim of the defendant, in the trial court, that there was no change of grade, and that the grading in question was done in constructing and working a new highway, but that the defendant there admitted, as already stated, that Myrtle Avenue had been a public highway for more than fifteen years last past, and that in 1901 the grade was changed in front of plaintiff's property by the defendant. These conceded facts, as well as the evidence before us, show that there was a change in the grade of the street, as defined in *McGar* v. *Bristol*, 71 Conn. 652.

There is no error.

In this opinion the other judges concurred.

JAMES H. CAMPBELL'S APPEAL FROM PROBATE.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Section 566 of the General Statutes provides that "process in civil actions," including transfers, applications for relief, and removals, shall be made returnable to the next return day, or to the next but one; while under § 567, "appeals from justices of the peace and from other inferior tribunals" must be taken to the return day of the appellate court next after their allowance. *Held* that the Revision of 1902 had worked no change in the previously existing law, under which an appeal from probate was included in the term "process in civil actions," and that such an appeal was therefore seasonably taken if made returnable to the next return day but one.

Argued October 28th—decided December 18th, 1903.

APPEAL from an order and decree of the Court of Probate for the district of New Haven, taken to the Superior Court in New Haven County and, upon motion of the appellees, erased from the docket (*Elmer*, *J.*), from which

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judgment the appellant appealed. *Error, judgment set aside and cause remanded.*

Jacob B. Ullman and *Edward H. Rogers*, for the appellant (James H. Campbell).

George E. Beers and *Carl A. Mears*, with whom was *Charles A. Pelton*, for the appellees (Anna M. Shields et al.).

TORRANCE, C. J. On the 27th of April, 1903, Campbell took the probate appeal here in question to the Superior Court to be holden on the first Tuesday of June, 1903. On the return day the appellees, by their counsel, filed a plea in abatement for want of jurisdiction, on the sole ground that the appeal from probate had been taken to the first Tuesday of June instead of to the first Tuesday of May. A few days later the appellees filed a motion to strike the case from the docket for want of jurisdiction, because the appeal had been taken to the first Tuesday of June. Subsequently the court granted the motion and struck the cause from the docket. The errors assigned relate solely to the action of the court in so doing.

Whether or not the probate appeal was properly made returnable on the first Tuesday of June depends upon the construction of §§ 566 and 567 of the General Statutes. By § 566, "process in civil actions" brought to the Superior Court must be made returnable "to the next return day, or to the next but one, to which it can be made returnable"; while by § 567, appeals from "inferior tribunals shall be taken to the return day of the appellate court next after their allowance." If the probate appeal in this case was a "process" in a civil action, under § 566, it was properly taken; while if it was an appeal from an "inferior tribunal," under § 567, it was improperly taken. Reading these two sections in the light of the prior legislation embodied in them, we are of opinion that the probate appeal here in question was "process" in a civil action under § 566, and therefore properly taken.

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In 1876 the legislature provided that "all process in civil actions brought before the superior court in either of the counties of Hartford, New Haven, or Fairfield, may be made returnable, in addition to the first days of the respective terms in said counties, on the first Tuesday of any month except July and August: *provided* that the return day be not more then eleven weeks from the date of the process." Public Acts of 1876, Chap. 31, § 3.

Subsequently, in 1877, it was enacted "that the words 'all process in civil actions,'" in the above Act of 1876, "shall be held to include all appeals from courts of probate, where by law appeals are allowed." Public Acts of 1877, Chap. 66.

In 1886 it was enacted that "process in civil actions brought to the superior court shall not be made returnable to any term or session thereof, but shall be made returnable upon the first Tuesday of any month except July and August; *provided*, that . . . all process shall be made returnable to the next return day, or the next but one, to which it can be so made returnable, except as hereinafter provided." Public Acts of 1886, Chap. 133, § 2. By § 3 of the same Act it was provided that "process in civil actions shall include all appeals, transfers, applications for relief and removals, but this act shall not be so construed as to change the time now provided by law within which probate appeals are to be taken."

This legislation, so far as it affects the question here considered, was embodied in § 794 of the Revision of 1888 in these words: "Process in civil actions, brought to the Superior Court, which shall include all appeals, transfers, applications for relief and removals, shall not be made returnable to any term or session of said court, but shall be made returnable upon the first Tuesday of any month, except July and August; provided that . . . all process shall be made returnable to the next return day, or the next but one, to which it can be made so returnable. But this section shall not be so construed as to change the time provided and allowed by sections 640, 641, 642, 644, and 645, for taking pro-

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bate appeals or appeals from the doings of commissioners on the estates of deceased or insolvent persons." The Revision of 1888 also contained, in other parts of it, the law as it then was concerning appeals from justices of the peace, and from other inferior courts, and concerning return days in the District Court of Waterbury, and in the Court of Common Pleas. During the interval between the Revision of 1888 and that of 1902, the law as to some of these matters underwent some slight changes from time to time; but the law relating to the return day of process brought to the Superior Court, as embodied in § 794 *supra*, remained unchanged even in form.

In the Revision of 1902 the law relating to the return day of appeals from justices of the peace and other inferior tribunals is embodied in § 567, while that relating to the return day of "process in civil actions" brought to the Superior Court or Court of Common Pleas is embodied in § 566. Section 566 reads as follows: "Process in civil actions, including transfers, applications for relief, and removals, if brought to the court of common pleas in New Haven county, or to the district court of Waterbury, shall be made returnable on the first Tuesday of any month; if brought to the superior court, or to the court of common pleas in any other county than New Haven, on the first Tuesday of any month except July and August; and all process shall be made returnable to the next return day, or to the next but one, to which it can be made returnable." The companion section (567) reads as follows: "All appeals from judgments of justices of the peace, and from other inferior tribunals, shall be taken to the return day of the appellate court next after their allowance; but nothing contained in this section or in § 566 shall be construed to change the time which may be expressly prescribed by statute in any particular case for taking an appeal."

It will be seen from this brief survey of the legislation touching the questions involved in this case, that for nearly twenty-five years prior to the Revision of 1902 the words "process in civil actions" included probate appeals, at least for the limited purpose of getting such causes before the

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Superior Court; and that for more than fifteen years prior to the Revision of 1902 those same words also included, for the same limited purpose, "transfers, applications for relief and removals"; and all this by express legislative enactment. This enactment has never been expressly repealed, but the appellees claim that it is repealed by implication in the Revision of 1902. This claim is founded solely upon the work of the revisers as embodied in §§ 566 and 567. We think the language of these sections, read in the light of the circumstances in which the Revision was made, do not support this claim.

In the first place, "revisers are presumed not to change the law." *State* v. *Neuner*, 49 Conn. 232, 235; *Guilford* v. *New Haven*, 56 id. 465, 468. In the next place, "a mere change in the words of a revision will not be deemed a change in the law unless it appears that such was the intention. The intent to change the law must be evident and certain." Sutherland on Stat. Construction, § 256; *Westfield Cemetery Asso.* v. *Danielson*, 62 Conn. 319, 322. Again, for a quarter of a century prior to the Revision of 1902, the words "process in civil actions" included appeals from probate for the purpose hereinbefore stated, and during that period the profession throughout the State treated such appeals as so included; as did also this court in *Barber's Appeal*, 63 Conn. 393, 413. "In the interpretation of re-enacted statutes the court will follow the construction which they received when previously in force. The legislature will be presumed to know the effect which the statutes originally had, and by re-enactment to intend that they should again have the same effect." Sutherland on Stat. Construction, § 256.

The appellees claim that probate courts are "inferior tribunals," and that appeals from them are provided for in § 567. This claim is based mainly on the fact that the word "appeals," used in § 794 (Rev. of 1888) is omitted in § 566. This argument proves too much. It proves that no appeals of any kind are provided for in § 566, whereas the language of § 567 clearly implies that some appeals are pro-

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vided for in § 566. The truth seems to be that the word "appeals" was omitted in § 566, because the revisers supposed that a probate appeal was an "action," under that section, for they say so in a note to that section, basing their statement on *Barber's Appeal*, 63 Conn. 393, 413; and, looking at the prior legislation upon this subject, they evidently supposed that such an appeal was included in the words "process in civil actions" as used in § 566. It is more reasonable to suppose that the word "appeals" was omitted in § 566 for the reasons stated, than it is to suppose that the revisers intended to make a radical change in the law merely for the purpose of making probate appeals an exception to all "process" brought to the Superior Court, "including transfers, applications for relief, and removals." No good reason has been shown, and none occurs to us, why such an exception should be made. For these reasons we are of opinion that the probate appeal in question here was properly taken to the first Tuesday of June, 1903, and that the court below erred in ordering it erased from the docket.

There is error, the judgment appealed from is set aside and the cause remanded to be proceeded with according to law.

In this opinion the other judges concurred.

JOHN T. MCGRATH ET UX. *vs.* THOMAS F. MCGRATH.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

The plaintiffs sued for a reconveyance of land, alleging that it had been transferred by them to the defendant upon his promise to manage the property, to collect the rents and profits, to pay off a certain mortgage thereon, and, after reimbursing himself for his expenditures, to reconvey to the plaintiffs, accounting also for the rents and profits; that he had collected more than his expenditures but had refused to reconvey or account. The defendant having

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denied the alleged agreement, a trial to the jury upon that issue resulted in a verdict for the plaintiffs. The court then ordered an account to be taken, and upon the accounting found over $5,000 to be due the defendant. It thereupon limited a period of time within which the plaintiffs must pay this balance to the defendant, and, that time having elapsed without payment, dismissed the action. Upon a writ of error by the plaintiffs it was *held*: —

1. That since there was no cross-complaint asking a foreclosure of the plaintiffs' right to redeem, so much of the judgment as limited a time within which the plaintiffs must make the required payment was erroneous.
2. That upon the pleadings as they stood, the court could only dismiss the action, since the plaintiffs failed to show themselves entitled to the relief asked for in the complaint.

Submitted on briefs October 30th—decided December 18th, 1903.

WRIT of error to reverse certain portions of a judgment of the District Court of Waterbury, *Cowell, J.*, adverse to the plaintiffs in error, after a verdict of the jury in their favor. *Error and judgment reversed in part.*

Lucien F. Burpee and *Terrence F. Carmody*, for the plaintiffs in error.

James E. Russell, for the defendant in error.

HALL, J. The plaintiffs in error brought an action in 1898 against the defendant in error, in the District Court of Waterbury, alleging in their complaint that on the 20th of November, 1895, they conveyed to the defendant a certain described tract of land in Waterbury of the value of $8,000, the easterly half of which was subject to a mortgage of $2,500 to Frances A. Minor, and the westerly half to a mortgage of $2,000, under an agreement, set forth in paragraph 6 of said complaint, "that the defendant should redeem said Minor mortgage, hold and manage said property, pay the accrued interest and taxes on said land, collect the rents and profits therefrom, and after indemnifying himself for said expenditures reconvey their said equity of redemption in said land to the plaintiffs, and account for the

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rents and profits of the same"; that on the 26th of November, 1895, Frances A. Minor conveyed her interest in said premises to the defendant by quitclaim deed, and that the defendant having collected $3,000 rent from said premises and more than the amount of his expenditures thereon, refused, when requested by the plaintiffs in 1898, to reconvey the equity of redemption to the plaintiffs, and to account for the rents and profits thereof after indemnifying himself for his said expenditures.

In said action the plaintiffs asked, by way of equitable relief, for a reconveyance of the equity of redemption in said land, an accounting for the rents and profits, a judgment for the excess of the receipts above the expenditures, and an injunction restraining the defendant from disposing of said property during the pendency of said action.

From the record in said action, it appears that upon a trial to the jury of the issue raised upon paragraph 6 of the complaint, by the defendant's denial of the allegations of the complaint, the following verdict was rendered: "The jury in the above case finds the issues for the plaintiffs, and according to such finding renders a verdict for the plaintiffs, and that the defendant agreed to reconvey the land in question to the plaintiffs, after an accounting had been had, and the plaintiffs had paid to the defendant whatever sum should be found due as alleged in paragraph 6 of the complaint."

The action and judgment of the court (*Cowell, J.*), after such verdict, is stated in the following language of the judgment file, dated September 11th, 1900: "The court thereupon ordered an account to be taken as asked in the plaintiffs' second claim, and the defendant having accounted the court accepted said account, and thereupon found the sum of $5,079.22 to be due the defendant on said account, and thereupon limited the time of payment of said sum by the plaintiffs to the defendant to September 10th, 1900. The plaintiffs failed to make payment of said sum either on or before said day, and said cause came by continuance to this day. Whereupon it is adjudged that said temporary injunction be dissolved

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and that said action be dismissed, and that the defendant recover of the plaintiffs his costs. . . ."

That part of this judgment limiting the time for the payment by the plaintiffs to the defendant of the sum so found to be due the latter, is alleged to be erroneous.

The twofold purpose of the action in the District Court was to obtain a judgment directing a reconveyance to the plaintiffs of the land in question, and payment to the plaintiffs of the balance alleged to be due them after deducting the defendant's expenditures from the rent collected by him. The only issues in that action were those raised by the defendant's denial of the matters alleged in the complaint. The plaintiffs were entitled to a judgment for a reconveyance, only upon proof of payment—if not from the rents and profits, at least in some manner—of the defendant's expenditures, and to a money judgment only upon proof that the rents and profits exceeded such expenditures. They not only failed to prove either of these facts, but it appeared upon the accounting that there was a large sum still due to the defendant. After the verdict of the jury and the finding upon the accounting the defendant was entitled to a judgment dismissing the complaint, unless, indeed, upon a proper amendment of the pleadings—permissible in such an equitable proceeding (*Woodbridge* v. *Pratt & Whitney Co.*, 69 Conn. 304, 333, 334)—it should be shown that after a tender to the defendant of the sum so found due him he still refused to reconvey the property to the plaintiffs.

After the verdict and accounting the court, from the language of its judgment, seems to have considered that the defendant, without any claim for equitable relief by cross-complaint or otherwise, was entitled to a decree foreclosing the plaintiffs of all right to redeem or to obtain a reconveyance of the property, and for that purpose to have made an order limiting the time within which the plaintiffs must pay the sum due the defendant, or lose their right to a reconveyance of the property, and to have rendered a judgment dismissing the action and dissolving the order restraining the defendant from disposing of the property, because of the failure of the

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plaintiffs to pay the sum found due within the time limited. The judgment, in so far as it limits the time within which the plaintiffs must pay the sum found due or be foreclosed of all right to redeem the property and obtain a reconveyance of it, is erroneous. There is no foundation in the pleadings for such a judgment.

That part of the judgment which reads: "and thereupon limited the time of payment of said sum by the plaintiffs to the defendant to September 10th, 1900. The plaintiff failed to make payment of said sum either on or before said day," is set aside. The rest of said judgment remains in force.

Error, and judgment reversed in part, with costs to the plaintiffs upon the writ of error.

In this opinion the other judges concurred.

HEWLETT O'DELL *vs.* LEROY M. COWLES.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

When a cause has been discontinued, upon the annual call of the docket, conformably to the rules of court, it is questionable whether the court at a subsequent term has any power to restore the case to the docket.

If such power does exist, it certainly cannot be exercised upon oral motion only and without notice to the adverse party; and a cause so restored to the docket should be erased therefrom.

Argued October 30th—decided December 18th, 1903.

ACTION of replevin, brought to the Court of Common Pleas in New Haven County where, after a pendency of three years without trial, it was stricken from the docket by the court, *Cable, J.* Subsequently, upon an *ex parte* motion, the cause was restored to the docket (*Cable, J.*), and later was again stricken therefrom (*Hubbard, J.*) after a hearing upon motion, from which action the plaintiff appealed. *No error.*

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Benjamin Slade, for the appellant (plaintiff).

William F. Henney and *Henry C. Gussman*, for the appellee (defendant).

PRENTICE, J. This cause, pending in the Court of Common Pleas in New Haven county, was at the May term discontinued conformably to the rules of court. At the September term, upon the oral motion of plaintiff's counsel, the case was restored to the docket. No notice of the pendency of the motion was given and it was not placed upon the short calendar. Subsequently the defendant, having learned of this action, made a motion to erase the case from the docket. This motion was placed on the short calendar and the parties heard thereon by the court, another judge presiding. Thereupon the court found that the case had been improperly restored to the docket and granted the motion.

If the court at its September term had any power over the judgment of discontinuance rendered at its May term, it was upon other proceedings than an oral motion without notice to the adverse party. *Hall* v. *Paine*, 47 Conn. 429; *Sturdevant* v. *Stanton*, ibid. 579; *Tyler* v. *Aspinwall*, 73 id. 493; *Goldreyer* v. *Cronan*, 76 id. 113.

The court having, subsequent to the unlawful restoration, upon motion, notice and hearing, found the facts which, in so far as they were essential, its own records disclosed, and having rightfully found thereon that the case was improperly upon the docket as a pending one, took the only proper course and erased it therefrom. This action involved no review, as claimed, of an exercise of discretion on the part of the judge who was presiding when the case was ordered restored. The court upon that occasion was vested with no discretion to do what it did.

There is no error.

In this opinion the other judges concurred.

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Louis A. Fisk *vs.* Frederick Ley et al.

Third Judicial District, Bridgeport, October Term, 1903.
Torrance, C. J., Baldwin, Hamersley, Hall and Prentice, Js.

The terms of a deed which clearly include an entire tract of land, out of which a number of building lots are carved, are not to be controlled by a more limited boundary indicated by the marginal words on a plan of the lots deposited in the town clerk's office, to which the deed refers. Such reference may explain the arrangement of the lots, but does not limit the area of the land so conveyed.

A five-acre tract upon the north shore of Long Island Sound was divided into thirty-five building lots, a plan or map of which was filed in the town clerk's office, to which reference was made in the deeds describing and conveying these lots. Four of them, at the south end of the tract, faced the water and fronted upon an open space marked upon the plan as a "Lawn," and the other lots fronted upon either side of an open space called the "Avenue," extending from the "Lawn" north to a highway. The "Lawn" was a level, grassy piece of upland, about fifty feet in width, sloping down to a strip of beach some twenty feet below. *Held* :—

1. That the filing of the plan and the conveyances referring to it, annexed to each lot a right to use the "Avenue" and "Lawn," and to use the strip of beach above the water-line for all such purposes as might reasonably serve the convenience of the lot-owners.
2. That the defendants, who owned one or more of the front lots, might properly be restrained from rebuilding the sea wall on the shore in front of their lots, upon a new line and in such a way as to change existing conditions and thereby materially injure the enjoyment of the rights which the plaintiff, as an owner of several rear lots, had in the "Lawn" and "beach," especially as it appeared that the new wall could have been as readily built on the line of the old bulkhead.
3. That under such circumstances it was immaterial that the plaintiff was the only lot-owner who disapproved the proposed alterations and had not contributed, or offered to contribute, to the necessary expense of repairing the existing bulkhead.
4. That the comparative benefit or loss to the plaintiff from the proposed wall was immaterial, except in so far as it might influence the court in exercising its discretion as to granting an injunction.
5. That it was of no consequence in whom the legal title to the "Avenue," "Lawn," or beach, might be, since the plaintiff's right to relief did not depend upon such title but on his ownership of one or more of the building lots.

The plaintiff's title was derived through deeds from *B*, who was de-

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scribed as trustee for certain persons named therein. *Held* that evidence that these beneficiaries in fact paid the purchase price of the entire tract conveyed to *B*, was properly excluded; also evidence that they did not know of or consent to the conveyance to the plaintiff, in the absence of proof or claim that the terms of the trust made such knowledge or consent necessary.

The plaintiff gave notice to the workmen building the wall to stop, and that he should procure an injunction, but did not notify the defendants. He waited two weeks before bringing the action, during which time the defendants expended a large sum in the work. *Held* that the notice, having been given to the actual tort-feasors, was sufficient; and that the delay was not so great as to constitute the defense of laches.

The terms of the injunction prohibited the defendants from "substantially changing" the extent and character of the beach and the shore, or the grade of the lawn, and from erecting or maintaining a wall on the line on which it was being constructed, indicated by a red line on a map introduced as an exhibit, but preserved their right to erect a wall "along the line of the original former bulkhead." *Held* that this was sufficiently certain.

Where many are entitled to a common privilege, in order to protect which a large expense must be incurred, no one of them has an absolute right to prevent the others from providing such protection as may seem to them to be reasonable and proper, if it be such in fact.

Argued November 3d—decided December 18th, 1903.

SUIT for an injunction to protect the plaintiff's enjoyment of certain rights in and to a strip of beach near his summer residence at the seaside; brought to the Superior Court for New Haven County and tried to the court, *George W. Wheeler, J.*; judgment for plaintiff, and appeal by defendants. *No error.*

Talcott H. Russell and *Harry W. Doolittle*, for the appellants (defendants).

Edmund Zacher, for the appellee (plaintiff).

BALDWIN, J. In 1885 a five-acre tract of land situated in Pine Orchard was conveyed to "Ellis B. Baker, Trustee," by deed bounding it north on a highway and "south by the sea or Long Island Sound," and describing it "as shown on a plan deposited with the town clerk of Branford, marked

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'Plan of 35 building lots belonging to Ellis B. Baker, Trustee, located at Pine Orchard, Branford, Conn.'" The plan so filed showed that the tract was a long and narrow strip of upland about 220 feet in width, laid out into lots of nearly equal size on each side of an open space marked "Avenue" leading from the highway to an open space on which the four southerly lots faced, marked "Lawn." The southerly boundary of the "lawn" was an irregular line substantially parallel to and some 40 feet distant from a line below which was marked "Long Island Sound." On the margin of the plan was written the following: "West boundary, commencing at stone 1 on line, runs north 881 ft. to roadway, stone 3—thence southeast at angle of 59° to post 4 on roadway and line east of property, thence south 630 ft. to post 2 on east line, thence west 220 ft. to west line post 1." Each lot was numbered. Those facing the lawn on the west of the "Avenue" were numbered 2 and 4, lot 4 being the lot next to it. Lots 3 and 1 were on the other side of it, lot 3 being next to it. Lots 1 and 2 were only accessible by going over the "lawn."

Although the boundary indicated on the plan by the marginal words above quoted, included nothing south of the 35 building lots, this cannot control the express terms of the deed, which clearly include the whole tract out of which they were carved. *Merwin* v. *Wheeler*, 41 Conn. 14, 26. The reference to the plan was made to explain the arrangement of lots; not to limit the area of the land conveyed.

The "lawn" was a level, grassy piece of upland, not over 56 feet in depth at any point, terminating in a slope leading down to the beach, which was some 20 feet below. Prior to July 5th, 1892, a wooden bulkhead, five feet high above the beach, had been built to protect this slope, and on top of it and extending back a short way was a board walk, forming part of a walk of similar construction running for a quarter of a mile on each side of the tract in question. This walk was supported throughout its entire length by a wooden bulkhead built on a uniform curve, and was used by the general public.

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On July 5th, 1892, Baker, as trustee, conveyed to F. E. Drake, trustee, lot 36, together with "the avenue and common lawn, with all improvements thereon, viz., summerhouse, flagstaff, bulkhead, and stairs, and all other property belonging to said E. B. Baker, Trustee for E. B. Baker, Harriet A. Fuller, and A. M. Young, located at Pine Orchard, Branford, Connecticut, as shown on a plan deposited with the town clerk of Branford marked 'Plan of 35 building lots belonging to Ellis B. Baker, Trustee, located at Pine Orchard, Branford, Connecticut.'" Drake, describing himself as trustee for the same parties, afterwards conveyed these premises to Prosper Istas, trustee. Istas, in 1901, conveyed them by warranty deed from himself individually to the plaintiff; and in 1903, pending this action, Istas, as trustee, executed and delivered another warranty deed of them to him.

The plaintiff also acquired title individually, in 1901, under Baker, trustee, through sundry mesne conveyances, to four other of the lots, all said conveyances describing them by reference to the plan on file.

In 1893, the bank and bulkhead in front of the "lawn" having been partly washed away, the bulkhead was rebuilt on the new line made by the washout, making a jog of 4 feet at its intersection on the west with the center line of the "Avenue" projected. A wharf, reached by a stairway from the "lawn," had been constructed on this center line. The new bulkhead was a foot or two lower than the former one, and was connected with the bulkhead and walk on either side by stairs.

Shortly before January, 1903, the bulkhead, as thus reconstructed, became dilapidated, and it was necessary to protect the "lawn" by a new embankment. Up to that time the owners of the four lots fronting on the "lawn" had always taken care of it, cut the grass, and made whatever repairs of the bulkhead were needed. The defendant Ley was one of them. They now, without consulting the plaintiff, began the construction of a substantial granite wall to replace the wooden bulkhead. Such a wall had already been built to replace

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the original wooden bulkhead for a space of a quarter of a mile on each side of the five-acre tract, by the owners of the shore lots. The line of the wall which the defendants proposed to construct did not follow exactly the line of the original bulkhead in front of the "lawn," and varied substantially from that of the line of the bulkhead as reconstructed in 1893, being run nearer to the water. It corresponded with the lines of the similar wall on either side, and made part of the same curve. The wall was to be raised to the same level as that of the adjoining walls, thus dispensing with any stairway in the public walk on top. It would protect the bank better than a wooden bulkhead; make the walk safer; be of general advantage to the owners of all the thirty-five lots; and increase the value of their property. The real purpose, however, of the front lot owners in selecting the new line, was to increase the extent of the "lawn" and secure as large a measure of benefit for themselves as possible. For this purpose, they proposed, as part of their scheme of improvement, to change the level of the "lawn"; carrying back the top of the slope so as to make that occupy half the "lawn," which would conform to the manner in which the adjoining ground on the east is graded. This would make the use of the "lawn" less convenient for the owners of the rear lots, who have been accustomed to bring out chairs and sit there. On the other hand, it would render it easier to keep the grass in good order, and prevent washouts, such as in the past have occasionally gullied the bank. There would have been no difficulty in building the stone wall on the line of the old bulkhead. Had it been so built there would have been no lack of beauty in the wall, nor of security, nor any appreciable break in the curve, nor any difficulty in making a junction with the new wall on the east and west; nor would a wall so built have been inferior to the proposed wall in utility; but it would have been a little more expensive. Building on the proposed line takes in a large strip of the beach, injures seriously this beach as a bathing beach and as a playground for children, prevents its use for the hauling out of boats, makes it dangerous for the an-

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chorage of boats, and in these respects injures the plaintiff through his ownership of these lots, and damages their value, which is upwards of $1,500, and dependent largely upon this beach and the right to its use. The water at high tide would come up to such a wall, whereas it never came up to the old bulkhead except in an extraordinary tide, which was infrequent.

Upon these facts, which appear from the finding of the trial court, an injunction was properly granted.

The filing of the plan in the town clerk's office, and the conveyances referring to it, annexed to every lot a right to the use of the "avenue" and "lawn"; to go over them to the Sound; and to use the strip of beach between the foot of the bank and the water for all such purposes as might reasonably serve the convenience of an adjoining proprietor. *Pierce* v. *Roberts*, 57 Conn. 31. Whether the benefit to the plaintiff from the proposed wall might be greater or less than his loss by it is immaterial, except so far as it might influence the court in exercising its discretion as to granting the extraordinary remedy of an injunction.

The circumstances show a condition of things in which great weight could be properly given to the preferences of the plaintiff. His legal title to the enjoyment of a considerable part of the common beach was threatened. He set more value on that than on the extension of the "lawn," the improvement of its slope, or any of the other benefits which he might receive at the cost of others. The tastes and pleasures of those who pass the heat of summer at a seaside cottage naturally vary. To one, sitting quietly upon a shady lawn and enjoying the prospect may be the greatest attraction, while another will make more use of the beach and the water. The plaintiff was apparently one of the latter class, and an injunction was his only adequate remedy to preserve his rights. *Wheeler* v. *Bedford*, 54 Conn. 244, 248.

He was not debarred from claiming it, because he was the only lot-owner who was dissatisfied with the proposed changes. Had it been impracticable or unreasonably expensive to construct the new wall without enclosing the strip of

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beach in question, another result might have been reached. If in such case, there had been a difference of opinion between the parties in interest, it may be that the preferences of those owning a majority of the lots should be allowed to control. Where many are entitled to a common privilege, in order to protect which a large expense must be incurred, no one of them has an absolute right to prevent the others from providing such protection as may seem to them to be reasonable and proper, if it be such in fact.

Evidence was offered by the defendants to show that the parties named in the deeds from Baker, trustee, and Drake, trustee, as those for whom they were trustees, did in fact furnish the purchase money with which Baker procured the original tract. There was no error in excluding this. It did not tend to show that, so far as the defendants were concerned, these trustees could not convey an absolute title, and it was not disputed that as to four of the lots a paper title of that description was vested in the plaintiff.

The defendants also offered evidence to show that the parties so named as beneficiaries of the trust, in the deeds under which the plaintiff claimed title to such lots, had never known or consented to such conveyances. There was no error in excluding it, in the absence of proof or claim that the terms of the trust made such knowledge or consent necessary.

Evidence was also excluded which was offered by the defendants to show that the deed to the plaintiff by Istas, trustee, executed in 1903, was given without the consent of the parties whom it described as those for whom he was trustee. This conveyance was made pending the suit; but if it could avail to enlarge the plaintiff's rights, he did not need its assistance, since he sues as an individual proprietor and not for the enforcement of any rights belonging to a trustee. The exclusion of this evidence was therefore of no injury to the defendants. The Superior Court was right in holding that title under this deed was not material to the plaintiff's case, and that it was of no consequence in whom the legal title to the "avenue," "lawn," and beach, might be.

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For similar reasons, evidence that the parties so named in the deed did not consent to the institution of this suit, nor wish an injunction granted, was properly excluded.

To meet the defendants' claim that the deed of 1903 was invalid, because purporting to convey a title free of any trust, the plaintiff was allowed to show that Baker had, as trustee, conveyed in 1891 a ten-foot strip of the "lawn" in front of lot 3 to the owner of that lot. If the plaintiff's rights under the deed of 1903 had been material, this evidence would have been proper; since in the absence of any direct proof as to the terms of the trust, they might have been inferred from acts of the parties to it, sanctioned by long acquiescence on the part of the lot-owners. As his rights under the deed were not material, the evidence which he adduced was immaterial also, but could do the defendants no harm.

Other rulings on evidence were made grounds of appeal, but were so plainly correct as to require no discussion.

As soon as the plaintiff heard that the construction of the wall complained of had been begun, he visited the spot, and notified the workmen whom he found there to stop work, telling them that if they did not he should apply for an injunction. It did not appear that they informed their employers of this interview; and the work went on as before. Two weeks later the suit was brought, a large expense having been meanwhile incurred by the defendants.

It is contended that the plaintiff, having given no direct notice to them, having delayed suit for a fortnight after he knew that the wall was being built, and having never himself contributed nor offered to contribute to the expenses necessary for the reparation or replacement of the bulkhead, was estopped from asking an injunction. There is nothing in this claim. Notice to those whom he found actively engaged in the violation of his rights was sufficient. He was not bound to inquire who their employers were. His suit was not unreasonably delayed. Nor because he had done nothing himself to restore or replace the dilapidated bulkhead, were other lot-owners, who had never sought his assistance or consent, authorized to restore or replace it on an improper line.

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The injunction granted was against "substantially changing the extent and character of the beach and the shore of the beach in front of said lawn, or of the grade of said lawn and said avenue, and from erecting and maintaining a wall upon said shore and said beach in the location marked upon Exhibit 5 by the red line, and from continuing the erection of the wall upon said beach, or maintaining said wall in the location it now is and is being placed," provided that "nothing herein shall be construed to prevent the erection of a sea wall along the line of the original, former wooden bulkhead nor from changing the grade of the lawn so as to make it uniform to the wall so erected along the original, former wooden bulkhead, provided such change shall not substantially interfere with the use of the lawn by the plaintiff and the other lot owners."

It is assigned for error that the terms of this judgment are uncertain and such as to invite future litigation. The trial court was not bound to assume the office of a civil engineer, and determine precisely the lines and grades that might be adopted, nor are the defendants in a position to complain that instead of forbidding any changes of those formerly existing, it only forbade substantial ones. The phrase "original, former wooden bulkhead" accurately described the bulkhead as it stood prior to 1893.

There is no error.

In this opinion the other judges concurred.

JOSEPH LAWRENCE *vs.* MICHAEL CANNAVAN.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Section 510 of the General Statutes provides that the trial of a cause in the Superior Court or Court of Common Pleas may be continued after the expiration of the term at which it was begun, but that the trial shall end and judgment be rendered before the close of

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the next term. *Held* that a judgment after the close of the term following that in which the trial commenced, was irregular and erroneous, unless rendered with the express or implied consent of both parties.

In the present case, in the Court of Common Pleas, the parties agreed at the close of the evidence on October 9th, that written arguments should be submitted thereafter, and oral arguments as well, if desired by court or counsel. In the following June, and after several terms of court had intervened, the case was assigned for oral argument, but was continued at the request of the defendant's counsel until July 3d, when he declined to argue the case and objected to any further proceedings. *Held*:—

1. That it could not fairly be inferred from the defendant's conduct prior to the close of the November term, that he had consented to the rendition of judgment after the close of that term—the limit prescribed by the statute.
2. That if his request for a continuance in June implied an assent to the rendition of a judgment thereafter, it did not appear that the plaintiff was so misled to his prejudice as to estop the defendant from objecting to further proceedings in July.

Argued November 5th—decided December 18th, 1903.

ACTION for an accounting and for the recovery of the sum found due thereon, brought to the Court of Common Pleas in New Haven County and tried to the court, *Hubbard, J.*; facts found and judgment rendered for the plaintiff, and appeal by the defendant, upon the ground that the judgment was rendered after the time allowed therefor by statute had expired. *Error and cause remanded.*

Charles S. Hamilton, for the appellant (defendant).

Richard H. Tyner and *Arthur G. Fessenden*, for the appellee (plaintiff).

HALL, J. This action was brought to the January term, 1897, of the Court of Common Pleas for New Haven county, terms of which are required by statute to be held on the first Mondays of January, March, May and November, and on the third Monday of September.

The judgment file, dated July 23d, 1903, states that the case came by legal continuances to that time, when the par-

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ties appeared and were fully heard, and judgment was rendered for the plaintiff for $538.90 and costs.

In the finding the following facts appear: The evidence in the case was heard by the court (*Hubbard, J.*) on the 8th and 9th of October, 1902. For convenience of counsel, it was agreed on the last day of the hearing that written arguments should be submitted, and that oral arguments might be made at a later date, if desired by the court or by counsel. Written arguments were submitted by both parties on the 24th of October, 1902. The court requested oral arguments to be made, but fixed no time for hearing such arguments, until, on a regular assignment day, the case, without objection from either party, was assigned for hearing on June 12th, 1903, but at the request of counsel for defendant was continued from that date from time to time until July 3d, 1903, when, at a special session of the court held by *Judge Hubbard* for the purpose of hearing oral arguments, both parties appeared, and the defendant objected to further proceedings and declined to argue the case. The court thereupon on said day heard the oral argument of the plaintiff, and on the 23d of July, 1903, rendered judgment as aforesaid.

It is claimed that under the statute such judgment is either void for want of jurisdiction, or erroneous, because rendered after the close of the next term after that at which the trial commenced, and based upon evidence taken several terms before that at which the judgment was rendered.

Section 510 of the General Statutes which was in force at the time of the trial of this case, provides that "any judge of the superior court or of the court of common pleas, who shall have commenced the trial of any civil cause, shall have power to continue such trial and render judgment after the expiration of the term or session of the court at which such trial commenced; but such trial shall be ended and judgment rendered before the close of the next term or session."

Upon its face the judgment in question is neither void nor erroneous, since it appears by the judgment file that the case was regularly continued to, and heard at, the term when final judgment was rendered.

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The judgment is not void for want of jurisdiction, upon the facts stated in the finding. The court appears to have been regularly in session when the judgment was rendered. The case had not been decided, but was still pending before a court which had jurisdiction of the subject-matter and of the parties. The parties, of course, had the right, notwithstanding the statute, to retry their case in July and have it decided, and for that purpose to waive the reproduction of the evidence previously presented before the same judge and to consent that the court might hear the arguments and decide the case in July, upon the evidence heard by him in October. *Jaques* v. *Bridgeport Horse-Railroad Co.*, 43 Conn. 32, 34; *Shackelford* v. *Miller*, 91 N. Car. 181; *Morrison* v. *Citizens' Bank*, 27 La. Ann. 401. Since the court, by consent of the parties, could lawfully have rendered the judgment in July, upon such evidence, it was within the jurisdiction of the court to render the judgment appealed from. *State* v. *Hartley*, 75 Conn. 104, 111. If the court in July, having jurisdiction of the parties and the subject-matter, rendered a judgment upon evidence not properly before it at that time, and which the parties had not consented should be considered in deciding the case, the judgment was erroneous, but not void. *Ex parte Bennett*, 44 Cal. 84, 87.

Such consent—that the court may render judgment upon evidence taken at a former term—need not be expressly given when the case is decided. An agreement, either express or implied, by the parties or their attorneys, at the close of the trial, that judgment may be rendered at a later term, is, if not afterwards revoked, equivalent to a consent that the court, for the purpose of rendering judgment at such later term, may consider the evidence heard at a previous term. *Sturdevant* v. *Stanton*, 47 Conn. 579, 580. Such a consent may also be implied from the conduct of the parties or their attorneys, in proceeding without objection with the trial or argument of the case, at such later term, or from the silence of the parties until the judgment has been rendered at such later term. *Molyneux* v. *Huey*, 81 N. Car. 106.

It is needless for us to inquire whether, in the absence of

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any statute upon the subject, the Court of Common Pleas could, against the objection of either party to the action, have properly continued the trial of this case after the expiration of the term at which it was commenced, or could, against such objection, have properly rendered judgment at a term subsequent to the trial upon the evidence taken at the previous term. We are satisfied that it was the purpose of § 510 to provide that, irrespective of any consent of the parties, the court might so continue the trial of a case, and render final judgment during the next term after that at which the trial commenced, upon the evidence taken at a previous term; but that a final judgmeut rendered after the close of such next term, upon such evidence, and without the express or implied consent of the parties, would be irregular and erroneous.

Under this section the Court of Common Pleas could, therefore, even against the objection of the parties, have heard the arguments in this case and decided it, at any time before the close of the November term, which might by law have been continued until the first Monday of January, 1903. After that date the judgment could not have been properly rendered, without the consent of the parties, either express or implied.

The judgment was not rendered with the consent of the defendant, but against his express objection. Neither from his agreement at the close of the hearing on the 9th of October, that written arguments might be submitted and oral arguments made thereafter, nor from the filing of a written argument on the 23d of October, nor from any conduct of the defendant prior to the close of the November term, can it be fairly inferred that he consented that judgment might be rendered in the case at as late a time as July of the following year. When in October he consented that written and oral arguments might be presented at a later date, he might very properly have expected that the case would be decided within the time limited by statute, namely, before the first Monday of the following January.

If it can be said that the defendant's requests for post-

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ponements from June 12th until July 3d indicate that he then consented that judgment might thereafter be rendered, it does not appear that the plaintiff was thereby induced to so change his conduct to his detriment, or that he was thereby caused such loss or inconvenience, that the defendant was estopped from objecting on the 3d of July to further proceedings in the case.

The judgment is erroneous and is reversed, and the case remanded to be proceeded with according to law.

In this opinion the other judges concurred.

ROLAND R. RATHBUN ET UX. *vs.* JAMES MCLAY, JR.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A contract for the employment of a broker to negotiate for the purchase of certain real estate is one for his personal services, and provable by oral testimony. The statute of frauds has no application to such an agreement.

By no circumvention, scheming or strategy, can an agent profit at the expense of his principal. The relation is one of confidence, and the agent is bound to keep to the straight line of good faith and fair dealing.

Argued November 5th—decided December 18th, 1903.

ACTION to recover money entrusted to the defendant to purchase certain real estate for the plaintiffs, and wrongfully converted by the defendant to his own use, brought to the Court of Common Pleas in New Haven County and tried to the jury before *Hubbard, J.;* verdict and judgment for the plaintiffs, and appeal by the defendant. *No error.*

Charles H. Fowler, for the appellant (defendant).

Robert C. Stoddard, for the appellees (plaintiffs) was stopped by the court.

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PRENTICE, J. This is an action of fraud. The complaint alleges, in substance, that the defendant, being a real estate agent, accepted an agency from the plaintiffs to purchase for them certain real estate, which purchase was effected, and that in the performance of that agency he was unfaithful to his trust, deceiving his principals with falsehood and thereby obtaining from them, for himself, the sum of $500, under the false pretense that it was a part of the purchase money paid the seller. The answer consisted of a general denial and a special defense. The plaintiffs offered evidence in support of all the allegations of the complaint. The defendant sought, conformably to his special defense, to show that no agency was created; that the negotiations between him and the plaintiffs were had between them as seller and purchasers, and that he simply took advantage of his means of knowledge to sell for a greater price than that for which he was able to buy the property in order to consummate the sale.

The case thus, as the court correctly instructed the jury, resolved itself primarily into a question of fact as to whether or not the claimed agency did or did not exist. The court charged the jury that if they found that there was no agency, then their verdict must be in favor of the defendant. As the jury rendered a verdict for the plaintiffs, it follows that they found that the agency existed. This being so, the defendant's admitted conduct constituted a palpable and flagrant actionable fraud. His acceptance of the agency imposed upon him the duty of honesty in his intercourse with his principals and fidelity to their interests. By no indirection or circumvention, by no adroit scheming or concealed stratagem, could he profit at their expense. He had entered into a confidential relation and he was bound to keep to the straight line of good faith and fair dealing.

The burden of the defendant's complaint, as stated in the reasons of appeal, is that the court admitted parol evidence to establish this agency, and declined to instruct the jury that the agency in question was one which could not be created by parol.

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The court was entirely correct. The contract sought to be shown was one for personal service; it was not an agreement for the sale of real estate, or any interest therein or concerning the same. That the agency was created for the purchase of real estate for the plaintiffs, was a mere incident and of no consequence. The plaintiffs are not seeking to establish a resulting trust in their favor in the land standing in the defendant's name, as was the case in most of the cases relied upon by the defendant. They are not endeavoring to enforce any agreement for the transfer to them of the title to the land, nor claiming damages for the breach of such agreement. The agreement for the sale and transfer of the land to the plaintiffs has been carried out by the parties and they are not seeking to repudiate it. What the plaintiffs are claiming to establish, is a fiduciary relation and a breach of the duties incident to that relation resulting in injury. The evidence offered was admissible and competent for that purpose, and the court was quite correct in telling the jury that the defendant's several requests to charge bore no relation to the case if the agency was found to exist, and that they might find it to exist upon evidence not in writing. To adopt the defendant's contention would be to hold the monstrous doctrine that an agent employed to do anything concerning land could with impunity be as dishonest as he pleased and cheat and defraud his principal to his heart's content, if it chanced that his agency was not evidenced in writing.

It is complained that the charge taken as a whole was unsuited to the case. We have examined it with some care, only to be impressed with its eminent fairness and appropriateness. It presents the issues involved with clearness and precision, and states the legal principles which should guide the jury in a manner beyond criticism.

There is no error.

In this opinion the other judges concurred.

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THE KNAPP AND COWLES MANUFACTURING COMPANY *vs.* THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

The defendant, an ordinary steam railroad company, appropriated the entire width of a highway for its tracks, for a year or more, while eliminating grade-crossings and improving its line, pursuant to legislative authority, and during that time ran all its trains over said tracks. *Held* that the defendant was liable for such damages as the plaintiff, an abutter owning the fee of the street, sustained thereby, notwithstanding a statute which required these alterations and authorized a temporary closing of the highway did not expressly provide that the company should make compensation therefor; and that under such circumstances the provisions of the defendant's charter, requiring payment for land taken or used for its road, applied.

A judgment against the defendant for such damages does not constitute a taking of its property without due process of law, nor does it deprive it of the equal protection of the laws.

It is no defense to an action to recover such damages, that the defendant would have inflicted a greater injury upon the plaintiff if it had occupied the highway with its building apparatus and material, as it would have been compelled to do if it had laid its temporary tracks within its own location. It can never excuse a wrongful and injurious act that the defendant might have caused greater damage in a lawful manner.

An adjoining proprietor has no absolute right, in making improvements upon his own land, to occupy the whole of the adjoining highway with apparatus and material. His right of occupation extends only so far as is reasonably necessary, and so far as it is compatible with the right of the public and of other proprietors to a reasonable use of the highway.

General Statutes, § 2020, requires that a person injured by means of a defective road must give notice of the injury to the party bound to keep the road in repair, as a prerequisite to the bringing of an action therefor. *Held* that this requirement applied to persons injured while lawfully upon the highway, not to those wrongfully excluded from it; and therefore had no reference to the present case.

The construction of such a railroad upon the plaintiff's property is a trespass, for which an immediate action lies, and every day's use

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is a new act of trespass, giving a new right of action. Accordingly, the statute of limitations (§ 1115), if pleaded as a defense, only bars so much of the plaintiff's cause of action as rests upon acts done more than three years before the suit was begun.

A demurrer to an allegation that a corporation, in doing a certain act, "proceeded in no respect under its charter," does not admit the truth of the allegation, since that is a mere matter of argument.

In the absence of any finding to the contrary, it must be presumed that the trial court, in fixing the amount of damages, considered only such acts of trespass as occurred within three years before the bringing of the action.

Argued November 5th—decided December 18th, 1903.

ACTION commenced in March, 1903, for $3,000 damages, for acts done in the course of the construction of improvements upon the defendant's road to the injury of an abutter on a street adjoining the railroad; brought to the Superior Court for Fairfield County where a demurrer to the answer was sustained (*Case, J.*) and judgment rendered for plaintiff for $500. *No error.*

Goodwin Stoddard and *Arthur M. Marsh*, for the appellant (defendant).

Stiles Judson, Jr., and *Samuel F. Beardsley*, for the appellee (plaintiff).

BALDWIN, J. The plaintiff owns a factory in Bridgeport fronting on a highway known as Railroad Avenue, and also the fee of that street for its entire width. The defendant owns and operates a railroad adjoining that street on the opposite side. While reconstructing this road on an elevated grade, it put up a fence on Railroad Avenue which shut off all access from the sidewalk in front of the plaintiff's factory to the worked portion of the street, and occupied the whole of that portion of it with building apparatus and materials, and by a double track, laid two feet above the grade of the sidewalk, on which it moved all the trains on its main line for more than a year. The defendant pleaded in justification substantially the same matters which it relied on in the

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case of *McKeon* v. *New York, N. H. & H. R. Co.*, 75 Conn. 343, and also (1) that no written notice of this claim had been given by the plaintiff, as required by the General Statutes of 1888, § 2673 (Rev. 1902, § 2020); (2) that while running its trains on Railroad Avenue, its whole location was occupied by building apparatus and materials, which otherwise it would have been necessary for it to place on the avenue, and which, if so placed, would have occasioned the plaintiff greater damage and inconvenience than did the use made of the street as a site for a temporary railway; and (3) that the right of action did not accrue within three years before the commencement of the suit. The answer also averred that to sustain the action, under the circumstances disclosed, would be to take the defendant's property without due process of law, and deprive it of the equal protection of the laws, and thus violate its rights under both the State and National constitutions.

The acts of which the plaintiff complains are substantially similar to those which were the subject of the *McKeon* case.

The defendant's answer was therefore properly held insufficient, unless there is merit in some of the new defenses which it sets up.

That the plaintiff would have been damaged more, had the defendant filled up Railroad Avenue with building apparatus and materials, instead of turning it into a railroad, is immaterial.

In the first place, an abutting proprietor has at common law no absolute right, in order to facilitate the construction of improvements upon his land, to occupy the whole of the adjoining highway with apparatus or materials. He may thus occupy part or the whole of it, if it be reasonably necessary to facilitate such a work, and if it be compatible with the right of the public and of neighboring proprietors to the reasonable use of the highway. But their rights are as perfect as his. When several parties enjoy common or concurrent rights to the use of the same thing, each must use his with due regard to those of the others. No facts are set up in the answer showing that the defendant, merely

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by virtue of its ownership of adjoining land, could promote its own interests, at the expense of its neighbors and of the community, by filling up the entire street for a year or more with its apparatus and materials.

But, if it had that right, it did not exercise it. The answer avers that "certain necessary building materials and apparatus were placed and used by the defendant in said highway, but said temporary tracks occupied substantially the whole of the main roadway thereof."

Nor, under any circumstances, can one justify injuring another by an unlawful act, by showing that he could have done a lawful act which would have injured him more.

The judgment rendered against the defendant therefore took from it no property right. Its action was taken not as a landowner, in the exercise of a privilege appurtenant to premises which it owned and desired to improve, but as an agent of the State to promote public ends in the attainment of which it also had, by reason of its franchises, a private interest. That its authority from the State gave it no right to lay its tracks on the plaintiff's land without making just compensation, was determined in the *McKeon* case.

Nor does the judgment appealed from deprive it of the equal protection of the laws. The plaintiff's recovery is for a direct invasion of its rights of property. There was no discrimination against the defendant. Any one guilty of a similar wrong would be liable in the same way and to the same extent.

It is alleged in the answer that all the acts complained of were done under authority and direction of the State, and with an exemption from any liability for damages so occasioned, and that the defendant "proceeded in no respect under or by virtue of its charter." This last statement is in its nature mere matter of argument, and not an averment of fact. When the State clothed the defendant with the great powers on which it relies, the State knew what was the legal character and what were the legal responsibilities of the agent thus selected to do its will. It could only ac-

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cept and only exercise the agency in its character as a railroad company, for as such only did it exist. It must be presumed that the General Assembly intended the charter from which it derived its being to govern its proceedings, except so far as the new grant of new powers might enlarge or restrict its effect. That there was in the legislation on which the defendant relies no implied restriction of the provision in the charter respecting its duty to pay for the use of any real estate required for constructing its road, with all necessary turn-outs, was determined in the *McKeon* case.

It is further alleged that the defendant received no benefit from its use of Railroad Avenue except such as might be necessarily incidental to carrying out the orders of the State for the elimination of grade-crossings. Had it been incumbent on the plaintiff to show a benefit to the defendant, it would be necessarily implied from its use of the street, elsewhere admitted in the answer, to run its trains on. But the question was as to the plaintiff's loss, not the defendant's gain.

The use which the defendant made of the street was not a mere source of consequential damage, such as might happen from closing part of a highway to public travel, or diverting its course, as in *Newton* v. *New York, N. H. & H. R. Co.*, 72 Conn. 420, 429. It was a direct taking of the plaintiff's land during a certain time, for a purpose to which it had never been dedicated or appropriated.

General Statutes, § 2020 (re-enacting General Statutes, Rev. of 1888, § 2673), gives an action to "any person injured in person or property by means of a defective road," against "the party bound to keep it in repair," except that "when the injury is caused by a structure legally placed on such road by a railroad company" the action lies only against such company; but no action can be maintained "unless written notice of such injury and a general description of the same, and of the cause thereof, and of the time and place of its occurrence shall, within sixty days thereafter, or, if such defect consist of snow or ice, or both, within fifteen days thereafter, be given" to the party sued.

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No such notice as is thus provided for was required from the plaintiff to the defendant. The statute is designed merely to give an action to one injured while using a highway, in consequence of a defect due to a want of repair. *Bartram* v. *Sharon*, 71 Conn. 686, 694; *Upton* v. *Windham*, 75 id. 288, 292. It was enacted to protect those rightfully upon the highway, not those wrongfully excluded from it. Still less can it be claimed to refer to the injury done to the owner of land within the limits of a highway, by the temporary taking of it, without making compensation, as a site for a steam railroad.

The fifth defense—that of the statute of limitations—having been pleaded as a full defense, was properly held insufficient.

For the defendant to construct a railway upon the plaintiff's land was an act of trespass, for which an action could have been immediately brought. Every day's use of it for railway purposes was a new trespass, founding a new claim for damages. *New Milford Water Co.* v. *Watson*, 75 Conn. 237, 249; *Uline* v. *New York Central & Hudson River R. Co.*, 101 N. Y. 98, 4 Northeastern Rep. 536. More than three years had elapsed from the date of the original entry before the action was brought. The statute of limitations applicable to actions of trespass (General Statutes, § 1115) was a bar to so much of the plaintiff's cause of action as rested upon acts done more than three years before suit brought, but not a bar to a recovery for acts done or damages suffered within three years. *Bull* v. *Pratt*, 2 Root, 440. The taking of the plaintiff's land for the defendant's purpose was not a permanent appropriation of it. It constituted a temporary invasion of his rights, commencing, as averred in the answer, on or about December 15th, 1899, and continuing until on or about March 15th, 1901, when it ceased altogether.

The cause of demurrer pleaded to the fifth defense was that "the acts of the defendant alleged in the complaint gave rise to one continuous and entire right of action, and it appears from the allegations of the answer that said acts

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continued until on or about the 15th day of March, 1901, which is within three years before the commencement of this action." This statement of the nature of the wrong was not technically accurate, but it gave the defendant substantial notice that the plaintiff considered its complaint as adapted to a recovery for a continuing series of acts, the latest of which occurred on or about March 15th, 1901. It must be presumed, in the absence of any finding to the contrary, that the trial court, in assessing damages, considered such only as followed from the continuance of the trespasses within three years from the commencement of the suit.

There is no error.

In this opinion the other judges concurred.

WILLIAM H. DOWNS *vs.* CLINTON B. SEELEY ET AL.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A complaint alleging merely that the plaintiff, while lawfully riding on the defendant's freight elevator in the act of delivering ice to its club room on the second floor, was injured by a fall of the elevator due to the breaking of its cables, does not describe the relation of a passenger to a common carrier of passengers, nor does it disclose a situation which calls for the exercise of more than ordinary care upon the part of the defendant.

Upon a hearing in damages after a default, the burden assumed by the defendant does not extend beyond the disproof of such facts as are alleged with reasonable certainty in the complaint. Accordingly, if charged with "knowledge" of the defects which caused the plaintiff's injury, it is sufficient for the defendant to prove that he in fact had no knowledge of them; he is not obliged to go further and disprove the nonexistence of circumstances from which knowledge might be imputed to him as a conclusion of law.

In the absence of a default, it is questionable whether such a variance between the plaintiff's allegation and proof might not, in the discretion of the trial court, be disregarded as immaterial.

Submitted on briefs November 10th—decided December 18th, 1903.

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ACTION to recover damages for personal injury alleged to have been caused by the defendant's negligence, brought to the Superior Court in Fairfield County and heard in damages to the court, *George W. Wheeler, J.*; facts found and judgment rendered for nominal damages ($50) only, and appeal by the plaintiff. *No error.*

Thomas M. Cullinan and *John Cullinan, Jr.*, for the appellant (plaintiff).

Alfred B. Beers, for the appellee (the Algonquin Club one of the defendants).

PRENTICE, J. This action was originally brought against three individuals and the present defendant, the Algonquin Club, herein referred to as the defendant.

The complaint, omitting the allegations of damage, was as follows: "1. The defendants, Clinton Barnum Seeley, Wilson Marshall and Wilson Marshall, Jr., are the owners of a building on State Street, in said Bridgeport, and the defendant, the Algonquin Club, is a tenant in possession of a portion of said building. 2. There is in said building a freight elevator, which elevator is owned by said defendants, Clinton Barnum Seeley, Wilson Marshall and Wilson Marshall, Jr., and is used exclusively by said Club for carrying freight and other articles, and persons in charge of said freight and other articles, to its rooms which are located on the second floor of said building. 3. On December 30th, 1901, the said plaintiff was employed by the Bridgeport Ice Co., to deliver ice to certain customers of said company, among them being the said Club. 4. In pursuance of said employment of delivering ice to the said Club, the plaintiff was on said date riding on said elevator with the knowledge of said defendants and their servants, and in accordance with their instructions and orders, and while he was so doing, without fault or negligence on his part, the cables supporting said elevator broke, and said elevator fell, precipitating the plaintiff to the ground floor, a distance of over 20

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feet. 5. The plaintiff, several times prior to said December 30th, 1901, had been ordered and directed by the defendants and their servants to take ice to said second floor by means of said elevator, and had been by them forbidden to carry ice to said second floor by any other way or entrance. 6. Said elevator fell on account of the defective construction and condition of said cables, which defects existed prior to the letting of said rooms and said elevator to the said Algonquin Club by the said Seeley and Marshalls, and on account of said cables being out of repair, all of which was known to the said defendants and their servants, and by reason of their negligence they failed to remedy the same in accordance with their duty."

The defendant suffered a default, and filed a notice that upon the hearing in damages it would offer evidence to disprove all the allegations of the complaint save those of paragraph one and portions of paragraph two, and to prove certain things unimportant to notice.

The court found that the accident arose from the breaking of the hoisting cable. This cable, it was found, was a new, first-class one, installed by the defendant within a year of the accident; that it was of the best type, not defective in construction, properly attached to the elevator and hoisting machinery, having an ample working capacity, and that, under ordinary circumstances, it would have been safe for eight years. The defendant proved, as the court found, that it had no knowledge or information of any defect in the cable, and that ordinary observation prior to the accident did not indicate that it was defective. The defendant offered no evidence to prove that the cable was not defective prior to the accident. It offered no evidence, and there was no evidence in the case, upon which the court could find as a fact the existence or nonexistence of such prior defect, or in what particular the defect, if any, consisted, or how long it had existed. The court thereupon found and ruled that the defendant had not disproved the alleged existence of the defect; but that having disproved actual knowledge it had disproved the knowledge charged,

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and thereby disproved the negligence alleged; and that therefore judgment for nominal damages, only, could be rendered against it, notwithstanding that it did not offer evidence to establish, and thereby establish, that the defect had not existed for so long a time or under such circumstances that it did not have the means of knowledge, which, with the exercise of ordinary care, would have given it actual knowledge, so that knowledge should not be imputed to it. This ruling and the incidental ruling that the rule of duty applicable to the situation was that of ordinary care, furnish the substance of the reasons of appeal.

Whatever might be said, upon the facts found, of the relation which existed at the time of the accident between the plaintiff and the defendant, and the consequent duty devolving upon the latter as respects the former, it is quite clear that the relation set out in the complaint as the basis of the plaintiff's claim for damages, and the duty relied upon, must be regarded as such as called for the exercise of only ordinary care on the defendant's part. To permit the complaint to be regarded as one which alleges a relation of passenger to common carrier of passengers, and charges a breach of the high duty imposed upon such carrier, would involve a stretch of construction which, after a default, would be unfair to the defaulting party. It cannot in justice be held to have admitted, by its default, any fact not alleged with reasonable certainty in the complaint, or to have assumed thereby the burden of disproving the existence of such fact at its peril. The relation of common carrier of passengers to passenger, and the consequent duty, are clearly not so alleged in this complaint. Its allegations are not such as are calculated to fairly apprise the adverse party that such a claim was being made against it.

In applying this rule of duty the trial court committed no error in holding that the defendant, by its default, assumed no obligation to disprove the existence of any facts save those alleged in the complaint with reasonable certainty, in order to lift from itself the burden of substantial damages; and that imputed knowledge of the defect in

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question was not a fact so alleged. The complaint alleges knowledge. This allegation the court found disproved. Imputed knowledge is not of itself alleged, neither are any facts stated from which the legal conclusion of the existence of such knowledge could be drawn. It is urged, however, that the allegation of knowledge is sufficiently comprehensive to impose upon the defendant the duty to disprove the existence of imputed knowledge, and that the court erred because it did not render judgment for substantial damages for the defendant's failure to negative such knowledge.

We think that this contention is not well made. The plaintiff has charged knowledge, and not some legal equivalent thereof, and upon a default he must be confined to his averments as reasonably construed. It is unnecessary to hold that, if there had been no default and the plaintiff had been put to his proof of the allegations of the complaint, the variance between the allegation of knowledge and the evidence of facts establishing, as a legal conclusion therefrom, imputed knowledge, would have been so material that a court could not, with a due regard for the rights of the defendant, disregard it and admit the testimony. The liberality now exercised in this regard might, perhaps, under proper circumstances, justify such a procedure. But there has been a default suffered, and it is quite another thing to say that the allegation of actual knowledge so certainly and reasonably includes imputed knowledge, that the defendant has imposed upon it, as the result of its default, the burden involved in that inclusion. It is one thing to say that the court may in its discretion treat the variance as immaterial in a given case, and quite another to say that the averment of the complaint is such that the defendant's admission by his default extends of necessity to the full length suggested, and embraces not only what is in terms alleged but also all facts equivalent in their legal operation to that which is so alleged.

The plaintiff, in aid of his contention, appeals to the rule which provides that acts and contracts may be stated

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according to their legal effect, and the principle that where acts are pleaded according to the legal effect the allegations may be supported by proof of facts having that effect. Rules of Court, p. 44, § 144; *Fish* v. *Brown*, 17 Conn. 341. The plaintiff here makes the mistaken assumption that actual and imputed knowledge are the same things. They may lead to the same results as respects one's duty or obligations, but they are different things. The one involves knowing in fact: the other may consist with ignorance in fact. The legal effect of facts justifying an imputation of knowledge is not knowledge. Such facts simply create a situation to which the law gives the same legal effect as that which attaches to actual knowledge.

There is no error.

In this opinion the other judges concurred.

FORTIS H. ALLIS *vs.* HENRY F. HALL.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

While an independent suit to restrain a party from enforcing a judgment of the Superior Court can be brought to that court only (General Statutes, § 537), it is not essential that it should be brought in the same county as that in which the first action was tried and determined.

A court of equity may reform a written instrument which, by reason of a mutual mistake of the parties either in a matter of fact or of law, fails to express their true intent and meaning.

Where one of the parties seeks to give the instrument a different meaning from that which both parties accorded to it when it was drawn, and to hold the other liable on it as thus construed, the latter should ordinarily protect himself by filing a cross-complaint for a reformation of the instrument; otherwise he may be precluded from availing himself of that remedy by the rule or doctrine of *res judicata*—which includes not only such defenses as were actually interposed, but such also as might and ought to have been made.

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That rule, however, which rests upon and grew out of considerations of public policy in the administration of justice, has important and recognized qualifications, and its application will not be permitted where it will work a manifest wrong or injury to a litigant who has acted in good faith and with reasonable diligence in the protection of his own interests.

In the present case *A*, the plaintiff, when sued by *H*, the defendant, on the written agreement, did not ask for its reformation, because he knew the construction urged by *H* was not in accord with their real agreement, and also because he was advised by competent counsel, and in good faith believed, that *H's* contention could not be upheld. As soon, however, as this court had decided otherwise, *A* asked leave of the trial court to file a counterclaim for a reformation of the writing, which was denied on the ground that it came too late. He then brought the present independent action, for a reformation of the contract, and for an injunction restraining *H* from taking out execution on his judgment. The trial court having found that the contract as drawn did not express the true agreement of the parties, reformed it accordingly and granted the injunction. *Held*:—

1. That the situation was one which justly appealed to the judicial conscience, and fully warranted the court in relaxing the rule of policy above stated.
2. That the refusal to permit *A* to file a cross-complaint in the former action was simply an exercise of the trial court's discretionary control over pleadings, and was not an adjudication of the plaintiff's right to a reformation.
3. That the fact that *A* relied upon the construction of the instrument which had been common to both parties and accorded with their real agreement and intent, as a sufficient ground of defense in the first action, was not to be imputed to him as laches nor to have the effect of an estoppel, under the circumstances disclosed by the record; especially as *H*—who must be presumed to have known the real agreement, and therefore the falsity of the instrument by means of which he was seeking to render *A* liable—was in no position to invoke the doctrine of laches or estoppel.
4. That the doctrine of election had no application to *A's* situation.

Absence of direct contradiction by the mouth of a witness does not make a so-called fact "undisputed," within the meaning of the Rules of Court, p. 93, §10.

It is one of the important functions of a trial court to determine the relative credit to be given to oral evidence; and this is a province which this court cannot invade.

On his direct examination a witness testified that at a given date the defendant was of sound mind. *Held* that he could not fortify or reinforce that opinion, on his direct examination, by showing that within a few days after such date he had, with the advice of his

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counsel, given the defendant a power of attorney involving the care and disposition of his entire property.

It is not important the record should be corrected in order to show that an elementary claim of law was urged upon the trial court, unless it affirmatively appears that the court did not accept the proposition as correct in arriving at its conclusion.

Until the cost of such printing has been paid to him, the clerk is justified in refusing to print evidence, the only place or purpose of which in the record is incident to an effort to secure a review and correction of the finding. The cost of such printing is by no circumvention to be cast upon the State.

Argued October 15th, 1903—decided January 6th, 1904.

SUIT for the reformation of a mortgage deed, brought to the Superior Court in Hartford County where a demurrer to the complaint was overruled (*Roraback, J.*), demurrers to the answer and amended answer were sustained (*Case, J.*), and the cause was afterwards tried to the court, *Roraback, J.*; facts found and judgment rendered for the plaintiff, and appeal by the defendant. *No error.*

Henry G. Newton and *Harrison Hewitt*, for the appellant (defendant).

Charles E. Perkins and *Frank L. Hungerford*, for the appellee (plaintiff).

PRENTICE, J. This case is a sequel to that of *Hall* v. *Allis*, 73 Conn. 238, which was an action to recover damages for the breach of the covenants of a mortgage. The facts of that case and its history are pertinent to this. In so far as they are recited in the report of that case they need not be repeated here. Upon the announcement of the decision of this court in the former action, the present plaintiff, being the defendant therein, moved for leave to file a cross-complaint asking, upon appropriate allegations of mistake, that the mortgage upon which the action was brought might be reformed so that the principal of the Yale College mortgage should be excepted from the operation of its covenants and it thus be made to express what the proposed cross-com-

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plaint alleged was the agreement and intent of the parties thereto, which agreement and intent Allis had theretofore unsuccessfully contended was in fact expressed by the mortgage as drawn. This motion was denied, upon the ground that it was made too late, and judgment was thereupon rendered that Hall recover $7,821.70 damages and costs. After the denial of this motion, and before final judgment was rendered, Allis brought this action to the Superior Court in Hartford county, seeking a reformation of said mortgage in the way already indicated, and an injunction restraining Hall from taking out execution on the judgment rendered, or to be rendered, in the prior case, and from taking any measures or steps to enforce the collection or payment of the judgment.

The complaint alleges, in substance, and the court finds, that the parties, prior to the execution of the mortgage, agreed that the principal of the Yale College mortgage should be excepted from the operation of its covenants; that the mortgage should be upon the equity in the property, subject to the college mortgage, the mortgagor agreeing to pay the interest upon that mortgage debt, and the taxes on the property, and keep the equity over and above the principal sum clear, but not to be holden to save the defendant mortgagee harmless from said principal or protect him therefrom; that the mortgage as drawn and executed was intended by both the parties thereto to express said agreement; that by the mistake of the scrivener who drew it and the parties who executed it, it failed to do so; and that it was delivered by Allis to Hall under the mistaken belief, mutually entertained by them, that it did so express said prior agreement, and with the intention that it should. It is also alleged and found that Allis, up to the time of said decision by this court, fully believed, as he was advised by competent counsel, that the covenants of said mortgage as drawn did not bind him to protect Hall from the principal of the mortgage debt, and that his conduct theretofore and in said prior action was had in good faith, relying upon said belief.

Other pertinent facts are, that the transfer of the stock of

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the Brick Company by Sloper and his associates to Allis was for the purposes of collateral security; that at some time within one or two years after the execution of said mortgage, Hall made a claim upon Allis, that by the legal construction thereof the latter was bound to protect him, Hall, from the principal of said mortgage debt to Yale College, and that Allis repudiated said claim; that on December 23d, 1896, Hall brought an action of ejectment to obtain possession of the mortgaged property, said action being based upon his ownership of said second mortgage; that on February 5th, 1897, Allis, while said action of ejectment was pending, for the protection of Yale College under its first mortgage, surrendered to said college the possession of said premises by an instrument in writing, which provided that Allis should pay to the college any deficiency that might at any time be due to it in case the rents of said property should not be sufficient to pay the taxes, insurance, repairs and interest on its mortgage; that the college entered into possession and collected the rents, and that before the law-day for the redemption of the mortgaged premises by the defendant expired, Allis had paid to Yale College all that was due upon said mortgage debt above the principal, and all the costs of the foreclosure proceedings, so that there remained due to said college on said law-day the sum of $8,000 and no more. The facts involved in the prosecution of the former case are set up in the complaint and found.

Before entering upon a discussion of the defendant's claims of error to which he has given most prominence, it is well to inquire whether, upon the facts found, the plaintiff would in any event be entitled to have a reformation of the mortgage as prayed for. The defendant insists that the mistake is one which equity will not undertake to correct. If this is so, the very foundation of the plaintiff's action is taken away, since he would be unable to show the loss, in the former action, of a meritorious defense. The full discussion of this subject had in the opinion in *Park Bros. & Co.* v. *Blodgett & Clapp Co.*, 64 Conn. 28, and the conclusion there reached, render it unnecessary to renew the discussion here. Clearly,

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the circumstances relating to the mistake, which are disclosed by the finding, are such as, under the principles enunciated in that case, would justify a reformation in equity.

The defendant contends that the Superior Court in Hartford county has no jurisdiction to grant the relief prayed for and given, or, more strictly speaking perhaps, the vital part of it, involved in the prayer and judgment for an injunction restraining the defendant from making use of the judgment rendered in his behalf in the Superior Court in New Haven county.

To the Superior Court is reserved, by statute, the exclusive power to grant equitable relief against causes pending, or judgments rendered, in that court. General Statutes, § 537. If, therefore, the contention made is well founded, it must be either for the reason that the present proceeding is so connected with the former action as to be in its essence a part of it, or for the reason that the Superior Court—which in this State is one tribunal over the whole State—has no jurisdiction in an independent action to enjoin parties from making use of a judgment rendered by that court in another county. The reasoning and conclusions in *Smith* v. *Hall*, 71 Conn. 427, are decisive against the existence of these conditions.

The present action is an entirely independent one. It does not seek anything directly or incidentally affecting the former case, nor is it in aid of any such attempt. A new trial of the former cause is not asked. It is not proposed to disturb the former judgment. No judgment is prayed for affecting in any way the former proceedings. No process has issued or is asked to issue to the court which determined the former case. It is simply sought to prevent an individual availing himself, contrary to equity and good conscience, of a judgment which he has obtained, and which, it is assumed, will stand of record unreversed and unmodified. *Tyler* v. *Hamersley*, 44 Conn. 419.

That the power exists, and must exist, for one court to enjoin the use of a judgment obtained in another court of concurrent jurisdiction, is clear. *Erie Ry. Co.* v. *Ramsey*,

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45 N. Y. 637. The reason, drawn by some courts from public policy, for the doctrine that courts should not be permitted to so interfere with the judgments of courts of concurrent and co-ordinate jurisdiction, is one which does not appertain—to the same extent at least—under our organization of the Superior Court as under judicial systems which create independent circuits with a separate judge or judiciary for each circuit. We have not adopted that rule of policy. *Smith* v. *Hall*, 71 Conn. 427.

The defendant next relies upon the doctrine of *res judicata*. He says that the matters involved in the present action for a reformation have become adjudicated by the judgment in the former action. It is, of course, true, that they have not in fact been adjudicated. The defendant's position, strictly speaking, is, therefore, that as these matters are such as might have been pleaded defensively in the former action, he is now, by the judgment therein, as much precluded from availing himself of them as he would be had he in fact pleaded them; or at least that he is so far concluded that a court of equity will not take cognizance of them to restrain the operation of the judgment.

The general rule has long been recognized, that equity would not interpose to enjoin one from reaping the benefits of a judgment at law for reasons which might have been presented as a legal defense to the action. *Post* v. *Tradesmen's Bank*, 28 Conn. 420; *McBride* v. *Little*, 115 Mass. 308; *Cromwell* v. *County of Sac*, 94 U. S. 351. This rule has been extended to embrace equitable defenses, where such defenses were by statute or otherwise permitted to be made in actions at law; *Wilson* v. *Buchanan*, 170 Pa. St. 14; and to equitable defenses and counterclaims, where the functions of courts of common law and chancery have been united in one tribunal, and the distinctions between actions at law and suits in equity and the forms of legal and equitable procedure have been abolished, as in most code States. *Winfield* v. *Bacon*, 24 Barb. 154; *Savage* v. *Allen*, 54 N. Y. 458; *Kelly* v. *Hurt*, 74 Mo. 561; *Tuttle* v. *Harrill*, 85 N. Car. 456; *Ricker* v. *Pratt*, 48 Ind. 73; *Hopkins* v. *Medley*, 99 Ill.

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509; *Eastern B. & L. Asso.* v. *Welling*, 116 Fed. Rep. 100. This extension has, however, by no means received universal approval. There are not a few authorities to the contrary. *Lorraine* v. *Long*, 6 Cal. 452; *Hough* v. *Waters*, 30 id. 309; *Witte* v. *Lockwood*, 39 Ohio St. 141; *Fannin* v. *Thomasson*, 45 Ga. 533; *Hempstead & Conway* v. *Watkins*, 6 Ark. 317; *Dorsey* v. *Reese*, 53 Ky. 157; *Hill* v. *Cooper*, 6 Ore. 181; Pomeroy's Code Remedies, § 804; *Little Rock, etc., Ry. Co.* v. *Wells*, 54 Am. St. Rep. 216, note.

It is unnecessary to enter upon an exhaustive discussion of this question in all its aspects, including the distinction in effect, sometimes sought to be made between equitable defenses pure and simple, and equitable counterclaims furnishing the foundation for affirmative equitable relief prayed for. It would seem quite clear in reason, that the same effect ought to be given to judgments, as concluding available equitable counterclaims of the character of the one in question—being one which goes directly to the destruction of the plaintiff's claimed right of action—as is given to them as concluding available legal defenses. For the purposes of this case we may well so assume, as the defendant would have us do.

This general rule which we have been considering is not without important qualifications, which have had a recognition as extensive as that of the rule itself. A succinct statement of them as found in an exhaustive note appended to the case of *Little Rock, etc., Ry. Co.* v. *Wells*, 54 Am. St. Rep. 216, is as follows: Injunctions will not lie where a party has failed to make a defense which he could have made and ought to have made, unless his failure to do so was due to some cause recognized under the circumstances as a ground for equitable relief. In *Tucker* v. *Baldwin*, 13 Conn. 136, 144, this court approved the following statement of the law by Judge Story: "In all cases, where by accident, mistake, fraud or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is, therefore, against conscience that he should use that advantage, a court of equity will interfere,

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and restrain him from using the advantage which he has thus improperly gained." See also *Tyler* v. *Hamersley*, 44 Conn. 419.

An examination of the many cases involving an application of this principle, discloses that fraud, collusion, accident, mistake, surprise and ignorance of the defense, when the negligence of the party is not one of the producing causes, are frequently recognized as creating situations justifying equitable interference, where it is also shown that a meritorious defense has been lost thereby, that the execution of the judgment would be against equity and good conscience, and that there is no other adequate remedy. *Tucker* v. *Baldwin*, 13 Conn. 136; *Carrington* v. *Holabird*, 17 id. 530; *Pearce* v. *Olney*, 20 id. 544; *Tyler* v. *Hamersley*, 44 id. 419, 420; *Stanton* v. *Embry*, 46 id. 595.

The rule, however, by its general phraseology, recognizes that no enumeration of causes under familiar classifications would fully describe all the situations which would call for equitable intervention in order that the general principle of non-interference might not by its too rigid enforcement work wrong and injustice. The rule is not one of property or of right. It is purely one of policy and of judicial origin. The law conceives that, in general, public policy in the administration of justice calls for the application of the principle that a judgment silences defenses, and hence the rule of duty that a defendant shall plead all defenses which are available to him, or thereafter be barred therefrom. *Welles* v. *Rhodes*, 59 Conn. 498.

The rule which fixes the consequences for the failure in duty, if it is to be fair and reasonable, must necessarily have respect both to the ability of the litigant to perform the required duty, and to any just and sufficient excuses for not performing it. For these reasons it is recognized that when the failure to make a defense has arisen from circumstances beyond the control of the party, a case justifying the relaxation of the rule is made out. It is for the same reason that ignorance of a defense, without fault, is held to be a sufficient excuse. *Barker* v. *Elkins*, 1 Johns. Ch. 465. So it must

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be with any excuse which, under the strict scrutiny required, appeals to the conscience of the chancellor as sufficient, under the circumstances, to call for a relaxation of the arbitrary rule of policy in order that wrong may not triumph under its cloak. Fraud, collusion, accident, mistake and surprise, unmixed with negligence, are by universal consent regarded as furnishing such excuses. They do not, however, complete the list, and no enumeration of conditions can. The conscience of the court acting along recognized lines must, after all, supply the test for each case, and hence the elastic language of the rules noted, and of any statement of the rule which aims to be comprehensive.

"The general reasoning upon which this doctrine is maintained, is the common maxim, that courts of equity, like courts of law, require due and reasonable diligence from all parties in suits." 2 Story's Equity Jurisp. (12th ed.) § 896. Diligence in the production of defenses may well be required of defendant litigants, at the peril of forfeiture. It is open to doubt, however, whether the rule of duty can fairly be carried farther, and whether it is so carried. Many statements of the rule are careful to embody this limitation, as in *Tyler* v. *Hamersley*, 44 Conn. 419, 420, where we said: "But after a judgment an injunction will not be granted to stay its execution, unless there has been fraud or collusion in obtaining it or the verdict upon which it was founded, or where the party has been unable to defend himself effectually at law, without any fault or negligence of his own, or," etc. See also *McBride* v. *Little*, 115 Mass. 308. If the rule of duty is the exercise of diligence, the penalty for failure ought certainly not to be carried further. If this is so, the test in any case is a much simpler one than many have seemed to regard it, and the barrier against equitable intervention, in an otherwise proper case, is not arbitrarily set up against anything not involving a failure in the former case to use proper diligence in making available defenses. The exigencies of this case, however, do not require us to assert this proposition.

It remains to consider the present plaintiff's conduct in

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the former action, in its relation to the principles of law involved, and the circumstances presented, as they appeal to the judicial conscience. The facts, as found to exist, disclose that the plaintiff in the former action took advantage of the terms of an instrument between himself and the defendant therein, which by mutual mistake did not express the true agreement between them, to recover thereon a judgment for nearly $8,000, to which he was not entitled. Knowledge of this fact must be imputed to him, as he was a party to the real agreement and the mistake, and his conduct judged thereby. His conduct in pursuing his action, therefore, involves in legal contemplation a breach of faith, a breach of agreement, and, by a wrongful assertion of the false instrument, an attempt to obtain a judicial sanction to a legal fraud. *Essex* v. *Day*, 52 Conn. 483. The judgment obtained is that sanction successfully obtained. Its execution will consummate the fraud whereby $8,000 or thereabouts will be transferred from the present plaintiff, who is justly entitled to it, to the present defendant, who has no right to it. Such is the legal aspect of the situation, whatever the defendant's real motive and belief may for any reason have been.

The present plaintiff, in attempting to prevent the rendition of this wrongful judgment, made use of certain endeavors. During the pendency of the action, and down to the time of the decision of this court, he believed that the mortgage as drawn expressed the prior agreement that it was intended to evidence, and in good faith acted upon that belief. His counsel, who were competent attorneys, so advised him. This belief and advice were not without substantial justification in the instrument itself. A majority of this court held that the better construction was otherwise, but it is apparent, both from the language employed and the history of the cause, that there was room for a difference in honest and competent opinion. Surely one who, with the plaintiff's knowledge of the facts and his advice, held a confident belief that his construction was correct, and consistently insisted and relied upon that construction

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and founded his defense upon it, cannot fairly be held to have acted an unreasonable or negligent part. We cannot accuse him of an unwarranted belief. He is open to no charge of bad faith. He was simply consistent. Even though we may conceive that he might have assumed in his pleadings a safer double attitude, clearly he ought not to be penalized by the loss of his rights because he was, under the circumstances, firm in his faith and consistent in asserting his *bona fide*, not unfounded, belief.

As soon as the decision of this court made known to him his error, he acted promptly and presented to the court his cross-complaint asking for a reformation and asked leave to file it. The court denied his request. Thus by a power beyond his control was he prevented from having his contention adjudicated in the original action. Had the court granted his motion, as it might, he would not be here to-day. For the denial he cannot, of course, be held responsible. Whatever responsibility is upon him arises from his delay in presenting the cross-complaint, which delay consisted wholly of his conduct prior to the decision which has already been fully discussed.

We have here a case, then, in which the defendant was guilty of no lack of proper diligence for which he should be penalized to the extent threatened, in which, acting reasonably, he was unable to defend himself effectually against an unjust claim, and yet has had rendered against him a judgment for which there is no foundation in right. If his present prayer is denied, he loses important rights as the result of the exercise of judicial discretion in the denial of his request to amend. Clearly the situation is one which should justly appeal to the judicial conscience, and that so strongly as to justify a relaxation of the rule of policy, which was not designed to cloak so great a wrong.

We have thus far made no allusion to the case of *Botsford* v. *Wallace*, 72 Conn. 195, upon which the plaintiff has so strongly relied. So many distinctions can be drawn between the circumstances of that case and this, and between the legal principles involved in the two, that we have been

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unable to give to it the weight as an authority for the plaintiff's contention which has been claimed for it. Its conclusions are in harmony with those here reached, but they can scarcely be regarded as decisive of the present.

It is incidentally claimed by the defendant, that the action of the court in the former case, in denying the motion for leave to file the cross-complaint, amounted to an adjudication or conclusion of the plaintiff's right to a reformation. There was no adjudication, for the matters in the cross-complaint were never permitted to be pleaded. There was no conclusion, since the disallowance of the motion was simply an exercise of the court's discretionary control over pleadings. It did not have anything to do with the merits of the cross-complaint. It merely refused an opportunity for a hearing and adjudication, for the sole reason that the new matter came too late. To attach the conclusiveness of adjudication to such an exercise of judicial discretion, from which there is no appeal, would be to hold a harsh doctrine for which there is no warrant.

The defendant next appeals to the doctrines of laches and estoppel, to demonstrate that the court below erred in the rendition of its judgment. The claim is, that the plaintiff delayed taking steps for a reformation of the mortgage for so long a time that, on account of the delay and the resulting loss occasioned by what transpired in the interval, and what the plaintiff himself did or caused during that time, he ought not in equity to have the relief he asks, but should be estopped therefrom.

Laches consists in an "inexcusable delay in asserting a right." *Byrne* v. *Schuyler Electric Mfg. Co.*, 65 Conn. 336. Laches involves negligence. It arises from a failure in duty. Without such failure there can be no laches. It is "inexcusable negligence and inattention" to one's interests. *Smith* v. *Duncan*, 16 N. J. Eq. 240. An equitable estoppel involves conduct inducing another to believe and act to his prejudice.

The facts relied upon to establish the laches and create the estoppel are set out in paragraphs ten to twenty-one, in-

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clusive, of the answer. To these paragraphs the plaintiff demurred and the demurrer was sustained. The evidence relating to these allegations was, however, received, the facts found, and the defendant's claim made and passed upon. The defendant was, therefore, not harmed by the action of the court in sustaining the demurrer. Lest, however, there should be any question upon this point, we will consider the defendant's claims in the light of the facts as alleged, as well as of those found.

Before entering upon the inquiry it is well to notice the attitude in which the two parties appear. No charge of laches or misleading conduct is made on the part of the plaintiff subsequent to the decision of this court referred to. Prior to that time he was acting in the good-faith belief, based upon reasonable grounds, that the mortgage did in fact except the principal of the Yale College mortgage from the operation of its covenants, and therefore needed no reformation to make it express the true agreement of the parties. The plaintiff's conduct must be judged in the light of this fact. *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass. 290.

The defendant, on the other hand, was and is seeking to use what is found to have been a false instrument in order to consummate a legal fraud upon the plaintiff. Knowledge of the falsity of the instrument and the wrong of his conduct, must be imputed to him, since he was a party to both the original agreement and the mutual mistake. His imputation of laches, and his claim to avail himself of an equitable estoppel, must be judged in view of these two facts. In view of the fraudulent purpose which he is seeking to accomplish, it is to be observed that he is not in a position to appeal with much force to equitable principles to aid him to effect it. In view of his knowledge of the true agreement, of the mistake, and of the plaintiff's assertion of the true agreement, his attempt to assert the doctrine of laches, or to establish that by any conduct of the plaintiff's he has been induced to act to his prejudice, must be beset with difficulties. The law requires diligence largely for the

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protection of persons who may, in their innocence, suffer from unreasonable delay. Its application assumes a different aspect when the party who appeals to its protection is one who not only knows the adverse claim and the assertion of it, but the very facts which establish the claim to be a valid one. *Essex* v. *Day*, 52 Conn. 483; *Williams* v. *Wadsworth*, 51 id. 277; *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass. 290.

Now let us turn to the facts. The plaintiff did not ask for a reformation until the decision of this court construing the mortgage was announced. If he was inexcusably negligent and inattentive to his interests or inexcusably delayed the assertion of his rights in so acting and was therefore guilty of laches, that negligence, inattention and delay must have arisen from his having entertained his belief as to the construction of the language of the mortgage, or from the fact that, entertaining his belief, he unreasonably postponed his resort to legal proceedings. He was not negligent in not openly and to the knowledge of the defendant asserting his claim. Such assertion, we said in *Williams* v. *Wadsworth*, 51 Conn. 277, under similar conditions, was an equivalent of legal proceedings. But, regardless of that principle, his failure to take the course suggested, under the circumstances and with his belief, could not be fairly imputed to him as inexcusable negligence, inattention to his interests, or delay. That such negligence was not exhibited in his holding his belief, we have already had occasion to observe.

Upon this aspect of the case, the opinion in *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass. 290, 323, is most pertinent. Of the circumstances there presented it is said: "If the assertion and attempted exercise of rights of mining, by the defendant, after ceasing to carry on its business at Stockbridge and selling its furnaces, was notice to the plaintiff of the claim now made by the defendant, still, supposing this issue to be found for the plaintiff, it was notice of a claim inconsistent not only with the original agreement, but also with the terms and legal effect of the deed, as originally understood by both parties. That the plaintiff

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adhered to the understanding and construction which had been common to both, and relied upon that construction of the deed as a sufficient answer to the claims thus made, is not to be imputed as laches, by the defendant, without proof that the plaintiff had become aware of the mistake, or ought to have discovered it, and was guilty of neglect in not doing so and seeking the remedy sooner. It is a sufficient answer to any such position, that the true construction of the clause is a matter of serious controversy and learned argument by counsel in this case."

What other circumstances intervened during the period of the plaintiff's delay, and what other conduct of his was there to emphasize the claim of laches from the delay alone, so that it would be unjust to the defendant that the court should now assist the plaintiff, and that he ought to be estopped from asserting his claim? The equity in the mortgaged premises has disappeared by their depreciation in value. This would have happened in any event and was no fault of the plaintiff. The plaintiff, in February, 1897, surrendered the possession of the premises to Yale College, the first mortgagee. Assuming, as was alleged but not found, that this was done for the purpose of depriving the defendant of any benefit from the possession which he had brought an action of ejectment to obtain, the step was a sagacious and altogether justifiable counter-stroke to an attempt on the defendant's part—which appears to have had no justification in nonpayment of interest on the first mortgage debt, foreclosure of the second mortgage, or otherwise —to violate the spirit and intent of the mortgage agreement as found, and the provisions of the mortgage as the plaintiff interpreted them, and to appropriate the rents and profits of the property to himself while the plaintiff should be compelled to pay the interest on the Yale College loan. By the surrender of possession the plaintiff prevented this result and succeeded in having these rents and profits applied upon this interest, thus defeating an apparent purpose to gain an advantage over him. The plaintiff failed to pay the semi-annual interest payments to the college

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which fell due July 23d, 1897, and January 23d, 1898, when they accrued. True, but the college was then in possession, receiving the rents and profits under an express agreement with the plaintiff that he would pay any deficiency, and the plaintiff did, before the foreclosure took effect, adjust and pay all the interest due, so that the defendant had only to pay the principal sum of the loan in order to redeem. As the interest payment of July, 1897, did not fall due until some months after the college began its foreclosure proceedings, these latter cannot be charged to the account of the nonpayment. Foreclosure proceedings were begun by the college and the defendant foreclosed. These circumstances were only the natural incidents attending the status of junior incumbrancer, which status the defendant voluntarily assumed, and he was not deprived of the full right which he contracted for when he consented to take his security subject to the principal of the first mortgage. He was given the privilege of redeeming upon the payment of that sum. The note maker died insolvent. This again was another incident of the situation which the defendant accepted, and for which the plaintiff was not responsible. All these intervening circumstances which are relied upon, it will be seen, are those which are liable to be involved in every acceptance of a second mortgage, and the possibility of which the defendant must have contemplated when he accepted such a mortgage. The plaintiff did not guarantee against their occurrence, and he cannot be held responsible if the defendant failed to protect any interest or equity he may have had. The defendant was acting with full knowledge of his true position. If he has suffered, he has done so not through being misled in his ignorance, but in an endeavor to effectuate his unlawful design to impose a liability upon the plaintiff which was not his and, by necessary implication, known not to be his. If the defendant acted as he would had he conceded the obligation upon him to be as he assumed it, he has not suffered by any failure on the plaintiff's part to seek a reformation. If he has acted differently, with the knowledge that was his, he has

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only himself to blame for the result. It is clear that upon every ground, therefore, the defendant is not in a position to avail himself of any claim of laches or estoppel.

The defendant contends that the plaintiff, having rested his defense in the former case upon the mortgage as it was, must be held to have elected that position to the loss of the one now asserted. The doctrine of election has no application to the situation. An election is the choice between two or more courses of action, rights or things, by one who cannot enjoy the benefit of both. 2 Story's Equity Jurisp. (12th ed.) § 1075. The case of *Botsford* v. *Wallace*, 72 Conn. 195, is precisely in point.

The defendant says that the plaintiff cannot have the relief prayed for without putting the defendant back in *statu quo*. This claim needs no further consideration than is involved in what has been said upon the subject of laches and estoppel.

The defendant's claims of error arising from the allowance of a motion to erase certain portions of the answer, and the overruling of the demurrer to the complaint for the reason that the desired correction of the mortgage was not stated with sufficient definiteness, are not of the substance of the case and need not be considered.

The motion to rectify the appeal, so that it should appear that the claim was urged upon the trial court that until the execution of the mortgage there was no enforceable agreement between the parties, and that the defendant had the right at any time theretofore to decline to complete the transaction unless certain language was embodied therein, as the defendant testified was the fact, does not call for consideration. The finding as to the intent of the parties in the execution of the mortgage, and at the time of its delivery, renders the desired statement of additional claim of law unimportant, in the absence of information that the court did not accept the proposition as correct in arriving at the conclusion of facts found. The denial of the elemental principle propounded is certainly not to be presumed. Without doubt the defendant had full advantage of it.

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An examination of the evidence fails to disclose that any fact material to any question of law has been found without evidence, or that any admitted or undisputed fact has been omitted from the finding. The defendant's brief seems to mistake what is meant by an undisputed fact. Absence of direct contradiction by the mouth of a witness does not make a fact undisputed within the meaning of the rule. Rules of Court, p. 93, § 10. The trial court is at liberty to discredit any witness or multitude of witnesses, if it deems that it has cause to do so. It is one of the important functions of a trier to determine the relative credit to be given to oral evidence. Otherwise false testimony would be a more serious factor in the administration of justice than it now is.

Nor are we able to discover that the court in finding the material fact of mutual mistake, and in decreeing the reformation, was unmindful of the principles that the evidence tending to show such a mistake ought to be weighed with great care, and the fact only found upon clear and most convincing proof, and that the correction should be made only in the exercise of great caution. The repeated declarations of this court were called to the attention of the trial court, and we cannot assume that it did not act in strict conformity to its legal duty thus made known to it. The contrary cannot be made to appear from the evidence alone. The extent to which the affirmative proof is to be regarded as convincing or overwhelming, depends very largely upon the degree of credit which the court attached to contradictory testimony. That is a province which we cannot invade.

The rulings of the court upon the admission and rejection of testimony were either correct or harmless to the defendant. The only one which calls for notice was made when the defendant's wife was offered as a witness in his behalf. She testified in response to direct inquiries that the defendant was at a certain time of sound mind. The issue as to his sanity at that time was a material one. Counsel then, for the purpose of giving added force to this expression of opinion, sought to show by her that within a few days subsequent to the date in question she had, with the advice of her coun-

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sel, given the defendant a power of attorney involving the care and disposition of her entire property. This attempt to reinforce the opinion of the witness, and, incidentally, show the opinion of her counsel without his testifying, was, upon well established principles and for most convincing reasons, one which the court was bound to restrain.

A careful examination fails to disclose that the claim appearing in the defendant's brief—to the effect that the judgment for an injunction, in so far as it relates to the former judgment for costs, is erroneous—was either made to the trial court or assigned as a reason of appeal. It is therefore not entitled to consideration.

The claim that costs should not be awarded to the plaintiff in this action was made below, and the allowance of such costs is made a reason of appeal. The court committed no error in this respect.

The refusal of the clerk to print that portion of the record which embodied the evidence offered in the Superior Court, until the cost thereof should be paid to him, was justified. The burden of the cost of such printing is by no circumvention to be cast upon the State. This evidence was no true part of the finding, notwithstanding the ingenious effort to make it so appear. It had no place or purpose in the record, save as an incident to an effort to secure a review and correction of the finding of facts. It could not be of service in deciding any question of law.

There is no error.

In this opinion the other judges concurred.

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THE STATE *vs.* MICHAEL CAREY.

Second Judicial District, Norwich, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

The practice of instructing a jury that it is unsafe to believe the uncorroborated testimony of accomplices, arose from conditions which have in great part ceased to exist; and it is no longer a rule of law—if indeed it ever was—that such an instruction must be given to the jury in every criminal case in which an accomplice testifies. It is the character and interest of the witness as shown upon the trial, and not merely his participation in the crime charged, that must determine the discretion of the judge in commenting on his credibility.

If, however, the situation demands it, the jury should be cautioned; and it may be possible that a failure to perform this duty would furnish ground for a new trial.

Upon the trial of the accused for an assault with intent to procure an abortion, the woman who was operated upon testified as a witness for the State. The court charged the jury that she was not technically an accomplice, but was guilty of a distinct statutory offense, which might be considered by them as affecting her credibility and the weight of her testimony; and that the accused ought not to be convicted unless the evidence was clear, strong and convincing, and removed every reasonable doubt from their minds as to his guilt. *Held*:—

1. That the conditions were such that the comments of the trial judge upon her credibility did not indicate an abuse of discretion and a clear failure of duty, whether the witness could be strictly regarded as an accomplice or not.

2. That the trial court was correct in stating that the woman operated on was not strictly an accomplice of the accused in the perpetration of the crime charged against him.

The accused did not actually perform the operation, but employed one *B* for that purpose. *Held* that no error was committed by the trial judge in calling the attention of the jury to the statute (§1583) which permits an accessory to be prosecuted and punished as if he were the principal offender.

Failure of the trial judge to charge in the language of oral claims made by the accused, when no written requests to charge are made, is not properly assignable as error.

On her direct examination the complainant, after giving an account of the first operation, stated that after *B* had left the room the accused came in, told her how much the operation had cost him, locked the door, and against her protest remained with her until

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twelve o'clock having sexual intercourse with her, and then accompanied her home. Counsel for the accused objected to any evidence of what took place after *B* went out. *Held* that the relations of the parties to each other, which this evidence tended to prove, could not be affected by *B*'s presence or absence, and that if the evidence tended to unduly prejudice the accused in the opinion of the jury, as claimed on the argument in this court, it should, in fairness to the trial court, have been objected to upon that ground.

The fact that evidence not strictly admissible, and possibly harmful, has been heard by the jury, can rarely furnish ground for a new trial, unless the evidence came in by reason of some error of the trial court; if no objection is made the court cannot be charged with error, nor can it ordinarily be if the objection is on a specific ground which is correctly ruled to be untenable.

Evidence was received of what took place between the woman and the accused just after the first operation for abortion. *Held* that this was properly admitted to show the relations of the parties.

The accused offered evidence that during the year previous to the first operation by *B*, the woman had herself attempted, or submitted to an attempt, to produce a miscarriage. *Held* that this evidence was properly excluded.

A record of the City Court was offered by the accused to show his acquittal on the charge of seduction, and to fix a date. *Held* that there was no error in its exclusion for the former purpose.

Argued October 21st, 1903—decided January 6th, 1904.

INFORMATION for a felonious assault with intent to procure an abortion, brought to the Superior Court in New London County and tried to the jury before *Roraback, J.*; verdict and judgment of guilty, and appeal by the accused. *No error.*

The information of the State's Attorney charged one Marion W. Beebe and the defendant, Michael Carey, jointly, with an assault on the body of Ida May Lafferty, and with their hands thrusting an instrument into her womb and body, she being pregnant with child, with the intent thereby to procure upon her a miscarriage and abortion, the same not being necessary to save her life or that of her unborn child.

The information contained three counts, charging three offenses; the first as committed on July 16th, 1902, the second on August 1st, and the third on August 20th, of the same year.

At the request of Carey he was accorded a separate trial.

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The State claimed to have proved that Carey and said Lafferty were, at the times of the offenses charged, and for some time prior thereto had been, on intimate terms, involving sexual intercourse; that upon Ida's discovering signs of pregnancy, Carey hired said Beebe to operate for abortion, and on July 16th conducted her to a room provided for the purpose, where Beebe performed the operation, Carey watching outside the locked door; that upon discovering further signs of pregnancy, a second operation was performed on August 1st, and a third on August 20th.

The defendant claimed that the State had proved that operations were performed upon Ida, by Beebe, upon the dates mentioned; but claimed that the testimony was insufficient to prove the defendant's connection with the crime.

Beebe and Lafferty were examined as witnesses for the State. The defendant did not testify. It does not appear what, if any, other testimony was produced in support or contradiction of the defendant's connection with the crime.

The defendant was found guilty and sentenced upon each count.

A finding of facts was made by the court (*Roraback, J.*), and the defendant's appeal assigns error in the charge and in the rulings upon evidence.

William H. Shields and *Amos A. Browning*, for the appellant (the accused).

Solomon Lucas, State's Attorney, for the appellee (the State).

HAMERSLEY, J. The main error assigned in the reasons of appeal is found in the exception to that part of the judge's charge which relates to the credibility of the competent witness, Ida M. Lafferty, who was the victim of the attempted abortion.

In her testimony she admits that moral turpitude belonging to an unmarried woman who, believing herself pregnant, consents to an operation on her body for the purpose of

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avoiding the consequences which might follow the birth of a bastard child, and that she has committed the statutory crime of attempting to secure her own miscarriage. Her testimony is given under the bias of such interest as is disclosed by the record. In view of this condition and the defendant's claim that her testimony is worthless unless confirmed by independent evidence, the court substantially instructs the jury as follows: —

The State relies upon the testimony of the witnesses Beebe and Lafferty. Beebe is what is known in law as an accomplice. He admits that he was one of the perpetrators of the crime charged against the defendant. You should act upon the testimony of an accomplice with great caution. As a general rule it is unsafe to convict upon such testimony alone. It ought to be corroborated in material facts connecting the prisoner with the crime. The witness Lafferty cannot, technically speaking, be regarded as an accomplice. She is not a perpetrator of the crime charged against the defendant and cannot be convicted of that crime. But in submitting her person to the operation of Beebe she did commit a distinct crime, created by another statute, which provides for a different penalty, and you may consider her confession of this crime as affecting her credibility and the weight of her testimony. You ought not to convict in this case unless the evidence is clear, strong, and convincing, and removes every reasonable doubt from your minds as to the guilt of the accused.

In the absence of any written requests to charge, and in view of the state of evidence so far as disclosed by the record, we cannot say that the trial court did not fairly and properly exercise its discretion in commenting on the credibility of the witness Lafferty, as well as that of the witness Beebe.

Assuming that the witness Lafferty was an accomplice, the defendant claims that the court had no discretion in commenting on the weight of her testimony; that a practice of English judges in commenting on the testimony of accomplices, followed more or less closely in American courts, has

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become in this State substantially a rule of law directing a judge, whenever an accomplice testifies, to advise the jury that it is not safe to convict on his testimony alone; and that any failure to obey this direction is ground for a new trial.

We cannot accede to this claim. When the testimony of accomplices was first used, it was, under the then settled law of evidence, incompetent, and was admitted, notwithstanding, as an exception to that settled law, justified by necessity. The conditions at that time affecting such testimony were mainly these: a convicted felon was an incompetent witness; an accomplice confessed himself guilty of felony; a person having an interest in the event of a prosecution was an incompetent witness; the liberty or death of an accomplice, at first absolutely and afterward more or less directly, might depend on the event of the prosecution in which he testified; the necessity of punishing certain crimes induced the enactment of statutes offering bribes to perpetrators of these crimes who, confessing their commission, might charge the crime upon their associates or furnish the government with evidence that would lead to the arrest and conviction of others. Thus grew up the law of approvement. Under certain circumstances a person arrested and indicted for felony might confess his crime in open court, and appeal others, his accomplices, in its commission. If the court allowed the appeal, the appellees were arrested and tried, and if convicted the accusing accomplice had his liberty, and if not convicted he was hanged. The law of approvement was in force at the close of the eighteenth century, although long obsolete.

In analogy to this law, grew up the practice of admitting persons indicted for crimes as king's evidence, under an implied assurance of immunity from punishment for the crimes confessed by them. *Rex* v. *Rudd*, 1 Cowper, 331, 334; 1 Hale's Pl. Cr. 303; Hawkins' Pl. Cr. Bk. 2, Chap. 24, Chap. 37, § 7, Chap. 46. Hawkins defines an accomplice as one who is "an accomplice in the crime charged against the prisoner." Lord Mansfield defines an accomplice, in giving the main reason why his testimony is untrustworthy:

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"They (accomplices) are clearly competent witnesses; their single testimony alone is seldom of sufficient weight with a jury to convict the offenders; it being so strong a temptation to a man to commit perjury, if by accusing another he can escape himself." *Rex* v. *Rudd*, 1 Cowper, 331, 336.

The statutes encouraging informers to buy immunity in crime by accusing others, produced accomplices, as witnesses, in the most odious possible light; the danger of their testimony was enhanced by the condition of the law, which excluded an accused person from the witness-stand. The most reputable persons in the realm might be convicted of crime because they could not be heard in contradiction or explanation of accusations by the most infamous. Instances of such cruel injustice were not wanting in times of high political excitement. Notwithstanding an accomplice was thus admitted as a witness only as an exception to the settled law governing competency, he was nevertheless a competent witness. The weight and credibility of his testimony was subject to the settled rules and regulations of law affecting that of any competent witness. The jury might give him full credit and convict on his testimony alone. The court in commenting on the weight of his testimony had the same discretion exercised in respect to every competent witness. This law was affirmed by the twelve judges in 1788, and was unquestioned. *Rex* v. *Atwood*, 1 Leach C. C. 464; *Rex* v. *Jones*, 2 Campb. 131, 132; *Rex* v. *Hastings*, 7 C. & P. 152.

It was under these conditions and in respect to witnesses known as accomplices, thus defined, that during the latter part of the eighteenth and the earlier part of the nineteenth centuries the statements of English judges, in respect to their own practice in dealing with such witnesses, was made. The undoubted practice of sharply, and often indignantly, denouncing the worthlessness of the unconfirmed testimony of a witness who acknowledged himself a knave and that he was testifying against his comrades in the hope of obtaining by this means a pardon for his own crimes, was natural, lawful and just. And the form, force, and extent of such

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denunciation was wholly discretionary with the judge, according to the circumstances surrounding each witness.

The practice, so far as it was a general practice, of denouncing accomplices as *per se* witnesses whose unconfirmed testimony it was unsafe to believe, arose from the conditions we have mentioned. Those conditions no longer exist.

An accomplice as a witness is no longer admitted as an exception to the general law of competency, authorized on grounds of public necessity. A convicted felon is not an incompetent witness. A person interested in the event of a prosecution, however great his interest, is not incompetent. The peculiar statutes that bred the approvers or informers of former times have no place in our legislation. Arrangements for king's evidence or State's evidence cannot be initiated by the informer himself, or a private prosecutor, but are confined to an officer of the court appointed by the court. The accused is no longer excluded from the witness-stand. He is free to defend himself from unjust accusation. The general law of competency places accomplices on the same footing as other witnesses; the same rules apply to the weight and credibility of their testimony.

There is no longer any excuse for speaking of accomplices as an exceptional class of witnesses, incompetent on general principles, and unfortunately admitted under the stress of public necessity. It is not true that every accomplice, even if the meaning of the word is strictly limited to the "king's evidence" of former times, acknowledges a moral turpitude, ordinarily inconsistent with veracity, or testifies under the compulsion of an irresistible self-interest. It is true that moral turpitude, whether shown by confession, or conviction of crime, or otherwise, and self-interest, however great, does not affect the competency of any witness. It is true, as it always has been, that when a competent witness is shown in the course of a trial to have exhibited moral turpitude of a nature ordinarily inconsistent with veracity, or to have such an interest in giving his testimony as to render the temptation to perjury peculiarly powerful, it is the right of the court in the exercise of its discretion, and may be its

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clear duty, to call the attention of the jury in the strongest terms to the danger of giving credit to such testimony, unconfirmed by independent evidence. And where such duty is neglected to the manifest injury of the accused, such neglect may furnish sufficient ground for a new trial. We think this view of the discretion of a trial judge, and of his duty in commenting on the credibility of witnesses, is fully sustained by our former decisions. *State* v. *Wolcott*, 21 Conn. 271, 281; *State* v. *Stebbins*, 29 id. 463, 473; *State* v. *Williamson*, 42 id. 261, 264; *State* v. *Maney*, 54 id. 178, 193.

It is difficult to affirm just what was the practice of our trial courts, in commenting on the testimony of accomplices, prior to 1851, when it was first brought to the attention of this court. For quite a period prior to 1807, the loose and unjustifiable practice prevailed of giving the jury a mere resumé of the testimony produced, and of the arguments and claims of counsel, with no expression of opinion upon the law, and no comment on the weight of evidence. Apparently the courts subsqeuently exercised a reasonable discretion, when the testimony of an accomplice called for special comment, and the existence of such discretion, and the nature of the law upon which it rests, is laid down in *State* v. *Wolcott*, 21 Conn. 271. The doctrine of this case, affirmed in the subsequent cases, is inconsistent with the existence of a rule of law binding the judge, whenever an accomplice testifies, to instruct the jury that it is not safe to convict on his testimony alone. We think there is no such rule of law for the reasons above given.

It is the character and interest of the witness, as shown upon the trial, and not the mere fact of his being an accomplice, that must determine the discretion of the judge in commenting on his credibility. The conditions of character and interest most inconsistent with a credible witness, very frequently, but not always, attend an accomplice when he testifies. When those conditions exist, it is the duty of the judge to specially caution the jury, and, as we said in *State* v. *Stebbins*, 29 Conn. 463, it may be possible that a failure of duty in this respect may be so marked, and may

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so clearly and injuriously deprive the accused of that judicial control over a trial by jury to which he is entitled, as to furnish ground for a new trial.

In the present case, as we have said, the conditions of moral turpitude and overpowering interest attaching to the witness Lafferty were not such that the comments of the court on her credibility indicate an abuse of discretion and a clear failure of duty, whether the relation of the witness to the accused can be strictly regarded as that of an accomplice or not.

The court did not err in saying that the witness Lafferty was not, strictly speaking, an accomplice of the accused in the perpetration of the crime charged against him. She could not be prosecuted and punished for that crime. There is nothing in the record that justifies the affirmation that she testified under the inducement of any promise, express or implied, of immunity from prosecution for the distinct crime she had committed. She is far from coming strictly within the meaning of "accomplice" as used by Hale, Hawkins, Buller, Mansfield and all the earlier judges, in referring to the witness whose participation in the crime charged almost of necessity involved that turpitude and interest which destroyed his credibility.

The theory of the defense is that the crime of the accused involved an operation on the body of the witness; that this operation could be more conveniently performed with her assent; that in giving assent she assisted him in the operation, and was therefore a joint perpetrator with him of the crime. The conclusion does not follow.

Ordinarily a man may injure his own body by his own hand, or the hand of an agent, without himself violating the criminal law. And the person who injures his body with such assent may commit a crime of which the injured party is not guilty. A murderer cannot justify himself by proving the assent of his victim. Non-interference with a man's control of his person is not extended to the disposition of his life; but taking his own life is a thing distinct from the crime of murder.

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If a man in a moment of weakness should assent to the opening of a vein by another, for the purpose of taking his life, and, when in the immediate expectation of death, make a statement of the facts attending the assault, it would hardly be claimed, upon trial of his assailant for felonious killing, that the dying declaration must be received with all the infirmities attending the testimony of an accomplice in the crime. This distinction between a man's injuring his own body himself, or through assent to such injury from another, and the crime that may be committed by another in inflicting such injury, has been strongly drawn in crimes akin to the one under discussion.

At common law an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body, or to assent to such treatment from another; and the aid she might give to the offender, in the physical performance of the operation, did not make her an accomplice in his crime. The practical assistance she might thus give to the perpetrator, did not involve her in the perpetration of his crime. It was in truth a crime which, in the nature of things, she could not commit. And so it has been held, under various statutory forms of this offense, that the victim of an attempted abortion could not be an accomplice in a crime which consisted in an operation on her body, with or without her consent, by another person with intent to produce abortion. *Commonwealth* v. *Wood*, 11 Gray, 85, 93; *Commonwealth* v. *Boynton*, 116 Mass. 343, 345; *Commonwealth* v. *Follansbee*, 155 id. 274, 277; *State* v. *Hyer*, 39 N. J. L. 598.

Whether an attempt to produce an abortion on a woman quick with child was indictable under the common law of this State or not, it was made an offense by the Statutes of 1821, p. 152. It was limited to attempts at abortion through administration of drugs, and was classed with attempts to murder by poison. Subsequently it was made an entirely distinct offense, and extended to attempts at miscarriage through the employment of any instruments for physical

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operation. Compilation of 1854, p. 307. Under this law the victim of the attempted abortion was not, and could not be, an accomplice in the crime. The law was probably repealed in 1860. At all events it was not retained in the Revision of 1866. In 1860 the legislature enacted the statute now contained in § 1155 of the General Statutes. It differed from the former statute only in omitting the limitation that the subject of the attempted abortion must be quick with child, and in the extent of punishment. It is evident that the crime thus created does not differ from that defined by the former statute and by the ancient common law, in the relation of the woman who is the subject of the crime to its perpetrator. He is equally guilty, whether the woman assent or does not assent to this use of her person, and any assistance he may have in performing the physical operation through her assent is not, in the meaning of the law, assistance from her in the perpetration of his crime, and does not make her an accomplice in that crime.

This view is strengthened rather than weakened by the fact that the legislature at the same time, for the purpose of further promoting the public policy which regards all unnecessary miscarriage as a public evil, created two new and distinct offenses, now contained in §§ 1156 and 1157 of the General Statutes, one limiting the power of a woman over her own person and punishing an attempt to produce unnecessary miscarriage—whether through the use of her own hands or those of an agent,—and the other punishing every person who, by publication or otherwise, encourages the commission of either of the above-mentioned crimes.

The offense created in thus limiting the power of a woman to injure her own person is, in form, purpose and punishment, clearly distinct from that crime committed by another, who inflicts an injury on her person in violation of law.

The public policy which underlies this legislation is based largely on protection due to the woman, protection against her own weakness as well as the criminal lust and greed of others. The criminal intent and moral turpitude involved in the

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violation, by a woman, of the restraint put upon her control over her own person, is widely different from that which attends the man who, in clear violation of law and for pay or gain of any kind, inflicts an injury on the body of a woman, endangering health and perhaps life.

The information charges the defendant, jointly with Beebe, with thrusting an instrument up and into the womb and body of Ida M. Lafferty, with intent thereby to cause her miscarriage. The evidence tended to prove that Beebe used the instrument, and that the defendant hired him to do so, arranged for the time and place of the operation, and in other ways assisted in the perpetration of the crime. The court did not err in calling the attention of the jury to §1583 of the General Statutes, which provides that an accessory may be prosecuted and punished as if he were the principal offender, and the defendant has no reason to complain of that part of the charge relating to this subject.

Failure of the judge to charge in the language of oral claims made by the defendant, when no written requests to charge are made, is not properly assignable as error; but we have considered claims of this kind, specified in the finding, as bearing upon the fairness and adequacy of the charge as given.

The objections to the rulings upon evidence do not furnish sufficient ground for a new trial. Evidence of what took place at the time of the operations by Beebe, in the absence of the defendant, in view of the other evidence tending to prove the relation between Beebe and the defendant in the preparations for and commission of the crime, was properly admitted. Even if the scraps of conversation that crept into the account of what was done could be regarded as by themselves objectionable, they could not, in view of the other testimony, have injured the accused.

The relations between the defendant and Ida M. Lafferty, especially in the matter of sexual intercourse prior to the first offense charged and during the time intervening between the first and third offenses, were relevant as tending to show a motive for the defendant's employment of Beebe

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in the commission of the crime. Such evidence was admitted without objection.

During her examination in chief Ida M. Lafferty, having given an account of the first operation by Beebe, on July 16th, said that after Beebe left the room, Mike (the defendant) came back and told her what it had cost him; that she started to put on her hat to go home, but he insisted on her staying, and locked the door and kept her there till twelve o'clock. Counsel for the accused objected to this, saying, "Beebe has gone." The court admitted it as showing the relations of the parties. She then said that they had sexual intercourse, and after that he went home with her.

There was no objection to the admission of this testimony, except on the ground that Beebe had left the room. The court correctly ruled that the admissibility of what took place between the defendant and the witness, for the purpose of showing their relations to each other, could not be affected by the presence or absence of Beebe.

In argument, defendant's counsel urge that this testimony, even if remotely relevant, was unnecessarily prejudicial to the accused. Whether or not the unfavorable opinion of the prisoner's character the jury might form from the whole story of his relations with the witness Lafferty, was materially increased by the narration of this particular instance of sexual intercourse, can hardly be affirmed with certainty, but no objection was taken on this ground. The objection did not at the trial occur to the court, and if it occurred to the prisoner's counsel, it was withheld from the court. When testimony not strictly admissible, and possibly harmful, has been heard by the jury, that fact can rarely be ground for a new trial, unless the testimony went to the jury by reason of some error of the court. If such testimony is not objected to, the court commits no error, nor can it ordinarily be charged with error, when the testimony is objected to on a single specific ground, upon which the court correctly rules. The record does not sufficiently show that the question of the admissibility of this testimony, which we are now asked to decide, was presented to the trial court by any

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proper objection, or that the court decided, or even had its attention directed to, the question. We cannot charge the court with error in not acting rightly upon a question which it has had no opportunity to consider.

The evidence offered by the defendant for the purpose of proving that during the year previous to the first operation by Beebe, Ida had herself attempted, or submitted to an attempt, to produce miscarriage, was properly excluded.

The defendant offered in evidence a record of the City Court of Norwich, claiming it would show an acquittal of defendant on the charge of seduction, and that he wanted to fix a date by it. The court admitted the evidence for the purpose of fixing a date, but not for the purpose of showing an acquittal on a charge of seduction. There was no error in this.

An exception taken to remarks of the State's Attorney in his argument to the jury is without merit and was not pressed in argument.

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

In this opinion the other judges concurred.

CHARLES H. HAYDEN *vs.* THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

An appeal to this court will not be abated on the ground that the date of the term to which it is taken is not expressly alleged therein, provided it is stated by clear and necessary implication.

The case of *In re Shelton Street Ry. Co.*, 70 Conn. 329, distinguished.

A pedestrian on the sidewalk is not entirely free from the duty of exercising some care with reference to the traffic in the street. The degree of care required may vary with changing conditions; but whether in the street or on the sidewalk, he is bound to take such care to avoid injury to himself as a reasonably prudent man would exercise under like circumstances.

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The plaintiff, an adult, while standing on the sidewalk at a street corner, was struck and injured in the leg by the running-board of one of the defendant's long double-truck cars, which, as it slowly rounded the corner, overlapped the sidewalk about two feet. *Held* that an instruction to the jury, to the effect that the plaintiff while standing on the sidewalk was bound to take such care as would be exercised by a reasonably prudent man in his situation, was correct in law and sufficient for the guidance of the jury in the case before them; and that a request to charge that the defendant was bound to exercise in respect to the plaintiff the same degree of care it would be bound to take in regard to its passengers, was properly refused.

With regard to the care required of the defendant, the court charged the jury that if the running-board of the car while rounding the corner extended over a part of the sidewalk, it was the defendant's duty to use reasonable care to prevent injury thereby to any person standing on the sidewalk; that reasonable care might mean great care, depending upon the circumstances; and that the greater the overlapping, the greater the degree of care which must be exercised. *Held* that this was a fair statement of the law, and well adapted to the issues and claims before the jury.

A motorman has the right to presume that upon due warning being given of the approach of his car, an adult on the track, or in a position near the track—whether in the street or on the sidewalk—where he is likely to be struck, will exercise reasonable care and move from his position of danger; and he may rely upon that presumption until it is apparent, or by the exercise of reasonable diligence ought to be apparent to him, that the person continues in a position of danger and is not aware of it, or is so situated that he cannot avoid it.

The mere use by a street-railway company of a car which overlaps the sidewalk at certain corners, is not of itself negligence, provided such car is of the kind in general and ordinary use by other companies engaged in like business, and is operated in a proper and careful manner.

An objection that the charge as a whole is erroneous, is too general, and raises no question which this court is bound to consider.

A witness was asked whether the motorman could have seen the plaintiff where he stood. *Held* that the question was properly excluded as calling for a conclusion, without showing that the witness was in any position to draw it.

The defendant introduced in evidence an order of the common council authorizing it to locate its track at the point in question. *Held* that this was admissible to show that it was the only location given by the lawful authorities, and that to that extent at least was not a negligent location, as claimed by the plaintiff.

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The plaintiff cannot recover punitive damages for a personal injury occasioned by the defendant's negligence, if the complaint alleges no malicious, culpable or wanton misconduct upon the part of the defendant.

Argued October 27th, 1903—decided January 6th, 1904.

ACTION to recover damages for personal injury alleged to have been caused by the negligence of the defendant, brought to the Superior Court in New Haven County and tried to the jury before *Robinson, J.*; verdict and judgment for the defendant, and appeal by the plaintiff. *No error.*

In this court the appellee filed a plea in abatement, on the ground that the appeal failed to state the time of the sitting of the court to which it was taken, to which the appellant demurred. *Demurrer sustained.*

Henry G. Newton and *Harrison Hewitt*, with whom was *Phelps Montgomery*, for the appellant (plaintiff).

Harry G. Day and *Henry F. Parmelee*, for the appellee (defendant).

TORRANCE, C. J. The plea in abatement and the demurrer thereto will first be considered.

The statute (General Statutes, § 788) provides that appeals to this court, in cases like the one at bar, shall be taken "to the supreme court of errors next to be held after the filing of the appeal, in the judicial district where the judgment was rendered." Another statute (General Statutes, § 798) prescribes a form of appeal to the Supreme Court of Errors, provides that such an appeal shall "substantially" follow that form, and shall "state the court, and the time and place of holding it." In the case at bar, the appeal could be taken only to the Supreme Court of Errors to be holden at Bridgeport on the fourth Tuesday of October, 1903. The written appeal, filed July 2d, 1903, states that the appeal is taken "to the Supreme Court of Errors, next to be holden at Bridgeport, in the County of Fairfield, within and for the Third Judicial District." The defendant claims that the

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appeal is defective because it fails to state the time when the appellate court sits.

We think this claim is not well founded. In the appeal the appellate court is, in effect, described as (1) the Supreme Court of Errors, (2) to sit at Bridgeport, (3) next after July 2d, 1903. The only Supreme Court of Errors that could by law sit at Bridgeport next after July 2d, 1903, was the one to sit there on the fourth Tuesday of October, 1903; and the description in the appeal can apply to that court and to no other. The time of the sitting of the court is not expressly stated, but it is by clear implication. The defendant is informed by the appeal that it is taken to the appellate court that is to sit at Bridgeport next after July 2d, 1903, and he knew that this could only mean the court that was to sit at Bridgeport on the fourth Tuesday of October, 1903. If to the description of the appellate court in the appeal had been added the words "on the fourth Tuesday of October, 1903," they would have added nothing in substance to the description or to the information conveyed by it to the defendant. The appeal does not, perhaps, in form comply with the statute, because that seems to require that the time of the sitting of the court shall be expressly stated, and it is always safer to follow the form prescribed; but the appeal does by clear implication state the time with certainty, and in so doing we think it "substantially" complies with the statute.

The case of *Redfield* v. *Buck*, 35 Conn. 328, tried in 1868, involved a question somewhat similar to the one here presented, although the question in that case arose upon a motion in error. The statute (Revision of 1866, p. 45, § 210) then provided that motions in error should be taken "to the next supreme court of errors, which would have cognizance of a motion for a new trial, in the cause." Under this law the motion for a new trial in the above-named case could only be taken to the Supreme Court of Errors at its September term, 1867. The motion was taken simply to the "next term of the Supreme Court of Errors," and that was held to be a sufficient description of the appellate court.

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The case at bar, in respect to the point now in question, differs radically from the case of *In re Shelton Street Ry. Co.*, 70 Conn. 329. In that case the appeal could be taken to any term of the Supreme Court of Errors "next to be held in the judicial district or county where the parties or any of them reside." The parties resided in different counties. The appeal might, therefore, be taken to the next term of the appellate court in one county, or in some other county, at the will of the appellants. The appeal in that case was simply taken to "the Supreme Court of Errors," without specifying either time or place. It gave the appellee no certain information as to the court to which the appeal was taken, but left him to ascertain that court at his peril. There is nothing in that case inconsistent with our decision in the present case. The plea in abatement is overruled.

It remains to consider the case upon its merits. The reasons of appeal are based upon claimed errors in the rulings upon evidence, and in the charge. The material facts claimed to have been proved by the plaintiff may be stated as follows: The defendant operates street-railway lines in, and runs electric cars through, State and Elm streets in New Haven, and Elm Street runs in a northwesterly direction from State Street and at right angles thereto. About five o'clock in the afternoon of August 14th, 1902, the plaintiff, in conversation with one Comstock, was standing on the sidewalk, on the northwest corner of Elm and State streets, about twelve inches from the edge of the sidewalk, facing away from Elm Street and partly up State Street. At this corner there was an electric light pole and a police telephone box, about six feet apart, and the plaintiff stood between them. The running-boards of certain of the cars used by the defendant on its lines running around this corner—that is, the running-boards of the long double-truck cars—overlapped the sidewalk at one point a distance of two feet; but the plaintiff offered no evidence as to how far such boards overlapped the sidewalk where he stood, "except the fact that the plaintiff was struck by the running-board of a car." There was a great deal of travel at this corner, cars were

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passing there at least once every minute and bells were being constantly rung on such cars. Just before the accident to the plaintiff a short car passed the plaintiff safely while he stood as above described. Shortly thereafter one of the long cars came down State Street, approached said corner, slacked its speed, rang its gong, and passed around said corner slowly. The front and about one half of the body of the car passed the plaintiff in safety, "when the running-board of said car, at or near the middle of the car, as it rounded the curve, struck the calf of the plaintiff's leg, causing serious injuries to him and endangering his life. The car was not stopped after the injury, but continued on its course." Such is the plaintiff's case.

The defendant claimed to have proved, in substance, these facts: That its charter authorized it to build and operate said railway lines. The tracks were built upon the layout and according to the plan approved by the city authorities, in the manner required by law. Owing to the presence of a double-track railway in State Street leading into Grand Avenue, "it was impracticable to place said railway tracks so that the cars used thereon would overlap said sidewalk less than they in fact did." The radius of the curve opposite the point of the corner "was flattened to one hundred feet, to diminish the overlap as much as possible." The car that struck the plaintiff was of a kind in common use in New Haven and elsewhere. Their use had become necessary owing to the increase of traffic; they had been used on the lines in question for three or four years, and elsewhere for four or five years; and public necessity and convenience required their use on the lines here in question. When upon a straight track, the running-board of such car projected about nineteen inches beyond the rail; and at the place of the injury the running-board, at the center of the car, extended forty-two inches outside of the rail. At the point where the overlap was greatest at this corner, the running-board projected over the curbstone and over the sidewalk for a distance of twenty-five inches. The amount of said overlap constantly diminished after the car passed that point,

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and as it approached the place where the plaintiff stood. The overhang at the point where plaintiff claimed to have been standing was very little; "but owing to said point not being exactly determined, it was impossible to prove the exact amount thereof." The defendant also claimed to have proved that it had been guilty of no negligence as alleged in the complaint, and that the plaintiff, in remaining in a position of danger after due notice of the approach of the car, had been guilty of contributory negligence. Such in brief was the defendant's case.

The plaintiff requested the court to charge the jury as follows: "(a) Plaintiff had a right to stand on the sidewalk conversing, and was not under obligation to watch lest trolley cars should extend over the sidewalk and strike him. (b) If defendant operated a car which extended over the sidewalk, it was bound to the utmost care and diligence to prevent any injury thereby to any person standing on the sidewalk. (c) If the defendant operated a car which extended over a part of the sidewalk it was bound to see to it that no injury occurred to any person standing on the sidewalk. (d) If the plaintiff while standing on the sidewalk was injured by the car of the defendant, he is entitled to recover, unless you find that he wilfully incurred the injury, or was grossly negligent. (e) Defendant had no legal right to so maintain its tracks and run its cars as to do injury to persons standing on the sidewalk, and therefore your verdict must be for the plaintiff, unless you find that the plaintiff wilfully courted the danger, or was grossly negligent. (f) If the jury find that the defendant was in fault they may assess punitive damages, and may take into consideration plaintiff's expenses in the trial of this case."

Some of the reasons of appeal are based upon the failure of the court to instruct the jury according to the import of these requests. The last request (f) is of no importance upon this appeal, inasmuch as the verdict was for the defendant; but clearly, as the complaint alleged no malicious, culpable, or wanton misconduct on the part of the defendant, but merely that its servants were negligent in improperly

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operating the car, the plaintiff was not entitled to punitive damages. *Maisenbacker* v. *Society Concordia*, 71 Conn. 369.

Request (a) in effect asked the court to charge the jury that because the plaintiff was on the sidewalk, he was under no duty to exercise reasonable care with reference to the approach of a car around the curve in question. We think the court did not err in failing so to charge. Standing where the plaintiff did, so near the edge of the sidewalk, it was, we think, his duty to exercise some degree of care with reference to the street traffic. He was not, standing there, as free from all duty with regard to that traffic as he would have been in bed; yet that is substantially the import of this request. Standing in the street it would have been his duty to exercise a higher degree of care, perhaps, than would be required of him on the sidewalk; but even on the sidewalk he is not entirely free from the duty to exercise some care with reference to street traffic. Whether on street or sidewalk he was bound to exercise some care, the degree of care varying with the circumstances. In short, he was bound, standing where he did, to exercise such care as would be exercised by a reasonably prudent man in like circumstances; and this is just what the court charged. It said: "The law also requires the traveler upon the highway to exercise reasonable care to avoid injury to himself; and this plaintiff on this sidewalk, to avoid danger to himself, was in duty bound to exercise such care as would be exercised by a reasonably prudent man under all the circumstances." This was the only instruction that could properly be given for the guidance of the jury upon the point in question; and applying this instruction to the facts as they should find them, it was sufficient for their guidance in determining whether the plaintiff acted as a reasonably prudent man would have acted under like circumstances.

Requests (b), (c) and (d), may mean that the defendant was bound to exercise toward the plaintiff the same degree of care it would be bound to exercise toward one of its passengers; or they may mean that it was bound to exercise

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toward him such a degree of care as a reasonably prudent man would have exercised under the circumstances. If they mean the former degree of care, we think the court was justified in refusing so to charge; while if they mean the latter, that is just what the court told the jury, as is shown by the charge upon this point hereinafter quoted. In either case, the plaintiff has no cause to complain upon this point. Besides, these requests seem to imply that the plaintiff was himself under no duty to use reasonable care. The court did not err in not charging them.

Request (e), as a whole, the court was not bound to charge, for the reasons given with reference to requests (b), (c) and (d). The court did charge the first part of this request, in substance, and properly refused to charge the last part.

Coming now to the charge as made, as to the degree of care required of the defendant, the court charged in substance as follows: It was the duty of the defendant, in running its cars on the highway, to use reasonable care to avoid injury to persons using the highway; and what is reasonable care depends upon the circumstances of the case; and as the danger of accident increases, the degree of care should also increase. It was the duty of the defendant to the plaintiff to exercise such care as would be exercised by a reasonably prudent man under all the circumstances. "At places where there is more danger, the speed must be greatly reduced, and the gong should be sounded to give warning; and if the defendant company was operating a car the running-board of which, at curves, extended over a part of the sidewalk, it was its duty to use reasonable care and diligence to prevent injury thereby to any person standing on the sidewalk at such place; and it is the duty of the motorman operating such car to use reasonable care to avoid injury to persons on the sidewalk at places where there is such overlapping of the running-board; and reasonable care may mean great care, depending upon the circumstances, and the greater the overlapping, the greater degree of care must be exercised. It is his duty to use reasonable care to avoid

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injury to persons lawfully using the public street, whether crossing it, or whether on the sidewalk."

We think this was a fair statement of the law relating to the duty of the defendant and its servants toward the plaintiff in this case, and that it was well adapted for the guidance of the jury. The court charged the jury, in substance, that a motorman operating an electric street car has the right to presume that upon the approach of the car, due warning being given of such approach, an adult person on the track, or in a position near the track where he is liable to be struck, will exercise reasonable care for himself, and will remove himself from his position of danger as the car approaches. The plaintiff complains of this, but we think without sufficient reason. *Morrissey* v. *Bridgeport Traction Co.*, 68 Conn. 215, 218. The plaintiff in his brief concedes that such a presumption exists with reference to a person in the street, as distinguished from the sidewalk; but he contends that no such presumption exists with reference to one standing on the sidewalk. This distinction is not tenable as applied to a case like the present. The plaintiff was in fact in a position of danger, and the motorman, upon the facts in this case, had a right to presume that plaintiff was aware of it and would govern himself accordingly; he had a right to so presume, as the court told the jury, "until it is apparent, or by the exercise of reasonable diligence would be apparent to him, that the person is in danger, and is not aware of the danger, or is so situated that he cannot avoid the danger." The jury were properly instructed upon this point.

The plaintiff also complains of that part of the charge, hereinbefore quoted in connection with request (a), to the effect that the plaintiff, standing where he did, was bound to use reasonable care. For the reasons heretofore given we think the court did not err in so charging. The court charged, in substance, that the defendant claimed to have proved certain facts, to wit, that the position of its tracks were authorized by its charter and the laws of this State, that it was running a kind of car commonly in use, that the gong was sounded, and the car came around the curve at a

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slow rate of speed, at the time of the accident. The plaintiff complains of this because the court did not add a caution "that these claims of the defendant were not sufficient, or probably sufficient, as plaintiff was standing on the sidewalk." The court was not asked to add any such caution, and it clearly did not err in failing to do so in making a statement of the facts which the defendant claimed to have proved. The court, in other parts of its charge, sufficiently called the attention of the jury to the fact that this was a case where the plaintiff was, when injured, standing upon the sidewalk and not in the street.

The court further charged, in substance, that if the car that struck the plaintiff was of the kind in general and ordinary use by other companies engaged in the same business as the defendant, "the mere use thereof as a street car at such curves as the one in question, in a manner in all other respects careful and proper," would not of itself constitute negligence. The plaintiff complains of this, but we think without reason.

This brings us to the last reason of appeal relating to the charge, and that is to the effect that the whole charge as given is erroneous. This reason is too general, and raises no question that we are bound to consider; but looking carefully over the charge as a whole, we think the general assignment has no foundation in fact.

The rulings upon evidence will now be considered. Shepard, a witness for the plaintiff, testified on his direct examination that he saw the accident and helped to rescue plaintiff from the car as he was being dragged toward the electric light pole. He was asked later by the plaintiff how much room there was between the handle of the car and that pole, and answered, about eighteen inches. He was then asked this question: "Can you tell from recollection whether there was room for the body of Mr. Hayden (the plaintiff) between the car and the post." The court, on objection, excluded the question, and we think it ruled correctly. The witness had already, in effect, answered the question; and besides, it does not appear that the distance between the

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car and the pole was a material fact in the case. The plaintiff was not injured by the proximity of the pole to the car.

Comstock, the man with whom the plaintiff was talking when injured by the car, was a witness for the plaintiff, and on his direct examination was asked "whether a motorman on State Street could have seen Mr. Hayden (the plaintiff) where he stood?" This was objected to as calling for a conclusion, without showing that the witness was in any position to draw a conclusion. The court excluded the question, and properly excluded it on the ground stated. Besides, the exclusion did the plaintiff no harm, for it was "conclusively proved by the plaintiff, and appeared to be conceded by the defendant, that there was an unobstructed view from where the plaintiff stood up State Street one hundred to two hundred rods."

The defendant offered in evidence, and the court admitted, an order of the court of common council of New Haven, approved by the mayor December 19th, 1898, permitting the defendant to locate its tracks at the point in question, as shown upon four blue prints attached to the order, and relating to the location of the tracks at the time and place of the injury. The plaintiff objected to the reception of this evidence, but stated no reasons therefor. The plaintiff claimed that the location of the tracks at the point in question was a negligent location, and he attacked the right of the defendant to maintain it there. The evidence objected to showed that it was the only location that had been given them by the lawful authorities, and that it was, to that extent at least, a lawful location. The record does not disclose that the court erred in admitting this evidence.

The reasons of appeal founded upon the rulings of the court in case of the witnesses Kelly and Punderford are without merit and need not be discussed. Indeed, in the Kelly case no exception was taken to the rulings. This disposes of all the reasons of appeal based upon rulings upon evidence.

There is no error.

In this opinion the other judges concurred.

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FREDERICK A. BETTS, INSURANCE COMMISSIONER, *vs.* THE CONNECTICUT LIFE INSURANCE COMPANY OF WATERBURY.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., HAMERSLEY, HALL, PRENTICE and THAYER, Js.

In consideration of $2,000 received from *W*, the defendant promised in writing to pay him, "his heirs, legal representatives, or assigns, ⅛ of one per cent. of the gross monthly premium receipts," such payments to be made on or before the 20th of each month, and to continue "perpetually, unless otherwise agreed upon." By another instrument, executed at the same time and as part of the same contract, *W* promised that if these monthly payments should exceed a sum equal to eight per cent. interest on the $2,000, such excess should be applied monthly upon, and to the reduction of, said principal sum; and that when the excess together with such payments as the defendant might make to him from the proceeds of its unpaid capital stock—which it reserved the right to make—should equal said sum of $2,000, the contract should be null and void. *Held* that the transaction was intended, not as a purchase and assignment of an interest in the premium receipts, but as a loan, and should be treated as such by the defendant's receiver.

A finding of a committee, based upon conflicting evidence, that certain property assigned as collateral security was limited to a specific debt and did not apply to subsequent loans, is conclusive upon the trial court and also upon this court upon appeal; unless, in reaching such conclusion, the committee made some error of law.

Pending proceedings by the insurance commissioner for the appointment of a receiver for the defendant company, upon the ground that its liabilities exceeded its assets, its president, *P*, agreed in writing to take one hundred more shares of its capital stock at par ($100) and to pay therefor in part by the cancellation of a note for $5,000 which he held against the company. As a result of this and other subscriptions, the company was made solvent and the application for a receiver was dismissed. Nothing was done to enforce this subscription, nor did it come into the possession of the receiver subsequently appointed; nor was the note ever cancelled or surrendered by *P* to the company. *Held* that equity would treat as done that which in good conscience should have been done, and therefore the one hundred shares of new stock belonged to *P*, and the note for $5,000 belonged to the company and ceased to be a liability against it.

Argued October 29th, 1903—decided January 6th, 1904.

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APPEAL by certain creditors from an order and decree of the Superior Court for New Haven County (*Gager, J.*) in receivership and insolvency proceedings, disallowing in part their respective claims against the defendant. *Error in part.*

Lucien F. Burpee and *William H. Ely*, for the appellants (Lewis A. Platt, Henry L. Wade, and estate of Clark M. Platt).

Henry C. White and *Leonard M. Daggett*, for the appellee (the New Haven Trust Co., Receiver).

TORRANCE, C. J. Henry L. Wade, Clark M. Platt and Lewis A. Platt held separate and independent claims against the defendant insurance company. Each presented his claim to the committee appointed to receive and examine such claims under the receivership proceedings instituted by the insurance commissioner. That committee disallowed the claims in whole or in part, the creditors severally remonstrated against the disallowance, but the court overruled the remonstrance and accepted said report, and from that action each of said creditors has appealed to this court. The present appeal, therefore, involves the consideration of three separate cases, namely, that of Wade, of Clark M. Platt, and of Lewis A. Platt; and as the facts in each case are different, each case will be separately considered in the order above stated.

The facts in relation to Wade's claim are in substance these: In February, 1895, Wade and the defendant company, then called the Connecticut Indemnity Association, entered into a contract which was embodied in two separate writings made, executed and delivered at the same time, one, called Exhibit *A*, signed by the company alone, and one, called Exhibit *B*, signed by Wade alone. Exhibit *A* recited that in consideration of $2,000 paid said association by Wade, it agrees to pay him, "his heirs, legal representatives, or assigns, ⅛ of one per cent. on the gross monthly premium re-

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ceipts, subsequent to receipts of first policy year, of said association, said commission being payable on or before the twentieth day of each month in each and every year," beginning March 20th, 1895, "and continuing perpetually, unless otherwise agreed upon, said percentage being payable on the premiums received during the month of February, and continuing as aforesaid monthly thereafter." Exhibit *B* had attached to it a copy of Exhibit *A*, and it recites that Wade had entered into an agreement with the association whereby he was to receive "a commission of $\frac{2}{6}$ of one per cent. on the gross monthly premium receipts of said association, subsequent to the receipts of the first policy year, as stipulated in" Exhibit *A*. It then proceeds as follows: "Now, therefore, I hereby agree for myself, my heirs, legal representatives, or assigns, that any excess of said percentage over and above a sum equivalent to eight per cent. interest on the principal sum of two thousand dollars, paid for and in consideration of the above contract, shall be applied monthly upon said sum, and to the reduction of the same. It being understood and agreed that when the said excess as so applied, together with any payments as specified below, shall amount to the aforesaid principal sum paid for and in consideration of said contract, then the aforesaid contract shall be null, void and of no effect. The association, however, preserves the right to cancel this contract at any date by using the proceeds received from settling up the unpaid portion of capital stock, as per vote of the directors under date January 24th, 1894." In consideration of this contract, Wade paid to the company $2,000.

In his remonstrance against the disallowance of part of his claim upon said contract, Wade claimed that the transaction between him and the company was in the nature of a loan and should be treated as such; but the court overruled that claim and held that he was only entitled to recover the balance of premium receipts unpaid to him, with interest on the same, as allowed by the committee. The question whether the court erred in so doing is the only question in Wade's case; and the answer to it depends upon the construction to

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be put upon the somewhat singular contract embodied in Exhibits *A* and *B*.

These two writings constitute one contract and must of course be read together. Looking at Exhibit *A* alone, it appears that the company, in consideration of $2,000, paid to it by Wade, agrees (1) to pay him monthly, out of premium receipts, a certain percentage thereof absolutely, and (2) to do this perpetually. It does not purport to sell, assign or convey to Wade any right, title or interest in or to the premium receipts; it is in effect a mere promise to pay to Wade a certain sum out of a certain fund monthly forever; and it is a promise to pay to him as his own the whole of the described monthly sum. If Exhibit *A* stood alone, the sum paid by Wade might perhaps be regarded as the price paid by him for a promise of the kind above described; but when both writings are read as one that payment cannot fairly be so regarded. Exhibit *B* materially limits the scope and effect of the agreement or promise in Exhibit *A*. Exhibit *B*, also, conveys to Wade no right, title or interest in the premium receipts, and it cuts down the scope of the promise or agreement in Exhibit *A*. Reading the instruments as one, the promise of the company is only a promise to pay Wade out of premium receipts, if any, eight per cent. interest on the $2,000 until the company repays to him said principal sum in the ways provided for in Exhibit *B*; it is no longer a promise to pay a certain percentage of receipts absolutely and perpetually.

It will thus be seen that all Wade could possibly get out of the contract was interest at the rate of eight per cent. per annum upon the sum paid, and the possible repayment of said sum in the ways provided for in the contract; and that the contract contemplates that the company would forever continue to pay Wade said interest, or would cease to do so only on the repayment of the principal sum. Looking at the language of the contract, and the circumstance that it was largely the contract of an insurance company trying to borrow money from those who would lend, it seems unreasonable to suppose that Wade intended to pay $2,000

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for the bare promise of the company to pay interest out of a fund which might never exist, or which might at any time cease to exist, or that the company intended to take his money for any such promise. If such was the sole intention of the parties Exhibit *B* was superfluous. On the whole, reading the two instruments as one, we think it best accords with the intent therein manifested, to hold that the transaction in question was in the nature of a loan; and that the court below erred in not so holding.

The two claims of Clark M. Platt, now being prosecuted by his executors, are next to be considered. One of these was founded upon a contract made between Platt and the insurance company on the 4th of February, 1895. That contract was the exact counterpart of the Wade contract already considered, except that Platt paid therefor $10,000, and was entitled thereunder to receive one per cent. of the gross monthly premium receipts called for by said contract. The court below, against the remonstrance of the executors, taking the same view of this contract as it did of the Wade contract, allowed, on this claim of Platt, only the balance of premium receipts called for by the contract, with interest thereon, as found by the committee, and accepted the committee's report. For the reasons given in the Wade case, which need not be repeated here, we think the court below erred in so doing.

Clark M. Platt also claimed that certain property, transferred to him by the defendant to secure the payment of a certain note, was also holden as collateral security for the payment of certain loans of money made by him to the company and found due by the committee. Against the remonstrance of the executors, the court below overruled this claim, and whether it erred in so doing is the remaining question in the Clark M. Platt case. The facts in relation to that claim are briefly and in substance these: On the 20th of September, 1898, Platt loaned the company $30,000 and took its note, dated that day, payable to his order on demand, for the amount loaned. On the same day the company, by two written instruments, dated that day, trans-

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ferred to Platt the property in question, in one instrument describing the transfer made "as collateral security for a loan of thirty thousand dollars ($30,000), by him this day made" to the company, and in the other as made, "in order to furnish security in part" to him "for a certain loan this day made" by him to it. At this time proceedings were pending before a judge of the Supreme Court of Errors for the appointment of a receiver over the defendant company, but on the 27th of September, 1898, such proceedings were dismissed. On the 29th day of September, 1898, the company paid over to Platt the avails of certain assessments made by it amounting to $16,350.70, leaving a balance then due upon said note of $13,649.30. Between October 1st, 1898, and March 29th, 1899, Platt at divers times made further loans to the company aggregating $14,679.21; while during the same period the amount paid or credited upon said advances was $2,492.66, leaving a balance due Platt on March 29th, 1899, of $12,186.55, with interest upon the advancements to be added. Platt claimed that the property pledged to secure the note was also pledged as collateral to secure the loans made between October 1st, 1898, and March 29th, 1899. With reference to this claim the committee has found, in substance, these facts, in addition to the foregoing: Prior to September 20th, 1898, the company requested Platt to loan it $30,000, and offered to transfer to him as security therefor substantially the same property subsequently transferred to him to secure the loan of September 20th, 1898. "In substance, the company then proposed that Mr. Platt should act as its banker up to the amount of thirty thousand dollars, crediting it with its deposits, and charging it with its withdrawals, up to that amount," holding the property to be transferred as collateral "security for any balance due in the course of this transaction." Subsequently, however, and on September 20th, 1898, the company executed said claimed assignments dated on said date, and delivered to Platt the property described in the assignments. Thereupon Platt paid the $30,000. Afterwards the company paid to

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Platt the avails of the assessments, and he made the subsequent loans and advancements, as hereinbefore stated. The committee expressly finds that "there was no evidence" that the property transferred to secure the note was "to be held as collateral security" for the subsequent advancements, or that the agreement evidenced by the written transfers of September 20th, 1898, was ever "modified or changed in any way by the parties thereto"; and it has not found that the prior proposal made to Platt by the company was ever accepted or agreed to by him, or acted upon by him and the company.

The committee has thus in effect found, upon the evidence adduced before it, that no agreement was ever made between Platt and the company that the property, transferred as collateral security for the note, should be held as collateral security for any other loans made or to be made by Platt. This finding was conclusive upon the court below, and is also conclusive upon this court, unless the committee made some error of law in coming to its conclusion; but there is nothing upon the record to show that they so erred. The executors claim, in effect, that the evidence as to the proposed banking arrangement, the subsequent loan of $30,000, and the advancement made after October 1st, favor the view that the property securing the payment of the note also secured the other loans made. This may be conceded; but the evidence was weighed by the committee, and it failed to find that view to be the true one; and there is nothing to show that it erred in so doing. The other facts before the committee were the actual loan of $30,000 on the 20th of September, 1898, a note given for that amount, and a written assignment of specific property expressly limited to secure that single, specific debt. Upon the record before us, and in a contest not between the executors and the company, but between them and other creditors of a bankrupt concern, we cannot say that the committee erred in its finding or that the court erred in accepting that finding.

The claims of Lewis A. Platt, two in number, remain to be considered. He seeks to recover upon a promissory note

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made by the company July 2d, 1898, for $5,000, payable on demand to the order of Platt, claiming that it is secured by certain property of the company transferred to him for that purpose at the time the note was made. The claim to recover upon the note will be first considered.

The facts bearing upon the validity of this claim are in substance the following: On or about the time the note in question was delivered to Platt, and as the sole consideration for it, he indorsed a note made by the company for $5,000, which indorsed note the company had discounted at a bank. That note, the terms of which did not appear in evidence, is still held by the bank unpaid, but it was not presented as a claim against the company, and it did not appear in evidence that the contingent liability of Platt as indorser had ever become fixed by demand and notice; but he has paid some interest on the note, and considers himself liable on his indorsement. In August, 1898, application was made to a judge of this court for the appointment of a receiver for the defendant company, and the proceedings had upon that application are made a part of the record. In these proceedings the company, on the 14th of September, 1898, filed a supplemental answer alleging that subscriptions to its capital stock, at par for cash, to the amount of $66,000, had been made, conditioned that $11,000 more should be subscribed and that the proceeding for the appointment of a receiver should be dismissed. It asked for an adjournment of the proceedings, which was granted. Platt was a subscriber to this conditional subscription, for one hundred shares at $10,000. The exact terms of this conditional subscription were not in evidence, but the subscriptions required to make it binding were not obtained. On September 24th, 1898, the company filed a further answer, in those proceedings, alleging that by the compromise of outstanding claims on policies of the face value of $140,000, the company had made itself solvent. A final hearing in said proceedings was had on that day, and at the close of the evidence it was still in dispute between the insurance commissioner and the company, whether its solvency had been proved. The committee, how-

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ever, finds that the company was in fact solvent. At that hearing Platt stated, in his testimony, that, on condition that the application should be dismissed, he would take $10,000 more of the capital stock of the company, and pay therefor by the cancellation of notes of the company held by him, or his father; and before the arguments in said cause had been made, he executed a written subscription for $10,000 par value of the capital stock of said company, agreeing to pay for it in the way above stated. The exact terms of said subscription did not appear in evidence, and such subscription has never come into the possession of the receiver, who has been unable to find the same after diligent search. In said proceedings the note here in question was represented to the judge as a liability of the company, and, further, that Platt held collateral security therefor of the face value of $6,800. Platt was not authorized to make any promise to cancel or surrender, in payment for his said subscription, any of the notes held by his father against the company. The note here in question was the note, or one of the notes, which Platt "stated that he would cancel in payment of his subscription" to the stock of the company. The judge passed a decree dismissing the application for a receivership, and in it he included the following: "4. It is found that on the 24th day of September, 1898, $10,000 was subscribed for the capital stock of said association, at par, by Lewis A. Platt, president of said association, payable by the cancellation of notes held by him for that amount against the association." He also found, in the sixth paragraph of the decree, that, including Platt's subscription last aforesaid, the assets of the company exceeded its liabilities. Platt was president of the defendant company from 1893 to July 12th, 1897, when he resigned. In September, 1897, he was elected vice-president, and so continued until he was elected president again in July, 1898, which office he held until a receiver was appointed in March, 1899. During all this time he was also a director of the company and a stockholder. After the passage of the decree aforesaid, and until the appointment of the receiver, Platt was "in the active man-

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agement of the business and affairs of the defendant company." The note here in question was never in fact surrendered to the company or cancelled by Platt, but was, with the security therefor, held by him till he presented it to the committee. No certificate of stock was ever issued or tendered to him. Nothing whatever was done to enforce his subscription of September 24th, 1898. In March, 1899, upon the application of the insurance commissioner, the defendant company was placed in the hands of a receiver, under whom its affairs are being wound up.

Upon these facts, substantially, the court below held that Lewis A. Platt was not entitled to recover upon said note; and the question is whether it erred in so doing. In discussing that question we shall assume, without deciding, that the note in question was made upon a valuable consideration; that it was a valid note when first delivered to Platt, and that, but for what the record shows took place after its delivery to him, it would constitute a valid claim in his favor to-day. The record shows that when in August, 1898, application was made for the appointment of a receiver for the defendant company, its liabilities exceeded its assets; that pending said proceedings, and for the purpose or increasing its assets, it offered shares of its capital stock for sale for cash at the par value thereof to any one who would subscribe therefor; that for the purpose of increasing its assets above its liabilities, it offered some of such shares to Platt upon said terms; that he agreed to take one hundred of said shares, at the price of $10,000, to be paid for in part by the cancellation and surrender to the company of the note of July 2d, 1898; that the company accepted his offer and he thereupon, in open court, subscribed for said shares, conditioned upon the fact that they should be paid for in part at least by the cancellation and surrender of said note; that this was done by himself and the company for the purpose of making the assets exceed the liabilities, with a view to securing a dismissal of the application; that if made in good faith (and there is nothing to show that it was not) this transaction did in fact cause the assets to ex-

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ceed the liabilities; and that by means of it the company, and Platt as its president, secured the dismissal of the application, because said transaction made its assets to exceed its liabilities.

After such a transaction, on the principle that equity regards and treats that as done which in good conscience ought to be done, the stock belonged to Platt and the note to the company; and the stock should in fact have been issued to him and the note cancelled and surrendered to the company. Platt was in the active management of the affairs of the company, and no good reason is shown why this was not done, and there is nothing to show that it ever became impossible to do it. As president of the company, Platt, under the constitution of the defendant company (Art. 5, § 3), had power, and it was his duty, "to execute all papers legally demanded or requisite in connection with the affairs of the association, subject, however, to the instruction and approval of the executive committee." There is no evidence tending to show that the executive committee refused to approve of the issue of the stock for which Platt subscribed; and if he failed to demand its issue till the stock became of little or no value, the loss must equitably fall upon him and not upon the company or its creditors. There is nothing tending to show that the company ever repudiated the transaction in question or refused to carry out its part of it. The receiver in this case represents, for certain purposes, both the defendant company and its creditors, and whatever rights it or they may have against Platt arising out of said transaction, the receiver may enforce under the direction of the court; *Greene* v. *Sprague Mfg. Co.*, 52 Conn. 330, 361; *New Haven. Wire Co. Cases*, 57 id. 352, 388; *In re Wilcox & Howe Co.*, 70 id. 220, 233; and in settling an estate under receivership proceedings, the claims of the contesting parties to the trust fund are of an equitable nature, and are to be determined, if need be, upon equitable principles. *In re Waddell-Entz Co.*, 67 Conn. 324, 333; *In re Greeley & Co.*, 70 id. 494. On the whole, upon equitable principles, and upon the facts found with reference to the

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claim of Lewis A. Platt upon the note of July 2d, 1898, we think the court below rightly held that the note must in equity be regarded as having been cancelled and surrendered to the company in September, 1898.

In this view of the case of course the collateral security which Platt claims to hold for the payment of the note, is no longer so holden; and the second claim of Platt that it was so holden need not be further considered. This disposes of all the questions that require consideration upon this appeal.

The result is, that in overruling the claim of Wade and of the executors of Clark M. Platt as to their right to recover under the contracts of February 4th, 1895, as set forth in the finding, the court below erred; and its judgment in both cases as to said claims is set aside and the respective causes are remanded that judgment may be rendered in accordance with the views herein expressed.

In the case of Lewis A. Platt, and in the case of the executors of Clark M. Platt with regard to their claim to hold certain property as collateral security for advancements made by Clark M. Platt on and after October 1st, 1898, there is no error.

In this opinion the other judges concurred.

Frederick E. Colburn's Appeal from Probate.

Third Judicial District, Bridgeport, October Term, 1903.
Torrance, C. J.; Baldwin, Hamersley, Hall and Prentice, Js.

The mere fact that an action upon a note belonging to an intestate estate appears on its face to be barred by the statute of limitations, does not preclude the Court of Probate, in the exercise of a sound discretion, from granting administration to secure its collection, although more than ten years have elapsed since the intestate's death. Under such circumstances the Court of Probate has the power, and it is its duty, to determine whether the claim owned

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by the estate is an existing and available one, and to grant or refuse administration accordingly; and the Superior Court has a like power and duty upon appeal.

Whether the debtor can be "aggrieved," within the meaning of § 406, by a decree granting administration in such case, *quære*.

Argued October 30th, 1903—decided January 6th, 1904.

APPEAL from an order and decree of the Court of Probate for the district of Guilford appointing an administrator, taken to the Superior Court in New Haven County and tried to the court, *Elmer, J.*, upon demurrer to the reasons of appeal; the court sustained the demurrer and dismissed the cause, and the appellant appealed. *No error.*

William L. Bennett and *George H. Ennis*, for the appellant (Frederick E. Colburn).

Charles S. Hamilton, with whom was *George E. Beers*, for the appellee (the administrator).

TORRANCE, C. J. In 1887 Jane Elliott, domiciled in Guilford in this State, died there intestate. In March, 1903, for the first time, application was made to the Court of Probate for the district of Guilford for the grant of administration and appointment of an administrator upon her estate. In April, 1903, that court, after public notice and hearing, passed an order granting said application. At that hearing Colburn appeared and objected to the passing of the order, and moved an appeal therefrom. In his written motion for an appeal, which was filed in the Superior Court, are stated at full length all the reasons of appeal that were ever filed in that court. These reasons are, in substance, the following: (1) that the application was not made within ten years after the death of Jane Elliott; (2) that it showed no good reasons why it should be granted after the lapse of ten years from the date of her death; and (3) that the only reason alleged in it, for granting its prayer, was the existence of a promissory note belonging to the estate of Jane Elliott, purporting to be made by a partnership in which Colburn was a

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partner, which note, when the application was brought, "appeared upon its face to have been barred of recovery by the statute of limitations." It was also alleged in said reasons of appeal, in substance, that Colburn was aggrieved by the order appealed from, because he would be put to expense in defending against said note.

The administrator demurred to the reasons of appeal on two grounds: that by them it appeared (*a*) that Colburn was not an aggrieved party within the meaning of the statute (§ 406) and (*b*) that property belonging to the estate existed which could not be recovered or made available without the aid of an administrator. The Superior Court sustained the demurrer "for the reasons therein stated," that is, upon both grounds of demurrer; but the memorandum of decision speaks more specifically of the first. The judgment proceeds upon all the grounds of the demurrer.

In the view we take of the case it is unnecessary to determine whether Colburn was or was not a party "aggrieved" within the meaning of the statute (§ 406); as we are satisfied that the judgment below was correct upon the other ground. Our statutes provide (General Statutes, § 321) that "administration of the estate of any person shall not be granted . . . after ten years from his decease, unless the court of probate, upon written petition and after public notice, shall find that administration of said estate ought to be granted." There are certain exceptions to this rule, but the case at bar does not fall within any of them. In the present case the Court of Probate, for the purpose of determining whether it would grant the application, had the power to determine whether the claim on which it was based was an existing and available one; *Gay's Appeal*, 61 Conn. 445; *Chamberlin's Appeal*, 70 id. 363, 378; *Mack's Appeal*, 71 id. 122, 130; and it was its duty to do so; and on appeal the Superior Court had a similar power and duty. Such an application is addressed to the sound discretion of the court, and no hard and fast rules can well be laid down concerning the exercise of that discretion.

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If the court finds that the claim upon which the application is based has no foundation, or that administration, if granted, will avail nothing, or will be used merely for some illegitimate or improper purpose, then, in the interest of economy and repose, administration ought not to be granted. *Gay's Appeal*, 61 Conn. 445; 449.

In the case at bar it appears of record that there is property in the shape of a promissory note belonging to the estate, which probably can be, and can only be, collected and made available by the aid of an administrator. It is true that on the face of the note recovery upon it appears to be barred by the statute of limitations; but there is nothing to show that such recovery was in fact so barred, or that the defense of the statute of limitations would be, or could be successfully, interposed. The record thus shows, in substance, that property of the estate exists which can only be made available by the grant of administration, and it shows little if anything else. The petition to the Court of Probate does not appear upon the record, nor, aside from what is alleged in the motion filed as the reasons of appeal, does it appear what other reasons than the existence of the note, if any, induced the Court of Probate to grant administration. Under these circumstances there is nothing on the record to show that the Court of Probate, in granting administration, erred, or abused the discretion confided to it, or that the Superior Court erred in affirming the probate decree.

There is no error.

In this opinion the other judges concurred.

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THE HALSTED AND HARMOUNT COMPANY *vs.* MAIER ARICK ET AL.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Under one agreement with the landowner, the plaintiff furnished lumber for the construction of three tenement buildings, of substantially the same size and construction, which were separated by narrow passways and connected only by means of a wooden framework across the passways at the street line, in which a door was placed for the use of the occupants of the buildings on either side. *Held* that the three buildings did not in fact constitute one block, and that the plaintiff was justified in filing a separate certificate of lien for the materials used in each building.

Whether he might have treated the transaction as a whole, and filed one certificate covering all the buildings, *quære*.

The statute (§ 4136) does not require that a separate certificate of lien should be filed for the material used in each half of a double house, merely because the building is divided by a solid partition wall, thus making two houses adapted and intended for separate use.

It is not essential to the validity of a lien that the amount of the material furnished for the building should be stated with precise accuracy. It is sufficient if the amount for which the lien is claimed is the value of the materials furnished, or the balance due therefor, as nearly as that can be ascertained.

A waiver of the right to file a mechanic's lien does not result, as matter of law, merely from the fact that the owner, when ordering the lumber, agreed to give and afterwards did give the materialman a mortgage on other land "as additional security." The question whether the mortgage was intended to be in lieu of a lien is a question of fact for the trial court.

Argued November 3d, 1903—decided January 6th, 1904.

ACTION to foreclose a mechanic's lien, brought to the Superior Court in New Haven County where a demurrer to the plaintiff's replication was overruled (*Case, J.*) and the cause was afterwards tried to the court, *Gager, J.*; facts found and judgment rendered for the plaintiff, from which some of the defendants appealed. *No error.*

Two other cases between the same parties and alike in

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all material respects were consolidated and tried with this case.

In March, 1897, the defendant Maier Arick owned a piece of land in New Haven, 150 feet square, situated on the westerly side of Ashmun Street and the southerly side of Admiral Street, and on March 30th, 1897, mortgaged said land to Harry Matz and others for the purpose of raising money to be used in the construction of three buildings on said land.

On May 4th, 1897, Arick gave to the plaintiff a writing of the tenor following:—

"NEW HAVEN, CONN., May 4, 1897.

"In consideration of the furnishing of material by The Halsted & Harmount Co. for the building of my three new houses on Admiral St., cor. Ashmun St. I herein agree to pay in full for all material contracted for and charged to my a/c up to the time of the buildings being in readiness for the 'brown mortar,' at which time of the construction of the buildings I shall be entitled to a first payment on mortgage loan on said buildings. As additional security I also agree to give my note, payable on demand, secured by mortgage on my property on Eaton St., No. 25, No. 27, & No. 29.

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On the same day the plaintiff commenced to furnish material, *i. e.*, lumber, for each of the three new buildings which Arick had undertaken to construct, and ceased to furnish said material for each of said buildings on September 8th, 1897, and on October 7th, 1897, filed the certificate of lien—to foreclose which this action is brought—describing therein the land on which the middle one of said three buildings stood, and stating the value of the material furnished for said building. On the same day it filed two similar certificates of lien for the material furnished in the construction of each of the two other buildings.

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Subsequent to the incumbrance of these liens, Arick's land became subject to many incumbrances, consisting of mortgages, mechanics' liens, and attachments.

On December 31st, 1897, Harry Matz and others brought to the City Court of New Haven an action of foreclosure against Arick and the subsequent incumbrancers, including this plaintiff. Judgment of foreclosure was rendered by the City Court on April 20th, 1899, by which the time for redemption was limited to November 27th, 1899.

Upon the rendition of this judgment Arick and some of the subsequent incumbrancers appealed to the Superior Court to be held on the first Tuesday of June, 1899. Other incumbrancers, including this plaintiff, did not appeal. The cause was duly entered in the Superior Court and there tried *de novo*.

While the foreclosure action thus brought by Matz and others was pending in the Superior Court, this plaintiff commenced this action of foreclosure in the Superior Court against Arick and the incumbrancers subsequent to the plaintiff. At the time this action was commenced, two other independent actions of foreclosure were commenced by the plaintiff, in the Superior Court, to foreclose his two other liens above mentioned. The court consolidated with this case (No. 489) the two other cases (Nos. 490 and 491) for the purposes of trial.

On the same day that the Superior Court rendered judgments in these three actions commenced by plaintiff, it also rendered judgment in the said foreclosure action brought by Harry Matz and others. Some of the defendants appealing from the judgment in this action were also defendants in the action of Matz et al. v. Arick, and appealed from the judgment of the Superior Court in that action.

William B. Stoddard, for the appellants Corbett *et al.* (defendants).

E. P. Arvine, with whom was *George E. Beers*, for the appellants Hyman L. Brown *et al.* (defendants).

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James P. Pigott, for P. J. Cronan one of the appellees (defendant).

James H. Webb and *Samuel C. Morehouse*, for the appellee (plaintiff).

HAMERSLEY, J. This action is brought to foreclose a mechanic's lien filed in pursuance of § 4135 of the General Statutes.

The defendants claim that the lien is invalid for three reasons: *First.* It appears that at the time the building covered by this lien was erected, the owner of the land erected a second building of the same size and construction, distant from four to six feet southerly, and a third building of substantially the same size and construction, distant from four to six feet northerly; that at the time the plaintiff agreed with the owner to furnish lumber for the construction of the building in question, he also agreed to furnish lumber for each of the two other buildings, and that these agreements were witnessed by a single writing; that between the building in question and the building to the north, there is, upon the street line in front of the open space or passway, a framework attached to each building and a door is placed therein for the use of the occupants of the building north, and of that south, of the open space; and a similar framework is placed in front of the open space or passway between the building in question and the building to the south.

At the time of the construction of the three buildings, the defendant Arick owned the piece of land extending from the northerly line of the north building to the southerly line of the south building and including the open spaces mentioned.

The defendants claim that in view of these facts the building in question is a part of a block of buildings constructed by one owner under one contract, and that this lien is invalid because the whole of the block is not included in the description.

The trial court has found that the land described in this

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lien is that covered by the building in the construction of which the materials furnished by the plaintiff were used, and such adjoining land as is reasonably necessary and convenient for the use of said building.

It is plain that the three buildings are not, in fact, one block; the certificate of lien as filed is valid.

The statute clearly creates a lien in behalf of the materialman whose materials have gone into the construction of a separate building, on the land covered by the building and so much of the land adjoining as may be necessary for its convenient use. In this case the plaintiff had a valid lien on each of the three buildings for the value of the lumber he had furnished in the construction of each. Whether or not, under the circumstances of this case, the statute authorized him, as an alternative course, to treat the materials furnished for each of the buildings as one transaction, giving him an equivalent lien on the same land, is a question we need not consider.

The trial court rightly held that the plaintiff, in view of our decision in *Wilcox* v. *Woodruff*, 61 Conn. 578, was justified in filing a separate certificate of lien for the materials used in each building.

Second. It appears that the building described in this lien is constructed with a solid partition wall dividing it so as to make two houses adapted and intended for separate use. The defendants claim that the statute requires, when a building is so constructed, that a separate certificate of lien shall be filed for the materials used in each half.

A claim of this kind was considered and its unsoundness established in *Brabazon* v. *Allen*, 41 Conn. 361.

Third. The defendants claim that this lien is invalid because the amount of material furnished for the building upon which the lien was placed was not accurately ascertained, and because it does not appear how much of the lumber charged in this lien was used in the construction of the building described therein.

The trial court finds that the amount stated in the lien was in fact the value of the materials furnished in the

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building on the land described in the lien, as nearly as the same could be ascertained. It is not essential to the validity of the lien that the amount should be stated with precise accuracy.

The court finds that the plaintiff agreed to furnish, and did furnish, the lumber used in the construction of the three buildings mentioned; that the amount and kind of lumber for each building were substantially the same; that no account was kept by the plaintiff with the defendant Arick of the identical lumber furnished in the erection of each of the said buildings. This finding is consistent with the finding included in the judgment, that the plaintiff furnished materials in the construction of the building described in this lien in pursuance of an agreement with, and with the consent of, the defendant Arick, and that the balance due the plaintiff for the materials so furnished is the sum of $1,252.70.

In the written agreement of Arick to pay for the lumber to be furnished by the plaintiff for the three buildings mentioned, he agreed, as additional security, to give his promissory note secured by mortgage, and subsequently Arick did mortgage certain land to the plaintiff, conditioned upon the payment by Arick of the amount due for the lumber furnished by the plaintiff. The trial court finds that this mortgage was given for the purpose of giving additional security to the plaintiff, and was not intended by the parties to be in substitution or waiver of the plaintiff's rights of lien upon the buildings to be constructed; and that the plaintiff has never realized anything upon said mortgage, and that the same is now worthless.

The court did not err in overruling Arick's claim, that the plaintiff waived his lien by taking the mortgage security given in pursuance of Arick's said agreement to furnish additional security.

The defendants assign error in the ruling of the trial court as to the effect of the judgment of the City Court, in the foreclosure proceedings commenced by Harry Matz and others, upon this plaintiff, who was a party defendant

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in that case and did not appeal from the City Court judgment.

They also claim that this judgment is erroneous because the court failed to fix the law-day in equitable relation to the law-day fixed by the judgment in said case of Matz v. Arick.

These exceptions cannot be sustained, for the reasons given in the case of *Matz* v. *Arick*, *post*, p. 388, where precisely the same questions were raised and decided.

What we have said in respect to the errors assigned in this case applies to the two other cases between the same parties (Nos. 490 and 491), consolidated with this case for the purpose of trial.

There is no error in the judgment of the Superior Court in this case, and there is no error in the judgments of the Superior Court in the other cases (Nos. 490 and 491) between the same parties.

In this opinion the other judges concurred.

HARRY MATZ ET AL. *vs.* MAIER ARICK ET AL.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

In this State it is lawful for any one, except pawnbrokers and others loaning money on pledges of personal property (§ 4659), to loan at any rate of interest or subject to any discount or bonus; and no sum paid by way of discount or bonus can be set off or recovered back (§ 4599) by any proceeding in court.

A mortgage purported to secure a contemporaneous loan of $5,000, of which amount only $1,000 was then advanced, while $4,000, evidenced by eight due-bills, was to be paid over in instalments as successive stages were reached in the erection of buildings on the mortgaged premises; and these instalments were afterwards paid as they fell due. *Held* that the record of such a mortgage did not give notice to subsequent incumbrancers, with reasonable certainty, of the true nature of the obligation or indebtedness; that the due-bills not being payable at once could not be regarded as

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the equivalent of cash, and therefore, as against such incumbrancers, the mortgage was valid only to the extent of the $1,000.

Actual fraud between the parties to such a mortgage will avoid the entire security in favor of those to affect whose interests the fraud has been concerted; but in the absence of actual fraud, a court of equity will uphold such security so far as may be necessary to protect an honest and unquestionable debt.

An appeal to the Superior Court from a judgment of foreclosure rendered by the City Court of New Haven, taken by the mortgagor, vacates the judgment and transfers the entire case, as to all the parties, for a trial *de novo* in the Superior Court.

It is within the power of the legislature to give such an effect to an appeal to the Superior Court.

In an action of foreclosure, facts going to the foundation of the case and substantially admitted by the plaintiff, although pleaded by part of the defendants only, necessarily control the action of the court in respect to every defendant, and enure to the benefit of all.

In the absence of anything appearing to the contrary, it must be presumed that sufficient reasons existed for fixing the law-days on the dates shown in the decree.

Argued November 4th, 1903—decided January 6th, 1904.

ACTION to foreclose a mortgage for $5,000, brought to the City Court of New Haven and thence by appeal to the Superior Court in New Haven County and tried to the court, *Gager, J.*; facts found and judgment rendered establishing the validity of the mortgage for the full amount, as against the mortgagor Arick, but for $1,323 only, as against the other defendants, and appeal by the plaintiffs and certain of the defendants. *No error.*

E. P. Arvine and *George E. Beers*, for the appellants (plaintiffs).

William B. Stoddard, for the appellants (defendants Corbett *et al.*).

James H. Webb and *Samuel C. Morehouse*, for one of the appellees (the Halsted and Harmount Co.).

James P. Pigott, for one of the appellees (Patrick J. Cronan).

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BALDWIN, J. The mortgage in suit was executed by the defendant Arick, to secure his negotiable note for $5,000, dated March 30th, 1897, and payable on or before six months after date. It was given to raise funds to assist Arick in erecting three buildings on the land mortgaged, and he had received only $400 in money on the day when the note was dated and delivered. He had, however, agreed to allow the plaintiffs a bonus of $600 for making the loan, and gave them on that day a written receipt for $1,000, described as "being a part of the loan of five thousand dollars this day made to me." They also then delivered to him eight due-bills of the same date for the aggregate amount of $4,000, each expressed to be due when a certain stage had been reached in the erection of such buildings; and these were duly paid according to their tenor, the last maturing in August, 1897.

The action was tried at the same time with the consolidated cases of the *Halsted & Harmount Co.* v. *Arick*, *ante*, p. 382. In that action the judgment was that Arick should pay the company $3,788.88 and costs, on or before the first Monday of February, 1904, or be foreclosed; and the law-days for the subsequent incumbrancers, of whom there were several, followed with an interval of one day only for each. In this action the judgment was that Arick should be foreclosed unless he paid, on or before the first Tuesday of March, 1904, $5,000 and costs, with interest on $1,000 from the date of his receipt for that sum, and on the rest from the several dates of the actual payments to him upon the several due-bills; but that the subsequent incumbrancers, the law-days for whom followed with an interval of one day only for each, need only pay $1,000, with interest from March 30th, 1897, and costs.

The mortgaged premises are worth $15,000.

Not only may money be lawfully lent in this State, by those not in the business of a pawnbroker or loan broker, nor receiving security by pledge of personal property, at any rate of interest or subject to any charge for a discount or bonus, but no sum paid by way of discount can be set off or recovered

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back by any proceeding in court. General Statutes, §§ 4599, 4659. It would have been an idle ceremony for the plaintiffs to hand $1,000 to Arick on March 30th, 1897, and then, after getting his receipt for it, take $600 of it back for the stipulated bonus. In legal effect, when he received $400 and gave a receipt for $1,000, as part of the money borrowed on his negotiable note secured by mortgage, he paid the bonus, and became their debtor as to all the world for the full amount of the receipt.

As respects the balance of the $5,000, however, represented by this note, the terms of the mortgage were not such that the record of it would give notice to subsequent purchasers, with reasonable certainty, of the nature and amount of the indebtedness which it purported to secure. The amount of the obligation was truly stated. The nature of the obligation was not truly stated. The mortgagor declares in his deed that it is given in consideration of $5,000 received to his full satisfaction, of the mortgagees, and that he is indebted to them in that sum. The due-bills, however, were not, by their terms, due immediately, and cannot be regarded as the equivalent of cash. Their payment was definitely and distinctly postponed and made dependent on future events, which might never occur, or not until after the maturity of the note. To hold executory contracts of that kind equivalent to cash, as against subsequent incumbrancers, would be opening the door to opportunities for fraud and concealment. See *Beach* v. *Osborne*, 74 Conn. 405, 409.

Between the plaintiffs and the mortgagor there was no fraud or concealment, and no opportunity for it. The Superior Court therefore was right in holding that against him, the due-bills having been paid according to their tenor, the mortgage was good for the full amount, with interest from the dates of actual payment.

It was also properly adjudged that, as against the other defendants, the mortgage was good, and good only, to the extent of the payments evidenced by the receipt of $1,000.

The bad part was separable from the good part, notwithstanding both were on the face of the note indistinguishably

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mingled. Had there been any actual fraud, the whole security would have been avoided in favor of those to effect whose interests the fraud might have been concerted. In the absence of such fraud, a court of equity, even if the circumstances should be assumed to bring the security within the doctrine of constructive fraud, will uphold it so far as may be necessary to protect an honest and unquestionable debt. *Sanford* v. *Wheeler*, 13 Conn. 165.

Counsel for those defendants who have taken an appeal have called attention to our opinion in *North* v. *Belden*, 13 Conn. 376, 382, in which reference is made to *Sanford* v. *Wheeler*, and the mortgage under consideration in that case is described as having been given to secure two separate and distinct notes, as to one of which, only, it was held good. Reference to the original files in *Sanford* v. *Wheeler* shows that this description was erroneous. There was, as in the case now at bar, but a single note.

Counsel for the plaintiffs insist that the mortgage now in question is no more exceptionable than that which was held to be a valid security as against a subsequent purchaser in *Mix* v. *Cowles*, 20 Conn. 420. That case was a bill to redeem a mortgage given to secure an absolute note for $200. The note was really given to secure the mortgagee for goods to that amount in value, which he had agreed to sell to the mortgagor, from time to time, on request, and at the time of its delivery goods were so sold and delivered to the latter to the amount of $103. The Superior Court had dismissed the bill. This court reversed the decree, observing (p. 426) that inasmuch as the sale of the goods was part of the mortgage transaction and contemporaneous with it, the security was certainly valid to that extent. The question to be decided, it will be observed, was not whether the $200 note was fully secured by the mortgage, but whether anything was secured by it; for if anything was, the plaintiff had a right of redemption.

The plaintiffs also contended that as none of the defendants redeemed in accordance with the City Court judgment, and the law-day for each had passed long before the issues

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were closed in the Superior Court, all of them who did not appeal to that court were absolutely foreclosed. This position is untenable. An appeal lies, under the charter of the city of New Haven, in favor of any defendant in such a cause; and upon filing with the clerk of the Superior Court a certified copy of the full record in a cause so appealed, he is to "enter said cause on the docket thereof, and said cause shall thenceforth be proceeded with in all respects as in case of appeals from the judgment of justices of the peace." 12 Special Laws, p. 1163, § 176. The mortgagor, in the case at bar, and several of the subsequent incumbrancers appealed. This transferred the entire cause and vacated the judgment appealed from. The controversy between the mortgagees and those taking the appeal was not separable from that between the mortgagees and the other defendants who did not appeal. *Ayers* v. *Wiswall*, 112 U. S. 187, 191. No defendant could be foreclosed until the mortgage indebtedness had been ascertained, and ascertained in a proceeding to which the owner of the equity of redemption was a party. After the appeal by Arick, he was no longer a party to the proceeding in the City Court. Furthermore, until the foreclosure of the interest of the mortgagor should have become absolute, no subsequent incumbrancer was called on to redeem. The mortgagor's appeal prevented the possibility of such a foreclosure by vacating the judgment against him, and made the judgment of the City Court thenceforth ineffectual as respects every other defendant. It is within the power of the legislature to give to an appeal to the Superior Court, by any party to a judgment, the effect of vacating that judgment as to every other party as well as himself, and of transferring the cause for a trial *de novo;* and such is the effect of the mortgagor's appeal in this instance.

In the Superior Court, some of the defendants did and some did not set up affirmatively by answer, the facts showing the true nature of the obligation which the mortgage was given to secure. The plaintiffs contend that those not pleading these facts can take no advantage from them. The

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answers which set them up were substantially admitted by the replies. The court was thus placed in possession of the truth, and could not properly ignore it in respect to any whom it might affect. As the entire cause had been transferred, all the parties to it, whether they in fact entered appearances or not, were before the court for purposes of judgment, and equity was to be done equally to all. The facts admitted as to some were material as to the rest, and as they went to the foundation of the case necessarily controlled the action of the court in respect to every defendant.

The defendants who have appealed to this court object to the decree because they were defendants also in the companion suit of the *Halsted & Harmount Co.* v. *Arick*, *ante*, p. 382, and in that their law-days were set in February, 1904, whereas in the case at bar they were set in March, 1904. Their grievance, apparently, is that it would evidently not be worth while for them to redeem the Halsted & Harmount Co. liens, in case the plaintiffs' note is held to be an incumbrance prior to theirs, there being other mortgages to a considerable amount which are confessedly prior to either. While the two cases were tried at the same time in the Superior Court, they involved quite different questions and different equities. It is to be presumed, in the absence of anything appearing to the contrary, that there were sufficient reasons for framing the judgments in the manner complained of. Nor does it appear that any such claim as is now set up was made in the Superior Court.

There is no error on either of the appeals.

In this opinion the other judges concurred.

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HENRY S. BURNS' APPEAL FROM COUNTY COMMISSIONERS.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Upon an appeal from an order of the county commissioners granting or refusing a liquor license, the Superior Court is called upon to give its opinion and make a finding as to the suitability of the applicant and of his place, for the purpose of determining whether or not the action of the commissioners was within their power.

To affirm illegality in the action of the commissioners on such ground, the applicant's possession or lack of the statutory qualifications should appear to the court to be clear.

In the admission or rejection of evidence as to the suitability of the person or place, and in reaching his finding or conclusion upon the evidence, the trial judge is necessarily clothed with a judicial discretion, the exercise of which will not be reviewed except in respect to matters affecting the legality of the action taken by the county commissioners.

In the present case it appeared that the applicant's place of business was in a hotel which was patronized chiefly in the summer and which was substantially without patronage during portions of the year. The remonstrant claimed that it was impracticable for a place thus situated to conform to the requirements of the screen law (§ 2683); and that these facts were in law conclusive evidence of the unsuitability of the place. *Held* that this contention was not well founded: that while such facts might influence, they did not necessarily control, the judgment of the trier.

In his application for a license, the applicant failed to state, except by implication, that he was the proprietor of the hotel where his business was to be conducted, as directed by General Statutes, § 2675. *Held* that such defect did not avoid the license, which was issued after a full hearing and with knowledge of the facts.

The procedure upon appeal is summary, informal, and distinct from that in an ordinary civil action. While the court may properly direct the appellant to state, either orally or in writing, the grounds upon which he claims that the action taken by the commissioners was illegal, formal pleadings are not essential and ought not to be required.

Argued November 4th, 1903—decided January 6th, 1904.

APPEAL from a judgment of the Superior Court in New Haven County (*Elmer, J.*), confirming the action of the

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county commissioners of that county in granting a liquor license to one Michael O'Connell. *No error.*

Henry G. Newton and *Ward Church*, for the appellant (Henry S. Burns).

Charles Kleiner and *Philip Pond, 2d*, for the appellee (Michael O'Connell).

HAMERSLEY, J. This proceeding, under the name of appeal, is an application to the Superior Court under § 2660 of the General Statutes, for the purpose of vacating a license to sell spirituous and intoxicating liquors, because, in granting the license to a person not having the statutory qualifications for a licensee, the county commissioners acted illegally and beyond their power.

It is claimed that the licensee is not a suitable person, and that his place of business is not a suitable place. The statute requires these qualifications, and the county commissioners have no power to license a person who does not possess them.

This proceeding, although distinct from, is similar in practical effect to, that provided when the county commissioners unlawfully refuse to grant a license; except when this latter proceeding is based on the alleged misconduct of the commissioners in exercising the power vested in them in certain cases by § 2645, of rejecting an application for a license by a duly qualified person. *Moynihan's Appeal*, 75 Conn. 358.

Under either proceeding a judge of the Superior Court, exercising the judicial power, is called upon to form an opinion and make a finding as to the possession, by an applicant, of the statutory qualification of suitability of person and place, for the purpose of determining whether or not the action of the commissioners is within their power as limited by the legislature.

To affirm illegality in the action of the commissioners on such ground, the possession or nonpossession of the statutory qualifications should appear to the court to be clear.

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The proceeding is summary, informal, and distinct from an ordinary civil action, which involves a judicial contention between parties in the establishment of their respective rights.

The finding of the judge as to the existence of the qualification of suitableness, necessarily involves a judicial discretion in reaching his conclusion, as well as in directing the production of evidence to aid him in reaching that conclusion.

These propositions have been settled by former decisions and are not open to further discussion. *Hopson's Appeal*, 65 Conn. 140, 147; *Malmo's Appeal*, 72 id. 1, 6, 73 id. 232, 234; *Wakeman's Appeal*, 74 id. 313, 315, 316; *Moynihan's Appeal*, 75 id. 358, 363.

In this case the trial judge found that the person licensed possessed the qualification of suitability of person and place.

The appellant claims that it appeared to the court that the place of business of the licensee was in a hotel, adapted chiefly to summer business and substantially without patronage during portions of the year; that it was impracticable for a place thus situated to conform to the requirements of the screen law; and that these facts were in law conclusive evidence of the unsuitability of the place.

The claim is unfounded. Such facts can only influence, they do not necessarily control, the judgment of the trier.

The appellant further claims that it appeared to the court that in his application for a license, the applicant did not state, unless by implication, that he was the proprietor of the hotel where his business was to be conducted; that this defective statement was a violation of § 2675 of the General Statutes and rendered void the license which was issued after full hearing and knowledge of the facts. The section does not have that effect.

In excluding the question put to the witness Clark, calling for his opinion as to the suitability of the licensee and his place of business, the trial judge used his discretion in respect to the source and extent of information deemed necessary or desirable, under the circumstances of that case,

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to a fair exercise of his own judgment and formation of his own opinion. It does not appear that then or at any time he refused to listen to evidence of facts so inconsistent with the suitability of person or place as to show any illegal action on the part of the county commissioners.

Upon the hearing the trial judge ordered the appellant to file written reasons of appeal, and permitted a demurrer to these reasons, an answer and substituted answer, demurrer to substituted answer, reply and substituted reply to substituted answer, and rejoinder. Doubtless the court might properly direct the appellant to state the grounds of illegality on which he relied, orally or in writing, but the proceeding is not one which calls for formal pleadings, nor is it within the purview of the rules regulating pleadings under the Practice Act; and any attempt to improvise, for such hearing, rules of procedure, must prove unfortunate.

In spite, however, of this mode of conducting a summary and informal hearing, it is apparent that the court did determine the question of suitability in view of all the substantial claims urged by the appellant, and, upon evidence it deemed sufficient and satisfactory, reached the conclusion that the licensee was a suitable person and his place of business a suitable place.

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

In this opinion the other judges concurred.

ROSE MCGARRIGLE ET AL. *vs.* JOHN W. GREEN.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

The plaintiffs, who occupied a hat factory under a lease with an option of purchase, agreed with the defendant—who also owned and operated one or more factories for making hats—"to manufacture hats" for him for two years, furnishing tools, machinery, equipment and labor "necessary to the manufacture of hats of the

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character, style and quality which" he "may desire to be manufactured for him." These were the only provisions of the contract which had any reference to the quantity of hats which the plaintiffs were to make. *Held* that whatever might have been the intention of the parties at the time the agreement was drawn, the contract itself did not, either in express terms or by necessary implication, bind the defendant to furnish the plaintiffs with any orders at all; and much less to supply them with orders to the detriment or destruction of his own business.

Argued November 10th, 1903—decided January 6th, 1904.

ACTION to recover damages for breach of contract, brought to the Superior Court in Fairfield County and tried to the jury before *Ralph Wheeler, J.;* verdict and judgment for the plaintiffs for $1,005 damages, and appeal by the defendant. *Error and new trial granted.*

Samuel Tweedy and *Howard B. Scott*, for the appellant (defendant).

Howard W. Taylor, for the appellees (plaintiffs).

TORRANCE, C. J. This is an action to recover damages for the breach of a written contract made by the plaintiffs and the defendant at Danbury in this State, dated the 14th day of July, 1899, and called herein contract *B*. The plaintiffs, at the beginning of the suit, were Rose McGarrigle and Daniel Keating. During the pendency of the suit Mrs. McGarrigle died, and the suit is now prosecuted by her administrator and Keating.

The disposition of the case depends largely upon the construction that may be put upon contract *B;* and as that contract is to be construed in the light of the circumstances in which it was made, if necessary, it will be well here and now to state briefly what those circumstances were, as they appear of record. When the contract was made the defendant, Green, was, and theretofore had been, and thereafter continued to be, extensively engaged in the manufacture of hats in Danbury. He owned one large hat factory, was part owner in another, had charge of the former, and had part charge of the latter. Such was his situation.

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When the contract was made, the plaintiffs were in the possession of a hat factory in Danbury, with all the machinery and tools therein, known as the "Johnson factory." They held possession of that factory by virtue of a written agreement with Dexter, the owner thereof, made and dated on the 13th day of July, 1899, called herein contract *A*. Under that contract the plaintiffs had the right to occupy said factory, and to use all the tools and machinery therein, free of rent, and the right ultimately to purchase the same at an agreed price, upon keeping and performing all the conditions and stipulations on their part to be kept and performed, contained in contract *A*. For some time prior to July 14th, 1899, the plaintiffs, at said Johnson factory, had made hats for a commission house in New York City, out of materials furnished by said house, and had also sold to said house hats manufactured by the plaintiffs out of their own materials. Such was the situation of the parties of the second part in contract *B*, when that contract was executed.

The material parts of contract *B* are the following: The plaintiffs agree with Green "to manufacture hats" for him, "for the term of two (2) years from and after July 14th, 1899, upon the following terms and conditions, to wit:" Keating and McGarrigle "shall provide at all times the factory occupied by them and known as the 'Johnson factory' (or other equally convenient factory), together with tools, machinery, fixtures, equipment and labor necessary to the manufacture of hats of the character, style and quality which" Green "may desire to be manufactured for him." Keating and McGarrigle "shall give their entire time and attention to the manufacture of such hats under the direction of" Green, "and during the life of this agreement" they "shall not engage in the manufacture of hats, either for themselves or for any person or persons other than" Green, without his consent. Green "agrees to provide all stock and material necessary to the manufacture of said hats, which stock and material shall at all times remain his property, and to advance to" Keating and McGarrigle "all

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moneys that may be necessary to pay for labor employed and fuel and water purchased" by them in the manufacture of the hats; "and as a part of such labor it is agreed that" Keating and McGarrigle "shall draw twenty-five ($25) dollars each per week." The contract then provides for the selection and employment of a bookkeeper to keep the accounts relating to business done under the contract, and that the accounts shall at all times be open to the inspection of Green. It also provides that Green "shall take sole charge of the sale and disposition of all hats manufactured for him by" Keating and McGarrigle under the agreement. It further provides, in substance, as follows: "As compensation for the manufacture of such hats," Keating and McGarrigle "shall receive one half (1/2) of all net profits realized by" Green "from the manufacture and sale of such hats." In estimating such net profits, it is agreed that certain specified items shall be deducted from the amounts received by Green from the sale of hats made under contract *B*. Green agrees to advance to Keating and McGarrigle, upon certain prescribed conditions, certain sums of money from time to time, to enable them to meet certain payments called for from them under contract *A*; which advancements were to be deducted from the profits due to them under the contract. "In the event that the manufacture of hats under this agreement should not be conducted at a profit sufficient, in the opinion of" Green, "to warrant the continuance of such business," then Green "may terminate this agreement at any time after January 1st, 1900." The profits are to be divided and paid over "at the termination of each hatting trade." "It is expressly understood and agreed that in the manufacture of hats under this agreement," the parties to it "are not partners, and that the moneys paid" to Keating and McGarrigle by Green "from the sale of said hats, is paid to the said parties . . . as compensation for services and use of said factory."

Such was the contract entered into by the parties. Under it the parties, in July, 1899, began the manufacture and sale of hats according to its terms, and so continued until on or

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about September 21st, of the same year, when, as the evidence for the plaintiffs tended to show, the defendant refused to go on with his part of the agreement, and ceased to furnish material for the making of hats at said Johnson factory, and refused to make any further advancements of money under said contract, and refused to do anything more thereunder. Upon these facts the plaintiffs claimed the right to recover their share of the profits of the business up to the time of said breach of the contract, and also the damages caused to them by said breach.

The defendant asked the court to charge the jury, (1) that the defendant was not obliged by the contract to keep the plaintiffs' factory supplied with orders to its full capacity; and (2) that he was not obliged to furnish the plaintiffs with any orders. The court did not so charge, but instead thereof charged that "it became the duty of the defendant, with ordinary diligence, care and prudence of an experienced man in the hatting trade, and by the exercise or use of the ordinary means and methods for the sale and disposal of hats, to endeavor to provide the plaintiffs with employment suited to the capacity and equipment of their factory, with the view and purpose of establishing and maintaining a profitable business in connection with the plaintiffs, and to continue his endeavors therein, unless sooner discharged from his duty by reason of the failure of the plaintiffs in their duty under the contract, until the 1st day of January, 1900." In this connection the court further charged as follows: "The profitable use of the plaintiffs' factory under the contract is not to be regarded as dependent upon the overflow of the defendant's factory, but as based upon business-like methods and means to be adopted by the defendant to establish in connection with the plaintiffs a profitable business in the manufacture and sale of hats, without regard to the conditions at his own factory, except as he might have chosen to increase the business at the plaintiffs' factory by turning any overflow from his own factory in that direction."

The jury was thus told, in effect, that under contract *B*

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Green was bound to do whatever was reasonably necessary to furnish the plaintiffs with orders for hats, to the extent of the capacity of their factory, and that to do this involved the closing of his own factory whenever the orders he had on hand were not more than sufficient to keep the plaintiffs so employed.

We think contract *B* does not bind the defendant to furnish the plaintiffs with any orders for hats at all. Under it he may do so, and if he does so, and desires the plaintiffs to fill such orders, then the defendant must furnish them with material, and make advancements to them of money, for that purpose, as the contract provides; but by the contract itself, before anything is done under it, he is not obligated to furnish the plaintiffs any orders for hats. We look in vain through the contract for any express agreement on his part to do so.

Looking at the agreements entered into by the plaintiffs in contract *B*, it may be conceded that they supposed the defendant was bound to furnish them with orders for hats to the extent indicated in the charge; because otherwise they probably would not have bound themselves as they did to work for no one save the defendant; indeed it may be conceded that the contract was probably drawn on the part of both parties for the purpose of binding the defendant to such agreement, and that he supposed he was so bound by it, and even that he ought to be so bound; but the question before us is not what the parties meant to bind themselves to do, nor what they supposed they had bound themselves to do, nor even what they ought to have bound themselves to do; it is simply what have they, as manifested by their written words, bound themselves to do. Did the defendant, in contract *B*, bind himself to furnish the plaintiffs with any orders for hats? The only express reference to this matter in the contract is this: "The parties of the second part shall provide at all times the factory occupied by them and known as the 'Johnson factory' (or other equally convenient factory), together with tools, machinery, fixtures, equipment and labor necessary to the manufacture of hats of the character, style and quality which the party of the first part may

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desire to be manufactured for him." We think the last clause of this quotation governs the quantity of hats to be made under the contract, as well as the character, style and quality of such hats. The plaintiffs were to furnish factory and labor "necessary to the manufacture of hats . . . which the party of the first part may desire to be manufactured for him," as well as hats of the character, style and quality which he might so "desire to be manufactured for him." Unless the contract is so construed, it follows that nowhere in it is the quantity of hats to be made under it expressly provided for; for nowhere else in it is there any other reference to this matter. If we are to guess or infer from the entire contract that the defendant, when he executed it, actually intended to bind himself to furnish the plaintiffs with some definitely ascertainable amount of business, that will not help matters unless that intention is expressed in the contract. No such intention is found in the contract in express terms; and we think it is not to be found there by necessary implication. From the fact that the plaintiffs bound themselves, absolutely, to make hats which the defendant might order, to the extent of the capacity of their factory, it by no means necessarily follows that the defendant bound himself absolutely to furnish them with any orders for hats. If any obligation to furnish to the plaintiffs any orders for hats rests upon the defendant, it arises by way of inference and implication; and if any such obligation rests upon the defendant, it rests upon him to the extent indicated by the trial court in its charge; for no other measure of the extent of the defendant's implied obligation is given in the contract, or can in reason be inferred from it. The defendant is either bound to the extent indicated in the charge, or he is not bound at all. Now, reading this contract on the part of the defendant in the light of the circumstances in which it was made, can it be fairly said that the defendant, by the words used with reference to his obligation, meant to bind himself to cripple his own life business and perhaps destroy it, and to close his factories at any time, for the sake of two years' business in a small way with the plaintiffs? We think not. We think it

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is more reasonable to hold that the plaintiffs, through the fault possibly of the scrivener who drew the contract, failed to obtain from the defendant any absolute obligation to furnish them with any orders under the contract.

In this view of the case it becomes unnecessary to discuss or consider the other questions made upon this appeal. The defendant was under no obligation to continue the business with the plaintiffs after September 21st, 1899, but the plaintiffs, under the contract, are entitled to their share of the profits, if any, accruing in the business conducted under it up to that time.

There is error and a new trial is granted.

In this opinion the other judges concurred.

GEORGIE B. WENTZ'S APPEAL FROM PROBATE.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, JS.

General Statutes, § 237, provides that when any person having property shall be found incapable of managing his affairs, the Court of Probate "shall" appoint a conservator. *Held* that this did not exclude the exercise of a reasonable discretion on the part of the Court of Probate, or of the Superior Court on appeal.

In the present case it appeared that, pursuant to a family arrangement, the incapable person had some years before parted with valuable rights in real estate derived from his parents, without consideration and without understanding the effect of his conveyances, and that the proceeds thereof were now owned by an elderly sister, under whose care he lived and by whom his wants were adequately and affectionately supplied. It did not appear, however, that she was under any legal obligation to furnish such support, nor that it would be provided by any one after her death. *Held* that under these circumstances the Superior Court acted properly in appointing a conservator.

A right of action is "property" within the meaning of § 237, and a right of action to reclaim the title to land in this State is property in this State.

In determining whether a conservator shall be appointed, the trial court may take into account the existence of rights of action to reclaim

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lands in another State, and to prosecute demands against non-residents.

The change of legal *status* involved in the appointment of a conservator can be properly worked out only under and through the law of the territorial jurisdiction to which the incapable person belongs.

The pendency, in one State, of a suit for the protection of the rights of an incapable person in respect to real property in that State, does not affect the maintenance of a suit, in another State in which is his domicil, for his protection in respect to all the rights which he may possess.

While the primary object of the statute (§ 237) is to make necessary provision for an incapable person during his life or disability, the statute is also adapted, and presumably designed, to safeguard not only such means of support as the incapable person may possess, but whatever property he owns not needed for such purpose.

Any relative of the incapable person may apply for the appointment of a conservator, although he is not one of those who could be made liable for the support of the incapable person were the latter destitute of means.

It is not error for the trial court to accept as credible the testimony of the person found to be incapable of managing his affairs. The weight of his testimony is wholly a matter for the trier.

Argued November 10th, 1903—decided January 6th, 1904.

APPEAL from the refusal of the Court of Probate for the district of Fairfield to appoint a conservator over a person alleged to be incapable of managing his affairs, taken to the Superior Court in Fairfield County and tried to the court, *Gager, J.*; facts found and judgment rendered granting the application and reversing the action of the Court of Probate, and appeal by the respondent. *No error.*

Curtis Thompson, and *Alfred S. Brown* of New York, for the appellant (respondent).

Stiles Judson, Jr., for the appellee (applicant).

BALDWIN, J. On March 1st, 1877, the appellee (who, suing by his next friend, is the appellant in this court) was a cotenant in remainder of valuable real estate in New York City. The other cotenants were four of his brothers and two sisters. His father was tenant for life, and each of the re-

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maindermen was personally charged with $2,500 to be paid, out of the first rents and profits to which he might be entitled on coming into possession, to trustees for another brother, who was insane. The appellee and another of the cotenants were weak in intellect. To carry out a family arrangement which they were incapable of understanding, they were asked to join and did join, on March 1st, 1877, in a conveyance to three of their brothers and the sisters, as joint tenants, of the New York lands, subject to a charge for the payment of the trust fund for the insane brother, to be raised out of the rents and profits. By subsequent conveyances the title became vested in joint tenancy, in 1882, in three of the original joint tenants, subject to a mortgage for the amount of the trust fund. The life tenant had previously died. In 1888 part of the lands were sold for $80,000. In 1902 one of the sisters, then the sole survivor of the joint tenants, sold the rest for $140,000.

The appellee, in 1885, conveyed to this sister his interest in a house in Fairfield which they had theretofore owned as cotenants.

He did not understand the effect of either of his conveyances; received no consideration for either; and supposes that he still is a cotenant of all the real etate so conveyed. No accounting with him has ever been made for the proceeds of the lands sold, nor has he ever received anything from that source.

From a long time prior to 1877 to the date of the judgment appealed from, the appellee and his weakminded brother have been comfortably and adequately supported at the cost of the three joint tenants, in whom the title to the New York lands became vested in 1882, and of the survivors and survivor of them. Of late years they have lived in the house at Fairfield, taking their meals with their older sister (now the surviving joint tenant) who owns an adjoining estate. She is seventy-five years old and an invalid. She has cared for them affectionately and amply, but it was not shown that she or any one else had made any provision for them after her decease.

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In 1892 the insane brother died. The two weakminded brothers, who were each entitled to an eighth of the trust fund, thereupon signed an instrument acknowledging the receipt of their respective shares. In fact the appellee received no part of it.

The appellee is sixty-five years old, and from an early period in life has been and still is incapable of understanding or managing business or property matters of any importance, although quite competent to attend to such little affairs or dealings as enter into his present daily life. Twelve years ago, at the request of one his brothers, he put in his hands securities of the value of $1,100 for reinvestment, for which no accounting has ever been had. This brother died in 1899, leaving a large estate. He also at one time entrusted a less sum to another brother to invest, who afterwards told him that it had been put into a mortgage and lost by foreclosure. This brother died in 1902, and his estate is in course of settlement in New York.

The life of the appellee is happy and contented. He is not wasteful, and has now no funds in his possession which he could waste. He was a witness on the trial, but made personally no defense and had no counsel, though aware that a conservator, if appointed, would have control of his person and property. The defense was made by his sister, under whose care he lives. The appeal from the decree of the Court of Probate was taken by a niece, the daughter of a deceased brother.

The facts recited show that the appointment of a conservator was properly ordered by the Superior Court.

It is not improbable that the manner in which the appellee's property has gradually passed out of his hands into that of his immediate relatives, was the result of a family arrangement dictated by a desire to prevent its loss by the acts of sharpers, and provide for his comfortable support under favorable circumstances. What was done has nevertheless deprived him of a considerable estate, without his knowledge or consent. He is himself incompetent to decide whether it would be for his interest to endeavor to recover it. Our laws

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(General Statutes, § 237) provide that "when any person having property shall be found to be incapable of managing his affairs by the court of probate in the district in which he resides or has his domicil, on the written application of . . . any of the relatives of such person, . . . said court shall appoint a conservator of such person, who, upon giving a probate bond, shall have the charge of the person and estate of such incapable person." While the word "shall" as thus used does not exclude a reasonable discretion on the part of the Court of Probate, or of the Superior Court on appeal, the property interests in the case at bar are so large, and the future prospects of the appellee, should he survive the sister who is now caring for his wants, so uncertain, that the judgment appealed from was plainly a proper one.

No facts are found which are not entirely consistent with the conclusion that he is incapable of managing his affairs. *Cleveland's Appeal*, 72 Conn. 340.

He has affairs to be managed. A right of action is property, within the meaning of this statute. If it were not, it would always be easy to strip those of their means who are incapable of protecting themselves. A right of action to reclaim title to land in this State is property in this State; and part of the lands conveyed away by the appellee are in Fairfield, where the grantee also resides.

It is contended that the existence of rights of action to reclaim lands in another State and prosecute demands against persons belonging to other States, was not a thing to be taken into account by the Superior Court in determining whether a conservator should be appointed.

The proper forum to which to resort for the appointment of an agent of the law to take charge of the person and property of an incapable person, is primarily that of his place of domicil. It is a proceeding to change his legal *status*. Such a change, as respects his general right to regulate his own movements by his own will, can only be appropriately worked out under and through the law of that territorial jurisdiction to which he personally belongs. Minor on Conflict of Laws, §§ 68, 69. The method provided by the laws

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of this State for the protection of such of its people as own property, but are incapable of managing their affairs, is through a conservator to whom is entrusted the charge both of their persons and their estate. In determining whether the appellee needed such protection, it was proper to consider every right of action which he possessed, without regard to the court or jurisdiction in which suit to enforce it would be brought. Whatever it might be, it was for the court of his residence and domicil to determine whether he was competent to avail himself of the remedies proper to secure his rights, and all of his rights, and if he were not, to appoint some one able to decide and act in his behalf.

The question for the Superior Court to decide was whether it was proper to appoint a conservator. The powers of a conservator, when appointed, are fixed by the terms of the statute, so far as the law of Connecticut is concerned; though how far he can exert them in other States it will, in case of contest, be for their courts to determine.

It is found that legal proceedings are pending in New York, brought by a brother of the appellant, in the nature of a writ *de lunatico inquirendo* for the appointment of a commission to inquire into the mental condition of the appellee, and for the purpose of setting aside his conveyance of the New York real estate, and that such a commission has been appointed. That a suit for the protection of the appellee in regard to certain rights to certain real property in a State to which he does not belong, is pending in that State, does not affect the maintenance of a suit for his protection in respect to all the rights which he may possess, brought in the State to which he does belong.

It was contended at the trial, in behalf of the present appellant, that the sole object of the statute relating to the appointment of conservators is to make necessary provision for an incapable person, during his life or disability; and that the interest of a relative who may be an heir at law cannot be regarded, especially when the latter is not liable for his support. The primary object of the statute is, no doubt, that stated, but it is also adapted, and presumably

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designed, to safeguard not only such means of support as the incapable person may possess, but whatever property he owns not needed for such purposes. This operates directly for his own benefit, should he become freed from his incapacities. Whether any regard should be paid to the interest of his heirs or legatees, we have no occasion to inquire.

It has also been claimed in this court, that no appointment of a conservator can be made on the application of a relative who is not of the class upon members of which the support of the incapable person, if destitute of means, could be charged by law. As this point is a jurisdictional one, it is proper to consider it, although it was not made in the trial court.

The power to appoint a conservator was originally vested in the County Court, which could exercise it of its own motion. Rev. of 1750, p. 91. In the Revision of 1821, the provision was introduced that appointments should be made on the application of the selectmen "or any relation." Rev. of 1821, p. 274, § 1. In 1841 jurisdiction of such applications was transferred to the Court of Probate (Public Acts of 1841, p. 14, § 9) and in the Revision of 1849, the words "any relative of such person" were substituted for "any relation." Rev. of 1849, p. 434, § 1. In the Revision of 1875, the words "any of his relatives" were substituted for "any relative of such person." Rev. 1875, p. 347, § 1. In the revision of the probate laws made in 1885, the latter words were replaced by "husband or wife, or any of the relatives of such person" (Public Acts of 1885, p. 488, § 81), and these same words have ever since been retained. This succession of minute changes is the best evidence that no limitation to relatives of a particular class has ever been intended. The class of those on whom the burden of supporting an incapable person might be charged by law has been defined by statute since 1715, and had it been the design of the General Assembly to confine a resort to the courts for the appointment of a conservator to those belonging to it, a distinct reference to it would unquestionably have been made.

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The appellant in the Superior Court asked for a finding that many of the facts stated, including those relating to the reception from the appellee by two of his brothers of property to be reinvested, were found on his unsupported testimony. Such a finding would be immaterial. It could not be an error of law to receive his testimony for what it might be worth, nor yet to accept it on certain points as credible. Its weight was a matter wholly for the trial court.

Several exceptions were taken to rulings on evidence. Most of these rulings were so obviously correct that to discuss them would be a waste of words. Two went to exclude evidence which should have been admitted, but, as it was subsequently admitted and the finding accords with it, no injustice was done.

There was no merit in the motion to correct the finding. That sufficiently presented every point of law which the appellant desired to make.

There is no error.

In this opinion the other judges concurred.

JOHN J. DELEHANTY *vs.* WILLIAM T. PITKIN ET AL.

First Judicial District, Hartford, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

In this State a Court of Probate possesses only such powers as are expressly or by necessary implication conferred upon it by statute. Such court has no power to reverse or set aside its decree approving and establishing a will—although such decree may have been obtained by fraud—after the estate has been duly settled and the property distributed pursuant to its provisions.

Argued October 8th, 1903—decided January 26th, 1904.

APPEAL from an order and decree of the Court of Probate for the district of Hartford refusing to admit to probate a certain instrument as the last will and testament of Henry

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Kennedy, deceased, taken to the Superior Court in Hartford County and tried to the court, *Shumway, J.*, upon demurrer of defendants to the plaintiff's answer to a plea in abatement and to the jurisdiction; the court sustained the demurrer and dismissed the cause, and the plaintiff appealed. *No error.*

Lewis E. Stanton and *Sidney E. Clarke*, for the appellant (plaintiff).

Charles E. Perkins and *Arthur F. Eggleston*, with whom was *William Waldo Hyde*, for the appellees (defendants).

TORRANCE, C. J. In March, 1899, the Court of Probate for the district of Hartford approved a writing, dated December 29th, 1898, as the last will of Henry Kennedy. In January, 1903, Delehanty, the appellant here, offered for probate in said court a writing, dated February 24th, 1899, purporting to be a later and the last will of Kennedy, and petitioned the court in writing to set aside its approval of the former will and to approve of the later will in its stead. For brevity, the will made in December may be called the December will, and the other the February will. The court denied the petition, and from that denial Delehanty appealed to the Superior Court.

In the petition to the Court of Probate Delehanty alleged, among other things, that the original of the February will could not be produced in court, because one of the executors under the December will had obtained possession of the February will and had "by fraud destroyed the same." The petition had annexed to it what was alleged to be a copy of the February will, "as near as the same can be ascertained." In the reasons of appeal filed by Delehanty in the Superior Court, the above allegations were also made, and a copy of said February will was attached to said reasons.

To the reasons of appeal the appellees made no reply, but filed a plea in abatement of the appeal, for want of jurisdiction, to which they annexed a copy of the petition of Dele-

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hanty to the Court of Probate. To this plea Delehanty demurred, and the demurrer was overruled (*Roraback, J.*). He then moved to amend his reasons of appeal, and this motion was denied. He then filed an answer to the plea, in which he admitted all the substantial allegations of fact therein made, and set up certain additional facts showing, as he alleged, that the Superior Court had jurisdiction of the appeal, and that he had never had his day in court in respect to the matters set up in the plea and answer. The reasons of appeal were not made a part either of the plea or the answer, nor was a copy of the February will made a part of the plea or answer. The answer contained no allegation that the February will had been destroyed "by fraud," as alleged in the petition and reasons of appeal. The appellees demurred to the answer generally, and to each paragraph of it specifically. The court (*Shumway, J.*) sustained this demurrer upon the grounds stated in it, and, no further pleadings being filed, dismissed the appeal.

Whether the plea and answer, standing alone, contain all the facts essential to a correct decision of the case, may perhaps admit of some doubt; since they do not contain certain allegations of fact made in the petition to the Court of Probate, and in the reasons of appeal, which may have, and are claimed by Delehanty to have, some bearing upon the questions presented upon this appeal. Because of this doubt and for the purpose of determining the case upon its merits, we shall consider all the essential facts in the case, whether found in the petition to the Court of Probate, the reasons of appeal, the plea, the answer, or the judgment.

The essential facts thus appearing upon the record are in substance these: In March, 1899, the Court of Probate approved the December will as the last will of Kennedy, and committed the administration of the estate to the executors named in said will. After this, such proceedings were had in the Court of Probate, that said estate was distributed and finally settled as a testate estate under said will in February, 1900. In January, 1902, certain minor heirs of Kennedy took an appeal from the probate decree approving the December

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will, and in their reasons of appeal they alleged that the December will was not Kennedy's last will, because, as was alleged, he had made a later one, known as the February will. This appeal, to which Delehanty was not a party, was tried in May, 1902, and after a full hearing lasting some weeks, the Superior Court decided that the December will was the last will of Kennedy, and that the February will was not his will, and thereupon confirmed the decree from which said heirs had taken their appeal. This judgment, upon appeal to this court, was sustained in December, 1902. *Kirbell* v. *Pitkin*, 75 Conn. 301. Delehanty is a legatee and beneficiary under the February will, but not under the December will. The February will, in its legatees and beneficiaries, and in its legacies given and benefits conferred, differs very much from the December will, and it wholly revokes that will. Delehanty had no knowledge of the existence of the February will until at least a year after the settlement of Kennedy's estate under the other will. The February will is the real last will of Kennedy. In March, 1899, one of the executors under the December will obtained possession of the February will, "and by fraud destroyed the same." These are in substance the essential and controlling facts in the case, which must be taken to be admitted upon the record, in considering the questions raised upon this appeal.

Upon them the appellees claimed that the Court of Probate had no power to try the questions presented iu Delehanty's petition, and consequently that the Superior Court, as a court of probate, had no power to try the questions presented in the reasons of appeal. The court sustained this claim and dismissed the appeal.

It is not, perhaps, clear from the record, whether the refusal of the Court of Probate to grant the petition of Delehanty proceeded on the ground that he had failed to prove the existence of a later will, or on the ground of want of power to set aside the former decree; but as all the parties before us have assumed that such refusal proceeded on the latter ground, we also will assume that to be the fact. As the February will is radically different from, and expressly

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revokes, the December will, the approval of the former necessarily involves the disapproval of the latter and the reversal of the decree approving the latter, and of all decrees and orders made in the settlement of the Kennedy estate under the December will, so far as they are inconsistent with the settlement of the estate under the February will.

It will thus be seen that the real question in the case, stripped of all its wrappings, is this: Upon the facts as they appear of record, had the Court of Probate power to reverse or set aside the decree approving the December will? If it had, the judgment below should be reversed, and if it had not, that judgment should stand.

So far as we know this is a question of first impression in this State, and as the solution of it depends largely, if not entirely, upon our own statutes and decisions, they alone will be considered in discussing it. Such a question was recognized but not decided in *Potwine's Appeal*, 31 Conn. 381. In discussing this question, it must be borne in mind that our courts of probate possess only such powers as are expressly or by necessary implication conferred upon them by statute; *Hotchkiss* v. *Beach*, 10 Conn. 232, 238; *Potwine's Appeal*, 31 id. 381, 382; *Hall* v. *Pierson*, 63 id. 332, 341; and also that, within their jurisdiction, their decrees, while unreversed, are as conclusive and binding as those of any other court; *Judson* v. *Lake*, 3 Day, 318; *Mallory's Appeal*, 62 Conn. 218, 220; and cases hereinafter cited as to the remedy by appeal. The decree approving the December will, then, had all the elements of a final judgment. Until set aside in some lawful way, all the facts necessary to support it are to be taken as true beyond contradiction or dispute; and among those facts are the following: that the December will was the *last* will of the testator; that it was unrevoked at his death; that he had the requisite capacity to make it; and that it was made and attested as the law required. That it was his last will, and that it was unrevoked at the time of his death, are facts as conclusively established by the decree of approval as is the fact that he had the legal capacity to make it. *Dickinson* v. *Hayes*, 31 Conn. 417. Now the

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power to set aside a decree of this kind, after the estate is settled, is not in express terms anywhere given to our courts of probate; but the appellant claims that it is given to them by necessary implication. This claim is based upon two facts: (1) that to those courts is given exclusive original power to probate wills; (2) that they are empowered (General Statutes, § 191) to "make any lawful orders, or decrees," necessary "to carry into effect the power, authority, and jurisdiction" so conferred. Section 191 is merely an affirmance of a power already given in the general power to probate wills; for that general power necessarily carries with it the incidental power to do all things necessary to carry the general power into effect. The argument is this: that the exclusive original power to pass a decree approving or rejecting a will, coupled with the incidental power to do all things necessary to carry the general power into effect, necessarily carries with it the power to set aside such decrees. In other words, the claim is, that the power to pass a decree by necessary implication carries with it the power to set aside such decree. If the legislature had not given to some other tribunal the general power, on appeal, to modify, set aside, or confirm probate decrees, this reasoning might perhaps command our assent. It is valid, however, only on the supposition that the legislature has not given such power to some other tribunal; a supposition that is not true, for our laws give to the Superior Court, on appeals from probate, ample power to set aside, modify or confirm probate decrees. The conclusion that the Court of Probate has by implication a like general power to set aside its own final decrees, runs counter to all our legislation and decisions with reference to the powers of that court. It is to be borne in mind that this claimed power, if it exists, is practically without regulation or limitation. No law governs the manner of its exercise, nor the time within which it may be exercised. It may be exercised at any time pending the settlement of an estate, or long after the final settlement thereof, and after the right of appeal no longer exists in favor of anybody; and under it the Court of Probate may not only set aside its own

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final decrees, but also final decrees of the Superior Court sitting as a court of probate upon appeal. If such a power exists to-day, it has existed since the origin of courts of probate, for they have always had exclusive original power over the probate of wills. Looking at our legislation and decisions upon the powers of probate courts, we think they have no such unregulated and unlimited power to modify, reverse or set aside, either their own final decrees, or those of the appellate probate court. In the first place, the existence in such courts of an unlimited power to set aside their own decrees is inconsistent with the legislation conferring upon them, from time to time, a limited power to do this. In *Potwine's Appeal*, 31 Conn. 381, decided in 1863, and in *Mix's Appeal*, 35 Conn. 121, decided in 1868, certain questions were raised, and some of them left unsettled, regarding the power of the Court of Probate over its own decrees; and in 1869 the legislature provided that "any Court of Probate may modify or revoke any order or decree made by it *ex parte*, before any appeal therefrom, and, if made in reference to the settlement of any estate, before the final settlement." Public Acts of 1869, Chap. 110 (General Statutes, § 203). Why confer this limited power over *ex parte* orders in this guarded way, if the court already possessed the unlimited power claimed over all its orders? Again, in 1886 an Act was passed the provisions of which are now embodied in § 314 of the General Statutes (Public Acts of 1886, Chap. 97). That Act, among other things, provides that when the Court of Probate has approved a will, and it subsequently appears "pending proceedings before it" for the settlement of the estate under that will, that such will has been revoked, the court shall have power "to revoke, annul, and set aside" the decree approving said will, and any other decree made in the settlement of the estate under said will. Why should the legislature expressly make these successive and carefully guarded and limited grants of power, if the Court of Probate already had the unlimited power over their decrees claimed by the appellant? This legislation, specifically conferring limited power over decrees and carefully

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guarding its exercise, was wholly unnecessary if the courts of probate already possessed the power of control over their decrees contended for by the appellant.

In the next place, the existence of the power in question is inconsistent with our legislation giving the right of appeal from probate. "It is a principle of our law, coeval with our first municipal regulations on this subject, that the settlement of all estates, both real and personal, of deceased persons, appertains to the Court of Probate within whose jurisdiction the estate is; and an appeal lies from every order, sentence or decree of this court in relation thereto, to the Superior Court; and from this last court, by motion for new trial or writ of error, the cause may be brought to the Supreme Court of Errors. No course could be devised, perhaps, better adapted to effect a *speedy* settlement of estates, an important object in view of our law." *Pinney* v. *Bissell*, 7 Conn. 21, 23. Our legislation has always favored the speedy settlement of estates, and to that end has carefully limited the time within which such appeals must be taken; but what avails that limitation if the power claimed here exists? Under that power a party, long after his right of appeal is gone, may litigate in the Court of Probate the questions he is precluded from litigating upon appeal, and thus defeat the object of the legislature in limiting the time for appeal. Again, if a will, rejected by the Court of Probate, is established upon appeal by the Superior Court, and the estate settled under it, is there anything to prevent the Court of Probate, under this claimed power, from subsequently overthrowing that will in favor of a later one? and is there anything to prevent the pendency of proceedings in the Superior Court and in the Court of Probate, at the same time, for the reversal of the same probate decree? No such conflict of jurisdiction has ever arisen so far as we know; and no such question, as is now made in this case, has ever been raised in this court before, save, perhaps, in *Potwine's Appeal*, 31 Conn. 381. These facts are in themselves a strong argument against the existence of any such power as is claimed in this case.

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In addition to the reasons given, the legislature, having fully safeguarded the rights of parties aggrieved by probate decrees, by ample provisions for their relief by way of appeal to the Superior Court, has in express terms provided that, save in cases excepted by statute, probate decrees shall not be set aside "save by appeal." The words of the statute are as follows: "No order made by a court of probate upon any matter within its jurisdiction shall be attacked, collaterally, except for fraud, or set aside save by appeal." Public Acts of 1885, Chap. 110, § 6 (General Statutes, § 194). This statute must of course be read in connection with the sections hereinbefore referred to (§§ 203, 314), giving courts of probate a limited power to modify or revoke their own decrees pending the settlement of an estate; and when so read, it does, we think, expressly deny to probate courts any power to set aside their own decrees, save in the cases where that power is given to them in express terms. That this has always been the law upon this subject, and that the statute (§ 194) is merely declaratory of that law, is affirmed in *Mallory's Appeal*, 62 Conn. 218, 221.

This court, whenever it has spoken upon this matter, has held that, save in the cases excepted by statute, a final probate decree can be set aside or reversed only upon appeal. We cite some of the numerous cases to that effect. "The statute, having provided for the correction of any erroneous decree, by appeal, unless that remedy is taken, the decree must stand." *Gates* v. *Treat*, 17 Conn. 388, 392. "The application to the Superior Court, as a court of chancery, to set aside the distribution, in this case, cannot be sustained. The subject was a matter entirely within the jurisdiction of the Court of Probate, and its decrees must stand, until set aside by an appeal." *Bissell* v. *Bissell*, 24 Conn. 241, 246. "This order of the Court of Probate has never been reversed, but it now remains in full force, and we think it furnishes full protection to the administrator, and a conclusive answer to this suit on the probate bond, until it shall be regularly set aside on appeal taken from the order to the Superior Court." *Kellogg* v. *Johnson*, 38 Conn. 269, 271. "We are

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not disposed to question the proposition that a decree of a Court of Probate, unless appealed from, is final and conclusive upon the parties, as to all matters within its jurisdiction which are necessarily involved in the issue." *Mix's Appeal*, 35 Conn. 121, 122. "All these decrees were within the admitted jurisdiction of the probate court. These were decrees which could not be attacked collaterally. Not appealed from, they were, and are, conclusive." *Shelton* v. *Hadlock*, 62 Conn. 143, 153. "That the decree of a Court of Probate having jurisdiction, while unreversed, is final and conclusive as to all relevant matters embraced therein, is unquestionable. Indeed, that 'no order made by a Court of Probate upon any matter within its jurisdiction shall be attacked collaterally except for fraud, or set aside save by appeal,' is now the direct mandate of the statute, . . . which was made in affirmance of the existing common law." *Mallory's Appeal*, 62 Conn. 218, 220. "No such decree can be attacked except by appeal within the time limited." *State* v. *Blake*, 69 Conn. 64, 78. There is nothing decided in any of our cases inconsistent with the views expressed in the above cited cases.

The appellant, in support of his contention, places some reliance upon the case of *Johnson's Appeal*, 71 Conn. 590; but the important question raised in the present case was neither raised nor considered in that case. In that case the Court of Probate had settled and distributed the estate as an intestate estate. Eighteen months afterwards a will was discovered, admitted to probate, an administrator with the will annexed was appointed, and the court proceeded to settle the estate under the will, and recalled the previous distribution. All this was apparently done by the consent of all concerned, and no question was raised with reference to it. The only questions made, argued, considered, or decided, in this court in that case, related to the statutory power of the Court of Probate, and of the Superior Court sitting as a court of probate, to authorize administrators and conservators to compromise claims.

From this review of our statutes and decisions relating to

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the power of courts of probate over their final decrees, and to the provisions for appeal from those decrees, we are of opinion that the power contended for by the appellant does not exist; and therefore that the Superior Court was justified in dismissing the appeal from probate. In reaching this conclusion we have left out of view the charge of fraud which the appellant claims to be in the case, and have regarded the case as one in which there was no charge of fraud. The appellant contends, in effect, that the fraud charged in this case gives the Court of Probate a power to set aside its final decree which it would not otherwise possess; and the remaining question is whether that contention is correct. The only charge of fraud in the case is made in the petition to the Court of Probate, and in the reasons of appeal, and it is made in both in these same words: "The said will of February 24th, 1899, cannot now be produced in court. On or about March 13th, 1899, said William T. Pitkin obtained possession of said will of February 24th, 1899, and by fraud destroyed the same." Pitkin was one of the executors appointed under the December will. The above allegation seems to be an excuse for the non-production of the original February will, rather than a charge of fraud. Assuming, however, without deciding, that fraud is charged in the case, and that the above allegation sufficiently charges it, what is the nature of the fraud charged? At most it is, in effect, that Pitkin, with some fraudulent intent, or for some fraudulent purpose, destroyed the February will. With what specific intent, or for what specific purpose, he did this, is not charged. It is not charged that his act ever had or ever will have any other effect than what results from the mere destruction of the will; and it is not charged that this worked or will work the appellant or anybody else any harm. The appellant appears to have had no difficulty in procuring a copy of the February will covering nearly four pages of the printed record. It is nowhere alleged that the other executor under the December will, or any one save Pitkin, participated in the so-called fraud, or knew of its existence. It is nowhere alleged that the fraud

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of Pitkin was used to influence or affect the action of the Court of Probate in passing the decree approving the December will; or that such decree was obtained by any fraud practiced upon that court or upon any one else by Pitkin or any other person. The only fraud that in reason can avail the appellant, in support of his present claim, is some fraud that was used in procuring, and which was the efficient cause in procuring, the decree approving the December will; and no such fraud is alleged or appears upon the record. But even conceding that such a fraud is alleged and admitted, it does not follow that the Court of Probate can grant relief for that fraud, by setting aside the final decree obtained by means of it. For the reasons already given in the first part of this opinion, we think the Court of Probate in this case had no power to set aside its decree approving the December will, even if it had been obtained by fraud. A decree so obtained may, under the statute, be attacked collaterally, but the proceeding before the Court of Probate, assuming that fraud was charged in it, was not a collateral, but a direct, attack. Its main object was to set aside the former final decree and to leave the probate record as if such decree had never been passed. It was not an attack upon it which, if successful, would avoid its full effect for some limited purpose and still leave the decree in full force for all other purposes; but it was one which, if successful, would annihilate the decree for all purposes. A direct attack upon a judgment, if successful, wipes it out of existence; while a collateral attack upon it, if successful, leaves it in full force, except as against the party who collaterally attacks it and as regards the case in which it is so attacked. Clearly the proceeding before the Court of Probate was a direct attack upon the decree in question, seeking to have it set aside by the Court of Probate for fraud; and this, we hold, the Court of Probate had no power to do even for fraud. If such a power in the courts of probate, as the appellant contends for, is necessary for the due administration of justice, the legislature can easily confer it upon them, and hedge its exercise about with such restrictions as will not seriously

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interfere with the final and reasonably speedy settlement of estates.

It is claimed that the conclusion reached works a great injustice in a case like the present. It is said that although the appellant was a party who was interested in the decree approving the December will, and had the right to appeal therefrom because he was a legatee under the later will (*Buckingham's Appeal*, 57 Conn. 544), yet he was ignorant of that fact, through no fault of his own, until the time to appeal had passed. Our statutes limiting the time when probate appeals may be taken, run against parties whether they are informed of their rights or are innocently ignorant of their rights. Their absence from court when the decree is passed and their ignorance of the decree does not stop the running of the statute. "Our statute does not concern itself with giving them (i. e. parties) information as to when the approving decree will be passed; it is, however, careful to give each person to be affected thereby opportunity to appeal therefrom, provided he acts within the prescribed time; and in behalf of infants the door of appeal is held open for more than twenty years." *Lancaster's Appeal*, 47 Conn. 248, 257. After the passage of the decree approving the December will, the appellant had the right to appeal therefrom, and the door of appeal remained open to him one year thereafter, and no more. The fact that he was ignorant of his rights during this time makes no difference. That our statutes limiting the time for taking probate appeals would sometimes work a hardship in this way, as against parties innocently ignorant of their rights, must have been within the knowledge of the legislature when it passed them; for it makes no exception in favor of such persons. If cases like the one at bar should become of frequent occurrence, the legislature may be trusted to apply some appropriate remedy; but the mere existence of the hardship claimed does not of itself give the Court of Probate the power contended for.

In the case at bar we simply decide that the Court of Probate, upon the facts as they appear of record, had no power

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to do what the appellant asked it to do, and that the Superior Court did not err in dismissing the appeal.

In this view of the case it is unnecessary to consider the other matters assigned for error in the reasons of appeal.

There is no error.

In this opinion HAMERSLEY, HALL and PRENTICE, JS., concurred.

BALDWIN, J. (concurring in the judgment, but dissenting from part of the foregoing opinion). I dissent from the declaration made in the foregoing opinion that courts of probate have no power to set aside their own decrees, save in the cases where that power is given to them in express terms, and from the conclusion upon that ground that the Court of Probate could not admit the February will to probate, even if it was established that the decree admitting the earlier will to probate was procured by the fraud of one of the executors in destroying the later one.

It cannot be, in the nature of things, an uncommon thing that a man should die leaving a will, the existence of which is unknown to the parties in interest and for a time is not discovered. Most lawyers who have been long in practice have known such cases to occur. If, under such circumstances, an administrator be appointed on due notice, and the estate adjudged intestate, this ought not, in my judgment, to prevent the court which made these decrees from revoking them, under its general statutory authority and jurisdiction, should a will subsequently be found. General Statutes, § 203, however, would not authorize this, for it applies only to the revocation of *ex parte* orders. No other statute would be specially applicable to such a case except that allowing appeals to the Superior Court from any probate order; and it might well be that the time for any party aggrieved to appeal from the grant of administration had elapsed. Still greater would be the hardship, if the reason why the will was not found was that it had been fraudulently suppressed or destroyed by those interested in denying its effect.

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In the judgment rendered I concur, on the ground that the February will could not be admitted to probate without setting aside the probate of the December will, and that the latter, having been affirmed by the Superior Court, could not be so set aside.

WILLIAM H. WILLIAMS, STATE'S ATTORNEY, *vs.* LIVINGSTON W. CLEAVELAND, JUDGE OF PROBATE.

Third Judicial District, Bridgeport, October Term, 1903.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

No appeal lies from the refusal of a Court of Probate to allow an appeal; but such refusal may be reviewed upon mandamus proceedings against the judge of probate.

When a general guardian has been appointed by a Court of Probate, he is usually the proper person to represent the infant plaintiff in a civil action; but cases are not infrequent in which the infant may properly sue by next friend, notwithstanding the existence of such guardian.

The mere fact that the property of a minor is under the care of a guardian duly appointed by the Probate Court, and that he declines to appeal from a probate decree affecting property of which the minor is the sole heir, does not justify the Court of Probate in refusing to allow an appeal of the minor when duly taken by his next friend.

Whether the circumstances of the case are such as to permit the minor to prosecute the appeal by his next friend instead of by such guardian, and whether the next friend is a suitable person to represent the minor in the prosecution of such appeal, are questions for the sole consideration of the Superior Court to which the appeal process is returnable.

The facts in the present case reviewed and *held* to furnish a sufficient basis for action by the Superior Court which would sustain the probate appeal sought to be taken by the minor's next friend.

Under our practice it is not necessary that a *prochein ami* should receive authority from any court to enable him to commence an action in behalf of an infant.

A husband who has by antenuptial agreement renounced all claim to and interest in his wife's property, cannot be "aggrieved" (§ 406) by decrees of the Probate Court in relation to the settlement of

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her intestate estate; and therefore cannot appeal from such decrees.

The sole heir of an estate of a deceased person has the right, under § 406, to appeal from a probate decree authorizing the administrator to accept a certain sum in compromise of claims owned by the estate.

A parent is not entitled, as the natural guardian of his minor child, to the possession or control of the minor's property, either at common law or by statute (General Statutes, §§ 216 to 220).

The statute allowing a minor to appeal from a probate decree in his own name within twelve months after he arrives at full age (§ 408), does not prevent him from taking an appeal by next friend or guardian during his minority.

Under General Statutes, § 224, the guardian of property in this State owned by a nonresident minor has an authority, only, uncoupled with any legal title or interest in the property.

Argued October 29th, 1903—decided January 26th, 1904.

APPLICATION for a writ of mandamus requiring the respondent, as judge of probate, to allow an appeal from certain orders and decrees of the Court of Probate for the district of New Haven, brought to the Superior Court in New Haven County where the return of the respondent was adjudged sufficient upon demurrer (*Gayer, J.*), and judgment was rendered denying the application, from which the plaintiff appealed. *Error and cause remanded.*

John C. Chamberlain, for the appellant (plaintiff).

Henry C. White and *John Q. Tilson*, for the appellee (defendant).

HALL, J. The material facts of this case, as they appear of record, are these: Eliza T. White, who was domiciled in New York at the time of her death, died intestate, leaving property in New York and in Connecticut. Her estate in New York is being administered by an administrator duly appointed there, and in this State by an administrator *de bonis non*, James Kingsley Blake, duly appointed by the Court of Probate for the district of New Haven. Josiah J. White is the surviving husband of said Eliza White; and

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Frederic Hall White, a minor of about nineteen years of age, is the son of said Josiah and Eliza White, and the sole heir of said Eliza White. In 1897 the surrogate court of Kings County, New York, issued letters of guardianship of the property of said minor to the Long Island Loan and Trust Company of New York, which letters have not been revoked. In 1901 the Court of Probate for the district of Chatham, upon the nomination of said minor, appointed Ellsworth B. Strong guardian of the estate of said minor situated in Connecticut, and he is still acting in that capacity. Said Josiah White still remains the guardian of the person of his said son. In February, 1902, the Court of Probate for the district of New Haven authorized said administrator Blake to accept the sum of about $28,000, in compromise and settlement of certain claims of the estate of said Eliza White against the Brainard Quarry Company and the Shaler and Hall Quarry Company, corporations of this State, located in Portland in this State. In April, 1902, said Court of Probate accepted and approved the administration account of said Blake, showing funds of said estate in his hands to the amount of more than $30,000, a part of which was the money so received in compromise of said claims. In May, 1902, the said minor, Frederic White, by said Josiah White, as his father and as guardian of his person, and the said Josiah White as an individual, filed, in due form, an appeal to the Superior Court from said orders of the Court of Probate; said Frederic claiming in said appeal an interest in said estate as heir aforesaid, and said Josiah claiming an interest as surviving husband of said Eliza White. In June, 1902, said Frederic White by his next friend, J. Birney Tuttle, and said Josiah White, as surviving husband of Eliza White, filed, in due form, another appeal from said orders of the Court of Probate. Both of said appeals were disallowed by the Court of Probate.

The said minor personally desired to take an appeal from said orders, and in due season requested said Strong, guardian of his property in this State, to take an appeal from said order of compromise. Said Strong refused to take such

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appeal because advised by his counsel—who were also the attorneys for said Brainard Quarry Company and Shaler and Hall Company, in the matter of the claims of the estate of Eliza White against said companies—that it could not be successfully prosecuted.

The Supreme Court of the State of New York has authorized said Josiah White to retain said Tuttle to prosecute such appeals, and has ordered the said Long Island Loan and Trust Company, as guardian, to reserve from the property of said minor certain funds for the prosecution of said appeals.

The finding states that after a certain antenuptial agreement between said Josiah White and Eliza Hall (afterwards Eliza White) was produced and laid in evidence, showing that said Josiah White had renounced all claim which he might have had to his wife's property by reason of their marriage, and had agreed that in case of her death he would make no claim to any right or interest in any part of her estate, no further claim was made by him, or in his behalf, that he had any interest in said estate as surviving husband of said Eliza T. White.

The reason for not allowing said appeals, assigned by the respondent in his said return, is that the persons moving for the appeals have no interest in the subject-matter affected by the orders from which appeals are sought to be taken; Josiah White because of his antenuptial agreement renouncing all claim to his wife's property, and the others because the interests of Frederic White are protected by Strong, the guardian of the estate of said minor in Connecticut.

The Superior Court, upon the applicant's demurrer, held this return to be sufficient, and afterwards, having found the facts as above stated, rendered judgment denying the application for a peremptory writ of mandamus.

A separate discussion of the ruling upon the demurrer to the return to the alternative writ becomes unnecessary, since practically the same decision is involved in the final judgment rendered upon the facts found under the subsequent pleadings.

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As the law does not permit an appeal from an order of a Court of Probate disallowing an appeal, the proper method of obtaining a review of such refusal is by application for a writ of mandamus. If upon such proceeding it is made to appear that a party aggrieved by an order of the Court of Probate has, by himself or some person properly acting for him, within the time limited by law, requested the allowance of an appeal to the proper court from such order, and has given the required bond, the allowance of such appeal may be compelled by mandamus. *Elderkin's Appeal*, 49 Conn. 69–71; *Taylor* v. *Gillette*, 52 id. 216, 218; *Orcutt's Appeal*, 61 id. 378, 382; *Bassett* v. *Atwater*, 65 id. 355, 360.

It seems to be unquestioned that the antenuptial agreement laid in evidence shows that Josiah White had no interest in the estate of Eliza White as her surviving husband, and that he therefore, in such capacity, had no right to appeal from the probate orders in question. As natural guardian he was entitled to neither the possession nor control of his son's property, either at common law (*Kline* v. *Beebe*, 6 Conn. 494, 500) or by statute (General Statutes, §§ 216–220).

But Frederic White, as the sole heir of his mother, Eliza White, undoubtedly had such an interest in her estate as made him a "person aggrieved" by the orders of the Court of Probate, within the meaning of those words in § 406 of the General Statutes, and as gave him a right of appeal from such orders. *Norton's Appeal*, 46 Conn. 527; *Dickerson's Appeal*, 55 id. 223, 229; *Woodbury's Appeal*, 70 id. 455. The law permitting him to take an appeal in his own name within twelve months after he shall arrive at full age, does not prohibit him from taking an appeal by next friend or guardian during his minority. *Davidson* v. *Minor*, 1 Root, 275. But it is claimed that Strong, the guardian of the minor's property in Connecticut, was the only person by whom Frederic White could lawfully take the appeal. The Connecticut guardian was appointed under § 224 of the General Statutes, which provides that "when a minor residing without this state, and having no guardian within this state,

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shall own estate in this state, the court of probate for the district in which such estate or any part thereof may be, may appoint a guardian of such minor, who shall have the charge and management of such estate." By his appointment under this statute the Connecticut guardian acquired no title to the property of the ward. He had an authority only, uncoupled with an interest. The legal title to both real and personal property remained in the ward. *Welles* v. *Cowles*, 4 Conn. 182, 189; *Olmsted* v. *Olmsted*, 38 id. 309, 322. Neither the *prochein ami* nor the guardian *ad litem* are the real parties to the actions which they may prosecute or defend. Such suits are conducted by them in the name of the infants whom they represent, and not in their own names. *Morgan* v. *Potter*, 157 U. S. 195; *Sanford* v. *Phillips*, 68 Me. 431, 432; Woerner's Amer. Law of Guardianship, p. 69, § 22.

The appeal sought to be taken in behalf of Frederic White was, therefore, not properly disallowed because of a want of interest in the real appellant, Frederic White, in the subject-matter of the orders of the Court of Probate. The refusal to allow an appeal can only be justified upon the ground that the minor moved for the appeal in the Court of Probate, and proposed to prosecute it in the Superior Court, by one who could not lawfully represent him.

At common law, infants were required to both sue and defend by guardian. In England they were authorized by statute to sue by next friend as well as by guardian. Westminster 2, Cap. 15 (13 Edw. 1). The rule established by the statute of Westminster became part of our common law. *Apthorp* v. *Backus*, Kirby, 407, 409; *McCarrick* v. *Kealy*, 70 Conn. 642, 646. The remedy thus given has been held to be cumulative, leaving it optional with the infant to sue either by guardian or next friend. *Miles* v. *Boyden*, 3 Pick. 213; *Chudleigh* v. *Chicago, R. I. & P. Ry. Co.*, 51 Ill. App. 491, 496.

The powers and responsibilities of a next friend and of a guardian, in the prosecution of a suit for an infant, are the same. Indeed a guardian, in bringing an action for his

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ward, acts in the capacity of next friend of the ward, although not so designated in the complaint. *Simpson* v. *Alexander*, 6 Cold. (Tenn.) 619. The guardian and next friend in conducting a civil action are a "species of attorney whose duty it is to bring the rights of the infant to the notice of the court," and the authority of each is limited to the proceeding in which he is appointed. Wœrner's Amer. Law of Guardianship, pp. 64-71, §§ 21, 22. But while the court before which the action is pending may appoint a next friend to represent the infant plaintiff, a guardian *ad litem* is only appointed by such court for the defendant. *Clark* v. *Platt*, 30 Conn. 282, 285.

An infant having no guardian may always sue in a civil action by next friend. When a general guardian has been appointed by a Court of Probate he is usually the proper person to represent the infant plaintiff in such action. But there are frequently cases when the infant may properly sue by next friend, notwithstanding the existence of such guardian, as when the guardian is absent, or is unwilling or unable to institute or prosecute the required action or appeal, and especially when, though declining to take such action himself, he does not forbid such proceeding, or when he is disqualified by interest hostile to that of the infant, or is for other reasons an improper or unsuitable person to prosecute such actions in behalf of the ward. In such cases, and in the absence of any statute requiring infants to sue by probate guardian, there seems to be no good reason why actions and appeals may not at least be commenced by an infant by next friend. Reeve's Domestic Relations, 264; Wœrner's Amer. Law of Guardianship, p. 65, § 21; *Thomas* v. *Dike*, 11 Vt. 273; *French* v. *Marshall*, 136 Mass. 564; *Holmes* v. *Field*, 12 Ill. 424; *Chudleigh* v. *Chicago, R. I. & P. Ry. Co.*, 51 Ill. App. 491; *Patterson* v. *Pullman*, 104 Ill. 80; *Segelken* v. *Meyer*, 94 N. Y. 473; *Hooks* v. *Smith*, 18 Ala. 338; *Deford* v. *State*, 30 Md. 179; *Baltimore & Potomac R. Co.* v. *Taylor*, 6 App. Cas. (D. C.) 259; *Robson* v. *Osborn*, 13 Tex. 298; *Martin* v. *Weyman*, 26 id. 460; *Hicks* v. *Hicks*, 79 Wis. 465, 470.

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In the case before us, the guardian of the minor's estate in Connecticut has refused to take the appeal for the reason before stated, although requested to do so by the minor, who is nineteen years of age, and who may by law choose his own guardian, and although the father of the minor desires the appeal to be taken, and the taking of the appeal is approved by the proper court of the domicil of the guardian, and by the guardian of New York, and although sufficient funds appear to have been provided for carrying on the appeal without expense to the Connecticut guardian. The New York court and the persons above named appear also to have authorized the appeal to be taken by Frederic White by the said Tuttle as next friend. While the guardian has thus declined to take the appeal by himself, he has not forbidden it to be taken by next friend.

Unless the minor can appear by himself or by next friend in taking and prosecuting the appeal, he will be deprived of the right of appeal until he arrives at full age. Under these circumstances we think the Superior Court, to which the appeal was sought to be taken, might rightly have held that the appeal was properly taken by the minor by his next friend, and that the next friend named in the appeal was a suitable person to represent the minor in the prosecution of the appeal. This being so, the minor was at least entitled to commence the process of appeal to the Superior Court by his next friend, and to have his appeal allowed and entered upon the docket of the appellate court.

Under our practice it is not necessary that a *prochein ami* should receive authority from any court to enable him to commence an action in behalf of an infant. *McCarrick* v. *Kealy*, 70 Conn. 642, 646. The fact that the minor had a guardian, if of any importance, was only pleadable in abatement in the Superior Court; *Apthorp* v. *Backus*, Kirby, 407, 410; and, upon such plea, the court could have permitted the guardian to appear (*Clark's Case*, 2 Root, 383), or could have directed his name to be substituted for that of the next friend. General Statutes, §§ 621, 622, 623.

It was not the province of the Court of Probate to decide

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whether an appeal ought to be taken from its own decrees, nor whether the circumstances of this case were such as to permit the minor to prosecute it by next friend, instead of by the guardian appointed by the Court of Probate of the district of Chatham, nor whether the next friend who moved for the appeal was a suitable person to represent the infant in the prosecution of the appeal. These were questions for the consideration of the Superior Court to which the process of appeal was returnable. *Holmes* v. *Field*, 12 Ill. 424; *Chudleigh* v. *Chicago, R. I. & P. Ry. Co.*, 51 Ill. App. 491; *Patterson* v. *Pullman*, 104 Ill. 80; *Baltimore & Potomac R. Co.* v. *Taylor*, 6 App. Cas. (D. C.) 259, 270; *Price* v. *Phœnix M. L. Ins. Co.*, 17 Minn. 497. In *Apthorp* v. *Backus*, Kirby, 407, 409, it was said: "It is for the benefit of infants who have no guardians, or such as from particular circumstances cannot or will not sue for them, as the case may require, to admit their suits by *prochein ami;* whose power and responsibility relative thereto, are the same as guardians. And there can be no danger to the infant from such practice; for the court, under whose inspection the suit is prosecuted, is bound to take care for the infant; and, if the *prochein ami* is not a responsible and proper person, or misconducts the suit, or institutes one not apparently for the benefit of the infant, will displace him, and, if need be, appoint another."

As the minor had a sufficient interest in the estate of Eliza White to give him a right of appeal from the orders in question, and as by his next friend, authorized as before stated to appear for him, he exercised that right within the time limited by law, and furnished the required bond, he was entitled to an appeal, under the statute, and the fact that the appeal was not taken by the guardian of his property in this State was not a sufficient reason for refusing it. *Taylor* v. *Gillette*, 52 Conn. 216, 218; *Orcutt's Appeal*, 61 id. 378, 384.

There is error in the judgment of the Superior Court and it is reversed, and the case remanded with direction that a peremptory writ of mandamus be issued requiring the

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respondent to allow an appeal from said orders by said Frederic Hall White by such next friend as he may choose to prosecute such appeal.

In this opinion the other judges concurred.

The City of Waterbury *vs.* The Platt Brothers and Company.

Third Judicial District, Bridgeport, October Term, 1903.
Torrance, C. J., Baldwin, Hamersley, Hall and Prentice, Js.

Pursuant to an Act relating to the disposal of its sewage (Special Acts of 1903, page 179), the plaintiff applied to a judge of the Superior Court for the appointment of a committee to estimate the amount of compensation which should be paid to the defendant for any damage, loss or injury which it had already suffered by reason of the acts of the plaintiff in disposing of its sewage in the Naugatuck River—which damages were alleged to be substantial in amount—and to fix all future damages at a sum to be paid annually so long as the plaintiff might continue to cause such damage. *Held:*—

1. That while the Act assumed the existence of a power in the city, under its charter, to condemn the property of lower riparian owners for the public use of city sewage, and extended that power to owners of property on the Naugatuck River, its provisions were confined to prescribing a mode for the condemnation of such property in lieu of the mode theretofore existing.
2. That the clause of the Act authorizing the compensation to be fixed at a sum to be paid annually during a stated number of years, or during the continuance of the city's use, could be upheld only by construing it as applicable to cases in which the parties in interest agreed to that method of payment; and therefore such construction, which was reasonable and consistent with the validity of the Act, must be adopted.
3. That the provision in respect to the assessment of past damages by a committee, must also be treated as permissive rather than compulsory; for otherwise it would deprive the landowner of his right to a trial by jury, and be unconstitutional for that reason.

It is not to be assumed that a city, having condemned the property of

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riparian owners for city sewage, will so improperly or negligently use it as to create a public nuisance.

The right of a landowner adjoining a stream, to have the water flow over his land in its accustomed manner, is not a mere easement or appurtenance, but a right inseparably annexed to the soil; and a taking of that right is to that extent a taking of his property in the land.

The question whether a necessity exists for taking private property for a particular public use is one for the legislature, whose decision is ordinarily final; but what constitutes the "just compensation" essential to be made in order to complete the taking, is a judicial question, which the legislature cannot determine.

"Just compensation" means a fair equivalent in money, which must be paid at least within a reasonable time after the taking; and it is not within the power of the legislature to substitute for such present payment future obligations, bonds, or other valuable security.

The right of trial by jury cannot be destroyed or violated by the legislature under the guise of providing a new or modified remedy for the enforcement of a legal right.

Argued November 5th, 1903—decided January 26th, 1904.

APPLICATION for the appointment of a committee to determine what compensation should be paid to the defendant for loss or damage already sustained, and which might be sustained thereafter, by the riparian establishment of the defendant, by reason of the discharge of the plaintiff's sewage into the Naugatuck River, brought to and tried by the *Hon. Ralph Wheeler*, a judge of the Superior Court, upon demurrer to the application. The judge sustained the demurrer and dismissed the application, and the plaintiff appealed. *No error.*

Lucien F. Burpee, for the appellant (plaintiff).

John W. Bristol, for the appellee (defendant).

HAMERSLEY, J. In 1884 the city of Waterbury, with permission of the legislature, constructed a system of sewers whereby the *excreta* and noxious refuse accumulated by its inhabitants were collected and, together with the surface drainage, discharged into the Naugatuck River.

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In 1891 Platt Brothers and Company, owner of land and a manufacturing plant on the river below the city of Waterbury, brought an action against the city to the Superior Court, claiming an injunction against such use of the river and damages for the special injuries resulting therefrom. The court rendered judgment, awarding damages to the plaintiff and granting an injunction. The judgment was affirmed by this court in 1900. *Platt Bros. & Co.* v. *Waterbury*, 72 Conn. 531.

We then decided that such use of the river was an unlawful invasion of the property rights of Platt Brothers and Company, which the legislature had not authorized, and could not authorize except by providing for proceedings to appropriate the property for the public use of sewering the city of Waterbury, upon payment of just compensation for the property thus taken. The principle announced had been settled in other cases, and is not open to question. *Nolan* v. *New Britain*, 69 Conn. 668; *Morgan* v. *Danbury*, 67 id. 484. We expressed the opinion that the charter of the city of Waterbury authorized the city to institute proceedings for condemning the property of Platt Brothers and Company for the public use specified, stating, however, that a decision on that point was not material to the disposition of the case. Subsequently the city brought an application to a judge of the Superior Court asking the condemnation of the Platt Brothers and Company property for a period of five years. The application admitted that the use of the Naugatuck River for conveying the accumulated filth of the city to the premises of Platt Brothers and Company was not necessary to the public use of sewering the city, and alleged that the city intended to and would provide a different method for disposing of said sewage within a period of five years; that it would be compelled to use the river for that purpose during such period; and therefore asked that the property of Platt Brothers and Company be taken for this temporary use, and compensation be awarded for such temporary taking. The application was dismissed because the city's charter did not authorize it to condemn property for such a temporary use,

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and the judgment of dismissal was affirmed by this court. *Waterbury* v. *Platt Bros. & Co.*, 75 Conn. 387. In this particular the statute remains unchanged.

The charter of the city of Waterbury (6 Special Laws, p. 802; 9 id. p. 233) authorized the municipality to provide for the construction of drains and sewers, and for compelling its inhabitants to use such sewers for the prevention of accumulations of filth dangerous to public health, including the authority belonging to a riparian landowner to drain into the Naugatuck River in such manner as would not injure the property of other owners in the water of the river.

The right of a landowner to have the water of a stream covering his land flow in its accustomed manner, exists in connection with the rights of other landowners over whose land the stream flows, but it is not an easement or appurtenance; it is inseparably annexed to the soil. A taking of that right is to that extent a taking of his property in the land. *Nolan* v. *New Britain*, 69 Conn. 668, 681; *Wadsworth* v. *Tillotson*, 15 id. 366, 373. When such property is taken for the public use of sewerage, the public acquires the right to use the water of the stream for the conveyance of its sewage, subject to the rules governing the use of property held for a public use. The property thus taken is carved out of the owner's estate, and is in the nature of an easement imposed upon his land through this compulsory sale of his property. Like other property taken for public use, it may revert to the owner upon the abandonment of that use.

In 1881 amendments to the city charter authorized the city of Waterbury to construct a particular system of sewers in a particular way; to establish a fund to defray the expense of that construction and of the extension of main sewers beyond the city limits; to take property for the purposes of the Act; and provided a mode for condemning the property needed for said purposes. 9 Special Laws, pp. 233–237.

In 1903 another amendment of the charter was passed. Special Laws of 1903, pp. 179, 180. This Act plainly assumes a power in the city, conferred by its existing charter,

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to take the property of the lower riparian owners for the public use of sewering the city, by imposing upon their land the burden or easement involved in the public right to use the water of the river for conveyance of sewage from the city, and so removes, for the future, any doubt as to the meaning of the charter that might have been entertained before the passage of this amendment. Beyond affirming that the existing power to take property for the purpose of sewering the city shall include the property of lower riparian landowners on the Naugatuck River—and possibly other landowners—the Act is confined to providing a mode for condemning such property, in lieu of the previously existing mode.

The present application, for the condemnation of Platt Brothers and Company's property, is brought in pursuance of this last amendment. The allegations of the amended application, stripped of some surplusage and briefly stated according to legal effect, are these: (1) Platt Brothers and Company own a tract of land on the Naugatuck River about two miles below the city of Waterbury, with a water privilege whereon is a manufacturing plant. (2) Since 1884 the city of Waterbury has at various times, by means of the water of the Naugatuck River, conveyed to and upon the said premises filthy and noxious substances, discharged into the river from its sewers, whereby said Platt Brothers and Company have been greatly damaged. (3) The city of Waterbury has found it necessary and desirable to discharge into the Naugatuck River the sewage accumulated by its inhabitants and collected by the sewers it has constructed or may construct in pursuance of legislative permission, and to use the waters of said river for the conveyance of said sewage to and past the above described land, and for that purpose it is found necessary and desirable to take the property of said Platt Brothers and Company as above described. (4) Said city and said Platt Brothers and Company have disagreed as to the amount of compensation to be paid for the taking of said property, and as to the amount of damages that should be paid for the wrong described in paragraph 2. The prayer

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for relief asks the appointment of a committee to examine the premises and to determine the amount the city shall pay Platt Brothers and Company in settlement of the damages they have suffered by reason of the wrongs described in paragraph 2; and to ascertain and determine the just compensation for the property to be taken as aforesaid, and to determine that just compensation by fixing the amount of an annual payment which shall be paid by the city to Platt Brothers and Company so long as the city continues to use the property for the public purpose for which it is taken.

The respondents demurred to the application and prayer for relief, and the trial judge sustained the demurrer; and no further pleadings being filed, rendered judgment dismissing the application. The rulings of the judge upon the demurrer are the only reasons of appeal assigned.

Perhaps the principal ground of demurrer is that which affirms the insufficiency of the application and prayer for relief, in that it asks the compensation to be awarded for taking the respondent's property to be fixed at a sum to be paid annually so long as the property taken shall be used for the public use specified. The applicant claims that this mode of making compensation is authorized by the Act of 1903. If so, the Act to that extent must be held invalid.

The necessity of taking property for a particular public use is a legislative question, and ordinarily the decision of the legislature upon that question is final. What is the just compensation necessary to be made in order to complete the taking of property, is a judicial question, which the legislature cannot determine. *New York, N. H. & H. R. Co.* v. *Lony*, 69 Conn. 424, 437. So when the legislative Act directs the assessing tribunal to ascertain the "value of the land," or uses any phrase that might imply a restriction of the judicial powers, it must be held as equivalent to a direction to judicially ascertain the just compensation for the property taken, or else the Act will be void. *Bigelow* v. *West Wisconsin Ry. Co.*, 27 Wis. 478, 486.

"Just compensation" means a fair equivalent in money, which must be paid at least within a reasonable time after the

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taking, and it is not within the power of the legislature to substitute for such present payment future obligations, bonds, or other valuable security. *Butler* v. *Sewer Commissioners*, 39 N. J. L. 665; *Bloodgood* v. *Mohawk & H. R. Co.*, 18 Wend. 9, 35; *Sanborn* v. *Belden*, 51 Cal. 266; *Burlington & C. R. Co.* v. *Schweikart*, 10 Col. 178.

The Act of 1903, in authorizing a finding of the amount of compensation for the damage which any person shall suffer by reason of the future acts of the city in disposing of its sewage, authorized the finding of the amount of just compensation for the property taken for the public use of sewering the city, and does not control the duty of the court nor limit its power in settling what is just compensation. In authorizing the compensation for all future damages to any person, to be fixed at a gross sum to be paid at a time named, the Act authorizes the amount of just compensation, as judicially determined, to be paid on a day certain within a reasonable time. In authorizing the alternative course—of fixing the compensation at a sum to be paid annually during a stated number of years, or during the continuance of the use—the Act exceeds the legislative power, unless the alternative course is authorized only in pursuance of an agreement between the parties.

Reading the Act in connection with the existing charter, we think this construction of the Act is a reasonable one, and that if a different construction could be regarded as reasonable it would involve the invalidity of the Act; and therefore the reasonable construction consistent with the validity of the Act must be adopted.

Another ground of demurrer questions the right of the applicant to ask the appointment of a committee to assess damages for the wrongs mentioned in paragraph 2 of the application. In charters authorizing municipal or private corporations to condemn property for the public use of providing a supply of pure water, language of doubtful import has not infrequently been used. In these cases the property to be taken is mainly the water of a natural stream, which belongs to owners of land through which the stream flows.

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The corporation having acquired some land on the stream, has a right to take so much of the water as belongs to the owner of that land. If it takes more, it invades the rights of other landowners on the stream, and every day's continuance of such wrongful diversion of water renders it liable for a suit for injury so caused. *New Milford Water Co.* v. *Watson*, 75 Conn. 237, 250. Proof of the legal injury implies some damage. *Watson* v. *New Milford Water Co.*, 71 Conn. 442, 450. This invasion of legal rights may often be continued for a long time without causing any substantial and specific damage, and so it may not infrequently happen that a water company, authorized to condemn water rights, will continue for a longer or shorter time an unlawful, though not substantially injurious, diversion of water before commencing proceedings for condemnation. There may be cases where the postponement of condemnation proceedings would seem to be in the interest of all concerned. It is doubtless in view of this condition that the legislature, in authorizing the acquirement of such rights, has, in various charters, provided that either party may apply for the appointment of a committee to estimate the damage, past and future, caused by a specified diversion of water. So far as such legislation is permissive, it would seem convenient and unobjectionable; but if it must be treated as compulsory, depriving a party of all remedy for substantial past injuries, except through a proceeding for condemnation, its validity has been doubted. *New Milford Water Co.* v. *Watson*, 75 Conn. 237, 249; *Norwalk* v. *Blanchard*, 56 id. 461, 463.

The question now before us may differ in certain ways from any likely to arise in the application of charter provisions like those mentioned. The applicant alleges that it has committed clearly tortious acts in respect to the property of the respondent, from which the respondent has suffered substantial, actual damage, and asks the appointment of a committee to assess the amount of that damage and direct its payment in full discharge of the existing liability to the respondent; claiming that the Act of 1903 authorizes such a proceeding. There may be several aspects to a legisla-

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tive Act of this kind. It is sufficient for present purposes to consider one. The respondent has a valid cause of action against the applicant; the only process known to the law for trying that cause of action and settling the amount due to the respondent is a civil action in which the facts in issue must be tried by a jury unless the right to a jury trial is waived. The Act, if compulsory, deprived the respondent of a trial by jury. Does it deprive him of the right of trial by jury within the meaning of the constitutional guaranty, "the right of trial by jury shall remain inviolate?" Const. of Conn. Art. I, § 21. It is true that the legislative power of creating and modifying remedies for the enforcement of rights is a most necessary and exceedingly broad power, and that its legitimate use may in some instances incidentally limit the field of jury trial. But it is not true that under the guise of providing a new or modified remedy, the right of trial by jury can be destroyed or violated. Should a law be enacted that all actions to recover damages for trespass to land must be brought to a court of equity, the Act would be void unless it could be held to impliedly direct the court to refer issues of fact to a common law jury for trial. It is difficult to see how the Act in question differs in substance from such a law, beyond the limitation of its operation to a small selected class. It may be suggested that there is a difference in principle, in that the trial of facts by a committee of the court is limited to cases where the tortious act is admitted, and the only questions of fact to be tried relate to the amount of damages. It is true that in this State the assessment of unliquidated damages upon default or demurrer overruled in an action at law, is made by the court; and we have held that the right of trial by jury, as it existed at the adoption of our Constitution, did not include the right to have the facts involved in such an assessment of damages determined by a jury. But we have not held, and it is not true, that this practice of the assessment of damages by the court upon default of the defendant in an action at law extended beyond the single instance mentioned, and we do not think that the existence of this practice can justify

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the conclusion that the trial of questions of fact affecting the amount of damages was not within the field of jury trial, which is secured to every citizen by the Constitution. Unless this is so, it would be difficult to see why the legislature might not provide that in every action at law for the recovery of unliquidated damages, the jury should decide only those facts that determined the defendant's liability, and that the court should decide the facts that determine the amount of damages. Such legislation would certainly radically alter our system of jury trial, and inevitably do violence to the right of trial by jury. A right determination of the extent of an injury is no less important to its victim than a right determination of the existence of an injury. The guaranty of a jury trial extends to both, and the practical limitation of the guaranty involved in our ancient practice of assessing damages by the court, when a defendant submits to a default, furnishes no ground for new and different limitations, even if they are in some respects analogous.

If the authority given by the Act of 1903 for the determination of the amount due for such injuries as are described in paragraph 2 of the application, by a committee of the court appointed to fix the compensation for the property taken, is permissive, the provision is unobjectionable and may serve the interest and convenience of the parties; otherwise it is invalid. We think it may properly be treated as permissive; but in either case the applicant is not entitled to have the committee assess the amount of its liability to the respondent for its past wrongs, against the objection of the respondent, whether taken by demurrer or otherwise.

If the application and prayer for relief shall be amended, as it may be, so as to remove the defects which we have already indicated, it will not be open to the objections raised in the remaining ground of demurrer.

The legislature has the power to authorize, and has authorized, the city to acquire for the public use of sewering, by agreement with landowners on the Naugatuck River, or by condemnation of their property, the right to utilize the

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flowing water of said river for that purpose. It cannot be assumed that, having acquired such property, the city will so improperly or negligently use the property it has acquired as to inflict on the property of others any injury that is not incident to the lawful employment of its own property for such public use. If a condition should ever arise where it seems impossible for the State to afford that protection which it owes to the health and lives of the inhabitants of a city, without using means that must subject other portions of the public to the very dangers from which the inhabitants of the city are thus relieved, a serious problem will be presented for legislative solution, involving questions of legislative power which the courts may eventually be obliged to determine. There is at this time no occasion to consider such questions.

There is no error in the judgment appealed from.

In this opinion TORRANCE, C. J., HALL and PRENTICE, Js., concurred.

BALDWIN, J. (concurring in the judgment, but dissenting from part of the opinion). The legislative power of this State is vested in the General Assembly subject to fewer restrictions than those prescribed by the constitutions of most of her sister States. The Act of 1903, passed for the relief of the city of Waterbury, provides that if it cannot agree with the owner of any estate or interest which it desires to appropriate for the purpose of disposing of its sewage, as to the amount of compensation to be paid for the same, any judge of the Superior Court, on the application of either party and notice to the other, "shall appoint" a committee to examine the premises and "estimate the amount of the compensation which shall be paid to any person for any damage, injury, or loss which he has or shall suffer by reason of the past or future acts of said city in disposing of its sewage; and said committee may fix such compensation for all future damages to any person either at a gross sum to be paid within a time named, or at a sum to be paid annually

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either during a stated number of years or so long as said city shall continue to cause such damage, injury, or loss;" their doings to be reported to the judge who appointed them, for approval.

Following this statute, the city applied to *Judge Ralph Wheeler* for the appointment of such a committee "to estimate the amount of compensation which shall be paid to the said Platt Brothers & Company for any damage, injury, or loss which it has suffered by reason of the past acts of said city in disposing of its sewage in the Naugatuck River; and to fix all future damages at a sum to be paid annually to said Platt Brothers & Company by said city, so long as said city shall continue to cause such damage, injury, or loss."

The city thus proposed to determine the compensation to be paid to the defendant for any estate and interest which it had already appropriated to its own use for the disposal of its sewage, and also for such as it intended to appropriate and should thereafter appropriate to the same use for a period which it left indefinite. I agree with my associates that the statutory provision for estimating the compensation to be paid for any past appropriation could only become operative by the consent of the defendant. I disagree with them as to the total invalidity of the provision for estimating the compensation to be made for a future appropriation.

It is often necessary to use or to take private property temporarily for public purposes. The common law allowed this to be done without compensation in certain cases, as where travelers over a foundrous highway were allowed to proceed over land of the abutting proprietor. The General Assembly was of opinion that it might be necessary for the plaintiff to pollute temporarily the defendant's property with its sewage, and that this necessarily might continue for an indefinite number of years. The city is an important instrument of government. It is not for the public interest that it should take permanently what it needs only temporarily. It was therefore competent for the legislature to authorize a temporary taking of the defendant's property, on making just compensation. The statute, under which such authority is

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now claimed by the plaintiff, must be so construed, if it be reasonably possible, as to support its validity. In my opinion it can be construed as authorizing a taking for one year, if just compensation for one year's use be made at the commencement of such year. The greater includes the less. One year is none the less a stated number of years, because it is the least number. In authorizing compensation to be fixed at a sum to be paid annually during a stated number of years, the legislature seems to me to have authorized compensation for a year's appropriation of the riparian rights, to be assessed in such a proceeding as this, at a sum to be paid at the beginning of that year.

As one of the grounds specified for the demurrer was that a committee could not be appointed simply to make the estimate asked for in the application; as that mode of estimate is objectionable on the grounds stated in the opinion of the court; and as the plaintiff offered no amendment of its application, though ample opportunity was given for it, I concur in the judgment. I dissent from the conclusion that the Act of 1903 is wholly in excess of the legislative power, except so far as parties may consent to its provisions.

CHARLES THOMAS, ADMINISTRATOR, *vs.* MARY CASTLE ET AL.

First Judicial District, Hartford, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A testator, who died in 1890, gave the residue of his property in trust for the benefit of his son, *W*, during the latter's life, with power in the trustee to draw on the principal if necessary for *W*'s comfortable support, and, if considered advisable, to pay the whole or any portion thereof to *W* upon approval of the Court of Probate. If *W* died before the trust property was expended, the balance was to go in fee to the lawful issue of his body then living, if any, otherwise to be "disposed of in accordance with the laws in regard to intestate estates." *W*, who was the testator's sole heir at law, died intestate in 1899, before the trust property was exhausted,

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leaving no wife or lineal descendant. In a suit to construe the will it was *held*:—

1. That the language of the will clearly limited the trust estate to one for *W*'s life.
2. That the gifts over upon *W*'s decease, if valid, were, so far as they related to real estate, contingent, alternate remainders in fee; while the personalty followed the same course in effect, since remainders therein, dependent upon a life estate, might be created by will.
3. That upon the death of *W* without issue this remainder, if a valid gift, became a vested one in those entitled to take the property.
4. That if the clause directing the disposal of the balance of the trust property in accordance with the laws relating to intestate estates, was to be understood as a declaration of intestacy, the property would on *W*'s death at once pass to his estate; if it was to be construed as expressing a gift under the will to the heirs at law of the testator as determined at *W*'s death, the attempted gift would be void as contravening the then existing statute against perpetuities, and the property would, as before, pass as intestate estate; and lastly, if interpreted as a testamentary gift to the general heirs at law of the testator existing at his death, the result would be the same, unless, indeed, *W* could be excluded by implication from taking as an heir—a course not warranted by the language of the will; and therefore in any event *W*'s administrator was entitled to the property as part of his estate.

Submitted on briefs January 8th—decided January 26th, 1904.

SUIT to determine the construction of the will of Orlando Lewis of Roxbury, deceased, brought to and reserved by the Superior Court in Litchfield County, *Elmer, J.*, upon a finding of facts, for the advice of this court.

The testator died in 1890, possessed of both real and personal estate not ancestral. His will, duly probated, after providing for the payment of his debts, funeral expenses, and certain legacies, contained the following pertinent provisions:—

"*Fourth.* All the remainder of my property of every description, both real and personal, of whatsoever the same may consist, or wherever it may be situated, I give in trust for the use and benefit of my son William E. Lewis, meaning hereby that my said son William E. Lewis shall be entitled to the use, rents, profits, and income thereof during his life; and if such rents, profits, and income shall not be sufficient

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for his necessary support, then and in that event the trustee shall have full power and authority to use out of the principal what may be necessary for the comfortable support of my said son William E. Lewis so long as he shall live; and in the event of his death it is my will that so much of said trust property as is necessary be used to defray the funeral expenses of said William E. Lewis and to erect a suitable headstone at his grave.

"*Fifth.* It is my will, and I do hereby expressly declare, that the trustee for the benefit of my said son William E. Lewis have full power and authority to grant, bargain, sell, and convey any or all of the real estate that I may die seized and possessed of to any person or persons and their heirs forever in fee simple, and to execute all necessary deeds and conveyances for the purpose of perfecting such sale.

"*Sixth.* After the decease of my said son William E. Lewis before said trust property so given in trust as aforesaid shall be expended, then and in that event it is my will that the balance then remaining shall be and belong absolutely to the issue of the body of the said William E. Lewis, if any there be at the time of the decease of the said William E. Lewis, begotten in lawful wedlock; and in the event of the death of the said William E. Lewis without leaving issue of his body as aforesaid, then and in that event it is my will that the trust property so given as aforesaid remaining at his decease shall be disposed of according to the statute laws of this State relating to intestate estates. . . .

"*Eighth.* In the event my said son shall not survive me, then, and in that event it is my will and I do direct that my property after my decease be disposed of in accordance with the laws in regard to intestate estates.

"*Ninth.* It is my will and I do by these presents give to the trustee full power and authority whenever in his judgment he deems it advisable, to pay the whole or any part of the trust property given as aforesaid to my said son William E. Lewis with the approval of the Court of Probate."

The testator left surviving him no wife, or lineal descend-

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ants save only said William E. Lewis, his son, and no brother or representative of brother, or sister or representative of sister, save only one sister, Sarah Polly. He was also survived by five aunts, some maternal and others paternal.

Said Sarah Polly died intestate in 1895, leaving surviving her no husband, no lineal descendant, no brother or sister, and no representative of any brother or sister, except the said William E. Lewis.

Said William E. Lewis died intestate, August 3d, 1899, leaving surviving him no wife, or lineal descendant. He was survived by certain cousins. Two of the aunts of the testator above referred to also survived William. One still lives. The other has died leaving a child.

The testator's estate was duly settled and all claims against it and legacies were paid. After the payment of the funeral expenses of said William E. and the cost of the erection of a monument, there remained of the trust estate created by the portions of the will recited, in the hands of the plaintiff trustee, several thousand dollars in value of the estate, about equally divided between real and personal.

Frank W. Marsh, for the plaintiff.

James Huntington and *Arthur D. Warner*, for Miranda Gibbs et al.

Alfred B. Beers and *Carl Foster*, for Theodore Gray et al.

Daniel Davenport and *John F. Addis*, for Mary Castle et al.

PRENTICE, J. This will creates an estate for life for the benefit of William E. Lewis. Its language plainly limits the trust estate to one for the beneficiary's life. There are no words appropriate to a gift absolute or in fee, which subsequent provisions attempt to limit, cut down, or condition. The gifts over which are contained in the sixth paragraph, assuming them to be operative and valid, are, in so far as they relate to realty, contingent remainders. Both gifts de-

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pend upon events which may never happen. The right to enjoy the remainder estate, whether in the present or future, is wholly uncertain as to each class of persons named as possible beneficiaries. 4 Kent's Comm. (14th Ed.) 206; 2 Cruise's Digest, 269; *Farnam* v. *Farnam*, 53 Conn. 261; *Austin* v. *Bristol*, 40 id. 120; *Doe* v. *Considine*, 6 Wall. 458, 476. "If the remainder is limited to children living at the death of the life tenant, the remainder is contingent until the death of the life tenant." Tiedeman on Real Property, § 402. The first remainder being a contingent one and of a fee, the second limitation dependent upon it must necessarily be contingent. 2 Wash. on Real Property (6th Ed.), § 1576; 2 Cruise's Digest, 279. These contingent remainders are alternate remainders. Each is of a fee, but only one is intended to, or can by any possibility, take effect. The second named is a substitution for the first and not subsequent to it. The one fee is in no way limited upon the other. If the first attaches, the second utterly fails. Such an alternative limitation has been called a limitation with a double aspect. None of the conditions which compel a resort to the doctrine of executory devises to save the second gift exist. 2 Wash. on Real Property (6th Ed.), § 1575; Tiedeman on Real Property, § 415; 1 Fearne on Remainders, 373; 2 Cruise's Digest, 280; *Luddington* v. *Kime*, 1 Raymond Ld. 203; *Crump* v. *Norwood*, 7 Taunt. 362; *Doe* v. *Holme*, 2 Wm. Bl. Rep. 777; *Dunwoodie* v. *Reed*, 3 Serg. & R. (Pa.) 435, 452. The situation with respect to the personalty is the same in effect, since remainders therein, dependent upon a life estate, may be created by will. *Griggs* v. *Dodge*, 2 Day, 28, 51; *Hudson* v. *Wadsworth*, 8 Conn. 348, 361; *Langworthy* v. *Chadwick*, 13 id. 42, 46. The contingency contemplated in the first of the alternative provisions never happened nor can happen. The contingency contemplated in the second of the provisions has happened. It happened, as it was bound to do if it happened at all, the moment the life estate ended. 2 Blackstone's Comm. (4th Ed.) 168; 1 Swift's Digest, s. p. 96. The remainder thereupon—still assuming that the will contains an attempted gift of the remainder and a valid one—became a

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vested one. The seizin of the real estate, if we apply common-law conceptions and requirements, which had been supported by the intervening life estate then at once passed to the owners in fee designated by the will. In like manner the title to the personalty passed. What in both cases had theretofore been contingent then became vested.

There remains to be considered what interpretation and effect is to be given to the language of that portion of the sixth paragraph of the will which deals with the disposition of the trust property upon the death of William E. Lewis without issue of his body surviving. If it is to be understood as a declaration of intestacy, and that in the event specified the property should be treated and disposed of by the law as intestate estate, the result would be simple. As William E. was the testator's sole heir at law, the property would, upon the former's death, pass at once to his estate. If the language is to be construed as expressing a gift under the will, and that gift to the heirs at law of the testator to be determined at and as of the time of the vesting, to wit, the death of William E., the attempted gift would be in contravention of the statute against perpetuities and therefore void. *Rand* v. *Butler*, 48 Conn. 293; *Tingier* v. *Chamberlin*, 71 id. 466. Intestacy with the consequences already indicated would thereupon result. If, in the other possible alternative, the language is to be interpreted as expressing a gift under the will in the event stated, and that gift to the general heirs at law of the testator, that is, his heirs at law as of the time of his death, the same practical result as before would be reached unless, as the consequence of an implication arising from the provisions of the will, the son William E. should be excluded from taking as an heir at law. There is nothing in the will to indicate such an intention on the part of the testator, unless it be by implication from the creation of the life estate in trust for his benefit. In *Rand* v. *Butler*, 48 Conn. 293, 298, where there was precisely the same situation, we said that of themselves such facts were clearly insufficient to base thereupon an implication of exclusion. In that case it appeared that the will

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gave the remainder to the testator's "heirs at law," using the plural, whereas the beneficiary of the life estate, who was a grandson, was the sole heir at law not only at the testator's death but also when the will was made, and also that this grandson was an incapable person. In answer to the claim then made, that the grandson was, upon the facts, by clear implication excluded from the class who took as heirs, we said that in order to justify the giving to the word "heir" a construction different from the usual and accepted one, the intention of the testator must be clear and decisive, and that the facts of the case failed to so disclose any such intention. See also *Gold* v. *Judson*, 21 Conn. 616. For the reasons then given it must *a fortiori* be said in the case at bar, that no intention on the part of the testator to exclude his son William E. from any class of heirs at law entitled under the will to receive the remainder estate can be made to sufficiently appear.

The question of the interpretation of the concluding language of paragraph six need not be pursued further. It is evident that whatever construction be given to it the result must be the same, to wit, that the trust fund in the hands of the plaintiff at the time of the death of William E. Lewis passed by the will to the estate of said William E. Lewis to be administered as a part thereof. The ultimate destination of the property will be determined in the due course of such administration.

The Superior Court is advised that the trust property in the hands of the plaintiff administrator and trustee, as set out in the complaint, should be paid over to the administrator upon the estate of William E. Lewis, deceased, when one shall have been duly appointed and qualified, the same to be administered upon, divided and distributed as the estate of said deceased.

No costs in this court will be taxed in favor of either party.

In this opinion the other judges concurred.

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MORGAN G. BULKELEY ET AL. APPEAL FROM THE BOARD OF RELIEF OF THE CITY OF HARTFORD.

First Judicial District, Hartford, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, JS.

Upon appeal to this court the recitals of the judgment-file import absolute verity. If untrue in point of fact, the misstatements can be corrected only by the trial court.

The failure to request a finding of facts within the time limited therefor, does not preclude the trial judge from making a finding of his own motion, nor invalidate an appeal which is seasonably taken after such finding is filed.

Under our law relating to appeals to this court (General Statutes, §§ 790, 791, 793) it is incumbent upon the party desiring to appeal to take certain steps within limited times after the "rendition of the judgment." *Held* that the judgment was in fact rendered whenever the trial judge formally announced his decision in open court, or communicated it, orally or in writing, to the clerk in his official capacity and for his official guidance; and that the judgment-file, although necessarily written out and recorded thereafter, should be entitled as of the day on which the judgment was thus rendered or pronounced.

Argued January 5th—decided March 3d, 1904.

PLEA in abatement to an appeal from a judgment of the Superior Court in Hartford County (*Shumway, J.*), confirming the action of the board of relief. The appellant filed an answer to which the appellee demurred. *Demurrer overruled.*

Edward D. Robbins and *Joseph P. Tuttle*, for the appellee, in support of the plea in abatement.

Lewis Sperry, for the appellants, in opposition to the plea in abatement.

PRENTICE, J. The appellee pleads in abatement for reasons which are, in substance, that the steps prescribed by law to be taken in order to perfect an appeal to this court

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were not seasonably taken. The allegation of the plea, upon which the truth of all the others depends, is that final judgment in the trial court was rendered on August 27th, 1903. The appellant answers the plea, denying this allegation and with it all the allegations of unlawful delay which are dependent upon it. The answer by way of special answer also sets out in detail the history of the cause subsequent to its submission to the decision of the trial judge. The appellee demurs to this special answer.

The allegation as to the time when final judgment was rendered is in form one of fact. It involves, however, a legal conclusion, which is the real and the only point in issue between the parties. The question involved is as to the time when, under our statutes and rules, the judgment in the cause is, for the purposes of proceedings in appeal, to be regarded as having been rendered.

The cause is an appeal from the doings of the board of relief of the city of Hartford. The history set out in the answer embodies the following facts: On August 27th, 1903, the judge who sat as the court to hear it filed with the clerk his memorandum of decision, the concluding sentence of which was: "The action of the board of relief is affirmed." The clerk on the same day sent written notice to counsel, and on the 29th the appellants filed their notice of appeal. The judgment-file was not prepared until September 23d. On September 29th the appellants filed a second notice of appeal, and on October 1st a request for a finding accompanied by a draft of proposed finding. Then followed draft of counter-finding, finding, motion to correct finding and exceptions thereto, when finally, on November 27th, the completed and corrected finding was filed. On December 7th the appellants took their appeal. No extensions of time were granted.

The appellee claims that judgment in the cause was rendered on August 27th, and that the appellants' time for filing their request for a finding began to run from that date, or rather from September 1st, the days of July and August being excluded from the computation of time. The appel-

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lants claim that judgment was not rendered until the judgment-file was made out and signed on September 23d, and that the time for filing their request did not begin to run until that date.

Counsel have assumed that a decision of the question as thus stated would be decisive of the merits of the present plea, and have confined their arguments to that question. In this we think that they are in error, for two reasons.

The judgment-file which is before us bears date September 23d. It recites that the cause came to that day and was that day heard and adjudged. This record of the trial court is conclusive in this court of the truth of the facts recited. *Corbett* v. *Matz*, 72 Conn. 610; *Cox* v. *McClure*, 73 id. 486. If the facts are therein misstated the remedy is elsewhere. *Verzier* v. *Convard*, 75 Conn. 1.

The only failure which is charged to the appellants as depriving them of their right to appeal, consists in not filing a request for a finding and a draft of proposed finding within two weeks after September 1st. One desiring to appeal, who, in a case where a finding is necessary, fails to file his request and draft as, and within the time, prescribed by statute, loses his right to have a finding. *State* v. *Duffy*, 66 Conn. 551; *Scholfield G. & P. Co.* v. *Scholfield*, 70 id. 500. If, however, the judge waives the protection to himself contained in the statutory provisions, and makes and files a finding either without a request and draft of proposed finding, or upon defective and informal ones, or delayed ones, and an appeal is thereafter seasonably taken, the appellee cannot plead in abatement in this court therefor. *Scholfield G. & P. Co.* v. *Scholfield*, 70 Conn. 500.

The question upon which the parties have made their contention is, however, of so much practical importance to the profession, that we ought not to avoid its decision. A party desiring to appeal is bound to take certain steps in that direction within certain specified times from or after "the rendition of the judgment." General Statutes, §§ 790, 791, 793. The language of § 793 raises a strong implication that by the time of the rendition of the judgment is meant

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the time when the decision of the court is filed, for it is there provided that a request for a finding shall be filed within two weeks after the rendition of judgment, unless "the decision of the court" is filed in the months of July or August. Judgment-files are only indirectly the creations of statute. The statutes provide that all courts of record shall keep a record of their proceedings, and cause the facts on which they found their final judgments and decrees to appear on the record. General Statutes, § 763. To secure a proper compliance with this requirement we have §§ 94, 96, p. 33, of the Rules of Court. In the first of these sections it is provided that in all actions the judgment shall be formally written out within one week after its rendition, the paper so prepared to be known as the judgment-file. Here is recognized a clear distinction not only between the judgment and the writing which is required to be made to evidence it, but also between the rendition of the judgment and the preparation of this writing at some subsequent time. In *Goldreyer* v. *Cronan*, 76 Conn. 113, this distinction is judicially asserted. It is there said that the filed memorandum of decision brought a judgment into existence; that a judgment, speaking generally, is the determination or sentence of the law speaking through the court, and does not exist as a legal entity until pronounced, expressed, or made known in some appropriate way; that it may be expressed orally or in writing, or in both of these ways, in accordance with the customs and usages of the court in which it is rendered. It is impossible to reconcile the opinion in this case with any theory that there is, in our practice, no rendition of judgment until the judgment-file has been prepared, signed and filed. A judgment is in fact rendered whenever the trial judge officially announces his decision in open court, or out of court signifies to the clerk in his official capacity and for his official guidance—whether orally or by written memorandum—the sentence of the law pronounced by him in any cause. This pronouncement of the court it is incumbent upon the clerk to forthwith enter. The writing out of the judgment, in the form of a judgment-file to be recorded, is

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a matter of subsequent clerical action. The amount of the judgment, if it be one for damages, is assessed and computed as of the day on which the decision is rendered, and not in the exercise of a prophetic vision as to when a clerical duty will be performed. In fairness, therefore, it should bear that date.

Section 91 of the Rules of Court (p. 32) provides that all pleadings, judgment-files, orders and motions in writing, shall be entitled as of the day on which they are filed or entered. As applied to judgment-files, this rule is to be interpreted as requiring them to be entitled as of the day on which the judgments are pronounced or rendered. The rule as originally framed in 1890 used the word "judgments" in place of the present "judgment-files." The history of the evolution of the rule and of the changes which have been made in the tenor of judgment-files, and the co-existence of the rule with that regulating the preparation of judgment-files, serve to show that the construction suggested is the one which is fairly to be placed upon its present provisions, which are, perhaps, framed with too great a regard for brevity to express with the strictest accuracy of language their purpose as to all the subject-matter enumerated in it.

The case of *Vincent* v. *McNamara*, 70 Conn. 332, is not in point. The purport of that case is that an entry of judgment sustaining a demurrer to a complaint is not the rendition of final judgment in the cause.

The demurrer is overruled.

In this opinion the other judges concurred.

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HOMER R. SCOVILLE, ADMINISTRATOR, *vs.* JOHN C. MASON ET AL.

First Judicial District, Hartford, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A testator, who wrote his own will, gave to his county hospital "my farm, live-stock, tools and household furniture," to do with as the hospital authorities thought best, and "all my moneys, bonds, notes, and money in savings banks," to be held by the directors as a fund bearing his name, "the interest and income to be used for the benefit of said hospital." In a suit to construe the will it was *held*:—

1. That under the term "household furniture," the testator's silver spoons and odd pieces of silverware, of no great value, passed to the hospital.
2. That the wearing apparel did not pass under that or any other expression in the will, but became intestate estate and went to a maternal uncle, the testator's next of kin.
3. That the "farm" included not only the homestead, but also three other lots not far distant, all of which were used by the testator in his business of farming, and together constituted his farm as he had described it to a real estate agent for purposes of sale.
4. That while the expression "all my moneys, bonds, notes and money in savings banks" would not ordinarily include railroad stock and scrip, yet, when read in the light of the circumstances under which the will was made, it was reasonably clear that the testator intended it should embrace such property, and therefore it must be construed accordingly.

Argued January 5th—decided March 3d, 1904.

SUIT to determine the construction of the will of Stephen A. Watson of Harwinton, deceased, brought to and reserved by the Superior Court in Litchfield County, *Elmer, J.*, upon a finding of facts, for the advice of this court.

The testator, a farmer in Harwinton in this State, died in November, 1902, leaving the will here in question, executed in September, 1902. The entire will was written by himself, and is as follows:—

"In the name of God amen: I, Stephen A. Watson of the town of Harwinton, county of Litchfield, State of Connecticut, being of sound mind and memory and considering the

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uncertainty of life therefore do make and declare this my last will and testament that is to say, first after all my debts are paid I give and bequeath to my cousins Charlotte Butler, wife of Dan C. Merrill, and Frank R. Mason, son of John C. Mason, five hundred dollars each to the Litchfield County Hospital situated in the town of Winchester, my farm, live-stock, tools and household furniture to do with as the directors of said hospital think best and all my moneys, bonds notes and money in savings banks to be held by the directors of the said hospital to be known as the S. A. Watson fund, the interest and income to be used for the benefit of said hospital."

The summary of the inventory and appraisal of the testator's estate, as it appears in the record, is as follows:

Sundry articles, personal property, tools, hay, provisions, clothing, etc.,		$ 590.29
Live stock,		277.00
REAL ESTATE.		
Homestead, 60-acre tract,	$ 1,300.00	
Orchard and meadow, 12-acre tract,	300.00	
North piece, 31-acre tract,	300.00	
Wood lot, 35-acre tract,	300.00	2,200.00
SECURITIES.		
Certificate of 5 shares preferred stock, of $100 each, of Boston & New York Air Line R. R. Co., No. A596, issued May 12, 1879 (mentioned in the complaint),		$ 550.00
Scrip of above company,		1.00
Certificate of 18 shares stock, of $100 each, of Hartford & Connecticut Western R. R. Co., issued October 8, 1881 (mentioned in the complaint),		810.00
23 separate real estate mortgage coupon bonds, aggregating the sum of		8,190.00

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Amount brought forward, . . .	$12,618.29
4 debenture and trust bonds, . . .	900.00
18 separate mortgages and mortgage notes, .	9,680.00
3 promissory notes, ...	151.00
4 separate savings bank deposits, amounting to	10,960.31
Total inventory and appraisal . .	$34,309.60

The testator was never married, and his nearest of kin and only heir at law is his maternal uncle, John C. Mason of Mansfield in Tolland county, a man now over eighty years old.

Included in the inventory of the testator's estate were numerous articles of wearing apparel, appraised in the whole at the sum of $43.80, and certain articles of silverware, appraised at the sum of $8, making in all $51.80. All of these things are specifically enumerated and described in Exhibit *A* annexed to the complaint.

Homer R. Scoville, for the plaintiff.

Richard T. Higgins, for the Litchfield County Hospital.

William A. King, for John C. Mason.

TORRANCE, C. J. The questions in this case are in substance these: (1) Whether the articles in Exhibit *A* pass to the Hospital under the will. (2) Whether all the real estate in the inventory passes to the Hospital under the will. (3) Whether the shares of railroad stock, and the "scrip," in the inventory, pass to the Hospital under the will. (4) If any of the property of the testator is not disposed of by will, to whom does it pass under the statute of distribution? These questions will be considered in the order stated.

Exhibit *A* contains a list of numerous articles of wearing apparel, of no great value, and of a few silver spoons and odd pieces of silverware, also of little value. It is claimed by the Hospital that all the things in Exhibit A pass to it, by the will, under the words "household furniture." We think these words include the silverware; *Crossman* v. *Baldwin*, 49 Conn.

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490; but not the articles of wearing apparel. Comprehensive as the words "household furniture" undoubtedly are, they are not yet elastic enough to include mere garments and articles of clothing. The wearing apparel in Exhibit *A* is not disposed of by the will.

The real estate inventoried consists of four separate pieces of land in the town of Harwinton. Upon one of these pieces, containing sixty acres, was the homestead of the testator. Separated from the homestead land by a highway only, was a lot containing about twelve acres, and distant from the homestead land not over six hundred feet was a thirty-one acre tract. These three pieces of land were conveyed to the testator by one deed in 1861. The other lot of land, containing about thirty-five acres, distant from the homestead land about eight hundred feet, was conveyed to the testator in 1889. In connection with his homestead land, the testator used the twelve-acre lot for tillage, the thirty-one acre lot for pasture and tillage, and the thirty-five acre lot for wood land; and in 1900 in describing his farm to a real estate agent for purposes of sale, he included all of these four pieces of land. The words of the will, descriptive of the land devised to the hospital, are "my farm." The heir at law claims that these words describe the homestead land alone, and do not include the three outlying lots.

This claim is not tenable. These four lots of land were all used and occupied by the testator in his lifetime, in carrying on the business of farming, as one farm, had been so used and occupied by him for years before he wrote this will, and were called by him his farm. When he came to make his will and to give his real estate to the Hospital, he describes the subject-matter of the gift as "my farm"; using the same term that he used to the real estate agent in describing these four pieces of land. Reading these descriptive words in the light of the circumstances in which the testator wrote them, we think that it is clear beyond question that they include and were intended to include the four pieces of land.

The next question is whether the railroad stock and the scrip are given to the Hospital by the will. With reference

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to this property, the finding is that the testator inherited from his father certain bonds issued by the two railroad companies mentioned in the inventory, which bonds were convertible into the stock of said companies; that the testator, in 1879 and in 1881, converted said bonds into the stock and scrip in question.

The Hospital claims the stock and scrip under these words: "All my moneys, bonds, notes and money in savings banks." It must be conceded that these words, in their ordinary meaning, do not include the railroad stock and scrip; but when read in the light of the circumstances in which they were written, we think they should be held to include that property. The will is as commendably brief as it is broadly comprehensive, and it clearly shows, in the light of the facts as they appear of record, a purpose on the part of the testator to dispose of his entire estate, and to give substantially the whole of it to the Hospital. He first provides for the payment of all his debts, and the payment of two small legacies, and then he disposes of his live stock, tools, household furniture and land. This leaves to be disposed of, the remainder consisting of the notes, bonds, money in savings banks, and the railroad stock and scrip mentioned in the inventory; this stock and scrip being the product and avails of bonds. The will was made only a short time before he died, and apparently he had no money other than that on deposit in the savings banks. He desires to turn this remainder over to the Hospital as a trust fund, to be called by his name, the income of which fund should be used for hospital purposes. When, under such circumstances, he came to put this desire into words, and to describe the property of which the remainder consisted, he used the comprehensive words "all my moneys, bonds, notes and money in savings banks." Reading these words in the light of the circumstances in which they were written, we think the inference is a reasonable one that the testator intended them to include the railroad stock and scrip, as well as all his money, notes, and bonds; and we think that such intention is sufficiently expressed in the will.

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As John C. Mason appears to be the next of kin and sole heir at law of the testator, the property not disposed of by the will passes to him under the statute of distributions.

The Superior Court is advised (1) that under the will the shares of stock and the scrip, described in the inventory, pass to the Hospital as part of the trust fund; (2) that the silverware described in Exhibit *A* belongs to the Hospital, but that the wearing apparel, therein described, is intestate estate; (3) that all the real estate described in the inventory belongs to the Hospital under the will; (4) that John C. Mason takes, under the statute, such portion of the estate of the testator as is not disposed of by the will.

No costs will be taxed in this court.

In this opinion the other judges concurred.

The Sullivan County Railroad *vs.* The Connecticut River Lumber Company et al.

First Judicial District, Hartford, January Term, 1904.
Torrance, C. J., Baldwin, Hamersley, Hall and Prentice, Js.

Any judgment which has been either fraudulently obtained or so improvidently entered that it is against equity and good conscience to make claim under it may be set aside at a subsequent term, upon the application of any person aggrieved and due notice to all the parties to the record. This remedy is not confined to the parties to the suit, but is open to any one whose legal or equitable rights were directly invaded by the judgment.

Creditors of a corporation who had no knowledge of the pendency of proceedings for its dissolution, and were intentionally prevented from receiving notice thereof by those who were conducting the winding-up suit, are aggrieved by a judgment dissolving such corporation while it has outstanding liabilities and owns property or rights of action which are applicable to their payment.

In the present case the winding-up suit was ordered by the directors and prosecuted by the president of the corporation, who intentionally concealed from the court and the receiver the fact that the plaintiff had a large claim against it, in consequence of which the

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receiver failed to send any notice to the plaintiff of the limitation of time for presenting claims, and the corporation was wound up and dissolved before the plaintiff learned of what had been done. *Held* that although the president's concealment was not found to have been fraudulent, yet it was clearly inequitable and against good conscience, and afforded a sufficient reason for opening the judgment of dissolution upon the application of the plaintiff.

On such an application it is unnecessary for the creditor or claimant to do more than prove that he has a *bona fide* demand, which is a proper subject for judicial investigation and determination in appropriate proceedings; and therefore a finding that a valid claim was established and exists goes beyond the issue and will not prevent the receiver from disallowing the claim, if thereafter presented to him, should he, upon full investigation, deem it unfounded.

Notwithstanding the dissolution of a corporation by judicial decree, those really interested in it—its members or its creditors—can always rely upon obtaining adequate protection from the courts. So long as the control of the court over the winding-up proceedings continues according to the ordinary course of judicial procedure, so long it may open and set aside the judgment of dissolution for sufficient cause duly shown, and at the same time revive the corporation for the purpose of enabling it to be wound up properly.

One corporation which has transferred all its assets to another, upon the agreement of the second to pay the debts of the first, can proceed in equity to compel the performance of the agreement; and that right constitutes an asset which its creditors can pursue in equity. If it has been improperly dissolved, the reopening of the judgment of dissolution, so that the company or its receiver may enforce the agreement for the benefit of its creditors, is an appropriate remedy.

While a surety cannot sue the principal debtor, at law, until he has been damnified, if he has, as part of the contract of suretyship, put all his property in the principal's hands, he may have relief in equity, should the latter, while retaining the property, avoid payment of the debt in violation of the rights of the creditor.

In determining the sufficiency of a complaint to support a judgment, interlocutory rulings under which it may have been remoulded are immaterial.

Judges, as well as juries, when trying issues of fact, can find facts by inference from other facts.

A plaintiff cannot be said to have been guilty of laches, merely because he made a natural and excusable mistake in originally suing the wrong party.

Argued January 6th—decided March 3d, 1904.

SUIT to open a decree of the Superior Court in Hartford

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County dissolving the Connecticut River Manufacturing Company, and to set aside certain of the interlocutory orders leading up to it, brought to and tried by said court in that county, *Ralph Wheeler, J.*, after a demurrer to the amended complaint had been overruled (*Roraback, J.*); facts found and judgment rendered for the plaintiff, and appeal by the defendants. *No error.*

The following facts, among others, appeared upon the record or were found by the Superior Court: —

The Connecticut River Manufacturing Company was incorporated under the laws of this State, in 1891, and soon afterwards bought certain lumber mills of the Connecticut River Lumber Company, another Connecticut corporation, and went into the business of cutting logs on land of the latter company in New Hampshire and Vermont, driving them down the Connecticut River, and turning them into lumber at the mills. This driving and manufacturing business had previously been done by the lumber company, and the two organizations were practically one company, with the same managing officers and nearly the same directors.

In June, 1897, the manufacturing company, by its negligence in driving logs down the river, and allowing an extraordinary quantity of them to be accumulated against the piers of a bridge of the plaintiff, which crossed the river between New Hampshire and Vermont, caused substantial damage to the bridge.

In December, 1897, negotiations which had been in progress for two months, looking to the formation of a new company to take over the business both of the lumber and the manufacturing company, were concluded, and a contract was made between the two latter by which the manufacturing company sold out all its property to the lumber company, and agreed to wind up its affairs and take measures to procure its dissolution; and the lumber company agreed "to assist in every reasonable way in the winding up and termination of the manufacturing company," and "to pay at maturity all the just debts and liabilities of the manufacturing company, and to indemnify it against and hold it

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harmless from all claims, demands, debts, dues, and damages of every name, nature, and description, and, further, to purchase from every holder of any shares of stock in the manufacturing company all his stock, at such price as may be agreed upon, not exceeding par; or, if no such price can be agreed upon, then to pay to the manufacturing company, for the benefit of all stockholders whose shares have not been so purchased, a just proportion of all the proceeds of the said property remaining after the payment of the said debts and liabilities, which the manufacturing company will divide *pro rata* among the holders of such outstanding shares." At this time the lumber company owned five eighths of the stock of the manufacturing company, and by December 2d, 1899, it had acquired the rest of it, and had also received conveyances of all the property of the manufacturing company.

On December 2d, 1899, both companies brought an application to the Superior Court for Hartford county, alleging that the manufacturing company had in November, 1899, voted to wind up its affairs and dissolve; that it had for a long time past abandoned its business, and now had no assets; and that more than a third of its capital stock was owned by the lumber company; and asking the court "to appoint a receiver of said Connecticut River Manufacturing Company, and to limit a time for all creditors of said Connecticut River Manufacturing Company to present their claims to said receiver, and to decree that all claims not so presented shall be forever barred, and order said receiver to give notice of such limitation to all known creditors of said Connecticut River Manufacturing Company, and that this court will pass a decree dissolving said corporation, and make such other and further orders in the premises as shall to justice and equity appertain."

The prior conveyances of the property of the manufacturing company had been made pursuant to a purpose on the part of each company to prevent it from coming into the hands of a receiver of the manufacturing company.

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This property was worth over half a million dollars over and above all debts and liabilities of the manufacturing company.

The agreement of December, 1897, and all prior negotiations, were made and conducted in good faith and with no purpose on the part of either company to prejudice the rights of the plaintiff or of any creditor of the manufacturing company. Up to the date of this agreement, one Van Dyke was president of each company. Immediately prior to its execution he resigned these offices, and successors were elected, who thereupon executed the contract respectively in behalf of each company, and immediately afterwards resigned, Van Dyke being then, on the same day, re-elected to both offices, and accepting and retaining the same until the dissolution of the manufacturing company. He has always continued since his re-election, to be president of the lumber company. That is solvent and amply able to pay all claims against the manufacturing company.

At the date of the agreement of December, 1897, Van Dyke was fully informed that an injury had been done to the plaintiff's bridge by the drive of logs belonging to the manufacturing company, and that the damage to the plaintiff growing out of that injury was very great. There is no direct evidence that any other officer of the manufacturing company was at that time so informed, but as a fair and just inference from all the facts in evidence it was found that other officers of the company were so informed, and that it was contemplated by the officers of said company that a claim might be made against the manufacturing company for such damage, by the plaintiff.

In February, 1898, the plaintiff brought suit in New Hampshire for such damage, against the lumber company and Van Dyke. It sued them by mistake, having been informed and believing that the lumber company owned the logs which struck the bridge, and was then driving them, and being ignorant of the existence of the manufacturing company until after it had been dissolved. It first learned

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that it owned and was driving these logs from testimony given in the New Hampshire suit by Van Dyke, on September 26th, 1900. This action was brought in December, 1900.

During the whole time of the pendency of the dissolution proceedings, the existence of the plaintiff's claim against the manufacturing company was known to Van Dyke, who was president of the lumber company and also of the manufacturing company, but he intentionally concealed the existence of said claim from the court in which the dissolution proceedings were pending, and from the receiver; and no notice of the time limit for the presentation of claims against the Connecticut River Manufacturing Company was ever sent to the applicant by any one, and the applicant never knew of the existence of the proceedings for the dissolution of said corporation, nor that it was dissolved, until several months after the decree of dissolution was passed.

Charles E. Perkins, *Orville D. Baker* of Maine, and *Irving W. Drew* of New Hampshire, for the appellants (defendants).

John R. Buck, *John H. Albin* of New Hampshire, and *John H. Buck*, for the appellee (plaintiff).

BALDWIN, J. Any judgment which has been either fraudulently obtained, or so improvidently entered that it is against equity and good conscience to make claim under it, may be set aside at a subsequent term, upon the ap-

Just before argument Mr. Buck, the senior counsel for the plaintiff (appellee), called the attention of the court to language in the brief of the appellants (defendants), which in his opinion was contemptuous, offensive and disrespectful to the trial judge, and suggested that the brief ought not to be received.

Counsel for the appellants disclaimed any intentional disrepect to the trial judge, and insisted that the words objected to were but an illustrative way of asserting that certain of his conclusions were absolutely without evidence.

After a short consultation the court announced that the language on pages 129, 130 and 131 of the appellants' brief was impertinent and disrespectful both to the lower court and to the Supreme Court of Errors, and ordered these pages to be stricken from the brief.

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plication of any person interested and aggrieved, and due notice to all parties to the record. The remedy is not confined to parties to the suit. It is open to any one whose legal or equitable rights were directly invaded by the judgment. *Tyler* v. *Aspinwall*, 73 Conn. 493, 499.

General Statutes, § 3351, empowers the Superior Court, under certain conditions, to wind up and dissolve any business corporation, at the instance of shareholders owning not less than one tenth of its capital stock. In 1899 the Connecticut River Lumber Company, then owning more than one tenth of the capital stock of the Connecticut River Manufacturing Company, a corporation located in Hartford county, united with it in an application to the Superior Court in that county, under this statute. No others were made parties, and no order of notice was procured. Three days later, on an *ex parte* hearing, the allegations in the application were found by the court to be true, a receiver was appointed, and a time limited for the presentation to him of claims against it. He was directed to give notice of this limitation of time by an advertisement published for four weeks in a Hartford newspaper. The advertisement was properly given. No claims were presented, and the receiver found no assets of the company. His returns of all these facts, made on April 12th, 1900, a few days after the time limited had expired, having been accepted and found true by the court, final judgment, dissolving the corporation, was rendered on the same day.

If in fact the Connecticut Manufacturing Company had, on that date, any valuable property or rights of action, and was under a liability to any person who, by reason of any intentional act or omission of the plaintiffs in the action in which those proceedings were had, had no knowledge of its pendency, it is evident that such person was aggrieved by the judgment. He would not, indeed, be a party to the action, and aggrieved as such. His grievance would be that he was not made a party to the action, nor given any opportunity to protect, by becoming such, interests of his which it might directly affect.

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The proceedings, under our statutes, if the judgment stands, constitute a bar to any claim against the Connecticut Manufacturing Company, which the plaintiff may have. They also put that company out of existence, and so preclude it from enforcing any cause of action in its favor. The plaintiff alleges, and the trial court has found, that the manufacturing company had a valid cause of action against the lumber company to compel the payment of all legal claims existing against it, by that company. It is also found that the president of the lumber company and of the manufacturing company knew that the plaintiff had a claim for substantial damages against the manufacturing company at the time when the winding-up suit was instituted, and intentionally concealed its existence from the court and the receiver. By a vote of the directors of the manufacturing company he had been directed to cause that suit to be brought, for the expressed purpose of procuring its dissolution, and causing its debts to be paid and its remaining assets distributed among its shareholders. For what he did and said, while acting under this authority, in directing the course of the suit, each of the companies of which he was the president is justly responsible. The receiver naturally applied to the officers of the manufacturing company for information as to the existence of creditors. The concealment from him of the circumstances out of which the plaintiff's claim had arisen, while not found to be fraudulent, was obviously inequitable and against good conscience. Had they been made known to the receiver, it would have been his duty to mail notice of the limitation of time for presenting claims, to the plaintiff, and presumably this would have been done. Not having been made known to him by those who should have made them known and who controlled the cause, the judgment in the cause was improvidently entered under a misapprehension of fact on the part of the court, wrongfully induced by their silence as to a matter concerning which it was incumbent on them to speak.

There are 189 assignments of error, and the printed record on appeal covers over 2,200 pages. Most of the ex-

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ceptions taken relate to questions pertaining to the finding that the plaintiff had, at the date of the judgment appealed from, a valid claim against the manufacturing company for substantial damages. This was made after a full hearing occupying several weeks, as to all the circumstances leading up to the injury to the bridge.

It was unnecessary for the plaintiff to do more than to satisfy the court that it had a claim for substantial damages, which was a proper subject for judicial investigation and determination in appropriate proceedings. If it had any valid claim at all, there could be no dispute that it was one for a considerable sum. It was enough to show that it had an interest in a bridge which had been partly destroyed by force of an unusual rush of water caused by an extraordinary jam of logs belonging to the manufacturing company, and that it asserted in good faith that the company was negligent in allowing such a jam to accumulate at such a place. Whether the bridge was a lawful structure, and whether that company was in fact responsible for the injury to it, were questions to be settled on another occasion. The hearing on the present application was simply for the purpose of ascertaining if an opportunity ought to be given to raise these questions where they could be so settled. It called for no further inquiry into the merits of the plaintiff's claim than would have been requisite if, before the judgment of dissolution but after the time limited for the presentation of claims had expired, it had appeared and moved to have further time allowed for that purpose.

The finding, therefore, of the trial court, which is embodied in the judgment appealed from, that a valid claim for substantial damages to compensate the plaintiff for an injury done to its bridge by the manufacturing company on June 10th, 1897, was established and exists, legally imports nothing more than that sufficient proof of the existence of such a claim was made to support the application to open the judgment in the winding-up suit, and the orders leading up to it, so far as they barred the presentation of the claim to the receiver. It concludes the parties to the present action to

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that extent only, and leaves the receiver free to disallow the claim, if presented to him, should he, on full investigation, deem it unfounded.

It follows that most of the reasons of appeal are immaterial, and require no further consideration.

It is contended that there was error in the declaration in the judgment that the manufacturing company is "in existence, the same as before said decree of dissolution was passed."

The analogy between the death of a natural person and the dissolution of an artificial person is an imperfect one. Behind the artificial person stand and survive the other persons, natural or artificial, who really composed it.

The artificial person known as the Connecticut River Manufacturing Company never existed save in contemplation of law. When it sought dissolution by means of a judicial action, and assumed the position of an ordinary suitor, it became entitled to all the benefits and subject to all the burdens that are incident to that position. A corporation which resists unsuccessfully a stockholder's application for its dissolution could not be precluded by the judgment from appealing for errors in law, notwithstanding the judgment pronounced its existence at an end. It would remain in existence for the purpose of protecting itself against that judgment, the operation of which the appeal would meanwhile suspend. *Giles* v. *Stanton*, 86 Tex. 620. So if it procure a judgment of dissolution, third parties ought not to lose a remedy against it, or one which can only be enforced through it, if, as to them, that judgment is one that, in equity, cannot stand, and to open it and reinstate the corporation in life would smooth the way towards making that remedy effectual.

A corporation is called into existence and invested with the attribute of personality by the sovereign power of the State. If created for a limited term, and for that only, or if constituted subject to conditions the performance of which becomes impossible, a franchise thus expiring may be extended in duration or renewed by subsequent action on the

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part of the sovereign, even if that be had after a dissolution has occurred. *Colchester* v. *Seaber*, 3 Burr. 1866; *Rex* v. *Pasmore*, 3 T. R. 199; *Bleakney* v. *Farmers & Mechanics Bank*, 17 S. & R. (Pa.) 64. See *Wilcox* v. *Continental Life Ins. Co.*, 56 Conn. 468, 477. This does not create a new artificial person. It is a revival of the original corporation, and a revival after it had once ceased to exist. The harsh doctrine of the common law, that the absolute and unqualified dissolution of a corporation extinguished *ipso facto* alike all its property rights and all its obligations was never received in equity. Those really interested in them—its members or its creditors—can always rely on obtaining adequate protection from the courts. Every moneyed corporation is, in a sense, a trustee for those who own its capital or have a right to look to it for security. A trust never fails for want of a trustee, and whenever necessary the State, in some form of proceeding, can and will supply one.

It follows from these principles that when the legislative power has committed to the judicial power jurisdiction to dissolve corporations by judgments rendered in winding-up proceedings, so long as the control of the court over those proceedings continues according to the ordinary course of judicial procedure, so long may it open and set aside such a judgment, for sufficient cause duly shown, and at the same time reinstate the corporation in life for the purpose of enabling that to be done properly which had been undone because done improperly. The Superior Court opened the judgment because the affairs of the manufacturing company had not been properly wound up. That they might now be properly wound up, it was within its power to revive the company and thus facilitate at once resistance to any unjust demands against it, and the enforcement of all just demands in its favor. Its right of action on the contract of the lumber company to pay all its just liabilities was, in a court of law, personal to itself. *Baxter* v. *Camp*, 71 Conn. 245, 71 Amer. State Rep. 169; *Morgan* v. *Randolph & Clowes Co.*, 73 Conn. 396. Since, however, by other provisions of that contract, all its property passed to the lumber company, any recovery in

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such an action would be treated in equity as a recovery for the use of those in whose favor the liability might exist, and the proceeds of the judgment would be impressed with a trust to that effect. The equities attaching to this trust relation can be best worked out by putting the manufacturing company back in a position to sue for whom it may concern, should such a form of action be deemed preferable, in any case, to proceedings by the receiver. *Barber* v. *International Co.*, 73 Conn. 587, 593; 74 id. 652, 657.

The defendants contend that the judgment appealed from is erroneous, because the relief asked for and granted could be of no benefit to the plaintiff. Their argument is that, as between the two companies, their contract of 1899 made the lumber company the party really liable, if any one was, for the damage suffered by the plaintiff, and relegated the manufacturing company to the place of a surety; that the receiver has no rights which the manufacturing company did not possess; that a surety cannot sue until damnified; and that as the manufacturing company has not paid this damage, there can be no action to secure reimbursement.

A surety cannot sue at law until he has been damnified, but he and those for the debt to whom he is surety can have relief in equity when, as in this case, he bas, as part of the contract of suretyship, placed all his property in the hands of the principal debtor, and for that cause cannot himself respond in the first instance to his creditors' demands.

It is claimed that since the plaintiff alleged in its complaint, but failed to prove, that the contract of 1897 was made with an intent to defeat the collection of its claim, the judgment is unwarranted by the pleadings. It was enough to support it that the plaintiff also alleged and did prove that the pendency of the dissolution proceedings was concealed from it by the lumber company with that intent, and that the transfers of property under the contract were made before those proceedings were instituted, in order to prevent the coming of any assets into the hands of the receiver.

This is so, notwithstanding the fact that the averments

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above mentioned, which were not found true, were in part the ground on which a demurrer to the complaint was overruled. The complaint was sufficient without them. Nor is the judgment erroneous because these averments were put into the complaint by an amendment, to avoid the effect of a previous ruling sustaining a demurrer for want of them. In determining the sufficiency of a complaint to support the judgment, interlocutory rulings under which it may have been remoulded are immaterial.

It is further claimed that the finding tbat, in December, 1897, other officers of the manufacturing company besides Van Dyke knew of the existence of the plaintiff's claim against it, was made without evidence. It was a fact fairly inferable from Van Dyke's knowledge. His position as president of both companies made it his duty, before the contract between them was submitted to their boards of direction for execution, to communicate what he knew as to this claim to those acting with him in the management of the affairs of each; and the trial court was warranted in concluding that he fulfilled this obligation.

There was also sufficient ground for the inference made by the trial court that the property of the manufacturing company was conveyed to the lumber company to prevent it from coming into the hands of a receiver. It naturally had that effect, and the relations of the two companies to each other were such as to make it, to say the least, probable that they intended that result.

The defense of laches on the part of the plaintiff was properly overruled. The only substantial defendant was the lumber company. As already stated, it does not lie in its mouth to accuse the plaintiff of fault in not learning earlier of the winding-up proceedings, and there is ample evidence to support the finding that the mistake in suing the wrong party for the injury to the bridge was a natural and excusable one.

The defendants asked the Superior Court to rule that it was not the legal duty of Van Dyke to tell the plaintiff who owned and drove the logs which formed the jam against the

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bridge. A ruling on this point was properly refused. It was not material whether such was or was not his duty. The question was whether, in the absence of correct information from any quarter, the plaintiff, under the circumstances of the case, had slept upon its rights.

Of the numerous exceptions taken to the finding and to refusals to find as the defendants requested, it is enough to say that there was evidence on which each finding made can be supported, and on which each of the refusals complained of could have been properly rested. The trial court could rightfully take into account the substantial identity of the lumber company and the manufacturing company, after the contract of December, 1897, had done its work. One artificial person had been virtually transfused into another artificial person, with the same head in their common president. Courts have no less power than juries to infer facts from facts, in disposing of an issue of fact.

There is no error.

In this opinion the other judges concurred.

The Berlin Iron Bridge Company *vs.* The Connecticut River Banking Company et al.

First Judicial District, Hartford, January Term, 1904.
Torrance, C. J., Baldwin, Hamersley, Hall and Prentice, Js.

General Statutes, § 836, provides that no assignment of future "earnings" shall be valid against an attaching creditor of the assignor, unless certain steps are taken. *Held* that the word "earnings" was used in the ordinary, popular sense, as synonymous with "wages," and therefore the statute had no application to an assignment by a contractor of moneys which were to be paid to him under his contract, as the work progressed.

Subcontractors gave an order upon the contractor for "$1,000, and whatever more moneys may be due us upon our completion of contract at Hamilton Street bridge." *Held* that this covered not only what might become due under the contract, but for extra work as well.

Argued January 12th—decided March 3d, 1904.

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ACTION of interpleader, brought to the Superior Court in Hartford County and tried to the court, *Shumway, J.*; facts found and judgment rendered awarding the fund to the Connecticut River Banking Company, from which other claimants appealed. *No error.*

Seymour C. Loomis, for the appellants (the Fidelity and Casualty Co. et al).

Arthur F. Eggleston and *John H. Buck*, for the appellee (the Connecticut River Banking Co.).

TORRANCE, C. J. The plaintiff, the Berlin Iron Bridge Company, hereinafter called the Bridge Company, has in its hands a fund amounting to $1,063.10, which it is ready and willing to pay over to the person legally entitled to it. Said fund is the balance due the defendants, Harrison and Sons, from the Bridge Company. One of the defendants, the Connecticut River Banking Company, hereinafter called the Banking Company, claims the fund by virtue of an assignment, and an order, made by the Harrisons in its favor; while another of the defendants, the Fidelity and Casualty Company, hereinafter called the Casualty Company, claims the fund under a suit and attachment proceedings brought by it against the Harrisons, in which the Bridge Company was made garnishee.

As upon the facts found we think the entire fund belongs either to the Banking Company or to the Casualty Company, it will be unnecessary to consider the claims of the other defendants in the case, as their claims are all subordinate to those of the two defendants above named.

The assignment and the order were made and perfected before the attachment was made; but the Casualty Company claims that they are invalid as against the attachment, because they purport to assign future earnings, and were not made in the manner prescribed by the statute (§ 836) relating to the assignment of such earnings. In other respects the validity of the assignment and the order is not questioned by

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any one, nor is the right of the Casualty Company to the entire fund questioned, if the assignment and the order are invalid as against its attachment.

The main question in the case, then, is whether the assignment and order in question fell within the provisions of our statute relating to the assignment of future earnings. The controlling facts bearing upon this question are these. In September, 1898, the Bridge Company entered into a written contract with the city of Hartford, to build a bridge over Park River in said city, called the Hamilton Street bridge, for the sum of $17,450. This sum was to be paid "in monthly installments of 80 per cent of completed work, as estimated" by the city engineer; "and the balance when said bridge" should be completed and accepted by the city. Subsequently, during the same month, the Bridge Company sublet a part of this work to the defendants, the Harrisons, by written contract, for the sum of $4,000. This sum was to be paid "in monthly installments covering 80 per cent of the work done and materials furnished during the preceding months, as determined by the estimates of the city engineer of Hartford;" and the balance of 20 per cent was to be paid on the completion of the work sublet and its approval by the city of Hartford.

On the 12th day of November, 1898, the Banking Company loaned to the Harrisons $1,000, taking as evidence thereof their note of that date for $1,000, payable to the order of the Banking Company eighteen days after date. On the same day, to secure said note, or any renewals thereof, the Harrisons made a written assignment to the Banking Company of "the several sums of money and the amount thereof, due and to become due" to them from the Bridge Company, "for work done and to be done" under the contract between them and the Bridge Company. This assignment was on the 30th day of November, 1898, recorded "in the land records of the town of Hartford." The loan has never been paid, and the Banking Company still holds the note which was given in renewal of the first one. Notice of this assignment and a copy thereof were given to the Bridge Company on the 5th

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day of December, 1898. On the 30th day of November, 1898, the Harrisons also gave to the Banking Company, to secure said loan, a written order of that date upon the Bridge Company, the material parts of which read as follows: "Please pay to the Connecticut River Banking Company, one thousand dollars ($1,000), and whatever more moneys may be due us upon our completion of contract at Hamilton St. Bridge." This order the Bridge Company on or about December 5th, 1898, accepted and agreed to pay. Before the Bridge Company had notice of the assignment, or had accepted the order aforesaid, it had paid to the Harrisons, under its contract with them, the sum of $3,000 as follows: on October 25th, $2,500, and on December 2d, $500. When this last payment was made, the value of the work done and materials furnished by the Harrisons under their contract was $3,650, and 80 per cent of this was $2,920. The balance of the work done under the contract was done after December 2d, 1898, and was completed and approved by the city on or about July 10th, 1899. On the 10th of July, 1899, the total amount due to the Harrisons from the Bridge Company was $1,063.10. This is the fund in the case. It includes, besides the amount due under the contract, the sum of $134.25 for extra work outside of the contract, done by the Harrisons on said bridge for the Bridge Company in December, 1898.

The claim of the Casualty Company to this fund is twofold: (1) If the assignment and order are invalid it claims the entire fund; (2) if they are valid, then it claims the amount due to the Harrisons for extra work, on the ground that neither the assignment nor the order covers or includes that amount.

The question whether the Casualty Company is entitled to the entire fund will be first considered. The statute (§ 836) under which the Casualty Company questions the validity of the assignment and order reads as follows: "No assignment of future earnings shall be valid against an attaching creditor of the assignor unless made to secure a *bona fide* debt due at the date of such assignment, the amount of which shall be stated therein as nearly as the same can be ascer-

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tained, nor unless the term for which such earnings are assigned shall be definitely limited in the assignment; nor unless such assignment shall be recorded before such attachment in the town clerk's office in the town where the assignor resides, or, if he reside without the State, in the town where the employer resides, and a copy thereof left with the employer from whom the wages are to become due." The statute first appeared in this form in 1878 (Public Acts of 1878, Chap. 4), and it has remained unchanged in form upon the statute book ever since. In the Revision of 1888 it appears as § 1247, and in that of 1902 as § 836. The first Act regulating the assignment of "future earnings" was passed in 1874. Public Acts of 1874, Chap. 12. It provides in substance "that no assignment of future earnings shall be good and valid," unless recorded as therein provided within forty-eight hours after its execution. In the Revision of 1875 it was provided that "no assignment of future earnings shall avail to prevent their being attached, as a debt due to the assignor, when earned," unless it should be recorded as therein provided within forty-eight hours after its execution. Revision of 1875, p. 409, § 38. In 1876 it was provided that no such assignment should avail as against an attaching creditor, unless it should be recorded as therein provided, "before the service of process upon the garnishee." Public Acts of 1876, Chap. 25. After this came the Act of 1878, above mentioned, putting the statute into its present form.

Assuming that the assignment and order in suit do not comply with the provisions of the statute, the important question is whether the statute applies to a case like the present; and that turns upon the meaning of the words "future earnings," as they are used in this statute. The question is whether the word "earnings" in the statute means mere "wages," or whether it is used with a wider meaning, so as to embrace the compensation to be paid to the Harrisons by the Bridge Company under the contract between them which is here in question. The words "earnings" and "wages" have no fixed, definite, legal meaning. In common speech

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"wages" ordinarily mean the compensation paid to a hired person for labor or services by the day, week, or other subdivision of time; while the word "earnings" has often the wide meaning of that which is earned, or the narrower meaning of money or property gained or merited by labor or service, or the performance of something. See these words as defined in the Century Dictionary, in Webster's, and in Anderson's Law Dictionary. In the narrower meaning of the word "earnings," above given, it may include not only wages in the above sense, but also compensation for materials furnished, and expenditures made, in connection with the labor or services rendered. Quite frequently, too, the word "earnings," is used as synonymous with the word "wages," in the ordinary acceptation of that word. We think it is so used in the statute here in question. That statute provides, in cases where it is applicable, that a copy of the assignment of "future earnings" made under it, shall be "left with the employer from whom the wages are to become due." The language quoted shows that the Act was never intended to cover cases like the one at bar. In no proper sense was the Bridge Company the "employer" of the Harrisons, nor was the contract price to be paid to them "wages." Moreover, the use of the words "employer" and "wages" at the end of the Act clearly indicates that the legislature used the word "earnings" at the beginning of the Act as synonymous with the word wages in its ordinary acceptation. Looking at the Act as a whole, we are of opinion that the assignment and order in question did not come within its provisions, and consequently that they are valid as against the attachment.

The next question is whether the assignment and the order cover the entire fund, including the sum due for extra work, or only the amount due for work done under the written contract. The language of the assignment descriptive of the thing assigned, is this: "the several sums of money and the amount thereof, due and to become due to us from" the Bridge Company, "being for work done and to be done by us in pursuance of" the written contract between the Harri-

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sons and the Bridge Company; while the language of the order descriptive of its amount is this: "one thousand dollars ($1,000), and whatever more moneys may be due us upon our completion of contract at Hamilton St. Bridge."

Assuming that the assignment covers only the amount due and to become due under the contract, we think the order covers that and the extra work also; for, in effect, it is for all money that may be due to the Harrisons at the time the contract is completed and the work accepted.

By accepting and agreeing to pay the order, we think the Bridge Company agreed to pay to the Banking Company all the money that would be due to the Harrisons from the Bridge Company at the time the contract work was completed and accepted.

The Casualty Company seems to claim that the evidence did not warrant the court in finding that the Bridge Company had received notice of the assignment, or had accepted the order; but the record does not sustain that claim.

The trial court did not err in holding that the Banking Company was entitled to the entire fund, and in effect overruling all the Casualty Company's claims of law to the contrary.

The other errors assigned in the reasons of appeal relate to the refusal of the court to correct the finding in a few particulars, and to the rulings upon evidence.

In the view we have taken of the statute relating to the assignment of future earnings, all of the reasons of appeal founded upon the refusal of the court to correct the finding, and most of those relating to the rulings upon evidence, become of no importance, and require no consideration; and of the very few other rulings upon evidence of which complaint is made, it is enough to say that they were either correct or harmless and do not merit separate consideration or discussion.

There is no error.

In this opinion the other judges concurred.

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J. MILTON COBURN, CONSERVATOR, AND JOHN PAUL, ADMINISTRATOR, *vs.* WILLIAM T. RAYMOND ET AL.

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Where the facts are found and reported by a committee, it is reversible error for the trial court to find or infer additional facts material to the judgment, unless further evidence is submitted.

The contracts and conveyances of persons who are *non compos mentis* but not under guardianship, are voidable only, not void.

The better and more generally adopted rule is that a court of equity will not cancel or set aside the deed of an incompetent person, where the grantee has acted fairly, in good faith, and without knowledge of the grantor's incompetency, unless the consideration be refunded or the grantee be restored to his original position, and injustice be thus avoided.

The facts in the present case reviewed and *held* to show that the grantees were not negligent in assuming and believing that the mental deficiency of the grantor was not such as rendered her incapable of executing a valid deed.

The transaction in question was entered into by a mother, her son, and an incompetent daughter, on the one side, and the defendants, on the other. The conservator of the daughter, and, upon the daughter's death pending suit, her administrator, sought to set aside deeds given by her to the defendants, who acted in good faith and without knowledge of the daughter's mental infirmity. If successful, the property involved would, unless needed for debts, pass to the estate of the mother, who had also died after inheriting her daughter's estate. *Held* that inasmuch as the mother, by standing by and permitting the defendants to receive deeds from the daughter in the belief that they were in all respects valid, would have been estopped from thereafter asserting her daughter's incompetency as against the defendants,—the plaintiff would also be affected by the same equity in so far as the suit was for the benefit or advantage of the mother's estate.

A valid deed may be executed by one who is not of average mental capacity.

Submitted on briefs January 19th—decided March 3d, 1904.

ACTION to set aside certain deeds of real estate, to foreclose a mortgage, and for other equitable relief, brought to the Superior Court in Fairfield County and referred to a

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committee who found and reported the facts, upon which judgment was rendered (*Case, J.*) for the plaintiff, from which two of the defendants appealed. *Error and judgment reversed.*

The action was originally brought in the name of the conservator of Jane E. Jennings and Helmina J. Jennings, the defendants being Francis M. Jennings and William T. and Thomas I. Raymond. The case was referred to a committee to find the facts. After the committee reported, Helmina died and a month thereafter Jane also died. An administrator having been appointed upon Helmina's estate, he suggested upon the record the deaths aforesaid and entered as the administrator of Helmina to prosecute. The committee's report was then accepted and judgment rendered.

The facts found are in substance as follows: In 1880 Joshua Jennings died intestate, leaving, among other estate, his homestead of seven acres and another tract of land of fifteen acres. He left a widow, Jane E. Jennings aforesaid, and four children, of whom Helmina and Francis M. Jennings aforesaid were two. The widow and said Francis and Helmina thereafter continued to live together in said homestead until after the commencement of this action, when the said Jane and Helmina died. As the result of conveyances between the surviving family of Joshua, it transpired that in 1899 Francis owned (1) the homestead, subject to an interest in his mother, and also subject to a mortgage for the principal sum of $3,000 to the South Norwalk Savings Bank, which mortgage covered both the interest of Francis and his mother; and (2) the fifteen-acre tract, subject to a mortgage to Helmina for the principal sum of $2,000. There was also a second mortgage, made in 1896, covering both premises, to the defendants Raymond, for $1,000, of which sum $600 was a pre-existing debt, the balance of the mortgage being made to secure interest and future book accounts.

In the autumn of 1899 the Savings Bank instituted a foreclosure of its said $3,000 mortgage, because of a default in payment of interest; Francis M. Jennings was financially

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embarrassed, and unable to extricate himself or to redeem said mortgage. He called upon the Raymonds and requested their assistance. They offered to assume the Savings Bank mortgage and the interest due thereon, together with unpaid taxes and the expenses of foreclosure, and to cancel the indebtedness due to them, provided said Jennings would give them a deed of both tracts, conveying the whole title, cleared of the interest of his mother and sister; and with the further agreement on the part of the Raymonds that they would give Jennings a lease of said premises for ten years at a yearly rental of $325, with an option to repurchase at any time within ten years, on payment to them of the original cost. This proposition was accepted, after consideration, and on January 16th, 1900, in furtherance of said agreement, the following papers were executed, to wit: (1) A quitclaim deed from Francis M. Jennings and Jane E. Jennings to the defendants, covering their interest in the seven-acre tract; (2) a quitclaim deed from Helmina J. Jennings to Francis M. Jennings, releasing her mortgage on the fifteen-acre tract; (3) a quitclaim deed from Francis M. Jennings to the Raymonds, covering his interest in the fifteen-acre tract, which deed was subsequent to the last-mentioned deed; (4) a lease from the Raymonds to F. M. Jennings and his son, of both tracts for ten years, with an option to purchase during the continuance of the lease.

These deeds were executed under the following circumstances: The defendant Thomas I. Raymond acted for himself and William T. Raymond. After said Raymond made the offer hereinbefore detailed, and before January 16th, 1900, Francis M. Jennings told his mother, Jane E. Jennings, that he was in trouble, that the bank would take the property unless he could raise money, and informed her of the proposition of Raymond. He made these statements in the presence of Helmina. It does not appear what reply, if any, was made by either. Raymond never had any personal communication with the ladies regarding the matter. After Jennings had agreed to the proposition, Raymond directed his attorney to prepare the necessary papers, and

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sent his bookkeeper with the attorney to the Jennings house, where the attorney, the bookkeeper and the three Jennings all being present, the deeds were read and executed. Neither the attorney nor the bookkeeper observed that either lady was not competent to understand the deeds.

Neither of the Raymonds knew anything about the mental condition of Jane E. Jennings. Thomas I. Raymond had met Helmina J. Jennings some years before and knew that she was not a person of average mental ability, but he did not know whether or not she had sufficient capacity to understand or execute a deed. The Raymonds considered that they were dealing with Francis M. Jennings alone; and he was not acting as their agent, but solely for his own benefit, in obtaining the signatures of his mother and sister. Jane E. Jennings was eighty-four years old when she signed the deed, but her mind was not impaired to such an extent that she did not understand what she was doing, and she understood that she was conveying her interest in the land to the Raymonds, in order that her son and herself might thereby be saved from losing their home. Helmina Jennings was of inferior intellect; she could read and write to some extent, and she attended church and Sunday-school, but she was incapable of transacting any business intelligently, and could not be trusted to go to church or to the village alone, or to dress herself without advice. She did not understand the meaning of the deed read to her, and had not mental capacity to do so, and this fact was well known to Francis M. Jennings when he procured her signature. She received no consideration for her signature, except that by means of it her brother was enabled to obtain the lease from the Raymonds, which, if its terms were complied with, would presumably enable her to remain with him in the homestead instead of being ejected therefrom. She was incapable of understanding this advantage.

The plaintiff still holds the $2,000 mortgage. All allegations of fraud or conspiracy on the part of the Raymonds are found untrue.

The court rendered judgment cancelling and setting aside

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the deed from Helmina to her brother and that from him to the Raymonds, embracing the fifteen-acre tract, and foreclosing the brother and the Raymonds under the $2,000 mortgage.

John H. Light and *William F. Tammany*, for the appellants (William T. and Thomas I. Raymond, defendants).

Joseph A. Gray and *John J. Walsh*, for the appellees (plaintiffs).

PRENTICE, J. This case was sent to a committee to find and report the facts. The committee's report was accepted and thereon judgment was rendered. The court heard no evidence to determine any fact. The judgment-file recites that it is found that the procurement by Francis M. Jennings of the deed from his sister Helmina was a fraud upon her, which was well known to all the defendants. The committee's report not only finds no such fact of knowledge on the part of the defendants Raymond, but expressly finds the contrary to be true. Here was error. *West* v. *Howard*, 20 Conn. 581; *Brady* v. *Barnes*, 42 id. 512; *Bennett* v. *Bennett*, 43 id. 313; *Farrell* v. *Waterbury Horse R. Co.*, 60 id. 239. If the fact thus improperly made the basis of the judgment was material thereto, the judgment must be set aside. We are thus led to inquire whether or not the judgment rendered can be supported by the facts as the committee found them. If the answer is in the negative a reversal must follow.

The contracts and conveyances of persons *non compos mentis*, when not under guardianship, are voidable and not void. *Wait* v. *Maxwell*, 5 Pick. 217; *Eaton* v. *Eaton*, 37 N. J. L. 108; *Ingraham* v. *Baldwin*, 9 N. Y. 45; *Hovey* v. *Hobson*, 53 Me. 451; *Scanlan* v. *Cobb*, 85 Ill. 296; *Freed* v. *Brown*, 55 Ind. 310.

The authorities differ as to the conditions under which, as between the parties, executed contracts or conveyances, voidable for the cause stated, may be avoided in equity.

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There are cases which hold that restitution of the consideration received is not one of the conditions. *Gibson* v. *Soper*, 6 Gray, 279; *Hovey* v. *Hobson*, 53 Me. 451; *Nichol* v. *Thomas*, 53 Ind. 42; *Crawford* v. *Scovell*, 94 Pa. St. 48. Much the greater number of cases, however, hold a contrary doctrine, and support the proposition that a deed cannot be set aside on the ground of the grantor's incompetency, where the grantee acted in ignorance of the incompetency and fairly and in good faith, unless the consideration received be refunded or the grantee restored to his original position, and injustice thus avoided. *Eaton* v. *Eaton*, 37 N. J. L. 108; *Lincoln* v. *Buckmaster*, 32 Vt. 652; *Scanlan* v. *Cobb*, 85 Ill. 296; *Rusk* v. *Fenton*, 14 Bush (Ky.), 490; *Young* v. *Stevens*, 48 N. H. 133; *Boyer* v. *Berryman*, 123 Ind. 451; *Ashcroft* v. *DeArmond*, 44 Ia. 229; *Gribben* v. *Maxwell*, 34 Kan. 8; *More* v. *Calkins*, 85 Cal. 177; *Riggan* v. *Green*, 80 N. Car. 236; *Pearson* v. *Cox*, 71 Tex. 246.

The English cases give their unqualified support to the rule last stated. *Selby* v. *Jackson*, 6 Beav. 192, 200; *Niell* v. *Morley*, 9 Ves. Jr. 478; *Molton* v. *Camroux*, 2 Exch. 487; *Campbell* v. *Hooper*, 3 Sma. & Giff. 153. See also 2 Pomeroy's Equity Jurisp. § 946; 1 Story's Equity Jurisp. (12th Ed.) §§ 227, 228; 1 Devlin on Deeds, § 76.

The first case to assert the doctrine that there might be a rescission without restoration, we believe to have been *Gibson* v. *Soper*, 6 Gray, 279. The judge who wrote the opinion of the court found no little difficulty in harmonizing its views with the opinion rendered by Chief Justice Shaw in the then recent case of *Arnold* v. *Richmond Iron Works*, 1 Gray, 434, wherein a contrary doctrine was stated in plainest terms. The decision in *Hovey* v. *Hobson*, 53 Me. 451, followed about ten years later and adopted the views of the Massachusetts case. These two cases contain all that has been or can be said in favor of the position assumed. The reasoning of the court is grounded upon the watchful concern which equity maintains and ought to maintain over those who are incapable of managing their affairs. The law, it is said, makes their very incapacity their shield, so that

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in their weakness they find their protection. An analogy is drawn between infants and persons *non compos mentis*, and it is said that the law intends that he who deals with either shall do so at his peril. Pursuing the assumed analogy, the proposition is laid down that the right of the insane to avoid their contracts, like that of infants, is absolute and paramount, and superior to all equities of other persons however far removed in the chain of title. The argument is that if restitution was required as a condition precedent to cancellation, that might be indirectly accomplished which the law does not permit, and the great purpose of the law, in securing the protection of those who cannot protect themselves, be thus defeated.

The answer to this argument is obvious. It sees only the rights and interests of one party, and makes them paramount over all other considerations. A proceeding to set aside an incompetent's conveyance is one in equity. The powers invoked are equitable and call for the exercise of the broadest equity. 2 Story's Equity Jurisp. (12th Ed.) § 1365*d*. When the case involves an innocent, *bona fide* grantee, the court has before it two innocent parties between whom it is in duty bound to do equity to the best of its ability. It has no right to shut its ears to the claims of either party. To say that one, however innocent he may be and however fair his dealings, who chances to deal with an incompetent, does so at his peril and can have no consideration in a court of equity when he is about to be deprived of both his property and the consideration paid for it, is to hold a harsh doctrine which might easily transform the incompetent's shield into a sword. Cases of this character furnish no exception to the maxim that he who seeks equity must do equity; so that if, on the whole case, it would be inequitable to set aside a conveyance, there is no inexorable rule that it must be done because, perchance, the grantor was deficient in mental capacity. 2 Story's Equity Jurisp. (12th Ed.) § 1365*d*.

The argument under review also forgets the provisions which are made by statute for the protection of the property interests of incapable persons and the prompt redress of

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their wrongs. It is made easy to put such persons beyond the power of contracting or disposing of their estate, and to provide a competent substitute to secure redress when occasion arises. It may be safely assumed that the friendly or selfish interest of friends or relatives will, in the presence of so simple a recourse, leave few incapable persons possessed of estate free to dissipate it, or, in the event of a wasteful bargain or disposition by one whose power has not been legally restrained, that such interest will prompt to speedy action which will lead to an intelligent conservation of the incompetent's interests before delay has witnessed the dissipation of the consideration received, or permitted substantial changes in the status of the *bona fide* grantee. These considerations deprive of much of their force the arguments for the extreme doctrine laid down in the Massachusetts and Maine cases, which is therein drawn so strongly from the necessities of the situation and the consequences to incompetents assumed to flow from any other doctrine.

The assumed analogy between the status of infants and incompetents, of which so much is made especially in the Maine case, is by no means a perfect one, and may easily be carried too far. It is one thing to hold that he who does not discover the tangible, definite and ascertainable status of minority must suffer the consequences, and quite another to say that he who fails to detect the existence of the subtle, elusive and sporadic condition of mental unsoundness, and to correctly measure its degree, cannot be heard in a court of equity to plead his ignorance and good faith. There are practical reasons for the protection of an infant who cannot be put into a position where his acts become a nullity, and who it is said cannot, or at least may not, make a disaffirmance of his conveyances of realty until time has brought him to his majority, which do not exist in the case of the incapable person. Reeve's Domestic Relations, 254. In this connection it is to be noticed that the cases in question do not stop with the logical consequences of the analogy assumed. In both States the cotemporaneous view seems to have been that if an infant disaffirm his contract he must re-

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store the consideration in so far as he had it in his hands. *Badger* v. *Phinney*, 15 Mass. 359; *Bartlett* v. *Cowles*, 15 Gray, 445; *Boody* v. *McKenney*, 23 Me. 517. In the case of incompetents there is no hint of a duty to restore under any circumstances, as involved in the right of equitable cancellation. In so far as this State is concerned, argument from the analogy referred to would support the proposition that restoration was a condition precedent to an incompetent's rescission of an executed contract or conveyance, where the other party had acted in ignorance of the disability and fairly and in good faith; since the privilege of avoidance is under similar circumstances refused to an infant who has so enjoyed or availed himself of the consideration that the parties cannot be restored to their original position. *Riley* v. *Mallory*, 33 Conn. 201; *Gregory* v. *Lee*, 64 id. 407.

The true principle, however, would appear to be that the incidents of those contracts and conveyances which the law regards as voidable, whether by reason of fraud, duress, intoxication, infancy, mental disability, or other cause, differ according to the circumstance which gives rise to the defect, and that each class of cases stands in a court of equity upon a more or less independent footing, the status and incidents of each to be determiued by all the conditions and considerations involved as they appeal to the judicial conscience. One deduction by analogy, however, seems fully justified, and that is, that if restitution is required of an infant, it should be required on the part of an incompetent not under guardianship, in favor of one who has dealt with him in ignorance and good faith. Both reason and authority by way of analogy, in this jurisdiction, therefore, appear to us to support, as the best general rule, the proposition hereinbefore stated as having the support of the English and the greater number of American cases.

It needs no argument to demonstrate that if restitution must be made to the immediate grantee of the incompetent, subsequent grantees, who take the title in like good faith and ignorance of the incompetent's disability, are entitled to be restored to their original position before they can be de-

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prived of their property by the intervention of a court of equity.

There remains to inquire whether the defendants Raymond stand in the position of *bona fide* grantees in ignorance of Helmina Jennings' incapacity. The report finds that none of the allegations of fraud and conspiracy on their part were true, that they supposed they were dealing with Francis M. Jennings alone, that they did not know that Helmina did not have sufficient capacity to make a deed, and that neither their bookkeeper nor their attorney, who were sent to procure the execution of the deeds, observed that she was not competent to understand them. It is, indeed, found that Thomas I. Raymond had met Helmina some years before and knew that she was not of average mental ability. But average mental capacity is not required for the execution of a valid deed. *Hale* v. *Hills*, 8 Conn. 39. The land records showed, concerning the chain of title of the land in question, that Helmina's mother and all her three brothers and sisters had dealt with her as one having capacity. Her then interest was one thus created. Her mother, not to mention her brother of the same household, was a participant with her in the present transaction, and stood by as she executed her conveyance. Clearly the defendants Raymond were not, under all the circumstances, negligent in assuming and believing that her deficiency in mentality was not such as to make her incapable of executing a valid deed.

There is one other aspect of the case which should not be overlooked. Subsequent to the filing of the committee's report Helmina died, survived by her mother who died later. The mother thus became the sole heir at law of Helmina. General Statutes, § 398. If Helmina left no creditors, the fruit of the action would enure to the benefit of the mother's estate. The mother, who was competent, was a party with Helmina in the transaction in question. She was present when her daughter executed the deed sought to be set aside. She knew the purpose of the deed and of the general transaction of which it formed a part. Thus standing by and

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permitting the Raymonds to contract as they did upon the faith that they were receiving deeds from competent persons, and actively participating in the transaction, she would be estopped from thereafter setting up the incompetency of such persons, against those whom she thus assisted in deceiving. *Gregg* v. *Wells*, 10 Ad. & E. 90; *Rusk* v. *Fenton*, 14 Bush (Ky.), 490, 493; *Field* v. *Doyon*, 64 Wis. 560; *Ex parte Hall*, 7 Ves. Jr. 261, 264.

If it should appear that the estate sought to be recovered was not needed for the payment of the debts of the deceased Helmina, and that therefore the benefits arising from the foreclosure would accrue to her mother's estate, the facts suggested would become of controlling importance in balancing the equities in the case and in determining whether or not it was, on the whole, equitable that the Raymonds should thus be deprived of that for which they have paid, for the benefit of the estate of one who occupied towards them the position of Mrs. Jennings.

The other claims of error need not be considered.

There is error and the judgment is reversed.

In this opinion the other judges concurred.

DELIA FELL ET AL. *vs.* THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A contract of life insurance based upon a written application containing a warranty that the representations and answers therein made are strictly true and correct, and that any untrue answer will render the policy null and void, creates no liability on the part of the insurer if any one of such warranted statements is in fact untrue.

In a suit upon such a contract by the insured, he must allege the truth of all the statements in the application and assume the burden of proof in respect to such of them as may be denied by the defendant.

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The supervision which a judge has over the verdict is an essential part of the jury system, and the power of granting new trials for verdicts against evidence is vested in the trial courts. When error is claimed in the exercise of this power, great weight is due to the action of the trial court, and every reasonable presumption should be drawn in favor of its correctness.

The action of the trial judge in the present case, in setting aside a verdict for the plaintiffs, sustained.

Argued January 19th—decided March 3d, 1904.

ACTION to recover on a policy of life insurance, brought to the Court of Common Pleas in Fairfield County and tried to the jury before *Light, Acting-Judge;* verdict for the plaintiffs, which the court upon motion set aside as against the evidence, from which the plaintiffs appealed. *No error.*

John J. Walsh, for the appellants (plaintiffs).

Edward P. Nobbs and *Henry C. Stevenson*, for the appellee (defendant).

HAMERSLEY, J. By the express terms of the policy of insurance upon which this action is brought, the application for the policy is made a part thereof. The contract of insurance is based upon the statements in the application. The insured warrants that the representations and answers made in the application are strictly correct and true, and covenants that any untrue answer will render the policy null and void. Such a contract creates no liability on the part of the insurer if any one of the statements, the truth of which is thus warranted, is in fact untrue. *Wood* v. *Hartford Fire Ins. Co.*, 13 Conn. 533, 544; *Kelsey* v. *Universal Life Ins. Co.*, 35 id. 225, 237.

In an action on such a policy it is incumbent on the plaintiff to aver the truth of statements thus made and warranted, and, if the defendant shall deny that averment in respect to any particular statement, the burden of proof is upon the plaintiff; and unless the truth of the statement is established by a fair preponderance of all the evidence, the defendant is entitled to judgment. *Hennessy* v. *Metropolitan Life Ins. Co.*, 74 Conn. 699, 701.

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It appears that William E. Fell, whose life was insured for the benefit of the plaintiff, stated in his application made on October 29th, 1900, that his present occupation was that of a "lockmaker," and that he had never "been rejected or postponed by this or any other company."

The plaintiffs alleged in general terms the truth of all the statements made in the application. The defendant denied this allegation in respect to the two statements mentioned. Upon trial to the jury, the contested issues of fact were limited to the truth of these two statements. Unless the jury should find, upon a fair preponderance of evidence, that each statement, when made, was strictly correct and true, the defendant was entitled to a verdict. The jury returned a verdict for the plaintiff, and the defendant moved that this verdict be set aside and a new trial granted, on the ground that the verdict was against the evidence. The court granted the motion. This appeal is from that decision, and the only reason assigned is that the court erred in setting aside the verdict and granting a new trial.

The supervision which a judge has over the verdict is an essential part of the jury system, and the power of granting new trials for verdicts against evidence is vested in the trial courts. When error is claimed in the exercise of this power, great weight is due to the action of the trial court, and every reasonable presumption should be given in favor of its correctness. *Loomis* v. *Perkins*, 70 Conn. 444, 446; *Howe* v. *Raymond*, 74 id. 68, 71; *Burr* v. *Harty*, 75 id. 127, 129; *Uncas Paper Co.* v. *Corbin*, ibid. 675, 678.

In *Burr* v. *Harty*, 75 Conn. 127, 129, we say: "A court has some discretion in the matter of a new trial, but it is a legal discretion. It should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they or some of them were influenced by prejudice, corruption or partiality."

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This statement of the limits confining the legal discretion of a trial court, governs the present case. The court below could not legally have denied the motion for a new trial.

The evidence reported fails to show any evidence upon which the jury could reasonably reach the conclusion that Fell's statement as to his occupation was strictly correct and true. This is too apparent to admit of doubt or to justify discussion. The incorrectness of the statement was shown by the uncontradicted testimony of witnesses apparently favorable to the plaintiff, and the conclusion of the jury could not fairly have been reached unless through some mistake in the application of legal principles.

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

In this opinion the other judges concurred.

JAMES R. WILLISTON ET AL. *vs.* WILLIAM C. HAIGHT.

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Whether a deed executed and delivered in blank, as respects a grantee, and which is afterwards filled in with the name of a third person, can pass any title at all, *quære*.

While this court undoubtedly has the power to consider questions of law not raised in the court below, it will not exercise such power in ordinary cases.

Claims of law based upon unwarranted assumptions of fact cannot affect the judgment.

A ruling excluding a question as improper cross-examination, will be sustained unless the record shows that it was erroneous under the circumstances.

In an action to foreclose a mortgage given to a broker as security for stocks purchased and carried by him for the defendant, the latter was asked upon his direct examination whether he had "ever been sold out" under such circumstances as existed in the present case. *Held* that this was properly excluded as irrelevant.

Argued January 20th—decided March 3d, 1904.

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ACTION to foreclose a mortgage of real estate given as security for a balance due for purchases of stock, brought to and tried by the Superior Court in Fairfield County, *Case, J.*; facts found and judgment rendered for the plaintiffs, and appeal by the defendant. *No error.*

Curtis Thompson, for the appellant (defendant).

Howard H. Knapp, for the appellees (plaintiffs).

TORRANCE, C. J. The plaintiffs are James R. Williston, Robert L. Ide, Winthrop H. Barnes and Thomas B. Atkins, all of New York, copartners, under the firm name of J. R. Williston and Company, engaged in the banking and brokerage business in New York City; and the defendant is a resident of that city.

The property sought to be foreclosed is in the city of Bridgeport in this State.

The complaint as amended alleges the following facts: On the 9th of October, 1901, the defendant owed the plaintiffs $10,000 for stocks purchased by them for his account, and for interest due on said purchases. On the 2d day of October, 1901, the defendant delivered to the plaintiffs a quitclaim deed of a piece of land in Bridgeport, Connecticut, bounded and described as set forth in the complaint, "which deed, although dated on the 27th day of June, 1898, and executed in blank at that time, was not delivered until the 2d day of October, 1901, when the name of James R. Williston, one of the plaintiffs, was written in said deed as the grantee, and said James R. Williston received and accepted said deed for and in behalf of the plaintiff firm of which he is a member." Said deed, although an absolute conveyance of the fee upon its face, was in fact in equity a mortgage, and given to secure the plaintiffs for the indebtedness that they held against the defendant. At the time of the delivery of said deed to James R. Williston said premises were subject to a mortgage of $10,000, to Thomas F. Martin. Said claim and indebtedness of the plaintiffs against the de-

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fendant is still held and owned by the plaintiffs, and is due and unpaid. The defendant is now in possession of said premises. The prayer for relief claimed, among other things, "a decree adjudging said conveyance to be a mortgage for the security of said indebtedness, as alleged in the complaint."

The answer admitted that the plaintiffs were bankers and brokers engaged in business as alleged in the complaint; the existence of the mortgage to Martin; and that defendant was in possession of the mortgaged premises. It denied the indebtedness due from the defendant to the plaintiffs as alleged; and it also denied the giving and delivery of the deed by the defendant to the plaintiffs, and that the same was in equity a mortgage to them, as alleged in the complaint, "except as hereinafter (*i. e.* in the answer) admitted." The answer then set up the following facts: On June 21st, 1898, one Charles R. Clarke conveyed the mortgaged premises by an absolute warrantee deed to one Francis W. Marsh, to secure a loan of $600, then made by said Marsh to the defendant. "On June 27th, 1898, said Marsh having been paid said $600, executed said quitclaim deed, leaving the name of the releasee in blank, and delivered the same to the defendant.. On or about September 30th, 1901, the plaintiffs, who had for some time prior thereto been engaged in buying and selling stocks on a margin for the defendant, and who then held stocks, and securities therefor, for him, agreed with the defendant to carry the stocks then held by them, and also 300 shares of other stocks which they then advised him to buy, and which they bought, being the same as described in the bill of particulars, for a period of thirty days at least thereafter, and until they gave him reasonable notice, subject to his right at any time to have said stock sold by them at his direction and for his benefit, in consideration that he would give to them said quitclaim deed as collateral security for whatever sum should be found due upon striking an account from him to them; and thereupon he accepted their proposition, and performed his part of said agreement, by filling in the blank in said deed

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with the name of James R. Williston, and delivering said deed to him for the plaintiffs, to be held by them pursuant to said agreement. The plaintiffs, in violation and breach of their said agreement, before the expiration of the time for which they had agreed as aforesaid to carry said stocks for the defendant, without giving him reasonable notice, without any direction thereto from the defendant and without his knowledge or assent, and in violation of his rights, between the 2d and the 11th days of October, 1901, sold and conveyed the said stocks."

The defendant also, by way of counterclaim, claimed damages, caused, as alleged, by the breach of the agreement set up in the answer. In reply the plaintiffs denied in effect the new matter set up in the answer, and the allegations of the counterclaim.

The material facts found by the court below are the following: The defendant became a customer of the plaintiff firm in August, 1901, and in the following month of September the condition of the market was such, and the depreciation in the securities purchased for account of the defendant was such, that in accordance with their arrangement with him the plaintiff firm called for a cash margin from the defendant, who turned over to them one bond, par $1,000 (real value $980) as security, and seven bonds, par $1,000, but which were then in fact and still are valueless. During the latter part of the same month the market continuing to fall off and the securities purchased for the defendant still shrinking in value, the plaintiff firm called upon the defendant for further margin. The defendant not having the ready money told the plaintiff firm that he expected to be able to raise it within a day or two, but that he would and did in fact, on September 30th, 1901, deliver to them the quit-claim deed (foreclosed in this action) as security for his account. The defendant was again notified that the necessary cash margin must be paid by October 2d, at two o'clock, or the brokers would be compelled to sell in the market the securities being carried for him. Such sale was not made on that day, however, but as the promise of the defendant made

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on the day named for the sale was not realized, and the plaintiff firm having found that the property described in the deed was subject to a mortgage of $10,000, and not free of incumbrance as represented by the defendant at the delivery of the deed, on the 8th day of October sent a written notice to the residence of the defendant in New York City, that the necessary margin, amounting to $18,000, must be paid by noon of October 9th, or they would be compelled to sell the securities; and not hearing from the defendant, such a sale was had on October 9th and the avails thereof credited to the account of said defendant, who, after such credit, owed the plaintiff firm the sum of $9,317.57.

All of the steps taken by the plaintiff firm as to the manner of giving notice to the defendant of the required cash margin, and in the time of the giving of such notice, and in the time given the defendant in which to comply with such notice, and of the holding of such sale, were in all respects in accordance with the customs and usages of brokers with their marginal customers, of whom the defendant was one. "The defendant, upon the trial, conceded that the deed in question was in fact, in equity, a mortgage deed, given to secure the plaintiffs for their claim against the defendant for 'margin,' but the parties were at issue as to the precise nature of the transaction of September 30th, 1901, the defendant claiming that the plaintiff, in accepting the said deed as security, agreed to carry the defendant's account for thirty days from that time, during which time he should get the required cash margin. The plaintiffs claimed on the other hand that there was no agreement whatever, on their part, to carry the account of the defendant for thirty days or any other period of time, and no agreement other than that stated in this finding; and I find as a fact that the plaintiffs' claim as to what occurred on September 30th is true as above set forth."

On this appeal the defendant says the court below erred in rendering judgment upon the complaint, in overruling certain of his claims of law, and in two rulings upon evidence. The following are the reasons of appeal: "1. The

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complaint does not warrant the judgment: (*a*) Because it does not appear in the complaint that the plaintiffs, as described therein, have the legal or any title to the real estate sought to be foreclosed, and it does appear that only one of the firm, viz: James R. Williston, has the legal title or any title to said real estate. (*b*) Because it does not appear in the complaint that the defendant has the legal or any title to the said real estate, or any interest therein. (*c*) Because it does not appear in the complaint that the defendant is the owner of the equity, or has the right of redemption, in said real estate. 2. In rendering the judgment upon the allegations of the complaint, and the facts set forth in the finding, because of the want of title in the plaintiffs and in the defendant. 3. In overruling the claims of law stated in the last paragraph of the finding and numbered 1 to 11, inclusive. 4. In rejecting the testimony of one Brewer, and of the defendant, as stated in the finding."

The first and second reasons of appeal may be considered together. They attack the sufficiency of the complaint in this, that it does not show title to or right in the land in question in either plaintiffs or defendant. The answer admits that the deed in question was delivered to and accepted by the plaintiffs after filling the blank left for the name of the grantee with the name of James R. Williston, pursuant to an agreement between the plaintiffs and the defendant; and the main defense set up rests upon the assumption that this deed, in the shape thus given it, was a valuable security in the plaintiff's hands. Neither party now questions, or has ever questioned, the validity of the deed as a conveyance to James R. Williston. The defendant in his reasons of appeal asserts that he has no title to the granted premises, and that the title is not in the plaintiffs but only in one of them individually. We are therefore not called upon to determine whether the deed was, in law, such as to pass any title at all. Neither that question, nor the one which these reasons of appeal present, was made before the trial court, and for that reason this court is not bound to consider them upon this appeal. General Statutes, § 802; *Cooley* v. *Gillan*, 54

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Conn. 80, 82; *Mullen* v. *Reed*, 64 id. 240, 247; *Gustafson* v. *Rustemeyer*, 70 id. 125, 134. The defendant not only did not raise any such question in the trial court, but he conceded that the deed to Williston was, in equity, a mortgage which he gave to the plaintiff firm through Williston to secure his indebtedness to them, and he admitted that he was in possession of the mortgaged premises.

The only real dispute between the parties in the court below was in relation to the nature of the transaction of September 30th, 1901, in which the mortgage was delivered. The defendant claimed that when the plaintiffs accepted the deed they agreed to carry defendant's account for thirty days from that time; while the plaintiffs claimed there was no agreement of that kind, nor any agreement other than that stated in the finding. The court found the fact in regard to this matter to be as claimed by the plaintiffs. Undoubtedly this court possesses the power to consider questions appearing upon the record but not raised in the court below; *Atwood* v. *Welton*, 57 Conn. 514; but we do not think the present case is one calling for the exercise of such power.

The defendant next claims that the court erred in overruling certain claims of law made by him in the court below. These claims, eleven in number, so far as they are properly claims of law, are each based upon the assumption that the plaintiffs agreed to carry the defendant's account for thirty days after they received and accepted the mortgage, as the defendant claimed during the trial; but the court has found that there was no such agreement, and consequently the assumption is wholly unwarranted by the record. The defendant does not seek to have that finding reviewed upon this appeal, and it is therefore conclusive upon this matter. The facts upon which the claims of law were based did not exist, and the court did not err in rendering judgment "notwithstanding said claims."

In the last reason of appeal the defendant complains of two rulings upon evidence. This assignment is not alluded to in his brief. One of the questions was excluded apparently on the ground that it was not proper cross-examina-

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tion. There is nothing to show that the court erred in excluding it. The other question, asked of the defendant, as to whether he had ever before "been sold out under just such circumstances as Williston sold you out on October 9th," was properly excluded as calling for irrelevant matter.

There is no error.

In this opinion the other judges concurred.

GRACE A. MOWER, ADMINISTRATRIX, *vs.* CHARLES H. SANFORD, ADMINISTRATOR.

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

An agreement to pay a fixed sum "annually" from and after a certain event, does not require payment to be made in advance or at the commencement of each year. In the absence of any other provisions respecting the time of payment, it is sufficient if the annuity is paid at the end of each year.

In this State an annuity in lieu of dower, created by antenuptial contract and payable during widowhood, is not apportionable in respect to time.

Argued January 20th—decided March 3d, 1904.

ACTION to recover a portion of an annuity given to the annuitant during her lifetime, brought to and tried by the Superior Court in Fairfield County, *Thayer, J.*, upon demurrer to the complaint; demurrer sustained and judgment for defendant, from which plaintiff appealed. *No error.*

Charles K. Bush, for the appellant (plaintiff).

William B. Boardman and *Sanford Stoddard*, for the appellee (defendant).

HALL, J. The complaint in this action alleges these facts: On the 11th of November, 1869, the following agree-

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ment under seal was entered into, in this State, between Glover Sanford, party of the first part, and Sarah M. Smith, party of the second part: " . . . Whereas the said parties contemplate marriage, now prior thereto and in consideration thereof, said party of the first part hath given and doth hereby give to said party of the second part the sum and estate of one thousand dollars, lawful money of the United States, annually, so long as she shall remain his widow by way of jointure as a provision for her support during life, the same to take effect from and after the death of her said husband, the said party of the first part, and to be in bar, and in full satisfaction and discharge of all the claim of said party of the second part for dower in the estate of her said husband. And said party of the second part hereby accepts and receives said sum and estate of one thousand dollars, lawful money of the United States, annually, so long as she shall remain the widow of said party of the first part, the same to take effect from and after the death of my said husband, by way of jointure as a provision for the support of me, the said party of the second part during life, and the same to be in bar, and in full satisfaction and discharge of all my claim to dower in the estate of my said husband, pursuant to the provisions of the statute in such case made and provided."

Said persons afterwards married, and both died intestate; Glover Sanford on the 31st of May, 1878, and his widow, Sarah M. Sanford, on the 30th of January, 1903. The plaintiff is the administratrix of the estate of the widow, and the defendant is administrator of the estate of Glover Sanford.

After the death of Glover Sanford the defendant paid to his widow, under said agreement, $1,000, in instalments of varying amounts, between October, 1878, and June 2d, 1879; and on or about the 2d of June of each year thereafter paid her the sum of $1,000, making the last payment on the 2d of June, 1902. He has refused to make any payment to the plaintiff, under said contract, since the death of Sarah M. Sanford.

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Upon her appeal from the judgment of the trial court sustaining the defendant's demurrer to the complaint, the plaintiff makes two claims: first, that by the terms of the contract, upon the death of Glover Sanford, May 31st, 1878, the annuity for the first year became payable to the widow immediately, and for each succeeding year became payable in advance; and that the plaintiff, as her administratrix, is therefore entitled to recover the full amount of the unpaid annuity for the last year, commencing May 31st, 1902; second, that if the annuity did not become payable until the end of each succeeding year, after the death of Glover Sanford, the plaintiff is entitled to recover a proportionate part of the annuity for the last year, for the period between the date of the last payment, June 2d, 1902, and the date of the death of the widow, January 30th, 1903.

An "annuity" signifies a sum payable annually, unless the language of the instrument creating it may properly be construed as providing a different time of payment. By the agreement before us the annuitant is expressly given, and expressly contracts to receive, the sum of $1,000 "annually," so long as she shall remain the widow of the grantor. The word "annually" as thus used, not only denotes the amount to be paid, but the time of payment. *Kearney* v. *Cruikshank*, 117 N. Y. 95, 99. It means not only that the annuitant is to receive the sum of $1,000 for each year, but that that sum is to be paid to her each year. An agreement to pay a fixed sum annually, or each year, in the absence of language modifying the ordinary meaning of these terms, cannot fairly be construed as a promise to pay such sum annually in advance, or at the commencement of each year. A contract for the payment of money in fixed instalments, containing no other provision for the time of payment of such instalments than that they are to be paid annually, is lawfully performed by the payment of a single instalment at the end of each year. The words of the agreement, "the same to take effect from and after the death of her said husband," do not describe the time of the payment, but the event which brings the annuity into exist-

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ence, the time from which it begins to run. *Simmons* v. *Hubbard*, 50 Conn. 574, 576. "If an annuity is given by will, it will commence immediately after the testator's death, and the first payment shall be made at the expiration of a year from that event." 1 Swift's Dig. s. p. 455. In *Bartlett* v. *Slater*, 53 Conn. 102, 107, an annuity is defined as "a yearly payment of a certain sum of money . . . ," and it is said in that case, citing 3 Redfield on Wills, 186: "In case of an annuity bequeathed, it begins from the death of the testator, and the first payment becomes due in one year thereafter . . . ;" and again, citing *Gibson* v. *Bott*, 7 Ves. Jr. 96: "If an annuity is given, the first payment is payable at the end of the year from the death. . . ." The claim that the annuity was payable in advance cannot be upheld.

As the annuitant died before the end of the year following the last payment, made in June, 1902, may her administratrix recover a part of the sum of $1,000, proportionate to the part of that year which had expired at the time of the death of the annuitant, in January, 1903?

We think this question is very clearly answered in *Tracy* v. *Strong*, 2 Conn. 659, which in its principal features closely resembles the present action. In that case, as in this, the administratrix of an annuitant claimed to recover a fractional part of the annuity proportionate to the time which had intervened between the fixed time of payment and the date of the annuitant's death. It was urged there, that as the annuity was a provision for a widow in lieu of her dower, it was an exception to the general rule that an annuity was not apportionable. The court overruled the plaintiff's claim, and, in the opinions by CHIEF JUSTICE SWIFT and JUDGE GOULD, held that the only two exceptions introduced by courts of equity to the fully-settled common-law rule that there can be no apportionment of an annuity in respect of time, were "where an annuity is payable, by way of maintenance, to an infant or *feme covert*—who, by reason of their legal disabilities, might be unable to procure credit for necessaries, if payment for them de-

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pended upon their living till the annuity should, by the common rule, become payable." The present case does not come within these exceptions, since Mrs. Sanford, after the death of her husband, was under no legal disability to contract.

In England, and in Massachusetts, Rhode Island and New York, annuities are by statute made apportionable in respect of time. In some jurisdictions the exceptions to the common-law rule against apportionment have been extended to include an annuity given to a widow in lieu of dower, upon the ground that the annuity is necessary for the support of the widow until her death, or for the reason that that which is given in the place of dower should last as long as that for which it is given. *In re Lackawanna Iron & Coal Co.*, 37 N. J. Eq. 26; *In re Cushing's Will*, 58 Vt. 393; *Rhode Island Hospital Trust Co.* v. *Harris*, 20 R. I. 160, 163; *Blight* v. *Blight*, 51 Pa. St. 420. But the rule as laid down in *Tracy* v. *Strong*, 2 Conn. 659—perhaps fully understood by the parties to the present contract when it was drawn—has been so long recognized as the established law of this State, that if it is to be changed or the exceptions to it extended, it should be done by the legislature rather than by the courts.

There is no error.

In this opinion the other judges concurred.

THE UNION TRUST COMPANY, TRUSTEE, *vs.* MARY MCKEON ET AL.

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Apparent or ostensible authority in one person to act for another is such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent possesses.

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In the absence of countervailing facts, the possession of a mortgage deed and note by an agent of the mortgagee clothes him with an apparent authority to receive payments of principal on the mortgage loan. On the other hand, the want of such possession, while a circumstance of great significance and importance as tending to show the lack of such authority, is not necessarily and as matter of law decisive thereof; since other facts may justify the mortgagor in inferring, or a court in finding, its existence.

Ordinarily the existence of an apparent agency is essentially a question of fact, for the determination of the trier upon all the legitimate evidence in the case.

Where agency in fact is in issue, evidence of reputed agency is inadmissible.

Argued January 20th—decided March 3d, 1904.

ACTION to foreclose a mortgage of real estate, brought to and tried by the Superior Court in New Haven County, *Shumway, J.;* facts found and judgment rendered for the plaintiff, and appeal by the defendants. ***Error and new trial ordered.***

A. Heaton Robertson, for the appellants (defendants).

John K. Beach and *John W. Bristol*, for the appellee (plaintiff).

TORRANCE, C. J. The mortgage sought to be foreclosed was made in March, 1886, by John McKeon, to Bennett and Converse, trustees, to secure a note for $3,000 made by McKeon, payable on demand to the order of said trustees or the survivor of them. In June, 1890, Bennett as surviving trustee assigned said note and mortgage to Jane E. Winchester, who held them as owner until April 6th, 1894, when she assigned them to Luzon B. Morris as trustee. After the death of said Morris, his executor, in September, 1895, assigned said note and mortgage to the plaintiff as trustee, and the plaintiff is now the owner and holder of them.

The loan to McKeon was negotiated by Robert T. Merwin, a real-estate broker of New Haven. While the note and mortgage were owned by Mrs. Winchester, the mort-

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gagor made two payments on the principal of the note to Merwin, one of $1,000 on the 10th of March, 1892, and one of $1,400 on the 18th of July, 1893. Merwin died before this suit was brought, without having paid Mrs. Winchester the money so received from McKeon, and without accounting for the same; and McKeon and Mrs. Winchester are both dead.

The plaintiff claims that in receiving said money Merwin was the agent of McKeon; while the defendants claim that he was the agent of Mrs. Winchester; and this is the main question presented in the case. Upon the facts found, the trial court held that Merwin was not the agent of Mrs. Winchester in receiving these two payments. As bearing upon the question of Merwin's agency the controlling facts found are in substance these: —

Prior to the date of the note and mortgage in question Merwin, "a well-known and highly respected real-estate broker," requested Bennett and Converse, trustees, to loan the sum of $3,000 to McKeon, to be secured by the land described in the mortgage deed. Bennett examined the property and told Merwin that the proposed loan would be accepted. The mortgage deed and note were drawn by Merwin, executed by McKeon, and delivered to the trustees by Merwin, when they paid to him the amount of the loan, which he paid to McKeon. "No commission or other compensation for placing the loan was paid to Merwin by the trustees"; and they neither saw nor personally dealt with McKeon in the transaction. "It does not appear whether or not McKeon dealt with Merwin under the belief that Merwin was the agent of the trustees in making said loan. . . . At no time was the note or mortgage in the possession of said Merwin, after the delivery of the papers to said Bennett and Converse in 1886." From the beginning McKeon paid the interest upon the note, as it became due from time to time, to Merwin. "No express authority was ever given to Merwin by any of said owners of the note, or by said Bennett as agent of Mrs. Winchester, to collect either principal or interest on the note. The interest on the note was

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regularly paid by Merwin to Bennett as trustee, while said Bennett and Converse as trustees owned the note, and thereafter to Jane E. Winchester while she owned the note. No commission or compensation was paid by any of the owners of the note to Merwin on account of said payments of interest." It did not appear whether or not McKeon made the two payments of principal under the belief that Merwin was the agent of Mrs. Winchester to receive them. After the two payments were made to Merwin, he continued to pay to Mrs. Winchester and to the other owners of the note, down to the time of his death, the sum of $75 semi-annually, as interest upon the full principal of said note. After the first payment of $1,000 to Merwin, McKeon paid to Merwin interest at the rate of 5 per cent on the $2,000; and after the second payment of $1,400 he paid Merwin interest at the rate of 5 per cent on $600.

For many years prior to the time that the note became the property of Mrs. Winchester, Merwin had been her agent to collect the rents from various buildings belonging to her in the city of New Haven, and to make repairs on the same, for which services he received a commission or salary; and during the period that she was the owner of the note, to wit, from the 4th day of June, 1890, to the 6th day of April, 1894, the rents collected by Merwin for her amounted to at least the sum of $20,000 per annum, and during this period he negotiated and made leases of the various buildings belonging to Mrs. Winchester. For many years before, and during, the time that Mrs. Winchester held the McKeon note and mortgage, she loaned considerable sums of money through Merwin, secured by mortgages upon real estate, and in some cases Merwin received payments on the principal, and paid the same over to Mrs. Winchester, who accepted the same. But it did not appear that Merwin ever received any compensation for placing said loans, or that he was ever expressly authorized to collect or receive payments for her on account of the principal of said loans. At one time, while she owned the McKeon note, her bookkeeper sent to Merwin a list of the mortgages that Merwin had negotiated

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for her. That list contained some twenty-nine mortgages, including the McKeon mortgage, representing loans amounting to $225,000. It was sent to Merwin with a request to ascertain the condition of the taxes upon the property mortgaged. Upon Merwin's books there was a list of the mortgages made by him for her, and among them appeared the McKeon mortgage, with a minute that $1,000 had been paid on the principal; and at the beginning of this suit there was and now is between the estate of Merwin and the estate of Mrs. Winchester an unliquidated account.

Upon these facts the trial court held that Merwin "never had actual or apparent authority" to receive any payment on account of the principal of the note.

Whether Mrs. Winchester ever gave Merwin express authority to receive payments of principal on the McKeon note was a question of fact, and the court has found that she never gave him any such authority; and no complaint is made about this finding.

The court has also found the fact that the note and mortgage were not in Merwin's possession when the contested payments of principal were made, and were never in his possession after he delivered them originally to Bennett and Converse; and of this finding no complaint is made.

In the court below the defendants claimed, in effect, that if the other facts found tended to support the inference that Merwin had such apparent authority, the fact that he did not have possession of the securities would not, as matter of law, be conclusive against such inference; and they asked the court below so to rule. The court did not so rule. It ruled that "so far as this apparent authority of Merwin was a question of law as a legal inference from the facts proven and found," it could not be drawn, "because it appeared that Merwin never had in his possession the note or mortgage after their execution and delivery to the original mortgagees." The court thus held, in effect, that such want of possession of the securities by Merwin was the controlling fact in the case; and that its existence, as matter of law, prevented the court from drawing any inference, from the other facts

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found, that Merwin had apparent authority to receive the contested payments.

We think the court erred in ruling as it did, and that this error influenced its action in rendering the judgment in this case. Apparent or ostensible authority in one person to act for another, has been defined in one of the codes as follows: "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Cal. Civil Code, § 2317. It is well settled that the acts of *A*, having apparent authority from *B* to do them, are, so far as third parties are concerned, binding upon *B*, although *A* had no actual authority from *B*. The question in such cases is not what authority *B* had in fact conferred upon *A*; it is whether a third party in dealing with *A* is justified in inferring that *A* had actual authority, from the evidence thereof with which *B* had clothed *A*. *Griggs* v. *Selden*, 58 Vt. 561; *Lawson* v. *Carson*, 50 N. J. Eq. 370; *Gallinger* v. *Lake Shore Traffic Co.*, 67 Wis. 529. If, in the case at bar, the McKeon securities had been in Merwin's possession, with Mrs. Winchester's allowance, at the time the contested payments were made, and the payments had been made in good faith in reliance upon the facts of such possession, Merwin would in law, as to such payments, be treated as the agent of Mrs. Winchester. In cases like that the law is well settled that possession of the securities by the agent, of itself, in the absence of countervailing facts, clothes the agent with apparent authority; and justifies a third party, relying upon that fact and acting in good faith and without notice, in making payments upon the securities to the agent. *Wheeler* v. *Guild*, 20 Pick. 545; *Smith* v. *Kidd*, 68 N. Y. 130; *Crane* v. *Gruenewald*, 120 id. 274; *Haines* v. *Pohlmann*, 25 N. J. Eq. 179; *Lawson* v. *Carson*, 50 id. 370; *Central Trust Co.* v. *Folsom*, 167 N. Y. 285.

But while this is so, it does not follow that such possession is, as matter of law, essential to the existence of apparent authority, or that without it there can be no apparent authority. In reason, other facts may justify a third party

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in inferring, or a court in finding, the existence of such authority; and we know of no case holding a contrary doctrine. On the contrary, it has been distinctly held that such possession is not in every case essential to the existence of apparent authority. *Doyle* v. *Corey*, 170 Mass. 337; *Quinn* v. *Dresbach*, 75 Cal. 159; *Fitzgerald* v. *Beckwith*, 182 Mass. 177. Of course, such possession or the want of it is ever, in cases of this kind, a fact of great significance and importance. Where, as in the case at bar, there is no instrument or other evidence which of itself and as matter of law establishes the claimed agency, actual or apparent, the existence of an apparent agency is essentially a question of fact, to be determined by the trier from all the legitimate and relevant evidence in the case bearing upon that question, unhampered by any such rule of law as the trial court in this case imposed upon itself; and because that court thus limited itself in its consideration of the facts found, we think there should be a new trial.

Upon the question whether the facts found, considered without reference to any such erroneous rule as the court laid down, would or would not support the judgment rendered, we express no opinion.

A single ruling upon evidence remains to be considered. To prove that Merwin was generally known in New Haven as the business and financial agent of Mrs. Winchester, the defendants asked a witness this question: "Do you know what the general opinion was as to the business relationship existing between" Mrs. Winchester and Merwin. The witness answered, "Yes." He was then asked to state what it was, and the court on objection of the plaintiff excluded the question.

The defendants apparently undertook to prove the fact that Merwin was reputed to be the financial agent of Mrs. Winchester. But that fact was not an issue in the case nor was it relevant to any issue in the case. The question was not whether Merwin was reputed to be, but whether he was, her agent; and the facts constituting agency could only be proved by witnesses having knowledge of them.

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Where, as in this case, agency in fact is in issue, evidence of reputed agency is not admissible. The evidence was properly excluded.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

MARY K. WALP *vs.* C. A. MOOAR ET AL. (LAMKIN & FOSTER).

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

An entire stock of merchandise owned by *A*, an insolvent retailer in New Haven, was sold in New Haven to *B*, a New York dealer, in violation of the provisions of §§ 4868, 4869 of the General Statutes, which require such sales to be recorded, and in fraud of *A's* creditors, although it did not appear that *B* participated in the fraud. Three or four days later the plaintiff, who knew of *A's* insolvency and of his fraudulent purpose in selling to *B*, bought the goods of *B* in New York and shipped them back to New Haven for sale in her store there. *Held* that under the circumstances the plaintiff's purchase could not be regarded as having been made in good faith in New York, and in reliance upon the laws of that State; and therefore the goods upon their return to this State were again subject to attachment by *A's* creditors.

The statute (§§ 4868, 4869) being uniform in its operation, is not unconstitutional because of the limited number of persons, to wit, retail dealers, who are affected by it; nor does it deprive such persons of their property without due process of law. The legislature undoubtedly has power to adopt reasonable measures to prevent fraud in the sale of merchandise in this State, and the statute is clearly within that power.

The right of a creditor to attach property cannot be affected by the offer of a mere volunteer to pay the creditor's claim.

Argued January 21st—decided March 3d, 1904.

ACTION to recover damages for the conversion of a stock of goods, brought to the Superior Court in New Haven

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County where a demurrer to the second defense of the answer was overruled (*Elmer, J.*), and one to the reply to such defense sustained (*Gager, J.*), and the case was then tried to the court, *George W. Wheeler, J.;* facts found and judgment rendered for the defendants, and appeal by the plaintiff. *No error.*

After the decision of certain questions of law raised by demurrers to the pleadings, the case was tried to the court upon its merits, and the following facts found: —

On the 30th of September, 1901, W. G. Davidson and Company, who were conducting a retail shoe business in New Haven and were insolvent, sold their entire stock of merchandise, of the value of $3,500, to one Isaac Koch of Brooklyn, N. Y. Said sale, so far as Davidson and Company were concerned, was fraudulent and void as to creditors. As to Koch it is not found that the sale was fraudulent. Said sale was not made in writing and recorded within one day after the sale or delivery, as required by § 4868 of the General Statutes. On October 1st, 1901, the plaintiff saw the goods packed in cases at Davidson and Company's store, about to be loaded upon a van, and sent her clerk to Davidson and Company to learn if the goods could be bought, and if not, to whom they were to be sent, and having learned where and to whom the goods were consigned, wrote to Koch concerning the purchase of the stock, and upon receiving a reply, on October 4th went to the rooms of the Brooklyn Purchasing Syndicate in Brooklyn, N. Y., where said stock was exposed for sale, and purchased the same for $2,400. Said goods were shipped by plaintiff to her store in New Haven, where they arrived October 9th and were then placed by her on sale. Before making said purchase the plaintiff knew that Davidson and Company, while insolvent, had sold substantially all their stock to Koch, and that the sale had been made in fraud of their creditors. While the goods were in the plaintiff's store the defendants, on the 12th of October, attempted to attach them, and on October 31st, 1901, attached a part of them, as the goods of Davidson and Company, to secure payment of a claim of $425 for goods sold

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by the defendants to Davidson and Company. The goods so taken by the defendants were of the value of $800. Upon these facts judgment was rendered for the defendants.

Henry G. Newton and *Bernard E. Lynch*, for the appellant (plaintiff).

Cornelius J. Danaher, for the appellees (defendants).

HALL, J. The defendants failed in the trial court to prove the allegation of their second defense, that the plaintiff purchased the goods in question from the fraudulent vendee of Davidson. The title of Koch, from whom the plaintiff purchased, was not impaired by the fraud of Davidson and Company, in which the defendant failed to prove that Koch participated. *Knower* v. *Cadden Clothing Co.*, 57 Conn. 202, 217. Koch's title, therefore, was only defective because made so by the provisions of General Statutes, § 4869, regarding the effect of a sale by a retail dealer in this State of the whole or a large part of his stock in trade, without a compliance with the requirements of § 4868 as to the manner of making and recording such sale. The plaintiff's title can only be defective for the same reason, since by her purchase from Koch she acquired at least as good a title as that of Koch, her vendor. Had she been a *bona fide* purchaser from him, she might have acquired even a better title than that of her vendor. *Parker* v. *Crittenden*, 37 Conn. 148, 152; *Williamson* v. *Russell*, 39 id. 406, 412.

The ultimate question, then, for our decision is, how was the plaintiff's title to these goods affected by the provisions of §§ 4868 and 4869?

We think the fair import of the finding is that the sale from Davidson and Company to Koch was made at New Haven. The record states that the sale to Koch was made on the 30th of September, 1901; that the goods immediately before that date were a part of Davidson and Company's stock of merchandise in his store in New Haven, and that they were not taken from the store and shipped to New

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York until October 1st. These statements, in the absence of any language in the finding indicating that the contract was made in New York, justify us in treating the sale as completed in this State on the 30th of September, when the goods were here, and therefore as a sale governed by the provisions of the statute above referred to.

But it is urged by the plaintiff that she derives her title by purchase from Koch in New York State, where the goods were exposed for sale; that as Koch was not a retail dealer, the sale by him was not one required, even by the laws of Connecticut, to be in writing and recorded; that if by the laws of this State the plaintiff's title is such that the goods are still liable to attachment by the creditors of Davidson and Company, they are not by the laws of New York; and that upon the principles of comity the same effect should be given in this State to the sale as would be given to it in New York.

We shall assume that after the plaintiff purchased the goods, they could not have been taken by the creditors of Davidson and Company, if the laws of New York are to be applied to the contracts of purchase. It is a "general principle, sanctioned and acted on in all civilized countries, that the laws of one will, by what is termed the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. Therefore, the law of the place where a personal contract is made, is to govern in deciding upon its validity or invalidity; and a conveyance of personal property which is valid by that law, is equally effectual elsewhere. . . . The rule that the law of one nation will be carried into effect in the territories of another, is, however, subject to some exceptions;" and one is "that it will not be allowed to prevail where it will be manifestly injurious to the State where it is sought to be enforced, or to its citizens." *Vanbuskirk* v. *Hartford Fire Ins. Co.*, 14 Conn. 583, 586. "The general rule of law is, that contracts made in one State, and valid by its laws, shall be deemed valid in every other State; provided, that the State, before whose courts the contract is attempted to be enforced, or its citizens, shall

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not suffer any inconvenience by it; and that the consideration be not immoral; or that giving the contract effect will not have a bad tendency." *Vermont State Bank* v. *Porter*, 5 Day, 316, 320. "It is familiar law that, in respect to personal property, the validity of transfers depends in general upon the place of the contract; sometimes, as in questions like the present which respect delivery of possession, the situs of the property is an important consideration. . . . These general rules are subject to the exception that every State must judge for itself how far it will give effect to the laws of other States. The property in dispute here being within our jurisdiction, our courts decide whether to apply to the case our own rules, or the laws of Massachusetts." *Ballard* v. *Winter*, 39 Conn. 179, 182.

In giving the reasons why the law of this State ought not to be applied to the contract in question, in the case last cited, the court said that the contract appeared to have been made "in good faith, in another State, between citizens of that State, in relation to property there situate, with no purpose of being executed in Connecticut, or of evading our laws."

A marked difference is apparent between the circumstances surrounding the plaintiff's purchase from Koch, or the Brooklyn Purchasing Syndicate, which seems to be another name for Koch, and those described in the case of *Ballard* v. *Winter*, 39 Conn. 179. In the case at bar the property had been sold to Koch in Connecticut on the 30th of September, in violation of our statute requiring such sales to be in writing and recorded. The plaintiff, since she knew the circumstances of the sale before she purchased, was chargeable with knowledge that it was made in disregard of our laws, to the same extent that Koch was, and she knew the further fact of the fraudulent purpose of Davidson and Company, in making the sale. On the day after the sale, and while the goods were still in this State, the plaintiff commenced in Connecticut her efforts to make the purchase, which she three days later completed in the State of New York where the goods must have just arrived. After the purchase, the

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plaintiff immediately reshipped the goods to New Haven, where she had at all times intended to use them, and where, within a few days after their arrival, the defendants attempted to attach them. Apparently the goods were in New York no more than a day before they were purchased by the plaintiff and shipped back to New Haven, some of the goods being in the same cases in which they were packed at the store of Davidson and Company. To constitute the plaintiff a *bona fide* purchaser she must have bought the goods of Koch "without notice of the claims of third parties thereto, and upon the faith that no such claims existed." *Hayden* v. *Charter Oak Driving Park*, 63 Conn. 142, 147. *Alden* v. *Trubee*, 44 id. 455, 459. Before the goods were removed from this State they were subject to attachment by the creditors of Davidson and Company, even after the purchase by Koch. The plaintiff purchased with knowledge of the insolvency of Davidson and Company and of the claims of their creditors upon these goods, and of the intention of Davidson and Company, by the sale to Koch, to place them beyond the reach of their creditors, and with the intention on her part of taking the goods to Connecticut. Having brought the property within this jurisdiction, she now asks our courts to protect it in her hands against attachment by the very creditors of whose claims to the property she had full notice before she purchased. We cannot regard the plaintiff's purchase as one made in good faith in New York, and in reliance upon the laws of that State. The purchase was made by her in bad faith and with the intention of at once placing the property within the operation of the laws of Connecticut. Having under these circumstances brought the goods into this jurisdiction, she is not entitled to receive from our courts protection against the creditors of Davidson and Company to any greater extent than Koch was before he removed the property from this State.

The Act under consideration is not unconstitutional, either as applying only to a particular class, namely, retail dealers, or as depriving such persons of their property with-

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out due process of law. A law which is uniform in its operation is not rendered invalid merely because of the limited number of persons who will be affected by it. The Act in question applies equally to all the people of the State who may engage in the business described. The limitation of the Act to retail dealers is not an arbitrary classification. The nature of the business described in the Act is such as to furnish those conducting it opportunities of secretly selling their entire stock to the injury of those from whom they have purchased it on credit. The purpose of the Act is to prevent fraud, and it is of the same general character as our laws requiring assignments of future earnings and conditional sales to be in writing and recorded. It in no way interferes with the conduct of any retail business in the usual manner. It applies only to sales not made in the ordinary course of business, and imposes no unreasonable burden upon the parties to sales of that character. The legislature has the undoubted power to adopt reasonable measures for regulating the sale of merchandise in this State so as to prevent fraud, and we think the Act under consideration is clearly within that power. *State* v. *Conlon*, 65 Conn. 478, 485; *Atwood* v. *Protection Ins. Co.*, 14 id. 555, 559; *McDaniels* v. *Connelly Shoe Co.*, 30 Wash. 549; *Neas* v. *Borches*, 109 Tenn. 398; *Squire & Co.* v. *Tellier*, (Mass.) 69 Northeastern Rep. 312.

The offer of the plaintiff at the time of the attempted attachment on the 12th of October, to pay the defendants' claim against Davidson and Company, was the act of a mere volunteer, and cannot affect the rights of the defendants in this action.

It is unnecessary to discuss the rulings made upon the demurrers, as practically the same questions were raised after all the facts were found, and were decided by the final judgment.

There is no error.

In this opinion the other judges concurred.

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ANDREW F. LOOMER, TRUSTEE, *vs.* MARTHA A. LOOMER ET AL.

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Having made absolute gifts to his six children, a testator, in the seventh clause of his will, created a trust estate, consisting of real property, the net income of which was to be paid over to his children annually or oftener, in certain specified proportions, "to be held by said children and their heirs forever." After a certain son and his wife had deceased and their youngest surviving child had reached twenty-one, the beneficiaries receiving five eighths of the income were authorized to terminate the trust, if they chose, whereupon the trustee was to convey the principal of the trust estate to those entitled to the income, and in the same proportions. If not so terminated, the trust was to cease thirty years after the testator's death, when the *corpus* of the property was to be conveyed to the several beneficiaries in the aforesaid proportions. The testator died in 1892 and his six children still survive. Two of the sons were adjudicated bankrupts in March, 1902, and in February, 1903, the trustee in bankruptcy, pursuant to an order of court, sold their interests in the trust estate. In a suit to construe the will it was *held*:—

1. That in view of the general plan and purpose of the whole will, it was evidently the intention of the testator that the heirs of such child as might die during the term fixed for the continuance of the trust, should—subject to certain specified exceptions—take such decedent's share of the income.
2. That tested by the statute or common-law rule against perpetuities, the trust to pay income could not be saved in its entirety, since the gift to the heirs of the child dying within thirty years from the testator's death, might not vest within the period prescribed by law; but that until such death occurred the trust could be maintained and the testator's intent carried into effect.
3. That upon the testator's death each of his six children took an equitable, vested remainder, or cross-remainder, in fee, in a specific, undivided portion of the *corpus* of the trust property.
4. That the interest of the two bankrupt sons in the income ($\frac{2}{6}$), as well as in the *corpus* of the trust property, passed to their trustee in bankruptcy at the date they were adjudicated bankrupts; while the vendee of the trustee in bankruptcy was entitled to the income accruing since his purchase, with the right to a conveyance of the legal title in fee to two undivided eighths of the trust property upon the termination of the trust to pay income.

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There is no rule which limits the continuance of a trust to any period of time; but the beneficial interest must vest in the *cestui que trust* within the time limited by law for the vesting of legal estates.

Argued January 22d—decided March 3d, 1904.

SUIT to determine the construction of the will of Lyman L. Loomer of Derby, deceased, brought to and reserved by the Superior Court in New Haven County, *Shumway, J.*, upon the facts set forth in the complaint and answers, for the advice of this court.

March 18th, 1892, Lyman L. Loomer of Derby died, leaving a last will dated May 18th, 1891, which has been admitted to probate. He left surviving him six children, Martha, Lyman, Andrew, Lowel, Lucy and Minnie, whose ages ranged from forty-four to sixty-seven years, all of whom still survive. One daughter predeceased the testator, leaving two children. Two of said surviving children, to wit, Martha and Lucy, are unmarried. Lyman has been married more than twenty years, but is childless. The other three have been married many years, and all have children who have passed their majority. March 10th, 1902, Lyman and Andrew were adjudicated bankrupts in the United States District Court of Connecticut, and on March 22d, 1902, the defendant Birdseye was appointed trustee of their assets, and later qualified. February 19th, 1903, said trustee in bankruptcy, by order of court and against the objections of said bankrupts, sold and conveyed their interests in the trust estate created under the provisions of paragraph seven of the will of their father, to the defendant Hubbell.

The first five paragraphs of the will contain absolute gifts to each of the children save Lowel. The sixth contains a gift of two houses and certain lands in trust for Lowel and his wife and the survivor of them, for life, and the remainder over to their children. The seventh paragraph, which gives rise to the present controversy, is as follows: "I give, bequeath, and devise to my son, Andrew F. Loomer, all my lands, buildings, and tenements lying in the borough of Birmingham on the southerly side of Main or Second street: to have and to hold the same to him and his

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successors and heirs, in trust, and for the following uses and purposes, to wit: to control and manage said real estate, and keep the same in good repair, and insured, and rent the same, and collect the rents and income of the same, pay all of the necessary current expenses, including one hundred dollars annually for his services in executing this trust, and to pay the net income annually, or oftener if the same shall be received quarterly, as follows: four-eighths or one-half to my two daughters, Martha A. and Lucy A., and the survivor of them, and one-eighth to each of the following: Lyman Harvey, Minnie R. Hulme, Lowel M., and Lucretia, his wife, as one party, or the survivor of them, and retain one-eighth of said net income for himself: said sums and income when so paid to be held by said children and their heirs forever.

"In the management of said real estate I authorize my said trustee to collect and receive any insurance money for any loss that may occur to said property, or any assessments of benefits or other sums to be received on account of said estate, and expend the same or any part thereof in repairing or rebuilding any buildings thereon, and to manage said estate according to his best judgment for the benefit of my said children.

"Whenever in the judgment of my said trustee said real estate or any part of the same can be sold at advantage, and all the adult beneficiaries under this will shall in writing consent to such sale and conversion of the same into money, then I authorize my said trustee to sell and convey the same by good and sufficient deeds of conveyance, and hold the proceeds of said sale in trust, instead of and in place of said real estate; and when my said son, Lowel M., and his wife, Lucretia, shall have deceased, and the youngest surviving child, issue of their bodies, shall have reached the age of twenty-one years, then I authorize and empower my said trustee, on the request in writing of the beneficiaries entitled to five-eighths of said income, to terminate said trust, and convey the principal of said trust estate to those entitled to the income, in the same proportion as said income is given;

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and if no request shall be so made at the end of thirty years from my decease, I declare said trust at an end, and direct said conveyance to the several beneficiaries in said proportions; and on such conveyance I give and bequeath said trust estate so held to said several parties, their heirs and assigns forever."

The eighth paragraph makes provision for the care and maintenance of the two children of the deceased daughter, and the ninth paragraph disposes of the rest, residue and remainder equally to his children, the heirs of the body of any deceased child taking the portion that such child, if living, would take.

Andrew has qualified and is acting as the trustee under the provisions of said seventh paragraph. The value of the trust property is about $50,000.

Edward A. Harriman, for Richard H. Hubbell.

William A. Wright, for Lyman H. Loomer.

William S. Downs, for Andrew F. Loomer.

Arthur M. Marsh, for Isaac W. Birdseye, trustee in bankruptcy.

PRENTICE, J. The questions upon which our advice is asked arise from the provisions of paragraph seven of the will. The paragraph establishes a trust fund and creates a trust therein. The six surviving children of the testator are, beyond question, in terms made the beneficiaries for their respective lives, subject to the termination of the trust in the manner prescribed, of specified portions of the annual income. Certain rights of survivorship are created. The ambiguity in the language employed raises an uncertainty as to the disposition of income in the event of the death of certain of the children. Is no disposition made in anticipation of such a contingency; is there to be an accumulation; are there rights of survivorship; or is the share of each deceased child, except as otherwise expressed, given to his or her heirs?

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In answering these questions we should aim to gather the testator's intent, and to that end we are entitled to look at the whole will and its general plan and purpose as disclosed therein. The testator, in the paragraphs preceding the seventh, had made absolute gifts to all his children save one, created a trust for the benefit of that one and his family, and provided for the care of his grandchildren. It is apparent that his controlling purpose in framing paragraph seven was to provide an assured source of income for his children, being especially mindful in that regard of the claims upon him of his two unmarried daughters; and, that done, to make a final disposition of the property the income from which was devoted to that purpose. It is quite as apparent, from the general scheme of the will, that the testator had no intention of unduly favoring one child or stock over another. With these considerations in mind it is not easy to read paragraph seven throughout, without becoming satisfied that by the use of the words "and their heirs," in connection with the gifts of income, he meant to indicate that in the event of the death of any of his children the heirs of such child, should, subject to the exceptions made, become the beneficiaries of the allotted portion of income in its stead. The language used with respect to the power of sale, and especially the use of the phrase "adult beneficiaries" in that connection, and his language with respect to the final division of the trust fund, all emphasize the correctness of the interpretation indicated. There is nothing in the will to indicate any purpose to accumulate income, and the provisions relating to the final distribution of the trust fund, which are in express terms made applicable to the principal only, sufficiently negative the existence of such a purpose. A purpose to provide for survivorship, except as plainly indicated, is so foreign to everything in the will that it cannot be believed, in the absence of direction to that effect, that the testator intended to adopt a scheme which would inevitably operate to create discriminations between his grandchildren, depending upon the factitious circumstance of the order and time of survival among his children. That the testator made no

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provision for these contingencies of death, which, in view of the ages of his children, he must have contemplated, we are bound not to assume without satisfactory and convincing evidence to that effect from the will. Such evidence there is not, as we have observed.

We have next to inquire as to the validity of this trust to pay income. The claimant under the conveyance by the trustee in bankruptcy, contends that it is invalid under the common-law rule against restraints of alienation, since it may continue for the gross term of thirty years. There is no rule which limits the continuance of a trust to any period of time. A trust is no more invalid for the reason that it may continue thirty years than is a life estate or estate in fee simple. The essential thing is that the beneficial interest under the trust vest in the *cestui que trust* within the time limited by law for the vesting of legal estates. Gray on Perpetuities, §§ 232, 322, 412; 2 Wash. on Real Property (6th Ed.), § 1447; 1 Perry on Trusts (5th Ed.), § 383; *In re Walkerly*, 49 Amer. St. Rep. (n.) 129; *Connecticut T. & S. Deposit Co.* v. *Hollister*, 74 Conn. 228; *Andrews* v. *Lincoln*, 95 Me. 541.

Applying this test, however, the trust to pay income cannot be saved in its entirety. The gift to the heirs, upon the death of a child within thirty years from the testator's death, is one which might not vest within the life of the child and twenty-one years plus the period of gestation thereafter. *Bates* v. *Spooner*, 75 Conn. 501. It is possible, however, to sever the trust in the manner and for the reasons set out in the recent analogous case of *White* v. *Allen*, 76 Conn. 185, and thus give effect to the testator's intent until the death of either Lyman, Andrew or Minnie, or the survivor of Martha and Lucy, or the survivor of Lowel and his wife, Lucretia, when the trust must terminate and division of the trust property be made to those entitled under the will to receive it, who will receive it as owners in fee simple.

The concluding portions of the paragraph under consideration deal with this subject of the final division. They are not free from ambiguity, but when read in the light of

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the testator's intention and testamentary plan, and in connection with the other provisions of the paragraph, it becomes clearly evident that the testator intended by the language he used to give to his children equitable remainders or cross-remainders, in fee, in specific, undivided portions of the trust property, which should vest immediately upon his decease. Upon the termination of the trust, those possessed of the beneficial estate would forthwith become entitled to the legal. The concluding words of the paragraph, which were quite likely incorporated in it to express the purpose of the testator that the title acquired should be an absolute one, cannot, whatever their possible purpose, suffice to give to the testator's language any other intent and meaning than that indicated, which is otherwise so apparent.

It appears, therefore, that the testator's two sons, Lyman H. and Andrew F., at the time of their adjudication as bankrupts, were each, as *cestui que trust*, entitled, under the paragraph of the will in question, to receive one eighth of the net income of the trust estate during the continuance of the trust to pay income as aforesaid, and were each the owner of an equitable remainder in fee in an undivided one eighth of the trust estate, with the right to have the full legal title thereto upon the termination of the trust.

It needs no argument to show that upon the adjudication in bankruptcy of Lyman and Andrew, all their remainder title and interest passed to the trustee in bankruptcy. National Bankrupt Act, § 70*a*. It is, however, contended that their rights to the income under the trust did not so pass. Whatever may be said upon the much mooted question as to the legality of so-called spendthrift trusts, it is clear that the trust in question possesses none of the attributes of the trusts so described. The beneficial interests are absolute, and left wholly unrestrained and under the control of the beneficiaries. Such equitable estates, we have repeatedly held, are alienable, and may be subjected to the rights of creditors upon attachment and execution. *Ives* v. *Beecher*, 75 Conn. 564, and cases there cited. The equitable interests in question, therefore, passed to the trustee in bankruptcy, who thus,

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by virtue of the bankruptcy proceedings, came to stand in the shoes of the two bankrupts as respects their rights under the paragraph of the will in question.

As between the trustee in bankruptcy and the claimant Hubbell, to whom, on February 19th, 1903, the former conveyed the right, title and interest of the two bankrupts in and to the lands in question, we understand that there is no dispute as to their respective rights. The trustee claims that share of the income to which the two bankrupts would have been entitled on February 19th, 1903, had they not been adjudicated bankrupts, and Hubbell claims such share of subsequently-accruing income, and their undivided interests in remainder in the real estate itself. These claims are well founded.

The Superior Court is advised (1) that the defendant Birdseye, as trustee in bankruptcy, is entitled to receive from the trustee under the will two eighths of the net income upon the trust estate designated in the seventh paragraph of the will, which accrued prior to February 19th, 1903, and had not been paid over at the time of the adjudications in bankruptcy, and (2) that the defendant Hubbell is entitled to receive from said trustee, when the same shall become payable by the provision for distribution, two eighths of all the net income which has accrued from said trust estate since said February 19th, 1903, and from time to time, as payable, the like proportion of said income until the death of either Lyman, Andrew or Minnie, or the survivor of Martha and Lucy, or the survivor of Lowel and his wife, Lucretia, and is the owner of an equitable remainder in fee in two undivided eighths of said trust estate limited upon the event of death which shall as aforesaid terminate his right to receive said share of income, with the right to the legal title in fee in said two undivided eighths upon said event, and to a conveyance thereof at that time from said trustee.

No costs will be taxed in this court.

In this opinion the other judges concurred.

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ISAAC J. BOOTHE (MARY W. BOOTHE, EXECUTRIX) *vs.* SHERMAN ARMSTRONG.

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

"Counterclaim," as used in the Practice Act and rules thereunder, is a general and comprehensive term, and includes all manner of permissible counter-demands. Accordingly, under Rule V, § 3, the plaintiff's withdrawal of an action in which a "set-off" has been filed does not impair the right of the defendant to have the case remain upon the docket for the prosecution of that demand; although under the former procedure such withdrawal would have carried the set-off with it.

Argued January 22d—decided March 3d, 1904.

ACTION upon the common counts to recover for money loaned, brought to the Superior Court in New Haven County and withdrawn by the plaintiff after the defendant had filed defenses by way of set-off; the defendant moved to restore the case to the docket, to which the plaintiff demurred, and the court, *Shumway, J.*, reserved the case for the advice of this court. *Superior Court advised to overrule demurrer.*

The defendant, having been sued on the common counts, filed his answer containing a general denial and two separately numbered defenses entitled, "By Way of Set-off." The plaintiff replied and issues were joined by the defendant's rejoinder. A committee was appointed to hear the case. While the cause was so pending the plaintiff died. His executrix not having entered within six months, the defendant, pursuant to § 1131 of the General Statutes, had a writ of *scire facias* issue against her to show cause why judgment upon the set-offs should not be rendered against her. The parties thereupon stipulated that the action revive, that the executrix enter, and that it be proceeded with before the committee, "such procedure of such committee to be continued and completed in the same manner and to the same effect as if said Isaac J. Boothe had not

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died." A few months later the plaintiff filed a withdrawal of the action. The defendant thereupon filed a written motion for the restoration of the case to the docket. To this motion the plaintiff demurred. The defendant claims (1) that by force of the stipulation the case was not subject to withdrawal, and should therefore be restored as asked; and (2) that in any event he is entitled to have the case, in so far as his causes of action entitled "By Way of Set-off" are concerned, restored to or remain on the docket, so that he may pursue them to judgment.

Edward A. Harriman, for the plaintiff.

Verrenice Munger and *Robert L. Munger*, for the defendant.

PRENTICE, J. The claims set up in the second and third answers are of such a character that, before the adoption of the Practice Act, they would have been subjects for set-offs in the action. The withdrawal of the action would have carried with it the withdrawal of the set-offs. *Anderson* v. *Gregory*, 43 Conn. 61, 63. The principal question we have to consider involves the inquiry as to whether or not the Practice Act and rules under it have wrought any change in this regard.

For many years before the adoption of that Act, the right of a defendant, in an action "for the recovery of a debt" to set-off "mutual debts," and, if the situation warranted, have a judgment for excess, had been given by statute. Our courts had also recognized the right of a person sued in an action upon contract, to recoup or cut back the amount which the plaintiff might recover, by showing a right of action for damages in himself arising out of the same contract or, in a qualified sense, transaction. *Avery* v. *Brown*, 31 Conn. 398; *Beecher* v. *Baldwin*, 55 id. 419. Set-off was of statutory origin: recoupment of judicial. Both involved the existence, in favor of the defendant, of an independent cause of action which he might pursue in a

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separate action. In set-off the defendant might have a judgment for an excess of his claim over that of the plaintiff: in recoupment he could not.

The New York Code of Procedure as amended in 1850, for the first time, we believe, made use of the term "counterclaim" as applied to matter which a defendant might plead for his protection against the plaintiff's demand. The term as thus used was carefully defined and so defined, as it continues to be in the New York Code, as to include not only set-off and recoupment, but all manner of permissible counter-demands, whether legal or equitable. The definition does not include defensive matter, but matter which would furnish the basis of an independent action on the part of the defendant, and in the presentation of which he assumes the position of the actor. This term has since been incorporated into all the code practice systems of the country. In most jurisdictions it is employed with the same comprehensive meaning that was first given to it in New York. This, however, is not universally true, for there are systems which continue the use of the term "set-off," "counterclaim" being generally, if not uniformly, so defined as to include all other counter-demands which may be offensively pleaded.

Our Practice Act appropriated the term but did not define it. It is not, however, difficult to discover in what sense it was intended to be used and ought to be interpreted. The term itself is a general and comprehensive one, naturally including within its meaning all manner of permissible counter-demands. It was a term in use, before its appropriation in this State, as and in the sense already indicated. We fail to discover any good reason for the recognition of any distinctions between different classes of counter-demands, or the retention of a terminology indicating such distinctions. If there are no such reasons, the spirit and purpose of the Act calls for a construction of its language which shall simplify rather than complicate it. The Rules under the Practice Act—which were promulgated by the judges of the Superior Court under the authority of the Act, and which were, as a

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matter of common knowledge, prepared by the framers of the Act—in the sections which make up division V thereof, entitled "Counter-Claims and Cross-Complaints," throw no little light upon the meaning in which the word in question was employed. All these considerations, when taken in connection with the language of § 5 of the Act, lead to the conclusion that the term "counterclaim" in the Act and rules is used in its natural and comprehensive sense, and as including and not excluding set-off. The explanation of the presence of the latter term in the section is doubtless to be found in the fact that the right of set-off then existed by the express provision of statute, and that it was desired to make it clear that this statutory right was embraced within the provisions of the section. It was therefore expressly named, but not named with any intention to exclude set-offs from the class to which the descriptive term of "counterclaim" was given. The line of argument to the contrary would, when applied to the language of § 640 of the General Statutes, tend to demonstrate the altogether untenable proposition that equitable rights could not furnish the foundation for a counterclaim.

It follows that the provisions of § 3 of division V, of the Rules under the Practice Act—to the effect that the withdrawal of an action, after a cross-complaint or counterclaim has been filed therein, shall not impair the right of the defendant to prosecute such cross-complaint or counterclaim as fully as if said action had not been withdrawn—meet the present situation and establish the present defendant's right to have the case remain upon the docket that he may pursue his counterclaims, notwithstanding any rule of law to the contrary existing under the former modes of procedure. It having been wrongfully stricken off, he is entitled to have it restored for the purpose indicated. The right of the plaintiff to withdraw the action and thereby withdraw from the cognizance of the court his own cause of action, is of course unimpaired. That the defendant has chosen to entitle his claims as set-offs cannot militate against this right. They are no less counterclaims because they chance to be desig-

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nated as set-offs; in fact they are counterclaims because they answer the statutory requirements of a set-off.

There is no occasion to consider the questions raised under the stipulation.

The Superior Court is advised to overrule the demurrer to the motion to restore.

Costs in this court will be taxed in favor of the prevailing party.

In this opinion the other judges concurred.

CHARLOTTE ETCHELLS *vs.* JAMES WAINWRIGHT ET UX.

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A motion for a new trial, addressed to the trial court, contained a general allegation to the effect that the judgment was erroneous and ought to be set aside because of material errors committed by the trial judge. *Held*, upon demurrer to the motion, that this was not such an issuable allegation of fact as was admitted by the demurrer.

Aside from the common-law remedy by writ of error, the entire system of appellate procedure and proceedings for securing new trials generally, are governed in this State by statute.

The right of appeal is not granted by our Constitution nor is it essential to "due process of law." It is merely a statutory privilege granted upon certain conditions which must be strictly complied with. Such conditions cannot be modified or extended by any judge or court without express statutory authority.

Having tried and rendered final judgment in a case, the Court of Common Pleas has no power—at all events after the term in which the judgment was rendered—to grant the defeated party a new trial upon the ground that he was prevented by the death of the trial judge from obtaining a finding of facts, and consequently from appealing to this court for a review of alleged erroneous rulings of the trial court upon questions of evidence and claims of law.

Even had the trial court been clothed with jurisdiction to review the rulings of the trial judge, it could not have done so in the present case without a finding of facts, since it would have been impossi-

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ble for it to determine whether such errors had been committed as would entitle the defeated party to a new trial.

General Statutes, § 815, which empowers the Court of Common Pleas to grant a new trial for mispleading, the discovery of new evidence, want of notice, "or for other reasonable cause," does not include causes for which a new trial may be obtained by appeal under other statutes.

Argued January 22d—decided March 3d, 1904.

ACTION to recover money claimed to have been obtained by undue influence and fraud, brought to and tried by the Court of Common Pleas in New Haven County, *Cable, J.*, and judgment rendered for the defendants. After notice of appeal had been filed by the plaintiff, the trial judge died before making a finding of facts. The plaintiff then moved for a new trial, to which the defendants demurred, and the questions arising thereon were reserved (*Bishop, J.*) for the advice of this court. *Denial of motion advised.*

The plaintiff, in 1901, brought an action against the defendants in the Court of Common Pleas in New Haven county, to recover certain money and property amounting to about $800, which she alleged the defendants had wrongfully and fraudulently induced her to transfer to them while she was a member of their family, and when from age and infirmity she was unable to understand the nature and effect of such transfer.

The defendants, while admitting said transfer in their answer, denied that they had wrongfully procured it to be made.

On February 26th, 1903 (and during the January term of said court, terms of which are by statute held on the first Monday of January, March, May and November, and on the third Monday of September), the court having heard the parties found the issues for the defendants and rendered judgment in their favor for costs. The plaintiff, having given due notice of appeal, filed on the 6th of March, 1903, a draft-finding containing a statement, in 46 separate paragraphs, of facts which she requested the trial judge to find, showing the circumstances, as claimed by the plaintiff, under

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which said money and property were transferred to the defendants. It also contained a statement of certain rulings of the court in excluding questions asked by plaintiff's counsel of the defendants as witnesses, and a statement of the claims said to have been made by plaintiff's counsel upon said facts, and of the rulings of the court upon said claims. On the 12th of March the defendants filed their counter-finding, and both of said proposed findings were given to the *Hon. Julius C. Cable*, the judge who tried and decided said case.

On the 9th of June, 1903, said judge died without having made a finding of facts in said case.

On the 3d of September, 1903, the plaintiff filed in said Court of Common Pleas a written motion, entitled "Plaintiff's Motion for a New Trial," alleging therein that said judgment had been rendered, and said notice of appeal and proposed findings had been filed; that no finding had been made, and that by reason of the death of the judge who tried the case no finding could now be made by the court; that "upon the trial of said case there were manifest errors committed by the said judge who tried the same, and which errors were substantial and material, and which entered into and made a part of the judgment rendered by said court, and that such errors contributed to and were the cause of the judgment so rendered"; that "said judgment was manifestly erroneous, and should be set aside and declared null and void, and the plaintiff should be allowed to have a new trial of said action." Said motion asked the court to "grant a new trial of said action for the reasons" therein stated.

To this motion the defendants demurred, upon the grounds, among others, that said motion having been filed after the term in which the judgment was rendered, the court had no jurisdiction to entertain it; that the law made no provision for a new trial under the circumstances alleged in the motion; that no right to a new trial arose from the fact that it was impossible for the trial judge to make a finding; and that it did not appear that there was any reasonable ground for a new trial.

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The case was reserved for the advice of this court.

Verrenice Munger and *Robert L. Munger*, for the plaintiff.

Frederick W. Holden, for the defendant.

HALL, J. It is claimed that the defendants, by demurring to the plaintiff's motion, have admitted that the judgment which the plaintiff attempted to appeal from was erroneous. The motion states no facts or rulings showing the claimed error. An allegation, in an application for a new trial, that the judgment sought to be reversed is erroneous and ought to be set aside because of errors committed by the trial judge, is not such a proper and issuable allegation of fact as is admitted by a demurrer; nor ought we, from the demurrer to this motion, to assume, as the basis of our advice in this case, that the judgment in question is erroneous, if it is apparent that the alleged error cannot be shown.

The conclusion which we have reached upon the merits of the question before us, renders it unnecessary for us to decide whether, under § 813 of the General Statutes, a case from the final judgment in which an appeal has been taken to this court is, at a subsequent term and before the appeal has been perfected, so pending before the trial court that it may entertain any motion concerning it other than such as relate to the appeal.

Under the motion made by the plaintiff in the Court of Common Pleas, on the 3d of September, 1903, she had no better right to a new trial than she would have upon a petition for a new trial under General Statutes, § 815. In either case she is required to prove by legal evidence the facts upon which she relies to establish her right to a new trial, and in either case a decision in her favor would be subject to review by this court. *Carrington* v. *Holabird*, 17 Conn. 530, 538; *Husted* v. *Mead*, 58 id. 55, 66. Indeed, if a decision in plaintiff's favor upon this motion would not have been reviewable, it was not proper to reserve the motion for our advice.

We shall, therefore, inquire whether the plaintiff, under

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our law and practice and upon the facts above stated, would have been entitled to a new trial even if she had proceeded by a petition for a new trial under § 815, which provides that certain courts, including courts of common pleas, "may grant new trials of causes that may come before them respectively, for mispleading, the discovery of new evidence, want of actual notice of the suit to any defendant, or of a reasonable opportunity to appear and defend, when a just defense in whole or part existed; or for other reasonable cause, according to the usual rules in such cases."

In the case before us the plaintiff claims to be entitled to a new trial upon the ground that, without her fault, she has become unable, by reason of the death of the trial judge, to complete, as required by statute, an appeal from a final judgment in the Court of Common Pleas, taken to this court for the purpose of having reviewed certain alleged erroneous rulings of said trial court upon questions of evidence, and upon claims of law made by her at the trial upon the facts claimed to have been proved.

Except as we retain the common-law remedy by writ of error, the entire system of appellate procedure, and generally the proceedings for procuring new trials, are in this State governed by statute. Here, as generally in other jurisdictions, the conditions upon which appeals to courts of review may be taken and perfected, as well as the powers of different courts to grant new trials, are expressly defined and limited by statute, and "the conditions required by statute as precedent to taking and perfecting an appeal cannot therefore be modified or extended by any judge or court without express statutory authority." 2 Ency. of Pl. & Pr. p. 17; *Sholty* v. *McIntyre*, 136 Ill. 33. Certainly after the term in which final judgment is rendered has expired, courts of common pleas have no power, either upon motion for a new trial or otherwise, to review rulings upon questions of law made in the trial of a cause, nor to grant a new trial of the case because of such erroneous rulings. The former method of procuring a review of such rulings by motion for new trial made in the trial court (*Zaleski* v. *Clark*, 45 Conn. 397,

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402), has, since the Act of 1882, been superseded by the "appeal," which is a process for bringing to this court for review those questions of law arising in a trial which were before reviewable upon a motion for new trial, as well as the questions before reviewable by motion in error. *White* v. *Howd*, 66 Conn. 264, 266. By our present laws the only court which can properly review the rulings at a trial in the Court of Common Pleas, and grant new trials for such rulings, when erroneous, is the Supreme Court of Errors; and in this court such claimed errors—when, as in the present case, they do not appear upon the face of the record of the trial court—can only be reviewed, and a new trial granted, upon an appeal taken as prescribed by statute, containing a finding by the trial judge showing the rulings made by the court and the facts found, so far as such facts are necessary, for the proper presentation of the questions of law sought to be reviewed. The death of the trial judge has made it impossible to obtain the finding required by statute in order to enable this court to review the claimed rulings and grant the new trial asked for.

If the Court of Common Pleas had jurisdiction to review its own decisions and grant new trials for erroneous rulings upon such questions as those set forth in the plaintiff's proposed finding, it could not, without a finding of facts, properly determine whether such errors had been committed in the present case as would entitle the plaintiff to a new trial. In the absence of a finding by the trial judge, the rulings of the trial court which do not appear of record could not be properly proved. If witnesses could testify as to rulings made upon questions of evidence, they could not as to rulings upon claims made in the argument of the case. If it could be made to appear that certain rulings upon questions of evidence were erroneous, a new trial ought not to be granted, unless it could be determined, from a finding of all the facts, whether such rulings were so harmful as to justify the ordering of a new trial. We think the Court of Common Pleas cannot properly grant a new trial in this case upon the ground that the rulings of the trial court were erroneous.

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But the principal contention of the plaintiff seems to be that even if it is not made to appear that the rulings in question were erroneous, yet she is entitled upon equitable principles to a new trial, upon the sole ground that by the death of the trial judge she has been prevented from perfecting and prosecuting her appeal. It cannot be said that the trial of this case has not been fully completed and a final judgment rendered in the Court of Common Pleas. An appeal to this court from the final judgment of a trial court forms no part of the trial of the case in the latter court. That trial is completed when final judgment is rendered. The judgment of the trial court is not vacated by such an appeal, and it is none the less a final judgment because subject to be set aside upon writ of error or other process for a review of the proceedings in the trial court. If, after a trial and final judgment in the Court of Common Pleas, the only complaint of the defeated party respecting the proceedings at the trial and the character and amount of the judgment is, that such errors were committed in rulings upon questions of evidence and claims of law as are complained of by this plaintiff, the judgment should stand, and the successful party is entitled to have it stand as a final judgment, until it is shown that such rulings were erroneous and that the judgment ought to be set aside.

Excepting as the plaintiff questions the correctness of certain rulings of the trial court upon questions of law, she makes no complaint as to the proceedings in the trial in that court. Upon every question which she sought to have reviewed by her proposed finding she has been fully heard in the trial court. The right to have, by the appeal attempted to be taken, a second hearing upon such questions, is neither specifically granted by our Constitution nor is such right essential to due process of law. *Reetz* v. *Michigan*, 188 U. S. 505. It is not a right based upon principles of natural justice. "Having once been fairly and fully heard, the right to an appeal rests upon no natural equity; and that a party should by some misfortune be deprived of an opportunity to take an appeal, is a matter entirely different from his

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having been deprived of an opportunity to be heard at all." *Excelsior Electric Co.* v. *Chicago Waif's Mission*, 41 Ill. App. 111, 116. The right of appeal, whether for the purpose of transferring a case to another court for retrial, or for the revision of rulings of law, is merely a statutory privilege granted to an aggrieved party upon certain conditions which must be strictly complied with. *Bowers* v. *Gorham*, 13 Conn. 528, 530; *White* v. *Howd*, 66 Conn. 264, 266.

But in whatever light we regard the right to appeal, since it is a remedy which the plaintiff cannot now pursue, it would seem to be unfair to these defendants, who have obtained a favorable judgment, to impose upon them the burden and expense of a second trial, until it could be shown either that the first trial was in some way unfair or that some erroneous rulings were made at that trial.

The present case is not one in which the defendants by some accident, mistake, fraud, or otherwise, have obtained an unfair advantage in a proceeding at law, and have so obtained a judgment which a court of equity will control in order to restore an injured party to his right. *Stanton* v. *Embry*, 46 Conn. 65, 76. That an aggrieved party has, by the death of the trial judge, been deprived of the privilege of having the rulings and judgment of the trial court reviewed by appeal, is not a ground for a new trial under the provisions of § 815. The causes for which new trials may be granted, described in that section, are only such as show that the parties did not have a fair and full hearing at the first trial; and the words "or for other reasonable cause," mean other causes of the same general character, and were not intended to include causes for which a new trial may be obtained by appeal under other statutes. *Anderson* v. *State*, 43 Conn. 514, 516; *Brown* v. *Congdon*, 50 id. 302, 309. Rulings in other jurisdictions, to which our attention has been called as applicable to the case before us, are so generally based upon statutory regulations or rules of court in regard to appeals and new trials different from our own, as to be of little weight as authorities under our laws and practice.

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The Court of Common Pleas is advised to deny the motion for a new trial.

Costs will be taxed in this court in favor of the defendants.

In this opinion the other judges concurred.

JAMES A. CAHILL ET AL. *vs.* MARY CAHILL ET AL.

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

It is an established principle that two suits are not to be brought for the determination of matters in controversy between the same parties, whether relating to legal or equitable rights, or to both, when such determination can be had as effectually and properly in one suit.

General Statutes, § 4053, provides that any person claiming title to, or any interest in real property, may bring an action against those claiming adversely, in order to clear up all doubts and disputes and to quiet and settle the title to said property. *Held* that whether one dispossessed could, under any circumstances, maintain an action under this statute for the purpose of having his title determined as against his disseisors, he certainly could not do so while another suit in the nature of an action of ejectment, brought by him against the same defendants, to try the title to the same land, was pending in the same jurisdiction. Under such circumstances the pendency of the first action is a ground for the abatement of the second.

Having expressly alleged that certain persons, in whom rested the apparent record title, claimed no right or interest in the premises, the plaintiffs afterwards moved that they might be cited in as codefendants. *Held* that the trial court acted properly in denying the motion.

Argued January 26th—decided March 3d, 1904.

ACTION to determine the title to certain real estate, brought to the Superior Court in New Haven County where the defendants filed a plea in abatement alleging the pen-

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dency of another suit between the same parties for the same cause of action; the court (*Shumway, J.*) sustained the plea and dismissed the action, and the plaintiffs appealed. *No error.*

Verrenice Munger, for the appellants (plaintiffs).

William L. Bennett and *Frederick W. Holden*, for the appellees (defendants).

HALL, J. The principal question in this case is whether the trial court erred in sustaining the defendants' plea in abatement alleging that "at the commencement of this action there was and now is another action pending in the Superior Court for New Haven County between the same parties as the parties to this action, and for the same cause as is set forth in said complaint in this action."

The plaintiffs demurred to this plea, upon the ground that it did not allege that the pending case was for the same cause, and for the same relief as the present action. Before the demurrer was decided, it was stipulated that all questions that might arise in consequence of the plea in abatement, might be raised and decided at the same time by the court, upon the demurrer to the plea in abatement, and that the record in the first action might be used by the court for the purpose of deciding whether the present action should abate by reason of the pendency of said first suit.

The trial court overruled the demurrer and found the allegations of the plea in abatement proved and true.

The records of both cases are before us for the purposes of this appeal.

The parties in both actions are the same, the plaintiffs being the two sons of Richard Cahill, who died testate in June, 1901, and of Julia Cahill, his first wife, who died intestate in 1885, and the two defendants being the second wife and widow of Richard Cahill, and the administrator of Richard Cahill. The same land is described in each complaint, and both actions are returnable to the same court:

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the first in January, 1902, and the second, the present action, in September, 1903.

The complaint in the first action—which has been before this court, 75 Conn. 522—follows the *Form* 115 of the Practice Book, entitled "Ejectment, and for mesne profits," and alleges that on the 2d of July, 1901, the plaintiffs owned and possessed a lot of land (describing it); that the defendants on said day wrongfully entered on said land and dispossessed the plaintiffs, and still keep them out of possession, depriving them of the rents and profits; and that the rents and profits amount to $150 a year. Judgment for the possession of said premises and $600 damages is claimed. The only answer filed is a general denial.

In the present action it is alleged that in 1893 the corporation of Wallace and Sons, which had long before that date acquired title to the land in question, became insolvent, and that in March, 1894, all the real estate the record title to which stood in the name of Wallace and Sons, including the land in question, was by certain transfers and certain orders of court conveyed to Robert M. Thompson, Henry E. Jacobs and Robert T. Paine, as trustees for the creditors of Wallace and Sons; that afterwards said Thompson, Jacobs and Paine, under various orders of court, sold said land to divers persons, but did not sell the land in question, and that "the apparent and record legal title now appears to be in them as such trustees;" that the corporation of Wallace and Sons has been dissolved and said trustees discharged, and that neither said Wallace and Sons or any one claiming under them, nor said trustees or any one claiming under or from them, have, or claim to have, any right, title or interest of any kind whatsoever in or to the premises in question.

The complaint further alleges that Julia Cahill, the first wife of Richard Cahill and mother of the plaintiffs, entered into possession of said land in question in 1869, and continued in possession thereof until her death in 1885, at which date she was the lawful owner thereof; that the plaintiffs, as her heirs, now claim to be the owners of said land, and that the defendants claim to own it, or to have some interest in it,

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through Richard Cahill; and that no other persons than the plaintiffs and defendants claim any right, title or interest of any kind in said premises.

The plaintiffs claim in this second action: (1) that the defendants shall state the nature and extent of the estate or interest which they claim, and the sources through which they claim such estate or interest, in said premises; (2) an adjudication of the claims as between the plaintiffs and defendants, and the determination of their several rights; (3) an adjudication quieting and settling the title to said property, and that the title shall be adjudged to be vested in the plaintiffs.

As to the title of the plaintiffs and the fact that they are not in possession but have been dispossessed by the defendants, no allegations are made by the plaintiffs in the second action different from those which they made and still make in the first, nor is it suggested, as a reason for bringing the second suit, that there has been any change in possession since the first suit was brought.

The controversy is one between the plaintiffs and the defendants only, and is concerning the title to the described lot; the plaintiffs claiming that it was owned by their mother Julia Cahill and now belongs to them, as her heirs, and the defendants, who are in possession, claiming that it belonged to Richard Cahill and that they derived title under his will. The only purpose of the first action was to settle this question of disputed title, and that action was the proper one by which to have that question adjudicated. It was in the form of our common-law action of ejectment or disseisin, which was the only remedy at law for settling the title to real estate. The plaintiffs cannot recover in the first suit upon proof of a mere trespass, but must establish a legal title and that they were dispossessed. *Cahill* v. *Cahill*, 75 Conn. 522, 523. A judgment in the first action for possession of the premises must necessarily be an adjudication that the plaintiffs are the owners and that they are dispossessed at the time of the trial. *Potter* v. *New Haven*, 35 Conn. 520, 522.

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The second action is claimed to be authorized by § 4053 of the General Statutes, which provides that "an action may be brought by any person claiming title to, or any interest in, real property, against any person or persons who claim to own the same, . . . or to have any interest in the same, or any lien or incumbrance thereon, adverse to the plaintiff, for the purpose of determining such adverse estate, interest, or claim, and to clear up all doubts and disputes, and to quiet and settle the title to the same. The complaint in such action shall describe the property in question and state the plaintiff's claim, interest, or title, and shall name the person or persons who claim such adverse estate or interest." Each defendant is required to state in his answer whether or not he claims any interest in the property, and if so, the nature and extent of it, and the source through which it is claimed to be derived, and the court is to "hear the several claims and determine the rights of the parties," and may construe instruments which are the sources of title, "and render judgment determining the questions and disputes, and quieting and settling the title to said property."

Whether under this statute an action can be maintained by alleged owners of land who are not in possession, for the purpose of having their title determined as against those only who are holding adversely to them, is perhaps not the real question before us in the present case. The inquiry here is, rather, can such an action be maintained under the statute while another suit in the form of the ordinary action of ejectment to obtain possession of the same property is also pending in the same court and between the same parties?

The plaintiffs say that the second action is a proceeding in equity. But a bill in equity is not a proper remedy for the alleged owner of the legal title to land to obtain an adjudication of his title against one by whom he has been ousted of possession. *Miles* v. *Strong*, 62 Conn. 95, 105. A bill in equity to quiet title, or to remove a cloud from the title, is generally not maintainable by one having a legal title but who has been ousted of possession; *Munson* v. *Munson*, 28

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Conn. 582, 586; and such seems to be the rule in most of the States, in actions under statutes to quiet title or remove a cloud from the title. 17 Ency. of Pl. & Pr. 306. One reason for the rule is, that if the defendant is in possession the plaintiff has adequate remedy by the ordinary actions at law of ejectment and trespass.

If actions brought under such statutes, for the purpose of putting an end to litigation by settling, in one suit, controversies and disputes between several different persons concerning the title to land, are exceptions to the rule requiring possession in the plaintiff, the present action does not come within such exception, since it is alleged in the second action that there are no claimants to the land excepting those persons who are parties to the ejectment suit. No other persons than claimants could properly have been made defendants in the second action, since the statute permits the action to be brought only against persons who "claim" title to or an interest in the land. If no one claims under the alleged, apparent record title in the trustees, Thompson, Jacobs and Paine, an action under the statute, which provides for an action only against those persons claiming title or an interest in the land, is not a proper remedy to remove such cloud from the plaintiffs' title. If, under said record title in the trustees, the defendants claim any right or power to defeat the plaintiffs' title or keep the plaintiffs out of possession, such right or power, like any other claimed title or right by which the defendants may seek to defeat the plaintiffs' title or keep them out of possession, can be as well adjudicated in the first action as in the second.

"The pendency of a prior suit of the same character, between the same parties, brought to obtain the same end or object, is, at the common law, good cause of abatement. It is so, because there cannot be any reason or *necessity* for bringing the second, and, therefore, it must be oppressive and vexatious." This is "a rule of justice and equity, generally applicable, and always, where the two suits are virtually alike, and in the same jurisdiction." *Hatch* v. *Spof-*

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ford, 22 Conn. 485, 494. "It is now an established principle in our law of civil procedure that two suits shall not be brought for the determination of matters in controversy between the same parties, whether relating to legal or equitable rights, or to both, when such determination can be had as effectually and properly in one suit. In the interest of the State and of all parties concerned this principle should be inflexibly maintained." *Welles* v. *Rhodes*, 59 Conn. 498, 503.

If under any circumstances one who has been dispossessed may bring an action under § 4053 for the purpose of having his title determined as against his disseisors, he cannot properly do so while another suit in the nature of an action of ejectment to try the title to the same land is pending in the same jurisdiction between the same parties. There is no apparent necessity or reason for the bringing of the second action in the case before us. The determination of the real controversy between the parties can be as effectually and properly had in the first suit. The two suits are for the same cause of action.

The plea in abatement, which followed *Form* 341 of the Practice Book, was sufficient, and the second action was properly dismissed.

There was no error in denying the plaintiffs' motion to cite in the trustees, Thompson, Jacobs and Paine, as defendants in the second action. The complaint in that action alleges that these trustees claim no right, title or interest in the premises in question. That was a sufficient reason for denying the motion; especially in view of the language of the statute, permitting such action to be brought only against persons claiming a title or interest in the land in dispute.

There is no error.

In this opinion the other judges concurred.

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THE STATE OF CONNECTICUT *vs.* JAMES CAMPANE.

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

General Statutes, § 1458, gives the Criminal Court of Common Pleas jurisdiction of all criminal causes appealed from any city, borough, police, or town court, or justice of the peace; while § 1483, subsequently enacted, provides that the prosecuting attorney of the Criminal Court of Common Pleas may file in said court, and said court may try, an information for any offense which would have been within the "final jurisdiction" of the local city, town, borough, police, or justice court having jurisdiction thereof, had the information or complaint been made to such court. *Held* that an offense whose maximum punishment exceeded that which the local municipal court could lawfully impose, was not within its "final jurisdiction," and therefore was not within the jurisdiction of the Criminal Court of Common Pleas.

Argued January 26th—decided March 3d, 1904.

INFORMATION for perjury, brought to the Criminal Court of Common Pleas in New Haven County and tried to the jury before *Bishop, J.*, after a motion of the accused, to erase the case from the docket for want of jurisdiction, had been denied; verdict and judgment of guilty, and appeal by the accused. *Error and judgment reversed.*

Charles S. Hamilton, for the appellant (the accused).

Robert J. Woodruff, Prosecuting-Attorney, for the appellee (the State).

HAMERSLEY, J. The Criminal Court of Common Pleas is an inferior court established by the legislature. Its jurisdiction, as originally defined by statute, is purely appellate. It is empowered to retry, by jury, cases once tried by a justice of the peace or by a municipal court having jurisdiction and powers similar to those given to justice courts. Its judgment, upon conviction of the accused, can impose no

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greater punishment than that which might have been imposed by the court from which the cause is transferred by the appeal. A prosecuting attorney was provided with power necessary to conduct the trial of the case appealed, upon the complaint preferred to the justice court. In 1895 the attorney was authorized to file an information in lieu of the complaint in any appealed case, and also, to file an information for any offense within the jurisdiction of a justice or municipal court, which was subject to the appellate jurisdiction of the Criminal Court of Common Pleas; provided that, if a complaint for the offense charged had been made to the local court having jurisdiction thereof, the matter would have been within the final jurisdiction of that court; and upon such information being filed, the Criminal Court of Common Pleas is given jurisdiction to proceed with the trial of the offense charged in the same manner and with the same power as in appealed cases. These provisions are now embodied in §§ 1482 and 1483 of the General Statutes.

We think that "final jurisdiction," as used in § 1483, means a jurisdiction to try the cause and, upon conviction, to impose the full penalty prescribed, as distinguished from a jurisdiction given in respect to offenses the punishment whereof may be greater or less than that which a justice court can impose. In the latter case the justice may bind the offender over to the Superior Court for trial, or may convict him and impose a penalty not exceeding that within the jurisdiction of a justice court; but the offense is within the jurisdiction of the Superior Court until the justice court has determined, upon the circumstances of the particular case as proved before him, that no greater punishment ought to be imposed than that which he may lawfully inflict; and the justice cannot exercise any final jurisdiction until the nature of the particular offense has been thus determined.

Section 1483 does not give the Criminal Court of Common Pleas original jurisdiction of such offenses. The language of the section is necessarily somewhat obscure. The legislature attempts in a single sentence and in general terms to define a jurisdiction varying in each locality, in three dif-

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ferent counties where offenses may be committed. It had to consider not only the general jurisdiction of justice courts, but the exceptions pertaining to some particular offenses, the diverse jurisdiction of a large number of city, town, and borough courts, and to guard against any infringement of the peculiar jurisdiction of the District Court of Waterbury. Upon a careful study of the language of the section, and of the conditions in view of which it was used, it seems quite clear that the legislature intended to and did give the Criminal Court of Common Pleas original jurisdiction of any offense within the jurisdiction of the justice and municipal courts subject to its appellate jurisdiction, when, and only when, the court within whose jurisdiction the offense might be committed would have power to try the same, and upon conviction to impose the full penalty inscribed; and did not intend to give, and did not give, to the Criminal Court of Common Pleas any original jurisdiction of offenses within the jurisdiction of the Superior Court. Even if the meaning of the language were doubtful, there are considerations which make this interpretation of it the more reasonable one.

Offenders who commit offenses the punishment whereof may exceed or be less than that which justice or municipal courts can impose, can only receive the greater penalty in the Superior Court. Such offenses can only be brought before the Superior Court through an information filed therein by the State's Attorney, or through a binding-over by a justice or municipal court. The Criminal Court of Common Pleas clearly has no power of binding over, and no power to inflict punishment for any offense greater than that which can be imposed by the justice or municipal court within whose jurisdiction the offense is committed. If § 1483 is construed as giving to the Criminal Court of Common Pleas the original jurisdiction claimed, the Act not only creates a jurisdiction concurrent with that of the Superior Court, but provides that any exercise of this jurisdiction by the Criminal Court of Common Pleas shall operate to reduce the maximum penalty of the offense committed, to the maximum

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punishment that can be imposed by the justice or municipal court within whose jurisdiction it may be committed; and this power of securing such modification of the punishments prescribed by statute is vested in the prosecuting attorney of an inferior court created for the sole purpose of trying justice and municipal court appeals. A construction involving such results should not be adopted, if the doubtful language is fairly susceptible of another construction producing more reasonable results.

In *State* v. *Hartley*, 75 Conn. 104, we held that "final jurisdiction," as used in § 1483, meant a jurisdiction to try, convict, and punish, as distinguished from a jurisdiction to try and bind over to the Superior Court. In that case the information of the prosecuting attorney charged an offense for which the local police court could inflict the full penalty. But upon argument of the case, the meaning of § 1483 was discussed and thoroughly handled, and our conclusion was largely based upon the construction of the statute as above stated.

Perjury is punishable by imprisonment in jail for not more than six months, or in State prison for not more than five years. General Statutes, § 1254. The Criminal Court of Common Pleas has no original jurisdiction of this offense, and the motion of the accused to erase the case from the docket should have been granted.

Another decisive objection to the jurisdiction of the trial court is found in § 1446 of the General Statutes: "No justice of the peace, borough, town or city court, shall have final jurisdiction of any prosecution for crime, the punishment for which may be imprisonment in the state prison." Possibly the charter of the city of New Haven may except the New Haven City Court from the operation of this statute. 13 Special Laws, p. 442, § 185. The language used in the charter is not clear and should, for obvious reasons, be construed, if it reasonably can be, as consistent with the settled policy of the State expressed in § 1446. The case before us does not, however, require a decision of this question.

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As the court had no jurisdiction of the cause, the other reasons of appeal are immaterial.

There is error in the judgment of the Criminal Court of Common Pleas; the judgment is reversed, and that court is directed to erase the case from its docket for want of jurisdiction.

In this opinion the other judges concurred.

GEORGE L. LILLEY ET AL. *vs.* THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ET AL.

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Under General Statutes, § 539, any party aggrieved by a final judgment or decree of the District Court of Waterbury, in a case tried to the court and involving more than $1,000, may appeal to the Superior Court; while under § 788 an appeal from such judgment may be taken to the Supreme Court of Errors. *Held* that the effect of the two appeals was radically different; that the appeal to the Superior Court—which was taken in the present case by the plaintiffs—vacated the judgment and transferred the case to the Superior Court for trial *de novo*, and left nothing in the District Court which could form the basis for an appeal by the defendants to this court; and therefore the plaintiffs' motion to erase the latter appeal from the docket of this court must be granted.

Argued January 28th—decided March 3d, 1904.

SUIT for an injunction to restrain the defendants from stopping and leaving cars on a spur track in front of the plaintiffs' platform, except for the purpose of loading or unloading their merchandise, and for $5,000 damages, brought to the District Court of Waterbury and referred to a committee who found and reported the facts; the court, *Cowell, J.*, accepted the report and rendered judgment awarding the plaintiffs an injunction and $1 damages. From this judgment the plaintiffs, on November 20th, 1903, appealed

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to the Superior Court, and on the following day the defendants filed their appeal to this court.

To the latter appeal the plaintiffs filed a plea in abatement and motion to erase. *Motion to erase granted.*

Lucien F. Burpee and *Terrence F. Carmody*, for the plaintiffs.

Henry Stoddard and *Nathaniel R. Bronson*, for the defendants.

TORRANCE, C. J. In the District Court the plaintiffs in this action claimed a permanent injunction and $5,000 damages. The court gave judgment for a permanent injunction and $1 damages. From this judgement the plaintiffs appealed to the Superior Court, and afterwards the defendants appealed to this court. The appeal to the Superior Court was perfected and allowed on the 20th of November, 1903, and the appeal to this court was perfected and allowed on the day following.

From a judgment of the District Court of Waterbury, in a case like the present, either party aggrieved thereby may appeal to the Superior Court, under the provisions of § 539 of the General Statutes; *Waterbury Blank Book Mfg. Co.* v. *Hurlburt*, 73 Conn. 715; while under the provisions of § 788, such aggrieved party may appeal to the Supreme Court of Errors. The effect of the two appeals is radically different. The effect of the appeal to the Superior Court is to vacate the judgment appealed from, to take the case out of the District Court, and to transfer it to the Superior Court for a trial *de novo*, just as if it had been originally brought to that court. *Matz* v. *Arick*, 76 Conn. 388. The other appeal has no such effect. It is brought only to have reviewed the errors of law, if any, made by the trial court. It does not vacate the judgment appealed from, nor remove the cause to some other court for a trial *de novo*, nor entitle the appellant to such trial in any court. It follows from this, that as soon as the appeal to the Superior Court in

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this case was perfected and allowed on the 20th of November, 1903, the judgment of the District Court was vacated and the case was no longer pending in that court, but was pending in the Superior Court; *Huntington* v. *McMahon*, 48 Conn. 174, 195; and it further follows, that when on the following day the appeal to this court was perfected and allowed, the judgment from which the defendants attempted to appeal did not exist, and the claimed errors of the District Court in the trial of the case no longer existed for purposes of review in this court.

Where one statute gave a party aggrieved by the judgment of a City Court the right of appeal to the Supreme Court of Errors, and another statute gave him the right of appeal from the same judgment to the Superior Court, this court said that he could not exercise both rights, substantially on the ground that as they were practically inconsistent with each other, the exercise of one was a waiver of the other. *Bergkofski* v. *Ruzofski*, 74 Conn. 204, 206.

In cases like the one at bar, where one party has exercised his right of appeal to the Superior Court, the right of the other afterwards to appeal to this court does not exist; for only in this way can the two statutes giving the right of appeal be harmonized.

The motion to dismiss is granted and the appeal is dismissed.

In this opinion the other judges concurred.

D. PRESTON ATWOOD *vs.* GEORGE L. LOCKWOOD.

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Section 324 of the General Statutes provides that an administrator who does not return an inventory of the estate to the Court of Probate within two months after the acceptance of his bond, shall forfeit, to him who shall sue therefor, $20 for each month's delay, "unless

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before suit be brought he make an excuse for such delay acceptable to the court." *Held:*—

1. That the clause quoted implied that the subject-matter of the excuse should be presented in some way to the Court of Probate, and not merely to the judge; that the court should exercise its judicial functions in hearing and passing upon the acceptance or rejection of the excuse, and that its decision should be duly recorded, as a judicial act, upon its records.
2. That the existence of such an acceptance could be proved ordinarily only by the record.
3. That an excuse orally made to, and informally accepted by, the probate judge, without hearing or notice, and with no intention of making any record thereof as a judicial act, was not such an acceptance as the statute required, and would not be available as a defense, if proved.

Each month's delay in returning the inventory, after the time limited therefor, constitutes a complete offense, all of which may, however, be included in one count in the complaint.

The statute of limitations (§ 1120) bars a recovery of the forfeiture for every month's delay which occurred more than one year before the commencement of the action.

Submitted on briefs January 28th—decided March 3d, 1904.

ACTION to recover the penalties provided by General Statutes, § 324, for the neglect of an administrator to make and return an inventory of his intestate's estate, brought to and reserved by the Court of Common Pleas in Fairfield County, *Curtis, J.*, upon an agreed statement of facts, for the advice of this court. *Judgment advised for plaintiff.*

Jeremiah D. Toomey, Jr., for the plaintiff.

J. Belden Hurlbutt and *Leo Davis*, for the defendant.

TORRANCE, C. J. The material facts in this case are in substance these: In April, 1893, Ann Amelia Smith, a resident of Norwalk in this State, died in that town leaving an estate there. In May, 1893, the defendant, Lockwood, became the duly-qualified administrator of the estate of said deceased, and continued as such up to the date of the institution of this suit in August, 1899. Said administrator never filed any inventory whatever of said estate as required

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by law. "There is no record of any excuse being accepted" by the Court of Probate for such failure to file such inventory. "The defendant was excused orally and informally by the judge of said probate court from filing said inventory, although there was no formal application for such excuse, nor any hearing thereon, nor any record thereof." It is agreed that if, under the pleadings in this case, the foregoing fact "can be shown on a trial by the oral testimony of the defendant against any objection that the plaintiff could make, the same should be considered a part of this finding, otherwise not. . . . In the event of said oral testimony *in re* excuse being admitted, the plaintiff desires to note an exception to the ruling of the court in admitting said oral testimony." The plaintiff claims to recover "judgment for $20 per month for twelve months, or $240 and costs, as is provided by statute." The defendant claims that as "said suit was not brought within one year after said penalty began to accrue, the plaintiff is not entitled to recover anything," and that "said excuse is an absolute bar to the plaintiff's recovery."

The statutes under which this action is prosecuted required the defendant to deposit an inventory of the estate of his decedent in the Court of Probate "within two months after the acceptance of his bond" as administrator; General Statutes, § 323 (Rev. of 1888, § 578); and provided further, that in case of his failure to do this he should forfeit to him who should sue therefor, $20 for each month, until he shall return such inventory, "unless before suit be brought he make excuse for such delay acceptable to the court." General Statutes, § 324 (Rev. of 1888, § 579).

The defendant failed to comply with the first of these requirements up to the time the suit was brought, but he claims that he is protected by the saving clause in the last of the above sections; and whether he is so protected is one of the questions in the case. The answer to this question involves the construction of the saving clause in question. A clause of this nature has been upon the statute book for nearly two hundred years. Revision of 1808, p. 263, note (3).

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In the "Acts and Laws" of 1784, p. 52, it appears in this form: "without just excuse made to the judge of said court and accepted for such delay." In the Revision of 1821, p. 202, § 14, it reads thus: "unless he can make a just excuse for such delay, satisfactory to said judge of probate." In this last form it continued down to the Revision of 1875, p. 387, § 2, when it appeared in the form which it has since retained, and as it appears in § 579 of the Revision of 1888 and § 824 of the Revision of 1902.

Since 1875 the statute has required the excuse to be accepted, not, as before, by the judge of probate, but by the Court of Probate. This implies that the matter constituting the excuse shall be presented in some way to the Court of Probate, and not merely to the judge; that the court shall act upon the matter so presented, after the manner of a court, upon a hearing; that the court has power to reject as well as to accept the excuse; that such acceptance or rejection is a judicial act; and that as such it shall be duly recorded upon the court records. Such an acceptance as is here indicated is, we think, the only sort of acceptance contemplated by the statute, and the existence of such an acceptance can in general be proved only by the record. The statute expressly requires the judge of probate to cause the doings of the court to be recorded; General Statutes, § 197; and it is as true of our courts of probate as of other courts of record, that in general "their record is the only mouth through which they can speak." *Buell* v. *Cook*, 4 Conn. 238, 244. If an acceptance of the kind above indicated exists in the present case, it can, under the pleadings, be proved only by the record.

The complaint alleged that "the defendant did not, before this suit was brought, make an excuse for such delay acceptable to" the Court of Probate. This was met simply by a denial. Under such pleading, the existence of such an acceptance as the statute contemplates was put directly in issue, and its existence could only be proved by the record; and the record showed no acceptance of any kind. The defendant does not claim that a record of such an ac-

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ceptance once existed, and that the record has been lost or destroyed; nor does he claim that the Court of Probate did in fact make such an acceptance which it failed to record; nor does he seek to have the record amended in any way; but he claims the right to prove the existence of some kind of an acceptance under the statute, by oral evidence. This we think cannot be done. Where, as in this case, the existence of a judgment of the Court of Probate is in dispute in another court, upon a plea which in effect is one of *nul tiel* record, such judgment can only be proved by the record of the Court of Probate or a duly authenticated copy thereof. *Davidson* v. *Murphy*, 13 Conn. 213; 1 Black on Judg. (2d Ed.) § 106. It follows that the acceptance, contemplated by the statute in question here, cannot in this case be proved by parol evidence.

The acceptance, described in the agreed facts, which the defendant claims the right to prove by parol evidence, was one made by the probate judge, and not by the court, and it was apparently made without hearing or notice to any one, and with no intention of making any record of such acceptance as a judicial act. This was not such an acceptance as the statute contemplates, and would not have been available to the defendant if proved; and for this reason evidence of it ought not to be received. It thus appears that the saving clause of the statute upon which the defendant relies is not available to him in this case.

The defendant further relies upon the statute of limitations as a defense. That statute provides that "no suit for any forfeiture upon any penal statute shall be brought but within one year next after the commission of the offense." General Statutes, § 1120. The answer alleged that "the right of action for the cause stated in said complaint did not accrue within one year next before the commencement of this action."

We think that certain of the principles laid down by this court in the case of *Wells* v. *Cooper*, 57 Conn. 52, are applicable in the case at bar, and are decisive of it against the defendant's claim under the statute of limitations. In that

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case this court held, under the statute then under consideration, that each month's neglect was a complete offense in itself, that all that were more than a year old when the suit was brought were barred by the statute, and that all for which a recovery could be had could be included in one count in a complaint. We think these things are true also of the statute involved in the case at bar.

The Court of Common Pleas is advised to render judgment for the plaintiff for the twelve forfeitures incurred within the year next preceding the date when the suit was brought.

Costs in this court will be taxed in favor of the plaintiff.

In this opinion the other judges concurred.

MARCIA BEARDSLEY ET AL., TRUSTEES, *vs.* THE BRIDGEPORT PROTESTANT ORPHAN ASYLUM ET AL.

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Upon the decease of his wife, who was made residuary legatee during her life, the residue of the testator's estate was given to trustees, who were directed (*a*) to pay therefrom certain pecuniary legacies; (*b*) to hold two sums of $12,000 each, in trust for two nephews, paying the income to each nephew during his life, with remainder over; (*c*) to divide the rest among the grandnieces and grandnephews of the testator living at his death, or who "may be born thereafter," those who had then reached twenty-five to take their shares absolutely, while the shares of the others were to remain in trust in the hands of the trustees until the legatees should respectively attain that age, when they were to receive them with accrued interest. In a suit by the trustees, after the death of the widow, to construe the will, it was *held*: —

1. That the residuary estate vested, in point of right, in the trustees at the death of the testator, subject to the life use of the widow; and upon her death they became entitled to the possession, subject only to a deduction for the expenses of final settlement of the estate.
2. That the pecuniary legacies were payable as of the date the trustees became entitled to the possession of the fund, provided that event

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should occur—as it did in the present case—more than one year after the decease of the testator.

3. That the division into separate shares for the respective grandnieces and grandnephews was to be made as of the same date; the reference to those after-born being applicable only to births between the death of the testator and that of his widow, and none having occurred during that period.

4. That it was not incumbent upon the trustees to sell the securities which had been turned over to them as part of the trust estate (§ 255), in order to raise in cash the two sums of $12,000 to be held in trust for the nephews; since that would involve an immediate reinvestment and a possible and unnecessary loss of income to the life tenant.

General legacies, in the absence of any provision to the contrary, do not become payable, by the rules of the common law, until a year after the testator's death. This time is given to enable the executor to satisfy them without unnecessary sacrifice.

Argued January 29th—decided March 3d, 1904.

ACTION by the trustees under the will of Bronson B. Beardsley of Bridgeport, deceased, for a construction of the will; brought to the Superior Court for Fairfield County and reserved (*Elmer, J.*) for the advice of this court.

The material parts of the will were as follows: —

"Third. I hereby devise and bequeath the whole of my residuary estate, both real and personal, to my beloved wife, Mary W. Beardsley, during her life, for her sole use and benefit, and, at her death, I hereby appoint Miss Marcia Beardsley, my sister, of Bridgeport, Ct., and Miss Lucinda T. Montgomery, above mentioned, and Clara T. Hathaway—wife of George T. Hathaway, of Bridgeport, Ct., as Trustees for all my residuary estate, and I hereby request that when they deem it necessary—to counsel with Morris B. Beardsley, Esq., of Bridgeport, Ct., or Oswald P. Backus, Esq., of Rome, N. Y., or both, and I do hereby direct that the said Trustees and their successors shall hold and manage and appropriate the said residuary estate in the following manner."

"Fifth. I hereby direct that the said Trustees above named shall pay to Miss Katie Fitzpatrick the sum of Five Hundred Dollars ($500), she having been a faithful domestic in my family for many years.

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"Sixth. I hereby direct that said Trustees pay from my residuary estate the sum of Twenty-Four Thousand Dollars ($24,000) to the following named objects, respectively." Twelve legatees, mostly charitable corporations, were then named, and there was added: "The above $24,000 to be paid $2,000 each to the above named objects."

"Seventh. I hereby direct that the said Trustees pay from my Residuary Estate the sum of Twelve Thousand Dollars ($12,000) to my nephew, Nichols B. Trulock, of Pine Bluff, Arkansas.

"Eighth. I hereby direct that the said Trustees pay from my Residuary Estate the sum of Twelve Thousand Dollars ($12,000) to my nephew, J. Burton Trulock, of Pine Bluff, Arkansas.

"Ninth. I hereby direct that the said Trustees pay from my Residuary Estate the sum of Twelve Thousand Dollars ($12,000) to my grand niece, Clara T. Hatheway, wife of George T. Hatheway of Bridgeport, Ct.

"Tenth. I hereby give to the said Trustees the sum of Twelve Thousand Dollars ($12,000) to be held in trust for my nephew Marshall S. Trulock of Pine Bluff, Arkansas—the income to be paid to him semi-annually as long as he may live, and at his death the same to be paid to his heirs at law.

"Eleventh. I hereby give to the said Trustees the sum Twelve Thousand Dollars ($12,000) to be held in trust for my nephew James H. Trulock of Pine Bluff, Arkansas—the income to be paid to him semi-annually as long as he may live, and at his death the same to be paid to his heirs at law.

"Twelfth. I give and bequeath to Miss Lucinda T. Montgomery all my household furniture, pictures, library, bedding, silver and plated ware, jewelry and wearing apparel. Also my horse, carriages, and all thereto belonging, absolutely after the death of my wife, with the request that she shall give to my grand niece (Mrs. Clara T. Hatheway) any of the portraits or other things she may desire.

"Thirteenth. I hereby direct that the rest and residue of my estate shall be given in equal shares to each of my grand

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nieces and grand nephews as may be living at my death, or may be born thereafter—as follows: To those who may have already reached the age of twenty-five, I direct that their shares shall be given to them absolutely.

"Fourteenth. The remaining shares I give and bequeath to Miss Marcia Beardsley, Miss Lucinda T. Montgomery and Mrs. Clara T. Hathaway, to be by them held in trust for the other grand nieces and grand nephews until they severally reach the ages of twenty-five, when said shares with the accrued interest shall be given to them respectively. If any of them shall die before attaining the age of twenty-five years—leaving issue—I then direct that such issue shall take the share their parent would have had if living to the age of twenty-five years as aforesaid. But if any of my grand nieces and grand nephews shall die before reaching the age of twenty-five years—leaving no issue, their share or shares shall be divided equally among the survivors."

The first codicil contained this clause: —

"It is my will that out of the Residuary Estate therein mentioned, there shall be paid to George T. Hathaway—husband of Clara T. Hathaway therein named, the sum of Three Thousand Dollars ($3,000)."

A second codicil was executed in 1898, in which year the testator died.

The widow was made the sole executrix. She died in 1903, and an administrator *de bonis non* with the will annexed upon the testator's estate was thereupon appointed, who shortly afterwards paid over the residuary estate, which was all personal estate, to the trustees, after deducting the proper charges.

Samuel F. Beardsley, for the plaintiff.

Stiles Judson, Jr., for Nichols B. Trulock *et al.*

BALDWIN, J. The residuary estate became vested in right in the trustees at the death of the testator, subject to the life use of the widow. Upon her death they became entitled

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to the possession, subject only to a deduction for the charges incident to the final settlement of the testator's estate. General legacies, in the absence of any provision to the contrary, do not become payable, by the rules of the common law, until a year after the testator's death. This time is given to enable the executor to satisfy them without unnecessary sacrifice. No such cause can exist in the case of legacies made payable by trustees who are not to receive the trust fund until after the final settlement of the estate. The pecuniary legacies, therefore, left by the testator in the fifth, sixth, seventh, eighth, ninth, tenth and eleventh sections of his will and in the first codicil, were payable as of the date of the expiration of the life estate, provided that event should occur, as it did, more than one year after the decease of the testator.

The division of the residuary trust estate into separate shares is to be made as of the same date. There can be no reason for deferring it, unless the formation of the class of grandnephews and grandnieces should be postponed to await the possible birth of more thereafter. It would require clear words to justify such a postponement, and those used in the will may be fairly considered to refer only to births occurring between the death of the testator and that of his widow.

No grandnephew or grandniece in fact was born or died during that period.

The property made over to the trustees was not of the kind in which trust funds are ordinarily invested. Under General Statutes, § 255, however, trustees are authorized to hold such securities as may be received by them as constituting the trust estate, without altering the form of investment, unless otherwise ordered by the Court of Probate, so long as in the exercise of reasonable prudence they may deem it unnecessary to make any change. See *Clark* v. *Beers*, 61 Conn. 87.

The trustees under the will before us were given two sums of $12,000, the income from each of which funds was to be paid over to a certain person for life with remainder to his heirs. It is not incumbent upon them to sell out securities

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belonging to the trust estate, which they might otherwise keep under the rule above laid down, in order to raise these sums in cash. That would require an immediate reinvestment in other securities, their holding which might, perhaps, unnecessarily narrow the income of the life tenant.

We confine our advice to the points on which advice was asked for in the complaint.

The Superior Court is advised to render judgment in conformity with this opinion.

No costs will be taxed in this court for or against either party.

In this opinion the other judges concurred.

THE NORWICH GAS AND ELECTRIC COMPANY *vs.* THE CITY OF NORWICH.

* Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Chapter 231 of the Public Acts of 1893, now §§ 1978 to 1997 of the General Statutes, allows cities and towns to establish gas or electric plants for furnishing light for municipal use and the use of citizens paying therefor, but requires the municipality, before setting up its own plant, to purchase the local plant of a specially chartered corporation engaged in like business, if there be one, provided such corporation shall elect to sell and comply with the terms of the Act. In case of a disagreement as to what shall be sold, or as to the terms of sale, the Act provides that either party may apply to the Superior Court for the appointment of a "special commission," who shall hear the parties and "adjudicate" those matters, and that its doings shall be reported to said court for confirmation. If a remonstrance to the report is sustained, the court is to set aside the report in whole or in part, as justice may require, and appoint another "special commission;" and this procedure is to be repeated, if necessary, until the report, "covering all questions involved," has been confirmed by the Superior Court, which may compel compliance with its final decree and issue and

* Transferred from the second judicial district.

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enforce such interlocutory orders as justice may require. Upon appeal by the defendant from a judgment of the Superior Court accepting and confirming the action of such a commission it was *held*:—

1. That the question of the constitutionality of the Act of 1893 was one beyond the province of the special commission, its duty being simply to execute the powers confided to it by the Superior Court.
2. That the special commission was not a "court," nor its members "judges," within the meaning of Art. 5, §§ 1 and 3, of the Constitution of this State, which require courts to be established and judges appointed by the General Assembly.
3. That the compulsory purchase feature of the Act did not confer "exclusive public emoluments or privileges" upon the plaintiff in violation of Art. 1, § 1, of the Constitution of Connecticut, since the duty of purchasing such plants rested equally on all municipalities seeking to take advantage of the statute, and was owed equally to all corporations in the situation of the plaintiffs. While no man or set of men are entitled to demand exclusive privileges from the State, it may grant them, for proper cause and on equal terms, to certain sets of men or classes of corporations.
4. That the legislature had the right to create a particular kind of administrative tribunal to decide questions regarding the value of property to be appropriated to a public use, whether by a public or a private corporation, and the method and terms of such appropriation.
5. That in estimating the sum to be paid by the city for the plaintiff's property, the commission was not confined to a valuation of the bare physical plant, and committed no error in taking into account its earning capacity as a going concern, based upon its actual earnings, the expense of operation and the changes, if any, needed for the reasonable improvement of the plant, and the probable results thereof as bearing upon the output; also the fact that the plaintiff had an established business, built up at the risk of private capital after experiments and changes during a long period, as well as the policy of the State in dealing with public-service corporations like the plaintiff, in so far as that policy or purpose was manifested by the terms of the statute.
6. That it was unnecessary, and could serve no useful purpose, for the commission to specify separately each item of value which it included in the purchase price fixed by it.
7. That it was within the jurisdiction of the Superior Court, in framing the final judgment, to provide for the due fulfilment of the terms and conditions of sale laid down in the report, although it could not impose other or additional obligations upon the parties.
8. That the judgment, in fixing the date of the sale and transfer; settling the particular form of the warranty deed and bill of sale and the date and manner of their delivery; in computing interest and

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liquidating the precise amount of the purchase price; and in ordering the issue of an execution for the amount due at the date fixed for payment, did not depart from but merely gave effect to the terms of the report.

9. That the sale of the plant, subject to the mortgage, as directed by the commission, imposed no direct obligation upon the city to pay the mortgage bonds or interest thereon, and therefore a clause of the judgment which required the city to reimburse the plaintiff for such instalments of interest as it should thereafter pay, was erroneous, and unauthorized either by the statute or the commission's report. Under such circumstances the plaintiff must look solely to its equitable charge upon the mortgaged property for indemnity.

States, as well as individuals, can recognize honorary obligations.

The equal protection of the laws is not denied by treating different classes of persons in a different way, if it be a way not inappropriate to the class, and the class be set apart from others on reasonable grounds.

Where it becomes a material question, the members of a commission may testify, upon a hearing of a remonstrance to their report, as to what matters were considered by them in reaching their conclusion; but evidence by the remonstrant that the adverse party submitted to the commission a brief in which the alleged improper matter was called to their attention, is too remote and conjectural.

The plaintiff's plant was mortgaged to secure negotiable bonds to the amount of $400,000, which bore five per cent. interest payable semi-annually, and did not mature until 1927. *Held* that in the absence of any attempt by either party to have the contract rights of the bondholders condemned, the commission could not condemn them, and was justified in ordering a sale and purchase of the plant subject to the mortgage; notwithstanding the claim of the city that the property should be transferred free and clear of all incumbrance, and that it could borrow money to pay off the bonds for three and one half per cent.

The city claimed that the bonds were invalid, but the commission found otherwise. *Held* that this issue could not be retried in the Superior Court upon remonstrance, inasmuch as the statute required it to be determined through the medium or agency of the "special commission;" much less could it be retried upon a claim that the report of the commission was against the weight of evidence.

In hearing a remonstrance to the report of the special commission, the Superior Court is not an "appellate court or tribunal," within the meaning of that expression in General Statutes, § 693, respecting the use of depositions; nor does such section change the rules affecting the relevancy of evidence.

Upon the hearing of its remonstrance the city sought to introduce the stenographer's report of all the testimony given before the com-

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mission on the question of values. *Held* that inasmuch as the commission viewed the plant and might have thus derived decisive impressions of its value, which evidence could not be placed before the Superior Court, the stenographer's notes were for this reason, if for no other, properly excluded.

Argued January 26th—decided April 14th, 1904.

APPLICATION to a judge of the Superior Court, under Public Acts of 1893, Ch. 231, § 13 (General Statutes, § 1993), to compel the defendant to purchase the plaintiff's plant. A special commission of three was appointed to make the adjudication called for by the statute. The defendant filed two motions before the commission to dismiss the cause, which were denied. The commission filed its report in court, and the defendant remonstrated against its acceptance, and also moved to recommit it, and subsequently to erase the cause from the docket for want of jurisdiction. A supplemental report was afterwards filed, making no substantial change. The motions to recommit and erase were denied, the remonstrance overruled, the report of the commission confirmed, and a judgment rendered which was based upon it (*Robinson, J.*), from which the city appealed. *Error in part.*

Nathan Matthews, Jr., of Boston, *Gardiner Greene* and *Joseph T. Fanning*, for the appellant (defendant).

Henry Stoddard and *Frank T. Brown*, for the appellee (plaintiff).

BALDWIN, J. The special commission properly denied the motion for the dismissal of the proceedings, filed before it on the ground that the statute upon which they are based is unconstitutional and void. Its only business was to execute the powers which had been confided to it by the order of the court, without inquiring into their legal validity. *New Milford Water Co.* v. *Watson*, 75 Conn. 237, 245.

A similar motion filed in the Superior Court was properly overruled on its merits.

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The statute in question (General Statutes, §§ 1978–1997) allows cities, towns and boroughs, to set up plants for the manufacture and distribution of gas or electricity for furnishing light for municipal use, and for that of such of their inhabitants as may desire and pay for it, and to meet the expense of procuring any such plant by an issue of bonds; with the proviso (§ 4) that "no indebtedness shall be incurred by any city or town or borough, in connection with such plant, except as aforesaid, and excepting further, that money may be borrowed temporarily to pay the running expenses thereof." By § 12, "when any city, town, or borough shall decide, as herein provided, to establish a plant, and any corporation incorporated by the general assembly, for the purpose of furnishing gas or electric light, heat, or power, shall at the time of the first vote required for such decision, be engaged in the business of making, generating, or distributing gas or electricity, for sale for lighting purposes to consumers in such city, town, or borough, such city, town, or borough shall, if such corporation shall elect to sell and comply with this act, before establishing its plant, purchase of such corporation, such portion of its plant for gas, and property suitable and used for such business or in connection therewith, if the city, town, or borough shall have decided to establish a gas plant, or of its plant for electric lighting, and property suitable and used for such business or in connection therewith if such city, town, or borough shall have decided to establish . . . an electric lighting plant, as shall have at the time of the first vote, been engaged in or acquired for such business. If, in any such city, town, or borough, a single corporation owns or operates both a gas plant and an electric plant, such purchase shall include both of such plants. . . . The price to be paid for such plant, whether gas or electric, or both, shall be its fair market value for the purposes of its use (no portion of such plant to be estimated, however, at less than its fair market value for any other purpose), including as an element of value, the earning capacity of such plant, based upon the actual earnings being derived from such use, at the time of the final vote of said

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city, town, or borough to establish a plant, and also including the market value of any other locations or similar rights acquired by the owners of such plant or plants, with the intention of using the same in connection with such plant or plants, less the amount of any mortgage or other incumbrance or lien to which the plant or plants so purchased or any part thereof, may be subject at the time of the transfer of title; but such city, town, or borough may require that such plant or property shall be transferred to it free and clear of any mortgage or lien, unless said superior court, through its special commissioner as hereinafter provided, shall otherwise determine."

There were also the following provisions: "Sec. 13. Any corporation desiring to enforce the obligation of any city, town, or borough, under this act, to purchase any property shall file with the clerk of said city, town, or borough, within thirty days after the passage of the final vote, whereby said city, town, or borough shall have decided to establish a plant, a detailed schedule, describing such property, and stating the terms of sale proposed.

"If the parties fail to agree as to what shall be sold, or what the terms of sale or delivery shall be, either party may, after thirty days after filing the schedule, apply by petition to the superior court for the county in which such plant is located, or to any judge thereof in vacation, setting forth the facts, and praying an adjudication between the parties, and thereafter such court or judge shall, after notice and hearing, appoint a special commission of one or three persons who shall give the parties an opportunity to be heard, and shall thereafter adjudicate whether the property contained in said schedule, real or personal, including rights and easements, properly belong to such plant, and should be sold by the one and purchased by the other, and what the time, price, and other conditions of sale and delivery thereof shall be. Such commission shall report its doings to the superior court for the county in which the plant is located for confirmation by said court.

"Sec. 14. Any party aggrieved by the doings of the com-

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mission may, within fourteen days after its report has been filed with the clerk of said superior court, or such longer time as such court may allow, file a remonstrance to said report, and such court shall hear the questions arising on such remonstrance, and if the matters of the remonstrance are found true and sufficient, such court may set aside the report in whole or in part, as the justice of the case may require, and appoint another special commission to rehear the case, in whole or in part, as the justice of the case may require, who shall make report of its doings in the premises to said superior court, which will be subject to remonstrance in like manner as the original report, and in case such remonstrance is sustained, the court shall likewise send the case to another commission for action, and like proceedings shall be had, until the report of such commission or commissioners, covering all the questions involved, shall have been confirmed by the said superior court."

The defendant contends that so much of this statute as authorizes municipalities to acquire, set up, and operate such plants is valid, but that the provisions for forcing them to buy out any such plants already established is void.

The first point urged in support of this contention is that the special commission is entrusted with such judicial power as to make it a court, although it is not established in the manner in which courts, by our Constitution, must be. That the statute uses the term "adjudication," as descriptive of the decision which the commission is charged with rendering, is not enough to change the obvious character of that body. Whether it be regarded as an arm of the court in the exercise of its legal or equitable jurisdiction, analogous to a special jury or committee, or as a tribunal in the nature of a board of appraisers or other body appointed to ascertain the just compensation to be paid for property condemned for a public use, it is clear that it is not a court, nor its members judges, within the meaning of the constitutional provisions prescribing the mode by which judges are to be appointed. Its functions are but quasi-judicial. *State* v. *New Haven & N. Co.*, 43 Conn. 351, 382; *New Milford Water Co.* v. *Watson*,

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75 id. 237, 242, 247. Only if its report is confirmed can it assume the character of a judicial act, and then that character will be due wholly to the approving judgment of the court to which it was returned.

The second point made is that the commission is appointed to try the rights of particular parties and give the plaintiff the benefit of an exclusive privilege.

This is claimed to be contrary to § 1 of our Declaration of Rights, "that no man or set of men are entitled to exclusive public emoluments or privileges from the community."

In the statute in question, the General Assembly was dealing with two classes of artificial persons of its own creation, public corporations and public-service corporations. It desired to allow certain public corporations to engage in the business of lighting the streets and buildings within their limits, and it is equally apparent that it desired to do no injustice to any private corporation which it had previously chartered to do the same work and which had invested capital in a fixed plant, the value of which public competition must seriously impair. Money put into such a plant cannot be withdrawn. It has been turned into lands, buildings, and apparatus of little value except for the purpose for which they were specially designed. While the legislative power may be so exercised as to subject such investments to loss by a diversion of the business, built up by means of them, into other channels, those to whom that power has been confided have an equal right, in granting new franchises, to take care to protect prior ones on the faith of which the recipients have put their funds beyond recall. See *Enfield Toll Bridge Co.* v. *Connecticut River Co.*, 7 Conn. 28, 48. States, as well as individuals, can recognize merely honorary obligations. *United States* v. *Realty Co.*, 163 U. S. 427.

The duty of purchasing established plants is thrown equally on all municipalities seeking to take advantage of the statute, and is owed equally to all corporations standing in a position like that of the plaintiff. While no man or set of men are entitled to demand exclusive privileges from the State, it may grant them, for proper cause and on equal

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terms, to certain sets of men or classes of corporations. No corporation but a railroad company can run a railroad, and none but a gas company can supply the public with gas. The exclusiveness of the privilege which this suit was brought to enforce is a necessary incident of the fact that the plaintiff is the only chartered corporation of its kind having a plant in Norwich. If there were others there, they would have, under the statute, the same rights. That corporations formed for the same purposes under the general incorporation law, or individuals engaged in a similar business, would not have them, is of no importance. There was a legitimate reason for classifying chartered corporations by themselves, in this respect. In the case of each of them the State has determined, after special inquiry, that there was good cause for granting it a franchise, and if it has gone forward and established a plant, it has done it in reliance on its charter privileges, and on the natural probability that these would not be revoked or rendered valueless by the General Assembly without what should appear to that body to be proper cause. The equal protection of the laws is not denied by treating different classes of persons in a different way, if it be a way not inappropriate to the class, and the class be set apart from others on reasonable grounds. *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 111.

It is within the legislative power to establish a particular kind of administrative tribunal to decide a particular kind of questions, regarding the value of property to be appropriated to a public use, whether by a public or a private corporation, and the method and terms of such appropriation. *Bristol* v. *Branford*, 42 Conn. 321, 322; *Woodruff* v. *Catlin*, 54 id. 277, 295; *Woodruff* v. *New York & N. E. R. Co.*, 59 id. 63, 79. There is, at least, equal reason to justify the ruling of the Superior Court in upholding the right of the General Assembly to authorize its appointment of a commission clothed with powers of a similar nature as to property to be appropriated by a public corporation to aid it in discharging functions which it desires and the State permits it to assume, when the doings of such commission were to

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be returned to the court for confirmation, and when no question of the propriety or legality of committing such functions to the defendant was raised by either party.

The city in the Superior Court opposed the appointment of the commission by a motion to dismiss, a demurrer, and an answer. In none of these papers was it claimed that the provisions of the statute requiring municipalities, voting to establish a lighting plant, to purchase any existing one owned by a chartered corporation, and providing for the appointment of such a commission in case of a disagreement as to the terms of sale, were unconstitutional. After the commission had reported, in a motion to erase the cause from the docket, the city gave as a reason for erasing it that, under the provisions of the constitutions of this State and the United States, the purchase could not be enforced by such a tribunal. The only grounds of objection, however, which were there taken and specified, were those which have been above examined and held to be insufficient. Whether there were or were not other grounds that might have been brought forward, of greater weight, we have no occasion to inquire, since on this appeal we may properly confine our determination to the errors assigned.

The plaintiff's claim rested upon the validity of the entire statute. The defendant attacked only so much of it as provides for the compulsory purchase of existing plants. As that provision is valid, we have no occasion to consider the constitutionality of the rest of the statute, since no question has been raised in that respect by either party.

The report of the commission, after stating the value of the plaintiff's plant (exclusive of supplies and materials for current use, the manner of valuing which the parties agreed on) to be $590,000, and that "neither the franchises nor the good will of the plaintiff have been valued, and they should not be sold," proceeded as follows:—

"The commission has based its valuation upon the fair market value of the gas and electric plants for the purposes of their use, including, as an element of value, the earning capacity of said plants, based upon the actual earnings which

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were being derived from such use at the time of the final vote of said city, to wit, on the 2d day of June, 1902.

"In reaching said valuation, the commission has considered: the location of the plants with reference to the river, the railroad, and the community served by their distribution systems; the value of the land; the structural value of the buildings; the value of the machinery and all apparatus for producing gas or electricity; the distribution system of each of said plants; the present condition of the buildings, machinery, and distribution systems, their defects, the changes needed for their reasonable improvement, and the probable result of such changes as bearing upon the output of the plants; the expense of operation; and the opinions of the experts who testified. It has also considered that the plants are going concerns, and that their output has been increasing, and has also taken into account their earning capacity and their actual earnings at the time of said vote (making allowance for depreciation), and the fact that the plaintiff has an established business, built up at the risk of private capital, after experiments and changes during a long period, and has further considered the powers of the State, and its policy in dealing with public-service corporations.

"The commission deems the grounds of its valuation to be sufficiently stated, so that it is unnecessary to make separate rulings upon the various parts of the defendant's brief, as suggested during the argument.

"Said plants are subject to a mortgage for four hundred thousand dollars ($400,000), and bonds to that amount are outstanding, many of them in the hands of purchasers in good faith for value.

"The plaintiff filed a written request that the defendant be required to assume and pay the outstanding bonds, and that the plants be transferred subject to said mortgage.

"The defendant filed a written demand that said plants and all property affected by the adjudication of the commission be transferred 'free and clear of any mortgage or lien.'

"It did not appear from the evidence that said plants or

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property are subject to any encumbrance or lien other than said mortgage.

"The commission hereby determines that said plants and property shall be sold by the plaintiff and purchased by the defendant subject to said mortgage, and that the payment to the plaintiff by the defendant shall be the value of said plants and property already determined, to wit, five hundred and ninety thousand dollars ($590,000), plus the value of the supplies, materials, stock, tools, and other property of like nature, to be fixed as hereinbefore set forth, less the four hundred thousand dollars ($400,000) secured by said mortgage, with such interest thereon as may be unpaid at the time of the transfer."

In remonstrating against the confirmation of this report, the defendant set up two main grounds: first, that the valuation ought to have been confined to the bare physical plant; and second, that the conveyance ought not to be made subject to the mortgage.

The basis for determining the price, laid down in § 12 of the statute, was evidently intended, in case the parties failed to agree on the sum to be paid, to apply to a valuation by a special commission. It is claimed that in effect the commission, in this instance, put a value on the franchise and good will, although it excluded them in form.

It would not have fulfilled its duty, had it estimated the sum to be paid in view only of what the lands, buildings, pipes, wires, and other apparatus were worth, considered as separate items. They were to be valued in view of their arrangement for and adaptability to the purposes for which they were provided, and of their earning capacity as a going concern, in ascertaining which special regard was, by the terms of the statute, to be paid to their actual earnings. *National Water Works Co.* v. *Kansas City*, 62 Fed. Rep. 853. The phrase in the statute, "based upon the actual earnings," at a certain date, does not signify that the earning capacity of the plant, which was to be considered "as an element of value," was to be appraised solely on the basis of such earnings. It would be obviously necessary to take other

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considerations into account. The plant might have been strained to its utmost limit of productive power, and beyond any limit that could be steadily or safely maintained, in order to increase the apparent earnings of the company at a particular time. The real question was as to the amount of net profits then derived and derivable from the use of the plant. There might be defects in it fatal to the maintenance of earnings at the same rate, unless they were remedied. The remedies might be simple and cheap: they might be difficult and costly. All such matters it was proper for the commission to take into account. *Norwalk* v. *Blanchard*, 56 Conn. 461, 464. There is therefore nothing exceptionable in its statement that it considered the changes needed for the reasonable improvement of the plants and the probable results as bearing upon their output. It may be that it deemed such changes necessary to the maintenance of the present output. It may be that it thought that, if made, the present output could be maintained at less expense. The amount of the output was properly looked at in connection with the expense of operation. The net earnings of a producing plant are a more significant test of its value than the gross earnings.

It was also proper for the commission to pay regard to the fact that the plaintiff had an established business, built up after experiments and changes during a long period. *Gloucester Water Supply Co.* v. *Gloucester*, 179 Mass. 365, 60 Northeastern Rep. 977. This tended to strengthen the presumption that the actual earnings at the time of the city vote could be relied on as an important factor in determining the earning capacity of the plant. A manufacturer seeking to sell his works and anxious to enhance their apparent value when estimated at a particular day, might, by extraordinary efforts, get special orders to be filled on that day, which would give his operations a temporary and fictitious magnitude. It is only in case of an established business, based upon the use of well tested and long tested apparatus, perfected by many trials, experiments and changes, that the net earnings of a day are a fair index of the net

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earnings of a year. The commission reports that it considered, in connection with these facts, that the plaintiff's business had been thus "built up at the risk of private capital." It indisputably had been so built up, and whatever had been sunk in experiments in order to secure and with the result of securing a good working plant was properly considered as entering to some extent into the value of that plant. *Nihil simul inventum et perfectum est.* The defendant itself invited the commission, in making its valuation, to take into account "the value, if any, of the physical plant in excess of the value or cost to purchase and install the several parts of a similar plant in similar condition, due to the fact that it is a connected, working whole, shown by experience to be capable of operating at a definite cost." The proof furnished by experience was thus plainly and properly stated to be of material importance.

It is objected that the commission, in reaching its valuation, considered the powers of the State, thus indicating a decision that the statute was constitutional; and also the policy of the State, thus indicating an attempt to construe the statute by its own opinion as to what that policy was, rather than by its own terms.

As the statute, so far as the defendant called it in question, was a constitutional one, it would be unimportant, if true, that the commission so considered it.

That it construed the statute in view of the policy of the State, rather than by its terms, the trial court has found not proven. If this averment in the remonstrance was true and was material, it could have been proved by calling the members of the commission as witnesses in its support. *New Milford Water Co.* v. *Watson*, 75 Conn. 237, 248. Their testimony was not offered, nor any other evidence as to this point. The objection fails, therefore, unless the statement in the report, that the policy of the State in dealing with public corporations was considered as bearing upon the valuation to be made, discloses an error of law, harmful to the defendant. This policy, in reference to public service corporations such as the plaintiff,

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and in the situation of the plaintiff, was plainly apparent upon the face of the statute. The sections under which the commission was appointed to act were indisputably enacted to protect their property interests. The purpose or policy thus manifested the commission had a right to consider. In the absence of proof to the contrary, it is not to be presumed that it considered any other.

The defendant requested the commission to state specifically in its report what valuation it placed upon an "allowance for powers and policy of the State" as a part of the company's plant, and to specify separately each item of value which it included in the purchase price. This request having been denied, a motion to recommit the report with directions to add such particulars was filed in court, and denied.

There was no error in these rulings. The assumption that a price was set on the powers and policy of the State was obviously inadmissible. As respects the other items to which reference was made, it is enough to say that the valuation of anything in the nature of a connected and working whole must be made and regarded as an entirety. It would serve no useful purpose for those making such an estimate to specify the particular considerations leading up to the ultimate result. Rules of Court, p. 34, § 100. If improper subjects were taken into account, the remedy was by way of remonstrance. These same matters were thus brought up, but the defendant failed to support its allegations by proof.

In its answer to the remonstrance as to this point, the plaintiff alleged that the defendant especially invited the commission to consider the powers of the State and its policy in dealing with public-service corporations. Evidence was produced in support of this contention, and it is found by the trial court that the defendant did urge upon the commission that it was competent for the legislature to authorize municipal competition with the plaintiff, without providing for any compulsory purchase, or for compensation; that the statute worked no compulsion upon it in the

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legal sense; and that it was incorporated four years after the statute was passed. Subsequently, on the hearing upon the remonstrance and answer, the defendant offered in evidence part of a brief submitted by the plaintiff to the commission, in which it was called upon to consider the powers and policy of the State with reference to muncipal competition with private ownership, under the claim that this would tend to prove that the commission considered these matters in the way in which the brief stated them. It was properly excluded. The evidence was of too remote and conjectural a character. It showed on its face that there was something better that could be offered, namely, the testimony of the members of the commission.

The plaintiff's plant was mortgaged in 1897 to a trust company of New York, to secure its negotiable bonds to the aggregate amount of $400,000, payable in 1927 and bearing interest payable semi-annually at the rate of five per cent. All these bonds have been issued. The city claimed before the commission, and by remonstrance against the confirmation of its report, that they were illegally issued and void, and that the mortgage was executed without legal authority.

There was no error in confirming the report, notwithstanding the commission denied the defendant's request that the property should be transferred to it free and clear of any mortgage or lien, and notwithstanding evidence was submitted to it in support of the claim of the city above stated, and also such as tended to show that the city could borrow money with which to pay off the mortgage bonds at a rate of interest less than that which they bore by one and a half per cent.

The plaintiff could not force its bondholders or their trustee to accept payment of the mortgage debt before it was due. The State itself could not impair the obligation of the contract. It could authorize the condemnation of the contract rights under the mortgage, on paying just compensation for the loss of the advantage, if any, incident to such an investment in a long time five per cent. bond. The com-

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mission, however, had no jurisdiction to institute or entertain condemnation proceedings. No application was made by either party to the Superior Court to assume the exercise of such a power, and it is therefore unnecessary to inquire whether such an application could have been supported.

Under these circumstances the commission could take no other course than that which it adopted, unless it found the bonds or mortgage to be invalid. Although evidence that they were invalid was submitted to it, the report states in effect that they were valid. It followed that the lien could not be displaced by the sale.

The city sought, under its remonstrance, to have the question of their validity retried in the Superior Court on a stenographer's report of the evidence and exhibits introduced before the commission which bore upon it, in connection with the plaintiff's charter. The evidence thus offered was properly excluded. The issue was one to be determined, in the language of the statute, by the "superior court through its special commissioner." It therefore could not be determined by the Superior Court without the intervention of the commission. Still less could it be determined on a remonstrance to the confirmation of the report of the commission, upon a claim that the report was against the weight of evidence.

It is claimed that under General Statutes, § 693, certain depositions used before the commission were made admissible in support of this ground of remonstrance. That section refers solely to appellate tribunals, which in this instance the Superior Court was not; nor was it intended to change the rules affecting the relevancy of evidence.

The Superior Court also properly declined to admit, in support of the remonstrance, the stenographer's report of all the evidence introduced before the commission on the question of values. This was offered to show that the commission, in valuing the property at $590,000, must have taken into account considerations which were legally inadmissible. The claim of the city in making the offer was that there

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was no testimony before the commission warranting a valuation of over $420,000, in addition to a gross allowance, which on the hearing the city had admitted might fairly be made, of not over $60,000, by reason of the fact that the plant was that of a going concern. The sum at which this allowance, if made, should be fixed, was evidently a matter as to which a difference of judgment between reasonable men might fairly exist. The same state of facts which might lead one to deem $60,000 too much might to others seem to call for a much larger addition. The commission viewed the plant, and may thus have derived impressions that were decisive. The evidence thus put before it could not be put before the Superior Court. This is enough to justify the ruling, without reference to other grounds urged in its support.

It is made a reason of appeal that the supplies and materials that may be on hand for current use at the date of the transfer of title, which the city is required, under the terms of the report which were confirmed by the judgment, to purchase, are to be bought subject to the mortgage, although not in existence when the mortgage was executed. This question was not raised before the Superior Court, and therefore need not be considered here. It may, however, be observed, that the form of the bill of sale prescribed in the judgment purports to subject what is sold to the mortgage, only "so far as said mortgage covers or includes any of such personal property."

There is but one other ground of appeal that calls for particular consideration. This is, that the judgment goes beyond a confirmation of the report and lays new obligations upon the city in addition to those which the commission decided to be proper.

The Superior Court had power, by § 14 of the statute, to "set aside the report in whole or in part, as the justice of the case may require," but, if this were done, the questions determined by the part set aside were to be sent to another commission for settlement. It was plainly the intent of the General Assembly that every matter submitted to the

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commission should be decided by it or by some other commission, subject only to the approval of the court. The function of the final judgment was to make the work of the commission operative. For that purpose it was within the jurisdiction of the court, in framing the judgment, to provide for the due fulfilment of the terms and conditions of sale laid down in the report. This is implied in § 14 of the statute, which authorizes the issue of equitable process, "to compel compliance with the final decree of said court." A duty of compliance presupposes the existence of some requirement to be fulfilled.

There is nothing exceptionable in the provision in the judgment appealed from, that the time of the sale and transfer should be at the expiration of ninety days from its rendition, since that was on the day of the final acceptance of the report. The report was finally accepted when the Superior Court accepted it. That fixed the date of acceptance for all the purposes of the cause, subject to the right to postpone it by a subsequent extension of time in case of an appeal to this court and an affirmance. Rules of Court, p. 33, § 97.

The court also properly settled the particular form of the warranty deed and bill of sale, and the date and manner of their delivery. The forms prescribed pursue, in legal effect, the terms of the report. That all the personal property, including the supplies and materials on hand for current use were to "be transferred" by the delivery of the bill of sale, without any manual tradition, was sufficiently implied by the terms of the report.

Nor was there error in liquidating the precise amount of the purchase money to be paid. The report of the commission had fixed it (except as to that for the supplies and materials, concerning which the parties had agreed on a mode of valuation) at $590,000, "less the $400,000 secured by said mortgage, with such interest thereon as may be unpaid at the time of the transfer." This report was made in April, 1903. On the hearing as to its confirmation in the following autumn, the parties agreed that interest had been paid in

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full to July 1st, 1903. Another interest payment would become due, by the terms of the mortgage bonds, on January 1st, 1904. The date fixed for the sale was January 6th, 1904. Prior to that day, the plaintiff, if it fulfilled its contract obligations, would have to pay $10,000, and on that day five days' interest more would have accrued, which the report charged upon the city. It was simply giving due effect to the terms of the report to insert in the judgment the precise sum which the city was to pay on January 6th; and it is not claimed that in making it $179,666.66, there was any mistake in computation.

There was no error in ordering the issue of execution for this sum at the expiration of the ninety days. It was a natural incident of a money judgment, and the report, when confirmed, had the effect of one for that amount. It is true that the provision that execution issue on that day is unqualified, but it is always implied in an order of that nature that execution will not be issued if it appear that the debt has been paid.

For the same reason it was not erroneous to adjudge that the plaintiff recover of the defendant, after the transfer, the value, when ascertained, of the supplies and materials, as to the mode of valuing which an agreement had been made.

There is, however, one error which is well assigned in this connection.

The plaintiff especially requested the commission that the defendant be required to assume and pay the outstanding mortgage bonds; but the report contains no such provision.

The sale of an equity of redemption in mortgaged property casts on the purchaser no obligation to pay the mortgage debt. That remains, as before, solely the duty of him whose debt it was. The purchaser may, indeed, be forced to pay it, if he would avoid a foreclosure, but the mortgage creditor has no right of recovery against him, and can only collect his debt at his expense by enforcing his security.

The report simply determined that the sale should be subject to the mortgage. The judgment, after, in paragraphs fourth and fifth, assuming to make it subject to the mort-

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gage and the mortgage indebtedness, especially directs, in paragraph ninth, "that if the said petitioner shall in the future at any time or times pay any part of the principal or interest due or to become due upon said mortgage and bonded indebtedness of four hundred thousand dollars ($400,000) said petitioner shall after the expiration of ninety days from the rendition of this judgment recover from time to time of said city such sum or sums so paid, with interest at the rate of six per cent per year from the time of any such payment made after ninety days from the final acceptance or confirmation of the report of said special commission." This provision transcended the jurisdiction of the court, by prescribing new conditions of sale authorized neither by the report of the commission nor by the statute under which it was constituted. The plaintiff remains absolutely liable to the mortgage bondholders. They can compel it to pay them what it agreed and as it agreed. It can pay them, voluntarily, if it thinks fit. Upon making any such payment, when due and payable, the judgment gives it an absolute right to claim immediate reimbursement from the city treasury. This would be so, even if the city had abandoned the use of the mortgaged plant and constructed another. Here there is error. If the plaintiff should be hereafter obliged to pay anything to its bondholders, it must look solely to its equitable charge upon the mortgaged property for indemnity.

This provision is, however, clearly separable from the rest of the judgment, and may be struck out without affecting the rest.

There is error in the insertion, in the fourth paragraph of the judgment, of the words "and said mortgage indebtedness;" and in the insertion in the fifth paragraph of the words "and bonded indebtedness;" and in the ninth paragraph; and said words above quoted from the fourth and fifth paragraphs, and the whole of the ninth paragraph, are struck out of said judgment and set aside, and the residue of said judgment is affirmed, and the cause remanded, with directions to modify it by substituting a new date for the time of the sale, not later than ninety days from the date of

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such modification, and by such alterations in paragraphs fourth, fifth, seventh, eighth and tenth of said judgment as may be required by such postponement of the time of the sale.

Costs in this court will be taxed in favor of the appellant.

In this opinion the other judges concurred.

JOHN S. LEWIS *vs.* WILLIAM I. LEWIS ET AL.

First Judicial District, Hartford, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

The weight and credibility of evidence is a matter for the determination of the trier, and therefore the testimony of a witness or witnesses, although not directly contradicted, may nevertheless be discredited by circumstances in evidence.

Certain claims of error in the present case reviewed and *held* to rest upon mistaken assumptions respecting the finding of the trial court.

The possession of a life tenant is not adverse to the remainderman or reversioner.

The assignee of the reversion in an estate granted to a life tenant upon express condition, cannot avail himself of breaches of the condition which occurred prior to his acquisition of title.

Until a life tenant's right of possession matures he cannot be chargeable with laches in not asserting it.

To estop a plaintiff in ejectment upon the ground of his silence while the defendants were making improvements upon the property and selling portions of it as their own, it must at least appear that he either knew or was bound to know of them.

Section 4052 of the General Statutes provides that final judgment in ejectment shall not be rendered against a defendant who has in good faith made improvements upon the property, believing his title to be absolute, until the court shall have ascertained the present value of such improvements and the amount due the plaintiff for use and occupation; and if the value of the improvements exceeds the amount due for use and occupation, execution shall not issue until the excess has been paid by the plaintiff to the defendant, or into court for his benefit; but if the plaintiff shall elect to have the title confirmed in the defendant, and shall file notice thereof, the court shall ascertain what sum ought in equity to be

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paid to the plaintiff, and upon its payment may confirm the title in the defendant. *Held* :—

1. That the statute gave the court no authority to force an unwilling defendant to purchase the plaintiff's title, and therefore the trial court erred in rendering a judgment against the defendants for the ascertained value of such title. It is questionable whether the legislature could constitutionally enact a statute conferring such power.
2. That whether the provisions of the statute are applicable to any case in which the plaintiff is not the owner of the fee, they certainly do not apply, and could not have been intended to apply, to a case in which the plaintiff's interest is only a life estate defeasible upon conditions subsequent, which may or may not occur at any time, and which limit the plaintiff's beneficial enjoyment in the premises and diminish the value to him, of the defendants' improvements, the extent of such diminution being in any event substantial, and susceptible of being still further restricted by judicial construction of the language imposing the conditions.
3. That the conditions of forfeiture imposed upon the life tenant, provided he alienated the premises or failed to live upon them during his life, were not against public policy.
4. That the plaintiff was entitled to recover as damages the fair rental value of the unimproved property during the time he was unlawfully dispossessed, subject to any proper deductions; but that such rental value was not to be reduced by reason of the limitations imposed upon the plaintiff in the use of the premises.

A waiver of the right to take advantage of existing breaches of conditions is not a waiver of the conditions themselves.

Argued January 5th and March 1st,—decided April 15th, 1904.

ACTION in the nature of ejectment, brought to and tried by the Superior Court in Middlesex County, *Ralph Wheeler, J.*; facts found and judgment rendered that the plaintiff, by operation of § 4052 of the General Statutes, recover of the several defendants certain sums, and that upon the payment thereof to the plaintiff the title to the land claimed by each respectively be confirmed in him, from which all the parties appealed. *Error, judgment set aside and cause remanded.*

This is the same case as that reported in 74 Conn. 630. The substantial allegations of the complaint are there recited. The judgment then reviewed, being one upon demurrer to the complaint sustained, having been set aside and the cause remanded, the defendants answered. The

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answers contained sundry admissions and denials, and set up that the conditions contained in the deed of August 28th, 1867, which are also recited in the report of the former case and which were then held to be conditions subsequent, had been broken, that re-entry had been made by the grantor and possession thereafter acquired by him, which possession continued in him until his death when it passed to the defendant William I. Lewis, his devisee, who, together with his grantees, his co-defendants, have since remained in such possession. They also alleged matters of estoppel arising from delay in the assertion of the plaintiff's rights. The reply denied the allegations of breach of condition, re-entry, re-possession and estoppel. The case was heard by the court and the issues found for the plaintiff, and it was found that the plaintiff was entitled to the possession of the premises in question for the term of his life.

The court found true the allegations of the complaint with respect to the original ownership of the premises in question by John Lewis, his conveyance thereof by deed of August 28th, 1867 (herein known as Exhibit *A*), Henry C. Lewis' entry into possession under said deed, the latter's support of John Lewis in accordance with the terms of the deed until October 1st, 1870, and John Lewis' departure from the premises on that day never to return. The plaintiff was then four years of age and lived with his father upon the premises. The events which succeeded are found as follows: When John Lewis left the premises he removed to New York City, where he became sick and was visited by his nephew, William I. Lewis, one of the defendants, and he subsequently went to Washington, D. C., where he lived until the time of his death, October 2d, 1871, with the said William I. Lewis. After making his home with William I. Lewis and being cared for by him, John Lewis became desirous that he should have the property in question, and formed the intention of giving and conveying it to him. With that intention he executed and delivered to him a deed thereof, dated March 10th, 1871, herein called Exhibit *B*. William I. Lewis was fully informed of the purpose of John

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Lewis and accepted said deed. Thereafter John Lewis, in all his acts in reference to this property, was moved by the fixed purpose of perfecting the title in William I. Lewis, and of making the transfer certain and effectual. At the time when Exhibit *B* was delivered, John Lewis represented to William I. Lewis that Henry C. Lewis had not performed and was not performing the conditions set forth in Exhibit *A*, and that he, the said John Lewis, was by reason thereof entitled to repossess himself of said premises and to enjoy his former estate therein, and William I. Lewis was fully informed by John Lewis of the facts as claimed by him, John Lewis, and was advised by him to go and demand possession of the premises. Shortly thereafter William I. Lewis visited Westbrook, and, with said deed in his possession and claiming by authority thereof, went upon the premises and demanded of Henry C. Lewis that he relinquish possession of said premises to him, the said William I. Lewis, but Henry C. Lewis refused to surrender possession.

William I. Lewis thereafter returned to Washington, and on May 27th, 1871, Exhibit *B* was filed for record in the office of the town clerk of the town of Westbrook.

On June 16th, 1871, John Lewis executed and delivered to William I. Lewis a power of attorney to attend to all business of the former "within the State of Connecticut of whatever kind or description that is now necessary to attend to or that may become necessary during the time the said Wm. I. Lewis may remain in said State," and on or about said day delivered to William I. Lewis United States bonds, aggregating in value about $5,000, telling him to go and get possession of said premises, and further advising him as to an offer to be made to Henry C. Lewis. William I. Lewis went to Westbrook and upon the premises, and by the authority of said power of attorney, began negotiations with Henry C. Lewis. Henry C. Lewis proposed to relinquish possession of the property for the sum of $8,000 to be paid him. William I. Lewis offered to give $2,000. It was thereupon agreed to leave to one Stannard the determination of the question of what sum should be

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paid Henry C. Lewis. Stannard having decided that the sum of $4,000 should be paid him, a release deed dated July 10th, 1871, was then executed by Henry C. Lewis to William I. Lewis, and left by the former with Stannard for delivery by him to William I. Lewis when the consideration should be paid. The bonds of John Lewis, which had been brought from Washington by William I. Lewis, were, on said July 10th, 1871, left by him at a bank in Clinton for sale through a broker in New York. The proceeds of such sale were deposited in said bank in the name of William I. Lewis, and drawn upon by him in payment of Henry C. Lewis, checks therefor signed by him being left with Stannard for use when Henry C. Lewis should leave the premises. Henry C. Lewis thereafter relinquished possession of the premises. The money was paid him, the deed delivered to William I. Lewis in accordance with the understanding, and on July 28th, 1871, the same was left for record in the office of the town clerk. Upon leaving the premises Henry C. Lewis took with him the plaintiff.

On or about May 1st, 1872, William I. Lewis and Isadora I. Lewis, his wife, removed from Washington and occupied said premises, and have since remained in occupation thereof, excepting such portions as have been conveyed to the other parties.

William I. Lewis in 1878 conveyed said premises through a third party to his wife, Isadora. The defendants Winship, Hall, and Yale, claim to own portions of the premises under deeds from William I. Lewis and wife.

Henry C. Lewis died April 13th, 1898. John Lewis left a will devising all his real estate in Middlesex county in this State to William I. Lewis.

Subsequent to July 10th, 1871, Henry C. Lewis did not at any time during his lifetime possess any portion of said premises; neither has the plaintiff since the death of Henry C. Lewis; but the defendant William I. Lewis and the grantees under him have at all times been in possession.

When William I. Lewis accepted the deed of July 10th, 1871, he intended to, and did in fact, waive and abandon all

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right to claim possession of said premises on account of non-performance of any of the conditions set forth in Exhibit *A*, both for himself and for John Lewis, so far as John Lewis had any interest or William I. Lewis had any right to represent John Lewis.

Upon the court's determination that the plaintiff was entitled to possession, the several defendants made claims, under the provisions of § 4052 of the General Statutes, for payment to them by the plaintiff of the value of the improvements made by them upon the several portions of the original premises then owned by them respectively, which improvements were claimed to have been made in good faith and in the belief that their respective titles to the land upon which they were made were absolute. The court having first determined that improvements had been made upon the premises and made as claimed, thereupon estimated the present value of an estate for the plaintiff's life therein, based upon his expectation of life according to approved expectancy tables, and also the amount due the plaintiff from the several defendants for use and occupation. The plaintiff, pending these proceedings, filed his election to have the title confirmed in the several defendants, and the court also ascertained and determined the amounts which ought in equity to be paid the plaintiff by each occupant to entitle him to such confirmation. In this determination the court took into account the fact that the estate of the plaintiff was only a life estate, and ruled, with respect to both this inquiry and that as to the amount due for use and occupation, that the conditions attached thereto, to wit, that he was required to occupy the premises himself during his life, barred him from a more profitable use of them than for farming purposes. In arriving at the amounts which ought to be so paid by the several defendants, the court added to the sums found due for past use and occupation, upon the basis adopted as aforesaid, such further sums, and such only, as would during the plaintiff's expectation of life yield him an annual income from the several portions of the premises equivalent to the annual rental values ascertained as aforesaid. As the result of these

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computations it was found that there ought, equitably, to be paid to the plaintiff, as a condition of the confirmation of the defendants' respective titles, the following sums: from Lewis and wife $2,500, from Hall and Yale $200, and from Winship $200. The judgment of the court was that the said defendants respectively pay the plaintiff said several sums, and that when payment thereof, together with interest thereon from the date of judgment, should be made, the title of the parties so paying should, on motion to the court, be confirmed in them.

In his memorandum of decision the court directed that the defendants might within one week file with the clerk statements of intention in regard to the payment of the several sums which it was found as aforesaid ought to be paid to the plaintiff. The defendants Lewis and Winship filed notices of their elections not to pay, the defendants Hall and Yale of their election and offer to pay.

All the parties appealed from the judgment. The appeal of Hall and Yale was subsequently withdrawn.

Lewis E. Stanton and *Frank D. Haines*, for William I. Lewis *et al.*

Henry C. White and *Edward L. Clark, Jr.*, with whom was *Charles E. Jennings, Jr.*, for John S. Lewis.

Henry Stoddard and *Hugh M. Alcorn*, for Yale *et al.*

PRENTICE, J. Two altogether distinct classes of questions are presented upon this record, to wit: those which relate to the finding of the court that the plaintiff was entitled to have possession of the premises in controversy, and those which arose from the attempt to apply the provisions of § 4052 of the General Statutes to the situation disclosed. The appeal of Lewis and wife and Winship raises the questions of the first class.

These questions relate both to the finding of facts and the legal conclusions of the court therefrom. Various exceptions are taken to the finding, upon the grounds that facts are found without evidence, that undisputed and

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proven facts are not found, and that facts are found contrary to undisputed evidence. Our examination of the record with respect to the exceptions concerning facts material to any question of law, fails to disclose any instance in which a fact has been found without evidence, or an admitted or undisputed fact not found. With objections based upon claims of "facts proved" we have no concern.

Most of these claims involve the mistaken assumption that the direct evidence of a witness or witnesses, if not distinctly contradicted, constitutes undisputed evidence. This is far from true. There may be the best of reasons for discrediting witnesses. There may be circumstances in evidence which in the opinion of the trier ought to outweigh any amount of assertions. These matters all lie within the domain of the trial court. It is the final judge of what is to be believed and what not. These observations apply with peculiar force to the finding of the court with respect to the controlling features of the case involving the intention of the parties in the delivery and acceptance of the deed of March 10th, 1871, the character of the negotiations which resulted in the giving of the deed of July 10th, 1871, the scope of the submission to arbitration, the nature of the transaction as consummated, and the waiver therein of all claims arising from a breach of condition. The considerations which led to the conclusions reached are apparent from the evidence. The finding that there had been no breach of condition prior to John Lewis' final departure from the premises is deprived of its significance in the decision of the case by the other facts found.

These defendants' remaining claims of error addressed to this branch of the case are by their counsel grouped under six heads. The first four, to the effect that John Lewis, the original grantor, re-entered for condition broken and thereby defeated the estate of both Henry C. Lewis and the plaintiff, that the submission and award was as effective as a final judgment ousting both the life tenants as a judgment in ejectment would have been, and that William I. Lewis

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derived his title under the will of John Lewis and in no other way, are effectually disposed of by the finding. It is found that William I. Lewis took title by the deed of March 10th, 1871. The conclusion of law involved in this proposition is fully supported by the subordinate facts found. *Moore* v. *Giles*, 49 Conn. 570. The objection that the deed could convey no title, for the reason that the grantor was at the time ousted by the possession of Henry C. Lewis, is without foundation. The possession of a life tenant is not adverse to the remainderman or reversioner. *Merwin* v. *Morris*, 71 Conn. 555; *Schroeder* v. *Tomlinson*, 70 id. 348. The possession of Henry C. Lewis had not been converted into one adverse to John Lewis by the latter's assertion of any right for condition broken.

That John Lewis never made re-entry follows as a consequence of his conveyance of his interest on March 10th, 1871. No re-entry is claimed until subsequent to that date. William I. Lewis, who alone could thereafter make re-entry, could not avail himself of antecedent breaches of condition. Subsequent breaches of which he could take advantage do not appear. General Statutes, § 4051; *Warner* v. *Bennett*, 31 Conn. 468; *Lewis* v. *Lewis*, 74 id. 630. Waiver is furthermore expressly found.

The submission and award related only to the amount to be paid to Henry C. Lewis. Nothing else was arbitrated. All else was covered by the agreement of the parties, and that agreement was based upon a waiver of all right to claim possession for any breach of the condition of the deed of August 28th, 1867. Any claim that the agreement extended to the interest of the plaintiff, or that the negotiations and transactions which culminated in the deed of July 10th, 1871, in some way terminated that interest, has no basis in any fact found. That interest does not appear to have been involved in the negotiations, and was not in form conveyed. Had it been otherwise, Henry C. Lewis' power to bargain away or convey the estate of his infant son does not appear. Had he the power to extinguish that estate by a breach of condition, his breach in conveying and surrendering his occu-

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pancy to William I. Lewis is one of which the latter cannot take advantage. *Lewis* v. *Lewis*, 74 Conn. 630.

The fifth claim of these defendants is that the payment of the $4,000 by John Lewis, under the award, estops the plaintiff from now making any claim to the premises. The answer to this claim is apparent. The submission, as we have said, did not involve any subject-matter save the amount to be paid Henry C. Lewis, and the award was of the amount to be so paid. The plaintiff's interests were in no way involved and cannot, therefore, be concluded by any compliance with the award.

The last claim consists in an appeal to the doctrine of laches and estoppel. It is said that the plaintiff is estopped from asserting his claim because he remained silent for thirty-two years after the transactions of 1871, and permitted the defendants to improve and sell portions of the property. In so far as this contention is founded upon delay in asserting title, it is to be observed that until the first life tenant's death, which did not occur until 1898, the plaintiff had no right of possession to assert. The defendants' possession as grantees of the estate of the first life tenant was a lawful possession and not adverse to the plaintiff. In so far as the claimed estoppel is based upon silence during improvements and sales, the sufficient reply made is that it does not appear that the plaintiff had knowledge of them or was under any duty to know of them.

No error, therefore, entered into the determination of the court that the plaintiff was entitled to the use and occupation of the premises for the term of his life.

The questions of the second class are raised in part by the appeal of the defendants Lewis and Winship, and in part by that of the plaintiff. The Lewises and Winship complain of that part of the judgment which requires them to pay the plaintiff the sums found to be equitable in order to entitle them to confirmations of their titles. The plaintiff complains of certain of the methods employed and principles applied in the ascertainment of said sums.

The defendants are clearly right in their contention that

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the court exceeded its power in the rendition of judgment. Nowhere in the statute is authority given to the court to require a defendant in dispossess proceedings in effect to purchase and pay for the plaintiff's property or interest in property regardless of the former's objection, and no such authority can be implied. Were such authority in terms given, a serious question as to the constitutionality of such legislation would at once present itself. This question, it is to be presumed, the General Assembly would be careful to avoid, and the provisions and history of the Act show that such care has been exercised.

The question next suggests itself as to the nature of the judgment which the statute authorizes where, as here, the prevailing plaintiff has elected to have the title confirmed in the occupant and the occupant has signified his refusal to accept the title and pay the ascertained equitable equivalent. This question, suggested by our legislative attempt to deal in a brief and summary manner with a by no means simple subject, to which, in other States, more sections are devoted than there are lines in our statute, would, in a proper case for the application of the statute, involve important considerations. We have no occasion, however, to enter upon their discussion, since we are satisfied that our statute was not intended to be and is not applicable to a situation such as this case presents. The language of the statute prompts the query whether it was designed to apply to any case in which the plaintiff was not the owner of the fee. No limitation to be sure is expressed, but the sum which it is in terms provided shall be ascertained and paid by the plaintiff is the present value of the improvements, and not, under any circumstances, some share thereof appropriate to the estate which the plaintiff will acquire in them. Again, the section provides for the confirmation of the occupant's title in a certain event, apparently assuming that the claimant must have that whereby such confirmation might be made. See *Burkle* v. *Ingham*, 42 Mich. 513.

It is claimed, however, that the statute is one which is to have an equitable application, and may be moulded in the

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general manner in which the trial court sought to do, so that the spirit rather than the letter shall control. If we so assume, there yet remain cases—of which the present is a good example—of such a character that it is incomprehensible that they were intended to be brought within its scope, so inapt are its provisions, so inadequate are they to the accomplishment of equity, and so impossible are they of any intelligent application.

The plaintiff has only a life estate. The deed which created it made it one upon conditions. *Lewis* v. *Lewis*, 74 Conn. 630. These conditions in terms limit the plaintiff's enjoyment of the premises, in that they forbid him selling or in any way conveying to others any part thereof, and require him to live on and occupy them during his life. These limitations, furthermore, if they continue to be effectual, are such as would have an important bearing upon the beneficial value to the plaintiff of the improvements in question. What their consequence would be in this regard would depend upon the interpretation and effect which is to be given to the language immediately preceding the *habendum*. Interpreted in one way it would seem to reduce that value to small, if not invisible, proportions. We have no occasion to make this interpretation. It is enough to indicate, as we have, the uncertainties attending the situation, and to note that in any contingency the plaintiff cannot have the full beneficial use of the improvements even during the continuance of his estate.

The plaintiff, however, claims that these limitations, whatever their extent, are no longer operative, (1) because the condition as to occupancy was on July 10th, 1871, waived by William I. Lewis, under whom all the present owners hold, and (2) because all the conditions are void as being against public policy. The waiver, which is expressly found, is one of a right to take advantage of existing breaches of condition, and not of the conditions themselves. The transaction of that date was the buying in by the owner of the reversion of an outstanding life estate. There can be no fair legal implication therefrom, or from any incident thereof as found,

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of a waiver of any condition attaching to a succeeding independent life estate not the subject of the negotiations or conveyance which resulted.

With respect to the second claim, it is to be observed that the provisions in question created conditions through which the estate which vested might be defeated, and not restrictions. In the former action all the parties concurred in that construction, which we then adopted as being in consonance with the apparent intent of the parties gathered from the whole instrument, although it was not expressed in any of the more customary formulas or in the clearest manner. A condition of forfeiture upon alienation is one which may be validly annexed to a life estate. Gray on Restraint on Alienation, § 72, and cases there cited. The condition as to occupancy is not one either impossible, unlawful, or incompatible with the estate to which it is annexed, and we discover no reason to hold it void.

We have, therefore, a situation in which the claimant has only a life estate and the occupants are the owners of the reversion. The plaintiff's estate discloses the following incidents: (1) It is a life estate only, and therefore terminable in favor of the defendants at any moment by his death. (2) It is an estate to which are annexed conditions by virtue of which it may be divested at any time within the plaintiff's life, which time cannot be approximated or estimated upon any law of average. (3) It is an estate the conditions of which limit the plaintiff's beneficial enjoyment of the premises. (4) It is an estate the conditions of which would render certain of the improvements of little or no beneficial value to the plaintiff, and all of them of a restricted value dependent in extent upon judicial construction as to the interpretation to be placed upon the language imposing the conditions. It is inconceivable that the General Assembly intended to make our statute applicable to such a situation, and by no means easy to discover how it could be judicially moulded so as to admit of an equitable application to such uncertain conditions, and what standards should be employed in the attempt. It is quite certain that if any such scope

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was intended to be given to the statute more apt language would have been used, more careful provisions made, and less left to judicial conjecture and construction.

In view of the conclusion which we have reached as to the inapplicability of the statute, the plaintiff's reasons of appeal do not call for a further consideration than has already been incidently given them, except to observe that in the assessment of damages, which the complaint calls for, the plaintiff is entitled to be allowed the fair rental value of the unimproved property for and during the time he was unlawfully dispossessed, subject of course to any proper deductions. The defendants can claim no reduction from this rental value by reason of any limitations imposed upon the use of the premises while in the plaintiff's possession. The court below seems not to have observed this rule in ascertaining the amount due for past rents and profits. In this there was error.

There is error, and the judgment is set aside and the cause remanded to be proceeded with according to law.

In this opinion the other judges concurred.

THE CITY OF HARTFORD *vs.* STEPHEN MASLEN ET AL.

First Judicial District, Hartford, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

The parties were at issue respecting the right of the State to authorize the erection of a soldiers' memorial upon a strip of land in the city of Hartford lying south of the driveway in front of the Capitol; the city claiming said strip as a part of one of its public parks, while the defendants alleged that it had been tendered by the city and accepted and occupied by the State as a part of the Capitol grounds. *Held:* —

1. That in the absence of a deed or other written conveyance by the city to the State, resolutions of the General Assembly authorizing the city to provide a site for the Capitol free of expense to the State, and other Special Acts relating thereto and to the erection of the building and the grading of the grounds, also the votes and proceedings of the municipal authorities pursuant to such author-

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ity, the action of the agents of the State and city in the premises, and the possession and control actually taken and exercised by the State over the strip in dispute for more than twenty years, with the knowledge and acquiescence of the city, were not only admissible in support of the defendants' contention, but were sufficient as matter of law to constitute an express or implied dedication and transfer of the control of said strip by the city to the State.

2. That the city had authority to devote the strip of land in question to the use made of it by the State, and for which it was accepted, such use being consistent with its continued use as a public park.
3. That if the State's use could be regarded as inconsistent with that to which the land was originally dedicated, the legislature nevertheless had power to authorize the city to devote it to such other and higher public purpose as would render its enjoyment more extended and general.
4. That such authority from the State was sufficiently shown by the resolutions of the legislature and the fact that the land was tendered to, and accepted by, the State itself.
5. That no deed or written conveyance was required in order to render such transfer or dedication to the State effective.
6. That the erection of the memorial in question was a proper exercise of the right of control so surrendered by the city to the State.
7. That after its erection upon the Capitol grounds, the memorial would become the sole property of the State.

The city claimed that the tender of land which was accepted by the State was one made in lieu of, not in addition to, the original tender, and did not include the strip in question. *Held:*—

1. That testimony of persons present at a city meeting, as to what matters were discussed there, was not admissible as traditionary evidence of the general understanding of the citizens respecting the substitution of one site for the other; nor was an article in a daily paper of that date admissible for such purpose.
2. That if offered to prove that the second tender was in fact expressly made in lieu of the first, this evidence was properly excluded as hearsay.

Traditionary evidence concerning facts of general interest affecting public or private rights is limited to proof of declarations of decedents, or persons supposed to be dead or unavailable as witnesses, as to ancient rights of which they are presumed or shown to have had competent knowledge, and which are incapable of proof in the ordinary way by living witnesses; and this exception to the admission of hearsay evidence is not to be favored or extended.

Argued January 8th—decided April 15th, 1904.

SUIT to restrain the erection of a soldiers' memorial upon land designated for that purpose by the State, but alleged

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to be owned by the plaintiff, brought to and tried by the Superior Court in Hartford County, *Roraback, J.;* facts found and judgment rendered for the defendants, and appeal by the plaintiff. *No error.*

This action involves the right of the State, under a resolution of the General Assembly and without authority from the plaintiff, to cause a certain memorial, commemorative of the services rendered by the First Connecticut Heavy Artillery in the Civil War, consisting of a famous mortar suitably mounted and supported by a stone foundation, to be erected upon land a short distance northeast of the Capitol at Hartford.

The land upon which it is proposed to erect the memorial is described in paragraph 1 of the complaint as bounded "northerly on a roadway leading westerly from Trinity Street through Bushnell Park and known as the southerly roadway in Bushnell Park, about 200 feet; easterly on Trinity Street about 75 feet; southerly on land conveyed to the plaintiff by the trustees of Trinity College, and devoted by the plaintiff to the purposes of a site for the State Capitol, about 200 feet; and westerly on a walk running practically parallel with Trinity Street, said walk leading from the said State Capitol to a point on Trinity Street near the Memorial Arch, about 75 feet—said plot of land being on the southeasterly portion of what is known as West Bushnell Park."

The complaint alleges that the plaintiff is the owner and is in the possession of said tract of land, and that the defendants threaten to erect said memorial upon said land.

The defendant Maslen has contracted to erect said memorial, with the other six defendants, who are a committee of a private association composed of persons who were formerly members of said First Connecticut Heavy Artillery.

The defendants by their answer denied the plaintiff's allegations of ownership and possession of said described tract, and in their second defense alleged: (1) that "by special act and resolution of the General Assembly of the State of Connecticut, passed and approved July 9th, 1895, the

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regimental association of the First Connecticut Heavy Artillery was authorized and empowered to erect a monument or memorial of its services at such point upon the 'Capitol Grounds' at Hartford as should be designated by the State comptroller"; (2) that "pursuant to and acting under authority of said resolution, and at the request of the committee of said regimental association, the comptroller did designate a site for such monument or memorial, upon the 'Capitol Grounds,' which site so designated forms a portion of the property within the control and under the exclusive authority and supervision of the State, and is within the limits of the plot of ground described in paragraph one of the plaintiff's complaint . . . ; and (4) that "by authority of said resolution and acting under the direction of the comptroller, the defendants [being the committee of said regimental association and the contractor Maslen employed by them] entered upon the work of erecting, upon the site designated, said memorial, and claim the right to erect the same upon the site so designated by virtue of the special act of the General Assembly above described."

The plaintiff demurred to this second defense, upon the grounds that it did not "allege the conveyances, leases, contracts, or other instruments or means whereby the State acquired exclusive authority and supervision over" said tract; that the allegations that the State had such control, and exclusive authority and supervision, and that the land in question was a part of the "Capitol Grounds," were conclusions of law, and that it did not appear from said defense that the State had any authority to designate a site for the erection of such memorial upon the "Capitol Grounds" or upon the plaintiff's land.

The court having overruled the demurrer, the plaintiff replied, denying the allegations of paragraphs 2 and 4 of the second defense, and upon the issues thus framed the court found the following facts:—

In 1858 the plaintiff acquired title in fee simple to the tract described in the complaint, which, with other lands, was devoted to the purposes of a park called Bushnell Park.

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The southerly line of said park, and of the tract in question, was the southerly line of Elm Street produced westerly; said southerly line being between twelve and thirteen feet north of the north steps of the Capitol as it now stands.

On July 17th, 1871, the General Assembly, having on that day passed resolutions authorizing the city of Hartford to issue its bonds to the amount of $1,000,000, for the purpose of defraying the expense of constructing a State-house in the city of Hartford, and of purchasing the land upon which it should be erected, and authorizing said city to hold a special city meeting for the purpose of voting by ballot upon the question of approving the issue of such bonds, passed a resolution, portions of which read as follows:—

"*Resolved by this Assembly:* That Marshall Jewell of Hartford, William D. Bishop of Bridgeport, William A. Buckingham of Norwich, William H. Barnum of Salisbury, and William D. Shipman of Hartford, be, and they hereby are, constituted and appointed a board of commissioners for the State, with ample powers to contract for and fully complete, construct, and erect in the city of Hartford a building suitable for the use of the State as a State-house.

"And said commissioners shall confer with the proper authorities of the city of Hartford, and with them determine upon a site for said building, which shall be provided by said city free of expense to the State, and subject to the use of the State so long as Hartford shall be recognized either as one of the capitals of the State, or as the capital thereof."

July 20th, 1871, an Act was passed as an amendment to the charter of the city of Hartford, providing that "whenever the court of common council of the city of Hartford shall have agreed with the board of commissioners for the erection of a State-house upon a suitable site for the location of said State-house, the said court shall have the right to enter upon, use, and occupy sufficient land for said purpose and for the laying out of suitable grounds around said buildings; *provided*, however, that before entering upon or using said land for the purpose aforesaid, the said court shall agree with the owner or owners thereof . . . as to the amount of damage to be

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done thereby;" and further providing, in case of failure to so agree with such owners, for the taking of land for such purpose, by the court of common council, by condemnation proceedings.

On August 25th, 1871, said board of commissioners for the State were duly notified of the action taken at a special city meeting on the 16th of August, 1871, approving of the issue of bonds by the city of Hartford as authorized by said resolution of the General Assembly of July 17th, 1871.

On August 28th, 1871, the court of common council of the city of Hartford passed the following resolution:—

"Resolved, that the high ground upon the West Park in the city of Hartford, or so much thereof as may be necessary, be, and hereby is offered to the State as a site for the erection of a suitable building in said city for the purposes of the State as a State-house, and that said site be and hereby is offered free of expense to the State, and subject to the use of the State so long as Hartford shall be recognized as one of the capitals of the State, or as the capital thereof.

"Resolved, that the Mayor, Aldermen Sumner and Lawrence, and Councilmen Buckley, Allen, Eustace and Soper, be and hereby are appointed a committee on behalf of this court to confer with the 'Board of Commissioners concerning the State-house,' appointed by the General Assembly at the last session thereof, and to offer for the site of a State-house, the site proposed in the foregoing resolution."

On September 8th, 1871, at a meeting of said board of State commissioners, a formal tender of the high ground of West Park, made by the city through its authorized representatives, was formally accepted on behalf of the State by said commissioners in accordance with the following vote passed at said meeting: "Voted, That the site on the West Park in the city of Hartford, this day tendered by the city through the committee of the court of common council, for the purpose set forth in the resolution this day presented to this board by said committee, through their chairman, his honor, the mayor of said city, be, and the same is hereby accepted by this board."

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"The site thus tendered by the city and accepted by the State includes the land north of the capitol building now in controversy. The resolution tendering the above site was never rescinded."

On March 15th, 1872, the court of common council submitted to popular vote for approval, its resolution of that date for the purchase of the grounds known as the Trinity College site, bounded north by the Park, south by College Street, east by Trinity Street, and west by Park River, containing thirteen acres more or less, the same to be devoted to the purposes of a public park, excepting such portion as the court of common council should thereafter offer to the Capitol commissioners for a site for a State-house.

Said resolution having been approved by the voters of the city at a special city meeting, the city received a deed of said Trinity College lands, and in April, 1872, the court of common council appointed a committee, consisting of the mayor, two aldermen and two councilmen, "to formally tender on behalf of the court of common council, to the commissioners appointed by the last legislature to contract for and erect a new State-house in the city of Hartford, so much of the premises recently purchased of the trustees of Trinity College as may be necessary for and acceptable to said commissioners as a suitable site for said State-house."

On May 27th, 1872, the report of this special committee was received and accepted by the court of common council, the only record thereof being: "Board of Aldermen, May 27, 1872. Report of special committee to tender site for a new State-house received and accepted. C. C. Board concurred."

The so-called Trinity College tract lies immediately south of the said West Park, and is connected with the tract described in the complaint, the south line of Elm Street produced westerly being the northerly boundary of said Trinity College tract.

A topographical map of the State-house site, made at the direction of the commissioners for the State, shows a plot of land bounded north by said south line of Elm Street produced; and the State-house, the building of which was

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begun in October, 1872, and which was completed and ready for occupancy in January, 1879, was erected wholly upon said Trinity College tract, the north steps of the Capitol being, as before stated, between twelve and thirteen feet south of the south line of the tract described in the complaint.

In 1879, in accordance with the provisions of said resolution of the General Assembly of 1871 appointing said commissioners for the State, all interest of the State in the old State-house at Hartford was duly conveyed to the city of Hartford.

In 1878 the General Assembly directed the Capitol commissioners "to procure proper plans and execute the work for the grading of the grounds around the new Capitol building, and also to prepare proper driveways and approaches to said building at an expense not exceeding $10,000."

The driveway on the north side of the Capitol, described in the complaint as the northern boundary of the tract in controversy, was constructed in its present location by the said commissioners for the State, at the same time with the laying out of the grounds and the location of the edifice, and has since been maintained by the State at its own expense.

In 1879 the comptroller of the State and the board of park commissioners of the city of Hartford were by resolution of the General Assembly appointed a special committee to grade, lay out, fence, and plant the Capitol grounds, in the manner they deemed suitable, at an expense not exceeding $25,000; and further large appropriations were afterwards made for the same purpose. In their final report in 1883, which was accepted by the General Assembly, said committee give a detailed account of their work, describing the boundaries of the Capitol grounds which they had laid out and graded as: "The roadway in front of the State-house on the north, Trinity Street on the east, Capitol Avenue on the south, Broad Street and Park River on the west." The tract described in the complaint is included within these boundaries.

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Concerning the tract in question, thus laid out and graded as a part of the Capitol grounds, the trial court says in its finding: It was "tendered to and accepted by the State as a part of its Capitol grounds, and the same is of absolute necessity to the State for convenient and proper approaches to the north entrance of the Capitol building. The State has mapped out these grounds and graded them as a part of the State-house property. Lawns, flower beds, lamp-posts, walks, drains, the north roadway, and the curbing on the south side thereof, have been made and constructed by the State at no small expense. For more than twenty years this piece of land has been in the uninterrupted, undisputed, and continuous control, and under the exclusive authority and supervision of the State, with the full knowledge, consent, and acquiescence of the city."

On July 9th, 1895, the General Assembly passed a resolution, a part of which is as follows:—

"*Resolved by this Assembly:* Section 1. That the regimental association of the First Connecticut Heavy Artillery be and it is hereby authorized to erect a monument or memorial of its services at such point on the Capitol grounds at Hartford as shall be designated by the comptroller; and upon the erection and completion of said monument or memorial under the supervision and to the satisfaction of the quarter-master general, at an expense not less than $1,000, the comptroller shall draw his order on the treasurer in favor of the quartermaster-general for the sum of $1,000 toward the payment for such memorial."

Pursuant to such authority and at the request of said regimental association, the comptroller in 1902 designated a point upon the tract described in the complaint, as a place for the erection of said memorial, and before the commencement of this action the defendants—a committee of said association and the contractor employed by them—had begun the work of erecting said memorial at said point.

The memorial has since been erected upon land near the corner of Trinity Street and Capitol Avenue, upon the land purchased from Trinity College.

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Upon these facts judgment was rendered for the defendants.

William F. Henney and *Joseph P. Tuttle*, for the appellant (plaintiff).

Charles Phelps, for the appellees (defendants).

HALL, J. Apparently no deed or written conveyance of any kind has ever been given to the State, of any right, title or interest in or to either the tract described in the complaint, or to the land purchased from the trustees of Trinity College upon which the State-house now stands.

The right of the State to use the tract upon which the memorial in question is intended to be placed, and the extent of the control which the State may properly exercise over that tract, which are the only questions with which we are at present concerned, can only be determined from the facts above stated, showing the various resolutions passed by the General Assembly, by the court of common council of the city of Hartford, and by its voters at city meetings, the acts of the agents and appointees of the State and city pursuant to such resolutions, and the use and control which the State has been permitted to make of, and exercise over, this tract.

The facts so found show that it was intended that the State might, if necessary, make some use of the plot in controversy.

The tender made and accepted September 8th, 1871, was of the high ground of West Park, or so much thereof as might be necessary as a site for a State-house. The court has found that the site so tendered and accepted embraced the tract in question, and that the resolution tendering the same was never rescinded. For more than twenty years the State has made a certain use of said tract, and exercised a certain control over it, without objection by the city, and apparently without further permission from the city than that given by the tender. The resolution of the court of common council of April, 1872, appointing a committee to

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tender to the State commissioners so much of the Trinity College grounds as might be necessary and acceptable to the commissioners as a suitable site for a State-house, did not direct that those grounds should be tendered in lieu of the land previously tendered and accepted. Neither the records of the common council nor those of the State commissioners show that the tender was in fact so made, nor does the court find that such was the fact. While the facts found indicate that the Trinity College tract was tendered with the understanding that the State-house itself should be placed upon that ground, they are not inconsistent with an intention upon the part of the city authorities that the State might use some part of the land first tendered and accepted, if it should be found necessary to use it in order to erect the State-house upon a suitable site.

The understanding of the city and of the State as to what part of the land first tendered might be used by the State, and as to the purpose for which it might be used, is sufficiently clearly shown by the facts before us.

The language of the resolutions passed by the General Assembly, by the common council, and by the citizens of Hartford, show that it was the arrangement between the city and the State that the city should provide for the use of the State, and free of expense to the State, not only the land upon which the State-house was to be placed, but land sufficient for the laying out of suitable grounds around the State-house. This clearly includes both the providing of land sufficient for the construction of suitable approaches to the State-house, and the placing of the land to be used for all of said purposes, so far within the control of the State, as to enable it to properly use and maintain said grounds, for said purposes.

The State availed itself of the offer made by the plaintiff. The State commissioners, in the discharge of their duty, fixed the present site of the State-house a few feet south of the north boundary line of the Trinity College property, as the most suitable one. This location of the State-house made it necessary to use a small strip of the southerly

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part of the land first tendered, for the purpose of constructing suitable approaches to the north entrance of the Capitol. In building the driveway on the north of the Capitol, and other ways, as necessary approaches to the Capitol on the north, the tract in question was necessarily included and laid out as a part of the Capitol grounds. It became, in the words of the finding, "of absolute necessity to the State for convenient and proper approaches to the north entrance of the Capitol building."

At great expense to the State, as well as to the city of Hartford, the State-house has been erected upon the site so chosen on the Trinity College tract, and the plot described in the complaint, in connection with other land northerly from the Capitol and south of the north driveway, has been laid out and for many years maintained and used by the State, as stated in the finding, as land required to be used by the State in the proper construction and maintenance of necessary approaches to the Capitol. For this purpose, in the language of the finding, "for more than twenty years this piece of land has been . . . under the exclusive authority and supervision of the State, with the full knowledge, consent, and acquiescence of the city."

We think all these facts show that it was intended that that part of the land first tendered and accepted, which has been thus used by the State, including the tract in controversy, might be used by the State, as necessary for the purpose of constructing suitable approaches on the north of the Capitol, and that for the purposes of such use it might be laid out, maintained and controlled by the State as part of the Capitol grounds. The nature and extent of the right intended to be given to the State may properly be considered as commensurate with the right thus actually enjoyed by the State. *City of Hartford* v. *County of Hartford*, 49 Conn. 554, 562.

The court of common council of Hartford had authority to devote the tract in question to the use by the State for the purposes for which it was accepted. The city procured an unconditioned and unrestricted title to the land in fee.

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Having afterwards lawfully dedicated it, with other lands, to the purposes of a public park, it held it in trust for such public use; *Driscoll* v. *New Haven*, 75 Conn. 92, 101; the power to lay out, alter or discontinue such parks, in the manner described in the charter, being vested in the court of common council. Whether the city through its common council, or otherwise, could thereafter, without legislative authority, devote such land to another use inconsistent with the first, we have no occasion to inquire. The use to which it was in fact devoted was not inconsistent with its use by the public as a public park. The court has not found, nor does it appear from the facts of record, that the proper enjoyment by the public, of this part of the park, has been, or will in any manner be, curtailed by such use by the State. Before the tender to the State in 1871, the right of the public to use it as a park was subject to such reasonable restrictions, as to the manner of enjoyment, as might be imposed by the common council or the board of park commissioners. Practically the only effect of joiuing this land to the Capitol grounds was to place under the control of the General Assembly part of a public park which had before been under the management of the city authorities.

But the control of public parks belongs primarily to the State. The authority which the common council or park commissioners of a city may exercise in the control and management of public parks is not derived from the citizens of the municipality within the limits of which such parks are situated, but from the legislature. Such public parks are held not for the sole use of the people of a particular municipality, but for the use of the general public which the legislature represents. Municipalities in controlling and managing such public parks act as governmental agencies, exercising an authority delegated by the State, and are always subject to legislative control. *Commonwealth* v. *Davis*, 162 Mass. 510; *West Chicago Park Comrs.* v. *McMullen*, 134 Ill. 170; *People ex. rel. Bryant* v. *Holladay*, 93 Cal. 241. Regarding, as we do, the use which tbe State has made of the tract in question as consistent with that to which it was

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first dedicated, the offer of such land to the State as a part of the Capitol grounds was no more than a voluntary surrender to the State of the control which primarily belongs to the State over such property, and which the city had before exercised with the consent, or by the direction, of the State.

If, on the other hand, such use by the State ought to be considered as inconsistent with that to which this land was first dedicated, the legislature possessed the power to authorize the court of common council to devote it to such other and higher public purpose as would render its enjoyment by the public more extended and general; and such authority might be granted either by express words or by necessary implication. *Evergreen Cemetery Asso.* v. *New Haven*, 43 Conn. 234, 242; *Driscoll* v. *New Haven*, 75 id. 92, 101. Such authority from the State is sufficiently shown by the language of the resolutions of the General Assembly above referred to, by the fact that the land was tendered to the State itself for such use, and that it was accepted and used by the State for that purpose. It was not necessary that the question whether the land should be so used should be submitted to a popular vote. *Whitney* v. *New Haven*, 58 Conn. 450, 459.

By the tender and acceptance as before described, it was evidently not intended to convey the fee of this property to the State. Whether such tender and acceptance be regarded as a transfer or surrender of the control of a portion of a public park to the State, or as a dedication of the land to a new public use, no deed or written conveyance was required to be given to render such transfer or dedication effective. The resolutions of the court of common council, of the General Assembly, and the acts of the officers and agents of the city and of the State, clearly showing not only an intention on the one hand that the land should be used for this public purpose, and on the other to accept it for such public use, but a long continued use for such purpose, acquiesced in by the city, were sufficient to constitute either a valid express or implied dedication and transfer of the control of said property for such purpose. *Kent* v. *Pratt*, 73 Conn

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573, 578; *Pierce* v. *Roberts*, 57 id. 31, 39; *Meriden* v. *Camp*, 46 id. 284, 287.

The erection of the memorial in question is a proper exercise of the right so surrendered to the State to control and manage this land as a part of the Capitol grounds. The same power which is given by statute to the city and its board of park commissioners, "to lay out, . . . plant and otherwise at their own discretion improve and adorn the parks," may, by the State, through the General Assembly, be exercised over this land as a part of a public park. It is neither alleged in the complaint nor shown by the finding that the monument to be erected is in any respect inappropriate for such public grounds, or that its character or its proposed location will in any way interfere with the enjoyment of such grounds by the public.

In authorizing the erection of this memorial, the State is not granting to the regimental association a right to occupy or control a part of the Capitol grounds. The memorial is to be erected by the association for the State, under the supervision of a State officer, and either wholly or in part at the State's expense. After its erection upon the Capitol grounds it becomes the property of the State, with no interest in it or right of control over it remaining in the association.

The trial court admitted in evidence, against the plaintiff's objection, a diagram showing the Capitol and grounds as they existed at the time of the trial, and as they had been occupied by the State; the resolution of the common council of August 28th, 1871, tendering to the state commissioners the high ground of West Park, and the minutes of the State commissioners of September 8th, 1871, accepting the same; the resolution of the court of common council of March 15th, 1872, submitting to popular vote the question of purchasing the Trinity College ground, with the record of the city meeting of March 19th, 1872, authorizing the purchase of the same; the reports to the General Assembly in 1882 and 1883 of the commissioners appointed to lay out and grade and complete roads and walks in the Capitol grounds; the

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resolution of the court of common council in accepting the opinion of the city attorney as to the duty of the State to repair the roadway north of the Capitol, and directing that notice be given of the same to the State comptroller; and testimony of State comptrollers and superintendents of the Capitol as to grounds over which they had exercised control.

The substance of the objection made to such evidence was that these facts did not tend to prove that the State possessed the right to control the tract in question as a part of the Capitol grounds. All of this evidence was admissible as tending to prove that the State had used and controlled the tract in question as a part of the Capitol grounds, with either the express or implied consent of the city.

For the purpose of proving that the tender to the State of the Trinity College grounds on the 27th of May, 1872, was a tender of such grounds in lieu of the high ground of West Park, tendered August 28th, 1871, the plaintiff, having offered evidence showing that the court of common council on January 22d, 1872, had received a communication from a meeting of citizens, at which there was an animated discussion, and that the court of common council in the following March voted to purchase said Trinity College grounds, inquired of witnesses who were present at said city meeting what the animated discussion was about, with the view of showing as a matter of traditionary evidence the general understanding of the citizens as to the substitution of one site for the other. For the same purpose the plaintiff also offered in evidence an article from the Hartford Courant of May 28th, 1872, stating that the second site had on the previous day been tendered and accepted in lieu of the site first tendered.

This evidence was properly excluded by the trial court. This was not a case for the admission of what is termed traditionary evidence. The records of the action of the citizens at the meetings of March 19th and March 30th, 1872, and of the court of common council of March 11th, March 15th, April 22d and May 27th, 1872, show suffi-

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ciently clearly the purpose for which the Trinity College grounds were purchased by the city, the tender which the committee of the court of common council were directed to make of these grounds, and that the committee in making the tender did all that they were authorized to do.

The evidence was apparently not offered for the purpose of proving that the second tender when made was actually expressed to be in lieu of the first, but to show that the citizens of Hartford understood that such was the real purpose for which it was to be, and was in fact, made. As the facts before stated, showing the purpose and intention of the parties interested in the purchase and tender of Trinity College property were before the court, it was the duty of the court to determine the purpose of the tender and its effect upon the rights of such parties, from such facts themselves, rather than from statements of citizens at a public meeting, of their understanding of the purpose for which the second tender was to be made, or from the understanding of the public as to the legal effect of the second tender.

If the evidence was offered to prove that the second tender was in fact expressly made in lieu of the first, it was open to the further objection that it was hearsay.

The exception to the general rule excluding hearsay evidence, which permits in certain cases the reception of what is called traditionary evidence concerning facts of public or general interest affecting public or private rights, is limited to proof of declarations of deceased persons, or persons supposed to be dead or who are not available as witnesses, as to ancient rights of which they are presumed or are shown to have had competent knowledge, and which rights are incapable of proof in the ordinary way by living witnesses; and this exception is not to be favored or extended. 1 Greenleaf on Ev. (13th ed.) §§ 128-130; Thayer's Cases on Ev. pp. 409-428; *Merwin* v. *Morris*, 71 Conn. 555, 572; *Southwest School District* v. *Williams*, 48 id. 505, 507; *Wooster* v. *Butler*, 13 id. 309, 315; *Brown* v. *Crandall*, 11 id. 92, 94; *Higley* v. *Bidwell*, 9 id. 447, 451.

The discussion at the public meeting of January, 1872,

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occurred before the second tender was made, and could not therefore show in what form it was in fact made.

The article from the "Courant" does not show a declaration concerning an ancient matter by an ancient person having knowledge of the fact of which he spoke, and who could not be called as a witness. It does not appear who wrote the article, nor that its author had either personal knowledge of the fact of which he wrote, or had heard declarations concerning it from persons having such knowledge; nor does it appear that the author of the article could not himself have been called as a witness, nor that there were not other living witnesses who might have testified as to how the second tender was in fact made.

The trial court did not err in overruling the plaintiff's demurrer to the second defense. There were no "conveyances, leases, contracts or other instruments," showing how the State acquired exclusive authority and supervision over the land described in the complaint, the omission to plead which rendered the second defense demurrable. Further discussion of that ruling is, however, unnecessary, since the facts relied on by the defendants as proof of such control and authority have been found by the trial court, and the ruling of that court by its final judgment, as to the sufficiency of such facts for that purpose, is the principal question raised by this appeal.

The fact claimed by the plaintiff to be shown by the evidence before us, that the present location of the memorial near the corner of Capitol Avenue and Trinity Street is only temporary, and that it is still intended to place it upon the site originally designated, could not, if made a part of the finding, affect the plaintiff's right to the relief asked for. It is therefore unnecessary to consider the plaintiff's request for a correction of the finding in respect to that fact.

There is no error.

In this opinion the other judges concurred.

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HENRY H. GALLUP, TREASURER OF THE STATE OF CONNECTICUT, APPEAL FROM PROBATE.

First Judicial District, Hartford, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

The Act of 1897 providing for a "succession tax" (General Statutes, §§ 2367–2377), declares that after certain exemptions or deductions have been made, the "rest of the estate of every deceased person shall be subject to the taxes" therein provided; and that "in all such estates" any property "within the jurisdiction of this State," which shall pass by will or by the inheritance laws of this State, shall pay a certain percentage of its value for the use of the State. *Held:* —

1. That the statute was enacted, and should be construed, in view of the long existing and widely recognized principle, that for the purposes of administration, descent, and distribution, all the personal property of a decedent, wherever situated, is within the jurisdiction of the State in which the deceased had his domicil at the time of his death.
2. That as thus construed, all the personal property of a decedent domiciled in Connecticut was to be taken into account in computing the amount of the succession tax, although some portion of such property might be within the territorial limits of another State.
3. That the amendment of 1903 (Public Acts of 1903, Chap. 63) authorizing, under certain circumstances, a transfer tax upon the personal property in this State of nonresident decedents, was not in conflict but in harmony with the construction above given to the Act of 1897.

Argued January 12th—decided April 15th, 1904.

APPEAL from an order and decree of the Court of Probate for the district of Meriden determining the amount of a succession tax payable to the State, taken by the treasurer of the State to the Superior Court in New Haven County and reserved by that court, *Elmer, J.*, upon a demurrer to the reasons of appeal, for the advice of this court. *Superior Court advised to overrule the demurrer and to modify the order of the Court of Probate.*

Owen B. Arnold, a resident of Meriden, died testate. The

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Court of Probate of the district of Meriden admitted his will to probate, and Charles H. Nettleton, his executor, duly qualified September 12th, 1900. His property was inventoried and valued according to law, as follows: —

Real estate	$8,900.00
Personal property	242,738.87
Total	$251,638.87

The inventory included certain stocks, bonds and securities, valued at $75,832, which were in the possession and custody of the testator at Meriden, at the time of his death. The stocks and bonds are of corporations not domiciled in Connecticut, and organized under the laws of the United States or of other States, and include shares in the Adams Express Company, a partnership concern, or a joint-stock corporation in the nature of a partnership.

On April 3d, 1903, the Court of Probate computed the amount of succession tax payable to the State, and passed an order directing its payment by the executor.

The amount of the estate upon which the tax was computed, as set forth in the order, was ascertained as follows, to wit: by making deductions from the valuation of the property inventoried of,

Foreign assets	$75,832.00
Statutory exemption	10,000.00
Debts and expenses of administration	9,121.00
United States internal revenue tax	4,492.91
Total	$99,445.91

The item called "foreign assets" represents the inventoried value of the stocks, bonds and other securities above mentioned.

The State treasurer appealed from this order, assigning as his substantial reason of appeal that the deduction of the item called "foreign assets" is not authorized by law. The executor demurred because the item is authorized by law, and also because the law is unconstitutional.

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William A. King, Attorney-General, for the State treasurer.

Edward A. Harriman, for Charles H. Nettleton, executor.

HAMERSLEY, J. The questions presented by this reservation involve the construction of an "Act Providing for a Succession Tax," passed in 1897. Public Acts of 1897, Chap. 201. This Act was slightly amended in 1901 (Public Acts of 1901, Chap. 123), and in 1902 its first section was modified with the evident intent of expressing more clearly the purpose and meaning of the Act, and as thus amended and modified was included in the Revision of 1902, appearing in §§ 2367 to 2377.

In 1889 the legislature passed an Act providing for a tax upon the transfer of property by will, inheritance, or deed, to a collateral heir or stranger to the blood of a decedent. Public Acts of 1889, Chap. 180. This Act was a condensed reproduction of an Act passed by the legislature of New York in 1885, and, in substantially the same form adopted by our legislature, was enacted by the legislature of Massachusetts in 1891. This legislation has never been before this court for construction. In New York, soon after 1885, the legislature made various alterations resulting in the specified imposition of a transfer tax upon the personal property found within the State belonging to nonresident decedents, as well as a tax upon the devolution of all personal property belonging to resident decedents. Somewhat similar changes were made by the legislature of Massachusetts soon after the passage of the Act of 1891.

It was after these changes were made that our Act of 1897 was passed. Our legislature repealed the Act of 1889, except as applicable to estates of persons then deceased, abandoned the policy peculiar to that Act, and substituted a new Act for giving effect to a modified policy, which it called "Providing for a Succession Tax." The new Act contains some language found in the old, but this language must be

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read and construed in relation to the structure, purpose, and policy of the new Act.

We think, therefore, that the true meaning of the legislation contained in §§ 2367 to 2377 can be more correctly ascertained by considering those sections as independent legislation, without speculating as to the views we might have entertained in respect to the abandoned statute of 1889, framed on different lines and for a different purpose, had that statute ever come before us for construction.

"The Act imposes an indirect tax or duty of the kind known as death duties; that is, an exaction to be paid to the State upon the occasion of death and the consequent transfer of ownership in the property of the decedent, through the intervening custody and administration of the law, to the persons designated by the law, through the statutes regulating wills, descents, and distribution." *Nettleton's Appeal*, 76 Conn. 235, 245. This duty is not a tax upon property nor upon person. The property of the decedent, as inventoried by his administrator, is valued not for the purpose of imposing a tax upon that property, but solely to furnish a basis for computing the amount of the duty to which the estate described in the Act is made subject.

The duty is not computed upon the amount of the property valued. Its amount does not depend upon the amount of that property. After the valuation of all the property inventoried, the Act contemplates a subtraction from this sum of the amount of the decedent's debts; a subtraction from this remainder of the amount of the costs and charges of administration; a subtraction from this remainder of the sum of $10,000; a subtraction from this remainder of the value of certain bequests for public benefit; and the computation of the amount of the duty upon the mathematical balance thus remaining.

The appellee claims, in substance, that the Act requires another subtraction to be made before the amount of the duty can be computed, namely, a sum equal to the total appraised value of all personal property not within the territorial limits of this State at the time of the decedent's death,

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which was inventoried for the purposes of administration and distribution under the laws of this State.

This depends, in the first instance, on the purpose of the legislature as expressed in the provisions of the Act laying this particular tax. There are three plans which may be followed in subjecting the estate of a deceased person to a succession tax: (1) A tax based upon the distribution of the net proceeds of a decedent's property to the persons upon whom it devolves by force of the laws of the taxing State. This plan includes in the estate subject to the tax the net proceeds of a decedent's land situate in the taxing State, and in case the decedent was domiciled in the taxing State, but not otherwise, of all his personal property. (2) A tax based upon any transfer, actual or potential, of a decedent's personal property situate at his death within the taxing State, whether the net proceeds of that property pass to the decedent's beneficiaries by force of the laws of the taxing State, or not. Under this plan the tax is more nearly akin to an ordinary transfer duty. (3) The inclusion in one Act of a tax under each of these plans.

There would seem to be no constitutional objection to the adoption of either plan. *Blackstone* v. *Miller*, 188 U. S. 189. Our succession tax is laid in pursuance of the first plan, and the Act is framed in view of the existing law of domicil in relation to this subject.

Personal property is bequeathed by will, and is descendible by inheritance, according to the law of the domicil and not by that of its *situs*. *Eidman* v. *Martinez*, 184 U. S. 578, 581. It is a settled principle of law that the disposition, distribution of, and succession to, personal property, wherever situated, is to be governed by the laws of that State where the owner had his domicil at the time of his death. *Holcomb* v. *Phelps*, 16 Conn. 127, 132. Under our law it is the duty of the administrator at the place of domicil to inventory and account for all such personal property, and that property is regarded as within the jurisdiction of the State for purposes of administration and distribution. It is true that the actual *situs* of such property in another State involves a power or juris-

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diction in that State in respect to it for certain purposes, including the power through process of administration to appropriate so much as may be necessary to the satisfaction of claims of local creditors; but such administration is ancillary to that of the domicil, and the jurisdiction thus exercised is not in denial of, but in aid of, that exercised at the owner's domicil. This principle of law, though founded on international comity, is equally obligatory upon our courts as a legal rule of purely domestic origin. This principle is settled and unquestioned law within this State. *Marcy* v. *Marcy*, 32 Conn. 308, 315 *et seq.*; *Russell* v. *Hooker*, 67 id. 24, 27; *Rockwell* v. *Bradshaw*, ibid. 8. It has generally been recognized by Federal and State courts as law binding throughout the United States. It is in the exercise of this power or jurisdiction in respect to the personal property of a decedent domiciled within its limits, that the State taxes a succession to that property notwithstanding some of it may have been at the decedent's death within the limits of another State. The legislature framed its Act in view of this law. The assertion of power over property outside its limits is limited to the purposes of succession, but to the extent of determining its descent or distribution, it claims jurisdiction of the property.

It is plain that this purpose of the legislature is expressed in the provisions of the Act. These clearly apply, primarily, and mainly, to estates of decedents domiciled in Connecticut. This is true of all our general legislation providing for administration of estates of deceased persons, from the first order of the General Court in 1639 (Col. Rec., p. 38) to the last Revision (1902), §§ 302, 303, 318. Until 1821 there was slight occasion (for reasons sufficient and of interest in connection with some of our earlier decisions, but unnecessary now to detail) to provide for appointment of administrators on estates of nonresident decedents, and in that year an Act for this purpose was passed. Statutes of 1821, p. 201. This distinction between the estates of decedents domiciled here and estates of those domiciled elsewhere, is based on substantial grounds justifying special or separate treatment, and legisla-

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tion dealing generally or primarily with the former class does not apply to the latter, unless the latter is embraced within its terms or clearly falls within its equity. *Lawrence's Appeal*, 49 Conn. 411. That the Act under discussion deals generally and primarily with estates of deceased persons domiciled here, is patent from all the proceedings it authorizes and directs. The first step relates to the inventory required by the general statute (§ 323), which includes land within this State and all other property belonging to the decedent, including choses in action and personal property without the State. This general statute applies in its fullness only to estates of decedents here domiciled. Neither its requirements nor its penalties apply necessarily to all ancillary administrations, and the requirement to inventory personal property without the State cannot apply to such administrations.

The language of the Act, however, does imply that some estates of nonresident decedents, upon which ancillary administration is taken out, may be subject to the tax, and indicates these estates, namely, those consisting of lands within this State belonging to nonresident owners. Such estate is within the purpose of the Act.

Were it not for the rule of accuracy ordinarily applied to laws imposing a tax, these estates might fall within the equity of the Act, had this language not been used. For most purposes of administration and distribution, they are scarcely distinguishable from estates of domiciled decedents. But with estates consisting of personal property within this State belonging to a nonresident owner, it is different. They come neither within the letter nor the equity of the Act, but are excluded by the express terms, which subject to a succession tax only those estates which are in the hands of an administrator for the purposes of distribution under and in pursuance of the laws of this State.

The intent of the legislature in respect to the "estate" subject to the tax, is too clearly shown in the provisions of the Act to leave room for reasonable doubt. It is the net proceeds or residuum of land within this State owned by a

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decedent, and of all personal property owned by one here domiciled, remaining for distribution or transfer in any form to the persons entitled thereto by force of the laws of this State, deducting therefrom the sum of $10,000 and the value of certain bequests. This, and no other, is the estate made subject to a succession tax.

The amount of a tax is measured through a percentage on the property thus devolving upon the successors, based upon a valuation previously made of all the decedent's property inventoried by the administrator. The percentage in respect to that portion of property in these estates, which passes to the decedent's immediate family, is one half of one per cent; and in respect to that portion passing to other successors, is three per cent.

In other jurisdictions it has been held that a law providing for a duty in the nature of a succession tax upon occasion of a succession to property of a decedent by his legal legatees or distributees, although general in its terms, includes, as subject to the tax, the personal property of a domiciled decedent wherever situate, and excludes, as subject to the tax, personal property of a decedent domiciled elsewhere, although situate at his death in the taxing State. *Wallace* v. *Attorney-General*, L. R. 1 Ch. App. 1; *Attorney-General* v. *Campbell*, L. R. 5 H. L. 524; *Eidman* v. *Martinez*, 184 U. S. 578; *Orcutt's Appeal*, 97 Pa. St. 179. This rule controls the personal property of a domiciled decedent, although the same law also imposes a tax in respect to personal property of a nonresident situate in the State. *Frothingham* v. *Shaw*, 175 Mass. 59. But our law specifically includes within its range the beneficial interest in all personal property of a domiciled decedent, and excludes the personal property of nonresident decedents within our limits.

Having ascertained, by the certain test of the provisions of the Act, its controlling purpose, the classes of deceased persons whose estates are made subject to a tax, the composition of those estates when they become subject to a tax, as well as the property from which they may be derived, the meaning of the language used in reference to this controlling

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purpose, and which has suggested the appellee's contention, can readily be ascertained. That language is as follows: "§ 2368. In all such estates any property within the jurisdiction of this state, and any interest therein, whether tangible or intangible, and whether belonging to parties in this state or not, which shall pass by will or by the inheritance laws of this state to the parent or parents," etc., "shall be liable to a tax of one half of one per cent. of its value for the use of the state; and any such estate or interest therein which shall so pass to collateral kindred, . . . shall be liable to a tax of three per cent. of its value for the use of the state."

The appellee contends that the words, "any property within the jurisdiction of this state . . . passing to" (the legatees or distributees of the decedent) "shall be subject to a tax of" so much per cent. on its value—separated from the context and treated as an isolated and independent phrase—impose a tax upon that property of the decedent, and on that property only, which is found at his death within the territorial limits of the State. This may be true, but it is immaterial. Such a method of exegesis is not construction of the law enacted, but the enactment of a new law.

The meaning of this section, and of all the language used, is controlled by all the provisions of the Act; and the language in question is specially and absolutely controlled by the first words of the section, in view of which alone it is used, namely, "in all such estates," that is, estates of deceased persons as defined by the provisions of the Act and made subject to a succession tax as provided. It is in reference to such estates, and to such estates only, that the language following is used.

The "property" referred to is that of which such estates consist, and no other. No property is referred to for the purpose of taxing that property. No such tax is imposed. The property of which such estates, so made subject to a succession tax, consist, is mentioned for the purpose of fixing the amount of that succession tax, as well as of con-

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trolling the stress of the tax which may fall upon the successors in relation to their nearness of kin to the decedent.

Whether the legislature used the phrase, "within the jurisdiction of this state," as indicating its jurisdiction in respect to the descent and distribution of personal property belonging to decedents domiciled in the State, or in the narrower sense of local probate jurisdiction for the purpose of appointing an administrator, or as indicating property within the State limits, it used the word "property" to indicate the whole or proportional shares of estates as made subject to the tax, and, as thus used, "property" in such estates is within the jurisdiction of the State for the purpose of regulating its descent and distribution, is within the jurisdiction of the Court of Probate whose administrator holds it for distribution, and is within the State limits.

Why the legislature phrased this Act in several particulars precisely as it did, may not be clear. It was dealing with a subject of much difficulty and novel to the legislation of this State, with great brevity and disregard of detail. It is sufficient that its intent is expressed with certainty.

The Act lays a death duty in respect to the beneficial interest, which, by force of our laws, accrues to the beneficiaries of a decedent. The property, upon whose value the amount of the tax is computed, is that residuum of the decedent's property, inventoried under our law, remaining after claims of creditors and charges of administration have been satisfied. This property constitutes the "estates of deceased persons" referred to in the Act, and that portion of it remaining after deducting from it the sum of $10,000 and certain bequests, constitutes the estates spoken of as subject to the tax.

These estates may be derived from the land within the State belonging to any decedent, and from all the personal property of a decedent domiciled here, but cannot be derived from personal property in this State which belonged to a non-resident decedent. That property is left to the operation of any death duty that the State of the owner's domicil—

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which State by our law can alone control its descent and distribution—may see fit to impose. This scheme of taxation is framed upon established principles, and is adapted to avoid the peculiar difficulties and to meet with fairness the interstate obligations attending the imposition of death duties. We think it is expressed with sufficient certainty, and do not feel justified in the employment of hypercriticism for the discovery of possible defects.

This view of the legislative purpose is strengthened by an examination of the amendment passed in 1903. Public Acts of 1903, p. 42. The legislature amends § 2368 by striking out the words "by the inheritance laws of this state," and inserting in lieu thereof the words "by inheritance." Having thus removed the bar erected by the original Act, against the use of any of its provisions for imposing a transfer tax on personal property of non-residents, it proceeds to authorize such a transfer tax and to prescribe the machinery for its collection, coupling this, however, with instructions to the treasurer not to collect such transfer tax in any case were the decedent resided in a State which does not collect transfer or succession taxes from personal property therein "belonging to the estates of Connecticut decedents." The amendment recognizes the justice of the scheme adopted in the original Act, and attempts its modification only so far as may be necessary to add to the force of example the influences of reciprocity.

In the present case the Court of Probate had no authority to deduct, for the purpose of computing the tax, the value of personal property inventoried by the executor and claimed to have been situate in other States at the time of the decedent's death, from the value of the estate remaining in the executor's hands for the payment of legacies and subject to the tax. It is immaterial whether the claims made as to the actual *situs* of the testator's personal property at the time of his death are correct in whole or in part.

The questions raised as to the constitutionality of the Act were disposed of in *Nettleton's Appeal*, 76 Conn. 235.

The Superior Court is advised to overrule the demurrer;

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to modify the order of the Court of Probate so that the tax shall be computed upon the value of the estate without the deduction of the sum of $75,832 made by the Court of Probate, and to affirm the order as modified.

In this opinion the other judges concurred.

JAMES T. PATTERSON *vs.* THE FARMINGTON STREET RAILWAY COMPANY ET AL.

Third Judicial District, New Haven, January Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

In an action against several defendants, one of them, a nonresident, pleaded to the jurisdiction, alleging, first, that the action was purely *in personam*, and that no service had been made upon him in this State nor any property of his attached; and second, that no order had been made by the court, judge, or clerk, in regard to the notice which should be given to him, as such nonresident, of the institution or pendency of the complaint. To the first part of this plea the plaintiff demurred, substantially upon the ground that the action was one *in rem*, and denied the allegations of the second part respecting the want of an order of notice. The trial court found the issue of fact for the plaintiff, but adjudged that the action was purely personal and abated it as to said defendant. Thereupon the resident defendants demurred to the complaint for substantial and radical defects, and their demurrer was sustained. *Held*:—

1. That the legal effect of the judgment abating the action as to the nonresident defendant was simply to eliminate him as a party in so far as the action was directed against him personally, but that such judgment did not affect the plaintiff's right to press the action as a proceeding *in rem* touching any interest which such nonresident, or the other defendants, might have in the property which was the subject of the proceeding.

2 That inasmuch as the complaint was properly held to be wholly insufficient to sustain a judgment *in rem*—the only judgment open to the plaintiff upon his theory of the cause of action alleged—the earlier ruling could not have harmed him, even if erroneous.

An action to adjust equitable interests in the stock of a Connecticut corporation, and to compel the registry on its books of the legal

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title, as determined by the court, is in the nature of a proceeding *in rem*, and is maintainable, against property within the jurisdiction of the court, upon giving all persons interested therein reasonable notice in the manner prescribed by law.

A court cannot enforce the specific performance of an agreement whose terms, as alleged, are indefinite and uncertain.

The allegations of the complaint in the present case reviewed and *held* not to set forth with sufficient certainty any agreement which the court could specifically enforce in the manner prayed for by the plaintiff.

An option-contract transfers no property interest in its subject-matter to the holder of the option, nor does it give rise to the trust relation between him and the owner of the property which is said to exist between vendor and vendee pending payment and delivery.

One who has an option to purchase a block of the mortgage bonds of a street railway company whose property is foreclosed and sold pending the exercise of his option, cannot enforce the contract by requiring a delivery to him of shares of stock in a new company which was organized by the purchasers at the foreclosure sale to take over and operate the property thus purchased; at least without alleging facts which show that such stock was derived from, or attached to, the ownership of the bonds, or had some necessary relation thereto. The mere fact that the bondholder was one of the purchasers at the foreclosure sale and that the property so purchased was transferred to the new company, is immaterial.

Where the very terms of an offer limit the time within which it must be accepted, or upon which payments must be made to keep it alive, time is the essence of the contract, and a promise of the obligor, after its expiration, to extend it, is not binding unless supported by a new consideration.

The trial court having sustained a demurrer to the complaint for substantial defects, may properly refuse to allow an amendment which does not obviate them.

Argued January 28th—decided April 15th, 1904.

ACTION to enforce the rights of the plaintiff under an option-contract for the purchase of certain bonds of a Connecticut street-railway company, and for an injunction, brought to the Superior Court in Fairfield County and abated (*Gager, J.*), upon a plea to the jurisdiction, as to one of the two nonresident defendants; afterwards a demurrer to the complaint filed by the other defendants was sustained, *Thayer, J.*, and judgment rendered for the defendants, from which the plaintiff appealed. *No error.*

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The foundation of this action is an agreement between the plaintiff and the defendant Coykendall and others made June 2d, 1898. The other parties to the agreement assigned their interest to the plaintiff, and for the purposes of this case he and the defendant Coykendall may be treated as the sole parties.

The agreement is as follows: "Memorandum of agreement made this 2d day of June, 1898, by and between S. D. Coykendall, of the City of Kingston, in the State of New York, of the first part, and J. T. Patterson, Charles M. Henney, David Henney and William F. Henney, parties of the second part: The party of the first part hereby gives to the parties of the second part the right to purchase at their option one hundred and thirty-five of the present issue of the first mortgage bonds of the Hartford and West Hartford Horse Railroad Company, for the sum of eighty-one thousand dollars ($81,000), at any time within two years from date, payments therefor to be made as follows: (1) $1,000 at this date, receipt of which is hereby acknowledged; (2) $4,000 on the first day of August, 1898; (3) the balance of said $81,000 on or before two years from the date of this instrument. (4) The parties of the second part agree to make the payments of $1,000 and $4,000 above specified, and in addition to pay interest on the whole sum of $81,000 from the first day of April, 1898, to the first day of August, 1898, and thereafter to pay interest at the rate of five per cent. per annum, semi-annually, on the whole of said principal sum remaining unpaid at the date when such interest becomes due; interest, however, to terminate whenever within said period of two years the bonds are purchased and entirely paid for according to the terms of this agreement, and all unpaid coupons belonging to such bonds are included in this option, and are to pass with the bonds when purchased and paid for as herein provided. (5) Should a new issue of bonds, in substitution for those already outstanding, be made by said Railroad Company, the party of the first part agrees to take, in lieu of the 135 bonds herein mentioned, bonds of such new issue to the amount of 3/7 of such issue in lieu of said 135 bonds,

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and to hold such new bonds subject to the terms of this option. It is understood and agreed, however, that said Coykendall shall not be required to exchange the bonds he now holds for those of a new issue of bonds until the balance of the 315 bonds of the present issue have been exchanged. Should the parties of the second part fail to make promptly any payment for interest herein provided for, all payments theretofore made shall upon such failure be forfeited, and this option shall thereby terminate."

The action is brought to enforce the plaintiff's rights growing out of this agreement, and four persons are made defendants, viz., Coykendall and Soop, residents of New York, Greeley, a resident of Connecticut, and the Farmington Street Railway Company, a Connecticut corporation. Actual service within the State was made upon Greeley and the railroad corporation. No service was made upon Coykendall and Soop, but a copy of the writ and complaint addressed to each of them at Kingston, N. Y., was mailed to each in pursuance of an order of notice.

The first three paragraphs of the complaint, as amended, allege that on June 2d, 1898, Coykendall owned 135 of the $1,000 first mortgage bonds of the Hartford and West Hartford Horse Railroad Company, being three-sevenths of the whole amount of that issue (315 bonds), and on that day the above option-contract between him and the plaintiff was executed, whereby the plaintiff obtained a right and option to purchase of Coykendall 135 of the bonds mentioned therein, for the sum of $81,000, at any time within two years from the date thereof, according to the terms set forth therein; that the plaintiff duly performed all the obligations imposed upon him by said contract, except that he did not make the payment due on August 1st, 1899, and setting forth in detail the circumstances claimed as a legal excuse for not making that payment; that on June 1st, 1900, the plaintiff tendered to Coykendall the amount of the agreed price of said bonds, and demanded the transfer thereof, but said Coykendall refused to transfer the same.

The remaining seven paragraphs allege that on March 3d,

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1899, an action was commenced by the treasurer of the State—the trustee named in a deed of trust executed by said Hartford and West Hartford Horse Railroad Company, which conveyed to the State treasurer all the rights, property and franchises of said company to secure the payment of said 315 bonds—and such proceedings were had that upon August 1st, 1899, all the rights, property and franchises of said company were sold, and were purchased by said Coykendall, Soop and Greeley; that immediately upon said purchase they organized the Farmington Street Railway Company as a joint-stock corporation, to take over the property so purchased, with a capital stock of $189,000, divided into 1,890 shares of the par value of $100 each; that Coykendall, intending to prevent the consummation of said option-contract and avoid his obligations thereunder, caused a transfer of the property so purchased to be made to the Farmington Street Railway Company; that said Coykendall, Soop and Greeley subscribed for all the shares of the Farmington Street Railway Company, each subscribing for 630 shares; that Coykendall, Soop and Greeley purchased said bonds as trustees for the bondholders, and subscribed to said stock as trustees for the benefit of the persons entitled to said bonds; that the plaintiff was entitled to the bonds so agreed by Coykendall to be transferred to him, and so entitled to three sevenths of the stock so subscribed for by Coykendall, Soop and Greeley, trustees, to wit, to 810 shares; that the plaintiff is entitled to said 135 bonds, and offers to pay Coykendall all that is due him under said option-agreement, and if said stock has taken the place of said bonds, the plaintiff is also entitled to said stock; that the plaintiff has no adequate remedy at law; that no issue of certificates of stock has been made, and the plaintiff fears that Coykendall, Soop and Greeley are intending to transfer said stock so as to prevent his obtaining his due portion thereof, and that the Farmington Street Railway Company will allow such transfer to be made on its books.

The complaint asks by way of equitable relief a decree ordering the delivery to the plaintiff of 135 of said bonds,

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or the transfer to him of 810 shares of said stock; an injunction restraining said Coykendall, Soop and Greeley from transferring their stock so as to deprive him of his rights; an injunction restraining the Farmington Street Railway Company from allowing such transfer to be made on its books; and such other and further relief as is due in the premises.

The defendant Coykendall filed a plea to the jurisdiction, and the court adjudged that the action abate as to him. He did not otherwise appear. Soop did not appear.

The defendants Greeley and the Farmington Street Railway Company each filed a demurrer to the complaint, which the court sustained and rendered judgment in favor of the demurring defendants.

The appeal assigns error in the rendition of the judgment on the plea to the jurisdiction, in the rendition of the judgment on the demurrers, and in disallowing an amendment to the complaint.

Charles E. Perkins and *Howard H. Knapp*, for the appellant (plaintiff).

Edward D. Robbins, for the appellees (defendants).

HAMERSLEY, J. The claims of the plaintiff are based on two transactions and assume a sort of common-law marriage between the two, whereby the property rights incident to the first are transferred to or merged in the second. A reliance upon this assumption, without stating facts which justify it, accounts for the vagueness and uncertainties of the complaint, and constitutes its radical defect.

The first transaction centers in the option-contract of June 2d, 1898, between the plaintiff and the defendant Coykendall. Upon the allegations relating to this transaction, the plaintiff claims that on June 1st, 1900, there was a completed contract of sale between Coykendall and himself, which Coykendall has refused to execute, and the plaintiff

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seeks under this complaint a specific performance by Coykendall of that contract of sale, namely, the delivery to him by Coykendall, in exchange for their purchase price, of 135 of the 315 bonds issued by the Hartford and West Hartford Horse Railroad Company (hereinafter called the West Hartford Company).

The other centers in a sale of all the property and franchises of the West Hartford Company, under an order of court in an action brought to foreclose the mortgage given by said company to secure the payment of its bonds, which sale took place August 1st, 1899; in the purchase at that sale of the mortgage property by the defendants Coykendall, Soop and Greeley; the subsequent organization of the defendant, the Farmington Street Railway Company; and the acquirement, through subscription, of all its capital stock by Coykendall, Soop and Greeley, each acquiring one third thereof—630 shares.

The plaintiff claims that the allegations of the complaint relative to this transaction establish an agreement on the part of Coykendall, Soop and Greeley, whereby, in making said purchase, they acted in behalf of persons then owning bonds of the West Hartford Company, and in acquiring the capital stock of the Farmington Street Railway Company they acted for the benefit of such persons, and acquired three sevenths—810 shares—of said stock for the benefit of the plaintiff. Whereupon the plaintiff asks specific performance of the trust agreement thus set forth, namely, the transfer to him of 810 shares of the 1,890 shares, of which Coykendall, Soop and Greeley now hold individually the legal title; an injunction *pendente lite*, restraining all the defendants from acts affecting the ownership of the stock or the title thereto; and ancillary relief against the defendant corporation, by way of compelling it to afford the facilities, and do the acts, necessary to effectuate the principal relief asked against the other defendants.

Assuming that the allegations relative to the second transaction can be held to state a definite trust agreement by the terms of which, as stated, Coykendall, Soop and Greeley ac-

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quired and now hold the legal title to all the stock of the Farmington Street Railway Company in trust to transfer the same to persons who are, by the terms of said agreement, the equitable owners thereof—of whom the plaintiff is one and the equitable owner of 810 shares—and to state facts sufficient to show that action by the corporation, under direction of the court, is necessary to settling the ownership and establishing the title of the parties to the trust agreement in accordance with its terms,—we think the plaintiff is entitled to bring an action to which the trustees, the *cestui que trust*, and the defendant corporation, may be made parties, and that notice given to nonresident defendants, in pursuance of the statute prescribing notice in such case, is sufficient to justify the Superior Court in adjudicating the rights of the parties in the stock of the defendant corporation, for the purpose of settling the title and requiring the corporation to give the aid necessary, under the laws of this State, to invest the true owners with the legal title to the property; and that the judgment of the court will be binding upon nonresident defendants' interest in the property which is the subject of the judgment, whether or not they enter an appearance in pursuance of the notice. *Roller* v. *Holly*, 176 U. S. 398, 406; *Bennett* v. *Fenton*, 41 Fed. Rep. 283, 288.

The capital stock of the defendant corporation is property which exists only by virtue of the laws of this State; property which, by force of the law creating it, can only be transferred on the books of the company in this State; this is true notwithstanding certificates of shares of stock in many business corporations have some of the qualities of negotiable instruments, and are treated for some purposes as property. This capital stock as property is subject to liens, —statutory liens in favor of the corporation itself, mortgages liens, and liens created by contract. Conditions may arise under which such liens cannot be effectually enforced, securing the rights of all persons interested in the property, unless by the courts of this State. Our statutes provide for the citation of nonresidents interested in this property,

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when our courts are called upon to settle its title, and the mode of giving them notice is prescribed.

We cannot doubt that an action calling upon our courts to enforce equitable liens, adjust equitable interests in such property, and to compel the registry on the books of the company of the legal title in the owner of the property, as determined by the court, is in the nature of a proceeding *in rem*, which justifies a court, in a proceeding against property within its jurisdiction, in binding all persons with respect to their interest in that property, upon giving them reasonable notice in the manner prescribed by law, and is fully consistent with the principle recognized in *Pennoyer* v. *Neff*, 95 U. S. 714.

But even if the allegations relative to the second transaction could be held to state a good cause of action to which all the defendants are properly made parties, it nevertheless remains true that the allegations relative to the first transaction state a different cause of action against the defendant Coykendall alone. Upon trial the plaintiff might abandon all his claims under the second transaction, or the court might find his averments insufficient or untrue, and still judgment might be rendered against Coykendall upon proof of the allegations relative to the first transaction; unquestionably such a judgment, unless Coykendall voluntarily appeared, would be void, because a purely personal one against a defendant who had not been served with process within the State.

The complaint, therefore, if the assumption as to the legal effect of its allegations is tenable, contains two distinct causes of action: one against Coykendall alone, and the other in the nature of a proceeding *in rem* against all the defendants. The plaintiff, however, claims, and has claimed from the beginning, that the substantial action stated in the complaint is one *in rem*, and that the averments supporting a personal action against Coykendall are merely incidental to a complete statement of the action *in rem*.

On the other hand, Coykendall claims, and has claimed from the beginning, that the action is in substance a per-

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sonal one against him; that the assumption that the allegations of the complaint state the facts essential to support a proceeding *in rem* is wholly untenable; and that the allegations in respect to the second transaction affecting the other defendants are merely incidental to a statement of the personal action alleged against him; and the other defendants maintain the same claim as to the legal effect of the allegations of the complaint.

In this attitude of the parties, the defendant Coykendall entered an appearance for the limited purpose of pleading to the jurisdiction. The plea contains two paragraphs: (1) averring that the action is a purely personal action, and that process has not been served upon him within the State; (2) averring that he is a nonresident, and that the notice required by statute to be given a nonresident of the pendency of an action affecting property within the State in which he has, or claims, an interest, has not been given.

Apparently the plea was framed to meet whatever view the court might take of the complaint, substantially setting up two pleas to the jurisdiction: one averring want of personal service, if the court should hold the action to be a personal one, and the other averring want of statutory notice, if the court should hold the action to be *in rem*.

The plaintiff demurred to the first paragraph of the plea, and answered to the second. The demurrer does not except to the averment that the action is a personal one as a conclusion of law, but simply affirms the insufficiency of the averments as made, because the action is in the nature of a proceeding *in rem*, and states that statutory notice of its pendency has been duly given.

The issue thus framed, whether properly or not, is the single issue of law: do the allegations of the complaint legally state a personal action against Coykendall, or an action *in rem* affecting all the defendants? The contingency of the complaint containing a statement of both actions is not directly presented.

The answer to the second paragraph or plea admits the nonresidence of Coykendall, and denies the allegation that

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statutory notice of the institution of the action has not been given.

It is evident that the issues thus presented, especially in view of the facility afforded by the Practice Act for a full statement of all matters in controversy between the parties to an action, jointly, separately, or in the alternative, and for the rendition of judgment upon any cause of action substantially stated and proved, produced a novel situation, suggestive of some doubt as to the correct course for the court in its treatment.

The court did accept the issues precisely as framed by the parties. It found the issue of law for Coykendall, holding that the complaint did not legally state facts essential to support the action as a proceeding *in rem*, and that the action was therefore in substance a personal action. It found the issue of fact for the plaintiff, and held that Coykendall had received due notice of the institution of the action, if it could be considered as a proceeding *in rem*, and adjudged that the personal action as to Coykendall abate. The plaintiff has appealed from this judgment, assigning no reason except the general claim that the court erred in rendering the judgment.

The plaintiff has suffered no injury from this judgment. After its rendition the plaintiff was entitled to press his action as a proceeding *in rem*, and, if upon trial his claims should be sustained by the court, he would be entitled by the terms of the judgment, which found that Coykendall had been duly notified of the institution of the action as a proceeding *in rem*, to as full a remedy in respect to the interest of Coykendall in any property which might be the subject of the proceeding, as if the judgment had not been rendered.

The judgment is not only harmless to the plaintiff, especially in view of the conclusion we reach in regard to the other part of the case, but is in substance a correct answer to the issues framed by the parties. In legal effect it is limited to the abatement of a personal action as against Coykendall.

In fact, after the judgment abating the personal action

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against Coykendall, the plaintiff pressed and tried his alleged proceeding *in rem* against all the defendants, including the defendant Coykendall, who could not complain of the result, because he did not see fit to appear in pursuance of the legal notice the court had adjudged he received. The alleged proceeding *in rem* has been heard upon a demurrer testiug the substantial merits of the alleged cause of action. The trial court, upon full hearing, has found that the facts alleged by the plaintiff are in substance insufficient to support his proceeding *in rem*, and has rendered judgment for the defendants. It is not assigned for error, nor claimed in argument, that the plaintiff has any substantial grievance not involved in the alleged error of the trial court in rendering judgment against him upon the merits of his cause of action as stated in his complaint. This is the controlling error in the appeal, and the one that has been argued before us.

We think the plaintiff is not entitled, upon the specifications of error in this appeal, to a reversal of the judgment.

After the judgment on the plea to the jurisdiction was rendered, the plaintiff filed two amendments to his complaint, and each resident defendant separately demurred to the amended complaint. The demurrers are substantially the same, and will be treated as one. Many grounds of demurrer are specified, some going to matters of form, but most of them pointing out defects so substantial that, if they exist, the complaint fails to state any cause of action against the demurring defendants, or to state any cause of action except the purely personal one against the defendant Coykendall. The judgment must stand if any substantial ground of demurrer specified is sufficient. In his memorandum of decision the trial judge specified four grounds of the demurrer as sufficient, but afterwards, as stated in argument, the court based its decision upon each ground of demurrer, sustaining the demurrer upon all the grounds. This decision was incorporated in the judgment. If it were error not to state in writing, according to § 765 of the General Statutes, all the grounds of this decision, the plain-

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tiff could have suffered no harm and does not complain. He had the same opportunity to amend the substantial defects in his complaint, if they could be amended, and in fact did attempt to amend his complaint before judgment, but only in matter of form.

The only cause of action claimed by the plaintiff is one growing out of the second transaction centering in the purchase of the property of the West Hartford Company on August 1st, 1899, and one which authorizes the court to assume control of the stock of the defendant corporation and, through its decree, to vest, in the persons it shall find to be the equitable owners of that property, the legal title thereto. It is not claimed that the complaint states any cause of action against the demurring defendants, unless the facts as alleged therein are legally sufficient to support this one.

It is essential to the plaintiff's cause of action that he should allege that Coykendall and others made an agreement in respect to the contribution to a common fund of money for the purchase of the property of the West Hartford Company at the anticipated foreclosure sale, Coykendall to have three sevenths of the profits of the venture; that the necessary fund was furnished and placed in the hands of Coykendall, Soop and Greeley, under an agreement by them with the plaintiff, that they would use the fund for the purchase of the property in their own names, upon a trust to carry out the terms of the two agreements.

It may be immaterial whether these agreements arise from express contract, or are necessarily implied from the facts alleged, but it is essential that their existence should be stated, and it is also essential that the terms of these agreements should be stated.

The plaintiff claims that Coykendall, Soop and Greeley, by means of the property purchased by them in pursuance of said agreements, acquired and now hold the legal title to all the stock of the Farmington Street Railway Company in trust to carry out the terms of said agreement. The plaintiff's cause of action arises upon the refusal of Coykendall,

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Soop and Greeley to do this, whereby he has become entitled to a specific performance, and other relief asked in aid thereof. It is apparent that the court cannot enforce specific performance of an agreement whose terms are indefinite and uncertain. *Todd* v. *Diamond State Iron Co.*, 8 Hous. (Del.) 372. The terms of an agreement, of which the specific performance is asked, are facts essential to the plaintiff's cause of action, and must be alleged. It is incumbent on a plaintiff, seeking specific performance of an agreement, to state its terms and to prove them as stated. *Daniels* v. *Davison*, 16 Ves. Jr. 249, 256; *Ellard* v. *Llandaff*, 1 Ball. & Beatty, 241, 251. "Every fact and circumstance necessary to make out his claim must be distinctly and clearly alleged, with all convenient certainty." *Skinner* v. *Bailey*, 7 Conn. 496, 500. We do not think the allegations of the complaint state with sufficient certainty any agreement which the court can specifically enforce in the manner demanded by the plaintiff's claimed cause of action. But if we assume that Coykendall made an agreement with others to furnish the money for the purchase of the property of the West Hartford Company, and that Coykendall, Soop and Greeley made the purchase under a trust agreement by the terms of which they acquired the property, and subsequently acquired and now hold the stock of the defendant corporation, for the benefit of Coykendall and others, yet the plaintiff's claim that Coykendall's equitable interest in that stock equitably belongs to the plaintiff is unsupported by the allegations of the complaint, and the allegation of facts sufficient to support this claim is essential to the plaintiff's claimed cause of action.

The plaintiff's equitable right to Coykendall's equitable interest in the stock equitably belonging to Coykendall, Soop and Greeley, trustees, depends upon several facts, of which one, and an absolutely essential one, is the equitable ownership by the plaintiff, on and prior to August 1st, 1899, of 135 of the bonds of the West Hartford Company, to which Coykendall had the legal title. This equitable ownership depends on the legal effect of the option-contract of June 2d,

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1898. No claim of equitable ownership can be maintained, and none is seriously made, unless the option-contract existing at the date of the purchase of the property of the West Hartford Company made the plaintiff then the equitable owner of the bonds. The complaint affirms an equitable ownership, through an agreement to transfer the bonds to be found in the option-contract, and affirms no other equitable ownership; and counsel for the plaintiff urge in their brief that the option-contract was the equivalent of a contract of sale, and so Coykendall held the legal title to the bonds in trust for the plaintiff, the equitable owner.

A contract of sale involves an offer to buy or to sell, and an acceptance of that offer. An offer may be withdrawn before acceptance, and a bare offer is ordinarily held to be withdrawn unless accepted immediately. The offer may be accompanied by a promise not to withdraw it within a specified time. In that case it may be accepted within the time specified, before an actual withdrawal. The promise not to withdraw is without consideration and cannot be enforced. The power to withdraw an offer, or retract a promise to keep such offer open, is a valuable advantage, which may itself be the subject of sale, and an option-contract is the sale and purchase of this advantage or right belonging to the owner of the property. It is in aid of, but clearly distinct from, the contract of sale. It affects for a limited time one right incident to absolute ownership, namely, the right to sell at pleasure, but does not otherwise affect the ownership. In this, it is clearly distinct from a contract of sale. Upon a contract of sale pending payment and delivery, the vendor is said to hold his title in trust for the vendee, and the vendee holds the purchase money in trust for the vendor. *Haughwout* v. *Murphy*, 22 N. J. Eq. 531. This particular trust relation, arising from a contract of sale in respect to the property which is the subject of sale, does not result from an option-contract. *Provident Life & Trust Co.* v. *Mills*, 91 Fed. Rep. 435, 442; *Dickinson* v. *Dodds*, L. R. 2 Ch. D. 463. Such a contract gives no property interest in its subject-matter. *Waterman* v. *Banks*, 144 U. S. 394; *Bost-*

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wick v. *Hess*, 80 Ill. 138. The contract of June 2d, 1898, is plainly an option-contract, and is so alleged by the plaintiff in his complaint.

There is another fatal omission to state facts essential to support the plaintiff's claim to an equitable interest in the stock of the defendant corporation. It is not alleged, and does not appear, that Coykendall's interest, legal or equitable, in the property purchased of the West Hartford Company was derived from, or attached to, any ownership of the bonds, legal or equitable. The most that appears is that the purchase was made by persons who happened to be owners of the bonds.

The allegations in respect to the mortgage sale are so meagre that it is impossible to affirm anything beyond what the law governing such a sale, as this seems to have been, implies. If conducted according to law, the sale was a public one open to all the world. No one person had a better or different right to purchase than any other person. A bondholder might purchase, not because he was a bondholder, but because any one could purchase. No preference could be given to any one. Collusion between the receiver, who sold the property, and the bondholders or creditors, whereby the latter might obtain it at less than its value, would be fraudulent and might avoid the sale. The only advantage a person holding the bonds could have, must arise from the better knowledge of the property he might have, and from the fact that, ordinarily, the purchaser might, at his option, use toward the payment of so much of the purchase money as is not needed for expenses of the litigation and payment of liens prior to the mortgage lien, the bonds held by such purchaser, toward the payment of which the net proceeds of such sale is legally applicable.

It is not alleged, and does not appear, whether or not the purchase price was all paid in cash and absorbed by the expenses of the litigation and the liens prior to the mortgage lien. It does appear that if Coykendall and others owning bonds may have arranged this purchase for their own benefit, the arrangement and the purchase was a transaction having

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no necessary relation to the bonds, and in which the bonds played no part, except that the parties to the arrangement adopted the amount of the bonds held by each as a measure of the money each should pay, and of the interest each should have in the venture. It is obvious that no equitable interest that the plaintiff might have in Coykendall's bonds entitled him to require Coykendall to enter into any such arrangement, or to account to him for the profits of any such venture. It is also obvious that the plaintiff, whether equitable owner of the bonds or not, might himself have made the purchase or have entered into an arrangement with others, bondholders or not, for that purpose. If he desired to secure any accidental advantage that might arise from ownership of the bonds in making the purchase, he could have exercised his option under his contract with Coykendall and purchased his bonds. This he did not do. Or he could have employed Coykendall as his agent to make the arrangement he did make, furnish him with the money for that purpose, and so become entitled to his interest in the purchase. This he did not do.

The statement in the third paragraph of the complaint—inferentially made while setting forth an excuse for the nonpayment of a part of the consideration for the option-contract — that some assessment had been made against bondholders for the purchase of the property of the West Hartford Company, and that some adjustment was contemplated between the plaintiff and Coykendall in the matter of reimbursing the latter for money the latter had paid, or should pay, under the assessment, and that the plaintiff on the evening before the sale offered to pay the money involved in such adjustment, without any allegation that Coykendall ever accepted the offer, or that any money was ever paid by the plaintiff, falls far short of an averment that in his arrangement with other persons owning bonds he acted as agent of the plaintiff, or made the purchase with the plaintiff's money, or in pursuance of any agreement with the plaintiff by which the plaintiff became, either legally or equitably, entitled to Coykendall's interest in the purchase.

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In the view we take of the case, the allegation that the bonds of the West Hartford Company are now outstanding uncancelled, belonging to the holders thereof and under the control of Coykendall, Soop and Greeley, trustees for the holders, has no significance favorable to the plaintiff's claim; and the affirmation in the sixth paragraph, that on August 1st, 1899, the plaintiff was by force of his option-contract entitled to the bonds then owned by Coykendall, and that these bonds to which he was so entitled are, through the subscription of Coykendall, Soop and Greeley, represented in the stock of the defendant corporation, is not well pleaded, if intended as an independent allegation of fact, and as a conclusion either of fact or of law from the facts which are pleaded, is unsound.

It is doubtful whether the facts alleged do not show that the plaintiff's option to purchase Coykendall's bonds expired on August 1st, 1899. By the terms of the contract the time within which the plaintiff might accept the offer of sale expired on August 1st, unless a stipulated payment was made on that day. The payment was not made. In such cases time is not only of the essence of the contract, but by its very terms no right of acceptance is given beyond the time limit, and after its expiration a promise of the obligor to extend the time is not binding unless supported by a new consideration. Circumstances which might relieve a party from the penalty of an ordinary forfeiture, might not relieve the obligee in an option-contract from the legal effect of his failure to accept the offer of sale, or make a stipulated payment within the time specified. *Chaffee* v. *Middlesex R. Co.*, 146 Mass. 224; *Cummings* v. *Lake Realty Co.*, 86 Wis. 382; *Waterman* v. *Banks*, 144 U. S. 394; *Potts* v. *Whitehead*, 20 N. J. Eq. 55; *Carter* v. *Phillips*, 144 Mass. 100, 102; *Harding* v. *Gibbs*, 125 Ill. 85. But it is unnecessary to discuss this question and others raised by the demurrer.

We are satisfied that the complaint does not sufficiently allege, in view of the challenge of the demurrer, facts which support a cause of action that requires the court to assume

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control of the capital stock of the defendant corporation, and by its decree to settle the ownership of that stock and establish the legal title thereto in pursuance of trust agreements, the parties to which are unnamed, and the terms of which are unstated; and that whatever trust may attach to the stock alleged to be held by Coykendall, Soop and Greeley, the complaint does not allege facts sufficient to support any interest in the plaintiff under that trust. The trial court properly sustained the demurrers upon these grounds.

The gist of the case, as presented by the record and arguments of counsel, is simple and free from doubt. In argument and brief the plaintiff's counsel rest their claim on two propositions, each essential to the cause of action in question. First: The property of the West Hartford Company purchased on August 1st, 1899, constituted a trust fund equitably belonging to the then bondholders, and as such was transferred to the defendant corporation organized for the purpose of taking it over, and whose capital stock was issued against this property. Second: On August 1st, 1899, the plaintiff, by force of his option-contract with Coykendall, was equitable owner of three sevenths of the bonds, and so entitled to three sevenths of the property purchased, and therefore became entitled to three sevenths of the stock issued against it. This is the claim urged on behalf of the plaintiff, and no other claim finds reasonable suggestion in the complaint.

For the purpose of supporting the first proposition, the allegations of the complaint are defective. The second proposition rests upon inferences of law which are clearly unsound. The complaint, therefore, is bad in substance. The judgment on the demurrers is correct, and the judgment on the plea to the jurisdiction is harmless, and its liability to attack is immaterial.

After the demurrers had been sustained, the plaintiff filed an amendment to his complaint, containing an additional and more specific prayer for relief. The amendment did not avoid the substantial grounds on which the demurrer was sustained. It was filed without motion for leave, agree-

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ment of parties, or offer to pay costs. The court committed no harmful error in disallowing the amendment so filed.

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

In this opinion TORRANCE, C. J., and PRENTICE, J., concurred.

BALDWIN, J. (dissenting). As I read the complaint, it sets forth the option-contract with Coykendall, and its breach by him, only by way of inducement to show the foundation of the plaintiff's claim to an equitable interest in the bonds or stock in the hands of the defendants. The validity of that claim could not be determined in any suit not so brought as to put Coykendall in the position of a party. The majority of the court are of opinion that he retained that position after the action, as against him, had been abated by a formal judgment. It seems to me that this judgment put an end to his connection with the action. To abate an action is to end it. To abate an action as to one party, for want of jurisdiction, is to end it as to him. Coykendall could not be bound to attend further to proceedings which, as to him, the court had determined were no longer in existence. The abatement was total. It was not confined to so much of the action as might set up a right of action on the option-contract against Coykendall personally. *Powell* v. *Fullerton*, 2 B. & P. 420; 2 Williams' Saunders, 210, b.

If I am right in this view of the effect of the judgment, the plaintiff was necessarily injured by it, for he could obtain no relief against the other defendants in a proceeding which, as to Coykendall, was no longer in existence. Coykendall was an indispensable party to any inquiry into the plaintiff's equity to an interest in the bonds or in the stock of the new corporation. He had therefore been properly put in the position of a party; but he ceased to occupy it, when, as to him, the action was adjudged to be ended.

I cannot concur in the opinion of the majority of the court that in legal effect this judgment referred only to a personal action against Coykendall. The complaint was an entirety. The judgment was an entirety.

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The demurrer to the complaint, subsequently filed by the other defendants, was properly sustained for the reason stated by the trial court, that the action could not be maintained against them after Coykendall had ceased to be a party. No other of the causes of demurrer assigned appear to me sufficient. I do not think that it was essential to the plaintiff's cause of action that he should state with greater particularity than he did how he became equitably entitled to share in the benefits of the purchase at the foreclosure sale. He was not seeking a specific performance of the contract. It had become impossible for Coykendall to perform it, for the bonds were no longer under his sole control. The plaintiff was pursuing an equity arising from acts and events subsequent to the breach of the contract. He did not sue as an equitable owner of bonds, but as one equitably entitled to follow the proceeds of bonds which ought to have been, but never were, his.

In this opinion HALL, J., concurred.

WILLIAM F. LAHIFF *vs.* THE SAINT JOSEPH'S TOTAL ABSTINENCE AND BENEVOLENT SOCIETY.

First Judicial District, Hartford, March Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A voluntary association having expelled a member in an illegal manner and at a special meeting not warned or called for that purpose, subsequently and at a regular meeting approved of the action first taken. *Held* that if the original expulsion was not binding upon the association, its subsequent action rendered it liable.

One who is illegally and summarily expelled from membership in a voluntary, unincorporated association, is not obliged to resort to a writ of mandamus for reinstatement—if, indeed, that is a permissible and available remedy—but may maintain an action against the association for damages.

In estimating the damages recoverable in such a case, the loss sustained by the plaintiff in being deprived of the use and enjoyment of the property of the association and the privileges of membership, as

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well as his mental suffering caused by his illegal expulsion, may properly be considered.

The writ of mandamus is an extraordinary remedy to be applied only under exceptional conditions, and is not to be extended beyond its well established limits.

Argued March 1st—decided April 15th, 1904.

ACTION to recover damages for the illegal and summary expulsion of the plaintiff from membership in the defendant society, brought to and tried by the Superior Court in Windham County, *Gager, J.*; facts found and judgment rendered for the plaintiff for $200 damages, and appeal by the defendant. *No error.*

Henry H. Hunter and *Samuel B. Harvey*, for the appellant (defendant).

Charles E. Searls and *Thomas J. Kelley*, for the appellee (plaintiff).

HALL, J. The defendant in this action is a voluntary unincorporated association, which, under § 588 of the General Statutes, may sue and be sued by its distinguishing name, and against which a suit may be brought by any individual member thereof.

The plaintiff claims damages, upon the ground that he has been unlawfully expelled from said association and deprived of all the rights and privileges incident to membership therein.

By its answer the defendant denied all the allegations of the complaint, excepting those describing the character and location of the defendant society.

It appears by the finding of facts, that at a special meeting of the society on the 1st of May, 1901, the plaintiff, who had long been a member of the society in good standing, and was then its vice-president and acting as president at said meeting, was declared expelled from the society.

It is found that the special meeting was not called for the purpose of acting upon the expulsion of the plaintiff,

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that the plaintiff had no notice of such proposed action, that no charges were preferred against him, that he was given no opportunity to be heard, that the motion for his expulsion was put by a member of the society and declared carried without the noes being called for, and that the plaintiff was thereupon compelled to withdraw from the rooms of the society.

Afterwards, at a regular meeting of the society, the plaintiff demanded admission to the defendant's rooms and to the privileges of membership in the society, but was refused; and he has ever since been debarred from all the rights and privileges of membership.

In the trial court the defendant claimed, upon these facts, that the plaintiff was not entitled to recover, because he had failed to prove that the acts complained of were in violation of the constitution and by-laws of the society, and that the plaintiff could recover, if at all, only to the extent of his pecuniary loss proved.

The trial court overruled these claims and rendered judgment for the plaintiff for $200, basing said damages upon the injury sustained by the plaintiff in being deprived of his interest in the defendant's property, and of the rights and privileges of membership in the society, and upon the mental distress suffered by him "on account of the indignity put upon him." The overruling of the defendant's said claims in the trial court, and the rendering of a judgment for the plaintiff upon the facts found, are in substance the errors assigned in the appeal.

Upon this appeal the defendant abandons its claim made at the trial court, that the plaintiff was not illegally expelled, and concedes that the proceedings in the matter of expulsion were "in direct violation of law." We are now asked by the defendant to set aside the judgment of the Superior Court upon the ground, first, that the vote of expulsion at said special meeting was illegal and void, and not binding, either upon the plaintiff or the defendant society, or its absent or dissenting members, not only because of the manner in which the proceedings of that meeting were conducted,

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but because no notice was given in the call for the meeting that action was proposed to be taken upon said matter of expulsion; and second, upon the ground that mandamus is the only remedy for such illegal expulsion.

Neither of these questions appears to have been so distinctly raised and decided in the trial court, nor to be so specifically stated in the reasons of appeal, as to meet the requirements of § 802 of the General Statutes and entitle the defendant to have them considered here. But waiving the irregular manner in which these claims are presented in this court, they cannot be sustained upon the facts before us.

As to the first of these claims, if we assume, for the reasons stated by the defendant, that the special meeting of May 1st, 1901, was not a lawful one for the purpose of acting upon the matter of expelling the plaintiff, and that the action taken upon that matter at such meeting was unauthorized by, and not binding upon, the defendant as an association, it still appears that the association is responsible for the illegal expulsion of the plaintiff, since the court finds that the defendant afterwards, at a regular meeting of the society, in effect approved the action of the meeting of May 1st, 1901, by refusing the plaintiff admission to its meeting, and that it has ever since debarred the plaintiff from all the rights and privileges of membership.

As to the second claim, we are not prepared to hold that a writ of mandamus to compel the association to readmit him to membership is the plaintiff's sole remedy for the illegal expulsion complained of, nor even that it is an available remedy to the plaintiff for such injury.

The writ of mandamus is an extraordinary remedy to be applied only under exceptional conditions, and is not to be extended beyond its well-established limits. *Duane* v. *McDonald*, 41 Conn. 517, 522. It lies to compel the performance of a public duty, or one imposed by public authority and for the nonperformance of which there is no other specific or adequate remedy at law, but not for the enforcement of merely private obligations such as those

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arising from contracts. *Hartford* v. *Hartford Street Ry. Co.*, 74 Conn. 194, 196; *Bassett* v. *Atwater*, 65 id. 355, 360; *Tobey* v. *Hakes*, 54 id. 274; *Parrott* v. *Bridgeport*, 44 id. 180, 182; *American Asylum* v. *Phœnix Bank*, 4 id. 172, 178. It is often an appropriate remedy for the reinstatement of a member of an incorporated benevolent or social society, who has been unlawfully and unreasonably deprived of the enjoyment of the rights and privileges of membership in such societies. 1 Morawetz on Corp. (2d Ed.) § 277; 2 Spelling on Extraordinary Rem. (2d Ed.) § 1606; *Commonwealth ex rel. Burt* v. *Union League*, 135 Pa. St. 301; and note on same case, 8 L. R. A. 195. Such associations, although private corporations, are chartered by the State, and enjoy privileges and exercise powers expressly granted by the State, and for that reason the duties devolving upon them are regarded as of a public character, the performance of which may properly be compelled by writ of mandamus. *State ex rel. Cuppel* v. *Milwaukee Chamber of Commerce*, 47 Wis. 670; *Burt* v. *Grand Lodge of Masons*, 66 Mich. 85; *Tobey* v. *Hakes*, 54 Conn. 274.

Otto v. *Journeymen Tailors' Union*, 75 Cal. 308, and *Von Arx* v. *San Francisco Gruetli Verein*, 113 id. 377, are cited by the defendant as cases where writs of mandamus were issued against unincorporated associations to compel the reinstatement of members wrongfully expelled. Our attention has not been called to any other authorities holding that mandamus is an appropriate remedy against unincorporated societies for the restoration of an expelled member. It seems generally to have been held that writs of mandamus will be denied in such cases. *People ex rel. Rice* v. *Board of Trade*, 80 Ill. 134; *Burt* v. *Grand Lodge of Masons*, 66 Mich. 85; *Lamphere* v. *Grand Lodge of Workmen*, 47 id. 429. But whether or not a person might be expelled from an unincorporated society under such circumstances as to warrant the granting of a writ of mandamus to compel his restoration to membership, and what effect the granting of such writ might have upon one's right to recover damages for such illegal expulsion, are questions which we are not called upon to decide

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in this case. No writ of mandamus has been issued or asked for in the present case. The circumstances of his expulsion were perhaps such that the plaintiff could not thereafter have enjoyed the privileges of membership, had his reinstatement been ordered. Mandamus might for that reason have been but a partial remedy for the injury sustained by his wrongful expulsion, and an action for damages a more complete remedy.

Upon the facts before us the plaintiff had the right to abandon all claim to reinstatement in the society and resort to an action for damages for the injury sustained by reason of the illegal expulsion. *Burt* v. *Grand Lodge of Masons*, 66 Mich. 85; *Lamphere* v. *Grand Lodge of Workmen*, 47 id. 429; *Washington Beneficial Soc.* v. *Bacher*, 20 Pa. St. 425; *People ex rel. Deverell* v. *Musical Union*, 118 N. Y. 101; *People ex rel. Dilcher* v. *German United Church*, 53 id. 103; *Ludowiski* v. *Polish Benevolent Soc.*, 29 Mo. App. 337; *State ex rel. Koppestein* v. *Lipa*, 28 Ohio St. 665; *Fraternal Mystic Circle* v. *State ex rel. Fritter*, 62 id. 628; *Fisher* v. *Board of Trade*, 80 Ill. 85. We cannot adopt the view which seems to be expressed in *Lavalle* v. *Société St. Jean Baptiste*, 17 R. I. 680, that the bringing of an action for damages in such a case is a waiver by the plaintiff of the illegality of his expulsion. The loss sustained by the plaintiff in being deprived of the use and enjoyment of the property of the society and the privileges of membership were proper elements of damage, as was also the mental suffering of the plaintiff caused by his wrongful expulsion and the manner in which it was effected. *People ex rel. Dilcher* v. *German United Church*, 53 N. Y. 103; *Maisenbacker* v. *Society Concordia*, 71 Conn. 369, 376; *Gibney* v. *Lewis*, 68 id. 392, 396.

There is no error.

In this opinion the other judges concurred.

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EUGENIA C. MATHEWS *vs.* J. M. SHEEHAN ET AL., ADMINISTRATORS.

First Judicial District, Hartford, March Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

It is the duty of an administrator to close up a speculative margin account in stocks, opened by the decedent, within a reasonable time after his death; and for a breach of this duty, resulting in losses, he is personally liable to the heirs at law or distributees who do not consent to the continuance of the speculation.

The mere fact that in continuing the account the personal representative acts in good faith for the benefit of the estate, and with ordinary care and prudence, is immaterial, inasmuch as the law forbids him either to enter upon or continue in such a hazardous undertaking.

A finding by a committee, to the effect that charges made by administrators for their services were reasonable and proper, is sufficient, without detailing the evidence upon which it rests.

The taxation of costs, upon an appeal from probate, is a matter within the discretion of the Superior Court.

Argued March 1st—decided April 15th, 1904.

APPEAL from an order and decree of the Court of Probate for the district of Stafford relating to certain administration accounts, taken to the Superior Court in Tolland County and referred to a committee by whom the facts were found and reported; the court, *Shumway, J.*, accepted the committee's report, overruling a remonstrance thereto, and judgment was afterwards rendered (*Robinson, J.*) in favor of the defendants, from which the plaintiff appealed. *Error, judgment set aside and cause remanded.*

Julius Converse died intestate June 7th, 1892, leaving a widow, Mira L. Converse, and four children, namely, Eugenia C. Mathews, Lillia A. Lee, J. Carl Converse and Louis S. Converse. Alvarado Howard and J. M. Sheehan were appointed and qualified as administrators of the estate of the deceased, and one year from June 16th, 1892, was fixed for the settlement of the estate.

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This case, in another aspect of it, was before this court in *Mathews' Appeal*, 72 Conn. 555. After the decision of this court in that case, the Superior Court proceeded to settle the final account of the administrators of said estate, and as one step in that business it appointed a committee to hear the evidence and report the facts to the court. To the report made by that committee Mrs. Mathews filed a remonstrance, the substance of which is stated in the opinion. To the separate grounds of the remonstrance the administrators demurred on divers grounds. The court sustained the demurrer and subsequently overruled the remonstrance, accepted the report, and rendered judgment in accordance with the facts therein found.

Edward D. Robbins, for the appellant (plaintiff).

Charles E. Perkins, for the appellees (defendants).

TORRANCE, C. J. When Mr. Converse died he was indebted to certain stock-brokers in the sum of a little over $286,000, "on margin account," secured by stocks and bonds purchased for him by such brokers and carried by them for him "upon the usual terms on which speculative accounts are carried" by brokers.

The appellant claims that the administrators, instead of settling these speculative accounts within a reasonable time, carried some of them along for an unreasonable time and for the purpose of speculative gains, and thereby caused loss to her as one of the heirs of the intestate, and that they are accountable to her therefor.

The committee has found that the course pursued by the administrators with respect to these accounts was one "which ordinary business men would have taken under similar circumstances," and that in pursuing it they acted in good faith and with due care and prudence.

Upon this finding the court held that the administrators were not accountable to the appellant for any losses that may have resulted to her from what they did with these specula-

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tive accounts; and the main question in the case is whether the court erred in so holding.

In substance, the report shows the following facts bearing upon this question: At the time of his death Mr. Converse had speculative accounts with the following stock-brokers, namely, Howard Lapsley and Company, Clark, Dodge and Company, Cordley and Company, and Samuel W. Boocock. For brevity these accounts will be called the Howard account, the Clark account, the Cordley account, and the Boocock account, respectively. The understanding between Mr. Converse and these brokers was the usual one in such cases: that the securities carried by them should at all times have a value exceeding the balance due upon his account by a margin of at least ten per cent. of the par value of such securities; and that if Mr. Converse did not furnish such margin, when required to do so, the broker had the right to sell such securities upon the stock exchange, so far as might be necessary for the broker's protection. On July 1st, 1892, there was due from the estate upon these four accounts the following sums (omitting the cents) namely: on the Howard account $44,610; on the Clark account $148,324; on the Cordley account $75,895; and on the Boocock account $15,275. In the inventory the administrators entered the net value of the securities held by the brokers for this indebtedness as "cash with bankers and brokers, $45,000," that amount being their estimate of what might be realized from a sale of these securities above the indebtedness due on the several accounts. The administrators permitted all of the securities to remain in the hands of the brokers, but made no arrangements with them as to the terms on which the accounts should be carried for the estate, other than the arrangement which Mr. Converse had with them as hereinbefore stated, with the exception of an arrangement made with Cordley and Company in July, 1893, as hereinafter stated. No advances were made to any of the brokers by the administrators to restore reduced margins, although in a few instances they were called upon to do so. If the margins were impaired by reason of the reduction in the market value of the

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collateral, they were restored to the amount required for the proper security of the account, either by a sale of the stocks, or by a transfer by the administrators of stocks from the other brokers whose accounts showed a margin above what was required, the broker receiving the stock holding it as additional security for the money advanced. The interest on the balance due to the several brokers was adjusted in the accounts, and no money was ever advanced to the brokers by the administrators on account of this item, nor for any other purpose. The administrators bought no new stocks, and their transactions related wholly to the stocks belonging to the estate of Mr. Converse in the hands of said brokers at the time of his death. The Boocock account was closed out in August, 1892, by a sale of the securities held by him, leaving a balance due the estate of $6,620.52; which was paid to the administrators and duly credited in their account. By February, 1893, the Cordley account had been reduced by sales or transfers of the securities to $20,062.50; and on the 20th of that month, by order of the administrators, Howard Lapsley and Company paid that indebtedness and took by transfer the securities then remaining in the hands of Cordley and Company, thus closing the Cordley account. In July, 1893, by sales of securities from time to time, the Clark account had been reduced to $34,000.22, secured by certain stocks; and on July 5th, 1893, by order of the administrators, these stocks were transferred to Cordley and Company who then assumed the indebtedness to Clark, Dodge and Company, whose account was thus closed. On July 27th, 1893, the Howard account had been reduced to $25,594.61, secured by stocks; and on that day, by direction of the administrators, Cordley and Company paid that balance to Howard Lapsley and Company and took a transfer of the securities held by the latter, and this closed the Howard account. On August 1st, 1893, under this new account with Cordley and Company, the balance due to them from the estate was $10,070.43 secured by certain stocks in their hands. Subsequently, by sales of these securities made in November, 1895, and in May, 1896, the indebtedness to

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this firm was reduced to $2,610.38. To secure this balance there was left 500 shares of the common stock, and 150 shares of the preferred stock, of the Buffalo, Rochester & Pittsburg Railroad Co. No further sales of the stock were made, and on June 24th, 1897, Cordley and Company became insolvent, and their estate is being wound up under the insolvent laws of Massachusetts. It is not probable that anything will ever be paid on this account. Cordley and Company, in order to secure their own private debts, either sold or pledged the stock in their hands belonging to the estate, being the 500 shares of Buffalo, Rochester & Pittsburg common stock, and 150 shares of the preferred stock of the same company, and at the time of the failure they held none of these shares. The new account was opened with Cordley and Company with the agreement that the interest charge on balances should be at the rate of six per cent., and that it should not be considered or treated as a speculative account. Subsequently the accounts were rendered to the administrators in the form usually adopted in speculative accounts, but the administrators were not called upon for any money to increase or to restore the margins. In June, 1893, there was a financial panic, and the stock-market became unsettled and irregular, and there was little opportunity of disposing of the stocks at fair prices. Some time afterwards Clark, Dodge and Company and Howard Lapsley and Company each demanded twelve per cent. interest on the balance due to them from the estate for carrying the stocks then in their hands. The administrators refused to comply with this demand, and made an agreement with Cordley and Company to open a new account with them on August 1st, 1893, the rate of interest on balances to be six per cent. Under this agreement the stocks in the hands of the two firms were transferred to Cordley and Company, as hereinbefore stated.

Between July 1st, 1892, and February 1st, 1893, "many attempts were made by the administrators and the heirs to divide the property and settle the estate, by some agreement which should cover all of the property, including the

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brokers' accounts. No agreement was reached at this time, and with the approval of the widow and all of the heirs, except Mrs. Mathews, who did not participate in these attempts at settlement, the brokers' accounts were permitted to remain as they then were, in the expectation that such an agreement would be accomplished. It did not appear that Mrs. Mathews either approved or disapproved of this arrangement."

It is further found, in substance, that between the dates last mentioned all of the securities held by the four brokers had a current market value, varying somewhat from time to time; that many of said securities were, during that time, sold at current market prices; that with reasonable effort all of them could have been so sold; but that the "administrators in the exercise of their best judgment, and with the approbation of the widow and the three heirs living in Connecticut, decided that it was not for the best interest of the estate to place all of said stocks on the market at that time and force their sale, but thought it best to hold them for better prices or for a distribution to the widow and heirs, as hereinbefore stated." It is further found that in this matter the administrators acted in good faith, in the exercise of their best judgment, upon the best advice and counsel obtainable.

These are in substance the controlling facts found upon this part of the case. From them it appears that one of the four speculative accounts, Boocock's, was settled in August, 1892; that the Cordley account was settled in February, 1893, by transfer to the Howard account; that the Howard and Clark accounts were settled in July, 1893, by transfer to Cordley and Company; that the new Cordley account thus opened continued down to the time of the insolvency of that company in June, 1897; and that these accounts of Howard, Clark, and Cordley, might have been settled, without loss of other than speculative gains, within a reasonable time after July 1st, 1892, just as the Boocock account was.

Upon the facts found, the question arises whether the administrators are accountable for any losses that may have

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occurred from the course pursued with reference to these last named speculative accounts. The answer to this question depends upon the answer to two other questions: (1) what was the duty of the administrators with reference to these accounts; and (2) did they perform that duty?

The securities held by the brokers when Mr. Converse died, were clearly a part of his estate, subject to the claims of the brokers. All the property of the estate, including these securities, was in a certain sense a trust fund in the hands of the administrators. *Robbins* v. *Coffing*, 52 Conn. 118, 144. By the 1st of July, 1892, the administrators had full knowledge that a part of that fund, which they inventoried at $45,000, was subject to the great hazards of the business of stock speculation. In these circumstances it was clearly their duty not to carry the speculative accounts for speculative gains, but to settle those accounts in a reasonable time, and thereby withdraw the securities from the perilous business in which they found them pledged. An administrator, or an executor, in the absence of authority therefor, is not permitted to use any part of the estate in trade, or manufacturing, or stock speculation, or other business venture, whereby the trust fund is put at hazard; and the doing by them of any of these things has generally been regarded as a breach of trust, rendering them personally liable for resulting losses, while incapable of sharing in accruing gains. *King* v. *Talbot*, 40 N. Y. 76; *Warren* v. *Union Bank*, 157 id. 259, 268; *Ward* v. *Tinkham*, 65 Mich. 695, 698; *Mattocks* v. *Moulton*, 84 Me. 545; *Lucht* v. *Behrens*, 28 Ohio St. 231, 238; *Alsop* v. *Mather*, 8 Conn. 584, 587; *Hallock* v. *Smith*, 50 id. 127; *Guthrie* v. *Wheeler*, 51 id. 207, 214.

As the law imposed upon the administrators the duty of settling the speculative accounts in a reasonable time, the next question is whether they performed that duty. That is largely a question of fact, and we think the clear import of the finding is that they did not, but that they carried these accounts along as speculative accounts, for speculative purposes, in

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the hope of gains purely speculative and problematical. After July 1st, 1892, these accounts were carried along in the name of the estate very much as they had been carried during the life time of Mr. Converse, except that no new stocks were purchased. It is true, also, that the administrators advanced no money upon these accounts either for margin or interest; but it is equally true that whatever the brokers required by way of margin or interest was in some way furnished and paid, and ultimately came out of the estate. The committee has found, in effect, (1) that at all times between July 1st, 1892, and February 1st, 1893, the securities held by the brokers had a current market value that varied but little, from time to time, from the value they held in July, 1892; (2) that with reasonable effort they could have been disposed of at any time during that period, with advantage to the estate; and (3) that they probably would have been disposed of within some reasonable time during that period, but for the fact that the administrators, with the consent and approbation of the widow and the three heirs living in Connecticut, "thought it best to hold them for better prices or for distribution to the widow and heirs." We think that this part of the report must be treated as finding that the administrators did not settle or attempt to settle three of the speculative accounts within a reasonable time after July 1st, 1892, as they might and should have done, but that they carried them along as speculative accounts subject to all the hazards of stock speculation. In doing so they clearly deviated from the strict line of their duty. The committee has found, in effect, that, in doing this, they acted in good faith for the benefit of the estate, and with ordinary care and prudence. Be it so. This finding can only mean that they conducted the business of stock speculation in good faith and with ordinary care and prudence. But the law forbade them to enter upon or to continue in that business, and when charged with disobeying the law it is no answer to say that the forbidden thing was done in good faith and with ordinary care and prudence.

For loss resulting from this breach of duty the administrators are accountable to the widow and heirs, unless the acts which

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caused the loss were done with the consent and allowance of the widow and heirs; and whether these acts were so done is next to be considered.

Where an administrator or an executor, acting in good faith and with ordinary care and prudence for the good of the beneficiaries of the estate, deviates, with their consent and approbation, from the strict line of his duty, and loss results therefrom—as for instance by continuing the property in business without authority—the consenting beneficiaries cannot charge the representative of the estate with such loss. *Poole* v. *Munday*, 103 Mass. 174; *Duffield* v. *Brainerd*, 45 Conn. 424. The committee has found, in effect, that what the administrators did with these speculative accounts, from first to last, they did with the full knowledge, consent, approbation and allowance of the widow and the three heirs who resided in Connecticut; and of this finding no one complains, and those whom it most affects appear to be entirely satisfied with the conduct to which they consented. But during the settlement of the estate Mrs. Mathews lived in Chicago, and with reference to her consent the finding is not as clear and explicit as it is with respect to the consent of the widow and the other heirs. Upon that point the facts found are these, in substance: In July, 1892, she knew of the situation in regard to these accounts. She was then in this State and present at some conferences between the administrators and the widow and heirs, at which were discussed plans for distributing among the heirs such securities in the brokers' hands as might remain after the debts due to the brokers had been paid. No agreement as to this matter was then reached, but Mrs. Mathews then told the administrators that she would enter into any arrangement to which the others would consent. In December, 1892, and in January, 1893, Mrs. Mathews, and her husband, who acted as her agent in this matter, were in this State and had interviews with the administrators. The husband suggested that the estate should be closed; he told the administrators that it would be unwise to continue the stock accounts; that he thought the stocks could have been sold out in November, 1892; and said that

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while he did not want the stocks to be slaughtered, it was desirable to have the estate settled as speedily as possible. "A general scheme for the distribution of all the property, including an adjustment of the stock accounts, was considered at this time, and presented to the parties interested, including the appellant and her husband;" but it was not completed, because, though approved by the appellant, it failed to get the approval of the other parties. Previous to this Mrs. Mathews had expressed to the administrators a wish to obtain her share of the estate as soon as possible; and was "anxious at all times after this that the stocks should be sold and the estate settled, and of this the administrators had notice." Subsequently, in April, 1893, Mr. Mathews expressed his regret to one of the administrators that the stocks had not been sold. In April, 1893, the widow and heirs, including Mrs. Mathews, entered into a written agreement for a mutual distribution of most of the estate (except the stocks in the hands of brokers) as provided by statute. It was filed in the Court of Probate in June, 1893, and the property embraced in it was turned over to the parties entitled to it as of July 1st, 1893. Subsequently, in 1895 and 1896, efforts were made from time to time by the administrators to settle with and turn over to Mrs. Mathews her remaining share of the estate, but it was never done. There are no other facts found having any material bearing upon the point now in question.

The committee has not found specifically that Mrs. Mathews did or did not consent to the course pursued by the administrators with the speculative accounts; but we think the fair import of the report upon this point is, that up to the first of February, 1893, she did consent, as the others did, to the acts of the administrators with reference to the speculative accounts; and that the finding must be so construed. It follows from this, that for losses to the appellant, if any, resulting from continuing the speculative accounts up to the end of January, 1893, the administrators are not accountable to her; but that for losses so resulting after that time they are accountable.

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The committee has thus found, in effect, that the administrators, in violation of their duty and against the expressed wish of the appellant, continued to carry the speculative accounts as such after January, 1893. It has also found, in effect, that for any loss resulting to her after that time, from the course thus taken by the administrators, they are not accountable, because they acted with ordinary care and prudence and in good faith. This last finding states a conclusion of law rather than one of fact; and it is a conclusion not warranted by the law as applied to the facts found; it is an erroneous conclusion. The appellant remonstrated against the acceptance of the report on account of this erroneous conclusion of the committee, and to this ground of remonstrance the administrators demurred. The court below sustained the demurrer upon this point, accepted the report, and rendered judgment thereon. In so doing we think the court erred, and that for this reason the judgment must be set aside.

In the view we take of this case the other grounds of remonstrance either become of no importance or require but a brief consideration.

The second ground, founded upon the alleged failure of the committee to find definitely the market value of the speculative accounts at a certain time, becomes of no importance in view of the fact that there must be a further hearing and finding in the case. This is true also of the third ground of remonstrance, based upon certain alleged inaccuracies in the report.

The fourth ground of remonstrance alleges, in effect, that the committee has not found the facts upon which it bases its finding that the charges made by the administrators for their services were reasonable and proper. The committee has found the fact itself, and that is sufficent in the absence of anything to show that it committed an error of law in so doing. It was not obliged, nor would it have been proper, to report the evidence on which its finding was based. Under the circumstances disclosed by the record we think the payments made by the administrators to the widow and

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J. Carl Converse, to which exception is taken in the fifth and sixth grounds of remonstrance, were by the committee properly credited to the administrators.

In the sixth ground of remonstrance the appellant also excepts to certain interest charges paid to brokers, for which the committee allowed the administrators credit. In the further disposition of this case to be made as hereinafter stated, this ground of remonstrance becomes unimportant. This disposes of all the grounds of remonstrance.

The appellant in the court below claimed that the administrators should not be allowed their costs in that court, but that costs should be taxed against them personally. The court overruled this claim and allowed the administrators their costs. As the judgment below must be reversed on other grounds, this ruling falls with it and can do the appellant no harm. It should be noted, however, that in cases like the present the allowance of costs is a matter within the discretion of the Superior Court. *Smith* v. *Scofield*, 19 Conn. 534; *Canfield* v. *Bostwick*, 22 id. 270; *Adams' Appeal*, 38 id. 304.

We think that the report as it now stands should be supplemented by a further finding, after a proper hearing, upon these two grounds: (1) Whether after January 31st, 1893, any loss resulted to the appellant, as an heir, to her portion of the estate, from the cause thereafter pursued by the administrators in dealing with the speculative accounts; and (2) the extent of that loss, if any; and that the report of the committee as modified by such supplemental finding should stand.

There is error, the judgment appealed from is set aside and the cause remanded to be proceeded with according to law.

In this opinion the other judges concurred.

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TRUMAN S. SKILTON *vs.* THE TOWN OF COLEBROOK.

First Judicial District, Hartford, March Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

General Statutes, § 2349, provides that if one resident of this State is indebted to another in such manner that the debt is liable to be assessed and set in the list of the creditor, and is not secured by mortgage on land in this State, the amount thereof shall, on request of the debtor, be deducted by the board of relief from his list and added to that of the creditor; while § 2351 declares that no greater amount of indebtedness shall be deducted than the assessed value of the property for which such indebtedness may have been contracted. *Held* that in view of the settled policy of the State as shown by its legislation, § 2351 must be construed as restricting the operation of § 2349, and as impliedly prohibiting any deduction for unsecured indebtedness which was not contracted to obtain, and did not in fact obtain, for the debtor taxable property which was afterwards set in his list and made the subject of assessment.

Such a deduction can only be made of an indebtedness which is fairly capable of a valuation at a sum equal to its amount.

The legislation for more than one hundred years last past, in respect to certain features of taxation, reviewed and commented on.

Argued March 1st—decided May 4th, 1904.

APPEAL from the refusal of the board of relief of the town of Colebrook to deduct $500 from the appellant's tax list; brought to the Superior Court for Litchfield County and heard on demurrer to the application, *Elmer, J.*; judgment for the defendant and appeal by the taxpayer. *No error.*

Wilbur G. Manchester, for the appellant (plaintiff).

Samuel A. Herman, for the appellee (defendant).

BALDWIN, J. The decision of this cause depends on the construction to be given to General Statutes, § 2351, and this requires a review of the legislation of this State on the subject of taxation, since 1777. At that date and far into

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the succeeding century, our system, except so far as related to poll and faculty taxes, was in substance one of taxation on income, although in form it was one of taxation upon certain specified kinds of property. Either this property was put into the list of the taxpayer at a valuation no greater than the net income supposedly derivable from it, or else the assessment was made on such a percentage of the total valuation as would represent such income. Statutes, Ed. 1750, p. 137.

In 1777 it was enacted that "all Persons shall be set in the List at the Rate of Six per Cent. for the Monies due to them on Interest on good Security, deducting what they pay interest for, if any be." Session Laws of 1777, August Session, p. 473. In 1781 moneys lent to the State or the United States on interest were exempted from taxation. Session Laws of 1781, p. 574. In the Revision of 1808 these provisions were thus combined in stating what was to be assessed: "All monies loaned on good security, except monies loaned to this State, or the United States more than the owners thereof pay interest for, at six per cent on the just value thereof." Statutes, Ed. 1808, p. 469. In the Revision of 1821 it was re-enacted thus: "All monies at interest, secured by notes or bonds of responsible persons, resident in this State, or elsewhere, except monies loaned to this State, and all monies on interest, secured by mortgage on real estate in this State, or elsewhere, more than the owners thereof pay interest for, shall be set in the list at six per cent." Revision of 1821, p. 448. In 1836 it was again re-enacted, with these changes: moneys due on any written obligations of responsible persons were included; the words "more than the owners thereof pay interest for" were omitted; any one so taxable for money at interest due to a resident of this State was given a right to have the amount of such indebtedness deducted from the valuation of the real and personal estate in his assessment list; and provision was made for adding the amount thus deducted to the list of the creditor in the town of his residence. Statutes, Ed. of 1839, p. 604.

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In 1852 three amendatory statutes were passed. One provided that if such indebtedness were secured by mortgage of real estate, the amount deducted should be listed against the creditor in the town, school society, or school district in which the land lay. The others provided that so far as school district taxation was concerned, no deduction from the list of an owner of land in the district should be made, whereby he should be relieved from paying full taxes on his land. Public Acts of 1852, pp. 83, 86, 87. In 1865 it was enacted that all money at interest secured by mortgage upon real estate in this State should be listed only in the town where the land was, "*provided* the debtor resides in such town, society or district." Public Acts of 1865, p. 86. In the Revision of 1866 the provision for adding the amount deducted from the debtor's list to that of the creditor in the town of his residence was retained (p. 715, § 35) for all cases where both resided in the same town, and for all where they did not "except where such debt is secured by mortgage on real estate." The next section (§ 36) read thus: "All money at interest, secured by mortgage upon real estate, situated within this State, shall be set in the list, and taxed only, in the town where said real estate is situated, if the debtor resides in such town."

In 1867 two statutes were passed, requiring consideration. The first provided that any deduction for indebtedness was to be made from the debtor's personal property only. Public Acts of 1867, p. 67. The second provided "that no greater amount of indebtedness shall be deducted from the list of any person, than the assessed value of the property for which the indebtedness was contracted." Public Acts of 1867, p. 72.

The change from the plan of taxing income to that of taxing property, and of taxing all property not particularly exempted, which took final effect in 1860 (Public Acts of 1860, p. 11), was not a sudden one. In 1851 all moneys, credits, choses in action, bonds and notes were made taxable, and thus for the first time moneys not at interest and earning no income were included. Public Acts of 1851,

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p. 53, § 8; *Adam* v. *Litchfield*, 10 Conn. 127, 131; *Hamersley* v. *Franey*, 39 id. 176.

In the Revision of 1875 the provision for a deduction for indebtedness is extended to any indebtedness to a resident of this State upon which he could be taxed, and the limitation of the amount of the deduction is stated as that of "the assessed valuation of the property, for which such indebtedness may have been contracted." Revision of 1875, pp. 159, 160, §§ 37, 40. The words thus quoted are repeated in each of the later Revisions. General Statutes, Rev. of 1888, p. 858, § 3857; Rev. of 1902, § 2351.

It thus appears that, until 1867, in our legislation concerning taxation nothing was to be found indicating that any regard was to be paid to the source of the indebtedness for which a deduction was asked, nor suggesting any limitation of the right to a deduction to cases of indebtedness incurred in connection with the acquisition of property listed for taxation. Did the statute of that year providing that no deduction should be made in excess of "the assessed value of the property for which the indebtedness was contracted," assume that a deduction could never be made except for a debt contracted for the acquisition of taxable property, or was it intended to prescribe a limitation applicable only to cases of such deductions as might be made for debts that were so contracted?

From the beginning of our colonial history down to 1836, holders of secured debts who were themselves indebted to others on interest-bearing obligations, were taxable only on the excess of the debts they owned over those which they owed. In 1836 all holders of such debts, residing in this State, became taxable on the whole amount of them; and if any such debt were due from a resident of this State, he became entitled to have the full amount of it deducted from the total valuation of his taxable property. The intent of the law before 1836 was to tax a man as to his choses in action only on what he was really worth, or on the interest from them to which he was entitled, less any sum that might be due from him to others as interest on debts

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due them. The intent of the statute of that year was to substitute, for this, full taxation of all interest-bearing debts due from responsible parties, but, if both parties were residents of this State, to tax the value represented by them but once, and that in the list of the creditor. This was so, equally, whether such debts were or were not incurred for property acquired. The creditor was under all circumstances bound to include them in his list, and the right of the debtor to deduct their amount from his, while conditioned on his having taxable property from the valuation of which the deduction was to be made, was not conditioned on any connection between the debts and the acquisition of that property.

A year later, another statute was enacted, and is still in force, which indicates the same general intent to avoid a double taxation of values. It provided "that money loaned on interest with an agreement that the borrower shall pay the taxes thereon, and secured by a mortgage of real estate in this State, to an amount equal to the assessed value of the land mortgaged, as valued and set in the assessment list of the town where it is situated, shall be exempt from taxation; and the excess of any such loan over such valuation shall be assessed and taxed in the town where the lender resides, in the same manner as other money on interest." Public Acts of 1875, p. 16; General Statutes, § 2319. Here it is plain that the exemption of so much of the mortgage debt as does not exceed the value of the mortgaged property is in no way founded on the consideration that property may have been acquired by aid of money borrowed on the security of the mortgage. It is also to be observed that this statute was adopted after the Revision of 1875 had provided that debts secured by real estate mortgage should be listed in the town where the land mortgaged was situated, even though the debtor did not reside there. Rev. of 1875, p. 156, § 14. The manifest object of this alteration of the law contained in the Revision of 1866 (p. 715, § 36) was to secure that town against being deprived by a mortgage, under any circumstances, of the power of taxing, either actually

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or in effect, all the land within its limits. The same result is now secured by General Statutes, § 2323.

From 1836 to the enactment, in 1875, of the statute exempting certain mortgage loans from taxation, all mortgage loans had been a proper subject of taxation against the creditor, if a resident of this State, even though the mortgagor had agreed with him to pay the tax; and when that statute was adopted, they were taxable against the creditor in the town where the mortgaged land lay, although he might live and pay the bulk of his taxes in another town. The mortgagor, as respects town taxation, could claim a deduction from the valuation of his taxable property for the mortgage debt, as fully as if it had been unsecured. Rev. of 1875, p. 160, § 38. In practice he did not do this, except when he had not agreed with the mortgagee to pay the taxes on the debt. When he had so agreed, he paid full taxes on the land, and the creditor, as the statute was practically construed and administered, did not list and was not understood to be liable to list the debt.

By the statute of 1875, whenever the borrower had promised to pay the taxes on the debt the creditor was altogether relieved from any liability for them, if the debt were for an amount not exceeding the value of the security; and if it were for more he was only taxable on the excess, and in his own town. This statute therefore withdrew such debts, so far as they were secured, from the operation of the general laws as to making deductions from tax lists for indebtedness.

In the Revision of 1902 the laws which have been mentioned as to deductions for unsecured indebtedness assumed a new shape, and are to be found in §§ 2349, 2350, 2351.

The second section of the Act of 1852, as to listing mortgage debts against the creditor in the town where the mortgaged land lay (Public Acts of 1852, p. 83), which had appeared in the Revision of 1866, p. 715, § 37, Revision of 1875, p. 160, § 38, Revision of 1888, § 3855, was omitted. The first section of the same Act, which was that "whenever in the making or perfecting of the tax list of any person, any real estate shall be omitted or abated by reason of any

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indebtedness secured by mortgage thereon, such indebtedness shall be taxable in the town, society or district in which such real estate is situated and there only," has never appeared in any Revision. It was little, if anything, more than an expression of the result to be achieved under the succeeding section, and had also received an important qualification by the Act of 1865, above mentioned. In lieu of it, General Statutes, Rev. of 1888, § 3828, after stating the general rule that choses in action shall be listed in the town where the owner resides, contained this exception: "but money, secured by mortgage, upon real estate in this State, when there is no agreement that the borrower shall pay the tax, shall be set in the list, and taxed only in the town where said real estate is situated." The same exception is given in the same words in the Revision of 1902, § 2323.

The revisers evidently considered it unnecessary to retain what was found as § 3855 in the Revision of 1888, since they had provided, in § 2323, where mortgage loans should be taxable, if the borrower did not assume the taxes, and, in § 2319, where any excess of a mortgage loan over the value of the mortgaged land should be taxable when the borrower had assumed the taxes. There was no occasion to provide for listing mortgage loans to an amount not exceeding the value of the mortgaged land, when the borrower had assumed the taxes; for they were exempted from taxation by § 2319.

The Revision of 1902, § 2349, however, contains one important innovation. All deductions for indebtedness not secured by mortgage on Connecticut real estate are to be made, not as before from the debtor's personal property only, but "from the list of said debtor," or as it is otherwise expressed, "from the listed property of said debtor." If the creditor resides in a different town from the debtor, provision is made, as before, for adding the indebtedness to his list in the town of his residence. Thus, if this section is not qualified by other statutory provisions, a landowner in one town who in any manner whatever has become so indebted to an inhabitant of another town "that the debt is liable to be assessed and set in the list of the creditor," pro-

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vided there is no mortgage to secure it on Connecticut real estate, can have "the amount of said debt" deducted from his list. If, then, he owns land in his own town worth that amount, or more, it may, up to that amount or value, be wholly withdrawn from taxation; and while the same amount will form part of the creditor's list, this, if the latter resides in another town, will go to the benefit of that town only.

There is no escape from this result unless § 2351 is regarded as qualifying § 2349; for the latter clearly provides that the full amount of any indebtedness between inhabitants of this State, which is of such a nature as to be "liable to be assessed and set in the list of the creditor," (that is, fairly capable of a valuation at a sum equal to its amount, as a basis of taxation against the creditor,) if not secured by mortgage on land in this State, must, at the debtor's request, be deducted from his listed property.

Merchants are allowed the benefit of a similar reduction from their "list" by § 2342, which expressly refers to § 2349 as showing the manner in which it may be obtained. In their case, as the average amount of goods kept on hand for sale during the year preceding the first of October is made the basis of assessment, and not any particular goods actually on hand and susceptible of valuation upon that day, it may be more questionable whether § 2351 applies. But as respects others, in our opinion it restricts the operation of § 2349 and impliedly prohibits any deduction for unsecured indebtedness which was not contracted to obtain and did not in fact obtain for the debtor taxable property which was afterwards set in his list and made the subject of assessment.

It is urged that the change of the phraseology of the Act of 1867, made in the Revision of 1875, and ever since retained, by which "may have been contracted" has been substituted for "was contracted," indicates that deductions may be claimed for debts that may not have been contracted for the acquisition of property. It is sufficiently accounted for as intended to obviate any possible criticism, on grammatical grounds, of the manner in which the original sentence was constructed.

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A more serious objection to the effect given by the Superior Court to § 2351 is that it certainly excludes from the benefit of the deduction anyone buying taxable property on credit, who may alienate it before the first day of the following October, even if he have procured with the proceeds, or by way of exchange, other taxable property of equal or greater value; and may involve the exclusion from such benefit of purchasers of taxable property on credit, who may have been assessed for taxation by reason of its ownership on the first day of the following October, but have subsequently disposed of it. But the allowance of any deduction was a matter of legislative discretion. Its allowance may therefore be restricted within any limits which the General Assembly thinks proper to impose. By permitting such deduction as may be made from the entire list of the debtor, an important limitation, long maintained, has been removed. It seems to us that it could hardly have been intended to abandon it, without leaving something which would in some measure fill its place, and that the legislature relied for this on the terms of § 2351.

There is no error.

In this opinion the other judges concurred.

THE NEW ENGLAND MERCHANDISE COMPANY *vs.* FREDERICK W. MINER.

Third Judicial District, Bridgeport, April Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

In the interest of simplicity and directness in pleading each count in a complaint and the answer thereto should be complete in themselves. Accordingly, although the answer has once denied the truth of allegations forming part of one count in the complaint, it should again deny them when they are by reference incorporated in a second count; unless, indeed, the defendant intends to admit their truth in respect to that count.

Argued April 12th—decided June 14th, 1904.

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ACTION to recover moneys alleged to have been unlawfully appropriated and converted by the defendant to his own use, as well as damages for false entries, brought to and tried by the Superior Court in New Haven county, *Elmer, J.*; facts found and judgment rendered for the defendant, and appeal by the plaintiff. *No error.*

The complaint contained two counts. The first charged that the defendant, as the former treasurer of the plaintiff corporation, unlawfully took and converted to his own use the moneys of the corporation. The second, that having made such unlawful conversion, he, in order to conceal the same, wilfully and maliciously made untruthful and improper entries in the cash book of the corporation. Damages were claimed not only for the amount converted, but for special damage resulting from the improper bookkeeping.

The court found that "it did not appear that the defendant had ever taken any cash or funds for which he had not made the proper entries, or that he had ever appropriated to his own use in any manner any cash or property of the plaintiff company," and that it did not appear that he had ever intentionally made any erroneous entries in the company's books, and rendered judgment for the defendant.

Maxwell Slade, for the appellant (plaintiff).

Leonard M. Daggett and *John Q. Tilson*, for the appellee (defendant) were stopped by the court.

PRENTICE, J. The appeal fails to assign any error of law. Five reasons of appeal are stated. The first is general and therefore not entitled to consideration. General Statutes, § 802. The remainder complain because the court, upon the subordinate facts found, refused to find an appropriation of funds and intentionally false bookkeeping. The situation admits of no possible error of law. The conclusions reached by the court are conclusions of fact involving no possible misconception or misapplication of principles of law.

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The second and third paragraphs of the first count were by reference incorporated into the second count. The defendant denied these paragraphs in his answer to the former count, but made no answer to the paragraph of the latter count which incorporated them. In its brief the plaintiff claims that the court erred in not accepting as admitted the allegations of these paragraphs in so far as they formed a part of the second count, and in finding the facts to be otherwise. This claim was not made upon the trial, neither is it contained in the reasons of appeal; it need not, therefore, be regarded. General Statutes, § 802. As the claim is one which, if well and seasonably made, could have been met by a simple amendment, and the fault, whether of inadvertence or misunderstanding, remedied, the situation is one which can reasonably permit no relaxation from the strict enforcement of the rule. Perhaps we ought to say, however, that whatever effect we might, in a proper case, be disposed to give to pleadings in that form, good pleading requires that the defenses to each count be complete in themselves, and indicate what stands admitted or denied without reference elsewhere. Simplicity and directness can thus be best obtained.

There is no error.

In this opinion the other judges concurred.

JAMES A. MULLIGAN, ADMINISTRATOR, *vs.* THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

Third Judicial District, Bridgeport, April Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A policy of life insurance provided that if it should lapse for nonpayment of premiums it might be revived upon written application and payment of arrears and satisfactory evidence of the sound health of the insured. In an action upon such a policy, which had lapsed and been reinstated, the company alleged that the reinstate-

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ment was procured by the false and fraudulent declaration of the insured that she was then in as good a state of health as when the policy was issued; and the plaintiff's denial of this allegation formed the principal issue submitted to the jury. *Held* that under these circumstances the trial court properly refused to charge that this declaration was a warranty which must be literally true regardless of the good faith or belief of the insured in making it.

In the absence of a request or claim calling the attention of the court to the matter, the omission to comment on the weight of particular testimony can rarely furnish ground for a new trial.

Argued April 13th—decided June 14th, 1904.

ACTION to recover the amount of a policy of life insurance, brought to the District Court of Waterbury and tried to the jury before *Cowell, J.;* verdict and judgment for the plaintiff, and appeal by the defendant for alleged errors in the charge of the court. *No error.*

John O'Neill, for the appellant (defendant).

Edward F. Cole, for the appellee (plaintiff).

HAMERSLEY, J. This is an action on a policy of life insurance issued October 8th, 1900, by which the defendant, in consideration of the payment of a weekly premium of fifty-six cents and compliance with the conditions of the policy, insured the life of the plaintiff's intestate for the sum of $500. The insured warranted the truth of the statements made in her application as to the condition of her health and other matters. No claim is made that any statement covered by this warranty was untrue. In October, 1901, the policy lapsed for nonpayment of premiums. The insurance contract contained this provision: "If this policy is lapsed for nonpayment of premium, it will be revived within one year from the date of lapse upon written application, and payment of all arrears, subject to satisfactory evidence of the sound health of the insured, if required by the company's rules." On November 1st, 1901, the insured applied for a renewal of the policy and her application contained the following statement: "I hereby declare myself, who was form-

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erly insured under the above-named policy, to be in as good a state of health as when said policy was issued, and that having allowed it to become lapsed I wish to renew it, upon the understanding that it will not be in force (although I now pay arrears) until the company shall have consented to revive the same." Upon this application the defendant revived the policy and received the premiums as they became due until the death of the insured on January 20th, 1902.

In its rebutter the defendant, as a bar to the plaintiff's right to recover, sets up the provisions of the policy in respect to a renewal after lapse, the lapse of the policy sued upon, the application for revival of November 1st, 1901, and alleges that in said application for revival "the insured falsely and fraudulently represented and warranted and declared to the company that she was in as good a state of health as when said policy was issued"; that "on November 1st, 1901, the insured was not in as good a state of health as when said policy was issued, but she was then suffering from an attack of tuberculosis and quick consumption, from which there was no reasonable or probable ground or hope of recovery, and of said disease she soon thereafter, on the 20th day of January, 1902, died"; that "the defendant relied upon said false and fraudulent statements, and believed the same to be true, and was induced thereby to consent to receive the premiums, amounting to $2.80, and to revive said policy; and the defendant, further relying upon said false and fraudulent statements as to the state of the health of the insured at the time of the renewal of said policy, continued to receive said weekly premiums down to the time of the death of the insured"; that "the above mentioned statements in relation to the health of the deceased were false and fraudulent, were well known by the deceased to be false and fraudulent, and they were made for the purpose of obtaining the consent of the defendant to renew said policy." The foregoing allegations were denied by the plaintiff. The issues raised by these allegations in the defendant's rebutter and their denial by the plaintiff were the only ones submitted to the jury as to which there was any substantial

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controversy. The defendant requested the court to charge as follows: "The statements contained in the application for a renewal of the policy by the insured are a warranty, and as such must be true. It does not matter that the insured thought the statements were true, or believed that they were true; if on November 1st, 1901, the insured was not in fact in as good a state of health as when the policy was originally issued to her, then your verdict must be for the defendant." The court did not so charge, but did charge: "I do not think that as a matter of law the representations had to be as strong and explicit and were of such binding force as the original application for the policy; but she was bound to act in good faith. Fraud will vitiate any contract, and if you find that she fraudulently represented that she was in good health when she was not, as a matter of law it would vitiate this policy"; and further charged that "where the insured at the time of the renewal is not afflicted with any diseases other than those mentioned in the original declaration which tend to threaten life or increase the risk, and those diseases have not become so aggravated as to make his condition substantially different from what it was at the date of the first policy, he is in good health within the meaning of the parties."

The appeal assigns error in the refusal to charge as requested and in the charge upon this point as given, and also in the failure of the court to give specific instructions as to the weight of testimony in respect to certain matters, as to which no request to charge was made.

No one of these exceptions to the charge is well taken. The proposition contained in the request to charge is manifestly unsound; and in view of the state of evidence disclosed by the record and the issues framed by the parties the defendant, certainly, has no reason to complain of the charge on this point as given. There was nothing in the state of evidence which made it the duty of the court to remind the jury that the opinion of physicians as to the health of a person is presumably entitled to more weight than the opinion of lay people, or to discuss the relative weight of

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affirmative and negative testimony. Moreover, an omission to comment on the weight of particular testimony, in the absence of any request or claim calling the attention of the court to the matter, can rarely furnish ground for a new trial. The claim that the charge as a whole failed to give the jury such instructions as were correct in law, adapted to the issues and sufficient for their guidance in the case before them, is unfounded.

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

In this opinion the other judges concurred.

ENOCH L. GOODALE *vs.* JOHN ROHAN.

Third Judicial District, Bridgeport, April Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

The allowance of an amendment of the pleadings during the trial of the cause is a matter resting in the sound discretion of the trial court, whose action will be reviewed on appeal only where it appears from the record that such discretion was improperly exercised.

A party who fails to request the court to order separate verdicts upon distinct and independent causes of action, waives his right to object to a general verdict.

Argued April 13th—decided June 14th, 1904.

ACTION to recover the amount of a promissory note and also for work and labor done and money expended for the defendant, brought to the City Court of New Haven and tried to the jury before *Tyner, J.*; verdict and judgment for the plaintiff, and appeal by the defendant. *No error.*

Edward J. Maher and *Charles C. Spreyer*, for the appellant (defendant).

Charles S. Hamilton, for the appellee (plaintiff).

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HALL, J. The complaint in this action contains two counts. The first count is upon a promissory note of the defendant for $100, dated August 20th, 1897, and payable to the order of the plaintiff three months from date. The second count consists of the common counts. The bill of particulars under the second count contains charges against the defendant for work and labor, and cash, on different dates from 1898 to 1901, amounting to $160, and also items of credit on different dates from March, 1897, to April, 1900, amounting to $162.25. The only answer to the first count is that the note therein described was an accommodation note, given without any consideration. The answer to the second count is a general denial, and a second defense of payment. The reply denies the answer to the first count, and the answer of payment made to the second count.

It appeared at the trial that there was an indorsement of a payment of $25 upon the back of the note described in the first count.

After the plaintiff had introduced his evidence in support of the allegations of both counts and had rested his case, the defendant moved to amend his pleadings by substituting an answer of payment for his answer to the first count. Upon objection by the plaintiff, the court, "seeing no sufficient ground for allowing said motion, denied the same."

The jury by their verdict found "the issues for the plaintiff," and that the plaintiff should therefore recover of the defendant $106 damages. The judgment upon the verdict was "that the plaintiff recover of the defendant the sum of $106 damages, and his costs taxed at ——."

In his reasons of appeal to this court the defendant claims, among other things, that the court erred in refusing to permit him to amend his answer by pleading payment to the first count, and in not rendering judgment in his favor upon the second count of the complaint.

The defendant was not entitled, as a matter of absolute right, to amend his answer during the trial of the case. The allowance of the amendment, at that time, was a matter

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resting in the reasonable discretion of the trial court. *Gulliver* v. *Fowler*, 64 Conn. 556, 565.

The record fails to show that that court exercised such discretion improperly. If the jury found all the charges upon the bill of particulars proved, it is evident from the amount of the verdict that the defendant received the benefit not only of the payment of $25 indorsed upon the note but also of the full amount of all the payments credited upon the bill of particulars, excepting the excess of $2.25 of the credits above the charges.

If the reason of the defendant's motion to amend his answer was that he intended to prove other payments than the one indorsed upon the note and those credited upon the bill of particulars, or to show that all or some of the charges on the bill of particulars should not be allowed by the jury, and that therefore some of the credits upon the bill of particulars should be applied in payment, or part payment, of the note, he should have so stated to the court. From the record before us it does not appear that the trial court erred in holding that no sufficient reason was shown for allowing the the amendment.

The judgment of the court rightly followed the verdict. It could not properly have been in favor of the defendant upon the second count, upon the verdict as rendered. As the only defense to the first count, that the note was without consideration, appears to have been abandoned at the trial, and as the amount of the credits exceeded the amount of the charges in the bill of particulars under the second count, it is very probable that the sum named in the verdict represents only the amount due upon the note, after deducting the $25 payment indorsed upon it; but we cannot say that any injustice has been done the defendant because a verdict was not rendered in his favor upon the second count. If the defendant had requested the court to instruct the jury to bring in separate verdicts upon the two counts, claimed to be for distinct and independent causes of action, it would have been the duty of the court to comply with such request. By failing to make such request the defendant has waived all

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objection to the general verdict rendered. *Morris* v. *Bridgeport Hydraulic Co.*, 47 Conn. 279, 291; *Johnson* v. *Higgins*, 53 id. 236, 240; *State* v. *Basserman*, 54 id. 88, 93.

There is no error.

In this opinion the other judges concurred.

JOHN W. DOUGLASS *vs.* JOHN C. GALWEY.

Third Judicial District, Bridgeport, April Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

When one who has two distinct causes of action arising out of the same transaction puts one in suit, he is not debarred from afterwards suing on the other, unless the remedy first sought is inconsistent with that subsequently pursued.

The pendency of an action upon a replevin bond to recover the value of the goods which were replevied and not returned, together with the damages awarded to the obligee for their detention, is not a bar to a subsequent action of replevin by the obligee for the same goods.

The obligee in a replevin bond may maintain an action to recover nominal damages for the refusal of the plaintiff in the original action to return the goods and pay the damages assessed against him, on demand, although such return and payment is subsequently made.

Argued April 13th—decided June 14th, 1904.

ACTION of replevin, brought to the Superior Court in New Haven County and tried to the jury before *Gager, J.;* verdict and judgment for the defendant, and appeal by the plaintiff. *Error and new trial ordered.*

Charles S. Hamilton, for the appellant (plaintiff).

James M. Sullivan and *Edward J. Maher*, for the appellee (defendant).

BALDWIN, J. The greater part of the goods in question

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under the present writ were, in two former actions of replevin by one Unmack, a receiver in bankruptcy of the defendant, adjudged to belong, some to the plaintiff, and the rest to a copartnership of which he was a member. *Unmack* v. *Douglass*, 75 Conn. 633. The defendant, under a plea of the general issue, offered in evidence the files of two pending actions, one brought by the plaintiff and the other by said copartnership, on the replevin bonds given in the former cases. In each it was alleged that a return of the goods and payment of the damages and costs, given by the judgments, had been demanded and refused. One of the judgments was for a return and $975 damages and $33.48 costs; the other was for $655 damages and $35.23 costs. The files so offered showed that attachments of property of the bondsmen had been made on June 10th, 1903, but that no personal service was made upon them until July 17th. The present action was brought between June 10th and July 17th.

These files were received in evidence against the objection of the plaintiff, and the court ruled that they established an election by him to resort to the bonds, instead of the property, and barred the present suit.

When one who has two distinct causes of action arising out of the same transaction puts one in suit, he is not debarred from afterwards suing on the other, unless the remedy first sought is inconsistent with that subsequently pursued.

The judgments in the Unmack suits established, as between the parties to them, that the plaintiff, either individually or as a copartner, had title to all the goods which he has now replevied from the defendant. They also created an obligation on the part of Unmack to return them, with other goods, and to pay nearly $1,700 in damages and costs. The damages were for the detention of the goods. The obligees in the replevin bonds had a right both to their goods and to the damages. When they demanded both and both were refused, their right of action on the bonds became absolute. It could not have been defeated by a subsequent payment of the damages and costs. That would have worked no change of title as to the goods. It could not have been de-

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feated by a subsequent tender of the goods, without payment of the damages and costs. Had both a return of the goods and a payment of the damages and costs been made, there would still have been a right of action for nominal damages on the original refusal. *Bradley* v. *Reynolds*, 61 Conn. 271, 282. No more could the plaintiff's right of action be affected by a subsequent recaption of the goods, whether effected with or without the help of a new suit. That would simply go in reduction of damages.

If, therefore, it be assumed, for the purposes of the case, as claimed by the defendants, that the actions on the bonds were brought before the case at bar, this could constitute no bar to its maintenance.

The observation made in *Walko* v. *Walko*, 64 Conn. 74, 77, on which the plaintiff relies, to the effect that the security furnished by a replevin bond virtually takes the place of the goods replevied, refers only to the office of the bond pending the replevin suit.

The files received in evidence should have been excluded. They were totally irrelevant to the issue.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

William H. H. Hewitt et al. Appeal From County Commissioners.

Third Judicial District, Bridgeport, April Term, 1904.
Torrance, C. J., Hamersley, Hall, Prentice and Roraback, Js.

In granting or refusing a license to sell intoxicating liquors, the county commissioners act not as judges but as administrative officers, and may properly consider all information which comes to them not only through public hearings but such as may be derived from the personal knowledge and investigation of each; and therefore the unavoidable absence of one commissioner from a public hearing does not disqualify him from taking part in the decision.

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A street which is used both for dwelling-houses and business purposes may or may not, according to circumstances, be a "suitable" place for the sale of liquor; but it certainly does not come within the terms of the statute (§ 2647) which forbids the issue of a license to sell in a "purely residential" part of a town.

Argued April 14th—decided June 14th, 1904.

APPEAL from a judgment of the Superior Court in New Haven County, *Thayer*, *J.*, confirming the action of the county commissioners of said county in granting a liquor license to one Patrick J. Fitzgerald. *No error.*

Henry G. Newton, for the appellants (remonstrants).

Charles Kleiner, for the appellee (the applicant).

HAMERSLEY, J. The county commissioners are administrative officers. *La Croix* v. *County Commissioners*, 50 Conn. 321, 324. Granting licenses in pursuance of our statute regulating the sale of intoxicating liquors is an administrative act. *State* v. *Wilcox*, 42 Conn. 364, 371; *Underwood* v. *County Commissioners*, 67 id. 411, 416. The power to grant such licenses is vested in the county commissioners, and the license is given by a writing signed by themselves. General Statutes, § 2643. The formal license must issue in pursuance of a decision reached by all, or by a majority, after consultation between themselves. *Martin* v. *Lemon*, 26 Conn. 192, 193; *Smith* v. *New Haven*, 59 id. 203, 211. Section 2660 of the General Statutes authorizes an appeal by an aggrieved taxpayer to the Superior Court from such decision of the county commissioners in granting the license. This proceeding is brought under that section.

It appears from the finding of the trial court that the decision appealed from was reached at a meeting of all the commissioners after consultation and without dissent. It also appears that one of the commissioners was unable, by reason of sickness, to attend a hearing previously had before the commissioners upon objection filed by certain citizens to granting the license. The appellant claimed before

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the trial court that the action of the commissioners in granting the license was illegal, because a commissioner who was not present at the hearing took part in the decision.

The court did not err in overruling this claim. In granting or refusing a license the commissioners act upon all the information they may obtain, including the personal knowledge and personal investigation of each. The provision of the statute for a public hearing in certain cases furnishes an additional means of information to which the commissioners are bound to give due consideration. It does not, however, exclude other means. Opportunity for a public hearing is required in every application for a license which is not a renewal, and in every application for a renewal-license when any citizen files an objection. At these hearings the commissioners may compel the attendance of witnesses and the applicant is always entitled to the opening and closing of the argument, and so they are referred to in the statute as hearings or trials; but they are not judicial trials and have no substantial analogy to ordinary trials in court. Their purpose is not to determine a controversy but to furnish information. The commissioners do not act as judges bound to determine a specific issue of fact according to the weight of evidence, but as a board of inquiry bound to hear and consider what may be said on behalf of the applicant and the public, in connection with other information they may possess or obtain, before reaching their decision in granting or refusing a license. It is evident that such hearings may furnish information of controlling or of very little weight, dependent in many cases on other information the commissioners and each of them may properly obtain, and that their usefulness would not be aided but might be impaired if the unavoidable absence of one commissioner from a hearing should deprive the commissioners of his judgment and knowledge in reaching their decision in granting a license. The statute providing for these hearings does not work such a result.

It appears that the place designated in the license is situated on Hudson Street, 1,100 feet in length, on which there are fifty-eight buildings; the street is very thickly settled,

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the houses being small and occupied for the most part by Italians and people of African descent. There are on the street four small grocery stores occupying portions of buildings which are also occupied as dwellings, and two licensed saloons. Section 2647 of the General Statutes forbids the granting of any license in the purely residential parts of a town, except the renewal of a license at the discretion of the commissioners as to the suitability of person and place, and except to a well-established hotel of good reputation. Upon the trial the appellant claimed that § 2647, by its terms, forbade the issue of any license to sell liquors in any part of a town occupied as Hudson Street was occupied, and that the county commissioners and the Superior Court were excluded from considering the question whether or not a building on Hudson Street was a suitable place to be licensed, unless the license asked for were a renewal, or to a well-established hotel of good reputation. The Superior Court overruled this claim, and the appellant now claims that its judgment should be reversed because based on a misconstruction of the statute.

A place upon a street, used both for the purpose of living and that of business, may or may not, according to the circumstances of each case, be a place "suitable" to license for the sale of intoxicating liquors, and the amount and character of the business may be of importance in considering the circumstances; but such a street does not come within the absolute bar of the statute as a "purely residential" part of the town. Plainly there was no misconstruction of the statute.

The conclusion of the Superior Court as to the suitability of person and place, under the circumstances stated in the finding, is not reviewable. *Burns' Appeal*, 76 Conn. 395.

There is no error.

In this opinion the other judges concurred.

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VICTOR ROHLOFF, ADMINISTRATOR, *vs.* THE FAIR HAVEN AND WESTVILLE RAILROAD COMPANY.

Third Judicial District, Bridgeport, April Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

A child of eight years is not necessarily and as a matter of law incapable of contributory negligence.

As applied to the conduct of a child of that age, ordinary care means only such care as may reasonably be expected of children of like age, judgment and experience, under similar circumstances.

Whether a street-car was equipped with proper appliances, and whether the motorman acted prudently in managing the car and did all he could to avert an accident, are questions of fact for the trial court.

While the law requires the same degree of care to be exercised toward adults and children, yet conduct which is prudent in reference to an adult may be otherwise in respect to an infant under like circumstances.

Submitted on briefs April 14th—decided June 14th, 1904.

ACTION to recover damages for negligence resulting in the death of the plaintiff's intestate, heard in damages by the Superior Court in New Haven County, *Thayer, J.*, and judgment rendered for nominal damages only, from which the plaintiff appealed. *No error.*

David E. Fitzgerald and *Walter J. Walsh*, for the appellant (plaintiff).

George D. Watrous, Harry G. Day and *Henry H. Townshend*, for the appellee (defendant).

HALL, J. The following are, in substance, the facts found by the trial court: On the 29th of September, 1902, the plaintiff's intestate, George Rohloff, who was about eight and a half years of age, was going westerly on the northerly sidewalk of Chapel Street in New Haven, on his way to school in company with his two sisters, one, Henrietta, older, and the other younger, than he, and several other children.

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When they were about one hundred and fifty feet from Olive Street, toward which they were going, Henrietta ran diagonally across Chapel Street toward Olive Street to meet another girl on the south side of Chapel Street, and as she reached that sidewalk called to her brother George to follow her. He at once ran into the street from behind a tree near the curb, and started to cross the street, running a little westerly from the direct line across, and running in front of the defendant's street-car, which was going westerly on Chapel street. As the boy reached the north rail of defendant's northerly track, which north rail was thirteen feet south from the north curb of Chapel Street, he was struck by the car "and thrown to the ground just north of said rail, so that the end of the brakebeam, axle, or fender, rolled him over, and dragged him a few feet, causing injuries from which he died a few days after."

Chapel Street at the place of the accident is about thirty-five feet wide. When the plaintiff's intestate started to cross the street the car was twenty-five or thirty feet easterly of the point where he was struck, and was moving at a lawful rate of speed, about eight or ten miles an hour. There was no crosswalk at the place of the accident. The motorman managing the car was inexperienced, having been first employed by the defendant about three months before the accident, and at the time of the accident was serving in the place of a regular motorman on this route. When he saw the group of children he threw off the power so as to have the car under better control, but did not apply the brakes, nor drop the fender, nor sound the gong. He did not see Henrietta as she ran across the street, nor did he know of George's intention to cross the street until he saw him in the street near the front of the car. There was nothing along the curb line, excepting the tree, to prevent him from seeing the children two or three hundred feet ahead of him, nor any person or vehicle in the street to prevent him from seeing the plaintiff's intestate, or to prevent the latter from seeing and hearing the approaching car. In the language of the finding, "when the boy sprang into the

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street in front of the car, he (the motorman) did what was proper to do, and all that could be done, before the boy was struck and injured, to avoid the accident. . . . After the motorman observed the boy in the street, there was not time to reverse the power and drop the fender before the boy was struck."

The trial court finds that the car was equipped with a proper fender; that its appliances were in good working order; that the accident was not due to the failure to drop the fender; that the motorman "was not negligent in failing to further check the car, or in failing to ring his gong, or to drop the fender, before the accident"; and that the injuries to the plaintiff's intestate were caused by his own negligence and not by the negligence of the defendant.

The record presents no questions of evidence. Unless, therefore, the trial court, in so determining the questions of the defendant's negligence and the contributory negligence of plaintiff's intestate, has failed to apply to the conduct of one of them the proper legal test, or unless the conclusions of the trial court upon these subjects are inconsistent in law or reason with some of the subordinate facts found, the decision of that court upon the questions of negligence is final.

The allegations in the complaint, of care upon the part of the plaintiff's intestate, and of negligence upon the part of the defendant, which the latter assumed the burden of disproving upon the hearing in damages, are: that the plaintiff's intestate was in the exercise of due care; that the defendant's car was not provided with a proper fender and was moving at an unlawful and unreasonable rate of speed; that the motorman was careless in not seeing the child, George Rohloff, as he was crossing the street, in not ringing the gong, in not dropping the fender, in not having the car under proper control, and in not stopping it in time to prevent the accident.

The claim made by the plaintiff at the trial, that a child of the age of the plaintiff's intestate was as a matter of law incapable of contributory negligence, was properly overruled

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by the trial court. In *Daley* v. *Norwich & W. R. Co.*, 26 Conn. 591, 598, in which the question whether a child less than three years old, who was injured while on the defendant's railroad track, was guilty of contributory negligence, was submitted to the jury, this court said: "It might almost have been assumed as matter of law, that the plaintiff was guilty of no neglect or culpability whatever." In *Brennan* v. *Fair Haven & W. R. Co.*, 45 Conn. 284, 299, it was held that the trial court properly found a boy ten years of age not guilty of contributory negligence, who, in getting off a car, used such care, caution and prudence as could be expected from a person of his age, although the same conduct might have been negligence in an older person. In *Birge* v. *Gardiner*, 19 Conn. 507, 512, where a child between six and seven years old was injured by the fall of a gate, the question of contributory negligence was submitted to the jury in the trial court. This court said: That while "it might perhaps have been going too far, for the court to have said, as a matter of law, that a child of this age could not be so blameworthy as to excuse the defendant," the court would not say that such cases might not be imagined, or might not sometimes occur. In *Nolan* v. *New York, N. H. & H. R. Co.*, 53 Conn. 461, 478, it was said that it was a mistake, if the trial court decided, as a legal question, that a plaintiff seven years of age was not guilty of contributory negligence in attempting to cross the defendant's railroad track. In *Hayden* v. *Smithville Mfg. Co.*, 29 Conn. 548, 559, the plaintiff, who was ten years of age, was injured by the machinery of a mill in which he was an operative. It was held that if the question whether he was mature enough to appreciate the hazards of his employment, was important, it was a question of fact for the jury.

Although in the case at bar the child injured was but eight and a half years old, the plaintiff, in the absence of any allegation of proof that the injury was produced by any wanton or intentional act of the defendant, was not entitled to recover substantial damages, if upon the hearing in damages the defendant proved that the failure of the

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child George to exercise reasonable care, under all the circumstances, essentially contributed to cause his injury. The fact that the carelessness of the plaintiff's intestate which so contributed to cause the accident was that of a child eight and a half years of age did not, as matter of law, deprive the railroad company of the defense of contributory negligence. But that defense was not established by bare proof that the child, George, failed to act with that prudence and foresight which would have been required of an adult under similar circumstances. The term "ordinary or reasonable care," applied to the conduct of a child of the age of the plaintiff's intestate, means such care as may reasonably be expected of children of similar age, judgment and experience, under similar circumstances. See the cases above cited, and *Sioux City & Pacific R. Co.* v. *Stout*, 17 Wall. 657; *Lynch* v. *Smith*, 104 Mass. 52; *Plumley* v. *Birge*, 124 id. 57; *Hayes* v. *Norcross*, 162 id. 546; *Morey* v. *Gloucester Street Ry. Co.*, 171 id. 164. That the trial court applied this test to the conduct of the child, and that it reached a correct conclusion upon the question of contributory negligence, as one fact, we have no occasion to question from the finding before us.

The conclusion thus properly reached by the court, that the injuries were caused by the negligence of the child, George Rohloff, is decisive of the case, since it forbids a recovery of more than nominal damages, even if the record shows that the defendant was also negligent. But we discover no error in the rulings and conclusions of the court upon the question of defendant's negligence. The question of the rate of speed of the car; whether it was equipped with a proper fender; what the motorman should have done in order to have his car under control after he saw the children on the street, and what he ought to have anticipated that the children might do; whether, after seeing the boy in the street and before he was struck, he could have reversed the power and dropped the fender, and whether during that time he did all that could have been done to avert the accident, were wholly questions of fact, the decisions of the trial

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court upon which we cannot review upon this appeal. The question of defendant's negligence was one of reasonable care and diligence upon the part of the motorman under all the circumstances. The law lays down no such fixed and definite rules as to the acts required to be performed by a motorman in the management of an electric car, under such circumstances, as will warrant us in saying as a matter of law that the motorman's conduct was not reasonable in the present case.

There was no allegation in the complaint that the defendant failed to employ a competent motorman, nor does it appear that the inexperience of the motorman in any way contributed to cause the accident.

Upon the trial of the case the plaintiff made, among others, this claim of law: "When a duty exists, the degree of care required by law toward infants is greater than that required toward adults." This language does not correctly state the law as held in *Nolan* v. *New York, N. H. & H. R. Co.*, 53 Conn. 461, 474, cited by plaintiff in support of this claim. In regard to the claim, the trial court correctly ruled "that the same degree of care is required toward infants as toward adults, but that conduct which comes up to that degree of care when exercised toward adults may fall short of it when exercised toward infants under the same circumstances."

There is no error.

In this opinion the other judges concurred.

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THE UNION SCHOOL DISTRICT OF GUILFORD *vs.* BURTON W. BISHOP ET AL.

Third Judicial District, Bridgeport, April Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

As a reasonable regulation of a matter of personal *status* the legislature has the power to provide, as it does in General Statutes, § 2297, that the taxable estate of a married woman shall be set in the list of her husband, and thereby charge him, personally, with the duty of paying the annual taxes on her real estate, and relieve her from the obligation of returning a separate list.

A husband listed in his own name several tracts of land, two of which were owned by his wife, as "73 acres of land, bounded and described on back of this list." These were valued by the assessors at a lump sum and entered on the grand list of the school district as his property. *Held* that he was thereby estopped from claiming that each parcel should have been valued separately and his wife's parcels entered as hers in the grand list; and was justly taxable on the assessed valuation.

In an action by the school district to foreclose a tax lien on the land so listed, the complaint alleged that all the land stood in the name of the husband, but that the wife claimed a joint interest in it; and this was found to be untrue. *Held* that as against the wife the action was properly dismissed, inasmuch as no fair notice was given her of the real nature of the plaintiff's claim in respect to her lands.

The disposition of a cause cannot be affected by matters not in issue under the pleadings.

A school district tax is not invalid because laid in part to discharge debts which had been accumulating for several years.

Real estate cannot be foreclosed under a lien to pay taxes on personal property.

Where a partial payment of a tax is made but is not applied by either party to any particular item of property, it will be applied by the court as the justice of the case may require.

Affirmative relief in favor of a defendant can only be granted when it is asked for by a cross-complaint or counterclaim.

Argued April 14th—decided June 14th, 1904.

ACTION against husband and wife to recover the amount of a tax and to foreclose a lien therefor, brought to and tried by the Court of Common Pleas in New Haven County,

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Hubbard, J.; facts found and judgment rendered for the defendants, and appeal by the plaintiffs. *Error and cause remanded.*

George E. Beers and *Edwin S. Pickett*, for the appellant (plaintiff).

J. Birney Tuttle, for the appellees (defendants).

BALDWIN, J. On October 1st, 1897, Burton W. Bishop owned a tract of land, and his wife owned two others on one of which was a house, in the Union School District of Guilford. He also owned another tract in the town, which was not in that district, and a little personal property. He put all these items of property into his tax list and returned it under oath to the town assessors. The lands were described as:

"1 dwelling-house with buildings and lots appurtenant thereto.

"73 acres of land, bounded and described on back of this list."

The assessors valued all the 73 acres at a lump sum, and afterwards, under General Statutes, § 2417, one of them valued so much of these lands as lay in the district at another lump sum, and returned a list of the same, including also the personal property and the house lot at proper valuations, to the clerk of the district, all being thus entered in the name of Burton W. Bishop.

In July, 1898, the district levied a five-mill tax to pay debts which had been accumulating for several years. It was made payable October 1st, 1898. No rate bill was made out until October 6th, 1898. Then one was made out in which Burton W. Bishop was charged with $12.92, this being five mills on the assessed valuation of all the property, real and personal, in the district, so owned by himself and his wife on October 1st, 1897. No attempt was ever made to collect any part of this $12.92 out of the personal property, and no personal demand was ever made or served

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upon either. On September 30th, 1899, the collector of district taxes put on record a certificate of lien for $12.92 on the three tracts of land in the district.

In February, 1903, Burton W. Bishop paid $3 on the tax, claiming that that was all of it that was legally due from him. Soon afterwards this suit was brought. The defendants in their answer denied the validity of the proceedings by the town and district, which were stated in the complaint. No evidence was offered on the trial to show the separate value of either of the three tracts. Judgment was rendered for the defendants, and "that said tax lien is void and the same is hereby set aside and declared of no effect."

General Statutes, Rev. 1888, § 3803 (Rev. 1902, § 2297), provided that "the taxable estate of married women, other than separate property, shall be set in the lists of their husbands." The exception of separate property was first made in 1880. Public Acts of 1880, p. 525, Chap. 57. At that time there were comparatively few married couples whose rights were regulated by the new system adopted in 1877. The term "separate property of a married woman" had an established meaning. It was "such estate only, be it real or personal, as is settled on her for her separate use, without any control over it on the part of her husband." *Butler* v. *Buckingham*, 5 Day, 492, 497, 501. It does not appear that the land of Mrs. Bishop was of such a character.

It was within the power of the legislature to make this statutory provision. Taxes are naturally a charge on income. Practically a husband, whether married before or after 1877, is apt to have the management of his wife's lands, and to receive the income from them. To charge him primarily with the duty of paying the annual taxes on her real estate, and to relieve her from the duty of returning a separate list, was a reasonable regulation of a matter of personal *status*. It might be otherwise, were he compelled to pay assessments for public improvements benefiting her land, which would be properly a charge upon the land rather than upon the income from it. *New London* v. *Miller*, 60 Conn. 112.

The omission to make a separate valuation of each parcel

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of land was invited by Burton W. Bishop. He listed the various parcels together as "73 acres." While it is true that he referred in that connection to the back of the list on which the acreage and situation of each were separately described, he presented them on the face of the list, which is the place on which to enter the valuation, as a single item. He is therefore estopped from claiming that they should have been valued separately. *Albany Brewing Co.* v. *Meriden*, 48 Conn. 243, 245. As he also listed them all as his own property, making no reference to the fact of his wife's ownership of two of the parcels and that the house was on one of these, he is equally precluded from taking any benefit from the fact that in the grand list of the district they were not entered as hers. His act naturally led to this irregularity.

The complaint alleges that all the land so listed by the district stood in the name of Burton W. Bishop, but that his wife claims a joint interest in it. The finding shows that this was untrue. On such a complaint, the Court of Common Pleas was justified in dismissing the action as against her. While she was described in the writ as the wife of Burton W. Bishop, there is no allegation that she owned any of the property in question, or that she was made a party because she was a married woman. No fair notice therefore was given her of the real nature of the plaintiff's claim, as respects her lands.

As to him, however, the case set up was in part made out. He was the owner of some of the land assessed. He had induced its valuation by the district, together with other land of his wife, at a lump sum for the whole. He was justly taxable on this amount.

It is found that no notice of the valuation made by the district was ever given, nor any meeting held of the assessors and selectmen to act upon applications for relief, as required by General Statutes, §§ 2417, 2418; that no personal demand was ever made upon him for payment of the tax; and that there was no attempt to collect it out of his personal property. None of these matters were in issue under the

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pleadings, and therefore they could not affect the disposition of the cause.

The answer set up the defense that the tax was invalid, because partly laid to pay old debts which had been in arrears for years. It was the duty of the district to pay them, and taxation was the proper means.

Land cannot be foreclosed under a lien for taxes on personal property; but it does not appear that any part of what is now due to the plaintiff is for a tax on personal property. The $3 paid on account was not applied by either party to any particular part of the indebtedness. It should therefore be applied as the justice of the case may require. *Chester* v. *Wheelwright*, 15 Conn. 562. This will be best secured by applying it, so far as necessary, in discharge of that portion of the tax laid on account of the personal property (which was less than $1), and treating the balance as paid to reduce the amount due for the proportion of the tax laid on account of the lands owned by Mrs. Bishop. For the whole of the residue the plaintiff is entitled to a foreclosure as respects the tract of land listed by the district which was owned by Burton W. Bishop.

The judgment appealed from, in declaring the lien set up by the plaintiff to be void and setting it aside, went beyond the issue. Affirmative relief in favor of a defendant can only be granted when it is asked for by a cross-complaint or counterclaim.

There is error, the judgment of the Court of Common Pleas is set aside and the cause remanded with directions to dismiss the suit as against Mrs. Bishop and to grant a foreclosure as respects the tract of land owned by her husband, for $9.92, with interest and costs.

In this opinion the other judges concurred.

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GEORGE H. GORHAM ET AL. *vs.* THE CITY OF NEW HAVEN.

HENRY W. MUNSON *vs.* THE CITY OF NEW HAVEN.

Third Judicial District, Bridgeport, April Term, 1904.
TORRANCE, C. J., BALDWIN, HAMERSLEY, HALL and PRENTICE, Js.

Making the surface of the ground conform to the level established in the layout of a highway is not a "change" of grade for which an adjoining landowner is entitled to recover special damages under General Statutes, § 2051. That statute does not apply until the prescribed grade has become an accomplished fact in a completed and usable highway, the cutting and filling necessary thereto being merely a part of the original construction.

In an action to recover damages for an alleged change of grade, the defendant offered in evidence the survey, layout, and map, as tending to prove that the highway was, and was intended to be, laid out at the grade shown on the profile map. *Held* that in connection with the other evidence in the case these documents were properly admitted.

Argued April 15th—decided June 14th, 1904.

ACTION to recover damages resulting from a change of grade of a highway, brought to and tried by the Superior Court in New Haven County, *Thayer, J.*; facts found and judgment rendered for the defendant, and appeal by the plaintiffs. *No error.*

Another action—Henry W. Munson *v.* The City of New Haven—identical in its issues, was tried with the foregoing case and judgment rendered for the defendant. *No error.*

A. Heaton Robertson, for the appellants (George H. Gorham *et al*).

Harrison Hewett, for the appellant (Henry W. Munson).

Leonard M. Daggett, for the appellee (the City of New Haven).

TORRANCE, C. J. These two cases were tried together

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in the court below, but the record in only one of them—the Gorham case—is before this court. It is agreed, however, that *mutatis mutandis* the controlling facts found in the Gorham case are to be regarded as the controlling facts found in the other case.

The substance of the finding may be stated as follows: The plaintiffs are, respectively, the owners of the building lots in the city of New Haven described in their respective complaints, the land comprising said lots having been in their respective families since 1877. The lots are all vacant save one, on which stands a house erected fourteen years ago. They are not separated by fences, and are used as farm lands by the tenant living in said house. Prior to June, 1892, there existed a roadway on the northerly side of said lots (which adjoined each other and fronted on said roadway) running westerly from Dixwell Avenue to the city line, which was known as West Hazel Street. In October, 1891, the city engineer of the defendant caused a survey to be made of the profile line of said roadway, and also a profile map showing the existing level of said roadway and the proposed level to which it should be graded, which map the plaintiffs introduced in evidence, with testimony showing that the defendant has graded to that line. Since it was made, said map has remained on file in the office of the department of public works as one of the official maps of said city. Said map, designated as Exhibit 1, is made part of the record. In June, 1892, the city ordered a layout to be made of a highway running westerly from Dixwell Avenue, at the point where said roadway intersected the line of said avenue, and pursuant to said order a survey and layout of such highway was duly made, an assessment of benefits and damages for such layout was duly made, and said survey, layout, and assessment were duly reported to the court of common council, and accepted and adopted. The line of said highway is substantially the line of said roadway. The survey and layout of said highway, containing a map of the land taken therefor and showing the adoption of the layout by the city, is made part of the record as Exhibit 2; while the proceed-

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ings of the board of compensation, and their adoption by the city, are shown in Exhibit 3. These exhibits (2 and 3) contain no reference to Exhibit 1, nor to any change of grade in the highway as laid out. The plaintiffs offered no testimony to prove the width or exact location of said roadway, or that the same was a legal highway, or had ever been used by the public or anybody other than the tenant of said house, who used it to reach Dixwell Avenue. It did not appear in evidence whether said roadway prior to its layout by the city extended to or beyond the city line. Beginning some time in the year 1897 and continuing up to some time in the year 1901 or 1902, the city cut down the ground within the limits of said highway to the level indicated on said map, Exhibit 1. This cut, at a point 50 feet west of Dixwell Avenue, was $1\frac{6}{10}$ feet. It gradually deepened till at a point 350 feet further west it was 4 feet; and then gradually lessened till at a point about 590 feet west of said avenue the grade "coincides with the pre-existing grade or surface of the ground." Some of the plaintiffs' lots were at the point where the cut was deepest.

Upon these facts the plaintiffs claimed (1) that the layout of said highway, "as appears by Exhibit 2, was at the actual grade of the pre-existing roadway;" (2) that the cutting down of the level of the roadway was a change of grade within the meaning of the statute, for which no damages were assessed by the city. It was admitted by the pleadings that no damages had been assessed to the plaintiffs for injury resulting from a change of grade of an existing highway. The court overruled these claims and held that the cutting down complained of was not a change of grade within the intent and meaning of the statute. Whether the court erred in so holding is the principal question in the case.

The record shows that prior to June, 1892, there was no highway over the plaintiffs' lands, nothing but a mere private way used by their tenant alone; that in that month a highway was legally laid out over said land; and that all the damages and benefits to the plaintiffs caused by such layout were duly assessed, to the satisfaction of the plaintiffs. It

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further appears that some five years after the layout the city first began to work and construct the highway to the grade indicated in the profile map, and completed the work in four or five years.

The statute (General Statutes, § 2051) provides that "when the owner of land adjoining a public highway" shall sustain special damages to his property "by reason of any change in the grade of such highway," he shall be entitled to the amount of such special damages. This statute clearly contemplates the existence of a worked highway, completed and in actual use, or opened and made ready for use, and not a mere layout on paper, or a mere tract of land taken for a highway but not yet made fit for public use. Furthermore, the statute contemplates a used or usable highway, having an actual existing grade, to which it was constructed, or at which it is actually used. The words "any change in the grade of such highway," clearly imply an already existing grade. It is true that such grade need not be "a level precisely established by mathematical points and lines;" it may be only "the surface of the highway as it in fact exists;" *McGar* v. *Bristol*, 71 Conn. 652, 656; but it must in some way have become the existing grade of a worked and used, or usable, highway. When land is taken for highway purposes it does not become a highway, within the meaning of the statute, until it has been made into one by working it to some grade and otherwise completing it for travel. This may require that hollows be filled up and that hills be cut down; but this is not a change of grade within the meaning of the statute; it is part of the original working and construction of a new highway; and damages, if any, accruing therefrom, are not recoverable under the statute here in question. The plaintiffs allege that the injury, for which they sought to recover damages, resulted from changing the existing grade of an existing highway; and the court has found that they failed to prove that allegation. We think the court was justified in so finding, and in rendering judgment for the defendant.

A single ruling upon evidence remains to be considered.

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The plaintiffs objected to the admission in evidence of the layout (Exhibit 2), substantially on the ground that it did not tend to prove a layout "at any grade other than that of the pre-existing roadway," or that any change of such grade was contemplated. The court admitted the evidence.

We think Exhibit 2, in connection with the other evidence in the case, tended to prove that the highway was, and was intended to be, laid out at the grade shown on the profile map; and that the court did not err in admitting the exhibit.

There is no error.

In this opinion the other judges concurred.

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MEMORANDA OF CASES

NOT REPORTED IN FULL.

MARIA G. BUONOCORE *vs.* RAPHAEL DE FEO.

First Judicial District.
Argued October 9th—decided December 18th, 1903.

ACTION to recover the statutory penalty for neglecting to execute and deliver a release deed of a satisfied mortgage, brought by appeal from a justice of the peace to the Court of Common Pleas in Hartford County and tried to the court, *Coats, J.;* facts found and judgment rendered for the plaintiff, and appeal by the defendant. *No error.*

Opinion filed with the clerk of the Court of Common Pleas in Hartford County.

Augustine Lonergan and *William R. Sharton*, for the appellant (defendant).

Albert C. Bill, with whom was *Leslie L. Brewer*, for the appellee (plaintiff).

The statute (§ 4048) provides that the holder of a satisfied mortgage who neglects to execute a release deed thereof, within thirty days after a written request and a "tender" of the necessary expense, shall pay a penalty to any person aggrieved. In the present case it appeared that the plaintiff presented a proper release deed to the defendant for his signature, and also offered to pay any expense he might incur in its execution; but that the defendant refused to execute the deed until he had received $5, which he claimed the plaintiff owed him in another matter.

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The Supreme Court in an opinion by *Prentice, J.*, held that under these circumstances the plaintiff was relieved from the actual production and proffer of the money, and stood in the same legal position he would have occupied had a precise and formal "tender" in fact been made. *Reporter.*

FLORENCE A. PLUMB *vs.* JOHN F. MAHER.

Third Judicial District.
Argued October 27th—decided December 18th, 1903.

ACTION to recover damages for personal injuries alleged to have been caused by the defendant's negligence, brought to the District Court of Waterbury and tried to the jury before *Cowell, J.;* verdict and judgment for the plaintiff for $500, and appeal by the defendant. *No error.*

Opinion filed with the clerk of the District Court of Waterbury.

John O'Neill and *William Kennedy*, for the appellant (defendant).

William E. Thoms and *Theodore E. Rogers*, for the appellee (plaintiff).

DANIEL HEAD *vs.* ISAAC H. SELLECK ET AL.

Third Judicial District.
Argued January 19th—decided March 3d, 1904.

ACTION to recover the amount of two Wisconsin judgments, brought to and tried by the Superior Court in Fairfield County, *Robinson, J.;* facts found and judgment rendered for the plaintiff, and appeal by the defendants. *No error.*

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Opinion filed with the clerk of the Superior Court in Fairfield County.

Robert E. DeForest and *Howard W. Taylor*, for the appellants (defendants).

Samuel Tweedy, for the appellee (plaintiff).

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APPENDIX.

OBITUARY SKETCH OF DWIGHT LOOMIS.*

DWIGHT LOOMIS, born July 27th, 1821, in Columbia, Tolland county, was the son of Capt. Elam Loomis, a respected farmer. His mother, Mary Pinneo, was of French descent. His first ancestor in this country was Joseph Loomis, who came from England in 1638 and settled in Windsor. His general education was gained in the public schools of his native town, and in the academies at Munson and Amherst, Mass. After teaching for some years, he began the study of law in the spring of 1844 with Hon. John H. Brockway of Ellington, completed it in the Yale Law School, was admitted to the bar in Tolland county, in 1847, and, associated with Mr. Brockway, commenced practice in the then village of Rockville, the first of his profession to locate there. He soon gained public confidence and professional success. He represented Vernon in the General Assembly in 1851, the twenty-first senatorial district in 1857, was a delegate to the Republican National Convention at Philadelphia in 1856, and the representative of the first district in the thirty-sixth Congress, and again in the thirty-seventh after a unanimous renomination. The larger part of his service in Congress was during a time of national distraction and peril, and Mr. Loomis was found among the most steadfast and able members who loyally upheld the Union. He was elected a judge of the Superior Court in 1864, re-elected in 1872, became a judge of the Supreme Court of Errors in 1875, and thus remained until disqualified by age. After leaving the bench he was chosen a State referee, and held the office the rest of his life. Yale University conferred on him the degree of LL. D. in 1896. In 1892 he removed from Rockville to Hartford.

Happily his life was active to the very last. Judicial service ended, his counsel and aid in legal matters were much sought,

* Prepared by the Hon. David S. Calhoun of Hartford, at the request of the Reporter.

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but he did not act as advocate. He arbitrated some important questions, was for a time a lecturer in Yale Law School, wrote the Judicial and Civil History of Connecticut in collaboration with J. Gilbert Calhoun, and discharged all his duties as a State referee. It was during his return from a hearing in that capacity at Torrington, that, by a sudden stroke, the end came September 17th, 1903.

Judge Loomis brought to the bench an uncommon union of fitting qualities. With a competent knowledge of law and a natural love of justice were joined an accurate legal perception, the habit of thorough investigation, and a rare judicial temperament. He was ready of comprehension, patient in hearing, deliberate of decision, dignified without assumption, considerate of every one, clear in rulings and charges to juries, administering justice with due respect of law but with all practicable kindness, and an impartiality never suspected, for it was beyond reach. He had that industry which answered every call of duty, and possessed no disturbing frailties of temper.

Nature, learning and character combined to qualify him as a trial judge, and to win for him the highest esteem and confidence. His able and important service in the Supreme Court will now best appear from those reported opinions of the court written by him. They are vigorous, logical, confined to the decided points, and usually cite supporting authorities. They satisfy the student, for they leave no doubt of their meaning or scope, being free from cumbrous elaboration and confusing rhetoric, while they show the clear thinker and the broad and learned jurist. A good example is the opinion in *Regan* v. *New York & New England Railroad Co.*, 60 Conn. 124.

The professional and public life of Judge Loomis illustrated his private life and character. He was modest, with the simple manners of earlier days, a regular and generous supporter of good objects, making moral and religious principles his law of life. Without conceit or self-assertion, he was independent in opinion, with abundant will and energy in action. Always found in the way of duty, with a sound and dispassionate judgment, he was a trusted example, and exerted a wide and worthy influence.

His social nature was domestic rather than general, and found its greatest enjoyment in his home. Yet he was genial, hospi-

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table, a firm friend, and interesting in conversation, where good sense was enlivened by a quaint and copious humor. Diversions show a person's tastes better than vocation. Judge Loomis relished nothing coarse. He enjoyed nature, travel and music, loved flowers and their culture, and in their season they beautified his home. He was familiar with poetry, and was ready with an apt quotation from a favorite author. Under favorable circumstances he might have been "one of the rhyming race," for he had the gift of easy versification, mostly shown in letters to his daughter, which were always in rhyme.

It was consistent that a life so pure, useful and honorable, found age "as a lusty winter."

OBITUARY SKETCH OF WILLIAM C. CASE.*

William Cullen Case resided all his life in the house in Granby in which he was born February 17th, 1836, with the exception of a few years' residence in Tariffville in Simsbury. He graduated at Yale in 1857; taught school for one year in Harwinton, and then studied law in Pittsfield, Massachusetts, in the office of Rockwell and Colt. He was admitted to the bar in 1860, opened an office in Tariffville, and at once took a prominent position among the lawyers of Hartford county. In 1869, 1870, 1872, 1873 and 1874, he represented Simsbury in the General Assembly, and Granby in 1881 and 1884; and was unanimously elected by the latter town a member of the Constitutional Convention of 1902, but died before the Convention assembled. In 1881 he was speaker of the house, and in 1884 chairman of the judiciary committee and the acknowledged leader of the house. Largely by his efforts the change from yearly to biennial elections and legislative sessions was effected. He held no other political offices, though often urged to be a candidate for State senator and representative in Congress. At different times he was offered the position of judge of the Superior Court and judge of the Supreme Court, but declined the appointments.

The discussion of legal principles that had not been distinctly

* Prepared by William H. Ely, Esq., of New Haven, at the request of the Reporter.

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and positively decided was his delight; and for it he was particularly fitted, for in the field of original and logical reasoning he was unsurpassed. It was ever his effort to reduce the matter at issue to its simplest possible form. As a trier of a case he was ready on any question raised, thoroughly informed as to the facts, never at a loss, and never disconcerted. In the direct examination of witnesses he was clear and forcible; but of cross-examination he was the master, having a method peculiarly his own. He seldom attempted to break down a witness, but generally succeeded in so harmonizing the testimony with his own theory of the case, as to make, if not an additional witness for his own side, at least a witness of no value to his opponent. Skilled in repartee, he never feared, though he never invited, the personal altercations that sometimes arise upon a trial, and in the later years of his practice he passed by all personal remarks as unworthy of the profession. His arguments were masterpieces of logic, and when occasion invited, of wit and pathos, all expressed with perfect diction, and yet so clear that the dullest could comprehend and appreciate. No court room had vacant seats if it were known that he was to speak in an important case. With his varied powers always at command, and magnetic in his personality, he was an advocate sought for in the most difficult and complicated cases, and an opponent always to be feared. No client ever felt that his case was lost through any fault or shortcoming of his counsel. Admittedly the best orator in the State, he treated with respect the intelligence of his audience, and never attempted to befog, but always to clarify, the point at issue. He was a constant reader of the best literature and no literary gem was unknown to him, nor was he ever unable to tell its author. Keen in his insight to character, and wise as to the motives of men, with a great heart to guide him, no person really in trouble ever came to him without finding a wise adviser and a sympathetic friend. He died December 21st, 1901.

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OBITUARY SKETCH OF LYMAN D. BREWSTER.*

Lyman Denison Brewster, the son of Daniel and Harriet Averill Brewster and a direct descendant of the sixth generation of Elder William Brewster of Plymouth, was born in Salisbury, Connecticut, July 31st, 1832. He prepared for college at Williams Academy, Stockbridge, Mass., and was graduated from Yale in 1855. He was the poet of his class. Subsequent to graduation he travelled extensively abroad and upon his return began the study of law in the office of Hon. Roger Averill (afterwards Lieutenant-Governor), in Danbury, where he lived the remainder of his life. In 1858 he was admitted to the bar, and ten years later married Sarah Amelia Ives, who survives him.

Judge Brewster early attained prominence at the bar. In 1868 he was judge of probate, and in 1870 the first judge of the Court of Common Pleas of Fairfield county, serving four years. In 1870, 1878 and 1879, he represented Danbury in the lower house of the State legislature, serving two years on the judiciary committee, also as chairman of the committee on constitutional amendments, and as a member of the committee on a reformed civil procedure, whose work resulted in the drafting and adoption of the present Practice Act. In 1880 and 1881 he was a member of the State senate and chairman of the judiciary committee.

He confined himself closely to the practice of his profession after 1880, and became very successful as a trial lawyer. His most important case was the suit involving the will of Samuel J. Tilden of New York. Appearing for the heirs at law, he attacked the validity of the residuary bequest creating the "Tilden Trust." The Court of Appeals of New York, by a bare majority, held the bequest invalid, the prevailing opinion indicating that the conclusion of the court was based largely on Judge Brewster's brief, in the preparation of which the best part of four years was spent. Joseph H. Choate was associated with him in this case, and James C. Carter was one of the opposing counsel.

* Prepared by J. Moss Ives, Esq., of Danbury, at the request of the Reporter.

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Judge Brewster was a charter member of the American Bar Association, and until his illness in 1903 had attended all of its meetings. Since 1890 he had been chairman of the committee of the Association on uniform State laws, and from 1896 to 1901 was president of the National Conference of Commissioners on Uniformity of State Legislation, appointed by the governors of the various states. He practically gave up the last years of his life to this movement, and contributed more than any other one man to its success. In 1901 he wrote a series of exhaustive articles for the Yale Law Journal and Harvard Law Review, in defense of the Negotiable Instruments Act, which had been subjected to the criticism of Dean Ames of the Harvard Law School. He was an earnest advocate of reform in the business laws of the country, and gave forcible expression to his views in a paper on "A Commercial Code," which he read before the New York State Bar Association at Albany, in January, 1903. Immediately after reading this paper, which he had said would probably finish his work in behalf of uniformity, he was stricken with paralysis. The last year of his life, although one of partial invalidism, saw no impairment of his mental vigor, and on the day preceding his death he brought about the settlement of a case in which he had been counsel. He died in sleep at his home in Danbury, February 14th, 1904.

A lovable Christian character shone all through his life, and during his last year of rest and freedom from activity his life became a benediction to all who came in touch with him.

OBITUARY SKETCH OF CURTIS THOMPSON.*

Curtis Thompson died at his home in Bridgeport, April 17th, 1904. He was born in 1835 of Puritan stock, and his ancestors on both sides resided in Stratford from the settlement of that town.

His career presents a familiar story in American life. It discloses narrow circumstances in childhood, high purpose and ambition, privations endured, difficulties surmounted, and the

* Prepared by the Hon. Howard J. Curtis, of the Bridgeport bar, at the request of the Reporter.

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reward of character, success, competence and public esteem gained.

He was educated at the Stratford Academy and prepared for Yale College, but did not enter owing to lack of means. He learned and practiced a trade, taught school, and thus secured means to attend the Harvard Law School as a member of the class of 1864. In 1871 Yale College gave him the honorary degree of M. A.

After his admission to the Fairfield county bar in April, 1864, he represented Stratford in the General Assembly for three years, serving twice on the judiciary committee. In his adopted city he filled many public places, and served as alderman, councilman, town attorney and city attorney, for several terms in each position.

Mr. Thompson lived a laborious life, applying himself with unwearied industry to every matter placed in his hands by his clients, thus winning the lasting regard of an extensive and important clientage, and serving them in many large affairs with unswerving fidelity and marked ability. He was a high-minded, able and successful lawyer, with an ingrained honesty that was recognized by his client, his opponent, and the court.

His career at the bar was not meteoric or dazzling, but it was strong, substantial and effective. He was not content to be a lawyer merely, he sought also to be a good citizen; his voice and influence were always at the service of every cause tending to the public good. During his mature life he represented in influential speech and action the conscience and candid judgment upon public affairs of the large body of right-minded, public-spirited men in his city.

Mr. Thompson was called upon for occasional addresses in his vicinity more frequently than any other man, and particularly for those of a historical nature; for his mind was a storehouse of information regarding the local history of Bridgeport and vicinity, and his interest in such matters was deep and constant. Local history was his intellectual recreation.

His interest in life and affairs was always keen, and a remarkable freshness of feeling and power of enjoyment pervaded his life to the end. Conversation with him disclosed a social disposition, a wide acquaintance with the best in literature and science, and a catholic breadth of mind, always open to new

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thoughts and impressions, always growing in sane thinking. He was a manly man, led by a high sense of duty and an unerring instinct toward right action in all the relations of private and public life.

His career recalls these words of Lowell:—

"The longer on this earth we live
And weigh the various qualities of men,
Seeing how most are fugitive
Or fitful gifts at best, of now and then,
The more we feel the high stern-featured beauty
Of plain devotedness to duty,
Steadfast and still, nor paid with mortal praise,
But finding amplest recompense
For life's ungarlanded expense
In work done squarely and unwasted days."

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CONTRACTS.

Reimbursement for expenses incurred.

1. The defendant purchased the plaintiff's plant and business, and agreed to reimburse it for expenditures theretofore actually made by it upon its uncompleted contracts, which the defendant assumed. *Held* that the plaintiff's right of recovery was not limited to expenditures made in the partial performance of such contracts, but included expenses incurred by its engineering department in making estimates, and the salaries and traveling expenses of its agents while negotiating and securing the contracts. *Berlin Iron Bridge Co.* v. *American Bridge Co.*, 1.

"Contracting expenses;" estimates upheld.

2. These expenditures, charged as "contracting expenses," were not given in detail, but were estimated, under a long-standing general-average rule of the plaintiff, at five per cent. of the contract prices, a method which the experienced officers of the plaintiff testified was proper and necessary and led to substantially correct results. Upon evidence of this character and tendency the trial court found that the sums called for by these estimates were actually expended by the plaintiff. *Held* that this conclusion, whether regarded as one of law or fact, was fully warranted. *Ib.*

"Pool" expenses allowed.

3. Another item, charged by the plaintiff on its cost book under the head of "pool expenses," was for sums paid by it to unsuccessful bidders upon these contracts, under a mutual agreement that the successful bidder should pay to each of the unsuccessful ones a certain percentage of the former's estimated profit. No question was made as to the validity of the "pool" agreement, or payments made thereunder, but the defendant contended that such payments were not covered by its promise of reimbursement. *Held* that such contention was not well founded. *Ib.*

"Shop cost" of contracts.

4. The plaintiff guaranteed that the contracts turned over by it to the defendant would net the latter a clear profit of at least fifteen per cent. of the "shop cost" of performing them; and another clause declared that this term included "labor, material, and general shop expense, f. o. b. cars at works of the plaintiff." The trial court ruled that shop cost or expenses incurred elsewhere than at the works of the plaintiff in Connecticut and Pennsylvania were not to be included in determining the amount of the shop cost of the contracts as assumed by the defendant. *Held* that this ruling was correct and in accord with the limited meaning which the parties themselves had seen fit to place upon these words. *Ib.*

Breach by anticipation.

5. A breach of an executory contract by anticipation occurs only when there is a distinct, unequivocal, and absolute refusal to perform the promise by one party, before the time for its performance has arrived, and an equally clear acquiescence in or acceptance of such renunciation by the other. In other words, the contract re-

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PUBLIC ACTS.

STENOGRAPHER. See GAS AND ELECTRIC LIGHT COMPANIES, 16.

STREET RAILWAYS.

1. While a street-railway company which does not adhere in all particulars to the plan for the construction of its line adopted by the local municipal authorities, may, at their instance, be required to conform thereto (§ 3824), it does not necessarily follow that its disobedience in a mere matter of detail—in this instance the location of a cross-over switch some distance from the place indicated on the plan—is, for that sole reason, a public nuisance abatable by an adjoining proprietor who suffers special annoyance therefrom. If such an annoyance is in its nature a necessary incident to the use of the highway for public travel, the street-railway company is not liable, although the annoyance happens to fall with greater

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