CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT

JULY, 1917—JULY, 1918.

VOL. 92.

By JAMES P. ANDREWS.

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JUDGES

OF THE

SUPREME COURT OF ERRORS

DURING THE TIME OF THE WITHIN DECISIONS.

HON. SAMUEL O. PRENTICE, CHIEF JUSTICE.
HON. ALBERTO T. RORABACK, ASSO. JUSTICE.
HON. GEORGE W. WHEELER, " "
HON. JOHN K. BEACH, " "
HON. MILTON A. SHUMWAY, " "

JUDGES OF THE SUPERIOR COURT.

HON. EDWIN B. GAGER.
HON. WILLIAM S. CASE.
HON. JOEL H. REED.
HON. HOWARD J. CURTIS.
HON. WILLIAM L. BENNETT.
HON. LUCIEN F. BURPEE.
HON. GARDINER GREENE.
HON. JOSEPH P. TUTTLE.[1]
HON. JAMES H. WEBB.
HON. DONALD T. WARNER.
HON. JOHN P. KELLOGG.
HON. WILLIAM M. MALTBIE.[2]
HON. JOHN E. KEELER.[3]

ATTORNEY-GENERAL.

HON. GEORGE E. HINMAN.

[1] Resigned to take effect August 31st, 1917.

[2] Appointed by the Governor August 1st, 1917, to fill the vacancy caused by the resignation of Judge Tuttle.

[3] Appointed February 20th, 1917, to take effect May 19th, 1918.

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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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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ERRORS

OF THE

STATE OF CONNECTICUT

THE PLUM TREES LIME COMPANY *vs.* SAMUEL KEELER.

Third Judicial District, Bridgeport, April Term, 1917.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

A motion to correct the finding under General Statutes, §§ 795, 796, should contain written exceptions to particular findings or to the refusal to find as requested. If made under § 797, it ought not to anticipate, but to follow within one week, the filing of the finding.

A title to property, or a lien upon or possession of it, is not essential to the existence of an insurable interest therein. It is sufficient to constitute such an interest, that one derives a benefit from the existence of the property or would suffer a loss by its destruction.

In the present case the plaintiff, who was a lessee of a lime kiln which was in a dilapidated condition, having constructed several new buildings upon the premises at a cost to it of about $2,500, and being bound by its lease to keep the buildings in good repair, insured for $1,200 those which it had built, but by a mistake, occasioned by the insurance company, the policy was taken out in the name of the defendant landowner, who received the insurance money after the buildings had been destroyed by fire, although he had refused, at the plaintiff's request, to take out any insurance upon his own buildings. *Held* that the plaintiff had an insurable interest in the property; and that the defendant was to be regarded as a mere custodian or trustee of the insurance moneys for the benefit of the plaintiff, who was equitably entitled to them.

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A trust is implied when, as in this case, it is deducible from the transaction as a matter of intent.

The defendant claimed that he was entitled to a set off for the expenses incurred by him in a former suit in collecting the insurance moneys now in question. *Held* that this claim was not well founded, since the defendant could not properly have recovered attorney's fees in that suit.

Argued April 19th—decided July 6th, 1917.

ACTION to recover moneys paid by certain fire insurance companies to the defendant as a fire loss, to which the plaintiff claimed to be equitably entitled, brought to and tried by the Court of Common Pleas in Fairfield County, *Scott, J.;* facts found and judgment rendered for the plaintiff for $819, and appeal by the defendant. *No error.*

The plaintiff is a corporation organized under the statute laws of Connecticut. This action is brought by Wilbur F. Tomlinson, Charles Kerr and Alphaus A. Hathaway, its directors, acting as trustees for the purpose of closing up the business of the corporation pursuant to the provisions of §§ 29 and 30 of Chapter 194 of the Public Acts of 1903, regulating the voluntary dissolution of corporations.

In August, 1910, the defendant was the owner of the premises described in the plaintiff's complaint, as amended, upon which was a ledge or deposit of limestone, with lime kilns and lime shed. On August 4th, 1910, the defendant leased these premises to one Alfred P. Phillips, for a term of ten years from date, which premises, under a series of assignments of this lease, passed into the possession of the plaintiff on the 24th day of February, 1912. This lease provided that the lessee should keep the kilns, buildings, machinery and plant thereon, in good repair, and should deliver up the same at the expiration of its tenancy in as good condition as they were then in, ordinary wear, fire and

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other unavoidable casualties excepted. Subsequent to the 24th day of February, 1912, and up to the 8th day of October, 1914, the plaintiff was engaged in mining or quarrying limestone on these premises, and the burning, manufacturing and preparing the same for market.

At the time of the execution of this lease, and for a number of years prior thereto, these premises had been unoccupied and unused, and the kilns and buildings had been grossly neglected. At the time these premises passed into the possession of the plaintiff, the plant thereon consisted of three lime kilns, constructed of non-combustible materials, to wit: exteriorly of brick, and lined internally with fire brick, and the structures connected with the kilns, built of wood, were decayed and unsafe and not practicable for the uses required of them, and a lime shed practically dismantled by the removal of everything that could be carried away; the plant being unfit, inadequate and insufficient for prosecuting the business of the plaintiff. The plaintiff, for the purpose of enabling it to carry on its business conveniently and efficiently, was compelled to erect and construct, and did erect and construct, various structures and appliances on the leased premises, at its own cost and expense, and for its own purpose and advantage. The structures erected by the plaintiff on these leased premises, consisted of a wooden tower on top of the kilns, with a hoisting apparatus thereon for the purpose of hoisting their raw limestone and fuel to the top of the kilns; a platform on top of the kilns with a bridge leading therefrom to the hillside adjoining the kilns for the purpose of affording access thereto with teams and materials; an engine-house and other structures and appliances adapted to the business of the plaintiff, costing in the aggregate about $2,500. The buildings, structures and appliances erected by the plaintiff on these premises were new, and did not re-

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place other similar structures, but were radically different from those used by its predecessors in occupancy of the premises, and changed the method of handling the raw material and finished product in the plaintiff's business.

The plaintiff, desiring to protect its property on these premises, made application to the local agent of the Fidelity-Phoenix Fire Insurance Company of New York, and the Phoenix Fire Insurance Company of Hartford, Connecticut, for insurance thereon. At the time of making such application, the plaintiff, by its president and general manager, informed the agent of the condition of the property desired to be covered by the proposed insurance; that the structures to be insured were the property of the plaintiff, and were located on real estate occupied under a lease from the defendant, and that it desired to have the policies issued in the name of the plaintiff; but they were informed by this agent that the policies could not be issued in the name of the plaintiff, but must be issued in the name of the defendant as owner of the land upon which the structures were located. The plaintiff, relying upon the statement of the agent, caused the property of the plaintiff, located on these premises, to be insured for the sum of $600 under Policy No. 329, issued by the Fidelity-Phoenix Fire Insurance Company, and for the additional sum of $600 under Policy No. 2295, issued by the Phoenix Fire Insurance Company, in the name of the defendant as beneficiary. The plaintiff paid the premium on these policies, retained the same in its possession, and had no intention of insuring the property of the defendant, but intended to insure its own property located on the leased premises.

The defendant was ignorant that these policies, Nos. 329 and 2295, had been issued until after the property insured thereunder had been destroyed by fire, when ap-

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plication was made to him by the plaintiff to execute a proof of loss as required by the insurance companies. The plaintiff, by its officers, requested the defendant to insure his buildings on these premises, but the defendant refused to do so. On October 8th, 1914, the buildings, structures and appliances on these premises belonging to the plaintiff and insured under the policies were destroyed by fire. At the time of the execution of the policies, and at the time of the loss occasioned by the fire, the plaintiff was the owner of the property insured under these policies. Upon proof of loss, the insurance companies adjusted the same and paid the sum of $1,200 to the defendant, and the defendant has retained the same.

On November 17th, 1914, the plaintiff initiated proceedings for the dissolution of its corporate existence, pursuant to the provisions of §§ 29 and 30 of Chapter 194 of the Public Acts of 1903, regulating the voluntary dissolution of corporations, and subsequent to that date the plaintiff ceased doing business as a going concern, and its directors have since then been acting as trustees in closing up the business of the corporation. All property belonging to the plaintiff is in the hands and under the control of its directors acting as trustees. The plaintiff, by its directors acting as trustees, made demand upon the defendant for the proceeds of the insurance policies, as a part of the assets of the company for the purpose of liquidating its indebtedness and closing up its business. Subsequent to the commencement of proceedings for winding up the corporate existence of the plaintiff, the defendant offered to expend the proceeds of the policies in restoring the defendant's own buildings on these premises which were not insured under the policies. The defendant refused to pay over the proceeds of the insurance to the plaintiff. The proceeds of the insurance policies in

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the hands of the defendant are insufficient to restore the structures and appliances built by the plaintiff, to an efficient, workable condition. Immediately after proceedings were commenced to terminate the corporate existence of the plaintiff, its directors, acting as trustees, surrendered the possession of the leased premises to the defendant, and the defendant has since been in possession of the same.

Leo Davis, for the appellant (defendant).

George Wakeman, for the appellee (plaintiff).

RORABACK, J. The plaintiff seeks to recover from the defendant the proceeds of two insurance policies described in the complaint, and judgment was rendered for it to recover $819.27.

Several reasons of appeal are based upon alleged errors of the trial court in denying certain paragraphs of the defendant's motion to correct the finding. This motion to correct is informal. If we consider it as brought under §§ 795 and 796 of the General Statutes, we do not find, as we should, any written exceptions to any finding of facts or to a refusal to find facts as requested. Practice Book (1908) p. 268. The reasons of appeal, if considered as made under the provisions of § 797 of the General Statutes, are irregular. This section provides, in substance, that in lieu of the motion to correct, under §§ 794, 795 and 796 of the General Statutes, either party may, within one week after he shall have received notice of the filing of such finding, file with the clerk of the court a copy of the evidence and rulings, with a motion that such evidence be made a part of the record on appeal, and that the claims of the appellant for such correction may be presented in the assignments of error in the same way that questions

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of law are now raised. The record discloses that this motion, to make the evidence and rulings part of the record, came too early in the defendant's attempt to take his appeal. It should have been made within one week after he received notice of the filing of the finding. It appears, however, that this motion was in fact made about four months before the finding of the trial court was filed with the clerk of the court. But it appears that the court below recognized the defendant's motion as made under the provisions of § 797, as it ordered a certificate of the evidence. The purpose of the defendant is clear, and we are not disposed, by a strict construction of § 797 of the General Statutes, to deprive him of a remedy which, if properly pursued, was his.

One of the requests to correct the finding was allowed by the trial court. Other assignments of error relate to facts of but little importance. The evidence as to the remainder of the facts referred to in the motion to correct, is either conflicting, or is of such a nature that we cannot say that the trial court erred in finding or refusing to find certain facts. Therefore the motion to correct the finding is overruled, and the claim for a correction is denied.

The first four reasons of appeal assign error in a general and indefinite manner. They may, however, be considered as suggesting the proposition that the court erred in holding that the Plum Trees Lime Company had an insurable interest in the property insured. It may be said generally that "by the law of insurance, any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself." *Eastern R. Co.* v. *Relief Fire Ins. Co.*, 98 Mass. 420, 423.

In *Getchell* v. *Mercantile & Mfrs. Mut. Fire Ins. Co.*,

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109 Me. 274, 277, 83 Atl. 801, 30 Ann. Cas. 739, the court say: "The crucial question therefore is, will the insured be directly and financially affected by the loss of the property insured. If so, he has such an interest as the law will recognize. The loss must not be indirect or sentimental, but direct and actual. It is not necessarily an interest in the property in the sense of title, but a concern in the preservation of the property and such a relation to or connection with it as will necessarily entail a pecuniary loss in case of its injury or destruction. This opens a wide field and the decisions take an extensive range with a growing tendency to expand rather than to contract the scope of the term. It has therefore been held that it is sufficient if the insured has any legal interest whatever as an owner in fee, a mortgagee, a tenant for life or a lessee." In *Fowle* v. *Springfield F. & M. Ins. Co.*, 122 Mass. 191, 194, the court said: "The plaintiffs had an insurable interest in this building. They had erected it at their own expense, and used and occupied it, in their business, as a carpet store. They might wish to rebuild it, or to indemnify themselves for their expenditures, in the event of its loss by fire. In either case, it was proper for them to procure insurance, and they might lawfully do so to the extent of the value of the building. It is clear that they would derive benefit from its continuing to exist, and would be injured by its destruction." The plaintiffs, in the case quoted, were sublessees of the land on which the building insured stood. See, also, cases cited in note, 30 Ann. Cas. 741, and 14 R. C. L. 915, § 91.

In the present case the plaintiff's lease required it to keep the kilns, buildings and machinery in good repair. It had expended about $2,500 in erecting buildings, structures and appliances upon the leased premises. These buildings were new and entirely different

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from those used by its predecessors in occupancy. This lease it appears, under ordinary conditions, was not to expire until August, 1920. Under these circumstances the plaintiff had such an insurable interest in the property in question as permitted it to procure the insurance and to recover in case of loss.

The plaintiff's complaint alleges: "Said corporation, for its own benefit, protection and advantage, and at its own cost and expense, insured its property, so erected and constructed on the leased premises, . . . under policies which, through error, inadvertence and mistake, were issued by the Insurance Companies in the name of the defendant, Samuel Keeler, as beneficiary, instead of in the name of said Plum Trees Lime Company, although the defendant had no interest in these policies or the property insured thereby, other than a nominal one resulting from the error as aforesaid." These allegations were denied by the defendant in his answer. We learn from the judgment-file that the issues upon the questions thus presented were found in favor of the plaintiff. The finding of facts made by the trial court is entirely consistent with this adjudication. It also appears that the defendant, when requested to insure his buildings, refused so to do; and that the value of the plaintiff's buildings and structures standing upon the leased premises, when they were destroyed by fire, was much greater than the amount of insurance covered by the insurance policies then in force. Under these conditions it is now too late for the defendant to claim that the Plum Trees Lime Company had no legal or equitable right to recover this insurance money.

The defendant also claims that the trial court erred in reaching the conclusion that the defendant was holding this insurance money in trust for the plaintiff. It must be conceded that it appears from the face of the insurance policies that the apparent legal title to this

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insurance and the money derived therefrom was in the defendant. But the court below has found as a fact that the intention of the Plum Trees Lime Company, the party procuring the insurance, was to protect its own property and not that of the defendant. It has also been found that through mistake and inadvertence the insurance policies were issued by the insurance companies in the name of the defendant, Keeler, as beneficiary, although he has no interest in the policies other than a nominal one. Mr. Justice Swayne, in *Seymour* v. *Freer*, 75 U. S. (8 Wall.) 202, 213, 19 L. Ed. 306, 310, defined a trust as follows: "A trust is where there are rights, titles, and interests in property distinct from the legal ownership. In such cases, the legal title, in the eye of the law, carries with it, to the holder, absolute dominion; but behind it lie beneficial rights and interests in the same property belonging to another. These rights, to the extent to which they exist, are a charge upon the property, and constitute an equity which a court of equity will protect and enforce whenever its aid for that purpose is properly invoked." It is also a familiar principle of law that a trust may be express or implied, and that it is implied when deducible from the transaction as a matter of intent. 8 Words & Phrases, p. 7121. It follows, therefore, that from the facts found the trial court properly held that the defendant might well be regarded as holding the proceeds of this insurance money in trust.

One reason of appeal is that the court erred in ruling and holding that the plaintiff was not bound, under its lease, to pay to the defendant rent for the term beginning March 1st, 1914, and ending March 1st, 1916. From the scant information which the record contains upon this branch of the case, we cannot find any error in the action of the trial court in that connection.

Upon the facts found there is no ground for the claim

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now made, that the court erred in holding that the defendant was not entitled to a set-off for his expenses in a former suit in collecting the insurance money now in question. It appears that the only issue in that case was the right to the possession of the checks which were given by the insurance companies in their adjustment of the loss sustained by fire. These checks were made payable to the defendant, Keeler, and were in the possession of Tomlinson, the president of the Plum Trees Lime Company. This question was litigated between Keeler and Tomlinson; Keeler was successful in this litigation and Tomlinson paid the costs. It appears that this litigation was not against the corporation, but against an individual who happened to be president of the company. But a more complete and decisive objection to this claim is, that it is apparently based upon a demand for attorneys' fees in an action in which no such claim could have been properly allowed.

There is no error.

In this opinion the other judges concurred.

The Coast and Lakes Contracting Corporation *vs.* Manuel J. Martin et al.

Second Judicial District, Norwich, April Term, 1917.

Prentice, C. J., Roraback, Wheeler, Shumway and Case, Js.

General Statutes, § 831, provides that attachments of machinery, engines, or implements, situated and used in any "manufacturing or mechanical establishment," may be made without removal of the property, if in the opinion of the officer it cannot be moved without manifest injury. *Held:*—

1. That the statute was intended to include all establishments outfitted with machines used in conducting such operations as the

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business required, and therefore a stone quarry equipped with hoisting-engines and compressed-air machines which were used for getting out the stone, constituted a "mechanical establishment" within the fair meaning of the statute.

2. That it was not essential to the validity of the attachment—which was made in this case without a removal of the machines—that the officer's opinion as to injury in case of removal should be set forth in his return, especially as it was admitted that he in good faith believed a removal of the property at the time of its attachment would be injurious to it, and the trial court found as a fact that the machines could not have been moved without injury.

In the absence of an outer door, the posting of a notice of the levy of an execution in a conspicuous place upon the inside wall of the shed or structure in which the hoisting-engine is contained, is a sufficient compliance with the provisions of § 911 relating to the levy of executions on machinery.

In the present case the property attached and levied upon was described in the notice as "compressed-air machinery" and "three hoisting-engines." *Held* that as against one who bought the property "subject to existing liens," this description was sufficient.

An adjudication in bankruptcy does not dissolve attachment liens acquired more than four months before the filing of the petition; but the attaching creditor, upon obtaining judgment, must collect it out of the property attached, and the judgment, upon request, should be so restricted.

Argued April 24th—decided July 6th, 1917.

SUIT to vacate an alleged attachment of personal property and to restrain the defendants from taking and selling the property on execution, brought to and tried by the Superior Court in New London County, *Reed, J.;* facts found and judgment rendered for the defendants, and appeal by the plaintiff. *No error.*

Frank L. McGuire, for the appellant (plaintiff).

Charles B. Whittlesey, with whom was *Perry J. Hollandersky*, for the appellees (defendants).

SHUMWAY, J. The complaint in this action seeks an injunction against the defendant, a Deputy Sheriff of New London County, to restrain him from taking and

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selling on execution certain property held under attachment. The execution was issued to enforce a judgment rendered in an action brought by Joseph Novy against the Breakwater Company. Novy's action was begun and the attachment made on August 15th, 1913. At that time the Breakwater Company was engaged in the business of quarrying stone in the town of Ledyard. The stone, after it was taken from the quarry, was carried away and used in the construction of breakwaters and sea-walls. The quarry occupied ten to twelve acres, covered by the operations of the Company. The land was owned by a corporation called The Rivers and Harbors Improvement Company.

Among the articles of property owned by the Breakwater Company were three hoisting-engines and compressed-air machinery, used by the Company in the quarry. On the 27th of December, 1913, a petition in bankruptcy was filed against the Breakwater Company and it was adjudicated a bankrupt on February 2d, 1914. The judgment in favor of Novy against the Breakwater Company was rendered on April 2d, 1914. On March 23d, 1914, the trustee in bankruptcy sold the property under attachment to one Siegel, and he, on April 4th, 1914, transferred the same to the plaintiff in this action.

The process in the action of Novy against the Breakwater Company was served and the attachment was made by J. H. Tubbs, Deputy Sheriff of New London County. He attached, as the property of the Breakwater Company, three hoisting-engines and the compressed-air machinery. At the time of the attachment the hoisting-engines were in different parts of the quarry and were separately and partially enclosed by rough structures, each having a roof, but open on one or more sides. The compressed-air machinery was located in a long building which was divided into separate rooms

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by partitions, and had doors in front and rear. In the same room were two pumps. The compressed-air machinery consisted of two compressors, a steam-cylinder and an air-cylinder. Each compressor was mounted on a bed, on one end of which was a steam-engine and on the other end was the cylinder in which the air was compressed. On each of the compressors was a plate giving the name of the manufacturer, its number, and size.

From the judgment in favor of Novy the Breakwater Company appealed to the Supreme Court of Errors, and the judgment of the Superior Court was affirmed on December 22d, 1914, and an execution delivered to Deputy Sheriff Martin, the defendant herein, on February 20th, 1915; and on the same day he made levy and posted notices of the sale.

The plaintiff's complaint was doubtless framed, having in mind §§ 831 and 911 of the General Statutes, and with a purpose to allege sufficient facts to show that as the property attempted to be attached had not been removed by the officer, the provisions of these statutes in such cases had not been complied with. One of the important questions in the case is whether or not the acts of the officer as detailed in the finding, secured to the plaintiff named in the process a lien on the property attached, so that the same could be held to satisfy an execution issued on final judgment.

The statute, § 831, provides that in certain cases an officer making an attachment is not required to move the property attached. The portion of the statute material for the purposes of this case, is as follows: "Attachments of machinery, engines, or implements, situated and used in any manufacturing or mechanical establishment, . . . which cannot, in the opinion of the officer levying upon the same, be moved without

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manifest injury, shall be effectual to hold the same, without any removal thereof; *provided* the service of such attachment shall be completed and a copy of the process and accompanying complaint, with the officer's return indorsed thereon, particularly describing the property attached, shall be filed in the office of the town clerk of the town in which such property shall be situated, within twenty-four hours after such attachment shall have been made." Section 911, relating to the levy of an execution on machinery, engines, or other implements, provides that if the property cannot, in the opinion of the officer levying the same, be moved without manifest injury, he shall not move it, but shall give notice of such levy by posting a notice thereof on the outer door of the building in which such property is situated.

One of the claims of the appellant is that the attachment was void because the Breakwater Company's business of working a quarry was not a "manufacturing or mechanical establishment." This statute is peculiar to this State, and decisions in other jurisdictions give but little aid in construing its meaning. The purpose of the statute was to provide the method by which machinery, engines and implements, could be attached without moving them, and thereby held to secure a judgment. The word "manufacturing" has no restricted meaning as used in the statute. It is apparent that such was not the intent when the word "mechanical" was inserted. The primary meaning of the word "mechanical" is pertaining to machinery, and the fair meaning of the statute is that it was intended to include all establishments outfitted with machines used in conducting such operations as the business required. The machines attached were in use in a mechanical establishment.

Another contention of the plaintiff is that the attachment made by Deputy Sheriff Tubbs is void because he

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did not state in his original return that, in his opinion, the property could not be removed without manifest injury. The statute leaves it to the judgment of the officer making an attachment to determine whether or not the machine could be moved without injury, and the return which an officer makes on the original writ of his doings is only prima facie evidence of the facts stated therein, and they may be disproved by proper evidence. The only thing omitted, as claimed, is a statement of the officer's opinion that the property could not be moved without manifest injury. That he entertained this or that opinion, may be as readily determined in many cases by what he does as by what he says. But the court has found as a fact that the property could not be moved without injury, and it is admitted that the officer was in fact rightfully of the same opinion at the time of the attachment. It may be that the officer ran a risk that the attachment would not hold if he came to a wrong conclusion, but it would be manifestly unfair to an officer to so rule if he acted in good faith. In the case of *Morey* v. *Hoyt*, 62 Conn. 542, 556, 26 Atl. 127, it was held that under the circumstances in that case it was not necessary to the validity of the attachment of machinery that the property be moved or a reason given in the return why it was not. The attachment did not fail in this case because Deputy Sheriff Tubbs did not state in the return that in his opinion the machines could not be removed without manifest injury; but it is not necessary to rule that it would be so in every case.

The plaintiff contends that the levy of the execution by Deputy Sheriff Martin was void, because he did not post notices of the levy on the outer door of the buildings in which the hoisting-machines were situated. The structures had no doors which could be moved to permit entrance. The notices were posted in a con-

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spicuous place upon the structures, which was a sufficient compliance with the statute.

The plaintiff complains because the property attached and levied upon was not "particularly described" in the attachment and the notice of levy. The description, as made, was "compressed-air machinery," and "three hoisting-engines." The purpose of requiring such description was to notify all persons who were or might become interested in the property, that the property was under attachment and levy. No claim is made that the plaintiff was a purchaser without notice. The property was sold to the plaintiff "subject to existing liens." If the plaintiff investigated and made inquiry at the proper place, the town clerk's office in Ledyard, he would have found that what purported to be an attachment lien rested upon the compressed-air machinery and hoisting-engines in the quarry in Ledyard, the property of the Breakwater Company, and possibly might have found in the quarry the notices posted by Deputy Sheriff Tubbs, indicating the particular property attached. The description was sufficient.

Another claim by the plaintiff is that Novy lost his lien, if he had one at any time, by the adjudication in bankruptcy of the Breakwater Company. Attachment liens acquired more than four months before proceedings in bankruptcy are begun, by filing a petition, are not dissolved by an adjudication in bankruptcy. *Metcalf* v. *Barker*, 187 U. S. 165, 23 Sup. Ct. 67. The attachment was made on August 15th, 1913. The petition in bankruptcy was filed December 27th, 1913.

But the plaintiff contends that under the authority of *Wakeman* v. *Throckmorton*, 74 Conn. 616, 621, 51 Atl. 554, the judgment in favor of Novy should have been restricted "to be satisfied only out of the interest which the defendant had in the property attached."

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If such restriction had been claimed, or a suggestion made to the court that the defendant was a bankrupt, the judgment no doubt would have been so restricted; but the judgment is not void. Novy must, if he collects his judgment at all, collect it out of the property attached.

There is no error.

In this opinion the other judges concurred.

Mary R. Lyons *vs.* Marianne Walsh.

Second Judicial District, Norwich, April Term, 1917.

Prentice, C. J., Roraback, Wheeler, Shumway and Case, Js.

Every owner of land is entitled to have his soil in its natural state supported by the adjoining land.

A landowner who removes his own soil supporting the higher land of an adjoining proprietor, and erects a retaining wall wholly on his neighbor's land, may or may not be guilty of a trespass, depending upon whether the invasion of the adjoining land was with his neighbor's consent or not; but in either event the obligation to maintain such wall does not run with the land of the lower proprietor, nor affect his successors in title. The result would have been different had the wall been erected by the lower proprietor upon his own land: then the obligation assumed would have become a charge upon that land, at least so far as the maintenance of the wall was necessary to preserve the rights of the upper proprietor.

Such a wall becomes as much a part of the realty upon which it stands as the earth had been which the wall replaced, and with the same incidents and burdens of ownership.

In the case at bar the retaining wall had been built long before either of the present owners had acquired their respective titles, and each sought to compel the other to rebuild and maintain the wall, parts of which had already fallen and injured the lower premises owned by the plaintiff. *Held* that while the plaintiff was entitled to recover for the damage already done to her land, irreparable injury was not so clearly disclosed by the record as to warrant the granting of a mandatory injunction to compel the defendant to restore the wall to its original condition.

Argued April 26th—decided July 6th, 1917.

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Lyons *v.* Walsh.

SUIT for a mandatory injunction requiring the defendant to repair and rebuild a stone wall supporting her land adjoining and above that of the plaintiff, brought to and tried by the Court of Common Pleas in New London County, *Waller, J.;* facts found and judgment rendered for the defendant upon her counterclaim, and appeal by the plaintiff. *Error and cause remanded for the rendition of a judgment for the plaintiff for damages.*

The parties own adjoining city house lots on a street in Norwich running north and south. Both lots were originally in one tract, and in its natural condition the land sloped unbrokenly and at a steep pitch from the north. Long before either of the present owners acquired title to her lot, the then owner of the lower lot—who had purchased from the original owner of the tract—leveled a part of his land for building upon it, and in so doing excavated and removed the soil from this portion up to and along a section of his northern boundary line. This destroyed for a corresponding distance the natural lateral support of the adjoining land of the north lot, and to replace it he built into the bank a retaining wall ten feet high along this portion of the east and west line. This wall was set wholly upon the upper, or what is now the Walsh lot, and the dividing line of the two properties lies along its exposed southern face.

Some years afterward, in 1895, and after the defendant had become the owner of the north lot, a later owner of the south lot made another excavation in preparation for further building, and removed more soil up to the line as extended from the eastern end of the wall. This operation removed the lateral support of the Walsh land along the continued line, and in substitution for this support he extended the wall at the same height of ten feet still further along the line—

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continuing it wholly on the Walsh land so that the dividing line of the two lots follows the southern face of the wall throughout its length. The height of the wall measures the depth of the excavations at the line, and no additional burden requiring more than the natural lateral support of the soil has ever been added to the Walsh lot.

The parties are ignorant of the circumstances under which the first section of the wall was placed on the Walsh lot, save that its purpose and the person erecting it were as already stated, and although the remaining part of the wall was built after the defendant had acquired her present ownership, the record is silent as to why this part of the wall was also placed wholly upon her land. No deed dealing with any of the property involved mentions the wall.

The plaintiff bought the south lot in 1913, and through neglect and the work of the elements, the wall has been disintegrating for several years, there being no evidence of any effort by any one to maintain it or keep it in repair. It is now out of plumb in parts, and stones from it have become loosened and dislodged, and have fallen upon the plaintiff's land. Damage to the plaintiff from this cause during the two years next before this action was brought amounts to $25. More trouble of this character is likely to occur, and the wall is in danger of further collapse unless it is strengthened or restored.

There was apparently no dispute between the parties as to these essential facts, and upon them the plaintiff claimed, by way of equitable relief, a mandatory injunction directing the proper repair or rebuilding of the wall by the defendant, and legal relief in damages for the injury already incurred.

The defendant, in pursuance of a counterclaim which rehearsed the more important of the facts and supple-

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mented them with further allegations in the nature of assumed legal deductions from them, claimed a mandatory injunction compelling the restoration of the wall by the plaintiff to a condition of efficiency, or the furnishing of other adequate support for the defendant's land.

The trial court rendered judgment for the defendant for a mandatory injunction as prayed for, and for nominal damages, and the plaintiff's claim of error, alternatively stated in its several assignments upon the appeal, is based upon the court's holding that the duty of maintaining the wall rested upon the plaintiff, and in not holding that it rested upon the defendant.

William H. Shields and *William H. Shields, Jr.*, for the appellant (plaintiff).

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

CASE, J. When a former owner of the Lyons' land first disturbed its surface, he did so at the peril of answering in damages if his act should destroy the lateral support which was his neighbor's by natural right. The law as to that situation is universally settled. "The right of an owner of land to the support of the land adjoining is *jure naturæ*, like the right in a flowing stream. Every owner of land is entitled, as against his neighbor, to have the earth stand and the water flow in its natural condition." *Gilmore* v. *Driscoll*, 122 Mass. 199, 201; *Trowbridge* v. *True*, 52 Conn. 190; *Ceffarelli* v. *Landino*, 82 Conn. 126, 72 Atl. 564.

He apparently recognized this, and sought to forestall the probable result to the higher ground of the upper lot, by substituting an artificial support to safeguard it. In every effective sense he accomplished this purpose, but what he actually did was to take away a

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portion of his neighbor's land and replace it with a solid stone wall. Whether he invaded the adjoining lot by mistake or with its owner's consent is of no consequence so far as his successors in title are concerned. It was in any event so done as to leave no charge upon his own land. The wall became as much a part of the realty upon which it was built as the earth had been which it replaced, and with the same incidents and burdens of ownership as attach to every part of the land on which it stands. *Ward* v. *Ives*, 91 Conn. 12, 21, 22, 98 Atl. 337.

The accepted law with relation to lateral support is, therefore, without direct significance here, and of only an incidental interest in its possible bearing upon the equities which the case discloses. Such right arising from it as the defendant's predecessors in title had in relation to the adjoining land, was by way of relief in damages once a wrongful invasion had been followed by an actual injury to the land. There is of course no natural right to equitable interference for the prevention of such an anticipated wrong,—though it may very well be that in cases presenting situations peculiar to themselves and disclosing the essential elements of irreparable injury a court of equity will interpose its aid. But the redress contemplated by the law is that which comes from an infringement of the right that works actual damage. The violator is then answerable for his tort whether he be the owner of the premises on which the initial mischief is committed, or the merest stranger to the title. *Gilmore* v. *Driscoll*, 122 Mass. 199, 208. The action is a purely personal one. The wrong which gives rise to it binds the land to nothing, charges the title with nothing.

But if the owner, in anticipation of such an injury arising out of his acts, sets an artificial structure on his own land to prevent it and to replace what he has

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removed, he assumes an obligation which equity will recognize, and charges the land with its maintenance—so far, at least, as that maintenance is necessary to preserve his neighbor's rights.

The defendant seems to assume that in some way the situation presented here is controlled by this principle, and relies chiefly upon the earnestly urged unfairness of saddling the maintenance of the wall upon her, when it was confessedly erected by a former owner of the adjoining land to protect what later became hers from the consequences of his invasion. However persuasive her statement of the equities may appear in this limited view of the situation, the claim is not tenable. It ignores the entire absence of the link vitally necessary here to fasten any liability upon the plaintiff,—a burden upon the land itself which attaches to her as its owner. She is obviously only reachable through this, and it is not even seriously suggested that under the positive and well understood law of real property the land came to her charged with any duty to this wall. As to any supposable personal agreement by the builders of the wall to maintain it—if we were at liberty on the record before us to assume that such an agreement ever existed—there is no conceivable theory of law or equity which could transfer the obligations of such a personal undertaking to the plaintiff upon her mere acquirement of a title in no way affected by it.

But while these considerations are decisive of the case, it is apparent that something might be said for the plaintiff's equitable position here,—if there were occasion to treat the matter in that aspect. She succeeded to her present ownership as recently as 1913, and took the land as she found it. The wall was no part of her purchase, but was an open and visible part of the adjoining property. We may properly assume from the

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facts found that it was then in an advancing condition of decay. Whatever the original purpose of its erection had been, it became after her ownership began a source of annoyance, if not a menace, to her occupation. Even had she taken title with knowledge that the structure had been voluntarily put there by some former owner of the land she was buying, to avoid a personal liability for a tort of his own, this could not weaken her position from the standpoint of equity. She was in no sense equitably, any more than legally, answerable for any act of her predecessor in title, to which she was not a party, and which did not result in a charge upon the land.

We are unable to sustain the judgment of the trial court charging the plaintiff, as it does, with the duty of maintaining the wall, but the finding is comprehensive enough to warrant a final disposition of the case without a retrial.

The plaintiff is entitled to recover for the damage already done to her land by falling parts of the wall, but as to her claim for equitable relief by way of a mandatory injunction directing the rebuilding or restoration of the wall to its original condition, we are not satisfied that irreparable injury is clearly enough disclosed to warrant the exercise of so drastic a power. Equitable relief of this character is, and for the most obvious reasons should be, granted only in situations which so clearly call for it as to make its refusal work real and serious hardship and injustice. The facts of the case before us hardly bring it within this requirement.

There is error, the judgment is reversed, and the cause is remanded with directions to the Court of Common Pleas to enter a judgment for the plaintiff to recover damages assessed at twenty-five dollars.

In this opinion the other judges concurred.

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LUCY A. MASSEY, GUARDIAN, *vs.* LYDIA L. MAIN FOOTE.

Second Judicial District, Norwich, April Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, SHUMWAY and CASE, JS.

In this State the jurisdiction of Courts of Probate is entirely statutory; and in the exercise of this jurisdiction they possess only such powers as are necessary to the performance of the duties imposed upon them by law.

Under General Statutes, § 203, authorizing probate courts to modify or revoke *ex parte* orders or decrees before appeal, a Court of Probate is powerless to revoke an order of distribution made by it upon notice to the parties and after an appeal therefrom has been taken. Such a decree can be reversed or modified only upon appeal.

Argued April 26th—decided July 6th, 1917.

APPEAL by the plaintiff from the disallowance by the Court of Probate for the district of Norwich of her account as guardian of the defendant, taken to and tried by the Superior Court in New London County, *Reed, J.;* facts found and judgment rendered confirming, with slight modifications, the decree of the Court of Probate, from which the plaintiff appealed. *Error and new trial ordered.*

C. Hadlai Hull, for the appellant (plaintiff).

Edmund W. Perkins, for the appellee (defendant).

SHUMWAY, J. The only debatable question in this case involves an interpretation of § 203 of the General Statutes. The part of the statute bearing upon the question reads thus: "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

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final settlement thereof, upon the written application of any person interested therein."

This court has held and reaffirmed, that the entire jurisdiction of probate courts is statutory, special and limited. In the exercise of such statutory jurisdiction they possess such incidental and implied powers, legal and equitable, and such only, as are necessary to the entire performance of all the duties imposed upon them by law. *Potwine's Appeal*, 31 Conn. 381; *Hall* v. *Pierson*, 63 Conn. 332, 28 Atl. 544; *Schutte* v. *Douglass*, 90 Conn. 529, 97 Atl. 906. In passing upon the jurisdiction of probate courts, this court has considered, also, the power of such courts to modify or set aside their orders and decrees.

In the case now under consideration, only such facts as are material need be recited. It appears that William L. Main died in 1890, leaving a will which was duly offered for probate and was approved. The estate was distributed by order of the Court of Probate. A portion thereof was distributed to Amos W. Main, a son of William L. Main. Amos W. Main died in July, 1901, leaving a widow (afterward remarried), the present plaintiff. She was appointed administratrix upon her husband's estate on July 18th, 1901. She duly filed an inventory and charged herself with this item: "The interest of said deceased in the estate of his late father, estimated at $2,000."

On the 6th day of October, 1908, distributors were appointed to distribute the estate. The Court of Probate having ascertained the heirs and distributees of the estate of Amos W. Main, ordered the estate distributed to them. To the present plaintiff there was distributed as follows: "One undivided third of the distributive share of what will remain for distribution of the estate of William L. Main . . . that by the terms and provisions of the will of said William L. Main would

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go to the said Amos Main on the death of the said widow of said William L. Main, if the said Amos had outlived said widow." At the time of Amos W. Main's death he had a minor daughter, Lydia L. Main, the present defendant, and a minor son, Clifford M. Main. On the 27th day of July, 1901, the plaintiff was appointed guardian of her minor daughter, Lydia L. Main. The widow of William L. Main died in April, 1913.

By the distribution of the estate of Amos Main on October 6th, 1908, which was approved by the Court of Probate, one third of what remained of William L. Main's estate was distributed to the plaintiff. On the 8th day of April, 1914, the Court of Probate ordered the balance of the estate of William L. Main to be distributed to the beneficiaries named in the will, and these beneficiaries had been ascertained and adjudicated by the decree of the court of October 6th, 1908. From the order of the court of April 8th, 1914, one of the executors of the will of William L. Main appealed to the Superior Court, which appeal was pending in said court until October 27th, 1914. In September, 1914, the executors of William L. Main's estate petitioned the Court of Probate, setting out that the order of April 8th was informal, incorrect and erroneous, and on the 27th day of October, 1914, that court made the following order: That said order of this court made and passed on the 8th day of April, 1914, be, and hereby is, reconsidered and amended to read as follows: ". . . The heirs at law of said Amos Main are found to be his two minor children, Lydia Main and Clifford Main, Mrs. Lucy Massey being their guardian, each of said two children taking one half of 53/419 of said balance;" thus giving nothing to the widow.

This procedure certainly constituted a revocation of the order of April 8th, and if the Court of Probate

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had authority to do this, the action of the Superior Court affirming the order of October 27th, 1914, should stand, otherwise it should be revoked.

The statute above quoted gives the Court of Probate authority to modify or revoke its decrees made *ex parte*, only before an appeal is taken. But in this case an appeal was taken and the order was not made *ex parte* but upon notice. In the case of *Delehanty* v. *Pitkin*, 76 Conn. 412, 56 Atl. 881, the power of the Court of Probate over its decrees was fully considered, and there it was held that a Court of Probate had no authority to revoke its decree admitting to probate a document purporting to be a last will and testament, although that decree was obtained by fraud. The court, in the case last named, say it was at that time a question of first impression in this State, though the question was recognized but not decided in *Potwine's Appeal*, 31 Conn. 381. As indicating how that decision was regarded, the reporter, in the *Potwine* case (p. 383), appended to the opinion a quotation from *Pettee* v. *Wilmarth*, 87 Mass. (5 Allen) 144, in which this pertinent clause appears: "If he [the Probate Judge] could rescind his first decree, he might rescind the second, and so on indefinitely; and there could be no certainty that any decree had finally established any party's rights, but every person, in whose favor a decree had been obtained, would hold it precariously at the discretion of the judge who passed it." The doctrine of *Delehanty* v. *Pitkin*, 76 Conn. 412, 56 Atl. 881, is affirmed in *Schutte* v. *Douglass*, 90 Conn. 529, 97 Atl. 906, and it is now so well settled as to be no longer open to question.

It is, however, contended in the appellee's brief, that the power of the Court of Probate to revoke decrees, extends not alone to *ex parte* orders, but to orders in reference to the settlement of any estate before final

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settlement; that the word "and" conjoining the phrases in the statute above cited, "order and decree made by it *ex parte*," "and if made in reference to the settlement of any estate," should be read "or," thus giving the Court of Probate power to revoke its decree in both cases. No such construction can fairly be put upon the statute; the language used and its meaning is too clear to permit it.

There is error in the judgment of the Superior Court, a new trial is ordered, and a proper guardian's account should be allowed pursuant to the probate decree of April 8th, 1914.

In this opinion the other judges concurred.

GRACE L. HOTT, ADMINISTRATRIX, *vs.* THE CITY OF NEW HAVEN ET ALS.

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

The plaintiff's intestate, while standing in the street, was killed by the fall of a trolley-pole, which was alleged to have been caused by the negligence of the driver of the defendant express company's automobile-truck, in allowing the vehicle to become entangled in a sagging wire attached to the pole and thus pulling the pole down upon the decedent. *Held* that in view of the evidence disclosed by the record a verdict for the plaintiff was not an unreasonable conclusion.

Argued June 5th—decided July 6th, 1917.

ACTION to recover damages for negligently killing the plaintiff's intestate, brought to the Superior Court in New Haven County where demurrers to the complaint, filed by the City of New Haven and by the

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Connecticut Company, were sustained (*Curtis, J.*), and the cause, as against the Adams Express Company, the remaining defendant, was tried to the jury before *Gager, J.*; verdict and judgment for the plaintiff for $5,000, and appeal by the defendant Express Company. *No error.*

Edmund Zacher and *William B. Ely*, for the appellant (the defendant Adams Express Company).

Robert J. Woodruff and *James J. Palmer*, for the appellee (plaintiff).

PER CURIAM. A trolley-pole fell upon and killed the plaintiff's intestate. The defendant ascribed the cause of the fall of the pole to the firemen engaged in working around and upon it after it had been cracked and bent by the impact of a fire engine running into it. The plaintiff ascribed the cause to the defendant Express Company's auto-truck becoming entangled in one of the wires attached to it, which sagged through the bending of the pole, and in this way the truck pulled down the pole upon the plaintiff's intestate.

Our reading of the evidence satisfies us that the jury might reasonably have found the cause of the fall of the pole as the plaintiff claimed. And further, the jury might reasonably have found that as the truck proceeded down George Street its driver ought, in the exercise of due care, to have seen the sagging wire and to have appreciated the danger of its becoming entangled with his truck and liable to pull down the pole and injure some one of those in the street near by.

Further, the jury might have found that the driver of the truck drove on after having received adequate warning. If the jury so found, and the verdict indicates this, the conclusion that the conduct of the driver

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was negligent and was a material and contributing cause of Hott's death, necessarily followed. The evidence would have justified the jury in finding that Hott, just prior to being struck, was in the middle of the highway in a position of no apparent danger, and at such a distance from this pole, and surrounded as it was by people, that he could not reasonably have been expected to have seen that the pole was in danger of falling, and that in fact it was not in such danger until pulled down by the truck. The conclusion of due care, which the verdict indicates the jury found, cannot be said to have been found upon inadequate evidence.

There is no error.

THE MILFORD WATER COMPANY *vs.* ANTONIO KANNIA ET ALS.

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

An irregularity in the conduct of appraisers from which no substantial injustice results, is not a ground for setting aside their award.

It is not irregular for appraisers in condemnation proceedings to examine public records which are admissible in evidence and are afterward admitted, though such inspection is made in the absence of the parties.

The just compensation to which a landowner is entitled in condemnation proceedings, is the value of the land taken (including in a proper case the damage to the rest of his land), considered with reference to the uses for which the land is then adapted; and therefore an inquiry as to how many quarts of bottled drinking water the landowner would have had to handle *per diem*, in order to make the business of its sale a feasible one, is properly excluded, in the absence of any evidence that the waters of the brook proposed to be taken possessed special qualities for drinking purposes, or that there was any available market for its sale. Such evidence

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is too remote and speculative as bearing on the value of the respondent's land.

In the present case one of the appraisers having heard that a cow was mired in the land proposed to be taken, asked the respondent about it when he was a witness. *Held* that this afforded no basis at all for a claim of bias or injustice.

A real-estate expert called by the respondent was asked by the respondent's own counsel whether he had not in conversation appraised the premises at a higher valuation than that to which he had just testified. *Held* that there was no error in excluding this question.

Argued June 5th—decided July 6th, 1917.

APPEAL by certain of the respondents from a judgment of the Superior Court in New Haven County (*Greene, J.*) overruling a remonstrance to the report of a committee appointed to assess damages in condemnation proceedings, and accepting the committee's report. *No error.*

George E. Beers, for the appellants (respondents Kannia *et ux.*).

George D. Watrous, for the appellee (plaintiff).

BEACH, J. At the last term a motion to dismiss this appeal was overruled, and it now comes before us on its merits.

The first assignment of error relates to the reception, against objection, of a tax list containing a valuation for assessment of forty-eight acres of land, including the premises in question, on the ground that the valuation was not shown to have been made by either of the respondents. But whether this objection is well taken or not is of no consequence, because the appraisers valued the sixteen acres taken by the applicant at more than three times the assessed value of the entire forty-eight acres.

It is also objected that the appraisers visited the

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assessors' office and inspected the tax list in the absence of the parties; but as no substantial injustice resulted, the alleged irregularity is not a ground for setting aside the award. *Groton* v. *Ledyard*, 22 Conn. 178, 191; *Bristol* v. *Branford*, 42 Conn. 321; *New Milford Water Co.* v. *Watson*, 75 Conn. 237, 247, 52 Atl. 947, 53 id. 57. Moreover, it is not irregular for appraisers to examine public records which are admissible in evidence and are afterward admitted.

It is also assigned as error that the appraisers excluded a question, asked of the witness Whitney, as to how many quarts of bottled drinking water would have to be handled *per diem* in order to make the business a feasible one. The respondents' claim in this connection was that without making an unreasonable use of the water of Beaver Brook, which adjoined their land, and without appreciably diminishing its flow, a bottling business could be conducted on their land for bottling and selling drinking water, and that the value of the land for that use should be taken into account. The appraisers excluded the question on the ground that the respondents had no right, as against lower riparian owners, to use any of the water of the brook except for farm and household purposes. It appears incidentally from the report that there are some springs on the respondents' land; but no question is raised on this appeal as to the right of a landowner to impound and divert spring-water at its source, and we express no opinion on that point.

The only ground of this branch of the remonstrance is, that the committee erred in ruling that the respondents had no right as riparian owners to bottle and sell any part of the water of Beaver Brook. We are of opinion that the question objected to was properly excluded. The just compensation to which a landowner is entitled in condemnation proceedings is the

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value of the land taken (and in a proper case the damage to the balance of his land), considered with reference to the uses for which the land is then adapted. It follows that no evidence of value is admissible with reference to the alleged adaptability of the land for any special commercial business, until a foundation is laid by evidence that the land is in fact adapted for that special business at the time of the taking. A mere claim of counsel is not enough. It is useless, for example, to discuss the alleged right of the respondents to sell bottled water from Beaver Brook, unless it is first made to appear that there is an available market for it. There is nothing in this record to show either an existing market for Beaver Brook water in bottles, or that the water of Beaver Brook possesses special qualities which would tend to make it more salable in bottles than ordinary brook water; and ordinary brook water is not so salable. As bearing on the value of the respondents' land, the evidence objected to was too remote and speculative, and on that ground, alone, the committee did not err in rejecting it. On this state of the record the question whether a riparian owner may bottle and sell brook water, provided he does not thereby appreciably or unreasonably diminish the flow of the stream, appears to us to be a moot question which does not require discussion.

A member of the committee who had heard of the fact that a cow got mired on the land in question, very properly asked the respondent Kannia about it, when the latter was on the witness stand. This incident affords no basis at all for a claim of bias or injustice.

There was no error in excluding the question, addressed to his own real-estate expert by the respondents' counsel, asking whether he had not in conversation appraised the premises at a higher valuation than that to which he had just testified. The fact that a

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real-estate expert employed to establish an asking price has revised his opinion downward, is no evidence that the revised valuation is less correct than the original.

There is no error.

In this opinion the other judges concurred.

THE STATE OF CONNECTICUT *vs.* THE MAD RIVER COMPANY.

* Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and TUTTLE, Js.

A company which has no title to the waters of a stream but merely controls its flow in its natural channels by means of reservoirs and dams, so as to avoid waste in times of freshet and a shortage in times of drouth, for the benefit of its stockholders who are lower riparian owners, is not taxable under the provisions of § 11 of Chapter 292 of the Public Acts of 1915, since its business is not the "selling" of water, which is one of the conditions essential to its taxation under this Act.

A "sale" implies an ownership in the thing sold and a transfer of that ownership or title to another.

Argued June 6th—decided July 6th, 1917.

APPLICATION to determine the amount of tax due the State from the respondent, and for an order for its payment, brought to and tried by the Superior Court in Hartford County, *Shumway, J.;* facts found and order passed requiring the payment of a tax of $19.50, from which the respondent appealed. *Error and judgment reversed.*

Mad River is a small tributary of the Naugatuck

* Transferred from first judicial district.

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River. In 1866 six riparian owners along the former stream entered into an agreement by the terms of which two reservoirs were to be built on streams which flowed into it, and an agent was appointed by them to buy the land and hold the same in trust, collecting from time to time from the parties to the agreement the expenditures entailed in the execution of the enterprise in certain specified portions. In 1872 this agreement was extended to include a third reservoir also located on a stream tributary to Mad River. Pursuant to these agreements the necessary land was purchased and the reservoirs built. The title to them was vested in a trustee.

In 1873 the defendant was chartered by the General Assembly. Its purpose, as stated in the charter, was "to maintain and improve the water power by means of reservoirs, cultivation of timber, and other suitable means, on the stream known as 'Mad River,' . . . and upon the branches and sources of said stream, and to purchase and hold certain improvements already made thereon." The corporation took over, in payment for its stock, all the property acquired under the two agreements recited, and the parties to those agreements became its stockholders. Its sole property was, and still is, the three reservoirs, together with their dams and the land connected therewith. It neither owns nor utilizes any canals, pipes or flumes. It has never diverted any of the water of the streams, upon which its reservoirs are located, from its natural course, nor has it the means or instrumentalities for doing so.

The dams and reservoirs are operated so as to hold back and store the water in times of plenty for release at such other times and in such amounts as its stockholders may desire. The water of the streams, after leaving the gates of the reservoirs, is at the service of every lower riparian proprietor. No objection has ever

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been made by any such proprietor, not a stockholder in the defendant, to the retention of the water impounded and economized in the reservoirs. The highest site owned by any of the stockholders is four or five miles below the nearest reservoir.

For a long time it has been customary for the Scovill Manufacturing Company, one of the defendant's stockholders acting informally as its manager, to advance all the expenses of maintenance and taxation, and obtain reimbursement from the other stockholders in proportions agreed upon at the annual meetings. These proportions have varied from time to time. No two stockholders own the same amount of stock, and contributions made by the several stockholders toward the payment of the expenses of the corporation have borne no fixed relation to the amount of stock owned. Each stockholder is represented on its board of directors. The revenues of the corporation are confined to the contributions made to meet the expenses of maintenance and taxation as above stated.

Arthur F. Ells, for the appellant (respondent).

George E. Hinman, Attorney-General, for the appellee (applicant).

PRENTICE, C. J. The Attorney-General brings this application under § 15 of Chapter 292 of the Public Acts of 1915, for an order for the payment by the defendant to the State of an amount claimed to be due under and by virtue of the provisions of Part II of that Act, being one providing for the taxation of certain corporations, partnerships, and so forth.

To bring the defendant within the operation of these provisions, three conditions must be met, to wit: (1) Its principal business must have been that of operating a system of water-works; (2) that operation must have

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been for the purpose of selling and distributing water for domestic or power purposes; and (3) it must have had gross earnings from such operation in this State. It may be assumed, without decision, that the first and last named of these conditions were satisfied in the defendant's case. The second surely was not. That condition embraces both the sale and distribution of water. If it can reasonably be said that allowing the water of a stream to flow in its accustomed channels and be used and enjoyed freely by those who as riparian owners are entitled to use and enjoy it, is distribution within the meaning of the statute, the element of sale of the water thus distributed clearly is wanting. A sale implies an ownership in the thing sold and a transfer of that ownership to another. Public Acts of 1907, Chap. 212, § 1. It involves the passing of title. The defendant never has had title to the water which it has detained in its reservoirs, and it has never undertaken to give to anyone title to it or to any part of it. It has never attempted either to appropriate any water, or to divert any from its natural channels, or to restrict the beneficial enjoyment of the waters of the streams by lower proprietors entitled to such enjoyment. The only thing that it has sought or accomplished is a control of the flow of the water in such manner that through avoidance of waste at times, and of shortage at other times, the interest of riparian proprietors should be more beneficially served than would otherwise be the case. The purpose of the defendant is not sale but conservation. It exists for the rendition of service, and not for dealing in a salable commodity.

There is error, the judgment is set aside and the cause remanded for the rendition of judgment denying the application.

In this opinion the other judges concurred.

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JOSEPH H. GALLON *vs.* EDWARD J. BURNS ET AL.

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

In an action to recover damages for false representations as to the financial condition of a corporation whose worthless stock the plaintiff was thereby induced to purchase, the trial judge in his charge referred to one of the defendants as a director and secretary of the company, when as matter of fact he was its secretary but not a director. *Held* that this reference was clearly an inadvertence which could not have misled the jury or worked any harm to the defendants.

The defendants contended that inasmuch as the plaintiff had an opportunity to examine the books of the company and failed to do so, he could not recover for their false representations as to its financial condition. *Held* that the principle thus invoked, if accepted as the law of this State, was nevertheless subject to the qualification that the person deceived must have stood upon an equal footing with those making the false representations,—a condition which did not exist in the present case, as the defendants were stockholders and, either as officers or directors, had full knowledge of the extent of the company's business and of its financial status, while the plaintiff had no information whatever upon that subject.

Argued June 6th—decided July 6th, 1917.

ACTION to recover damages for the alleged fraud of the defendants in inducing the plaintiff to purchase worthless shares of stock in a corporation in which they were interested, brought to the Superior Court in New Haven County and tried to the jury before *Greene, J.;* verdict and judgment for the plaintiff for $1,107, and appeal by the defendants. *No error.*

Charles T. McClure and *Hugh J. Murphy,* for the appellants (defendants).

Robert J. Woodruff and *James J. Palmer,* for the appellee (plaintiff).

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SHUMWAY, J. The complaint alleges that the defendants made certain false and fraudulent representations to the plaintiff whereby he was induced to purchase shares of the capital stock of a corporation called The Burns-Thomas Company, organized to carry on the business of selling and repairing automobiles. The defendants in their answer deny the making of representations alleged in the complaint. On the trial to the jury the issues were found for the plaintiff, and from a judgment in his favor the defendants appeal, assigning as error the court's failure to give proper instructions to the jury.

The defendant Burns was secretary and a stockholder, and the defendant Thomas was a director and stockholder, of the Burns-Thomas Company. The court in the charge used language that may be construed as a statement that Burns was a director and secretary. He was not a director. The defendants complain that the court's remark misled the jury to their harm. The remark was made in connection with the instructions given relative to the duty of the plaintiff to make an investigation for himself in order to ascertain the truth or falsity of the defendants' representations as to the condition of the company. The court said: "If with such superior means of information the defendants made false statements to the plaintiff with the intent to deceive him" and the plaintiff, "relying on their better means of information, went on depending upon the truth of their statements, they cannot escape liability merely because it would have been possible for the plaintiff to have obtained the information which would have saved him from losing his money."

It is clear that the court's reference to Burns as a director of the company was an inadvertence and did the defendants no harm. There was nothing to in-

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dicate that the court intended to intimate that a director of the company would have any better information as to the financial condition than the secretary.

The defendants also complain of the above-quoted passage because, as they say, the court removed a question of fact from the jury, as it was for the jury to determine whether the plaintiff should have made an independent investigation as to the condition of the company, instead of relying on the defendants' representations.

This claim of the defendants embraces essentially all the errors set out in the ten reasons of appeal, and it is unnecessary to consider them separately. Where fraud and deceit is the ground of action, it must be proved "that the representation was made as a statement of fact; that it was untrue and known to be untrue by the party making it; that it was made for the purpose of inducing the other party to act upon it; and that the party to whom the representation was made was in fact induced thereby to act to his injury." *Barnes* v. *Starr*, 64 Conn. 136, 150, 28 Atl. 980. The trial court in its charge followed this statement of the law, but the defendants claim that the court erred because it omitted to charge the jury "that if they found the plaintiff was able to make an independent investigation of his own concerning the financial condition of the Burns-Thomas Company, then he could not recover in this action under his pleadings."

The defendants state the point in their brief in this manner: "The plaintiff was bound to use reasonable diligence to ascertain the condition of the Company." Notwithstanding the claim of the plaintiff that he had been induced to purchase worthless stock of the Burns-Thomas Company through false representations of the defendants, the defendants insisted that as it appeared in evidence that the plaintiff had an opportu-

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nity to examine the books of the company and failed to do so, he could not recover in this action. The early case of *Sherwood* v. *Salmon*, 5 Day, 439, does not appear to have been questioned in this State. In that case, in an opinion by JUDGE SWIFT, the court says (p. 448): "I apprehend no authority can be found to warrant the doctrine, that a man must use due diligence to prevent being defrauded, otherwise he shall be entitled to no remedy. The truth is, redress is most commonly wanted for injuries arising from frauds, which might have been prevented by due diligence. . . . In such impositions and deceits where common prudence may guard persons against the suffering from them, the offence is not indictable, but the party is left to his civil remedy for redress of the injury that has been done him." It is possible that that statement of the law might not be regarded as correct in other jurisdictions, and it has sometimes been said that where a party deceived can protect himself by ordinary care, it is his duty to do so; but it is with this qualification, that he must have equal means of knowledge and be equally able to judge of the matter for himself, and to stand upon an equal footing with the one using deceit or making the representations; then if he acts without exercising the means of knowledge open to him, he does so at his own peril.

It matters not in this case which rule is applied, for the plaintiff and defendants were not on the same footing with respect to information as to the extent and character of the business of the Burns-Thomas Company, and it would have been erroneous for the court so to have charged the jury. Both Burns and Thomas were stockholders, one the secretary, the other a director, having full knowledge of the extent of the business and of the condition of the company, while the plaintiff had no information whatever. The court did not err in

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omitting to instruct the jury that the plaintiff could not recover in this action if he had an opportunity to examine the books of the company and he failed to do so.

The jury were properly instructed that if they found that the plaintiff relied on the false representation of the defendants that the business was in a sound and healthy condition, and the other false statements the plaintiff claimed to have proved, and was thereby induced to buy the stock, he was entitled to a verdict. If a person buys property having a defect known or visible to the buyer, it would be absurd to hold or find as a fact that he relied upon a statement in making the purchase that was contrary to what was known to him to be true. There was no obligation on the part of the plaintiff to examine the books of the company to find out that the defendants were lying, certainly not if, as claimed, he was told by the defendants the books would corroborate their statements as to the prosperous condition of the company.

There is no error.

In this opinion the other judges concurred.

The Rochester Distilling Company *vs.* Giovanni Geloso.

Third Judicial District, New Haven, June Term, 1917.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

The law implies that a vendor shall deliver the goods sold within a reasonable time, in the absence of any agreement as to the time of delivery.

What constitutes a reasonable time in a given case is ordinarily a ques-

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tion of fact dependent upon the terms of the sale and all the other attendant circumstances.

In the present case the defendant bought fifteen barrels of whiskey in bond, for which he gave $109 in cash and eighteen notes of $30 each, payable to the plaintiff at intervals of thirty days. The plaintiff agreed to send the defendant certain advertisements of this particular brand of whiskey, including six watches, but none of this had been received when the first note became due, and thereupon, and for this alleged reason, the defendant returned the certificates for the whiskey in bond, none of which had been withdrawn, and demanded a return of the cash and notes he had given. *Held* that upon the facts disclosed by the record the trial court was warranted in finding that the plaintiff's delay in shipping the advertising matter was not unreasonable, and in its conclusion that such delay did not justify the defendant's attempt to cancel or rescind the agreement.

Argued June 6th—decided July 6th, 1917.

ACTION by the payee against the maker of two promissory notes for $30 each, brought by appeal of the plaintiff from a judgment of a justice of the peace to the Court of Common Pleas in New Haven County and tried to the court, *Wolfe, J.*; facts found and judgment rendered for the plaintiff for $65, and appeal by the defendant. *No error.*

Robert L. Munger, for the appellant (defendant).

Alfred C. Baldwin and *Harold E. Drew*, for the appellee (plaintiff).

WHEELER, J. The plaintiff, a wholesale, and the defendant, a retail, liquor dealer, on June 3d, 1915, entered into a contract of sale of fifteen barrels of whiskey, by the terms of which contract the plaintiff agreed to sell to the defendant the whiskey in bond and to deliver the same by three certificates, certifying that the whiskey was stored in bond subject to the order of the defendant. The plaintiff further agreed to pay the storage insurance on the same, and to send to the de-

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fendant various articles of advertising matter, including six watches, and agreed that if these were not received the defendant should have the right to cancel the notes which the defendant agreed to give as part of his consideration for the purchase.

The defendant, in consideration of the agreements of the plaintiff, agreed to pay $108.98 in cash, and to give to the plaintiff eighteen notes, each for $30, payable serially thirty days from date, sixty days from date, and so on, until the last note in the series became payable.

The certificates and notes were duly delivered and the $108.98 in cash paid, and thereupon the contract became executed and complete, except as to the delivery of the advertising matter.

The purpose of the advertising matter was to call the attention of the public to the fact that this particular brand of whiskey which the defendant advertised was on sale by him.

No time was agreed upon for the delivery of this advertising material. In the absence of an agreement as to the time, the parties concur in the opinion that the law implies the delivery of the advertising material in a reasonable time. What would be a reasonable time for such delivery depends upon the terms of the sale and the circumstances surrounding the sale; and this ordinarily is a question of fact, and the conclusion of the trial court conclusive, unless the time found to have been reasonable was so short or so long that a court must hold as matter of law the finding erroneous. *Loomis* v. *Norman Printers Supply Co.*, 81 Conn. 343, 347, 71 Atl. 358.

Shortly after the contract was entered into the plaintiff began the preparation of the advertising material for shipment and placed its order for the manufacture of the watches with the manufacturer. It is the plaintiff's custom to ship to a customer all of

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the advertising material agreed to be furnished him, when the order is substantially complied with. It is also its custom to ship this material as soon as it is notified that the retail dealer has withdrawn any of the whiskey from bond, although sometimes the shipment is made at an earlier date. The defendant did not at any time withdraw any of the whiskey from bond.

On July 3d, 1915, the first of the notes was presented for payment and the same refused. At this time none of the advertising matter had been delivered to the defendant. On July 8th, 1915, the defendant notified the plaintiff that by reason of the failure of the plaintiff to deliver the advertising matter he cancelled the notes and asked for the return of the remaining notes and the $108.98, and he thereupon returned to the plaintiff the three certificates for whiskey in bond.

On July 14th, 1915, the plaintiff shipped all of the advertising matter except the watches to the defendant, but upon tender to him he refused to accept it. At the date of maturity of the first note the watches were in process of manufacture; and at the date of maturity of the second note, on August 3d, 1915, and at the time of the institution of this action, the watches had not been completed by the manufacturer.

In his brief the defendant says: "The appeal presents a single question, whether or not, according to the specific terms of this written contract, the defendant did not have the right to refuse to pay any of the notes he had given for the purchase of the whiskey if the material described in the memorandum was not delivered until after the maturity of the first note." The right to cancel the notes at the maturity of the first note would be undoubted, provided the failure to deliver the advertising material prior to that time was unreasonable. There is no relation between the period of delivery of the advertising material and the maturity of

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the first note, so far as the finding informs us. The defendant did not deem this delivery essential to the beginning of the contract, for he paid in $108.98 at its execution, when he must have known some time would elapse before he received this material. The defendant had no occasion to make use of the advertising material prior to the institution of this action, since at no time did he withdraw any of the whiskey in bond. He at no time requested the delivery of the advertising material. So far as appears, up to the time when this action was begun, the plaintiff had done everything that could be reasonably expected of it to procure the watches.

The conclusion of the trial court, that the defendant was not legally justified in refusing to accept these articles and that the plaintiff was entitled to a judgment for the amount of said notes, necessarily involved a finding that the failure to deliver all of the advertising matter prior to the maturity of the first note, and the failure to deliver the watches prior to the institution of this action, was not unreasonable.

In our view the finding of the trial court cannot be said to be unwarranted in law.

There is no error.

In this opinion the other judges concurred.

The State of Connecticut *vs.* Hampden Triplett alias Granville H. Triplett.

Third Judicial District, New Haven, June Term, 1917.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

Upon a prosecution for a conspiracy to commit rape, and for an assault with intent to commit rape, the State claimed that the accused, a New York lawyer, desiring to secure evidence against the wife of

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his brother in order to defeat her suit in New York for a separation from her husband for his cruelty and nonsupport, entered into a conspiracy with others to lure her to New Haven on a pretended business errand, and to have one of the conspirators ravish her there forcibly and against her will, while the others were suddenly to break into the room and discover her in that situation. No evidence was offered that the accused personally assaulted the woman, and his guilt, if any, was that of an accessory. Upon an appeal from a conviction upon each of these charges, it was *held* that however much the accused might merit severe punishment for the part he had taken in the conspiracy, the State had palpably failed to prove that the essential element of an intent to rape was involved in any combination of the parties, or that the accused aided or abetted in any act which had that design in view.

Argued June 7th—decided July 6th, 1917.

INFORMATION in three counts charging (1) a conspiracy to commit assault, (2) a conspiracy to commit rape, and (3) an assault with attempt to commit rape, brought to the Superior Court in New Haven County and tried to the jury before *Gager, J.;* verdict and judgment of guilty upon the second and third counts, and appeal by the accused. *Error, judgment set aside and new trial ordered.*

Dorothy A. Triplett, residing in New York City, is the wife of John E. Triplett, a clergyman residing in New Jersey. The accused is the brother of John E. Triplett, and a lawyer resident of and practicing in New York City. In February, 1914, Mrs. Triplett left her husband, taking with her their child, and went to reside with her mother in New York. A few months later she began proceedings in the courts of New York for a separation from her husband, upon the ground of his cruel and inhuman treatment and nonsupport of her, for the custody of their minor child, and for an allowance for the support of herself and child. The accused, acting in his brother's interest, took steps to defeat that proceeding and employed one, known in the present case by the name of Wilson, to watch

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Mrs. Triplett, and to secure evidence which might be used against her.

The State offered evidence to prove, and claimed to have proved, that the accused and Wilson conspired together to secure evidence touching Mrs. Triplett's chastity which could be so used, and to that end it was planned and arranged between them that Wilson, under the guise of a real-estate agent, should lure Mrs. Triplett to New Haven upon the false pretence that she was to meet a Mrs. Allen residing there or near there, who was a possible purchaser of a piece of property in Canada belonging to Mrs. Triplett's mother; that Wilson succeeded in arranging for a meeting between Mrs. Triplett and the pretended prospective purchaser at the Hotel Garde in New Haven, the former being accompanied by Wilson; that Mrs. Triplett, so accompanied, went to New Haven and to the hotel for the purpose of filling this pretended appointment; that upon their arrival at the hotel Wilson reported that Mrs. Allen had not yet arrived, and that they thereupon went into the dining-room; that Wilson thereafter left the dining-room upon some pretence, and went to the desk and registered himself and Mrs. Triplett as husband and wife under an assumed name, and received the assignment of a room; that meanwhile the accused and two New York men, whom he had employed for the purpose, known as Campbell and Donahue, had arrived at the hotel by prearrangement and taken a room; that at the time Wilson registered he conferred with Triplett, or one of his associates, as to the program which was to be followed; that Wilson returned to the dining-room and reported that Mrs. Allen had arrived and was in her room upstairs waiting for them; that Wilson and Mrs. Triplett then went, as the latter supposed, to meet Mrs. Allen; that Wilson showed the

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way to the room which had been assigned to him; that as Wilson opened the door and Mrs. Triplett entered she found that no one was there to receive her and that the room was an unoccupied bedroom; that she then turned to leave, facing Wilson, who had followed her through the door; that as she was about to depart Wilson pushed her upon the bed and seized her violently to keep her there; that a vigorous struggle ensued, during which Mrs. Triplett was badly bruised and lacerated upon one of her legs and thighs over a considerable area, bruised in her right arm, and her clothing in places torn; that while this struggle was proceeding Triplett and his associates appeared at the unlocked door, knocked and entered; that the struggle between Wilson and Mrs. Triplett then ceased, Wilson remarking, "I got her," and the accused replying, "I knew damn well you'd get her"; that Mrs. Triplett then passed into the hall, and out of the hotel to the station, where she later took a train for New York; and that the accused followed her downstairs, went to the desk, called the attention of the clerk to the occupancy of the room by a couple not man and wife, and later returned home.

The claim of the accused, overwhelmingly contradicted by the State's testimony, was that he, after having employed Wilson, began to suspect that Wilson had been unfaithful in that employment and that he had entered into illicit relations with Mrs. Triplett; that having overheard a telephone conversation between them making an appointment to go to New Haven by a specified train, he determined to follow them and hastily employed Campbell and Donahue to assist him in tracing their movements; that they succeeded in tracing them to the hotel and in locating them in a room which they visited, only to find Wilson and Mrs. Triplett in bed together and undressed.

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Spotswood D. Bowers, for the appellant (the accused).

Arnon A. Alling, State's Attorney, with whom was *Walter M. Pickett*, Assistant State's Attorney, for the appellee (the State).

PRENTICE, C. J. The defendant was convicted upon two counts, one for conspiracy to commit the crime of rape upon the person of Dorothy A. Triplett, and the other for an assault upon her committed with intent to commit rape. The State made no claim that he personally participated in an assault upon Mrs. Triplett or performed any overt act in furtherance of such assault by another. The overt acts which furnished the basis of the State's charge were committed by a person known in the case by the name of Wilson. The accused's criminal liability, if liable he is as charged in the two counts, is that of an accessory. No evidence was offered tending to show that Wilson ravished Mrs. Triplett. There was evidence impressively establishing that he committed an assault upon her. It was incumbent upon the State, therefore, if it would furnish a sufficient foundation for the defendant's conviction upon the last-named count, to establish beyond a reasonable doubt that Wilson's assault was made with the intent and purpose of ravishing Mrs. Triplett, and, if a conviction upon the first-named count was to be justified, to establish in like manner that any combination or conspiracy which may have existed between the accused and Wilson comprehended such ravishment within its scope and purpose. In other words, it was essential to the State's successful prosecution of the defendant, under either of the two counts upon which conviction was had, that it be shown beyond a reasonble doubt that there was an intent or purpose on the part of the parties implicated in the affair under investigation, or some of them at least, that carnal

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knowledge of Mrs. Triplett be had forcibly and against her will.

Were the evidence confined to the scene in the bedroom in the hotel where Wilson laid violent hands upon Mrs. Triplett, it might well be inferred that his purpose was her ravishment, but the exigencies of the State's case, which required that the accused be criminally connected with what there transpired, demanded that the evidence take a wider range. As a result we have in the record a disclosure of collateral matters and events vitally important to an intelligent understanding of the situation in which Wilson is found committing his assault, and throwing a flood of light upon the motive behind it and the end it had in view.

The story, as the State's evidence discloses it, is in all its details a long one, and need not now be rehearsed. It is sufficient to say that it shows no other motive behind the affair, and no other object sought by means of it, than the provision of a foundation for evidence derogatory to Mrs. Triplett's character for use in defeating her pending action against her husband, a brother of the accused, for a separation and support. The theory of the State was, and is, that the accused was desirous of obtaining such evidence, and to that end employed Wilson, Campbell and Donahue to carry out a carefully planned scheme, in accordance with which Wilson was to lure Mrs. Triplett to the hotel in New Haven and to a sleeping-room therein, on the false pretence of meeting there a lady on a business errand involving the sale of real estate, and the accused, accompanied by Campbell and Donahue, were to appear upon the scene following Mrs. Triplett's unsuspecting entrance to the room with Wilson.

Assuming that it was the moving purpose of the parties whom Mrs. Triplett faced upon this occasion to obtain evidence, or the foundation for evidence, in-

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criminatory of her character, it is more than difficult to imagine how the addition of her ravishment to the discovery of her presence in the room alone with Wilson could either have added a feature beneficial to her husband's cause, or been thought that it would do so. The truth would not have helped, and perjury would have been furnished no better foundation for the desired testimony than her presence in the room supplied. Not only was there nothing to gain by the perpetration of a rape, but the very attempt at its perpetration threatened both disaster to the scheme, through the outcry and commotion that would be likely to result, and dire punishment for the offenders singularly open to detection. It is hard to imagine a more senseless and foolhardy thing for the accused and his associates to have planned to do, if they hoped for success in their imputed purpose, than that which the jury, in order to return its verdict, must have found that they planned and did. It is well-nigh unbelievable that a sane man, much less a trained lawyer, would, in order to carry out a plan devised for the purpose outlined, have permitted so foolish, superfluous and hazardous a feature to enter into it as that of the rape of the intended victim of it.

As far as the assault is concerned, the explanation that it was prompted solely by the exigencies of the occasion, in order that Mrs. Triplett might be detained in the room and found therein by the waiting and momentarily expected watchers, is far more plausible and reasonable than that it was the first step in a concerted attempt to commit rape. Her discovery in the room was, for the conspirators' purpose, as sufficient an outcome as any other produced by force could have been. That purpose was, as claimed by the State,—and no other involving the accused in criminal responsibility is apparent—the securing of a plausible

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and workable foundation for testimony derogatory to Mrs. Triplett's character, to be used to defeat her cause against her husband. That foundation might be obtained by the discovery of outward suspicious conditions which might safely be left to speak for themselves before the trier, or it might be secured through the discovery of such conditions to be utilized in testimony which should weave around it manufactured details which would make a more explicit tale of wrongdoing. Her escape, before the prearranged arrival of those hovering near to entrap her, under circumstances themselves suspicious and susceptible of being embroidered into something worse than suspicion, would seriously threaten the successful execution of the plan which had been arranged. That fact must have been apparent to Wilson, and his resort to force to prevent her escape was not an unnatural consequence.

As one reads the repulsive story which the State's evidence presents with a striking array of proof, it is easy to see how the jury was influenced to return a verdict which would prepare the way for the infliction of severe punishment upon the defendant for the part he played in it. Although we may share in no slight degree the jury's natural feelings of disgust and repugnance at what the evidence appears clearly to disclose was done to Mrs. Triplett, we are bound to say that an examination of it shows that, whatever else it satisfactorily establishes, there is in it a palpable failure of proof, not to say of proof beyond reasonable doubt, establishing that the essential element of an intent to rape was involved in any combination entered into by the parties charged therewith, or that the accused assisted, aided or abetted in any act which had that design in view. Without such proof a conviction upon either count was without justification.

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In view of our conclusions, we have no occasion to consider the sufficiency of the remaining somewhat numerous assignments of error.

There is error, the judgment is set aside and a new trial ordered.

In this opinion the other judges concurred.

JAMES H. DORUS *vs.* FLORENCE G. LYON, EXECUTRIX.

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

General Statutes, § 1125, provides that the time during which a defendant shall be "without this State," shall be excluded in computing the period within which an action may be brought against him. *Held* that a resident of this State who took an apartment with his wife in New York but kept a residence here with his mother for fourteen years until her death, where he spent three days a week for a considerable portion of each year, and where his name remained on the voting list and he sometimes voted, was not "without this State" so as to prevent the running of the statute of limitations.

One may be a resident in two or more States at the same time; and the house in which a resident of this State habitually spends three days in the week for fourteen years, except when away on trips and vacations, is his "usual place of abode" (§ 571) for the purpose of serving process upon him.

Argued June 8th—decided July 6th, 1917.

ACTION to recover an alleged balance of a book account for groceries and other merchandise, brought to and tried by the Court of Common Pleas in Fairfield County, *Wilder, Acting-Judge;* facts found and judgment rendered for the defendant, and appeal by the plaintiff. *No error.*

The plaintiff's cause of action accrued March 9th, 1892, against Charles G. Lyon, then of Bridgeport, and

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this action was not brought against his executrix until December, 1915. To a plea of the statute of limitations, the plaintiff replied that Lyon removed from the State of Connecticut in 1892 and continued to reside out of the State until his death in April, 1915. The reply was traversed, and the finding on that point is that Lyon and his wife took an apartment in New York City in 1892 and removed from the State, and were without the State until his death, except that from 1892 until the death of his mother in 1906 Lyon continued to keep a residence at his mother's house in Bridgeport, where for a considerable part of each year he spent three days a week. It is also found that Lyon's name was on the voting list of the city of Bridgeport until his death, that he sometimes voted there, and that it was his usual custom to spend Thursdays, Fridays and Saturdays of each week at his mother's house, where he had a room, except those portions of the year when he was away from Bridgeport on some trip or vacation. There are other findings not inconsistent with the above, which, in the view we take of the case, need not be repeated.

William H. Comley, Jr., with whom was *Charles A. Hopwood*, for the appellant (plaintiff).

W. Parker Seeley, for the appellee (defendant).

BEACH, J. The controlling question is whether Lyon was "without the State," within the meaning of General Statutes, § 1125, from 1892 to 1906, so that the statute of limitations did not run against the plaintiff's cause of action during that period. If it did run, the plea was good.

It seems clear that the finding concludes the point against the plaintiff's contention. The finding is that Lyon was without the State except as therein stated;

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but the exceptions nullify the affirmation. In *Sage* v. *Hawley*, 16 Conn. 106, we held that the proviso as to absence from the State did not refer to temporary absences, but was intended to preserve the plaintiff's right of action during a period when, by reason of the defendant's absence, it was impossible to commence an action *in personam* against the defendant; and we said that if the defendant is domiciled or resident within the State, although temporarily absent therefrom, the statutes still provide a way by which a personal action may be commenced against him, in which a judgment may be obtained which will be binding and conclusive between the parties, and therefore in such a case no saving of the right of the plaintiff to commence such an action is necessary.

In this case the defendant was not even absent from the State. He was customarily in Bridgeport three days in the week, and by the exercise of ordinary diligence the creditor could have ascertained that fact, and commenced his action at any time.

The finding that he sometimes voted in Bridgeport, indicates very strongly that Lyon himself regarded Bridgeport as his legal domicil. There is no finding on the point of domicil, but it is expressly found that he had a residence in Bridgeport, and the necessary inference from the other facts found is that he also had a usual place of abode in Bridgeport. A man may be a resident in two or more States at the same time, and the house where a resident of Connecticut habitually spends three days in the week for a period of fourteen years, except when away on trips and vacations, is his usual place of abode for the purpose of serving process upon him.

There is no error.

In this opinion the other judges concurred.

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THE STATE OF CONNECTICUT *vs.* JOSEPH CASTELLI AND FRANCESCO VETERE ALIAS FRANK VETTER

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

In the interest of justice, those who are jointly indicted are ordinarily to be tried together; and the mere fact that evidence will be offered against one which is inadmissible against the other or others, does not necessarily require a separate trial for each. The question is still one for the exercise of a sound discretion, the controlling consideration being whether a joint trial is likely to result in substantial injustice to either of the accused.

Upon a prosecution for murder in the first degree, each of the two accused, who were deaf mutes, had made a full written confession of facts which, if legally corroborated, was sufficient to convict its author of that crime. *Held* that in view of the precautions taken in the admission of their confessions, and again in the charge of the court, it could not be assumed that the jury were improperly influenced by any corroborative effect given to evidence inadmissible against one of the accused which was received as against the other only; and that the trial court's denial of a motion by one of the accused for a separate trial was not an abuse of its judicial discretion.

Ordinarily the decision of a trial court upon a preliminary and collateral question of fact will be reversed only for clear and manifest error; and this rule is equally applicable to the determination of the question whether substantial injustice is or is not likely to result from a joint trial of persons jointly indicted.

Upon the preliminary issue as to whether confessions of the accused were procured by threats or inducements, the trial court may in its discretion allow leading questions and questions calling for conclusions of fact.

All statements in the nature of confessions are admissible, notwithstanding their supersession or merger in a final and detailed confession made in writing to the coroner.

A confession made by one of the accused is not rendered inadmissible because he was undoubtedly influenced in making it by seeing his associate engaged in making a similar statement, which, he was truthfully informed, gave the whole story of the homicide.

Having once been fully warned that anything he might say might be used against him, and having then made a full confession, one of the accused a week later, upon request, voluntarily rehearsed the steps taken by him and his associate at the scene of the murder.

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Held that evidence of such rehearsal was admissible against him without proof of another and further warning.

After the confessions had been received in evidence, following the proof of their voluntary character and after the State had rested, one of the accused testified, in his own defense, that an officer had struck him repeatedly with a piece of hose before he made his statement. *Held* that under these circumstances the trial court properly charged the jury that if they found the accused were frightened or forced to make their confessions by the conduct or abuse of the officer having them in charge, they should disregard the statements as of no value.

No error is committed in treating written confessions as exhibits, and in allowing them, like any other exhibits, to go to the jury-room.

It is for the trial court to determine whether the evidence of the loss of writings is sufficient to admit secondary proof of their contents.

Papers taken from the person of one of the accused tending to show unfriendly or hostile relations between himself and his wife whom he was charged with having murdered, are admissible in evidence against him.

The statements or declarations of an accused inconsistent with his plea of innocence—like any other relevant fact inconsistent with such plea—are admissible as evidence against him.

Having explained to the jury at great length what "reasonable doubt" meant, the trial court at one point in its charge used the phrase "considerable doubt" instead of the usual formula. *Held* that the jury could not have been misled by this inadvertence.

It is the duty of the jury and not of the court to remember the evidence and claims of the parties correctly, and if they are so informed, the omission of the court to call their attention to some single bit of evidence or claim is not reversible error.

The trial court is not bound to use the phraseology of counsel in preference to its own in stating familiar propositions of law to the jury.

A husband who, on his own story, suspects his wife is going to commit adultery and follows her to another city, seventy miles away, conceals himself in a closet armed with a deadly weapon awaiting the materialization of the expected provocation, and then kills her, cannot claim that his crime is thereby reduced from murder to manslaughter.

While one of two jointly accused cannot be convicted upon the unsupported testimony of the other, yet if the other chooses to testify in his own defense, his testimony, though not that of a full witness, is relevant so far as it tends to prove or disprove the existence of the crime outlined in the former's confession.

The evidence in the present case reviewed and *held* to abundantly corroborate the confessions made by each of the accused.

Argued June 2d—decided July 6th, 1917.

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INDICTMENT for murder in the first degree, brought to the Superior Court in New Haven County and tried to the jury before *Reed, J.*; verdict and judgment of guilty, from which each of the accused appealed. *No error on either appeal.*

The defendants were jointly indicted for the murder of Annie, the wife of Castelli, who was found in a bedroom at 260 Crown Street, New Haven, on Easter Sunday, April 23d, 1916, suffering from severe fractures of the skull, of which she died on the following day. The deceased and each of the accused were deaf mutes.

On the 26th of April both of the accused were apprehended in New York in connection with an inquiry into the disappearance from New York of Annie Castelli. While the inquiry was in progress the coroner for New Haven county arrived, and the identity of the missing woman with the murdered woman was established. Each one of the accused freely made a full confession to the coroner, in which each, separately from the other, described the killing in substantially the following way:—

Castelli, for reasons given, was tired of his wife and desired to get rid of her. He induced Vetere to plan and carry out a pretended elopement for the purpose of bringing Annie to New Haven, where Castelli was to kill her. Pursuant to this conspiracy Vetere induced Annie to accompany him to New Haven and took her to a lodging-house at 260 Crown Street, where they obtained a room, representing themselves as man and wife. They then went out to lunch and Vetere found an opportunity of leaving Annie and informing Castelli, who had followed them on the same train, of the whereabouts of the room and how to open the front door at 260 Crown Street. After lunch Vetere and Annie went back to their room, where Cas-

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telli had in the meantime concealed himself in a closet armed with a piece of iron pipe. Vetere kissed Annie and after some lovemaking went to the front window. Vetere says that Annie appeared to fall asleep. Castelli then came out of the closet and struck her on the head with the pipe, inflicting the wounds from which she afterward died. Castelli and Vetere then took Annie's jewelry and money and returned together on the same train to New York. On the way down Vetere, at Castelli's suggestion, wrote a postal card to the effect that Annie had eloped, addressed it to Castelli and mailed it on reaching New York. This postal card was produced and put in evidence at the trial. That evening they both went together to a social entertainment.

Each of the confessions was admitted in evidence against the party who made it, but not as against the other accused. The State also proved the death and identity of Annie Castelli, the fact that she and Vetere were seen together at the boarding-house, that Annie was left alone in the restaurant for a time and rejoined by Vetere, and that Vetere was seen leaving the boarding-house alone with a bag. Annie's jewelry was recovered from the person to whose custody Vetere had committed it.

On the trial each of the defendants went upon the witness-stand and admitted all the physical facts recited in their respective confessions, but Vetere claimed that the elopement was a genuine one, and Castelli claimed that he learned of it by seeing Annie and Vetere conversing about it in the sign language, followed them to New Haven without Vetere's knowledge, ascertained by observation where their room was at 260 Crown Street and found his way there without the assistance of Vetere, concealed himself in the closet armed with a piece of iron pipe, and that he became

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enraged at the behavior of Annie and Vetere and killed his wife under the influence of uncontrollable rage.

William A. Bree and *John Cunliffe, Jr.*, for the appellant (Castelli, one of the accused).

Spotswood D. Bowers and *Samuel E. Hoyt*, for the appellant (Vetere, one of the accused).

Arnon A. Alling, State's Attorney, with whom was *Walter M. Pickett*, Assistant State's Attorney, for the appellee (the State).

BEACH, J. At the opening of the trial Vetere moved for a separate trial, on the ground that it would appear from the coroner's finding and notes that there was evidence in the case admissible against one and not admissible against the other of the accused. Castelli made no motion for a separate trial. Vetere's motion was opposed by the State's Attorney on the ground that the crime was committed in carrying out a conspiracy to murder the deceased, and that as to any items of evidence which might be admissible against Castelli only, Vetere could be adequately protected by a proper instruction to the jury. The court overruled the motion and directed the accused to be tried together, and this is assigned as error by both of the accused.

The rule as to granting separate trials to persons jointly indicted is stated in *State* v. *Brauneis*, 84 Conn. 222, 226, 79 Atl. 70, as follows: "Whether a separate trial shall be allowed to parties jointly indicted is within the discretion of the court. Ordinarily justice is better subserved where the parties are tried together. But cases arise where the defenses of the different parties are antagonistic, or where evidence will be

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introduced against one which will not be admissible against others. Where from the nature of the case it appears that a joint trial will probably be prejudicial to the rights of one or more of the parties, a separate trial should be granted when properly requested." The discretion of the court is necessarily exercised before the trial begins, and with reference to the situation as it then appears; and the phrase "prejudicial to the rights of the parties," means something more than that a joint trial will probably be less advantageous to the accused than separate trials. The controlling question is whether it appears that a joint trial will probably result in substantial injustice. It is not necessarily a ground for granting a separate trial that evidence will be admissible against one of the accused which is not admissible against another. Such evidence is received and its limited application pointed out to the jury, in most cases where two or more accused persons are tried together. When the existence of such evidence is relied on as a ground for a motion for separate trials, the character of the evidence and its effect upon the defense intended to be made should be stated, so that the court may be in a position to determine the probability of substantial injustice being done to the moving party from a joint trial. It does not appear from the record that the trial court was so advised in this case, and on that ground alone it is impossible to say that the court abused its discretion in denying Vetere's motion.

Ordinarily the fact that one of the accused has made a confession incriminating the other, would be a good ground for granting a separate trial. But the peculiarity of this case was that each of the accused had made a full written confession of facts which, if legally corroborated, was sufficient to convict either one of them of murder in the first degree. It follows that no

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material fact incriminating either one of the accused came to the knowledge of the jury because they were tried together, which would not also have come to the knowledge of a jury if each had been separately tried and his own confession admitted against him. This being so, the claim that substantial injustice was done by a joint trial relates rather to the corroborative effect which each of these confessions may be supposed to have had upon the other; and if we assume that the trial court did know all the facts before the trial began, the question presented to it was whether it would order separate trials of two self-confessed conspirators, each of whose acts and declarations, made or done in pursuance of the conspiracy, was admissible against the other, because their respective confessions, being made after the event, were not so admissible. The mere statement of this proposition shows that the question was one fairly within the limits of judicial discretion, and that a denial of Vetere's motion for a separate trial was not an abuse of discretion. In view of the precautions taken in the admission of evidence and again in the charge of the court, we cannot assume that the jury were improperly influenced by any corroborative effect given to evidence not admissible against one of the accused but admitted as against the other only. It may be observed that our attention has been called to but two cases in this country where the action of a trial court in refusing to grant separate trials to persons jointly indicted has been held to be reversible error. In one of them the right to a separate trial was granted by statute, and in the other the effect of the joint trial was to deprive the accused of the benefit of material testimony, under the common-law rule that persons jointly indicted and tried may not be called as witnesses for or against each other.

Generally speaking, the decision of a trial court upon

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a preliminary and collateral question of fact will not be reversed unless in a case of clear and manifest error. In *State* v. *Willis*, 71 Conn. 293, 313, 41 Atl. 820, this rule was applied to, or quoted as applicable to, the determination of the voluntary character of extra-judicial confessions as affecting their admissibility in evidence; and we see no reason why it is not equally applicable to the determination of the probability or improbability of substantial injustice flowing from a joint trial of persons jointly indicted. If it were not so, there would be grave danger of mistrials from causes which were unknown to the trial court at the time when it was required to decide the question. Moreover, joint trials of persons jointly indicted are the rule, and separate trials the exception resting in the discretion of the court. For the reasons indicated, we are satisfied that in this case the court did not err in denying Vetere's motion for a separate trial, and that no substantial injustice has been suffered by either of the accused in consequence of their joint trial.

The assignments of error next in logical order are those relating to the admission of the several statements and confessions of the accused. Here again, the court had to deal with a preliminary issue, and upon the trial of that issue all of the statements and confessions were abundantly shown by the State to have been given voluntarily and without undue influence of any kind.

We will refer first to the assignments of error relating to this branch of the case pursued on the brief for Castelli. There was no error in admitting the general question addressed to the State's witnesses, whether any threats were made or inducements held out to procure the confessions. The issue was a preliminary one, tried to the court in the absence of the jury, and opportunity was given for cross-examination. Under

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these circumstances the court might in its discretion shorten the direct-examination of witnesses by admitting leading questions and questions asking for conclusions of fact.

Exhibit 31 was an affidavit for the purpose of extradition, and the evidence of the officer Enright is, not only that Castelli, before signing it, read it over carefully and made a correction in it, but, on cross-examination, that the notary warned Castelli in writing that anything he signed might be used against him. Exhibit 39 is the detailed confession made by Castelli to the coroner of New Haven county, and it is prefaced by a written warning in the form approved by this court in *State* v. *Coffee*, 56 Conn. 399, 16 Atl. 151, and in *State* v. *Willis*, 71 Conn. 293, 308, 41 Atl. 820. Exhibit 28 is a paper written by Castelli admitting the killing and addressed to the coroner after Castelli had been taken to the door of the room where Vetere was, and had seen that Vetere was making a statement to the coroner. The witness DeMartini testified that Castelli asked for a piece of paper on which to write it. No doubt Castelli was influenced by what he had just seen and by the statement of DeMartini, which was true, that Vetere was telling the whole story; but as pointed out in *State* v. *Willis*, 71 Conn. 293, 41 Atl. 820, it is difficult to conceive of a confession which is not induced by a sense of self-interest. Moreover, this paper added no material fact to the case made by the State. Castelli made several statements on April 26th, and the State very properly offered all of them in evidence, but so far as the issue of guilt or innocence is concerned they were all merged in or superseded by the final confession, Exhibit 39, which was complete in itself. Exhibits 38 and 30 are statements made by Vetere incriminating Castelli. These were not admitted as against Castelli, and the jury were instructed not

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to consider them as evidence against him. They were necessarily admissible as against Vetere, and the course which the court took was the only one possible. On their merits the assignments of error relating to these statements of Vetere go back to the denial of the motion for a separate trial, which has already been discussed.

In this connection we take up the alleged error of the court in admitting the story of Castelli's rehearsal of the murder scene at 260 Crown Street on May 3d. The claim is that Castelli was compelled to re-enact the murder and so compelled to give evidence against himself. This again was a preliminary issue and the court so treated it, ruling that the State must show that the actions of Castelli were voluntary. The State fully sustained the affirmative of that issue, but the objection is made that Castelli was not at that time warned that he could not be compelled to rehearse the murder, or that such rehearsal might be used against him. There is, however, no rule of law in this State which requires any such warning. The State must show affirmatively that any confession or performance in the nature of a confession was not procured by duress. The fact that a warning in the usual form has been given is generally accepted as satisfactory evidence that the confession was not procured by duress. But when the voluntary character of the confession is shown, either by proof of a warning or by any other satisfactory evidence, the law and the Constitution are satisfied. In this instance a warning had been given to Castelli the week before, and he had fully confessed after being warned. A week later he was asked, being deaf and dumb, to go to the scene of the crime and repeat the confession in pantomime, and upon the evidence he did so voluntarily. A second warning under such circumstances would have been superfluous.

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Castelli testified when on the witness-stand that one of the officers at the police station in New York struck him many times with a piece of hose before his confession was written. This evidence was offered after the State had rested, and of course long after the preliminary issue as to the voluntary character of Castelli's confession had been tried and determined in favor of its admissibility. Under these circumstances the court properly instructed the jury that if they found that the accused were frightened or forced to make their confessions by the conduct or abuse of the officer having them in charge, they should disregard the statements entirely as of no value.

Referring now to the statements and confessions of Vetere: It is assigned as error that the court ruled that Vetere's confessions were voluntary. In support of these assignments of error it is said that Vetere was allowed to see Castelli in the act of making a statement to the coroner, that the two were kept apart and not allowed to communicate with each other, that Vetere was not given anything to eat from 7:30 P. M., when he was brought into the police headquarters, until 11:00 P. M., that his examination was protracted until 3:00 A. M., and that the attempted proof of the voluntary character of his statements failed, because of the generality of the questions asked of the State's witnesses.

Most of these matters have already been sufficiently discussed. The length of time occupied in these examinations by the coroner is accounted for in part by the fact that he took the statements of Castelli and Vetere separately, partly by the mode of communication adopted, which was by writing out the questions and then handing the paper to the accused for him to write his answer, and partly by the fact that Vetere was taken out to supper. As to the alleged deprivation

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of food, it appears that up to the time when Vetere complained that he was hungry he had made no incriminating statement, that he offered to make a statement in writing, that the coroner wrote out the customary warning, and Vetere wrote in reply: "I want to get food as I nearly choked to death and I got awful headache. I am uneasy without food and if I get food I would be excited to write and tell all the truth." He was immediately taken out to supper, and wrote nothing in the nature of a confession until after he came back. This being so, it cannot be said that his confession was in any degree extorted by starvation. On the contrary, the coroner was careful that no confession should be made until after Vetere's hunger had been satisfied.

It is also assigned as error that the confessions of the accused were admitted as exhibits and allowed to go to the jury-room, the alleged wrong being that undue prominence was thus given to the most damaging portions of the testimony. There was no error in this. Writings made or subscribed by the accused are ordinarily admitted as exhibits. If these writings were harmful it was not because any rule of procedure was violated, but because the accused had furnished harmful evidence against themselves.

We take up next the assignments of error in the admission of evidence. DeMartini testified that he wrote on a piece of paper that Vetere was telling all and showed it to Castelli, who wrote back on a piece of paper, "Me afraid of chair; tell all." This testimony was objected to on the ground that the papers themselves must be produced; and to prove their loss the Assistant State's Attorney was allowed to state to the court that he had been through every scrap of paper the State had and could not find them. The testimony was then admitted. There was no error. The evi-

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dence of loss was sufficient to support the admission of secondary evidence, especially as the statement itself was of little importance because followed by a full written confession.

As to the admission of the summons in the suit for nonsupport brought by Annie against Castelli, the objection that it tended to prove a different offense from that with which Castelli was charged, was properly overruled. The paper was admissible, being taken from Castelli's person, as tending to show that Castelli had reason to believe that his wife had complained to the police against him in respect of the matter described in the summons. The probation card, also taken from him, and the testimony of Enright explaining it, were admissible on the same ground, and the exemplified copy of the record of the New York court in the nonsupport proceedings was directly admissible to show the relations between Castelli and his wife.

Vetere's assignments of errors numbers 8 and 9 are not well founded in the record. The claim is that DeMartini was permitted to testify to a conversation carried on in writing, without producing the writings; but the record is that the witness was asked whether any threats or inducements were made to Vetere in writing or otherwise, and that he answered "no."

The court in charging the jury with reference to the statements or confessions made by the accused, used the phrase "they are only admissible as evidence affecting the one who made them"; and this is claimed as error, because in *State* v. *Willis*, 71 Conn. 293, 306, 41 Atl. 820, we said that such statements were not "testimony," but facts to be proved by testimony. The distinction drawn in *State* v. *Willis* is quite correct, and that distinction was carefully observed by the trial court not only in other parts of the charge but also in the lan-

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guage complained of. The declarations of the accused inconsistent with their respective pleas of not guilty, were not testimony, but when proved they were "evidence affecting the one who made them," in the same sense that any other relevant fact inconsistent with the claims of an accused is evidence affecting him.

On one occasion the court in its charge used the phrase "considerable doubt" instead of "reasonable doubt," but it could not be supposed by the jury that the court intended to mean anything more or less than that reasonable doubt which it had been at great pains to explain and expound to them at great length.

The claim that the court unfavorably commented on evidence seems to us without foundation. It is true that the court apparently failed to remember Castelli's claim that he had bought his ticket for New Haven because he had seen Annie and Vetere talking about going to New Haven; but such a slip as that, in commenting on the evidence after a long trial, is not reversible error. In the first place, it is the duty of the jury, not of the court, to remember the evidence correctly, and in the second place the trial judge was very careful to so inform the jury, and to tell them that he might be mistaken in his recollection of the evidence, and that they must take the evidence not from him but from the witnesses. The court did not err in refusing to charge as requested by Castelli upon the subject of reasonable doubt. The charge of the court upon that point was correct and sufficient, and the court is not bound to use the phraseology of counsel in preference to its own, in stating familiar propositions of law to the jury.

The court did not err in charging the jury that in order to reduce Castelli's crime from murder to manslaughter, the homicide must have taken place under circumstances which would justify a reasonable belief

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that adultery was being committed. That is the rule expressed in *State* v. *Yanz*, 74 Conn. 177, 50 Atl. 37, and *State* v. *Saxon*, 87 Conn. 15, 86 Atl. 590. It was too favorable to Castelli. A husband who, on his own story, suspects that adultery is going to be committed, follows his wife and her suspected paramour from New York to New Haven, conceals himself in a closet armed with a deadly weapon waiting for the expected provocation to materialize, and then kills his wife, cannot claim the benefit of the rule in *State* v. *Yanz*.

As to Vetere's assignments of errors, numbers 39–41, the court correctly charged the jury that Vetere could not be convicted on Castelli's unsupported testimony. This was all that the case called for. Castelli was not a witness for the State. He could not, while jointly indicted, have been compelled to testify. But since he chose to testify in his own defense, his admissible testimony was relevant, though not that of a full witness, so far as it tended to prove or disprove the existence of the conspiracy outlined in Vetere's confession.

We have disposed of all the assignments of error pursued on the briefs, except those relating to the denials of the motions to set the verdicts aside on the ground that they were against the evidence. These motions were properly denied. The rule laid down in *State* v. *Willis*, 71 Conn. 293, 41 Atl. 820, is that an uncorroborated extra-judicial confession will not support a conviction of murder in the first degree. But these confessions were abundantly corroborated. The identity of the victim, and her death from the injuries inflicted by Castelli, are established without resorting to the confessions. Castelli's testimony at the trial, admitting the killing and pleading provocation, left only the degree of the crime to be determined by the jury. Was it a wilful, deliberate and premeditated killing, as his confession

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admitted, or was it the result of a sudden outburst of uncontrollable fury caused by the sight of his wife in Vetere's arms? The jury could give but one answer to that question; for Castelli himself testified that he concealed himself in the closet armed with a deadly weapon, to await the return of Vetere and his wife; and upon what little testimony was given on the trial as to the situation of the parties, it seems that Vetere was standing by the window at some distance from Annie when she was struck.

Vetere, also, admitted on the witness-stand that he was present at the killing. His testimony amounted to a judicial confession that he was an accessory after the fact, and the only question left for the jury was whether he was an accessory after the fact, in which case he was not guilty of any crime of which he stood indicted, or whether he was a principal under our statute as indicated by his confession to the coroner. All the physical facts were admitted. The determining question was whether the elopement with Annie was a genuine affair of the affections, as Vetere claimed in his testimony, or whether it was a pretense contrived to bring the victim to her place of execution, as Vetere admitted to the coroner.

No reasonable explanation consistent with the theory of a genuine elopement can be given of Vetere's own testimony as to what took place at and after the killing. The crucial scene is hurried over in a few words. He says that he kissed Annie; that she wanted to take a nap in the chair; that he went over to the window seat; that he heard and saw nothing until he looked around and saw Castelli standing beside his wife. Annie was then sitting with a drooping head, and Castelli, pointing to the door, said, "Killed, finished," and then "hurry up." Apparently no further communication passed between them until they reached

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the train. Could there be stronger corroboration of the confession to the coroner than is unconsciously furnished by Vetere's testimony? Not an indication of surprise, sorrow, anger, or desire for retributive justice; but on the contrary, instant acquiescence, a partition of Annie's jewelry and money, a joint flight from the scene of the crime without stopping to see whether Annie was really dead, and a common attempt to conceal the crime by writing a postal card addressed to Castelli intended to account for Annie's disappearance, and by appearing together at a social entertainment that same evening.

The fact that Vetere left Annie alone in the restaurant at the time when, according to his confession, he met Castelli and told him of the location of the room, and how to open the front door, was also proved. Without going further into details, it seems evident that the motions to set aside the verdicts were properly denied.

There is no error in either appeal.

In this opinion PRENTICE, C. J., RORABACK and SHUMWAY, Js., concurred.

WHEELER, J. (dissenting). One ground of error in Vetere's appeal, and one in Castelli's, in my judgment, entitles each to a new trial. Vetere seasonably moved for a separate trial. The granting of such a motion is ordinarily a matter of discretion. But if the defenses of the accused are antagonistic, or the evidence to be introduced against one is not admissible against the other, separate trials may be ordered.

Where a joint trial will probably be prejudicial to one or more of the accused the motion should be granted. *State* v. *Brauneis*, 84 Conn. 222, 226, 79 Atl. 70.

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I agree with the majority opinion, that the mere fact that evidence will be admissible against one accused which will not be admissible against another, will not necessarily furnish a ground for granting a separate trial; for the court, by limiting its admission and pointing out to the jury at the time of its admission and in its charge the precise use to be made of the testimony, may make it reasonably certain that the jury did not reach its conclusions by the improper use of this evidence. So that in a given case the test for the trial court is, will the joint trial probably result in substantial injustice, that is, will the jury be unable to separate the evidence and be likely to use the evidence admissible against one accused, against another against whom it is not admissible?

1. I agree with the majority, that the ground of the motion for a separate trial should develop the existence and effect of such evidence, so that the court will be placed in a position to determine the probability that substantial injustice will be done to the moving party. The majority hold that "it does not appear from the record that the trial court was so advised in this case." I think this conclusion does not accord with the facts of record. At the beginning of the trial Mr. Hoyt, counsel for Vetere, thus addressed the court: "Before we proceed to draw the jurors, I should like to make a motion in this case. I should like to make a motion that the accused be tried separately, first, upon the ground that there is evidence in this case, as is apparent from the coroner's finding and notes, which is admissible against one and not admissible against the other, in the nature of statements and other evidence decidedly of a character that is not admissible against both. As I understand the law in *State* v. *Brauneis* in the 84th Conn., it is of course a matter of discretion for the court. Our Supreme Court has said that where

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it would be prejudicial to the interests of the accused to try them together, then they should be tried separately. Now, I therefore move that they be tried separately, on behalf of Vetere at least." Replying, the State's Attorney conceded that the two accused "did make separate statements in writing . . . and other statements by signs to the authorities in New York during the coroner's inquest." Mr. Hoyt replied: "I cannot add anything, your Honor, to what I have already said, except this: the State's Attorney has suggested that in the event of admissions or conversations of one being admitted which would not be admissible against the other, that the caution of the court would take care of it. Now, it does not seem to me that while your Honor in the caution is doing everything you can do to prevent it being used against the other man, it certainly does get to the ears of the jury, and it is pretty hard for any human being to dismiss that from their minds; provided of course such statements are admissible." The ruling of the court upon the motion shows that it fully appreciated the ground of the motion, viz.: to prevent the State introducing statements and evidence which were admissible against one accused and not against the other.

The State's Attorney has argued this point as wholly within the discretion of the court. He has not claimed that the trial court was not apprised of the ground of the motion or the character of the evidence to be offered. Mr. Hoyt expressly called the court's attention to the coroner's finding and notes, and we may assume that the court—a learned and experienced judge, and for a long period a distinguished State's Attorney—had these before it. The court then knew that there were different statements in the nature of written confessions and oral statements claimed by the State to have been made by these accused, some of which might be

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admissible against one accused and not against the other, and others of which might be admissible against one and not against the other; and the court knew that the State intended to offer evidence that Castelli had been taken to the scene of the tragedy and had there re-enacted all that was done by him and by Vetere at and about the time of the killing.

I have never known a case where it was more apparent at the inception of the trial that it would probably be difficult, if not impossible, to disassociate the evidence thus offered against one accused from the evidence offered against the other. It was the duty of the court when this condition appeared, to grant separate trials to these accused.

Upon an examination of the evidence it appears that during its taking, in at least twenty-one instances, the court instructed the jury that certain evidence admitted was admissible against Castelli and not against Vetere, and in at least ten instances the court instructed the jury that certain evidence admitted was admissible against Vetere and not against Castelli. And these were not the only occasions when such instruction would have been pertinent.

The amended finding recites: "1. Upon the trial much evidence was admitted against the defendant, Joseph Castelli, only. This was done against the objection of counsel for the defendant Frank Vetere, made upon the ground that such evidence was prejudicial to the defendant, Frank Vetere, and that the mere fact that such evidence was admitted only against the defendant Joseph Castelli, did not properly protect the defendant Frank Vetere's rights, because the jury having heard such evidence and considered it against the defendant Joseph Castelli, would be unable wholly to dismiss it from their minds in a consideration of the evidence against the defendant Frank Vetere."

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The court states that under its ruling about half of the 596 pages of the printed testimony was admitted. The finding further states: "The substance of this evidence which is claimed to have been harmful to the defendant Frank Vetere, is as follows: 'That the defendant Joseph Castelli had killed his wife, of whose murder he and the defendant Frank Vetere were jointly charged, because he was mad at her for telling the deaf people about him, and because she had given him a disease. . . . That he had admitted this was the reason. That said Joseph Castelli had treated his wife very badly, and had been arrested at her instigation for nonsupport and had been sent to the workhouse as a result thereof. That Joseph Castelli had struck his wife on occasions. That said Joseph Castelli had been taken by the police authorities of New Haven over the route the State claimed was taken by him in going to the scene of the crime, and that he had acted out the tragedy by showing how he struck his wife from behind on the head several times with an instrument. That thereupon he and the defendant Frank Vetere left the scene of the crime together and went to New York together. That the defendant Joseph Castelli had stated that he had planned to have Frank Vetere take Joseph Castelli's wife to New Haven on the day of the killing, and that he told defendant Frank Vetere that he was going to kill her at that place, and had told Frank Vetere to find a room in New Haven where the killing could be accomplished, and that defendant Frank Vetere came to him while his wife was at dinner and gave him the key to the room so that he could get into it, and that after Joseph Castelli had killed his wife, he took all her money and jewelry and he and Frank Vetere went to New York together, and that on the way there he gave the jewelry to defendant Frank Vetere. That said defendant

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Joseph Castelli had stated that he had paid for Frank Vetere's ticket to New Haven on the day of the killing and also for the meal Frank Vetere had with Joseph Castelli's wife in New Haven, and that defendant Frank Vetere wrote Exhibit 40, which is made a part of this finding, at the direction of said Joseph Castelli, addressing the postal to Joseph Castelli and signing it as coming from Joseph Castelli's wife.' "

All of this evidence was vitally prejudicial to Vetere, and it is unreasonable to expect that the jury could have heard this evidence and kept it wholly separate. No matter how carefully the trial court cautioned the jury as to its duty to do this, the jury could not have kept wholly separated in its mind the evidence admissible solely against Castelli, and that solely against Vetere. It could not do it because the human mind cannot even read this record and do it, and the printed page is cold and dull compared with the same testimony given in open court. I think the record shows that the court was fully advised, preceding and during the trial, of the nature and character of this evidence, and was in a position to determine that substantial injustice would be done to Vetere on a joint trial.

The majority opinion concedes that "ordinarily the fact that one of the accused has made a confession incriminating the other would be a good ground for granting a separate trial." But it excludes Vetere from the benefit of this rule because "each of the accused had made a full written confession of facts which, if legally corroborated, was sufficient to convict either one of them of murder in the first degree. It follows that no material fact incriminating either one of the accused came to the knowledge of the jury because they were tried together, which would not also have come to the knowledge of a jury if each had been separately tried and his own confession admitted against

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him." If this means that because each confession covered the same facts it was immaterial if both were received in evidence, since the jury had before it the admissible confession which, if corroborated, was sufficient to convict, it would seem to assume that the jury found the admissible confession proven and corroborated without reference to the inadmissible confession. Unfortunately, we cannot know what the jury found proven, and we cannot tell what part the inadmissible confessions played in helping them reach their conclusion. The evidence of this character excepted to not only covered written confessions, but written statements of facts and acts, and a pantomine of the entire tragedy. It cannot be found that all of this inadmissible evidence was contained in Vetere's confession, nor can it be found that his confession was not illustrated, explained and corroborated by this inadmissible evidence, some of it intensive in kind and dramatic in quality.

The logic of this argument is somewhat disturbed as we read the questions asked Castelli by the coroner: "Didn't you make up your mind to kill her before that, and didn't you tell Frank Vetere that you were going to do it? No. Yes. Did you plan to have Frank Vetere take her to New Haven for you last Sunday? Yes, by me. Did Frank know that he was to take her to New Haven and you were to kill her there? Yes." And throughout the route which the coroner took Castelli over in enacting the pantomime of the killing and what preceded and followed it, the coroner constantly asked about Vetere, where he was, what he did and his part in the tragedy.

These references are simply illustrative of this entire record. How can it be said that its introduction was not prejudicial to Vetere?

Castelli did not move for a separate trial; he must be

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held to have waived any prejudice to his rights from the joint trial.

2. Vetere and Castelli were taken in custody in New York, and while in custody but not under arrest, Coroner Mix of New Haven, on April 26th, took their statements in New York, first stating to them that he was the coroner for New Haven county, Connecticut, and engaged in inquiring as to the death of Annie Castelli; that he could not compel them to, and they were not obliged to, say anything about it, unless they wished to, and he inquired if they were willing to tell what they knew about it. Subsequently, by extradition proceedings, the accused were brought to New Haven and Castelli was taken, on May 3d, to the office of the coroner, who wrote on a piece of paper for Castelli: "I am going to take you the way you took when you came to New Haven and to Crown Street. Will you show me?" And Castelli nodded his assent, and shortly thereafter the coroner, with others, accompanied Castelli over the said route and questioned Castelli in detail as to what he and Vetere did, where they went, etc.; in short, he caused Castelli to enact the pantomime of the tragedy and what took place while they were in New Haven. All of this evidence was duly objected to and exceptions noted. The court found that Castelli did all of this voluntarily.

This is an instance where a *quasi*-judicial officer of the State procures an accused to incriminate himself without warning him that his acts and words would be used against him. It cannot in fairness be held that the caution given by Coroner Mix in the police station in New York, about his giving his statement, must have been in the mind of this deaf and dumb man when, seven days after, the coroner, in New Haven, said to him: "I am going to take you the way you took when you came to New Haven and Crown

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Street." He was then entitled to a warning that he did not need to enact the tragedy of his crime in order to furnish the State evidence of his guilt. A statement made to a coroner by an accused under arrest, without a warning from him that he need not make it, cannot be held to be legally voluntary. So acts, conduct and statements explanatory thereof, made at the solicitation, persuasion, or command of a coroner, cannot be held to be legally voluntary if made without such warning. The only evidence before the trial court as to the voluntary character of this evidence was the statement that no promises or inducements were held out to Castelli to do or say what he then did. This evidence, I think, procured by the coroner without warning, was insufficient and inadmissible because in derogation of our rule as to involuntary confessions. It was a violation of the rights guaranteed to Castelli by Article First of our Constitution.

ALEXANDER G. CARTER *vs.* HENRY C. ROWE ET ALS. (HENRY C. ROWE ET ALS. APPEAL FROM COMPENSATION COMMISSIONER.)

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

A personal injury may arise out of and in the course of one's "employment," within the Workmen's Compensation Act, although suffered before actual work begins or after it has ceased.

In the present case the plaintiff reported at the defendants' boat, upon which he had agreed to work, at the appointed hour, and was then informed that the boat would sail six hours later and that he might use the intervening time as he pleased. Accordingly he left his luggage on the boat and went ashore, returning about an hour before the boat was to sail, and in passing through the defendants' premises in the dark, over a reasonable route, fell and received the injuries for which he claimed compensation. *Held* that under these circumstances the injury arose out of and in the course of the plaintiff's "employment."

Argued June 6th—decided July 6th, 1917.

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APPEAL by the defendants from a finding and award of the Compensation Commissioner for the third district in favor of the plaintiff, taken to and tried by the Superior Court in New Haven County, *Webb, J.*; award confirmed and appeal dismissed, from which the defendants appealed. *No error.*

Patrick Healey, for the appellants (defendants).

L. Erwin Jacobs, for the appellee (plaintiff).

WHEELER, J. The finding of the Commissioner recites these facts: On September 23d, 1916, the plaintiff entered into a contract of employment as a hand upon the defendants' boat, and was instructed by the defendants to report for duty on the boat which was to sail at five o'clock in the afternoon of September 24th. The plaintiff reported on the boat shortly before the hour of sailing. He was then informed that the boat would sail at eleven o'clock, and shortly went ashore, leaving his baggage on the boat. About ten o'clock in the evening he returned to the premises of the defendants, and while going through their yard to board the boat fell in the darkness and suffered injuries, for which he claims compensation.

The sole ground pursued on the appeal to this court is that the trial court erred in deciding that the injury arose in the course of and out of the employment of the plaintiff.

Carter's employment was to have begun at five o'clock, and from the time he entered his employers' premises in order to reach the boat until he boarded her shortly before five, he was doing something incidental to his employment and reasonably within its period. Employment may exist before actual work begins, just as it may continue after actual work has ceased. When

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he left the boat and went ashore he was, so far as the finding of the Commissioner discloses, engaged upon his own business or pleasure, and not in the course of his employment. From the memorandum of the Commissioner it appears that this question was not raised before him, which explains its absence from his finding. If Carter left the boat without orders and without permission, he voluntarily left his place of employment, and such dangers as he thereafter encountered could not be held to have arisen in the course of or out of his employment. Any injury so suffered occurred outside the place of his employment, since that was on the boat and not on shore, and while he was bent upon his own business and not upon the duties of his employment. *Larke* v. *Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 97 Atl. 320; *Mann* v. *Glastonbury Knitting Co.*, 90 Conn. 116, 118, 96 Atl. 368; *Warren* v. *Hedley's Colliery Co., Ltd.*, 6 B. W. C. C. 136. In his memorandum of decision the trial judge says: "He [Carter] was given permission to use the intervening time as he pleased." The parties, at least in the oral argument, have argued the cause as if this fact were a part of the finding before us. If we so assume, it would follow that Carter had been given the privilege of using his time at his will, and of leaving the boat and his employers' premises and returning at his pleasure. This permission would be subject to an implied qualification that he should return a reasonable time before the boat sailed and by a reasonable route over the owners' premises.

The defendants have argued the case upon the theory that the employment of Carter began at eleven o'clock instead of at five o'clock. If their assumption were to be made, it would not follow, in the absence of express contract to the contrary, that Carter could not have boarded the boat an hour before she sailed. That, it seems to us, would not have been an un-

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reasonable time to have sought the place of employment before the boat was to sail. Carter might well have supposed there would be duties to perform sometime before the sailing. *Fitzpatrick* v. *Hindley Field Colliery Co.*, 4 Minton-Senhouse W. C. C. 7.

If Carter left the boat by permission, and while returning to it and his work he was injured upon his masters' premises, and while he was proceeding over a not unreasonable route and while he was at a place where he had a right to be, and within the period of his employment, which began at five o'clock, he was injured in the course of his employment and his employment was a proximate cause of his injury.

There is no error.

In this opinion the other judges concurred.

MAX OTT *vs.* THE CONNECTICUT COMPANY.

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

A jury's conclusion as to what the evidence establishes is final, unless it appears that it was one which could not have been reached reasonably and without indicating the influence of partiality, corruption, prejudice, or other impropriety.

Argued June 12th—decided July 6th, 1917.

ACTION to recover damages for injuries to the person and property of the plaintiff, 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 *Greene, J.;* verdict and judgment for the plaintiff for $800, and appeal by the defendant. *No error.*

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Harrison T. Sheldon, for the appellant (defendant).

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

PER CURIAM. The defendant concedes that the evidence presented to establish its negligence was such as to entitle the plaintiff to go to the jury upon that issue, and that clearly was the case. Upon the issue as to the absence of contributory negligence, evidence was before the jury which, if believed, would furnish a reasonable basis for the affirmative conclusion at which it arrived. Although we are not as strongly impressed by the trustworthiness of some pertinent portions of that evidence as the jury apparently was, we cannot forget that it was its office to determine what the evidence established, and that its conclusion must stand unless it appears that that conclusion was one which it could not have reached reasonably and without indicating that its members were influenced thereto by partiality, corruption, prejudice, or otherwise improperly.

We cannot say that the trial court erred in ruling that the jury's conclusion, that the plaintiff was in the exercise of due care, was not one which, under the accepted rules of law, it should disturb.

There is no error.

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ALICE MAY SWANSON *vs.* EDWIN B. LATHAM ET AL. (EDWIN B. LATHAM ET AL. APPEAL FROM COMPENSATION COMMISSIONER.)

* Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

In the present case the reasons of appeal alleged that the Compensation Commissioner erred "in holding" this and that "upon the evidence"; while the questions reserved by the Superior Court for advice omitted the phrase "upon the evidence." *Held* that the questions raised upon the appeal and upon the reservation were identical, despite these slight differences in form of expression.

Upon an appeal from an award of the Compensation Commissioner the cause is not to be retried *de novo* in the Superior Court, but is to be decided upon the finding as made by the Commissioner, unless that is challenged by the appeal and is found erroneous by the court, whose power to correct is similar to that exercised by this court over the finding of the trial court upon a proper appeal therefrom.

A workman whose contract required his employer to pay the expense of his transportation to and from his home while engaged in work out of town, was killed at a railroad crossing while going home after his day's work in an automobile owned and driven by a fellow workman which had been engaged by the employer for that purpose. *Held* that the accident arose out of and in the course of the decedent's employment, within the meaning of that expression in the Workmen's Compensation Act; and that the master was liable not only for the death of this particular workman, but also for that of the owner and driver of the car who was killed at the same time.

Argued June 12th—decided July 6th, 1917.

APPEAL by the defendants from the finding and award of the Compensation Commissioner of the second district in favor of the plaintiff, taken to the Superior Court in Tolland County, from which the cause was transferred by agreement of the parties to the Superior Court in Hartford County, and reserved by that court, *Gager, J.*, upon the finding of the Commissioner and

* Transferred from first judicial district.

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the evidence before him, for the advice of this court. *Superior Court advised to dismiss the defendants' appeal.*

Warren B. Johnson and *Leonard J. Collins*, for the appellants (defendants).

William A. King and *Samuel B. Harvey*, for the appellee (plaintiff).

WHEELER, J. The facts essential to the decision of this appeal, as found by the Commissioner, are these:—

The plaintiff is the widow of Andrew S. Swanson, a carpenter, who was employed by the defendants, Latham & Crane, building contractors, of Willimantic, to work upon the Dennis house in Stafford Springs, for the repair of which the contractors had the contract.

The contractors agreed as a part of the contract of employment with Swanson and five other employees, including Osterhout, similarly employed, who lived in or near Willimantic, that they would pay them in addition to their regular wages their transportation charges fixed at ninety cents each day, from Willimantic to Stafford Springs and return. These employees were at liberty to remain in Stafford Springs and use the ninety cents for board, or to return to Willimantic and use it for transportation.

The contractors arranged with Osterhout, one of these workmen, to carry these employees to and from Stafford Springs in his own automobile, operated and maintained by him, for the sum of ninety cents a day for each man. On this particular job the transportation for these men was provided by means of Osterhout's automobile, which the men so used, and the ninety cents for each man was paid by the contractors to Osterhout and charged by them to Dennis and later paid by him.

On December 7th, 1916, about five o'clock in the

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afternoon, while returning from their work in Stafford Springs to their home in Willimantic, the automobile collided with a train at a railroad crossing and Swanson and the other five men in the automobile were killed.

The questions of law reserved are: Did the Commissioner err in holding (1) that the injury to, and death of, the decedent, arose out of his employment with the defendants, Latham & Crane; (2) that the injury to and death of the decedent arose in the course of said employment; (3) that the plaintiff was entitled to compensation by reason of said injury and death; (4) that there was an understanding or agreement between the employers and the Carpenters' Union whereby the former agreed to provide transportation for the decedent; and (5) that it was a part of the contract of employment between the employers and the decedent that the latter was to be carried to and from his work by Osterhout.

These questions, following the correspondingly numbered reasons of appeal, are identical with them, except that in questions three, four and five the words "upon the evidence," appearing in the reasons of appeal after the words "in holding," are omitted. This omission has not changed the purpose or meaning of the reasons of appeal. The questions reserved are, and were intended to be, those contained in the reasons of appeal.

Assignments of error four and five in the appeal from the Commissioner, and questions four and five upon the reservation, were, we presume, intended as statements of error committed by the Commissioner in finding the facts set forth in these assignments,—the words "in holding" being used in the sense of "in finding." We have examined the evidence with care and are of the opinion that the trial court might reasonably have found the facts complained of.

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Question three, reserved, which is assignment of error three, is based upon a mistaken conception of the nature of the appeal from the Commissioner. The trial court does not retry the facts. It decides the appeal upon the finding as made by the Commissioner, unless the appeal assigns, as error, the finding or omission to find any facts, and the court finds that facts have been found or omitted which, if found, in accordance with the evidence, would affect the result. The right of the trial court to correct the finding of the Commissioner is similar to that exercised by us upon a proper appeal over the finding of a trial court; and our authority upon appeal from the decision of the trial court, or upon a reservation in a compensation case, does not differ from that exercised by us in the ordinary appeal for errors in the finding of the trial court.

The remaining assignments of error are the holding of the Commissioner that the injury suffered arose in the course of and out of the employment.

The contract of employment between the decedent and the defendants required the decedent to work outside of the place of his residence, Willimantic, if his employer should so desire. And the defendants agreed that while the decedent was at work in Stafford Springs they, as a part of his contract of employment, would convey the decedent from his home to his work and back to his home each day in an automobile provided by them. The work began when the decedent reached Stafford Springs; the employment began when the decedent boarded the automobile at Willimantic, and continued during the trip and during the work and on the return trip to Willimantic. Transportation to and from his work was incidental to his employment, hence the employment continued during the transportation in the same way as during the work. The injury occurring during the transportation, occurred within the

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period of his employment, and at a place where the decedent had a right to be, and while he was doing something incidental to his employment because contemplated by it. The case falls clearly within the construction we have heretofore placed upon the terms of the statute, "arising in the course of the employment." *Larke* v. *Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 308, 97 Atl. 320. An injury received by an employee while riding, pursuant to his contract of employment, to or from his work in a conveyance furnished by his employer, is one which arises in the course of and out of the employment. The injury arose in the course of the employment and while the decedent was being transported to his home, consequently the employment was the proximate cause of it. It, therefore, arose out of the employment. For these are the tests to ascertain in a given case whether an injury arose out of the employment. *Larke* v. *Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 309, 97 Atl. 320. The Commissioner did not err in the matters reserved.

The Superior Court is advised to render its judgment dismissing the appeal.

In this opinion the other judges concurred.

CORA T. OSTERHOUT *vs.* EDWIN B. LATHAM ET AL.

* Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Swanson v. *Latham*, *ante*, p. 87, reaffirmed and followed.

Argued June 12th—decided July 6th, 1917.

APPEAL by the defendants from the finding and

* Transferred from first judicial district.

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award of the Compensation Commissioner of the second district in favor of the plaintiff, taken to the Superior Court in Tolland County, from which the cause was transferred by agreement of the parties to the Superior Court in Hartford County, and reserved by that court, *Gager, J.*, upon the finding of the Commissioner and the evidence before him, for the advice of this court. *Superior Court advised to dismiss the defendants' appeal.*

Warren B. Johnson and *Leonard J. Collins*, for the appellants (defendants).

William A. King and *Samuel B. Harvey*, for the appellee (plaintiff).

WHEELER, J. The facts are identical with the companion case, *Swanson* v. *Latham et al.*

The decedent, Osterhout, was an employee of the defendants, and the contract of employment with him was the same as with Swanson. He stood in a dual relation to Latham & Crane. As the owner of the automobile, he was their agent to transport, in his own automobile, Swanson and the other employees, including himself, from Willimantic to Stafford Springs and back each day, for the sum of ninety cents each day for each employee, including himself. As an employee, his contract of employment during the period of transportation did not differ in any essential from Swanson's and the other employees. So far as the facts disclose, Osterhout's case does not differ from Swanson's.

The Superior Court is advised to render its judgment dismissing the appeal.

In this opinion the other judges concurred.

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JOHN D. TIERNEY *vs.* NUNZIANTE MARTONE ET UX.

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

An officer who has a lawful writ to serve is not bound to declare that fact until his authority is questioned; although in the orderly performance of his duties it may be better to impart that information to all who are directly interested.

It is within the province of the jury to determine the credibility of witnesses.

In an action for assault and battery, a plaintiff's verdict for $300 for severe bruises, a broken nose, two weeks' inability to work, and an outlay of $87 on account of the injuries, is not excessive.

Evidence that while the plaintiff and the defendant husband were struggling together upon the ground, the latter's wife struck the plaintiff several times with a piece of wood, justifies a verdict for a joint assault.

Argued June 12th—decided July 6th, 1917.

ACTION for assault and battery, brought to the District Court of Waterbury and tried to the jury before *Reeves, J.;* verdict and judgment for the plaintiff for $300, and appeal by the defendants. *No error.*

The plaintiff had a writ directing him to attach the property of Rocco Martone, a son of the defendants. The defendants in their answer justify the assault, alleging that when the plaintiff attempted to attach their son's automobile the defendants informed the plaintiff that the son was indebted to his mother, the defendant Philomena, in the sum of $25 for storage of the automobile, and that it could not be moved until the storage was paid, and that thereupon the plaintiff assaulted the defendant Nunziante, and the defendant Philomena went to her husband's assistance, and used no more force than was necessary to protect themselves from the plaintiff's assault. The cause was tried to the

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jury, who rendered a verdict for the plaintiff against both defendants and assessed damages at $300.

Charles W. Bauby, for the appellants (defendants).

John J. O'Neill, for the appellee (plaintiff).

SHUMWAY, J. The defendants complain that the court erred in its charge, in its refusal to charge as requested, and in its refusal to set aside the verdict because it was against the evidence and because the damages found were excessive.

So far as appears from the defendants' brief, the claimed errors in the charge and refusal to charge are not pressed for consideration by this court. But if they are, the court complied substantially with the requests to charge, except one, as follows: "If you find that the plaintiff did not disclose to the defendants that he was an officer and had a writ to serve, then you would be justified in reaching the conclusion that the plaintiff was a trespasser and that the defendants had a right to order him from the premises and use force in ejecting him."

The defendants were not entitled to have the jury so instructed. An officer duly qualified with a lawful precept is not required to declare by what authority he acts until the authority is questioned. It would be better, in the orderly performance of his duties, for an officer to inform all who may be immediately concerned that he is an officer with a legal process to serve, as was done in this case. The defendants' answer alleges that the plaintiff demanded the payment of a bill. It appeared in the evidence that the defendants fully understood the plaintiff was an officer and about to make an attachment. It is also apparent that the affray between the plaintiff and defendants began because of the plaintiff declaring his intention to seize the automobile by attaching it, and the defendants

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objecting because Mrs. Martone claimed a lien on it for storage. Nunziante Martone testified that the plaintiff made an unprovoked assault on him at the time when he claimed his wife had a lien on the automobile, while the plaintiff testified that Nunziante assaulted him as he started to move it, and attempted to obstruct him in the service of the writ.

The defendants' main contention in the brief is that the trial court should have granted a new trial because the verdict was against the evidence and because the damages were excessive.

The verdict was not against the evidence. The evidence was so conflicting that the credibility of the witnesses became all important, and surely it was within the province of the jury to determine, if possible, where the truth lay.

It cannot be said that $300 was an excessive verdict, as the plaintiff testified he received severe bruises, a broken nose, and was incapacitated to follow his usual vocation for two weeks, and incurred a property loss and expenditure of $87 on account of his injuries.

It is suggested that the court erred in accepting a joint verdict against the defendants; the contention being that if the defendant Philomena assaulted the plaintiff, it was a separate assault and not the one in which her husband was concerned. Evidence was offered tending to prove that while the plaintiff and defendant Nunziante were struggling upon the ground, the defendant Philomena struck the plaintiff several times with a piece of stove wood. The jury were properly instructed that if they found the facts in accord with this evidence, the defendants had committed a joint assault and were jointly liable.

There is no error.

In this opinion the other judges concurred.

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MAURICE E. DAVIS *vs.* BENEDICT M. HOLDEN, RECEIVER (MARTIN E. PIERSON *vs.* THE PIERSON ENGINEERING AND CONSTRUCTION COMPANY).

* Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and TUTTLE, Js.

The question whether a court will permit its receiver to be sued is largely a matter of discretion.

There is no reason why a court which is already in possession of tangible personal property claimed to be owned by an intervening petitioner, should allow such claimant to sue its receiver for such property in another court, since that situation is controlled by the well-established rule that where a court has once acquired jurisdiction over a particular subject-matter, it retains that jurisdiction free from interference by any other court.

Argued June 13th—decided July 6th, 1917.

APPLICATION by Maurice E. Davis, the alleged owner of personal property in the hands of the receiver of the Pierson Engineering and Construction Company, for leave to bring an action against said receiver for the recovery of such property, brought to and heard by the Superior Court in Hartford County in which the receivership proceedings were pending; the court, *Shumway, J.*, denied the application, and the applicant appealed. *No error.*

On April 27th, 1916, a temporary receiver, afterward confirmed and appointed permanent receiver, was appointed over the Pierson Engineering and Construction Company, a corporation largely engaged in construction work, whose machinery, tools and equipment were located at various places where the work was then in progress.

One Maurice E. Davis applied to the court for an order requiring the receiver to deliver to him certain

* Transferred from first judicial district.

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property described in a so-called conditional bill of sale. The application was denied, and his petition for leave to sue the receiver was then filed and denied. The property in question appears from the papers to include a large part, if not all, of the tangible assets now in the hands of the receiver.

Alvan Waldo Hyde, for the appellant (Davis).

Lucius F. Robinson, for the appellee (Holden, Receiver).

BEACH, J. The petition is singularly brief. It simply alleges that the petitioner entered into an agreement, recorded and acknowledged according to law, with the defendant Company, whereby it was agreed that certain goods and chattels delivered by Davis to the Company should remain the property of Davis until certain payments had been made by the defendant; and that neither the defendant nor the receiver has made the payments, although the receiver is now in possession of the property. Wherefore the petitioner prays for leave to bring suit to determine his rights under the contract.

There is no allegation or finding that Davis was the owner of the property at the time when the agreement was executed; or that the payments to be made were instalments of an agreed purchase price. On the contrary, the agreement refers to "construction work now in progress in the town of Burlington," and recites that a large part of the equipment is located there. So far as this record shows, the transaction between Davis and the Pierson Engineering and Construction Company may have been an attempt to secure Davis for past or present advances by giving him a conditional bill of sale instead of a chattel mortgage.

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It also appears from the finding that the property described in the agreement was, at the time of filing the petition, in use by the receiver in carrying out contracts made by the defendant Company before the receivership.

The petition does not indicate what particular kind of an action the petitioner desires to bring against the receiver. The prayer for relief is broad enough to include, if granted, permission to bring replevin, and take the property out of the custody of the court pending the determination of the petitioner's rights under the contract. Under the circumstances a summary dispossession of the receiver by replevin is out of the question. The property is already in the custody of the court, which is making use of it in carrying out the defendant's contracts, in an attempt to conserve the defendant's assets for the benefit of all concerned.

Finally, the question whether a court will permit its receiver to be sued is largely a matter of discretion. There is no reason why the Superior Court, being in possession of the property and able to administer full relief to the petitioner, should allow him to bring another action in the same court to try out his alleged title to or interest in the property.

Presumably the desire is to bring an action in the District Court of the United States, Davis being described in his petition as a citizen of New York. In such cases much depends on the character of the action. If in the nature of a suit *in personam* not affecting specific assets, the court of the receivership may consistently allow its receiver to be sued in another court in the exercise of its discretion. But if, as in this case, the action relates to the title to, or right of possession of, property which has already been taken into the custody of the court, "the rule that where a court has once acquired jurisdiction over a particular subject-

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matter, it retains it free from interference by any other court, is that which governs." *Links* v. *Connecticut River Banking Co.*, 66 Conn. 277, 284, 33 Atl. 1003.

There is no error.

In this opinion the other judges concurred.

WILLIAM H. CORBIN, TAX COMMISSIONER, *vs.* SIMEON E. BALDWIN ET ALS., EXECUTORS.

SIMEON E. BALDWIN ET AL., EXECUTORS, *vs.* WILLIAM H. CORBIN, TAX COMMISSIONER.

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, SHUMWAY and TUTTLE, Js.

The words of a statute are presumed to have been used in their ordinary signification; but the context, the history of legislation upon that subject, the effect of the statute under different interpretations, and all the circumstances and conditions under which the Act was passed, are to be considered in determining its construction.

The long-established public policy of the State not to impair the usefulness of gifts to educational and charitable uses by subjecting them to taxation, may doubtless be set aside by legislation, but the intent to do so will not be deduced from doubtful or ambiguous expressions.

Chapter 332, § 3, of the Public Acts of 1915, provides that all property owned by a resident of this State at his decease, which passes by will to Connecticut corporations or institutions which receive "state aid," shall be exempt from so-called inheritance or succession taxes. *Held* that "state aid" as thus used, was not to be restricted to pecuniary assistance extended by the State by way of direct appropriations, as contended by the Tax Commissioner, but included help and assistance afforded by the State of whatever kind and by whatever means or method it might be furnished; and therefore that local corporations or institutions, whose property, because of its devotion to the use and service of the public, was exempted by the legislature from ordinary taxation, were the

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recipients of "state aid," and, as such, were not subject to the payment of death duties under the terms of the Act. (*Two judges dissenting.*)

Strictly speaking, the imposts required by the Act of 1915 are not taxes upon persons or property, but rather death duties levied by the State in the course of the settlement of estates of decedents as an incident to the devolution of title by force of its laws.

In computing the amount of an estate for the purpose of determining the succession tax, the following items should be deducted: sums paid by the executors as inheritance taxes in another State, taxes paid to the municipality of the decedent's domicil, and the amount of income tax paid to the Federal government.

In the present case the Court of Probate figured the tax at eight per cent upon the net estate, about $715,000, passing to persons or corporations in class C. *Held* that this was erroneous: that the tax upon $49,500 should have been figured at five per cent, on $200,000 at six per cent, and upon the balance at seven per cent, as required by § 6 of the Act of 1915.

Argued June 5th—decided August 2d, 1917.

APPEALS from an order and decree of the Court of Probate for the District of New Haven determining the amount of the inheritance and succession tax due the State from the estate of Justus S. Hotchkiss of New Haven, deceased, taken to and reserved by the Superior Court in New Haven County, *Warner, J.*, upon the demurrers filed by the Tax Commissioner to the answer to the reasons of appeal in the first case, and to the reasons of appeal in the second, for the advice of this court. *Judgment advised in favor of the executors.*

Justus S. Hotchkiss, late of New Haven, died possessed of an estate appraised in the inventory thereof at approximately $2,000,000. By his will he made bequests and devises to various persons and corporations. Among them were the First Ecclesiastical Society of New Haven, the General Hospital Society of Connecticut, the New Haven City Burial Association, the Home for the Friendless, the Lowell House, and Yale University, the latter being the residuary

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legatee and devisee. In the course of the administration of the estate, the Court of Probate passed an order and decree adjudging (1) that the gifts to the First Ecclesiastical Society, the General Hospital Society, the New Haven City Burial Association, and Yale University, were exempt from the payment of an inheritance tax; (2) that those in favor of the Home for the Friendless and the Lowell House were subject to such tax; and (3) that the amount of tax due the State was $58,082.80, the same being figured at eight per cent. From so much of this order and decree as established the above exemptions the Tax Commissioner appealed, his appeal being the first named of the above-entitled cases. From that portion which subjected the gifts in favor of the Home for the Friendless and the Lowell House to the tax, the executors appealed, their appeal being the second of the two cases. The appeal by the executors also embodied reasons of appeal alleging that the court erred in failing to make certain deductions from the total amount of the appraisal of the estate and the gains to be added thereto, and in computing the amount of tax payable at the uniform rate of eight per cent instead of a graduated rate of five, six and seven per cent.

George E. Hinman, Attorney-General, and *Charles W. Cramer*, for the Tax Commissioner.

Henry Stoddard and *J. Dwight Dana*, with whom was *John W. Bristol*, for the executors.

PRENTICE, C. J. By the will of Mr. Hotchkiss, six corporations were made the beneficiaries of gifts. One of these gifts, to wit, that to the General Hospital Society of Connecticut, confessedly is not subject to the payment of an inheritance tax. The Tax Commis-

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sioner contends that the other five are. Their beneficiaries, on the other hand, assert that they are exempt from such payment. These conflicting claims form the principal subject of these appeals.

These five beneficiaries include Yale University, a corporation chartered for educational purposes; the Home for the Friendless, and the Lowell House, the first chartered to carry on a benevolent and charitable work, and the second organized under the general law for a similar purpose; the First Ecclesiastical Society of New Haven, an ecclesiastical and religious corporation; and the Proprietors of the New Haven Burial Ground, designated in the will as the New Haven City Burial Association, incorporated for the purpose of maintaining a burial ground, and having as its sole property land exclusively used for such purpose. All of them enjoy at the hands of the State exemptions from taxation.

The record makes it clear that, if the gifts to these beneficiaries are to pass to them free from an inheritance tax, it must be by force of that provision of the statute which exempts "all property passing to or in trust for the benefit of any corporation or institution located in this State which receives state aid." Public Acts of 1915, Chap. 332, § 3. It also makes it equally clear that the sole claim to exemption by virtue of this statutory provision, which any of the corporations involved can successfully assert, is one founded upon the tax exemptions with which they are and for years have been favored at the hands of the State. In making this statement we do not ignore certain facts recited in the answer of Yale University demurred to, and thus presented by it in aid of its position, but they are at best of minor importance, and do not impress us as adding materially, if at all, to the strength of its position. Its claim to exemption must, therefore, rest for

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its support upon the proposition which it, in common with the other beneficiaries before the court, advances, that the gift to it is one which it is entitled to receive without diminution by reason of the imposition of a succession tax, for the reason that it is a corporation in receipt of State aid through the medium of exemptions from taxation conferred upon it at the hands of the State.

The claim thus made by the five corporations is not, it is to be borne in mind, that they are entitled to receive the gifts in their favor free from succession tax through the direct operation of statutes prescribing tax exemptions in their favor. Their claim, on the other hand, gives full recognition to the well-established law of this jurisdiction, that so-called inheritance or succession taxes are not taxes laid upon either persons or property, or, strictly speaking, taxes at all, but rather death duties, levied as exactions of the State in the course of the settlement of estates and as incidental to the devolution of title by force of its laws. *Hopkins' Appeal*, 77 Conn. 644, 649, 60 Atl. 657; *Warner* v. *Corbin*, 91 Conn. 532, 536, 100 Atl. 354. It concedes that if the gifts to them are to escape these death duties, it must be not for the reason that they are taxes in the ordinary sense, but for the reason that the so-called inheritance tax law specifically excludes them from its operation as having been made to corporations in receipt of State aid through the medium of tax exemptions.

The question at issue thus becomes narrowed to one of statutory construction. The law provides that property owned by a resident of this State at his decease, which shall pass by will or the general law of distributions to corporations or institutions in receipt of State aid, shall so pass inheritance tax free. Public Acts of 1915, Chap. 332, § 3. The Tax Commissioner contends

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that the corporations and institutions receiving State aid, within the true meaning and intent of this provision, are limited to those receiving pecuniary assistance by direct State appropriation, and that those corporations and institutions otherwise aided and assisted by the State's action are not included. His counsel urge that this portion of the Act is to be interpreted as though it contained the qualifying words "by appropriations," or language of similar purport, so that it read "State aid by appropriations" or equivalent language. The beneficiaries of the gifts assert, on the other hand, that all those corporations and institutions aided or assisted financially in whatever way, and whether by direct appropriation of State funds, or by the provision of material agencies for the conduct of their work, or by the enhancement of their financial resources by excusing them from the payment of taxes, are to be regarded as recipients of State aid as that term is employed in the statute.

In *Beach* v. *Bradstreet*, 85 Conn. 344, 353, 82 Atl. 1030, we said that "the ordinary definition of aid is help, support, or assistance," and that "State aid is support or assistance furnished by the State." The qualifying word "State" is of no importance, save as indicating the source from which the aid comes. "Aid" is the word which possesses significance for our present inquiry, and that word, as its definition clearly discloses, is one whose ordinary meaning is broad and comprehensive, and inclusive of help and assistance of whatever kind and by whatever means or method provided. There are various means and methods which may be resorted to by individuals in furnishing aid and assistance. The same is equally true of the State. It may, of course, make direct appropriations or payments by which the treasury of the recipient is replenished. If, instead, it excuses a corporation or institution from the

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payment of taxes, it gives aid, assistance, and support to such corporation or institution just as much and just as efficiently as it would by the appropriation of an amount equal to the taxes the corporation or institution would be required to pay were there no exemption. The result in either case, although accomplished by different means, is precisely the same. The difference is one of method, and not of kind or degree of aid furnished. In the one case the money is paid over and paid back; in the other, no money passes. In both the result, as reflected in the treasury of each of the parties, is the same. If the language of the statute is to be accorded its ordinary and natural meaning, our conclusion must, therefore, be that State aid embraces aid given by means of exemptions from taxation as well as by other means, as, for example, by appropriations.

While this is true, and the presumption is that the words of the statute were used in their ordinary signification, it does not necessarily follow that the term "State aid" was not used therein in some less comprehensive sense, or in the qualified and restricted sense for which the Tax Commissioner contends. His claim, therefore, calls for our inquiry as to the legislative intent, involving a consideration of the language used, its context, pertinent antecedent legislative history, related legislation, the subject-matter with which the language deals, its operation as it may be interpreted, the conditions and circumstances under which it was enacted, and all other matters calculated to throw light upon the subject of inquiry.

First and foremost we have the language of the statute. The natural and ordinary meaning of the term which is the subject of consideration does not, as we have already had occasion to observe, harmonize with the interpretation the Tax Commissioner would

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have us put upon it, and its context throws no additional light upon the sense in which it was employed.

Counsel for the Commissioner, in aid of their contention, point to the use of the term in the indices of the Revision and session laws, and in the body of statutes. Our examination of the indices referred to, as well as others, discloses that under the heading of "State aid," references are repeatedly made to statutes providing for the payment of moneys in aid of various objects. Such references are so made with undoubted propriety, since such payments are unquestionably State aid. It also reveals that in nearly as many instances, statutes providing aid and assistance by other means than the payment of money to the objects to be benefited, are referred to under that head. References of the two kinds are indiscriminately intermingled. This is noticeably so in the Revision, where the majority are to statutes of the latter character. As for the statutes themselves, there are two instances which have come under our observation in which the term "State aid," judging by the context, was used in the limited sense of aid by appropriations or direct payment. General Statutes, §§ 183, 1368. Our attention has not been called to others of that character. Scant proof, surely, is thus furnished of an accepted, customary, or common statutory use of the term in the narrow sense contended for. Far more suggestive of the meaning in which it was employed in the statute of 1915, is the fact that in the opinion in *West Hartford* v. *Connecticut Fair Asso.*, 88 Conn. 627, 630, 92 Atl. 432, handed down only a few months before its enactment, we characterized tax exemptions as State aid.

Looking outside of legislation to the conditions and circumstances under which the Act of 1915 was enacted, the subject-matter with which it deals, and its operation, there are several matters of large significance as

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bearing upon both the rule of interpretation which should be employed and the interpretation which should be given to the language in controversy.

Foremost of these is the public service character of tax-exempted corporations and institutions, and the public service performed by them, which furnishes the sole reason for the existence of their exemption. While it may be true, and doubtless is, that tax exemptions have at times been granted with too great liberality and with scant regard for their fundamental reason, such is not the case in the vast majority of instances, and manifestly is not in the case of any of the parties before the court.

It is to be borne in mind that exemptions are made, and can be made lawfully, only in recognition of a public service performed by the beneficiary of the exemption. They are not bestowed, as is too often unthinkingly supposed, as a matter of grace or favor. If lawfully granted, as most are, and as we for present purposes are bound to assume that all are, they are granted in aid of the accomplishment of a public benefit and for the advancement of the public interest. It is in recognition of their position as an agency in the doing of things which the public, in the performance of its governmental duties, would otherwise be called upon to do at its own expense, or which ought to be done in the public interest and without private intervention would remain undone. *Yale University* v. *New Haven*, 71 Conn. 316, 332, 42 Atl. 87. In the fullest sense of the word, the exemptions are given for the assistance and help of the private endeavor in its effort to advance the public interest or to perform some share of the public governmental duty.

This is true not only theoretically but practically. The extent of the public service, and of that service within the range of governmental duty, which is per-

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formed by private beneficiaries operating through the medium of tax-exempted institutions and corporations is enormous, and the importance and value of it in its purely public aspects incalculable. The amount of taxes which are lost to the State and its political subdivisions by reason of exemptions are of trifling consequence as compared with the sums coming from private sources which are spent for the public weal. They are trifling as compared with those spent for purposes governmental in their character, and which, but for the private expenditure, would become a charge upon the public treasury if the governmental duty of an enlightened modern State is to be performed.

The history and service of Yale University, one of the present beneficiaries having the largest interest under the will before us, furnishes a forcible illustration of the truth of the foregoing observations. The numerous charitable institutions of the State, among which are two of the institutions before the court, furnish other incidents as striking. But we may well take as a single example the typical one afforded by Yale.

It had its origin in a profound conviction on the part of the leaders of the infant Colony, that the public welfare demanded the establishment within its borders of a school of higher education, where young men might be prepared and trained to render the best public service to the community and State. The task of providing such a school in those days was no small one, but the urgency of the need, if the Colony was to prosper and maintain the necessary standard of intelligent and capable leadership, was so keenly felt and appreciated that, in spite of the difficulties, the longed-for institution came into its first modest existence. Its charter expressed the feeling of the time as to the place it was intended it should occupy as a pub-

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lic agency, when it characterized the purpose of the projected school as one wherein "youth may be instructed in the arts and sciences, who, through the blessing of Almighty God, may be fitted for public employment, both in church and civil State." The history of the institution thus founded need not be followed through the succeeding years, further than to observe that from the first it has enjoyed exemption from taxation, and not infrequently was made the recipient from the State of direct financial help.

Can any one, who reads the story of Yale's beginning and development, doubt that our fathers in founding it did so to provide what they thought to be a much needed agency of public service, that the Colony, and subsequently the State, in making direct gifts and tax exemptions in its favor, were actuated by the same high purpose, and that the tax exemptions early made and through the years since maintained, were made for the conscious purpose of giving substantial aid to the undertaking whose work it was felt was and would continue to be fraught with great public benefit to community and State? The same appreciation of the public service rendered by institutions of higher education, has led many of our sister States to make large expenditures from the public treasury in the establishment and maintenance of such institutions. The eastern States have, for the most part, been spared the necessity of making these expenditures by reason of the willingness of private benevolence to assume the task elsewhere shouldered by the State. In this way Connecticut has been favored. Its institutions and colleges are able to rely for their support upon private contributions and endowments, with only such State assistance as results from exemptions from taxation. The assistance gained through these exemptions has been of no small help in the conduct of their work and

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of no small proportions. But that from private sources has been far greater. The latter fact should not be allowed to obscure the public character of the work carried on by them. Neither should the former be forgotten when credit for the support of that work is being given to those who have furnished substantial aid.

The public policy of this State, and of the colonial government which preceded it, has, from its early days, been governed by a recognition of the public character deserving of public assistance and support of not only Yale's work, but also of that of other educational and charitable institutions and related institutions generally. In 1684 it was provided, "for the incouragement of learning and promoating of publique concernments," that all houses or lands given or held for "the mayntenance of the ministry, or schooles, or poore," should remain to the uses for which they were given, and be exempted out of the list of estates, and be rate free. 3 Col. Rec. 158. In 1702 this Act was succeeded by a broader one, furnishing the basis of our present statute of charitable uses (General Statutes, § 4026), which embraced within its provisions land, tenements, hereditaments, and other estates, given by Colony, town, village, or persons, for the maintenance of the ministry of the gospel, schools of learning, relief of poor people, or any other charitable use. Acts and Laws of the Colony, 1702, p. 64. This Act contained the general exemption provision, and continued in force until 1821. At that time the exemption clause was dropped from it, and since then the general policy of exemption indicated has been followed by general and special legislation to the extent, at least, of substantial, if not total, exemption. Rev. 1821, Title 56, Chap. 1, § 3.

This legislative history has no present importance save as it shows the long-time consistent policy of the Colony and State in not violating the ordained sanctity

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of property dedicated by gift of its owner to public charitable uses, by depleting its amount or effectiveness for the purpose of its dedication, through the levy of a tax or the imposition of other State burden upon it. If now it is proposed to reach out and take toll of such gifts in the process of the devolution of title, it marks a new and radical departure in policy in striking contrast with that which heretofore has characterized our governmental history. Such a departure is one which a court will be slow to find to be within the legislative intent, unless indicated by clear and unambiguous language.

Every dollar which Yale University has received or may receive, by gift or otherwise, is irrevocably dedicated to a public charitable use. General Statutes, § 4026; *Connecticut College* v. *Calvert*, 87 Conn. 421, 428, 435, 88 Atl. 633. When the title to property vests in the University, that property "passes out of the domain of private property" and becomes devoted forever to a public charitable purpose. *Yale University* v. *New Haven*, 71 Conn. 316, 333, 42 Atl. 87. The same is true of the funds held or received by the other beneficiaries in court. A generous public spirit prompted Mr. Hotchkiss to withdraw a large portion of his large estate from the domain of private property, capable of use for private enjoyment or profit, and to devote it to the public charitable uses represented by it and them. It is doubtless within the power of the State, by means of succession taxes so-called, to appropriate to itself some portion of the estate so undertaken to be devoted, and thereby divert it to some other public use not within the mind or purpose of the testator, but its intention to do that thing will not be deduced from language not clearly expressing or indicating such intention. *Evergreen Cemetery Asso.* v. *New Haven*, 43 Conn. 234, 242.

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The claim of counsel for the Tax Commissioner, that since that portion of the Act under consideration embodies an exemption from the operation of the general rule prescribed by the Act it should receive a strict construction, is not well made. The rule of construction thus appealed to is one which has its limitations, as is clearly pointed out in *Yale University* v. *New Haven*, 71 Conn. 316, 329, 42 Atl. 87, and the present situation is one which comes well within them.

Turning now to the history of inheritance-tax legislation in this State for light which it may throw on the subject of inquiry, we find that the first legislative attempt in that direction was made in 1889, when a statute was enacted laying such taxes, but specifically exempting property passing to or for some charitable purpose, defined as including "gifts to any educational, benevolent, ecclesiastical, or missionary corporation, association, or object." Public Acts of 1889, Chap. 180, §§ 1, 17. In the matter of exemptions, the law remained unchanged until 1897, when, in reframing the Act, nothing was said upon that subject. Public Acts of 1897, Chap. 201. This silence, incomprehensible as it may appear in view of the traditional policy of the State continued until 1911, save for the passage in 1909 (Public Acts of 1909, Chap. 218, § 1) of an Act exempting "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." At the session in 1911 an Act, consisting of seven lines only, was passed, which provided for the exemption of all gifts thereafter made by will to or for the benefit of any corporation or institution, located in the State, "which receives State aid by appropriations provided for by the general statutes," and further pro-

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viding that the exemption should extend to all like gifts theretofore made to or for the benefit of such corporations or institutions, on which a succession tax had not been paid. Public Acts of 1911, Chap. 148. In 1913 the succession tax law was extensively revised, and in that revision all property passing in trust for any charitable purpose to be carried out within the limits of this State, or to or for the use of municipal corporations of the State for public purposes, and gifts of the kind covered by the amendment of 1909, were exempted from the tax imposed by the Act. Public Acts of 1913, Chap. 231, § 2. Then followed the Act of 1915, again remodeling and elaborating the law, and containing the provision under consideration in the place of that embodied in the Act of 1913.

This history, with its frequently recurring changes, is barren of indication as to the intended meaning of the phrase under consideration, except such as may be derived from the legislation of 1911 and subsequent years.

From the latter legislation it would appear that the General Assembly had become awakened, in some degree at least, to the lack of wisdom shown in the Act of 1897, in that the State was made to take toll of all private benefactions coming within the jurisdiction of Courts of Probate, whether or not they were made in favor of organized agencies engaged in the performance of a work in the interest of the public welfare. How full that awakening was, as shown by the amendment of 1911, is not altogether apparent. It is curiously phrased, in that it in terms limits the State aid by appropriations to appropriations provided by general statutes. Whether the inclusion of that qualification was inadvertent or intentional, we have no means of knowing. If the latter was the case, the Act was one of very narrow application, since appropriations by

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general statute are very exceptional. If the former, and the intention was to confine the exempted corporations and institutions to those receiving State aid through appropriations, it was intended to be what counsel for the Tax Commissioner say that the Act of 1915 provides in the absence of any qualifying words at all.

Whatever the legislative intent was which the amendment of 1911 attempted to express, that embodied in the Act of 1913 is unmistakable. Apparently the General Assembly had come to realize that a sound public policy dictated that the State should not appropriate to itself, for use for its public purposes generally, property, or any portion of property, which had been dedicated by its late owner to public charitable uses, and that consistency of State action demanded that such exaction should not be made where, for a similar reason, taxation was foregone. At any rate, and for some reason it regarded as sufficient, it provided broadly that all property passing in trust for a charitable purpose should be exempt from the payment of inheritance taxes, thus going back to and adopting the policy embodied in the original Act of 1889.

Our legislation having thus, after a wide departure and sundry experiments, come back to where it began, and to a policy consistent with that which has marked our traditional attitude toward corporations and institutions engaged in service for the public weal, in harmony with our treatment of the property of such corporations and institutions in other respects, and supported, as we have seen, by dictates of sound reason, did the General Assembly of 1915 intend to depart again and take a step back from the position assumed in 1913? If it did, the way was open for it to accomplish that result by the use of plain and simple language—some such language, for instance, as that which the

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amendment of 1911 suggests. It would have been the simplest thing in the world to have expressed it in unmistakable language, and it is little short of inconceivable that if it was the legislative purpose to limit the exemption to gifts to corporations and institutions in receipt of State aid through the medium of appropriations, that it did not say so unequivocally, and not leave the desired limitation to be supplied by interpretation. The Tax Commissioner's claim asks us to supply such unexpressed qualification. It asks us to say that when the General Assembly used the term "State aid"—a term of comprehensive meaning, as we have seen—it meant such aid furnished by a particular means and in a particular method. We are unable to see any valid reason for so limiting the language it used, and thus supplying by implication the words without which the desired qualification is not suggested.

Certainly no inference that the term "State aid," in the 1915 Act, was intended to be understood with the qualification that the aid should be by State appropriation or direct payment from the treasury, can reasonably be drawn from the fact that the same words, "State aid," appear in the 1911 Act accompanied with the qualification that the aid should be by appropriations. Rather is the omission of the qualifying words once used, confining the aid to that by appropriations, suggestive of an intentional omission of them.

Neither does the fact that different language was used in the Act of 1915 from that of the Act of 1913, furnish a substantial basis for an inference that a radical departure from the rule prescribed in the former law was intended, much less the particular departure claimed by the Commissioner. It might well be that the change of language was prompted by a desire to supply a definite and precise test in place of one less precise, and to confine the benefits of the exemption to

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corporations and institutions whose public service character had received legislative certification by grants of aid either directly or by exemption from taxation. But whether so or not, and whatsoever other inferences may fairly be drawn from antecedent legislation, the fact remains that the General Assembly of 1915 did not use language indicating, with any reasonable degree of certainty, its purpose to impose succession taxes upon property passing, upon the death of its owners, to corporations and institutions which, by reason of their character as corporations and institutions receiving, holding, and administering property solely in the interest of the public welfare, were in the enjoyment of the aid of the State by way of exemptions from taxation.

The Court of Probate, in making its computations for the purpose of determining the amount of tax to be paid by the executors, and in framing its order and decree, made, as the Tax Commissioner concedes, two errors. One of these was in omitting from its deductions from the total amount of the appraisal of the inventory and the gains to be added thereto to obtain the net estate passing to beneficiaries, the following items, to wit: (1) $9,017.97 paid by the executors to the State of New Jersey as inheritance taxes, (2) $1,399.90 paid by them to the tax collector of New Haven as taxes, and (3) $708.99 paid by them to the United States Internal Revenue Collector as an income tax. By reason of these omissions, which total $11,126.86, the total amount passing to beneficiaries, as ascertained, was too large to that extent. This error is one which requires a modification of the decree in several places, and renders incorrect the court's final determination and adjudication as to the amount of tax due. The other error arose from the computation of the tax to be paid at eight per cent upon the net estate not exempt, whereas it

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should have been figured at five per cent on $49,500, six per cent on $200,000, and seven per cent on the balance. Corrections, as to which the parties are agreed, should be made in the decree wherever these errors or their results appear.

The Superior Court is advised to render its judgment (1) affirming so much of the order and decree of the Court of Probate as adjudged that the gifts to Yale University, the First Ecclesiastical Society of New Haven, and the New Haven City Burial Association are exempt from the payment of an inheritance tax; (2) modifying said order and decree so that it shall declare that the legacies to the Home for the Friendless and the Lowell House are likewise exempt; (3) amending it by incorporating therein the corrections outlined in the paragraph of the opinion immediately preceding this rescript; and (4) making such other incidental changes in it as may be necessary in order that it may correctly state the results flowing from the modification, amendments, and corrections thus made.

No costs in this court will be taxed in favor of any of the parties.

Is this opinion SHUMWAY and TUTTLE, JS., concurred.

WHEELER, J. (dissenting). Five beneficiaries under Mr. Hotchkiss' will claim exemption from the payment of the succession tax, by virtue of the statute which exempts "all property passing to or in trust for the benefit of any corporation or institution located in this state which receives State aid." The question for decision is whether each of these beneficiaries is a "corporation or institution . . . which receives State aid." Public Acts of 1915, Chap. 332, § 3.

Each of these beneficiaries has been receiving from the State an exemption from ordinary taxation. The only

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basis upon which their claim is supported in the majority opinion, is that the exemption from ordinary taxation accorded them is the receipt by them of State aid. The issue is thus a narrow one: Does the term "State aid," as used in the succession tax law of 1915, include aid rendered by way of exemption of property from taxation? The court relies for its conclusion upon (1) the ordinary meaning of State aid; (2) our judicial definition of the term; (3) the absence of anything in our statutes indicating that the use of this term is other than its ordinary one; (4) the history of our succession tax; and (5) the existence of a public policy in favor of the exemption of legacies to these institutions and corporations from the succession tax.

We will take up these points in order. The court quotes our definition of State aid from *Beach* v. *Bradstreet*, 85 Conn. 344, 353, 82 Atl. 1050—"State aid is support or assistance furnished by the State," and says that the qualifying word "State" is of no significance, save as indicating the source of the aid. Hence, it is argued, any form of support or assistance furnished by the State, whether by money grant, or by excusing the corporation or institution from the payment of taxes, falls within the ordinary and natural use of language under the term "State aid."

As it seems to us, the word "State" in the term "State aid," and in the definition of *Beach* v. *Bradstreet*, is all-important, for there can be no State aid unless the State furnishes the support or assistance. The opinion quotes a part of our definition in *Beach* v. *Bradstreet*. We shall get a clearer view of the definition if we have it before us entire. "The ordinary definition of aid is help, support, or assistance . . . furnished by the State to its institutions, organizations, or individuals for a public purpose. It is a term of our statutes, applied to pecuniary assistance furnished by the State

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to towns, schools, etc., and for internal improvements—all recognized public purposes." Our definition called for (1) support or assistance, (2) furnished by the State, (3) for a public purpose. To furnish, is to provide for, to give. It presupposes the giving of pecuniary assistance or support directly. One would not, in the natural use of language, speak of furnishing assistance to A, when what was done was not to give A something but to relieve A from paying a public obligation due the State. Affirmative and not merely negative action is required. The definition in *Beach* v. *Bradstreet* was intended to include aid furnished by the State, either in a pecuniary way, or by way of support furnished through appropriations made to that end. This becomes doubly clear when we read this definition in connection with the statute there under consideration. Since the State cannot furnish either pecuniary assistance, or support, unless there be an existing appropriation under law for a particular purpose, the furnishing of support is in reality the furnishing of pecuniary assistance. The definition of *Beach* v. *Bradstreet* does not include as "State aid" the indirect assistance afforded one by relief from the payment of taxes. When that opinion was rendered no such claim was made before the court and the court had no thought of it.

The majority opinion meets the contention of the Tax Commissioner—that the use of the term "State aid" in our statutes is in the sense of pecuniary assistance, or support,—by the statement that it finds scant proof of such an accepted statutory use of this term from its use in the indices of our statutes and in the two sections of the statutes to which it alludes in the opinion. If these instances were all that the statutes revealed, certainly their conclusive character could not be maintained. The contention of the Tax Commissioner rests upon a much broader base than this.

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We shall not attempt an exhaustive review of our statutes, but will point out the use of this term in the body and title of our statutes, in the heading and marginal notes, and in the indices of our statutes, sufficiently to establish that the recognized statutory use of this term conforms to our view of its meaning. In the Revision of 1902 we find four references to State aid in the body of statutes. Sections 183, 184, 1368 and 3019. In the Public Acts of 1913, Chap. 25; Public Acts of 1911, Chap. 187; and Public Acts of 1903, Chap. 161, references to State aid are made in the body of the statute. In all of these instances in which this term appears in the body of the statute, it refers to pecuniary assistance. The term is used in the heading of § 3019, of § 2889, and of § 2242, of the General Statutes, and in each instance it refers to pecuniary assistance. This term is found in the title of the Public Acts of 1913, Chapters 25 and 172; Public Acts of 1911, Chap. 183; Public Acts of 1909, Chap. 82; Public Acts of 1907, Chapters 145 and 232; and Public Acts of 1905, Chap. 226. In each of these instances the statutes refer to pecuniary assistance.

The marginal notes to the following statutes contain this term, and the statutes refer to pecuniary assistance. Public Acts of 1915, Chap. 335; of 1913, Chapters 167 and 172; of 1911, Chap. 187; of 1907, Chap. 216; of 1903, Chap. 102. In the index to the Revision of 1902, under the term "State Aid," one half of the references are to direct pecuniary aid, and one half to support furnished by the State through appropriations made to that end. In the indices of the Public Acts of 1913, 1911 and 1907, this term is used in reference to statutes affording direct pecuniary aid. Neither in the Revision of 1902, nor in any Public Act thereafter, is the term "State aid" used in the sense of an exemption from taxation. We have made an examination of the statutes preceding

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1902, but necessarily it has not been a completely exhaustive one, and in no single instance have we found that "State aid" was used in the statutes in the sense in which my brethren use it. No instance of such a statutory use was pointed out to us by counsel for the beneficiaries, and none has been found by the court. Under these circumstances, no conclusion is permissible but that the use of the term "State aid" in the Public Acts of 1915 was that which had always obtained in our statutes, viz: assistance furnished by the State by direct pecuniary grant, or support furnished by the State through an appropriation duly made.

Our Private Acts show that the property of many corporations and institutions devoted to charitable purposes is, by their respective charters, exempt from taxation in whole or in part, while the property of many other corporations devoted alike to charitable purposes is not exempt. Under the court's interpretation of "State aid," bequests and devises to all of these institutions and corporations which are not exempt from taxation and which do not receive from the State assistance either in money-grant or support, are subject to the succession tax. So that under our law not every corporation or institution devoted to charitable ends is exempt from the payment of ordinary taxes as the court assumes, nor from the payment of the succession tax. This inequality, which the court finds so glaring an injustice, is not relieved by the court's extension of the meaning of "State aid" to exemptions from taxation. Again, some of these corporations and institutions are exempt in whole and some in part, indicating differences in legislative policy toward these institutions and corporations. By the court's interpretation of "State aid," these differences are ignored, and the least exemption from taxation carries with it complete exemption from the payment of the succession tax.

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The court ignores a settled legislative public policy and recognizes a public policy which has never existed. Again, some of these institutions are made exempt from taxation provided the town of their domicil so votes. These inequalities and inconsistencies, consequent upon the court's interpretation, would be avoided if "State aid" is accorded its settled statutory meaning. If it is held to include exemptions from taxation, these will be perpetuated.

Is it likely that the General Assembly intended that corporations and institutions to which it had accorded a partial exemption from taxation should, by reason of this exemption, receive complete exemption from the payment of any and all succession taxes upon bequests and devises to them, no matter how large?

The history of exemption in our succession tax legislation, far from supporting the theory that a tax exemption is "State aid," is persuasive that "State aid," as used in the Succession Tax Act of 1915, was not intended to include aid by way of a tax exemption. Our first Succession Tax Act made all property within the jurisdiction of the State subject to this tax, other than property passing by will or by the intestate law to or for the use of some charitable purpose, or purpose strictly public within the State. Public Acts of 1889, Chap. 180, § 1. Chapter 201 of the Public Acts of 1897 repealed the Act of 1889, and enacted a succession tax law which omitted this exception. Under this Act all property devoted to a charitable purpose was subject to the succession tax. So the law remained until the passage of Chapter 148 of the Public Acts of 1911, which provided that all gifts by will to or for the benefit of any corporation or institution located in this State, "which receives state aid by appropriations provided for by the general statutes, . . . shall be exempt from the payment of any succession tax." For the first

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time in the history of our Succession Tax Acts, the receipt of State aid was made a condition of exemption. When the Act of 1911 was passed, State aid was given to some seventeen hospitals through appropriations made by public act. Public Acts of 1909, Chap. 118, and General Statutes, § 2852. In the session of 1911, these grants to hospitals were made through the Special Laws, and these appropriations to our hospitals comprised then, as now, the greater part of all State aid by way of appropriations by direct gift, or by support furnished. It would be futile to claim that State aid by appropriations includes aid by way of exemption from taxation.

In Chapter 231 of the Public Acts of 1913, the Act of 1911 was repealed, and it was provided that any property passing by will or inheritance in trust for any charitable purpose should be exempt from the succession tax. There has thus been nothing up to this time to indicate that the receipt of an exemption from taxation was State aid, or that it was intended in any of these Acts to include, within the exemption from the succession tax, property exempt from ordinary taxes. The Act of 1913 indicates a return to the early policy of exemption of the 1889 Act.

Chapter 332 of the Public Acts of 1915, recast the succession tax law, repealed the Act of 1913, and reenacted the Act of 1911, except that it omitted the words "by appropriations provided for by the general statutes." The reason for the omission is apparent. Up to the passage of this Act it must be conceded that there were only two forms of State aid known to our statute law, viz: one by direct gift, and one by the furnishing of support by means of an appropriation made for that purpose. State aid by way of an exemption from taxation was unknown to our law. Prior to the session of 1911, State aid, as we have pointed out, had

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been furnished certain designated hospitals by direct appropriation, and with the session of 1911, and thereafter, these appropriations were made in the Special Laws. A re-enactment, in 1915, of the Act of 1911, would have omitted from its benefits the very institutions to whom State aid had been the most generously extended. At this time it was understood that while the majority of the appropriations for State aid were made in the Special Laws, some also were made by the Public Acts, and some aid was extended by way of support made through appropriations of public moneys for that purpose. Under these circumstances, the General Assembly, desiring that bequests to all corporations or institutions receiving State aid should be exempt from the payment of the succession tax, could not limit the beneficiaries to those receiving State aid by appropriations, otherwise those receiving State aid by way of support would have been excluded; but by making the receipt of State aid the condition of exemption, it would include the two classes which had, up to that time, been the sole recipients of State aid. The reason supporting this form of exemption is found in the fact that increased payments by the State will be avoided by the exemption to institutions receiving State aid, but, in the case of institutions and corporations to whom the State makes no payment or furnishes no support, no such reason exists for making the exemption.

We do not think it is of any practical importance whether the rule of strict or liberal construction of this Act is adopted, since with either construction the result must be the same. Since the court has adopted the liberal rule of construction, it is well to instance the rule which the authorities make applicable to a case where an exemption is claimed from a general scheme of taxation. "Such exemptions are neither presumed nor allowed, unless there appears from the

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language of the statute or charter to be a clear intention on the part of the legislature to make an exception to the general rule." Cooley on Taxation (2d Ed.) 204; *Ford* v. *Delta & Pine Land Co.*, 164 U. S. 662, 17 Sup. Ct. 230; *In re Hickok's Estate*, 78 Vt. 259, 62 Atl. 724. "Statutes purporting to grant exemptions from general taxation are to be strictly construed." Cooley on Taxation (2d Ed.) 205.

We agree with the Attorney-General when he says: "If the General Assembly had intended to exempt all property passing to corporations or institutions exempt from taxation, it is fair to assume that it would have expressed that intent by express language as in the New York statute . . . and in the laws of Vermont." My brethren say that it is inconceivable that the General Assembly did not in words limit the meaning of State aid if such was its intent. Until the passage of the Act of 1915, State aid, as used in our statutes, had a recognized meaning, and its use in other statutes will be presumed to be with a similar meaning unless the contrary appears. There is nothing in the Act of 1915 which tends to show that it was intended, by the use of State aid in this Act, to add to its statutory meaning assistance resulting from a tax exemption.

The Special Commission on Taxation, in its report to the General Assembly in 1917, described the tax laws enacted in 1915, as "greater both in number and importance than the General Assembly had ever before made at a single session." Among the sixteen principal changes enumerated, the "whole inheritance tax law was recast. . . . The exemptions of trusts for charitable purposes within the State, other than gifts to municipal corporations of this State for public purposes, were repealed." If this committee had thought that bequests to corporations and institutions which were tax exempt were not subject to the succession tax, it

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cannot be doubted that it would have pointed out that, in spite of the repeal of the 1913 provision, the greater number of trusts for charitable purposes were not affected by this repeal. Unquestionably the committee were of the opinion that under the Act of 1915 all gifts to corporations or institutions, except those receiving aid in the way of money or support, were by the Act made subject to the succession tax. The committee further reported: "We recommend the exemption from succession taxes of all testamentary gifts to corporations created under the laws of Connecticut for charitable purposes." Would it have so reported if it had been of the opinion that all corporations exempt from taxation were in receipt of State aid? The significance of the conclusion of the committee is the greater from the fact that its chairman was former CHIEF JUSTICE BALDWIN.

Contemporaneous construction of this Act is of great weight. So far as we can learn, the claim that tax exemption is State aid has never before been raised in any proceeding, and no official has ever acted in the view that a charitable corporation which was tax exempt was for that reason in receipt of State aid.

The majority opinion finds, in the legislative history of the exemption from ordinary taxes, of property dedicated by gift to public charitable uses, a policy of Colony and State that no part of such gifts shall be depleted through the levy of a tax or the imposition of other State burden upon it; and the court finds in a present proposal to make any of these gifts subject to the succession tax, "a new and radical departure in policy in striking contrast with that which heretofore has characterized our governmental history." We fear the strong sympathy of the court with the charitable purposes of these corporations and institutions which claim an exemption from the payment of the succession tax, has momentarily caused it to forget that between

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1897 and 1911 such gifts were subject to the succession tax, and between 1911 and 1913 they were so subject unless the corporations or institutions to which they were given were the recipients of State aid through appropriations under the general statutes. There was no "new and radical departure"—merely a return to a former policy of taxation.

We refrain from expressing our view upon the wisdom of imposing a succession tax upon bequests to any corporations or institutions devoted to charitable purposes. We regard that decision as within the legislative function. The General Assembly enact statutes, the judiciary do not. That Connecticut had, as a rule, exempted corporations and institutions devoted to charitable purposes from the payment of ordinary taxes, indicated a public policy as to this class of exemptions. It did not indicate a public policy as to a totally different form of raising revenue by means of death charges. Our first succession tax law was passed in 1889; necessarily our public policy as to succession taxes originated after this date. It was no part of a policy originating long before the succession tax law was passed. We have held that succession taxes are death duties, charges upon the right or privilege of devolution and not taxes upon property or person. *Nettleton's Appeal*, 76 Conn. 235, 56 Atl. 565; *Gallup's Appeal*, 76 Conn. 617, 57 Atl. 699; *Warner* v. *Corbin*, 91 Conn. 532, 100 Atl. 354, Since succession taxes are a totally different concept from the ordinary tax, it follows that a public policy concerning the ordinary tax has no relation to a succession tax. The history of our succession tax laws furnishes an unanswerable argument to the contention that the public policy of the State has been and is against making all gifts to corporations and institutions devoted to public purposes subject to the succession tax. After an experience of ten years in exempting

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from the payment of the succession tax all property of such corporations and institutions devoted to charitable purposes, the exemption was repealed and so remained for fourteen years. This change in our policy was taken with deliberation.

The General Assembly enacted the 1897 statute through its knowledge that the living often failed to pay their just share of the cost of government, and that it was justice to the State that in the final settlement of the estate of the dead the debt of the deceased to the State should, at least in part, be paid before payments should be made to the objects of his bounty, even though these were charitable trusts. We have approved of this as a legitimate reason for succession taxes, and so have the United States Supreme Court. *Hopkins' Appeal*, 77 Conn. 644, 649, 60 Atl. 657; *Plummer* v. *Coler*, 178 U. S. 115, 20 Sup. Ct. 829. That the General Assembly of 1897 intended an entire reversal of the early policy, is perfectly clear from a reading of the Acts of 1889 and of 1897. The fact that bequests to all corporations and institutions devoted to charitable purposes were, under the Act of 1897, for fourteen years subject to the succession tax, is conclusive of the existence during that time of a public policy favorable to the imposition of a succession tax upon charitable trusts of this character. The change in 1911, exempting bequests only to those corporations and institutions which receive State aid "by appropriations provided for by the general statutes," indicated a change in public policy, to the end that bequests to such of these corporations and institutions as received State aid by appropriations through the general statutes, should be exempt from the payment of succession taxes. The change in 1913 indicated a reversal to the early policy exempting gifts to all institutions and corporations devoted to charitable purposes. The change in 1915 indicated a partial reversal of the policy of ex-

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emption of 1913. There was no indication in the language used, or in the title or history of this Act, that it was the public policy to make gifts to every corporation and institution which was exempt from taxation, free from the payment of the succession tax.

The Tax Commission report, to which we have referred, accompanied its recommendation that all charitable trusts be made free from the succession tax, by a bill carrying out this recommendation. The General Assembly of 1917 enacted several of the recommendations of this Commission, but re-enacted the part relating to the exemption of gifts to corporations and institutions receiving State aid, just as it appeared in the Act of 1915. The General Assembly thus refused to follow the recommendation of the Commission and exempt from the succession tax "all property passing to or in trust for the benefit of any corporation incorporated under the laws of this state solely for charitable purposes." So that the latest expression of the public policy of the State is a refusal to adopt the policy which the majority opinion holds to be the established public policy of the State.

Under the court's ruling, a bequest to any corporation or institution which is exempt from ordinary taxation, in whole or in part, is free from the succession tax. And this holds, whether the corporation or institution be devoted to charitable purposes or not. Surely the General Assembly never intended to exempt gifts to business corporations from the succession tax, although the corporation might be exempt from the payment of ordinary taxes. Under the court's construction of this Act, its effect, instead of restricting the exemptions of 1913, would enlarge them beyond those known in any of our succession tax laws. The General Assembly which passed the 1915 Act faced a serious financial situation. The expenses of the State far outran its revenue. The

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Governor of the State recommended, and the General Assembly passed, much taxation legislation enlarging the old, and discovering new, sources of revenue. In that crisis it would indeed have been strange had Governor and General Assembly intentionally released from the operation of the succession tax gifts to corporations which are tax-exempt but which do not receive State aid, when the amount involved was a very substantial sum. The Tax Commission of 1917 reported, as their estimate from their recommendation that bequests to Connecticut charitable corporations be made exempt from the payment of succession taxes, the following: "Reduction of Succession Taxes charged to Connecticut charitable corporations, probably on the average about $200,000." This is State history, and it tends strongly to show that the General Assembly did not intend, by the Act of 1915, to include under State aid, tax exemptions granted corporations and institutions.

We concur in the decisions upon the other points involved in these appeals.

In this opinion RORABACK, J., concurred.

VETAL F. AINS *vs.* EDWARD D. HAYES.

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

A landlord agreed that if through his sale of the premises his tenant "was compelled to vacate," he should receive $50 and his moving expenses up to $14. A year later the house was sold, and the purchaser, after installing gas, raised the rent from $14 to $25 a month, which the tenant could not afford to pay and so hired another

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house. *Held* that in the absence of any finding that the increase in the rent was arbitrary or unreasonable, the tenant could not be said to have been "compelled" to leave the premises because of their sale, and therefore could not recover the $50 and his moving expenses.

Submitted on briefs June 5th—decided August 2d, 1917.

ACTION to recover money alleged to be due under a contract between the parties, brought to the City Court of Bridgeport and thence by the defendant's appeal to the Court of Common Pleas in Fairfield County and tried to the court, *Walsh, J.*; facts found and judgment rendered for the plaintiff for $62 and double costs, and appeal by the defendant. *Error; judgment to be rendered for defendant.*

This action is for damages for compelling the plaintiff to move, occasioned, as alleged, by the sale of a house formerly owned by the defendant. A memorandum of agreement relating to this transaction was as follows: "Bridgeport, Conn., August 15, 1914.

I hereby agree if Mr. Ains is compelled to vacate my cottage on Ezra Street through my selling said cottage he is to receive the sum of Fifty (50) dollars and moving expenses, which are not to exceed the sum of $14.

Edward D. Hayes."

The controlling question in issue was whether or not the plaintiff was "compelled," within the terms of the contract, to move through the defendant's selling the cottage.

The finding shows the following facts: The defendant was the owner of a house consisting of five rooms and a bathroom, but with no water. This building was situated on the corner of Ezra Street and Fairfield Avenue in Bridgeport, Connecticut. Ezra Street was a new street and Fairfield Avenue had just been laid out through a newly opened tract of land in the northern part of the city. The place is now a residential neigh-

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borhood, and this house was the first one erected on this tract. The cottage was lacking in modern improvements, and consisted of a small five-room house upon a city lot. Prior to July 15th, 1915, the wife of the plaintiff called at the house of the defendant and inquired if he had any rents. The defendant stated that he had a house, which was not complete, as the water and gas had not been connected, but that water could be drawn from a spring, a few hundred feet away, until the city water-supply was connected, which would be in a few months. The defendant showed the plaintiff the building and offered to rent the same for $14 per month, to commence on August 1st, 1915. The plaintiff was willing to take the house on these terms, provided the defendant would give him assurance that he would not sell it to anybody who would compel the defendant to vacate the premises. The defendant acceded to this, and on August 15th, 1915, executed the writing hereinbefore set forth. The defendant received no new consideration for this writing. The plaintiff occupied these premises and paid the rent therefor until October 1st, 1916. On July 15th, 1916, the defendant sold this house to one Koehler, who knew about this agreement between the plaintiff and the defendant. Koehler installed gas in the house between July 15th and September 9th, 1916, and then notified the plaintiff that beginning October 1st, 1916, the rent for the house would be $25 a month. This sum was more than the plaintiff could afford to pay for house-rent, and was entirely beyond his means, and in consequence of the increase of rent the plaintiff was obliged, on October 1st, 1916, to find another rent. The cost of the plaintiff's moving was $7.50.

The court rendered judgment for the plaintiff to recover the sum of $50 and $7.50, his expense of moving, with interest thereon, and with double costs.

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John A. Cornell, Spotswood D. Bowers and *Charles E. Williamson*, for the appellant (defendant).

Henry E. Shannon and *Frank L. Wilder*, for the appellee (plaintiff).

RORABACK, J. Nothing is disclosed in the finding of facts which shows that the plaintiff was subjected to such a degree of compulsion as to warrant the rendition of a judgment in his favor. The contract states that it was agreed that if the plaintiff was compelled to vacate the defendant's premises because of the sale of them, he was to receive the sum of $50 and moving expenses.

The word "compelled" may in some cases refer to compulsion exercised through the process of the courts, or through laws acting directly upon the parties. Such certainly is not the present case. The word "compelled," in its ordinary sense, means: to drive or urge with force; to constrain; oblige; necessitate, whether by physical or moral force. Webster's International Dictionary.

As applied to the agreement of Mr. Hayes, the meaning of the language, "if Mr. Ains is compelled to vacate my cottage on Ezra Street through my selling said cottage," is this: Mr. Ains may be compelled to leave through the terms of the sale by which the purchaser is to take immediate possession; or Mr. Ains may be compelled to leave by the action of the purchaser immediately upon his purchase notifying him to leave; or Mr. Ains may be compelled to leave by the action of the purchaser in immediately upon his purchase making it unreasonable to expect him to continue in possession, as, for example, by raising the rent to a prohibitive rental.

The record is also barren of facts which *aliunde* tend

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to sustain the plaintiff's claim that he was compelled to vacate these premises because they had been sold. It does not here appear that either the defendant, or the party purchasing his property, did anything which the law condemns. There was no actual or threatened exercise of power possessed, or supposed to be possessed, over the plaintiff's person, or over the property which he occupied. It is not even claimed that the plaintiff was ever notified or requested to surrender possession of the property which had been leased to him by the defendant. There is nothing to suggest that this increase in the rental was arbitrary or unreasonable. Upon the other hand, it is fair to infer, from the facts found, that the owner of the property might have been justified in making an alteration in the charge for the use of his premises. The property had been improved, and the facts were not the same when the plaintiff vacated these premises as when he leased them. The only compulsion shown came from the plaintiff's inability to pay the rental of the property. This fact cannot be resorted to for the purpose of fastening liability upon the defendant.

There is error, the judgment for the plaintiff is set aside, and the cause remanded for the rendition of judgment in favor of the defendant.

In this opinion the other judges concurred.

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ROSE SCHWARTZ *vs.* MORRIS DASHIFF ET AL.

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

The plaintiff, who was the payee of sixteen promissory notes for $25 each, maturing at intervals of one week, presented them weekly and as paid surrendered them to their makers, the defendants; but through inadvertence or otherwise surrendered two notes, numbers fifteen and sixteen, which had not matured, and retained two, twelve and thirteen, that had matured and been paid, upon which—and one other note (the fourteenth) not then due and which the defendants paid before trial—the plaintiff based her present cause of action. *Held:*—

1. That the mistake or confusion in the surrender and retention of the notes, paid and unpaid, did not alter the contract rights of the parties, nor prevent the payments as made from applying to and extinguishing the notes in the order in which they became due.
2. That inasmuch as the alleged cause of action was based in part upon two notes which had been paid and therefore had no legal existence when the suit was commenced, the plaintiff certainly could not complain of a judgment in her favor for $50 and costs upon this branch of the case, although without interest.

Certain trunks bought by the defendants were not to be paid for by them until all had been sold, and this had not occurred when the plaintiff began her action. *Held* that the plaintiff was not entitled to interest on the amount of the judgment ($15.50) for this item.

Argued June 6th—decided August 2d, 1917.

ACTION to recover an alleged balance due for merchandise sold, brought to and tried by the City Court of Danbury, *Davis, Associate-Judge;* facts found and judgment rendered for the plaintiff for $65.50, from which she appealed. *No error.*

Chester H. Brush, for the appellant (plaintiff).

Henry C. Wilson, for the appellees (defendants).

RORABACK, J. The complaint contains four counts. The principal controversy grows out of the allegations

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of the first count of the amended complaint, which reads substantially as follows: On or about April 30th, 1915, the plaintiff sold to the defendants a part of a stock of men's furnishings, under the following written agreement: "Danbury, Conn., April 30, 1915.

I, Rosa Schwartz from 104 White St. Danbury, Conn. Co. of Fairfield, have sold to Dashiff & Kruzansky, Style of firm E. Z. System at 32 White St. Danbury, Conn. part of stock consisting of Gents Furnishing & Clothing amounting to $485.75 same being paid as follows. $25. cash the balance $25 weekly per notes. $60.75 note due May 1, 1915 and balance in notes as agreed on the notes.

Dashiff & Kruzansky."

The defendants failed to make payments in accordance with the terms of said contract, and there remained due on the same on August 7th, 1915, the sum of $100. To facilitate the weekly payments called for in the contract, a series of notes for $25 each, payable one week apart, were executed. Four of these notes remained unpaid August 7th, 1915. The fourth note has been paid since the commencement of this suit, on the 7th day of August, 1915.

The defendants in their answer admitted the sale of the goods, and that the agreement described in the complaint was signed by them; that notes, payable one week apart, were given to the plaintiff; and that there were sixteen notes, each for $25, made by them. The remaining allegations of this count were denied by the defendants. The defendants in their answer also averred that by a mistake seventeen notes were given instead of sixteen as intended, and that the seventeenth note was without consideration and void.

The finding shows that by the written contract the sum of $485.75 was to be paid in instalments as follows:

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$85.75 in cash at or about the time of the sale, and the balance of $400 in sixteen promissory notes of $25 each, payable one week apart. The sum of $85.75 was paid to the plaintiff by the defendants, and a series of notes, all dated May 1st, 1915, was signed and delivered by the defendants to the plaintiff. These notes were numbered from one to sixteen, inclusive. It also appears that seventeen notes were made and delivered by the defendants to the plaintiff. The notes falling due on July 31st and August 7th, 1915, were both numbered "13." The parties did not intend to make the seventeenth note and there was no consideration therefor. These notes were not presented in their numerical or chronological order, but several of them were presented without regard for such order. Notes one to eleven, inclusive, and fifteen and sixteen, were paid by the defendants prior to the date of the complaint. Number fourteen was paid by the defendants to the plaintiff subsequent to the time when the action was commenced and before the trial. Fourteen of the series of sixteen notes were paid by the defendants to the plaintiff. Note number twelve, and two notes each numbered "13" were presented to the defendants for payment, but payment was refused on account of the discrepancy in number and presentation. No interest was charged upon any of the notes.

It may be ascertained by a little mathematical calculation that notes number fourteen, fifteen and sixteen were not due at the time when this action was commenced on August 7th, 1915. It appears that note number fourteen, improperly numbered "13," was due August 7th, 1915, note number fifteen was due on August 14th, 1915, and note number sixteen was due on August 21st, 1915. These notes were the only ones unpaid when this action was commenced. Number fourteen has been paid since the commencement of this action.

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There are now two notes of $25 each, or $50, unpaid. This was the exact amount which the defendants offered to allow the plaintiff to take judgment for. This the plaintiff refused to accept. This is, also, the amount of the judgment rendered for the plaintiff upon this part of the case.

The right of the plaintiff to recover in this connection depends upon the allegations of her complaint and upon her claim that the defendants failed to make payments in accordance with the terms of the written contract and that there was $100 due thereon when she commenced her action on August 7th, 1915. As stated, it appears that by the terms of the contract, three of these notes, namely, numbers fourteen, fifteen and sixteen, were not due when this action was instituted. The terms of the contract were in conformity with the terms of the notes, except as to the one which was apparently given by mistake. The plaintiff, by her improper presentation and collection of these notes, attempted to change the terms of the contract and the terms of several of the notes. The surrender of the notes before they were due did not alter the terms of the contract, or of the notes due or not due. These payments should have been accepted and applied to that portion of the indebtedness and to the notes due when these payments were made. When so applied, the debt or debts now said to be due when this action was brought were necessarily extinguished. Whether or not the notes affected by these payments were surrendered is immaterial, in so far as the discharge of the debt or debts to which such payments should have been applied is concerned. *New Haven Mfg. Co.* v. *New Haven Pulp & Board Co.*, 76 Conn. 126, 129, 130, 55 Atl. 604.

The alleged cause of action now before us is based upon certain notes which were due and paid, and which had no legal existence when this action was commenced.

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The defendants offered to allow the plaintiff to take judgment for $50. This offer was refused by the plaintiff. It follows, therefore, that the plaintiff has no ground to complain of the action of the trial court in rendering judgment in her behalf for $50 and costs, upon this branch of the case. This also puts an end to the plaintiff's claim that the court below should have allowed her interest upon the notes.

The remaining reasons of appeal require only a passing notice. One of them objects to the judgment rendered, upon the ground that no interest was added to the judgment for certain trunks referred to in the second count of the complaint. A sufficient answer to this claim appears in the finding of the court that these trunks were not to be paid for until sold, and that they were not sold when the plaintiff commenced her action.

There is no error.

In this opinion the other judges concurred.

PETER J. MCNERNEY *vs.* WILLIAM S. DOWNS.

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

As a rule a surety cannot deny the truth of the recitals contained in an obligation signed by him, unless they were inserted by mistake. He may, however, question the legality of the execution of the instrument.

The very purpose of the recital in an officer's receipt for property attached, to the effect that the signer is "estopped" from denying that the property therein described is the property of the defendant in the attachment suit, was to preclude him from subsequently raising that question; and therefore evidence that someone else in fact owned the property is inadmissible in behalf of the receiptor when sued by the officer upon the receipt.

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Such an undertaking voluntarily entered into is not prohibited by statute, nor is it opposed to public policy.

The validity of the judgment in the original action in which the property was attached, is not open to collateral attack by the receiptor, when sued by the officer upon the receipt.

Argued June 12th—decided August 2d, 1917.

ACTION upon an officer's receipt for property attached, brought to and tried by the City Court of New Haven, *Booth, J.;* facts found and judgment rendered for the plaintiff for $60 damages and costs, and appeal by the defendant. *No error.*

William S. Downs, for the appellant (defendant).

David M. Reilly, for the appellee (plaintiff).

RORABACK, J. The following facts appear to be undisputed: The plaintiff is a deputy sheriff in and for the County of New Haven. On the 30th day of August, 1915, the plaintiff had in his hands for service as such deputy sheriff a writ of attachment against one F. W. Skinner, a resident of the town of Derby, in favor of John H. Dillon and William H. Douglass of New Haven, which writ was returnable to the City Court of New Haven on September 13th, 1915. The plaintiff, by virtue of this writ, attached as the property of Skinner certain cigars and liquors, and afterward took an officer's receipt for the same, which receipt was signed by the defendant. This receipt contained, among others, the following provisions: "which said property we hereby, for a valuable consideration, agree and promise, jointly and severally, to re-deliver in good order to said officer (or any officer legally authorized to receive the same), on demand, or in default thereof to pay the sum of sixty dollars (or if demand be not made before judgment is rendered), the amount of damages and costs which shall be recovered by the

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plaintiff in said case, if the same shall fall short of such sum. It being understood that we are hereby estopped from denying that the property herein described has been attached by said officer and that we have received the same from him, and is the property of said defendant and of the value herein named. Schedule of property attached, viz: Cigars and liquors of the agreed value of sixty dollars."

Skinner, at this time, was absent from the State and gone to parts unknown, and a true and attested copy of the writ of attachment was left by the officer with C. O'Brien for Skinner, O'Brien at this time having charge of the attached property.

On February 11th, 1916, Dillon and Douglass obtained a judgment, by default, in the City Court of New Haven against Skinner in this action. On the same date an execution was issued on this judgment and subsequently returned to the City Court wholly unsatisfied. This judgment has never been paid.

On March 28th, 1916, the plaintiff demanded of the defendant the property attached and described in the officer's receipt, but the defendant failed to deliver the same. On the same date, the plaintiff demanded of the defendant payment in satisfaction of the judgment and costs, but the defendant failed to pay the same. Prior to the demand upon the defendant by the plaintiff for the property receipted for, the defendant had surrendered possession of this property to O'Brien, hereinbefore referred to, O'Brien having demanded the same from the defendant.

The trial court reached the conclusion that the defendant was, by the terms of the officer's receipt, estopped from denying that the property described in this receipt was the property of Skinner.

It is unnecessary to consider the action of the trial court in sustaining a demurrer to the third paragraph

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of the defendant's answer, as the same question is presented in the third reason of appeal, which avers that the court erred in ruling "that the defendant was by the terms of said officer's receipt estopped from denying that the property described in said officer's receipt was the property of F. W. Skinner."

In 1 Brandt on Suretyship & Guaranty (3d Ed.) § 52, it is said: "The general rule is that sureties are estopped to deny the facts recited in the obligations signed by them, and this whether the recitals are true or false in fact. Having once solemnly alleged the existence of the facts they cannot afterwards be heard to deny it." As a rule a surety cannot deny facts recited in his obligation, unless such recital was inserted by mistake; he will not be allowed to claim that a bond was given without consideration; that the judicial proceedings in which it was given were irregular, or that the necessary preliminary steps were not taken. If the obligation has accomplished the purpose for which it was given, the surety will not be permitted, thereafter, to free himself from its disadvantages. But a surety is not estopped by the recitals of the bond, from questioning the legality of its execution. 32 Cyc. 69.

The parties, as it appears from this instrument, had agreed that the defendant should be estopped by the terms of the contract from denying that the property had been attached by the officer, that it had been received from him, and that it was the property of the defendant Skinner. It appears that one of the express purposes of this written contract was to exclude, as between the officer and the defendant, the possibility of the latter challenging the right of Skinner to the property attached. *Dejon* v. *Street*, 79 Conn. 333, 337, 65 Atl. 145.

This bond was voluntarily given by the defendant upon a sufficient consideration, and such an undertaking is not prohibited by statute or against public

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policy. The defendant in the former action, or his agent, by means of this undertaking upon the part of the defendant in the present case, has secured possession of the property of Skinner, and the defendant Downs cannot now escape liability for the nonperformance of his agreement.

The defendant also contends that "the judgment against Skinner was not binding upon this defendant because no legal service was made of the process, nor the provisions of the statute complied with." As we have already stated, the defendant cannot now claim that the judicial proceedings in which this receipt was given were irregular or that the necessary preliminary steps had not been taken before the judgment was rendered. He was not a party to the original action, and the judgment rendered therein cannot now be collaterally attacked by one who has agreed to redeliver the property attached to the officer, or pay the damages and costs recovered in that action. Aside from this, the record discloses that this property was lawfully attached by the plaintiff, who, it appears, left a true and attested copy of the original writ of attachment with the person having charge of the property of Skinner, who, as the finding states, was absent from the State and in parts unknown at the time the attachment was made.

In view of what we have already stated, it is unnecessary to discuss the defendant's claim that the trial court erred in rejecting his testimony which tended to prove that the defendant Skinner did not own the property receipted for when it was attached. It was not admissible.

Of the other errors assigned none seem to have sufficient merit to warrant their discussion.

There is no error.

In this opinion the other judges concurred.

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THE FORT ORANGE BARBERING COMPANY *vs.* THE NEW HAVEN HOTEL COMPANY.

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH, and SHUMWAY, Js.

In this State the action of summary process is regulated by statute (§§ 1078–1088), and the judgment of a justice of the peace therein has the same effect as a common-law judgment in other cases. His record imports verity and its statements cannot be collaterally questioned.

A waiver of the forfeiture incurred by a tenant for a breach of his covenant to pay rent, is a good defense in an action of summary process brought by the landlord to enforce such forfeiture; but a judgment in such action in favor of the landlord is conclusive against the existence of the alleged waiver, and therefore a court of equity will not reopen that question when called upon for relief.

Proceedings in summary process can be reviewed by this court only upon a writ of error.

While courts of equity have power to relieve against judgments at law and in some instances are bound to do so, they will not act lightly but only where some well-defined, independent, equitable ground exists for restraining the enforcement of the judgment—such as fraud or accident whereby the complainant has been injured.

The rule that by failing to declare a forfeiture of a lease when the landlord has the right to do so, he thereby waives the forfeiture, rests upon the ground of estoppel, and is applicable only in cases—unlike the present—in which the lessee has incurred large expenditures or made valuable improvements in reliance that the landlord will continue of the same mind and will not assert his technical right to insist upon a forfeiture.

No demand for rent nor re-entry for condition broken is essential before bringing an action of summary process, if the lease so provides.

The cases of *Bowman* v. *Foot*, 29 Conn. 331, and *Hartford Wheel Club* v. *Travelers Ins. Co.*, 78 Conn. 355, distinguished.

Argued June 13th—decided August 2d, 1917.

SUIT for an injunction to restrain the defendant from taking out execution upon, or from proceeding further with, a judgment in its favor in an action of summary process, brought to and tried by the Superior Court in

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New Haven County, *Webb, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiff. *No error.*

The finding shows: On the 17th day of October, 1911, the defendant leased to the plaintiff, in writing, certain space in the Hotel Taft, in New Haven, to be used as a barbering establishment, for a period of five years from the first day of September, 1912, at an annual rental of $2,700, and with an option for a renewal thereof for a further period of five years at the same rental, the rentals being payable monthly in advance. This lease, among other stipulations, provided that there was to be a forfeiture in the event of nonpayment of rent. The forfeiture clause was in the following language: "Provided, however, and it is further agreed, that if the rent shall become due and payable as aforesaid, or if the said Fort Orange Barbering Company . . . shall not perform and fulfill each and every of the covenants and stipulations herein contained to be performed by said Fort Orange Barbering Company, then this lease shall thereupon by virtue of this express stipulation therein at the option of said managers expire and terminate, and said managers may at any time thereafter re-enter said premises and the same have and possess as of their former estate, and without such re-entry may recover possession thereof in the manner prescribed by the statute relating to summary process; it being understood that no demand for rent and no re-entry for condition broken as at common law shall be necessary to enable the lessor to recover such possession pursuant to said statute relating to summary process, but that all right to any such demand or any such re-entry is hereby expressly waived by the said Fort Orange Barbering Company."

On or before April 1st, 1912, the plaintiff entered into the leased premises and has ever since continued

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to occupy the same, claiming the right to do so under the lease. The plaintiff, except upon two instances, neglected to pay the monthly rental on the first day of each month in advance. In a majority of instances these payments of rent were made after the middle of the month, and on two different occasions one payment was accepted for two months rent. All of the payments were made by check, mailed by the plaintiff from the city of New York to the defendant at New Haven. These checks were accepted by the defendant as and for the payment of rent then due and owing by the plaintiff. On September 14th, 1916, the plaintiff's rent was two months in arrears, and on this day the defendant served notice upon the plaintiff to quit possession of the premises. It was admitted upon the trial that a check for some instalment of rent was sent by the plaintiff to the defendant on September 14th, 1916, which the defendant refused to accept and returned to the plaintiff.

No evidence was offered by the plaintiff as to the amount of this check, nor as to what instalment of rent it should be applied, nor any evidence whatever concerning it. No evidence was offered by the plaintiff to show whether or not prior to September 14th, 1916, the defendant had ever in any manner notified the plaintiff that it would claim a forfeiture of the lease upon the failure of the plaintiff to pay the monthly instalments of rent at the time they became due and payable under the terms of the lease. On September 23d, 1916, the plaintiff tendered to the defendant a sum of money that would be in full of all rent to October 1st, 1916, which the defendant refused to accept.

On September 30th, 1916, the defendant brought an action of summary process against the plaintiff, returnable before James E. Wheeler, Esq., a Justice of

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the Peace for New Haven County, on the 6th day of October, 1916, claiming that this lease had been forfeited by the nonpayment of rent. The parties appeared before the justice and were duly heard, and on October 7th, 1916, judgment was rendered in favor of the defendant (The New Haven Hotel Company), that the Company recover possession of the premises. Thereupon this plaintiff (The Fort Orange Barbering Company) sued out a writ of error to the Court of Common Pleas for New Haven County, which writ was subsequently withdrawn by the plaintiff.

During the year 1912, the plaintiff carried on the business of a barbering establishment at a loss of $434.15, but thereafter carried on this business at an annual profit. Upon the opening of this business, supplies were purchased to the amount of $1,703.50. These supplies, consisting of hat racks, cuspidors, bottles, shaving mugs, massage machines, vases, and so forth, are still for the most part on hand, and together with towels and linen of the value of $150, are of value to the plaintiff.

The plaintiff offered no evidence to prove that it ever made any other tender to the defendant of the monthly rentals past due, except the offer of payment made on September 23d, 1916, herein mentioned. The plaintiff at the trial declared its willingness to pay to the defendant all instalments of rent in arrears with interest thereon, but made no tender thereof, nor offered evidence of any offer or tender other than that just mentioned. None of the irremovable fixtures in said barbering establishment, such as barber chairs, mirrors, wash stands, and so forth, were installed by, or belong to, the plaintiff. They were installed by and are the property of the owner of the Hotel Taft. Since the year 1912 the plaintiff has carried on its business on the premises in question at an annual profit, and it is

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reasonable to expect that this business will continue to be profitable to the plaintiff should it decide to avail itself of the option to extend said lease for a further period of five years from August 31st, 1917, and be permitted to remain in possession of the same.

The plaintiff in its complaint alleged that "by reason of the defendant's acquiescence in the delayed payments for a period of more than four years, the defendant induced the plaintiff to believe and the plaintiff did believe that a strict performance of the covenants in the lease in reference to the time of payment of the rent on the first of each month would not be required"; that "the plaintiff is ready and willing to pay the defendant all the rents that may be due or become due, with such interest as may be due thereon"; that "the defendant has suffered no loss or inconvenience by reason of the delayed payments"; and that the issuance of an execution of summary process would work irreparable loss to the plaintiff. These allegations were denied by the defendant in its answer. The judgment-file finds the issues for the defendant Hotel Company.

Samuel Campner, with whom was *Lewis M. Scheuer* of New York, for the appellant (plaintiff).

Robert C. Stoddard, with whom was *Jacob P. Goodhart*, for the appellee (defendant).

RORABACK, J. This case turns upon the sufficiency of the findings to sustain the conclusion of the trial court in rendering judgment for the defendant.

The plaintiff's objections to the decision of the Superior Court, which are urged here, are summarized as follows: "first, because it appears that the plaintiff will suffer irreparable injury, damage and loss, should the forfeiture of the lease be enforced; second, because

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it is a fixed rule in equity to give a tenant equitable relief against forfeiture for breach of covenant to pay rent, irrespective of any question as to whether such forfeiture would or would not result in irreparable damage to the tenant, it being the mere inequity of a forfeiture that prompts the relief; third, because, in view of the previous relations of the parties and their mutual conduct, it would be unfair, inequitable and unjust, . . . without previous notice of intention, to enforce strict performance."

This statement of claims involves several questions. One is as to the effect of the judgment of the Justice of the Peace in the summary-process suit. The recovery by the defendant in this action has an important bearing upon the present case. In this State the action of summary process is regulated by statute, and the judgment has the same effect as a common-law judgment in other cases. A court held by a justice of the peace is a court of record. His record, therefore, in judicial proceedings which have taken place before him and are within his jurisdiction, imports verity, and its statements cannot be collaterally questioned. Every act recited in such a record is presumed to have been properly and rightly done, until the contrary appears. *American Bonding Co.* v. *Hoyt*, 88 Conn. 251, 255, 90 Atl. 932; *Church* v. *Pearne*, 75 Conn. 350, 351, 53 Atl. 955. The judgment in the justice court against the appellant, the Barbering Company, established the validity of the lease, that the Barbering Company was in possession, its obligations to pay the rent then in question, and that these instalments were due and unsatisfied.

A waiver of the forfeiture of the breach of covenant to pay rent was a good defense in the summary process proceeding before the justice court. The judgment of that court against the appellant for the forfeiture, is

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conclusive evidence that there was no waiver at the time this judgment was rendered, and equity will not consider this question in an action like the present one to obtain relief against the forfeiture. *Dunklee* v. *Adams*, 20 Vt. 415, 50 Amer. Dec. 44.

The action of summary process is a special statutory remedy to enable landlords to obtain possession of leased premises without suffering the delay and expense to which, under the common-law actions, they might be subjected by tenants wrongfully holding over their terms. By § 1078 of the General Statutes the action of summary process is made returnable before a justice of the peace. Section 1081 provides that "no appeal shall be allowed from any judgment rendered in any such action." Under § 817 of the General Statutes, a writ of error lies from the judgment of a justice in an action of summary process to the Court of Common Pleas or the Superior Court, but not to this court. By § 1087 of our statutes a defendant in an action of summary process is allowed but forty-eight hours after final judgment for filing his bill of exceptions and procuring his writ of error, and is required to give a sufficient bond, with surety, to the plaintiff, to answer for all rents that may acrrue during the pendency of the writ of error. Erroneous proceedings in an action of summary process can be reviewed by this court only upon a writ of error. This was not done in the case now before us. *Banks* v. *Porter*, 39 Conn. 307. The jurisdiction of a justice of the peace is limited to claims for legal relief. General Statutes, § 533.

In proper cases the exercise of equitable jurisdiction to relieve against judgments is generally held to be within the discretion of the court, which is to be guided and controlled in its exercise by legal principles, and is to be exercised in conformity with the spirit of the law,

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and in a manner to subserve and not defeat the ends of substantial justice; and for a manifest abuse thereof it is reviewable by a proper procedure. While under certain circumstances the restraining of proceedings upon a judgment is a matter not of grace but of right, yet courts of equity do not lightly interfere with judgments at law, and do so only with caution, and where some well-defined independent equitable ground exists for restraining the enforcement of the judgment. 15 Ruling Case Law, 730, 731, and cases cited in notes; 2 Daniells' Chancery Pleading & Practice (6th Amer. Ed.) * 1621; 4 Pomeroy's Equity Jurisprudence (3d Ed.) § 1365; *Clark* v. *Board of Education*, 76 N. J. Eq. 326, 328, 74 Atl. 319, 320, 25 L. R. A. (N. S.) 827; *Hood* v. *New York & N. H. R. Co.*, 23 Conn. 609, 621. A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents. *Truly* v. *Wanzer*, 46 U. S. (5 How.) 141, 12 L. Ed. 88.

In the present case there is no allegation or suggestion of any fraud, accident, surprise, or mistake in the proceeding before the justice court. The application of the rule above cited, under the facts here presented, seems to leave the plaintiff but few facts upon which to base its claim for equitable relief, the most important of which is the allegation and claim that the plaintiff was induced to believe that a strict payment of periodical rents would not be required. This contention has not been sustained. It appears that the plaintiff alleges in its complaint that "by reason of the defendant's acquiescence in the delayed payments for a period of more than four years, the defendant induced

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the plaintiff to believe, and the plaintiff did believe, that a strict performance of the covenants in the lease in reference to the time of payment of the rent on the first of each month would not be required of it." This, as we have seen, was denied by the defendant. The judgment, by finding the issues upon this part of the case for the defendant, necessarily finds that the plaintiff has failed in its proof upon this subject. A special finding upon this part of the case which is broader than the general finding of the issues for the defendant in the judgment, is not inconsistent therewith.

There is nothing in the finding which suggests a basis for the claim that "in view of the previous relations of the parties and their mutual conduct, it would be unfair, inequitable and unjust to sanction the right of the landlord to cancel the lease without previous notice of intention thereafter to enforce strict performance." Upon the other hand, it appears that the court below has expressly found that "no evidence was offered by the plaintiff to show whether or not prior to September 14, 1916, the defendant had ever in any manner notified the plaintiff that it would claim a forfeiture of said lease upon the failure of the plaintiff to pay the monthly instalments of rent at the time they became due and payable under the terms of said lease." It does not appear from the finding that by the defendant's leniency the plaintiff has been put in any worse position than it would have been had the strict performance of the lease been enforced.

There is a class of cases holding that one having the right to declare a forfeiture, who does not declare it when he is entitled to do so, waives the right of forfeiture; but this rule rests upon the ground of estoppel. In such cases the lessee has usually incurred large expenditures, or made valuable improvements, believing that, by the landlord's failing to assert the right of

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forfeiture after a breach of the conditions, it would not be asserted. This is not such a case. *O'Connor* v. *Timmermann*, 85 Neb. 422, 424, 123 N. W. 443, 24 L. R. A. (N. S.) 1063, 1066.

The plaintiff relies upon *Bowman* v. *Foot*, 29 Conn. 331, as an authority to sustain its contentions. The facts in the *Bowman* case are easily distinguishable from those in this case, especially as to the express conditions contained in the lease now before us, which provides: "It being understood that no demand for rent and no re-entry for condition broken as at common law shall be necessary to enable the lessor to recover such possession pursuant to said statute relating to summary process, but that all right to any such demand or any such re-entry is hereby expressly waived by the said Fort Orange Barbering Company." The lease in the *Bowman* case contains no such provision. It follows, therefore, that no demand for rent or re-entry was necessary before the commencement of the present action. It is also of interest to note that in *Bowman* v. *Foot* the questions presented to this court were by means of a writ of error. The plaintiff also lays stress upon the case of *Hartford Wheel Club* v. *Travelers Ins. Co.*, 78 Conn. 355, 62 Atl. 207. In that case the questions presented and decided were: "The acceptance of rent accruing after a breach of condition for which the lessor has declared his election to terminate the lease, from a lessee for years who refuses to recognize the termination of the lease and continues in possession as before, constitutes a waiver of the forfeiture, which is binding alike upon the lessor and the lessee. While provisions in a lease which absolve the lessor from making any demand for rent, from making a re-entry, from giving the statutory notice to quit, and from every other formality, may enable him to commence an action for obtaining possession without such demand and

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re-entry, they certainly do not prevent the parties from waiving a forfeiture before such action is begun." In the present case it is not claimed that the Hotel Company accepted any rent after a breach of the conditions for which it declared its intention to terminate the lease. It is also of importance to notice that in the case of the *Hartford Wheel Club* v. *Travelers Ins. Co.*, the procedure adopted to test the question of waiver was also by a writ of error, as we have stated should have been done in the present case. *Burritt* v. *Lunny*, 90 Conn. 491, 495, 496, 97 Atl. 756.

There is no error.

In this opinion the other judges concurred.

ELIZABETH F. MILLS *vs.* LEO DAVIS AND LOUIS S. BEERS.

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH, and SHUMWAY, Js.

A finding in a case tried to the jury should state what the respective parties offered evidence to prove and claimed to have proved, and also such facts, if any, as were admitted by either party upon the trial.

If such finding is incorrect either in its statements or because of its omissions, and the trial judge upon request refuses to make the desired change, the proper procedure is an application to this court to rectify the appeal, supported by depositions, as prescribed by § 801 of the General Statutes.

If the facts alleged to have been admitted or undisputed were not such in reality, it is sufficient, and all that the appellant can properly ask, if the finding states that he offered evidence to prove and claimed to have proved them.

The plaintiff had settled a foreclosure suit brought against her, with funds furnished by the defendants, who were her attorneys, in return for which she had conveyed to them certain real estate, and

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she now sued them for fraud in inducing her to make the arrangement, alleging that it was in their own financial interest and in violation of their duty to her. The defendants denied the fraud, and averred that the settlement was voluntarily and intelligently made by the plaintiff with full knowledge of all the facts; and the jury returned a verdict in their favor. Upon the cross-examination of one of the defendants he was asked if he did not know that the plaintiff had a valid defense to the foreclosure suit. *Held* that this inquiry was immaterial unless the fact sought to be elicited formed a part of the defendants' plan to cheat and defraud the plaintiff; and that under the pleadings it was not relevant for that purpose.

Upon her direct-examination the plaintiff was asked what expenditures she had made in the prosecution of this case, and upon objection the question was excluded. *Held* that unless offered to prove exemplary damages, the ruling was correct; and that if otherwise, it was harmless, as the verdict was for the defendants and the jury were not called upon to consider the question of damages.

A finding in a former action as to the value of certain real estate, is not admissible as evidence of its value in a subsequent suit between different parties.

A party who fails to call the attention of the court at the time to alleged misbehavior of a juror, thereby waives his right to object to such conduct.

Argued June 13th—decided August 2d, 1917.

ACTION to recover damages for alleged fraud in obtaining real estate owned by the plaintiff, brought to the Court of Common Pleas in Fairfield County and tried to the jury before *Booth, Acting-Judge;* verdict and judgment for the defendants, and appeal by the plaintiff. *No error.*

Joseph A. Gray, for the appellant (plaintiff).

Carl Foster, for the appellees (defendants).

SHUMWAY, J. The defendants are lawyers. Beers was first engaged by the plaintiff to represent her in an action brought to recover the sum due on a note given by the plaintiff to one Hoyt. The note was secured by a mortgage upon a piece of real estate called

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Sound View Terrace. The note and mortgage were held by one Hubbell, he taking title to same by assignment. Later Hubbell brought an action to foreclose the mortgage, and the defendants appeared as counsel for Mrs. Mills, this plaintiff. The latter action was pending in the Court of Common Pleas in Fairfield County, and on March 7th, 1913, judgment was rendered in the foreclosure action, the court finding the sum of $1,609.42 due, including costs. On the day before the judgment was rendered a written stipulation was made between counsel for Hubbell and Mrs. Mills, that three appraisers should be appointed to appraise the property as required by statute preliminary to the rendition of a deficiency-judgment. Before the appraisal was had, the parties, through their counsel, made a settlement, whereby the sum of $772.80 was to be paid to Hubbell, and he was to release Mrs. Mills from all obligation on the note and mortgage. Mrs. Mills was not able to furnish the money to pay Hubbell. The defendants supplied the funds to make the payment, and thereupon Mrs. Mills conveyed to the defendants the Sound View Terrace property and a piece of land called the Aiken Street property. The defendants offered evidence that the value of Sound View Terrace was $2,000 and was subject to a mortgage for $1,400. The Aiken Street property was controlled by Mrs. Mills, though she did not hold the legal title, and she procured the necessary conveyance to vest the legal title in the defendants. The plaintiff's case is, in substance, that the defendants, by fraud and deceit, induced the plaintiff to make the settlement above mentioned, to their profit.

The particular acts as alleged, which the plaintiff claims constitute fraud, are substantially these: The plaintiff met the defendants on the 15th day of April, 1913, when the defendants insisted that the plaintiff

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convey to Hubbell the Aiken Street lot. The plaintiff refused, but the defendants falsely represented that if she did not convey the land to Hubbell he would take a deficiency-judgment against her, and take that lot and her homestead also. In fact, Hubbell never intended to take a deficiency-judgment, and was content to take the Sound View Terrace in satisfaction of the mortgage.

The defendants denied these allegations, and alleged affirmatively that the plaintiff agreed to the settlement and conveyed the property to them, to pay them for the money advanced to pay Hubbell, as well as for their fees and disbursements in the action mentioned.

The case was tried to the jury, and the court instructed them that if they found the allegations of the plaintiff to be true, their verdict should be in her favor. The jury rendered a verdict for the defendants. On appeal the plaintiff assigns numerous errors relating to rulings on evidence, the charge of the court, the court's refusal to correct the finding, and the court's refusal to take the case away from the jury for misconduct of one of the jurymen.

The plaintiff made a motion to the trial judge, which was entitled "a motion to correct the finding." On the refusal of the trial judge to change the finding, the proper procedure was an application to this court to rectify the appeal, if the judge had not correctly stated the events of the trial. Section 801 of the General Statutes provides how an issue of fact may be raised as to the correctness of a statement in a finding of what occurred upon the trial, and a way for determining that issue. *Bernier* v. *Woodstock Agricultural Soc.*, 88 Conn. 558, 562, 92 Atl. 160. The draft-finding, accompanying the plaintiff's request for finding, began as follows: "The following are admissions and undisputed evidence made and produced upon

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the trial." In the rules of practice of the Supreme Court of Errors are given forms for findings in cases tried by the jury and in cases tried by the court. In the former, the court is required to state the facts which the parties offered evidence to prove and claimed to have proved, and in the latter the facts proved by the evidence. In making up the record the services of the trial judge will be clerical rather than judicial. "His object will be to state for the record such facts and events as may have led up to the judgment and as are necessary to show whether the appellant is right or wrong in claiming that the law has been transgressed to his injury" during the trial of the cause. He acts as an historian. *State* v. *Hunter*, 73 Conn. 435, 444, 47 Atl. 665. In causes tried to the jury, if the trial judge on an appeal fails to insert in the record a statement of the facts either party offered evidence to prove and claimed to have proved, or if he includes in the finding a fact as claimed to have been proved, when there was no evidence offered to prove it, the proper procedure is an application to this court to rectify the appeal, by inserting the statement in the one case, or by striking it out in the other. *McCusker* v. *Spier*, 72 Conn. 628, 630, 45 Atl. 1011.

If the plaintiff desired to have any fact admitted by the defendants appear as such, upon the record, and the trial judge had omitted it, he should have made a motion to insert it, and upon the refusal of the judge to grant the motion, § 801 points out the manner by which the desired change might be accomplished in this court. Some of the statements of fact in the plaintiff's draft-finding were not admitted facts, nor were they proved by uncontradicted evidence. The trial judge had stated in the finding that the plaintiff offered evidence to prove them, which is all the plaintiff can properly claim, unless they were facts admitted

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by the defendants. The plaintiff is not entitled to a rectification of the appeal in this court.

The rulings of the court upon the evidence, so far as appears upon the record, were not erroneous so as to justify a reversal or setting aside of the judgment. The fact to be proved in the plaintiff's case, whereby to test the relevancy of the evidence, was the fraud and deceit, or, as it is called, the *quo animo*, of the defendants, whereby the plaintiff suffered injury. It appeared in evidence, not uncontradicted, to be sure, that the settlement made with Hubbell was a fair and reasonable one, consented to and approved by the plaintiff. Plaintiff's counsel, in the cross-examination of Davis, asked him if he did not know that Mrs. Mills had a valid defense to the foreclosure suit brought by Hubbell. The purpose of the question does not appear. It may have been intended to elicit from Davis an admission that by making a defense to Hubbell's action it could have been defeated. This was immaterial, unless it was in fact a part of a plan to cheat and defraud; but under the pleadings in the case it was irrelevant for that purpose.

The ruling of the court in excluding the questions put to Mrs. Mills was not injurious to her case. She was asked what expenditures she had made in the prosecution of this case. Upon objection by the defendants, counsel stated the purpose was to prove damage. It does not appear that the plaintiff was attempting to prove exemplary damages, or that the ruling of the court was that the evidence was not admissible for that purpose, but it is left to conjecture that such was its purpose, as the plaintiff cites on the brief *Noyes* v. *Ward*, 19 Conn. 250. As the verdict of the jury was in favor of the defendants, it was not required to consider the question of damages.

The plaintiff offered in evidence the record of an

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action brought by Hoyt, the person to whom the note and mortgage on Sound View Terrace were given. The action was brought by Hoyt against Hubbell and one Stuart, alleging the note had been wrongfully converted by them. Among other facts found in that action, was that the Sound View Terrace property was not worth more than $2,200, and the plaintiff claimed this finding of value, if not conclusive, was evidence of the value of Hubbell's claim. It is sufficient, to support the ruling of the court in excluding the record, that neither of these defendants were parties to that action, and, so far as appears, had no knowledge whatever of the pendency of the cause.

All the requests of the plaintiff to charge were covered by the charge, so far as they could be lawfully, and the real and decisive issues in the case were fairly stated to the jury and the controverted facts left for their determination.

The plaintiff also complains that the court erred in refusing to dismiss the jury from further consideration of the case after the conclusion of the argument, because during the argument of plaintiff's counsel one of the jurymen was offensive and insolent. The violation of propriety could not have been open and flagrant, to have passed unnoticed by the court. The behavior of the juror did not necessarily imply hostility to the plaintiff or her cause. The court could probably see that no harm could result to the plaintiff's case. The occurrences noticed by counsel earlier in the trial should have been called to the attention of the court at the time they were observed, otherwise a waiver of objection will be presumed.

There is no error.

In this opinion the other judges concurred.

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THE COHN AND ROTH ELECTRIC COMPANY *vs.* BRICKLAYERS, MASONS AND PLASTERERS LOCAL UNION NO. 1, ET ALS.

First Judicial District, Hartford, May Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and GAGER, Js.

Individuals may work for whom they please and quit work when they please, provided they do not violate their contract of employment. Combinations of individuals have similar rights, but because of the liability of others to injury from the concerted action of numbers, the exercise of such rights is subject to certain restrictions.

The members of labor unions may, by agreement between themselves, refuse to work, or to continue to work, with nonunion men, provided such action is taken in their own interest and not for the primary purpose of injuring another or others, and the means employed are neither unlawful nor opposed to public policy.

The upbuilding or strengthening of a labor union is a legitimate end, to accomplish which its members may lawfully refuse to work with nonunion employees; although in so doing they contemplate the probability of injury to an open-shop contractor or his employees.

Such refusal does not deprive an employer of his legal option to engage such men as he pleases, where plenty of nonunion men, qualified for the desired work, are available in that locality. Under such circumstances, and in the absence of a finding to that effect, the cessation of work by the defendants cannot be regarded as the cause of the employer's breach of his contracts.

Employees having the legal right to refuse to work, or to continue to work, with nonunion help, may lawfully notify their employers or contractors that a strike will follow if nonunion men are employed upon the same jobs, as they did in the present case; and the giving of such a notice would not ordinarily constitute a violation of the intimidation statute (§ 1296), though it might upon a different state of facts.

Argued May 1st—decided August 2d, 1917.

SUIT for an injunction to restrain the defendants from intimidating by strikes, threats of strikes, boycotts or otherwise, any property-owner, builder, or contractor, for the purpose of inducing the latter to cancel contracts with the plaintiff, which conducted an

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open-shop, or for the purpose of inducing them to refrain from thereafter employing, or from entering into contracts with, the plaintiff,—brought to and tried by the Superior Court in Hartford County, *Shumway, J.;* facts found and judgment rendered for the defendants, and appeal by the plaintiff. *No error.*

Ralph O. Wells, for the appellant (plaintiff).

Thomas J. Spellacy and *William M. Maltbie,* with whom was *Hugh M. Alcorn,* for the appellees (defendants).

WHEELER, J. The plaintiff has waived its claim for damages and relies upon its claim for injunctive relief, alleging that the defendant labor unions and the members thereof have combined for the purpose of obtaining a monopoly of all the employment for the members of these local unions in the several building trades in which they are engaged, and for the purpose of excluding from such employment all who are not members.

In furtherance of this purpose and to establish this monopoly the defendants are alleged to have agreed: (1) that no nonunion member shall be employed on any building in Hartford or its vicinity; (2) that no open-shop employer shall be permitted to supply any labor or materials for any such building; (3) that they will compel all owners, employers, and other persons to refuse to purchase supplies from open-shop employers; (4) that they will refuse to work for any owner or employer who shall purchase supplies from any open-shop employer; (5) that they will boycott all nonunion members and open-shop employers and all persons doing business with them. In furtherance of said boycott the defendants are alleged to have agreed: (6) to cause all members of the defendant unions to refuse to

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work on every building owned by any person who owns any building on which any nonunion member is employed, or on which any open-shop employer is furnishing, or has contracted to furnish, labor or materials; and (7) to refuse to work on each and every job on which a general contractor may be engaged if any nonunion member is working for such general contractor, or if any open-shop contractor is furnishing, or has contracted to furnish, any labor or materials.

The complaint also alleges that in furtherance of these purposes and agreements the defendants have boycotted the plaintiff and all owners for whose buildings the plaintiff has furnished labor or materials, and all contractors or builders by whom the plaintiff has been employed, directly or indirectly, and have threatened to institute strikes of all of these members on all work on which any of the members were engaged for any owner or by any contractor for whom the plaintiff has furnished labor or materials; and the defendants have instituted strikes in accordance with these threats in all cases where their demands have not been promptly complied with.

Comparing the facts found with those alleged in the complaint, we find a marked dissimilarity. We can discover no finding of the illegal purpose of these defendants which the complaint reiterates, nor one of a conspiracy and agreement such as is alleged, save in one particular. That agreement is not specifically found, but it is found that the several defendant local unions have adopted the same or analogous by-laws obligatory upon all of their members. These by-laws prohibit members working with nonunion men under penalty for violation. They provide that "no member shall work for any employer who is employing nonunion . . . workers," nor on any job contracted for by any nonunion contractor, nor on any job sublet to any con-

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tractor by any open-shop or nonunion contractor. The Hartford Structural Building Trade Alliance has adopted a by-law, of which Alliance all the defendant unions are members, and by which by-law all defendants are bound, that "no member of this Alliance shall work with any person . . . working at any trade in the Structural Building Trades Alliance who does not hold a working card" from the Alliance.

These by-laws create an agreement on the part of these several unions and all of their members, binding upon them, that their members will not work for any employer employing nonunion men on that job, nor for any nonunion contractor, nor on any job sublet to any contractor by any open-shop or nonunion contractor. Interpreted together, these several by-laws constitute an agreement, which membership imposed upon all members of the defendant unions, that they would not work on any job on which nonunion men or employers are at work.

All members of the defendant unions have ceased to work and refused to work on any building when the nonunion employees of the plaintiff have commenced work on such building. In one instance the members of the defendant unions withdrew from work on five buildings being erected by a single general contractor, because the plaintiff's nonunion employees were at work on one of these buildings. The defendants maintain their legal right to do these acts, and threaten and intend to continue in such course unless restrained by injunction.

The case set up in the complaint is not the agreement to cease work for a contractor if nonunion men are employed by him on any of his jobs, no matter where located, upon which the defendants are not at work and to which they have no relation; and if the complaint does rely upon this cause of action the finding does not

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support it. It recites that, in one instance, the members of the defendant unions ceased work on five buildings in process of erection by one contractor, because plaintiff's nonunion employees were at work on one of these buildings. A single instance of one act done would hardly permit a holding that the trial judge had, in refusing an injunction, exercised his discretion improperly. It is noticeable that the finding does not state that these strikes were instituted for any of the unlawful purposes so frequently reiterated in the complaint.

The trial court could not find the existence of an illegal purpose without proof, and we cannot so hold without a finding to that effect. If the purpose of the strikes were illegal, they were clear deprivations of the right of the plaintiff to work. *State* v. *Glidden*, 55 Conn. 46, 8 Atl. 890. If the purpose was to better the condition of the defendants, a situation is presented not heretofore considered by us, viz: a determination of whether an agreement to strike in a case in which the striking workmen are not concerned in a trade dispute, or in which their labor has not come in competition with nonunion labor, is lawful. Its decision is practically another phase of the question decided in *Pickett* v. *Walsh*, 192 Mass. 572, 582, 78 N. E. 753, in the last point treated in that case, and the first and second causes of action set forth in the complaint, pages 579 and 587 of the opinion. We express no opinion upon this point, leaving its decision open until it is fairly raised in the pleadings and in the record on appeal.

The agreement of the defendant unions and their members, that the members would refuse to work with nonunion men, followed by action by the members ceasing to work with the nonunion men of the plaintiff, is the only ground of complaint which the facts found support. Individuals may work for whom they please,

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and quit work when they please, provided they do not violate their contract of employment. Combinations of individuals have similar rights, but the liability to injury from the concerted action of numbers has placed upon their freedom to quit work these additional qualifications: that their action must be taken for their own interest and not for the primary purpose of injuring another or others, and neither in end sought, nor in means adopted to secure that end, must it be prohibited by law nor in contravention of public policy. *Connors* v. *Connolly*, 86 Conn. 641, 86 Atl. 600, is an example of an agreement which we held to be contrary to public policy.

The members of a union, acting upon their agreement, may refuse to enter upon employment with nonunion labor, or refuse to continue their employment with nonunion labor, provided their action does not fall within the qualifications of their freedom of action already stated. *Pickett* v. *Walsh*, 192 Mass. 572, 582, 78 N. E. 753; *Burnham* v. *Dowd*, 217 Mass. 351, 356, 104 N. E. 841; *Grassi Contracting Co.* v. *Bennett*, 174 N. Y. App. Div. 244, 160 N. Y. Supp. 279, 284; *Gray* v. *Building Trades Council*, 91 Minn. 171, 185, 97 N. W. 663. In *State* v. *Stockford*, 77 Conn. 227, 237, 58 Atl. 769, HALL, J., thus states our law: "Workmen may lawfully combine to accomplish their withdrawal in a body from the service of their employers, for the purpose of obtaining an advance in wages, a reduction of the hours of labor, or any other legitimate advantage, even though they may know that such action will necessarily cause injury to the business of their employers, provided such abandonment of work is not in violation of any continuing contract, and is conducted in a lawful manner and not under such circumstances as to wantonly or maliciously inflict injury to person or property."

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The facts found show that the plaintiff has suffered damage in its business and that the defendants contemplated this probable effect. A cause of action was thus made out entitling the plaintiff to judgment, unless the defendants have made out, or the facts presented disclose, that the defendants were justified in what they did. *Connors* v. *Connolly*, 86 Conn. 641, 647, 86 Atl. 600. The finding is not express upon this point, but we are of the opinion that the necessary implication from the subordinate facts found is a justification for the defendants' course.

The end the defendants had in view by their by-laws was the strengthening of their unions. That was a legitimate end. There is no indication that the real purpose of the defendants was injury to the plaintiff or the nonunion men it employed. Whatever injury was done the plaintiff was a consequence of trade competition, and an incident to a course of conduct by the defendants, begun and prosecuted for their own legitimate interests. The means adopted were lawful: no unlawful compulsion in act or word was present. The plaintiff had its option to employ the defendants or not; trade conditions did not convert this legal option into practical compulsion, since over one third of the men working in all of these trades to which the defendants belong in this locality were nonunion men. The cessation of work was not intended to cause a breach of existing contracts, and the cancellation of some of its contracts by the plaintiff is, so far as we know, attributable to the plaintiff's act, rather than to the defendants'. Certainly the finding is too bare of detail to permit the latter conclusion.

The notification by the defendants to the general contractors and owners, of the probability of a strike by them in case the plaintiff was employed on any job on which they were engaged, was no more than a

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notice that if nonunion labor was employed on jobs on which the defendant union men were employed the defendants would strike. If defendants had the right to contract that they would not work with nonunion labor, and if they might cease work if nonunion men were employed, as we hold in *State* v. *Stockford*, 77 Conn. 227, 58 Atl. 769, we can see no unlawfulness in their notice to contractors and employers of what would happen if nonunion men were employed on jobs on which they were engaged. The notice was the course of fair dealing. It did not take away the free choice from the contractor or owner; it possessed him of the facts which might affect his decision.

We do not think the notice was an act fairly within the intimidation statute. General Statutes, § 1296. The facts surrounding the giving of such a notice might bring it within the statute: the facts detailed in this finding do not.

There is no error.

In this opinion the other judges concurred.

THE SOUTH NORWALK TRUST COMPANY, EXECUTOR AND TRUSTEE, *vs.* MARY D. ST. JOHN ET ALS.

Third Judicial District, New Haven, June Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Upon an appeal from probate alleging testamentary incapacity, the sole statutory issue before the Superior Court is the validity of the written instrument purporting to be a will, and not its interpretation or construction.

While provisions for the forfeiture of legacies if the legatee attacks the validity of the will, are sustained without any exception in many of the States, the rule in this and some other jurisdictions is, that a

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will-contest made by a legatee in good faith and for reasonable cause, will not work a forfeiture of his legacy. This rule rests upon a sound public policy, in that it tends to disclose the truth and thereby advance the cause of justice, and thus helps to secure a devolution of property in accord with both statutory and common law.

Having created a trust fund for the benefit of his children, eight in number, a testator provided that if any one of them should contest the probate or operation of his will, the provision in behalf of such beneficiary should be null and void, and the amount thus forfeited should enure to the benefit of the others. *Held:*—

1. That the forfeiture clause was valid and enforceable although there was no gift over.
2. That an appeal from probate taken by all the children upon the alleged ground of a lack of testamentary capacity in the testator, constituted a violation of this clause of his will, and in the absence of any finding of the existence of a reasonable cause or ground for such a contest, worked a forfeiture of all their rights under the will, notwithstanding their stipulation in the Superior Court to confine the issue to the question of whether or not the trust in their behalf was in violation of the law against perpetuities.
3. That the law would not permit the clearly expressed intent of the testator to be nullified by the waiver or consent of his beneficiaries.

A suit to determine the legal construction of a will is not a breach of the ordinary forfeiture clause, since its object is not to render the will void but to ascertain its true meaning.

Submitted on briefs June 12th—decided October 4th, 1917.

SUIT to determine the validity and construction of the will of Oscar St. John of Norwalk, deceased, brought to and reserved by the Superior Court in Fairfield County, *Curtis, J.*, upon an agreed finding of facts, for the advice of this court.

Oscar St. John, late of Norwalk, died September 4th, 1912, possessed of both real and personal estate. He left a will which was duly probated, in which the plaintiff was named as executor and trustee. The estate has been settled. The plaintiff qualified as trustee and there remains in its hands as such trustee certain real and personal property.

The testator left a widow, Mary D. St. John, who died February 1st, 1917, subsequent to this action, and

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eight children, his only heirs at law, who are now living. Several of these children have minor children, who, with said eight children, are made parties. Mrs. St. John's death has been suggested upon the record, and the administrator of her estate has entered an appearance.

The Court of Probate admitted to probate the will of Mr. St. John, and all of the eight children appealed from this order and decree. On that appeal no evidence was submitted to the Superior Court, the parties to the appeal stipulating that the only questions to be determined were whether or not the whole or any part of section seven of the will was void under the law against perpetuities, and whether the gift therein of the income to the children of the testator, without limitation, passed an absolute estate in the property in question to such children.

The will of Mr. St. John gave to his wife all the personal property and effects in his homestead, and provided that she should have the use and enjoyment of the homestead free of rent and all other charges until it should be sold. It directed the executor to sell this real estate as soon as such sale could be advantageously made. The proceeds of this sale as designated in paragraph second, and of certain personal property specifically designated in paragraphs fourth and fifth, and all the rest, residue and remainder of the testator's estate, were then given to the plaintiff in trust. By the terms of the trust, defined in the seventh paragraph, the trustee was directed to pay to the testator's wife during her life, in full of all dower and rights she might have in his estate, certain sums of money in quarterly payments. This direction was supplemented by the following: "And after the decease of my said wife, to pay the net income from my trust estate equally to my children [names given], annually, and to their heirs forever, free from the control of the husband of any of

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my said children; and if any of my said children should die without leaving lawful issue, then and in such event, I direct that the share of such child so dying, in and to the income from my said trust estate, shall be distributed among and paid to my surviving children and their heirs, in equal proportions; the heirs of any child so dying to take the share which their parent would have been entitled to receive if living."

The eighth paragraph of the will was as follows: "To the end that there may be no wasting of my estate by litigation pertaining thereto, I hereby declare and it is my will, that any provision made herein in favor of my wife and of any of my children, shall, as to my said wife or as to such children, be null and void in the event of any one of them presenting any claim against my estate, or in any way contesting the probate or operation of this my will, or in any way seeking to set aside or annulling this my said will; and in such event, the provision for the payment of income to my said wife, or for the payment of income to such child, as the case may be, by this paragraph of my said will made null and void, shall be held by my said trustee for the benefit of the remaining beneficiaries under this will, and increase their several shares in like proportion as to income as is herein provided."

Judgment was rendered in the Superior Court affirming the action of the Court of Probate and refusing to pass upon the questions of construction.

The questions upon which advice is desired are the following:—

"a. Whether any legal effect can be given to any part of the fourth, fifth and seventh paragraphs of said will, and if so, what, and whether or not all or any part of said sections are or are not void; and whether any portion of the purposes contemplated by said sections can be made legally operative?

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"b. Whether the trusts made or which it was contemplated or attempted to be made or to make in said sections are valid, legal and operative, and capable of being carried out in any legal manner, and if so, how; and whether the trust estates created thereby, or which it was attempted to create, are now valid and subsisting estates, and whether the provisions for accumulation therein contained are legal and valid provisions; and if not, whether the other provisions of said sections are thereby rendered inoperative and void.

"c. Whether the provisions of said sections suspend the power of alienation for more than two lives, either actually or by possibility; and whether if said power of alienation be suspended for more than two lives, the trusts, which the testator sought to create, are thereby rendered inoperative and void?

"d. Whether the trusts, which it was sought to create by said sections, are or are not void for uncertainty, indefiniteness and a failure of the object of the testator's bounty?

"e. Whether or not the defendants or any of them, and if so, who, have violated the eighth paragraph of said will, by contesting the probate or operation of said will, or have sought to set aside or annul said will, and, if so, whether or not the provisions in said will in favor of such defendants are null and void; and whether or not such defendants have forfeited their right, title, interest and claim in and to said estate by violating said paragraph eight, and, if so, to whom the estate of said deceased, and the income therefrom, should be paid?"

Joseph R. Taylor, for the plaintiff.

John H. Light and *Freeman Light*, for Bertha E. St. John *et als.*

Thomas C. Coughlin, for Clifford M. St. John *et als.*

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William F. Tammany, for Oscar B. St. John, Administrator.

WHEELER, J. One of the questions submitted for our advice is whether or not the children of the testator have forfeited their claim to the estate by having violated paragraph eighth, and if so, to whom the estate and the income should be paid.

If the eighth paragraph be valid and literally interpreted, and the children have violated it, they have forfeited their claim to any part of this estate. The consideration of this question should precede all other questions, for, if the children have forfeited their claim to this estate, consideration of other questions under the will, so far as they are concerned, is academic.

The appeal from the Court of Probate took up to the Superior Court the special statutory issue, whether the will was a valid will. That was the sole issue of the appeal. *St. Leger's Appeal*, 34 Conn. 434, 447. The parties subsequently, in a very apparent attempt to avoid the consequences of having contested the will, stipulated that the only question to be determined upon the appeal was as to the construction of paragraph seven. Counsel for the Trust Company, in his brief, persists in assuming the existence of this wholly artificial position, but the counsel for the children frankly admit the real situation in their brief when they say: "The widow and all of the children joined in an appeal from the order and decree of the Court of Probate for the district of Norwalk admitting the will to probate, on the ground that the testator was of unsound mind when the will was made and executed; but they afterward came to feel such a dread of the consequences which would follow from legally establishing the mental incapacity of the testator, that they instructed counsel not to pursue that feature of the

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case, and, instead, to have the court determine the legality of the trust created by the will."

Two things are to be noted about this statement: (1) It is an inaccuracy to state that the widow joined in this appeal. (2) Counsel seek to bring the case within one of the exceptions, which some jurisdictions sustain, to the general rule supporting forfeiture clauses of the character of that in this will, by assuming that there exists *probabalis causa litigandi.*

The appeal was an attack upon the validity of the will, and the subsequent effort of the children to conceal this purpose must fail. The children, by their appeal, engaged in an act which the testator attempted to penalize by prescribing a forfeiture of the interest given them by his will. Substantially all authorities agree that a testator may in some cases impose upon a legatee a condition forfeiting his legacy if he contest the validity of the will. Counsel for the children concede this, for they say in their briefs: "While the validity of such condition is generally recognized, the exceptions to its operations have intrenched upon its effectiveness."

In England, the action to secure a legacy could be had in the ecclesiastical courts, where the rule of the civil law prevailed, in which a fiction had been adopted that, unless there was a gift over of such a legacy, no forfeiture would be decreed. The English court of equity accepted this rule, and enforced it as to legacies of personal property, but not as to devises of land. It was early pointed out by American text-writers and jurists that there was no substantial ground for any distinction in this respect between real and personal estate, and that the exception was purely an artificial one, and unsupported by any adequate reason. Some few of the American courts have adopted the English view, although in some instances recognizing that the

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exception is not based on any satisfactory reason. *Fifield* v. *Van Wyck*, 94 Va. 557, 563, 27 S. E. 446; *Friend's Estate*, 209 Pa. St. 442, 446, 58 Atl. 853; *Matter of Arrowsmith*, 162 N. Y. App. Div. 623, 628, 147 N. Y. Supp. 1016. The great majority of the American courts have repudiated this exception. *Bradford* v. *Bradford*, 19 Ohio St. 546, 547; *Moran* v. *Moran*, 144 Iowa, 451, 462, 123 N. W. 202; *Thompson* v. *Gaut*, 14 Lea (82 Tenn.) 310, 315; *Estate of Hite*, 155 Cal. 436, 445, 101 Pac. 443; *Donegan* v. *Wade*, 70 Ala. 501; *Hoit* v. *Hoit*, 42 N. J. Eq. 388, 7 Atl. 856; *Massie* v. *Massie*, 54 Tex. Civ. App. 617, 118 S. W. 219; *Smithsonian Institution* v. *Meech*, 169 U. S. 398, 413, 18 Sup. Ct. 396. Most of these authorities support a condition of forfeiture without recognizing any exception. Their underlying principle is, that since the testator may attach any condition to his gift which is not violative of law or public policy, the legatee must either take the gift with its conditions or reject it. The disposition of these authorities has been to sustain forfeiture clauses as a method of preventing will contests, which so often breed family antagonisms and expose family secrets better left untold, and result in a waste of estates through expensive and long drawn-out litigation.

The children suggest the possible approval of this exception, based on the failure to provide for a gift over, but the trustee omits reference to it. The trustee relies upon the appeal having been one to secure the construction of the will, rather than one to contest its validity. And both trustee and children unite in urging upon us, as an exception to the rule of forefeiture, the exception that if reasonable cause exist for the contest, a forfeiture will not be decreed. And they further urge that a forfeiture has been waived by them through their acquiescence in the execution of the will.

One of the claimed exceptions to the general rule of

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forfeiture is not an exception. If the action of a legatee is merely one to determine the true construction of the will, or of any of its parts, the action could not be held to breach the ordinary forfeiture clause, for the object of the action is not to make void the will, or any of its parts, but to ascertain its true legal meaning. *Black* v. *Herring*, 79 Md. 146, 152, 28 Atl. 1063; 1 Schouler on Wills (5th Ed.) § 605. The appeal taken from the decree of the Court of Probate did not, as we have before pointed out, raise the question of the construction of this will.

The exception that a contest for which there is a reasonable ground will not work a forfeiture, stands upon better ground. It is quite likely true that the authorities of greater number refuse to accept this exception, but we think it has behind it the better reason. It rests upon a sound public policy. The law prescribes who may make a will and how it shall be made; that it must be executed in a named mode, by a person having testamentary capacity and acting freely, and not under undue influence. The law is vitally interested in having property transmitted by will under these conditions, and none others. Courts cannot know whether a will, good on its face, was made in conformity to statutory requirements, whether the testator was of sound mind, and whether the will was the product of undue influence, unless these matters are presented in court; and those only who have an interest in the will, will have the disposition to lay the facts before the court. If they are forced to remain silent, upon penalty of forfeiture of a legacy or devise given them by the will, the court will be prevented by the command of the testator from ascertaining the truth; and the devolution of property will be had in a manner against both statutory and common law. Courts exist to ascertain the truth and to apply the law to it in any given situa-

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tion; and a right of devolution which enables a testator to shut the door of truth and prevent the observance of the law, is a mistaken public policy. If, on contest, the will would have been held invalid, the literal interpretation of the forfeiture provision has suppressed the truth and impeded the true course of justice. If the will should be held valid, no harm has been done through the contest, except the delay and the attendant expense.

Where the contest has not been made in good faith, and upon probable cause and reasonable justification, the forfeiture should be given full operative effect. Where the contrary appears, the legatee ought not to forfeit his legacy. He has been engaged in helping the court to ascertain whether the instrument purporting to be the will of the testator is such. The contest will not defeat the valid will, but it may, as it ought, the invalid will. The effect of broadly interpreting a forfeiture clause as barring all contests on penalty of forfeiture, whether made on probable cause or not, will furnish those who would profit by a will procured by undue influence, or made by one lacking testamentary capacity, with a helpful cover for their wrongful designs.

The practical difficulties following this exception are more apparent than real. Contests will be made only in causes where they are justified. Doubtful cases will not invite a forfeiture. There will be no more burden put upon the court in finding the fact of probable cause than in finding similar facts in other classes of cases. Schouler on Wills (5th Ed., Vol. 1) § 605, states his view upon this subject thus: "To exclude all contest of the probate on reasonable ground that the testator was insane or unduly influenced when he made it, is to intrench fraud and coercion more securely; and public policy should not concede that a

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legatee, no matter what ground of litigation existed, must forfeit his legacy if the will is finally admitted." *Estate of Hite*, 155 Cal. 436, 101 Pac. 443; *Friend's Estate*, 209 Pa. St. 442, 444, 58 Atl. 853; *Jackson* v. *Westerfield*, 61 How. Pr. (N. Y.) 399; *In re Kathan's Will*, 141 N. Y. Supp. 705, 710; *Smithsonian Institution* v. *Meech*, 169 U. S. 398, 413, 18 Sup. Ct. 396; *Cooke* v. *Turner*, 14 Simons, 493; *Morris* v. *Burroughs*, 1 Atk. 399, 404.

The facts of record are silent as to whether this contest was begun in good faith, and whether there was probable cause and reasonable justification. The stipulated facts do not bring the case within this exception.

These beneficiaries say that they are the only persons who could claim a forfeiture, and as they are all in court, requesting a division of the property in pursuance of the provisions of the will, they must be held to have waived the right to claim a forfeiture, and to have acquiesced in the execution of the will as a valid will. The court has before it a will providing for a forfeiture, and facts showing the existence of the forfeiture. Under those conditions, the court could not permit the testator's expressed will to be rendered nugatory by the consent of his beneficiaries. Its duty is to see that the testator's intention is consummated. The clause of forfeiture is one beneficiaries cannot waive. They may waive a known right of their own. They cannot waive a right which was exclusively the testator's, and one which he made a condition of his bounty and a guide to the devolution of his estate. Let us suppose that only one of six beneficiaries had forfeited his right to a bequest. Could all the other beneficiaries waive the forfeiture? Could an executor or a trustee refuse to present the facts of waiver before the court? And is it not his duty to insist upon the forfeit-

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ure, and thus to carry out the will of the testator? We find no authority which supports the claim of waiver of this forfeiture except *Williams* v. *Williams*, 15 Lea (83 Tenn.) 438, 454. Authority upon the point is limited, but against this view. Agreements by beneficiaries cannot validate a void trust. 2 Schouler on Wills (5th Ed.) § 1072; *Dresser* v. *Travis*, 39 Misc. (N. Y.) 358, 79 N. Y. Supp. 924. It is a well-recognized rule of law that contracts between devisees and legatees are not enforceable, when made with the apparent purpose of thwarting the testator's desires. *Mercier* v. *Mercier*, 50 Ga. 546; *Cuthbert* v. *Chauvet*, 136 N. Y. 326, 332, 32 N. E. 1088. This condition of forfeiture is not made for the benefit of the other beneficiaries, but to carry out the wishes of the testator. It is totally apart from a condition subsequent for the benefit of a third party, as where a will bequeathed land to a testator's heirs on condition that they pay for certain improvements to the heirs of S. The latter could waive the payment, for it was for their benefit. Such a waiver does not defeat the testator's will. *Hill* v. *Gianelli*, 221 Ill. 286, 77 N. E. 458.

The Superior Court is advised that said eight children, by contesting the probate of the will of Oscar St. John, have forfeited all rights under his will, and that the property in plaintiff's hands is intestate estate.

No costs in this court will be taxed in favor of any of the parties.

In this opinion the other judges concurred.

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ANNA F. STIERLE *vs.* ROBERT L. RAYNER.

First Judicial District, Hartford, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and GAGER, Js.

A property owner who has executed a bond for a deed must be prepared at the appointed time and place to give the conveyance agreed upon, or show a legal excuse for his failure; otherwise he is in no situation to ask for a specific performance of the agreement.

A promise to convey certain real estate by a good and sufficient warranty deed containing the usual covenants, calls for a clear, unincumbered title; and therefore is not fulfilled by a deed which transfers the property subject to an outstanding mortgage.

In the present case the property owner was unable to get into communication with the prospective purchaser between the date of their agreement and the time fixed for its consummation, when the latter did not appear. *Held* that this did not justify the owner in failing to take any steps to pay off the mortgage and thus enable her to transfer a clear title at the appointed time; and that because of such failure she could not properly ask a court of equity to specifically enforce the agreement against the defendant, the prospective purchaser.

The contract in suit required payment at once of $100, and near its close provided that if the defendant should fail to pay as agreed he should forfeit all claim to the premises and all moneys paid pursuant to the agreement. *Held* that this provision for a forfeiture was inserted to secure the performance of the contract by the prospective purchaser, and not to give him an option whether to perform or to lose what he had already paid on the purchase price.

Argued October 2d—decided December 15th, 1917.

SUIT for the specific performance of a contract to buy the plaintiff's real estate, or for damages, brought to and tried by the Superior Court in Hartford County, *Shumway, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiff. *No error.*

In October, 1915, the defendant approached the plaintiff, who was the owner of certain real estate in Simsbury, and concluded negotiations for its purchase. The purchase price agreed upon was $10,000. The

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parties thereupon caused to be prepared and executed a bond for a deed in the ordinary form, wherein, in consideration of $100 paid down, Mrs. Stierle covenanted that on or before February 1st, 1916, and immediately upon the latter's performance of his agreement to pay $9,900, being the purchase price less the $100 already paid, she would convey the premises to the defendant by a good and sufficient warranty deed containing the usual covenants, and the defendant covenanted that he would pay said sum of $9,900 on or before said date. The instrument further provided that if the defendant should fail to make payment as agreed, he should forfeit all claim to the premises and all moneys paid in pursuance of the agreement.

On January 31st, 1916, the plaintiff, at the instance of the defendant, agreed, in consideration of a further payment of $150, to extend the time for the completion of the transaction to April 1st, 1916. In pursuance of this agreement a new bond for a deed, similar in all respects save as to the date of performance, the amount of the consideration, and the amount of the balance of the purchase price to be paid, was executed by the parties.

On March 30th, 1916, the plaintiff, having heard nothing further from the defendant, and having made repeated unsuccessful efforts to reach him by telephone to make an appointment to close the transaction, sent him by registered mail a letter informing him that she would be at the town clerk's office in Simsbury on April 1st at one o'clock in the afternoon to perform her part of the agreement and give him a deed of the property.

On April 1st she kept her appointment, and waited for over two hours for the defendant, who neither appeared nor sent word. At this time she had the town clerk prepare a warranty deed of the premises from

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herself to the defendant, in which she warranted that the same was free from all incumbrances except a mortgage of $3,500 in favor of Harriet E. Hawley, which it was provided that the grantee assumed and agreed to pay. Subsequently, on April 4th, after consultation with her attorney and not having heard from the defendant, she again wrote him expressing her willingness to give him until April 10th, 1916, to perform his contract, and again naming the town clerk's office in Simsbury as the place and ten o'clock in the forenoon of said day as the time where and when she would be present to complete the transaction. The letter also expressed her willingness to meet the defendant at any other place or at any other time before April 10th which he might name.

Pursuant to this letter the plaintiff was at the appointed place on April 10th at the hour named and waited there for two hours, but the defendant did not appear or send word. At this time the warranty deed, which had been drafted upon the plaintiff's previous visit, was executed by her. This is the deed which she proposed and intended to give in fulfillment of her obligations.

At the time that the agreement of purchase and sale was entered into, the premises were incumbered by a mortgage for $3,500 to Harriet E. Hawley, and remained so incumbered until after April 10th, 1916. The note secured by this mortgage was on demand. No demand was ever made by the holder, neither was any offer to pay the note made to the mortgagee.

Stanley W. Edwards, for the appellant (plaintiff).

William F. Henney, for the appellee (defendant).

PRENTICE, C. J. The instrument executed by the parties, and whose specific performance is sought, is

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one commonly known as a bond for a deed. By its terms the plaintiff property owner agreed to convey, by a good and sufficient warranty deed containing the usual covenants, certain real estate immediately upon the receipt from the defendant purchaser of the stipulated purchase price, and the defendant agreed to pay that price. Performance was to be had on or before April 1st, 1916.

These were mutual and dependent covenants demanding of each of the parties readiness and willingness to perform, and requiring, as a condition of judicial enforcement or redress for breach at the complaint of either, such readiness and willingness on his part, or a showing of sufficient excuse for their absence. *Phillips* v. *Sturm*, 91 Conn. 331, 335, 99 Atl. 689; *Smith* v. *Lewis*, 24 Conn. 624, 635. Readiness to perform on the plaintiff's part meant readiness to convey an unincumbered title. *Harris* v. *Weed*, 89 Conn. 214, 225, 93 Atl. 232; *Janulewycz* v. *Quagliano*, 88 Conn. 60, 63, 89 Atl. 879.

The property at the time the contract was entered into was covered by a mortgage of $3,500, and it remained so incumbered until after both April 1st and 10th had passed. In so far as the record discloses, no steps of any kind were taken to either procure or prepare for its release in anticipation of the stipulated conveyance. That was the condition of things when, on April 1st at one o'clock in the afternoon the plaintiff went to the meeting place which she had named in a letter to the defendant and at the hour so named. Subsequent preparation on that day to perform her undertaking, was confined to the drafting of a warranty deed to the defendant of the property subject to the $3,500 mortgage thereon. The defendant did not appear, nor was he heard from. If he had appeared and paid the amount he was called upon to pay, the plaintiff could not, as far as appears, have secured a removal of the in-

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cumbrance and given the free title which she was obligated to give. The indications are quite to the contrary, especially as the mortgage was held by a person described therein as of Danbury. The record thus fails to show that the plaintiff was in a position to perform her part of the mutual undertaking of the parties on April 1st when she was in duty bound to be ready to do so.

The plaintiff's letter of April 4th, giving the defendant an extension of time to April 10th, does not change the legal aspects of the situation. She could, indeed, waive her right to have performance by the defendant on April 1st, but she was powerless to extend the time within which she was bound to perform or to be ready and willing to perform. Furthermore, her preparations in anticipation of the second appointed meeting were no more adequate than they were for the first. The little that was done only emphasizes her unreadiness to give the title she had obligated herself to give.

It follows that if the plaintiff is to prevail it must be by reason of her having a sufficient excuse for her conduct in making no provision for a release of the mortgage. Upon the trial she attempted to establish such excuse by evidence that the defendant, during the negotiations for the property, stated that he would take care of the mortgage if he purchased. The court, however, has refused to find, as the conflicting evidence justified him in doing, that such or a similar statement was made. The plaintiff is thus left to find her excuse in the defendant's conduct in not communicating with her between the time of the execution of the agreement on January 31st and April 1st, the limit of time fixed for the consummation of the transaction, and in absenting himself upon the latter day.

Her efforts to get in touch with him on the telephone had failed, and her letter naming a place and time of

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meeting sent on March 30th had elicited no reply. There was nothing else, save possibly the lapse of time, that could have made the plaintiff suspicious even that the defendant would not perform his obligations. If her suspicions were awakened by her inability to get into communication with him, her failure to hear from him, and the approach of the terminal date fixed for the payment and transfer of title, those suspicions should have aroused her to the necessity of putting herself in a position to make the conveyance she had agreed to make. They certainly did not justify her in acting as though the defendant had declared his abandonment of the agreement, indicated his purpose not to perform his part of it, or put himself in a position where he was incapable of performance. The defendant was under no obligation to keep in communication with her or to do anything until April 1st should arrive. He would have been wholly within his rights had he waited until that day, and then proffered his promised payment. The plaintiff was bound to know this, and to act upon that knowledge.

It was not until the plaintiff had waited at her appointed meeting place a reasonable time after one o'clock on April 1st that this situation became changed. Whatever excuse for further preparation the non-appearance of the defendant might then have afforded, it was too late for it to serve her as a justification for the utter lack of earlier efforts on her part, not shown to have been unnecessary, that she might have the ability to give a clear title within the time appointed.

In view of our conclusions above stated, the claim of the defendant that his contract to pay the stipulated purchase price was not one whose specific performance a court of equity will direct, but merely one embodying a forfeiture as the prescribed penalty in the event of his failure to perform, does not call for consideration.

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For the avoidance of future misunderstanding, however, we ought, perhaps, to say that we are unable to so construe the instrument executed by the parties. Plainly the forfeiture provision was inserted to secure the performance of the contract by the defendant, and not to provide an alternative method of performance at his option. *Goodale* v. *Hill*, 42 Conn. 311, 317; *Brown* v. *Norcross*, 59 N. J. Eq. 427, 430, 45 Atl. 605; *Koch* v. *Streuter*, 218 Ill. 546, 552, 75 N. E. 1049; *Dooley* v. *Watson*, 67 Mass. (1 Gray) 414, 416.

There is no error.

In this opinion the other judges concurred.

William A. White *vs.* The Lansing Chemical Company.

First Judicial District, Hartford, October Term, 1917.

Prentice, C. J., Roraback, Wheeler, Beach and Gager, Js.

The delivery of personal property by its owner to one who had agreed to buy it of the first vendee, if intended by the owner as a performance of his original contract, will be so treated, and will prevent him from thereafter suing the sub-vendee for a wrongful conversion of the property.

Payment of the purchase price as a condition precedent to the consummation of a sale by a delivery of the property, is one that can be waived.

A finding will not be changed to accord with a paragraph of the draft-finding marked "proven," if it is quite clear upon examination that such marking was inadvertent or through a misunderstanding of the paragraph's apparent purport, and that the finding proper states the court's real and intended conclusion in the matter.

Argued October 2d—decided December 15th, 1917.

Action for the alleged conversion of certain acids, raw material and machinery owned by the plaintiff

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and used upon premises leased by him for the manufacture of picric acid, brought to and tried by the Superior Court in Hartford County, *Shumway, J.*; facts found and judgment rendered for the defendant, and appeal by the plaintiff. *No error.*

On October 15th, 1915, the plaintiff entered into a contract with Gillespie Bros. & Company to manufacture picric acid, it being provided in the contract that the latter should supply the plaintiff with phenol, a necessary ingredient, and that the plaintiff should procure the other ingredients and make the acid. After the execution of this contract the plaintiff secured a lease of a plant in Melrose, Connecticut, for use in the conduct of the business, and entered into a contract with the Cochrane Chemical Company to supply him sulphuric and nitric acids, important ingredients used with phenol in the manufacture of picric, and purchased a large amount of machinery and supplies to equip the plant which had been leased. The contract with the Cochrane Chemical Company obligated that company to furnish a stipulated amount of sulphuric and nitric acids, to be delivered in installments approximately as provided, and obligated the plaintiff to buy and pay for such acids within thirty days from date of invoices at specified prices.

When the plant was fully equipped, and the plaintiff was ready to begin to manufacture, Gillespie Bros. & Company was unable to furnish the phenol as agreed, and notified the plaintiff that it would be unable to perform its contract in that respect.

In the preparation and equipment of the plant the plaintiff had expended $14,562.30, had become obligated to pay the rent specified in the lease of the plant, and had made the contract with the Cochrane Chemical Company, as already stated. At the time that Gillespie Bros. & Company advised the plaintiff of its

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inability to furnish phenol, a portion of the sulphuric and nitric acids contracted for with the Cochrane Chemical Company had been delivered, and was at the plant unpaid for.

In this condition of affairs the plaintiff, by his letter of January 19th, 1916, made a proposition to Gillespie Bros. & Company, which was thereafter accepted by them, by which he agreed to sell and transfer all his interest in the plant and appurtenances at Melrose, including acids, machinery, and stores thereat, upon their agreement to pay all unpaid bills as shown on list and invoices handed them, and reimburse him for all moneys already expended as shown by receipted bills also handed them. The bill of sale therefor was to be drawn immediately upon the performance by Gillespie Bros. & Company of their undertaking. For the purpose of carrying out the terms of this agreement, the plaintiff caused to be prepared a bill of sale of all his property at Melrose, an assignment of his lease of the premises, and an assignment of his contract with the Cochrane Chemical Company, and offered to execute and deliver the same upon performance on Gillespie Bros. & Company's part. Gillespie Bros. & Company thereupon advised the plaintiff that it was not then ready to make the payment called for, and upon its request completion of the transaction was postponed from time to time. Later, Gillespie Bros. & Company paid to the plaintiff, upon three occasions, the sum of $11,400, leaving a balance due of $6,800.

On or about February 15th, 1916, Gillespie Bros. & Company, together with Steiner & Son, on the one part, and the defendant on the other, entered into a contract wherein the former represented that they were the owners of the plant and property at Melrose. This contract provided for the use by the defendant of the plant for the manufacture of picric acid and the

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sale to the defendant of the raw materials there on hand. The defendant agreed to do, without delay, whatever was necessary to properly equip the plant and prepare it for the manufacture of picric acid, and to proceed without delay to manufacture the raw materials on hand into picric.

At about the same time Gillespie Bros. & Company's representative wrote to the plaintiff advising him that the defendant corporation had been organized, and had proposed to take over the Melrose plant, spending about $3,000 or $4,000 in putting it into condition to manufacture picric acid, and to purchase all the sulphuric and nitric acids at the plant. This letter stated that the writer figured that they would thus be enabled to realize the amount owing the plaintiff, and leave a balance in Gillespie Bros. & Company's favor. The writer stated that they had given representatives of the defendant a letter of introduction to the plaintiff, and that it would be two weeks at least before they could start manufacturing operations. These representatives were Messrs. Carpenter and Read, who subsequently called upon the plaintiff in Hartford with the letter of introduction signed by the writer of the aforementioned letter, in which it was stated that they were the representatives of the Lansing Chemical Company, of whom he had written, and confidence expressed that the plaintiff would give them any assistance in his power.

Upon the presentation of this letter the plaintiff, on February 16th, 1916, took Carpenter and Read to the plant at Melrose and turned over to them the keys to it, delivered to them full and complete possession of the property, and recommended for employment the men about the place and stated the compensation they were receiving. At this time Carpenter and Read informed the plaintiff that the defendant had closed a

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contract with Gillespie Bros. & Company, representing themselves to be the sole owners of the plant, and that they had come on behalf of the defendant to take possession of it and remodel it for the purpose of manufacturing picric acid, and that they had purchased the property in the plant, including the nitric and sulphuric acids. It was with full knowledge of these statements that the plaintiff delivered the keys and property to the defendant, who continued in the uninterrupted possession of both plant and property and in the manufacture of picric acid at the plant, until the institution of the suit at bar. The delivery to Carpenter and Read by the plaintiff was intended to be one of the personal property contained in the buildings at Melrose, as well as a transfer of possession of the real estate in carrying out the plaintiff's agreement to sell and transfer the same to Gillespie Bros. & Company.

The defendant made no contract, express or implied, with the plaintiff to purchase of the latter, and had no dealings with him looking to such purchase.

One of the objects which Carpenter and Read had in their visit to the plant was to ascertain the amount of sulphuric and nitric acids on hand, for which the Lansing Chemical Company, in its contract with Gillespie Bros. & Company, had obligated itself to make payment. Upon their arrival it was found that the stock of acid was so located that it could not be readily inventoried, and it was agreed that it should be taken out and rearranged under the direction of Carpenter and Read, so that the quantity could be determined. This was subsequently done, and an inventory taken by them showing its cost at the factory of the Cochrane Chemical Company, to have been $4,464.75 and its then value to be $7,243.38. This acid was subsequently, and prior to the beginning of this action, used by the defendant in the operation of the plant.

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The defendant in its answer admitted its use of the acid and its obligation to pay for the same, and expressed its willingness to pay therefor to the party entitled to such payment, but alleged that Gillespie Bros. & Company, and Steiner & Son demanded it of them.

Alvan W. Hyde, for the appellant (plaintiff).

William F. Henney, for the appellee (defendant).

PRENTICE, C. J. The plaintiff seeks recovery in tort for the conversion of personal property alleged to have been owned by him. The court rendered judgment against him upon the ground that at the time the alleged acts of wrongdoing were committed, the ownership of the property was in a third party. From the facts recited in the finding the conclusion necessarily follows that the title to the property and possession thereof had passed out of the plaintiff. There was a contract of sale and purchase of it between the plaintiff and Gillespie Bros. & Company, and a delivery to the defendant as the latter's vendee, made and intended to be made in execution of such contract. Sale of Goods Act, Public Acts of 1907, Chap. 212, § 18. Delivery to the defendant was, under the circumstances detailed in the finding, a delivery to Gillespie Bros. & Company, under the contract. Whether or not, under those circumstances, the title to the property was thereafter in Gillespie Bros. & Company, or in the defendant, is altogether immaterial. It is sufficient that the plaintiff had parted with it. Neither does it matter that the contract of sale by its terms made payment of the purchase price a condition precedent to a consummation of the sale by a delivery of the property. That condition could be waived, and upon the finding was waived.

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The plaintiff, however, contends that the finding, in so far as it concerns the fact of delivery and the intent with which the defendant was admitted into possession, should not be accepted at its face value, for the reason that it is inconsistent with one of the paragraphs of the plaintiff's draft-finding marked "Proven," and upon the evidence should be corrected so as to conform to what there appears and in such manner as to negative a delivery to the defendant in performance of the contract of sale made with Gillespie Bros. & Company. An examination of the two findings said to be inconsistent, and apparently not in harmony, makes it reasonably clear that the paragraph of the draft-finding relied upon was marked "Proven," either inadvertently or through a misunderstanding of its apparent purport, and that the finding proper states the court's real conclusion and the one intended by it to be expressed. Closely related paragraphs of the draft-finding endorsed "Not proven," as well as the general tenor of the finding itself and its ultimate conclusion upon which the judgment was founded, leave little doubt upon that point.

That the evidence justified the court in finding as it did in its finding proper, and that, therefore, we are not at liberty to disturb it, there can be no doubt.

A perusal of the record leads to the conclusion that the plaintiff may have a right of action of some sort against somebody; but that he has one against the defendant founded, as this is, upon its tortious wrongdoing in the conversion of the plaintiff's property, is not disclosed.

There is no error.

In this opinion the other judges concurred.

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SECOND NORTH SCHOOL DISTRICT ET ALS. APPEAL FROM BOARD OF STREET COMMISSIONERS OF THE CITY OF HARTFORD.

First Judicial District, Hartford, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

It is not within the province of a committee to whom a cause is referred to find and report the facts, to pass upon a demurrer, that being an interlocutory matter which should be disposed of by the court before the reference is made.

Under the provisions of the charter of the city of Hartford (6 Special Laws, p. 743, § 5, 7 Special Laws, p. 527, §§ 1, 5, 7), the judge of the Court of Common Pleas, upon an appeal to him from an assessment of benefits and damages for a public improvement, has no jurisdiction to determine any other question than that raised by the appeal, that is, whether the assessment complained of is inequitable and unjust to the appellant; and therefore he has no power to decide whether or not the original assessing board in its proceedings complied in all respects with the charter requirements.

The language of city charters differs so greatly, that cases involving the construction of one charter are not authoritative in interpreting others.

The facts relied upon to show the relevancy and materiality of questions excluded by a committee, and the harmful nature of the rulings, should be stated in the committee's report; otherwise the remonstrant should ask to have the report recommitted to include them. He cannot accomplish this end by stating them himself in his remonstrance.

Argued October 2d—decided December 15th, 1917.

APPEAL from an assessment of benefits and damages resulting from the widening of High Street in the city of Hartford and the establishment of building and veranda lines thereon, taken by several abutting property owners to the judge of the Court of Common Pleas in Hartford County and referred to a committee who heard the parties and reported the facts, after having sustained a demurrer filed by the City; the judge of said court (*Hon. Edward L. Smith*) overruled

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remonstrances to the report of the committee, accepted said report and rendered judgment in accordance therewith, from which the appellant Isham appealed. *No error.*

Thomas J. Spellacy, for the appellant, Henry G. Isham.

Francis W. Cole, for the appellee, the City of Hartford.

WHEELER, J. This action is an appeal from an appraisal of damages and an assessment of betterments by the Board of Street Commissioners of the City of Hartford, taken to the judge of the Court of Common Pleas of Hartford County, and praying for a reappraisal of the damages and a reassessment of the benefits.

The case was referred by the judge to a committee for a hearing, a demurrer was filed with the committee by the City against all of the other parties to the appeal, and all of the parties agreed that the committee should pass upon the demurrer and that the judge should review his decision thereon.

The committee passed on the demurrer, sustaining a part and overruling a part, and heard the case, and thereafter filed his report, to which the appellant herein remonstrated, and the judge overruled the remonstrance, and the appellant appealed to this court, claiming that the judge had erred in holding that the committee did not err on the three stated grounds: first, in sustaining the demurrer; second, in excluding certain questions upon the hearing; and third, in failing to consider in his appraisal certain elements of damage.

The procedure adopted by agreement of the parties, in having the committee pass upon the demurrer, was wholly irregular and should not have been permitted by the judge of the Court of Common Pleas. Interlocutory matters should be disposed of by the court before

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a case is sent to a committee. Our practice before the committee, the character of its report, the form of the remonstrance, and the judicial action to be taken thereon, comprise a procedure well established, and one whose essentials have been recently reiterated by us.

Since the judge who heard the appeal in effect decided the demurrer by his review of the committee's decision thereon, we have concluded, in the interest of a disposition of the question, to treat it as if it were before us in the customary way.

The demurrer ran to those paragraphs of the complaint which set forth the particulars in which the Board of Street Commissioners did not proceed in accordance with the provisions of the charter of the city of Hartford. The ground of the demurrer was that the judge of the Court of Common Pleas had no jurisdiction to determine whether this board had complied with these charter provisions.

The resolutions of the Court of Common Council relating to the widening of streets are referred to the Board of Street Commissioners to appraise damages and assess benefits, but "an appeal shall be allowed to any person aggrieved by any appraisal of damage or assessment of betterments to the tribunal, and in the time and manner which may be by law provided." 6 Special Laws (1869) p. 745, § 5; Compiled Charter, 1908, Hartford, p. 60, § 116. In 1873 (7 Special Laws, p. 527, § 1; Compiled Charter, 1908, p. 65, § 129) it was provided that such appeal should be taken to the judge of the Court of Common Pleas for the county of Hartford. By these two provisions the appeal is taken from any appraisal of damages or assessment of betterments, and this is the sole basis of the appeal.

The manner of taking the appeal is set forth in § 3 of the Special Act of 1873 (§ 131, p. 66, Compiled Charter, 1908), and it is there provided that the peti-

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tion shall ask for "a reappraisal and reassessment, or for a reassessment only." Sections 5 and 7 of the Special Act of 1873 read as follows:—

"Sec. 5. If upon the hearing of any appeal the judge or committee shall find cause to alter said appraisal and assessment, or assessment of benefits only, then said judge or committee shall proceed to reapportion the whole amount of the damages and benefits or benefits only upon the persons or lands specially benefited."

"Sec. 7. Such judge shall have, for the purpose of disposing of said appeal, all the power of the Superior Court, and may render judgment thereon, and may tax costs in favor of either party, and issue execution for said costs, to be taxed as upon civil process in the Superior Court."

If the judge finds cause upon the appeal to alter the appraisal and assessment, he shall reapportion the whole amount of the damages and benefits upon the persons or lands specially benefited.

The single feature of the Act upon which the appellant relies is § 7: "Such judge shall have, for the purpose of disposing of said appeal, all the power of the Superior Court." This, it is said, confers upon the judge the power to pass upon the validity of the entire proceedings. But § 5 states the subject-matter of the appeal, and it is this alone over which the judge on appeal has jurisdiction, and when § 7 gives him "all the power of the Superior Court," it vests in him the power of the Superior Court over the subject of the appeal, that is, over the reappraisal and reassessment.

The terms of these Acts support the claim of the City, and so does the history of this legislation. In 1859, in the city of Hartford, an appeal which involved the legality of the procedure taken, lay from the layout of highways, and an appeal lay from the assessment of

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damages and benefits upon such layout. Similarly, the two kinds of appeal lay from the action of the selectmen of towns in the layout of highways and in assessing damages and benefits. In 1859 the revised charter of Hartford (5 Private Laws, p. 316) was granted. Section 7 provided that "said court of common council shall have exclusive power to lay out . . . new highways," and should assess damages and benefits. It provided further that "an appeal shall be allowed to any person aggrieved by an appraisal of damages or assessment of betterments to any judge of the Superior Court; . . . and said judge shall have, for the purpose of disposing of said appeal, all the powers of the Superior Court . . . to reassess said damages or benefits." The subject-matter of the appeal was limited to a reappraisal of damages and benefits, and over this subject the judge on appeal is given jurisdiction, and over none other. The method of appeal was changed in 1867, and then taken to commissioners of relief, and in 1869 the Board of Street Commissioners was created and constituted a tribunal to assess damages and betterments, and the appeal provided, as already referred to by this Act and finally by the Act of 1873, to the judge of the Court of Common Pleas. The judge of this court had the same power over the same subject as the judge of the Superior Court by the Act of 1859.

The history of this legislation makes plainly evident its continuous purpose, since 1859, to give one appeal only, that from the assessment of damages and betterments, and to vest in the judge of the Court of Common Pleas the same power over the assessment of damages and benefits which the judge of the Superior Court formerly possessed, and all the power over this subject which the Superior Court would possess over such subject if the statute provided that the appeal should be taken to it.

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Several of our cases are cited by the appellant in support of his contention. These cases are not authoritative, they called for the interpretation of the charters of other municipalities whose language is entirely different from that of the Hartford charter. In *Hill* v. *Waterbury*, 84 Conn. 319, 80 Atl. 202, the charter granted an appeal from "any act of the board of aldermen or of any department." In *Peck* v. *Bridgeport*, 75 Conn. 417, 421, 53 Atl. 893, *Keifer* v. *Bridgeport*, 68 Conn. 401, 410, 36 Atl. 801, and *Citizens Association* v. *Bridgeport*, 84 Conn. 383, 386, 80 Atl. 203, the charter provided that the court on appeal "may inquire into the validity of all the proceedings on which said assessment is based." In *Evergreen Cemetery Asso.* v. *New Haven*, 43 Conn. 234, and in *New Haven* v. *Fair Haven & Westville R. Co.*, 38 Conn. 422, 430, the charter allowed an appeal from "any act of the Court of Common Council, or of the Board of Road Commissioners."

Park Ecclesiastical Soc. v. *Hartford*, 47 Conn. 89, was an appeal taken under the charter provisions now before us, and the validity of the assessment and the irregularity in the procedure were considered. But the case cannot be regarded as decisive upon this point, and for the reason pointed out by JUDGE BALDWIN in *Hunter's Appeal*, 71 Conn. 189, 195, 41 Atl. 557, that no question was there raised or considered as to the jurisdiction of the court on the appeal over such subjects.

Certain questions which the appellant asked of his witness, and which are stated in the report of the committee, were excluded. The facts in evidence upon which the appellant relied in support of his claim that these questions were relevant and material and that the rulings were harmful, are not stated in the report. It was the duty of the committee to have stated these facts in order to enable the appellant to have the rulings properly before the appellate court. Upon the failure

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of the committee to state these facts in his report, the remonstrant should have asked to have the report recommitted to include them. The appellant neglected to do this, but sought to accomplish the same end by including them in his remonstrance. The report of the committee cannot be extended in that way. The bare statement of the questions does not enable the court on appeal to intelligently pass upon the rulings made.

Finally, the appellant claims that in making his estimate the committee erred in failing to take into account the possible uses of this lot, and that its value is largely increased by reason of its being a corner lot. Our examination of the report does not satisfy us that the committee failed to consider these elements in making up his estimate.

There is no error.

In this opinion the other judges concurred.

THE UNDERWOOD TYPEWRITER COMPANY *vs.* FREDERICK S. CHAMBERLAIN, TREASURER OF THE STATE.

First Judicial District, Hartford, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

It is not to the interest of the State that those whom it seeks to tax should have to refuse to pay their taxes in order to test their validity. Such a course, if largely followed, might cause a serious inconvenience to the State in the discharge of its governmental obligations.

A property owner who, with knowledge of the facts, voluntarily pays a tax assessed upon him or his property, cannot recover the amount so paid, even though the Act under which the tax was laid afterward turns out to be unconstitutional. But if the payment is made under protest and in order to avoid the burdensome penalties

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prescribed by the Act for its nonpayment, such payment is not, in contemplation of law, voluntary, but one made under moral duress arising from the coercive features of the Act; and therefore the property owner is not prevented by such payment from subsequently attacking the constitutionality of the Act in a suit to recover the money so paid.

Sections 27 and 28 of Chapter 292 of the Public Acts of 1915, providing for an application for relief to the Superior Court by any corporation aggrieved by the tax laid against it under Part IV of the Act, and prescribing the powers and duties of the court thereon, are remedial in their character and entirely independent of and separable from the other provisions of the Act.

These sections (27, 28) were intended, not to limit the relief to a mere mathematical calculation affecting the amount of the tax—an act purely administrative in its nature—but to give the taxpayer adequate remedy at law, and entitle him to a review of the entire proceedings *de novo*, and to a determination of whether any part of the tax is unjust or illegal.

Argued October 3d—decided December 15th, 1917.

ACTION to recover the amount of a tax laid under Part IV of the Act of 1915, alleged to have been paid by the plaintiff under protest and to escape irreparable injury to its property, brought to the Superior Court in Hartford County where a demurrer to the prayers for relief was sustained (*Burpee, J.*) and judgment rendered (*Gager, J.*) for the defendant, from which the plaintiff appealed. *Error; demurrer overruled.*

Eugene D. Boyer of New York City, and *Arthur L. Shipman*, for the appellant (plaintiff).

George E. Hinman, Attorney-General, and *James E. Cooper*, with whom was *Charles W. Cramer*, for the appellee (defendant).

WHEELER, J. The single ground of the appeal is the alleged error in sustaining the demurrer to the claims of relief. The complaint alleges that the plaintiff is a corporation organized under the laws of Delaware, and

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engaged in manufacturing and in the sale and rental of its products and merchandise in Connecticut, but that the greater part of its business in Connecticut is in the performance of its agreements for sale and leases made in other States and foreign countries; that by far the larger part of its capital and assets are invested and located outside this State and used for its interstate commerce business; that the greater portion of its earnings and income is derived from such interstate commerce, and is received, held and possessed outside this State.

It further alleges that Chapter 292 of the Public Acts of 1915 provides that each company carrying on business in this State shall "pay a tax annually to the state upon the net income for its fiscal or calendar year next preceding, . . . upon which income such company is required to pay a tax to the United States"; that in the case of a company carrying on business outside the State and deriving profits principally from the sale or use of tangible personal property, such proportion of the net income shall be apportioned to this State "as the fair cash value of its real estate and tangible personal property in this state on the date of the close of the fiscal year of such company in the year next preceding is to the fair cash value of its entire real estate and tangible personal property then owned by it."

The complaint also alleges that § 23 of the Act of 1915 imposes upon the Tax Commissioner the duty of determining the tax laid on each company, and of mailing a statement of such tax to each company; and that it provides that the tax shall be payable on or before the first day of August in each year, and if unpaid after the first day of August, after ten days' notice and demand by the State treasurer, that there shall be added five per cent to the amount of the tax, and interest at the rate of three-fourths of one per centum per month upon such

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tax, and "such tax, if unpaid, shall constitute a lien upon the real estate of such company in this state, such lien to be in force from the filing of a certificate . . . in the land records."

The complaint further avers that the Tax Commissioner, prior to July 1st, 1916, acting under this Act, apportioned the sum of $629,668.50 of the applicant's net income on which the tax was imposed by the United States for the year ending December 31st, 1915, as the portion of its income for that year upon which it should pay to the State such tax, and thereupon assessed against this applicant two per cent of such income amounting to $12,593.37.

It is further alleged that acting under protest, the plaintiff, in order to prevent the imposition of the penalty of the Act, and without waiving its right to claim that no such tax was due or collectible from it by the State, and that the requirement for such return was unconstitutional, made and filed such return, and on July 29th, 1916, paid said tax under protest and to avoid irreparable injury through the enforcement of the penalties and coercive features of the Act.

The complaint further alleges that the sum determined as the net income upon which this tax is computed is in excess of forty-seven per cent of the total income earned and received by the plaintiff, and the greater portion was earned and received without the State and in conducting its interstate business, and not over $40,160.27 thereof was earned or received in its business carried on in Connecticut.

Upon these facts the plaintiff claimed relief by way of a judgment (1) that the Act, in so far as it attempts to tax the plaintiff, is in violation of the United States Constitution and void, (2) directing the treasurer of the State of Connecticut to repay to it the amount of such tax with interest.

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The defendant demurred to the claims of relief, principally upon three grounds: 1. That §§ 27 and 28 of the Act, under which the plaintiff's action was brought, did not give the court jurisdiction. 2. That the plaintiff could not seek the remedy provided by the Act whose validity it assailed. 3. That the plaintiff, upon the facts, paid the tax voluntarily, and hence could not claim the Act to be unconstitutional.

The plaintiff says in its brief: "The ultimate question in the case is whether or not Part 4 of Chapter 292 of the Public Acts of 1915, is constitutional, or does invade the exclusive power of the Federal Congress over interstate commerce, or violate the 4th, 5th, and 14th Amendments to the Constitution." The demurrer does not raise this question, but limits its contentions to an attack upon the right of the plaintiff to maintain its appeal, because of its own conduct in paying the tax, and of the limited scope of the remedy provided by the Act upon which the plaintiff predicates its action.

First. If the plaintiff, with full knowledge of the facts, paid this tax voluntarily, he cannot recover it, even though the tax were invalid and paid under protest. *Sheldon* v. *South School District,* 24 Conn. 88, 91. The tax in question was paid "under protest, in order to escape irreparable injury through the enforcement of the penalties and coercive features of the Act," the complaint alleges. The admissions of the demurrer go no further than the terms of the Act.

The tax would become due under the Act on or before August 1st. Ten days thereafter, and upon notice and demand of payment by the State treasurer, five per centum of the unpaid tax would automatically be added to it, and interest at the rate of three-fourths of one per centum per month upon such tax from the date the tax became due, would be added.

Further, the unpaid tax became a lien upon the real

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estate of the Company within the State from the time the tax became due and was unpaid, and from the filing of a certificate, signed by the State treasurer, in the land records of the town. Since the filing of the certificate might be contemporaneous with the date when the tax became due and unpaid, the Company was in danger of having this lien placed upon its property from such date.

The Company was confronted with this situation: Though it contested the validity of the tax successfully it could not prevent the filing of the lien upon its property. And if it were unsuccessful, no matter what merit its claims possessed, the lien would attach, and the five per centum penalty and the nine per centum interest would accrue. The lien might prove a serious burden upon its credit, while the actual pecuniary losses, suffered or threatened, involved a hardship and loss which no company should be compelled to face. It could not measure the extent of these penalties, because it could not know the time the tax litigation would take. It would be unfair to it to compel it to take this risk of loss as the condition of its right to test the validity of the tax. It should have that right without condition, and by a clear and certain remedy.

This is common practice and it is sound public policy. It is not to the advantage of the State that those whom it seeks to tax should refuse to pay their taxes in order to test their validity. Such a course, if largely followed, might cause the State more than an inconvenience in the disturbance of the budget upon which the payment of its governmental obligations depended. The more orderly course is a compliance with the law by a payment, reserving the right to contest the validity of the required payment.

The payment of the tax in question was not a voluntary one, it was in the contemplation of the law a

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payment under duress of the penalties of the Act. And this we hold from a consideration of the provisions of the Act, and without a consideration of any remedies by way of distress which the State might have for the enforcement of payment of this tax. A payment of a tax made to avoid the onerous penalties of the Act imposing the tax for its nonpayment, is not a voluntary payment. The more modern doctrine supports this view. *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17, 10 Sup. Ct. 5; *Atchison, T. & S. F. Ry. Co.* v. *O'Connor*, 223 U. S. 280, 285, 32 Sup. Ct. 216.

We reached practically the same conclusion in *Seeley* v. *Westport*, 47 Conn. 294, 299, on a petition to restrain a town and its officers against a levy upon real estate. We said: "We think therefore that the law is so that a man may protect his land from a sale, or prevent a cloud upon his title, by paying the tax and have his remedy to recover it back if the tax was illegal and unjust."

It was not necessary for the plaintiff to wait until demand was made by the State treasurer; the tax was due August 1st, it was paid July 29th, and the lien might have been made effective on August 1st. The compulsion of the law began when the tax was due, and it would have served no purpose to have permitted the defendant to have made demand, or to have been about to file the lien, before paying the tax. The plaintiff pursued the orderly course, it paid under protest and upon pressure of the law's duress.

Second. Another ground of demurrer is that the plaintiff cannot attack the constitutionality of an Act whose remedy it seeks; and also, that if one part of an Act is void all parts are void except such as are wholly separable.

This latter principle is sound. 1 Lewis' Sutherland, Statutory Construction (2d Ed.) § 297. It has no

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present application. The remedies provided by §§ 27 and 28 are entirely independent of the body of the Act. No reason has been presented, and we think of none, why the remedy provided by the Act may not stand, even though some other part of the Act fall.

Third. Finally, the demurrer asserts that the purpose and scope of the remedy provided by §§ 27 and 28 of the Act are administrative and relate to a correction in the amount of the tax, and the repayment of the excess, and not to a determination of the validity of the tax. And the State treasurer contends that the court has no power under these sections other than to determine whether the law has been complied with in determining the amount of the tax.

Section 27 provides that "any company aggrieved because of the tax laid . . . may . . . apply to the Superior Court . . . for relief, and said court shall fix a time when and place where such corporation may show cause why such tax should be changed." This is the usual language of our statutory appeals, except that instead of "may appeal" we have "may apply to the Superior Court for relief." The court which is to hear the cause and grant relief is one of general jurisdiction, and the language of the Act does not, at least expressly, attempt to restrict its jurisdiction. The corporation is granted, upon the appeal, the right to apply for relief, and this must mean either for legal or equitable relief. It is also accorded the right to show cause why such tax should be changed. This must mean a legal cause, not a cause outside the jurisdiction.

Our statutes furnish instances where appeals are given in the language used in § 27. General Statutes, §§ 2354, 4747, 2048, 2056, 4772 and 2627. "Appeal," and "apply for relief," or "application for relief," are obviously used in the statutes in the same sense and for the same purpose. In *Hall* v. *Meriden*, 48 Conn. 416,

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we construed a provision in the charter of Meriden which provided for an application for relief to the Superior Court by any person aggrieved by an appraisal of damage or assessment of benefits. The plaintiff claimed that the court had no power to reduce the damages awarded, that it could only raise them, or leave them as they were. The plaintiff supported his claim by contending that the application for relief granted differed from an appeal from such assessments. The court, through JUDGE LOOMIS, said (p. 427): "Now it cannot be that the legislature intended a totally different rule of procedure in the two cases where the proceeding is called 'an application for relief,' from that which is to be followed in the others. It is in every case in effect an appeal from a lower tribunal to a higher one, and must have the ordinary incident of an appeal." This decision is decisive.

Sections 27 and 28 were intended to give the taxpayer an adequate remedy at law, otherwise the taxpayer would be left to his remedy by injunction, and if exercised this would prevent the collection of the funds required to administer the State government, and if the taxpayer should not succeed he would subject himself to the penalties of the Act accruing during the pendency of the action. The remedy given by these sections gave the taxpayer a review of the entire proceedings *de novo* in court, and he, by paying the tax under protest, protected himself from the penalties of the Act and at the same time conserved the State treasury.

The relief afforded by these sections is not confined to a mathematical calculation, to the correction or change in the amount of the tax. It contemplates a determination of whether the tax, in whole or part, is unjust or illegal. That may require a finding of the exact amount of the tax, but its primary purpose is to find out if any

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part of the tax is unjust or illegal. Such a finding is the exercise of a judicial function, while a mere mathematical calculation would be an administrative act. It is not to be presumed that the General Assembly intended to impose upon the Superior Court administrative functions; and a fair construction of these sections does not lead to this conclusion.

There is error, the judgment is reversed and the Superior Court directed to overrule the defendant's demurrer to the claims for relief.

In this opinion the other judges concurred.

Charles H. Avery *vs.* Michael Ginsburg.

First Judicial District, Hartford, October Term, 1917.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

Alleged errors must be "specifically stated" in the reasons of appeal (General Statutes, § 802), in order to entitle them to consideration in this court. Accordingly, an assignment to the effect that the appellee did not prove his case with the certainty required by law, and that on the whole case judgment should have been rendered for the appellant, is too general and does not comply with the statute.

It is to be presumed that where there is any competent evidence in support of a certain fact set forth in its finding, the trial court relied upon that rather than upon other evidence which was excluded as hearsay.

The finding of a fact which is harmless to the appellant, even if not fully justified by the evidence, does not warrant the granting of a new trial.

The trial court found that the defendant, who was driving his automobile, violated the law of the road by negligently colliding with the plaintiff's wagon going in the same direction, and awarded the injured plaintiff $800 damages. *Held* that there was nothing in the record to substantiate the defendant's claim that this award was excessive, or that in fixing that sum the court erred.

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In passing upon the nature and extent of the plaintiff's personal injuries, a trial court is not confined to the medical testimony.

In an action to recover damages for personal injuries, the complaint originally asked for $1,000, which was the limit of the court's jurisdiction; but before trial the plaintiff was allowed to amend the *ad damnum* clause so that it claimed "$1,000 damages, trebled." Upon the trial judgment was rendered for the plaintiff for $800. *Held* that the allowance of the amendment, not being within the power of the court, must be treated as a nullity, and therefore as ineffective to oust the court of its jurisdiction, at least as against a non-objecting defendant who saw fit to go to trial upon the merits of the case.

Argued October 3d—decided December 15th, 1917.

ACTION to recover damages for personal injuries alleged to have been caused by the defendant's negligence in driving his automobile against the wagon in which the plaintiff was riding, brought to and tried by the Court of Common Pleas in Hartford County, *Markham, J.*; facts found and judgment rendered for the plaintiff for $800, and appeal by the defendant. *No error.*

The plaintiff was driving his horse, hitched to a wagon, over a road in New Britain. The accident occurred when the defendant was behind and following the plaintiff in an automobile over this road. The automobile struck the wagon in the rear, and raised it to such an angle that the plaintiff was violently thrown to the ground.

The parties were at issue as to the cause of the collision and the nature and extent of the plaintiff's injuries. Upon these questions the court below found for the plaintiff, and rendered judgment for him to recover $800 damages and his costs.

The reasons of appeal are thirty-eight in number; the last thirty-four of which are exceptions to the finding and to the refusal of the judge to incorporate therein certain matters which the defendant claims to have established by the evidence, which is before us under § 797 of the General Statutes.

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Other claims of the defendant are: "1. The plaintiff did not prove his case with a certainty required by law. 2. On the whole case, judgment should be rendered for the defendant. 3. On the whole case, if the defendant be liable at all, the damages assessed were excessive."

The defendant also contends that by an amendment filed by the plaintiff and allowed by the court, the Court of Common Pleas was ousted of its jurisdiction of the case. The record discloses that in the plaintiff's original complaint he claimed to recover $1,000 damages. By permission of the court the word "trebled" was added by amendment to the *ad damnum* clause so that it read: "The plaintiff claims $1,000 damages, trebled." The allegations of the complaint as thus amended were denied by the defendant.

George W. Klett and *Benjamin W. Alling*, for the appellant (defendant).

Arthur W. Upson, for the appellee (plaintiff).

RORABACK, J. The first assignment of error does not comply with the provisions of § 802 of the General Statutes, which require that the precise error claimed shall be "specifically stated" in the reasons of appeal.

It appears from an examination of the record that there was evidence from which the trial court could have fairly found the material and controlling facts set forth in the finding. It can also be said that these facts, so found, are consistent with and that they fully sustain the judgment rendered.

The defendant excepts to this finding of the court: "The defendant had only owned said automobile a short time previous to said collision, and had been licensed to drive said machine only since July 9th, 1915."

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The defendant contended that these two facts, a brief ownership and a recent license, were found upon testimony which was afterward excluded as hearsay. The record does not altogether sustain this claim, as there was other testimony, received without objection, tending to show that the defendant had owned the car only a few days at the time of the accident, and that he was then driving it for the second time. The presumption is that the court relied upon this evidence as the basis for its finding, rather than upon that which was excluded as hearsay. However, neither of these facts was important, nor even relevant, strictly speaking. How long an experience the defendant had had with automobiles might be relevant upon the question of his competency as a driver, but how long he had owned this particular car was of little, if any, consequence. He might have owned a dozen cars before this one, and also might have been licensed repeatedly before July 9th, 1915. Clearly the defendant was not harmed by this clause of the finding, even if it was not fully justified by the evidence; and its elimination would not change the result.

There was abundant evidence in support of the finding that the defendant was not a competent driver at the time of the collision, and that he was then driving the car in a dangerous manner; and therefore the exception to that statement is not sustained.

Several reasons of appeal are urged by the defendant to sustain his contention that the judgment for damages rendered by the court below was excessive. The trial court found that the defendant violated the law of the road by carelessly colliding with the plaintiff's wagon when he had plenty of room to pass on its left; and because of this finding, the defendant contends that the trial judge may have doubled or trebled the damages which he considered would be sufficient to

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compensate the plaintiff for his actual injury, and that he may have erred in so doing. It is a sufficient answer to this contention to say that the record does not indicate that the court doubled or trebled any sum, or awarded any other damages than those which it deemed compensatory for the injury sustained by the plaintiff; or that in so doing any error of law intervened. We certainly cannot assume that the court's action was irregular or improper, which is practically what the appellant asks us to do.

The defendant's contention that the medical testimony appearing in the case did not fully sustain the plaintiff's evidence and claim that he had three ribs broken, is entitled to consideration. The court was not confined to the medical testimony alone, as to the nature and extent of the plaintiff's injury to his ribs. The plaintiff upon this point testified that the doctor found that his ribs were broken; that before his rib was attended to he could feel the ends grate together, and that about one year after his injury he had frequent and severe pains at the point where he said his ribs were broken. It cannot be said that there was no evidence to sustain this paragraph of the finding.

The other requests made for a correction of the finding do not require consideration. Therefore the motion to correct is denied.

It appears from the record that the trial court in its estimate of the plaintiff's damages considered three matters: the plaintiff's bill for medical attendance, pain and suffering, and loss of time. The allegations of the plaintiff's complaint were broad enough to allow the court to consider all of these elements in the estimation of damages. It reached the conclusion that the plaintiff had sustained severe and permanent injuries, and rendered judgment for substantial damages. We cannot say from the evidence that the amount allowed was excessive.

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The matter in demand as it appeared in the complaint before its amendment was $1,000. Upon the Court of Common Pleas for Hartford County was conferred concurrent jurisdiction with the Superior Court in cases demanding more than $500 and not more than $1,000. General Statutes, § 535. The trial court, therefore, had jurisdiction, and was in the exercise of it when the amendment was made to the claim for damages.

Substantially the question here raised was considered by this court in *Fowler* v. *Bishop*, 32 Conn. 199. In this case, upon page 209, this court said: "Now if it be true that such an amendment, allowing it to operate as such, would have the effect to oust the Superior Court of its acknowledged jurisdiction over the case, we should then think that the amendment ought to be treated as a nullity. The Superior Court, having no authority to make it, ought to be considered, in law, as not having made it; and the suit would then be left pending as it was originally instituted, demanding five hundred dollars damages only." Furthermore, it was held by this court that a defect much like the present one was cured by the defendant's answering to the process and going to trial upon the merits of the case. *Cook* v. *Morse*, 40 Conn. 544, 549–551. The defendant made no objection to this amendment in the court below, but joined issue with the allegations of the complaint as it was amended, and the case went to trial upon its merits, when judgment was rendered against the defendant for an amount which was within the jurisdiction of the trial court. The improper allowance of this amendment did not, under the circumstances here present, oust the court below of its jurisdiction over the case. A wrong decision may constitute error, but it does not here destroy the jurisdiction which the court had over the case. This amendment, which plainly was irregular,

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should be treated as surplusage, or regarded as a nullity. *Fowler* v. *Bishop*, 32 Conn. 199, 209; *Turner* v. *Conkey*, 132 Ind. 248, 17 L. R. A. 509; *Franklin Union No. 4* v. *The People*, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 1001, 1009.

There is no error.

In this opinion the other judges concurred.

FRANK W. BARBER *vs.* THE GREAT ATLANTIC AND PACIFIC TEA COMPANY.

Second Judicial District, Norwich, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

In crossing a street a pedestrian is bound to make a reasonable use of his senses for his own protection.

In the present case the plaintiff, while crossing a well-lighted and unobstructed city street, either did not see the defendant's sleigh approaching, or, if he did, heedlessly stepped in front of it and was injured. *Held* that in either event the jury could not reasonably have found that the plaintiff was in the exercise of due care, and therefore that the trial court did not err in setting aside a verdict in the plaintiff's favor.

Argued October 16th—decided December 15th, 1917.

ACTION to recover damages for personal injuries alleged to have been caused by the negligence of the defendant's servant, brought to the Superior Court in New London County and tried to the jury before *Reed, J.;* the jury returned a verdict for the plaintiff for $1,096, which the trial court set aside as against the evidence, and from this decision the plaintiff appealed. *No error.*

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Lee R. Robbins, for the appellant (plaintiff).

Allyn L. Brown, for the appellee (defendant).

PER CURIAM. The court did not err in setting aside the plaintiff's verdict returned by the jury. The reasons assigned for the court's action were that upon the evidence the jury could not reasonably have found either that the defendant's servant was negligent or that the plaintiff was free from contributory negligence. An examination of the evidence shows that the second of these propositions clearly is sound. The plaintiff was injured in a city street, at the time well lighted, and, outside of the sidewalk, wholly deserted and free from obstructions to the sight of a traveler therein, save for the presence of the defendant's sleigh, which was being driven along it at a moderate rate of speed estimated at about four miles an hour. He had just stepped from the sidewalk with the purpose of crossing the street diagonally. At this time the sleigh must have been only a few feet away from his intended path. He had proceeded a distance from the curb, variously testified to as from three or four to thirteen feet, when he was hit in the back by one of the shafts of the sleigh.

The conclusion is inevitable that in crossing as he did he either made no use of his eyes in self-protection, or that, making such use, he heedlessly stepped in front of the approaching sleigh, of whose presence he must have been aware. In either event he was not in the exercise of due care.

There is no error.

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BERTHA HANTMANN *vs.* JOHN H. RYAN.

Second Judicial District, Norwich, October Term, 1917.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

It is quite within the province of a trial court to set aside, as unreasonable, a verdict which is founded solely upon the testimony of a single witness which is not only unsatisfactory and improbable in itself, but is at variance with that of other witnesses and with facts and circumstances established beyond question.

Argued October 16th—decided December 15th, 1917.

ACTION to recover damages for personal injuries alleged to have been caused by the defendant's negligence, brought to the Superior Court in New London County and tried to the jury before *Case, J.;* verdict for the plaintiff for $200, which the trial court, upon motion, set aside as against the evidence, and appeal by the plaintiff. *No error.*

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

Roderick M. Douglass, for the appellee (defendant).

PER CURIAM. The plaintiff, a child of tender years, was injured in her person by being run into by an automobile driven along the highway in front of her home by someone. It was claimed in her behalf that the defendant was the driver of the car. This the latter denied. Most of the evidence presented to the jury concerned the issue thus raised. Recovery by the plaintiff was dependent upon her ability to sustain the burden which was upon her to establish the defendant's identity as the driver of the car. The evidence offered in support of her claim was limited to testimony given

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by her mother. That testimony was so unsatisfactory and improbable and so much at variance, not only with the testimony of other witnesses but also with facts and circumstances established beyond reasonable question, that it was quite within the province of the trial court, having observed her appearance and demeanor upon the stand, to set aside a verdict founded solely upon it as being one which, especially in view of the other testimony, was not reasonably reached.

There is no error.

THE EAST HARTFORD FIRE DISTRICT *vs.* THE GLASTONBURY POWER COMPANY ET ALS.

First Judicial District, Hartford, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

An existing water-power, created and maintained under the provisions of the Flowage Act (General Statutes, §§ 982–991), is not for that reason protected from condemnation by a municipality under a general authority from the legislature to take the waters of any stream in that locality for its water-supply; at least when such water-power is not employed in some other public use at the time of the proposed taking.

A legislative grant to a private corporation of the limited powers which may be exercised by an individual under our Flowage Act, does not impair or modify *pro tanto* the general authority of condemnation theretofore conferred upon the municipality.

Property already devoted, or about to be devoted, to one public use, cannot be taken for another inconsistent public use, unless such taking be authorized either expressly or by clear implication.

A general intent to devote the property at some indefinite future time to some public use, is not, however, sufficient to protect it from condemnation.

In the present case it did not appear from the allegations of the answer, which was demurred to, that the respondent had done any work in constructing its authorized railway, or in generating electricity, or in developing its water-power, although twelve years had elapsed

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since it received its charter; and furthermore, it did appear from the charter of the respondent that its present intent to make use of the stream for generating electricity for public distribution and as the motive power for its railway, as alleged in its answer, might be subsequently changed, and the water-power applied to manufacturing, quarrying, or mining for its own private purposes. *Held* that under these circumstances it could not be said that the property had been devoted to a public use, and that it was, for that alleged reason, exempt from condemnation for a municipal water-supply.

Argued October 3d—decided December 15th, 1917.

APPLICATION for the appointment of a committee to assess just damages to the defendants for the proposed taking of the waters of Cold Brook in the town of Glastonbury in order to increase the plaintiff's water-supply, brought to and tried by the Superior Court in Hartford County, *Gager, J.*, upon a demurrer to the answer of the Glastonbury Power Company; the court sustained the demurrer and subsequently appointed a committee as prayed for, and from this judgment the Glastonbury Power Company appealed. *No error.*

The petitioner is a municipal corporation whose charter as amended in 1901 gave it general authority, reaffirmed in 1909, to take water from any brooks in the town of Glastonbury; and it brings this petition alleging that it is necessary for the purpose of increasing its water-supply to take water from Cold Brook, a tributary of Roaring Brook, in Glastonbury, and asking for the appointment of appraisers to assess just damage to certain lower riparian owners with whom it has been unable to agree.

The appealing respondent alleges in its answer that it was specially chartered by the General Assembly in 1905, and authorized to purchase and hold lands, mill-sites, etc., for the purpose of generating and distributing electricity, and to operate an electric railway as a

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common carrier; that subsequent to the general grant of authority to the petitioner to take water from any brook in Glastonbury, the respondent was specifically authorized to build and maintain dams, etc., on Roaring Brook and its tributaries, in order to develop and utilize their water-power; that it has acquired, at great expense, lands, dams, ponds, etc., for the purpose of carrying out its above named powers, and is and has been for a long time engaged in making its preparations to engage in the above named business; that the waters of Cold Brook are essential to the proper carrying out of its purposes, and any substantial diversion of its waters would wholly prevent the respondent from pursuing its purposes, and destroy the entire value of its property; and that by its acts, and pursuant to lawful authority, the respondent had already appropriated the waters of Cold Brook and Roaring Brook to a public use, before this petition was brought.

The petitioner filed a general demurrer to the respondent's answer, and no objection being made to the form of the demurrer, the Superior Court sustained it on the ground that it did not appear from the pleadings and the Special Acts of the General Assembly referred to therein, that the respondent had any rights in the waters of Roaring Brook and its tributaries, which were not subject to condemnation, upon payment of just compensation, under the authority conferred upon the petitioner by its charter.

The respondent then refused to plead over and judgment was rendered according to the prayer of the petition.

Robert P. Butler, for the appellant (defendant Glastonbury Power Company).

Percy S. Bryant, for the appellee (plaintiff).

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BEACH, J. The respondent claims that in 1905 it was specially authorized by its charter (14 Special Laws, p. 1090) to appropriate the waters of Roaring Brook and its tributaries; that this special grant modified *pro tanto* the prior general grant of authority to the petitioner to take water from any brook in the town of Glastonbury; that by acquiring the property and making the preparations alleged in its answer it had already appropriated these waters to a public use before this petition was brought; and that the petitioner cannot now take them for an inconsistent public use in the absence of any authority expressly or by clear implication empowering it to do so.

The respondent's corporate purposes, as expressed in its charter, are many and varied. It is given broad and general authority to operate all sorts of mines and quarries, and to carry on any kind of manufacture. It has authority to generate electricity and to distribute it within specified territory, and for that purpose to locate its poles and wires on highways and public grounds within such limits.

It has power to build and maintain dams, etc., on Roaring Brook and its tributaries for the purpose of providing the necessary ponds and reservoirs to improve, develop and utilize the power of said stream and its tributaries; and in that connection it is provided that "said company is hereby granted the powers conferred upon individuals by Chapter 65 of the General Statutes relating to flowage petitions, and said powers shall be exercised by said company subject to the provisions and restrictions of said chapter." It also has the power to build and operate a railway (otherwise than by steam) over a prescribed route, and by § 14 of the charter it is given power to take lands necessary for the construction of its railway as provided in § 3687 of the General Statutes.

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It thus appears that the respondent's powers of eminent domain are different in degree and graduated according as one or another of its varied corporate purposes is to be exercised. As a railroad company it has the same power to take land necessary for the construction of its railway that other railroad companies have under the General Statutes. As an electric light and power company it has power to locate its wires and poles on highways and public grounds, but no power to condemn private property for that purpose. As a mill owner and developer of water-power on Roaring Brook, it has the same rights of flowage, subject to the same restrictions, that individuals have under the Flowage Act, but no other powers of eminent domain. Since the Flowage Act does not authorize the condemnation of land except for raceways, the authority to build dams on Roaring Brook is necessarily to be exercised on lands acquired by the consent of the grantors or lessors; and that being so, the charter gives the respondent no greater right or larger authority to develop the water-powers of Roaring Brook than those which any individual would possess who happened to own or lease the same property; namely, the right to build dams on its own land, and, under the Flowage Act, to flow the land of others so far as necessary, on paying actual damages plus fifty per cent. But this latter right is expressly required to be exercised "subject to the . . . restrictions of said chapter," among which is the proviso, contained in § 984 of the General Statutes that no such dam shall be erected to the injury of any existing mill or mill-site not abandoned. Reading this restriction into the charter, it is manifest that the General Assembly did not grant, or intend to grant, to the respondent any special privileges in the matter of developing the water-powers of Roaring Brook, but only to give it all the

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rights, and no more than the rights, of other individual riparian owners under existing general law.

This disposes of the respondent's claim that its charter contains a subsequent specific grant of authority to appropriate the waters of Roaring Brook, which operated as a modification of the petitioner's general authority to take water from any brook in Glastonbury.

The respondent's other claim, that it had already appropriated the waters of Roaring Brook to a public use before the filing of the petition and hence that the petitioner cannot take them for another public use unless thereto authorized expressly or by clear implication, is capable of two possible applications; one resting on the proposition that the development and maintenance of water-power is in itself a public use, and the other resting on the claim that the respondent's answer sufficiently alleges that it has appropriated these waters to the specific purposes of operating a railway and of distributing electricity among the public.

As to the proposition that the development and maintenance of water-power is in itself a public use within the meaning of the rule relied on by the respondent, it should be noted that it has long been the custom of the General Assembly to grant to public and private corporations, chartered for the purposes of municipal water-supply, general authority to take water from any source within specified limits. In *Water Commissioners* v. *Johnson*, 86 Conn. 151, 164, 84 Atl. 727, the validity of these general grants was affirmed, with the remark that if they were not valid "much, if not most, of our legislation empowering municipalities to provide water-supplies would fail." It is also notorious that practically all of our streams available for municipal water-supply were long ago utilized for water-power, either directly or through their connecting waters. It must therefore be sup-

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posed that the General Assembly, in making these general grants, intended them to be operative upon streams already used for water-power. Such has been the common understanding of their effect, and, it must be held, that, by necessary implication, these grants of general power to take water from any brook within specified territory authorize the taking of water from existing water-powers, at least when such water-powers are not already employed in some other public use at the time of the proposed taking.

The respondent's claim that property already appropriated to one public use cannot afterward be taken for an inconsistent public use unless such taking is authorized either expressly or by clear implication, is undisputed. *Evergreen Cemetery Asso.* v. *New Haven*, 43 Conn. 234; *New Haven Water Co.* v. *Wallingford*, 72 Conn. 293, 44 Atl. 235; *Starr Burying Ground Asso.* v. *North Lane Cemetery Asso.*, 77 Conn. 83, 58 Atl. 467; *Water Commissioners* v. *Johnson*, 86 Conn. 151, 84 Atl. 727.

The rule applies to property which is about to be lawfully appropriated to a public use although the appropriation is not yet complete. *New Haven Water Co.* v. *Wallingford, supra.*

It is apparent, however, that the exercise of the sovereign right of eminent domain, when validly delegated for a proper purpose, ought not to be obstructed on the ground that the owner of the property in question intends to appropriate it to a public use at some future time, unless such intent is unmistakably evidenced by conduct which practically guarantees its speedy consummation. Accordingly it was held, in the case last cited, that the mere acquisition by the New Haven Water Company of land and water rights along a stream with a view to appropriating its waters for increasing the water-supply of New Haven, was

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not a prior appropriation as against a municipality having only general authority to take water from any brook in that locality; because the conduct of the Water Company did not evidence an intent to take the water under its charter at present or in the near future, but only to take it at some indefinite time in the future whenever it should desire and determine to do so.

In the present case the respondent was chartered in 1905 as the successor in interest to a corporation of the same name already organized under the Corporation Act, and nevertheless it appears from the answer that it has not yet commenced to construct its railway, or to generate electricity, or to develop the water-power of Roaring Brook. It alleges that it is, and for a long time has been, making its preparations to develop these water-powers, but it does not allege that these preparations include any construction work either on the brook or in the territory where it proposes to distribute electricity, or in the construction of its railway; or that the preparations it is now making are any better calculated to produce quick results than those which it has "for a long time" been making. Furthermore, it is not alleged when construction work will be begun, not to say finished, or so far finished that some part of the waters of Roaring Brook will in fact be used for the purposes alleged.

In the language of *New Haven Water Co.* v. *Wallingford*, 72 Conn. 293 (44 Atl. 235) at page 304, these allegations "indicate at most a general and indefinite intent to utilize the property in some way, at some indefinite time, and to appropriate the water, under its charter, not at present or in the near future, but whenever it should desire and determine to do so later on."

Moreover, in that case, the Water Company had no right to use the water for any other purpose than

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that of supplying the city of New Haven with water. So that the only uncertainty was as to the time when it would be so used. But in this case there is also another and more important uncertainty as to the use which the respondent may finally elect to make of its water-power when developed. True, it now intends to use it for the purposes alleged; but when this allegation of intent is referred to the respondent's charter, as it must be in order to ascertain its legal effect, it appears that the respondent is fully authorized to form a different corporate intent, and to use its water-power, whether translated into electric energy or not, for carrying on a mining, quarrying, or manufacturing business of a purely private nature, in case it should hereafter seem more profitable to do so.

In view of these uncertainties as to time and use, it cannot be said that the waters of Roaring Brook and its tributaries had been lawfully appropriated to a public use when this petition was filed.

This conclusion makes it unnecessary to discuss the question whether the generation of electricity for a public use by means of water-power is such an appropriation of the water to a public use that a water company generally authorized to take water from any source in that locality may not, upon paying just compensation, take some part of the water for a municipal water-supply.

There is no error.

In this opinion the other judges concurred.

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SAMUEL GARBER *vs.* ISAAC GOLDSTEIN.

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

The existence or nonexistence of a material fact in issue, which is properly submitted to the jury, is conclusively settled by their verdict.

An allegation of fact which is admitted by both parties is not in issue and therefore is not a matter for the jury's determination.

Whether a memorandum or informal writing constitutes a lease or only an agreement to make a lease, is to be determined by the intent of the parties as gathered from the language used when read in the light of the attendant circumstances.

An understanding between the parties—as in the present case—that a formal lease is to be executed in the future, does not necessarily and as matter of law preclude the memorandum or informal writing evidencing the terms of the undertaking, from being treated as a lease, if it is clear that the parties so intended.

In the present case the trial court instructed the jury that the memorandum signed by the defendant was a lease, unless the parties had agreed that a formal lease was to be executed thereafter, and left that question to the jury, who found, by their verdict for the plaintiff, that there was no such agreement,—a conclusion which was directly contrary to the undisputed evidence. *Held* that this instruction, which practically took the main issue in the case away from the jury, was erroneous and prejudicial to the defendant.

An oral lease for two years is within the statute of frauds and is not actionable unless evidenced by a sufficient memorandum in writing.

A writing in the form of a receipt for a given sum of money as a deposit on a store (giving street and number), and stating the duration of the term, the rent to be paid, the name of the lessee, and which is signed by the defendant landowner, is a sufficient memorandum to take the case out of the statute of frauds.

Argued October 23d—decided December 15th, 1917.

ACTION to recover damages for an alleged breach of contract in preventing the plaintiff from taking possession of a certain store theretofore leased to him by the defendant, brought to the Court of Common Pleas in New Haven County and tried to the jury before *Wolfe*,

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J.; verdict and judgment for the plaintiff for $374, and appeal by the defendant. *Error and new trial ordered.*

Walter J. Walsh, for the appellant (defendant).

Philip Pond, for the appellee (plaintiff).

WHEELER, J. That part of the case which requires discussion is confined to a single issue.

Both parties agree that they entered into an oral agreement, the terms of which were in part contained in the following instrument, Exhibit A, executed and delivered to the plaintiff by the defendant:—

New Haven, Conn.

Received of Mr. S. Garber the sum of $40 as a deposit on store 122 Congress Avenue for the sum of $80 per month from March 15, 1915, to March 15, 1916, and the remainder of two years at the rate of $85 per month.

Isaac Goldstein.

The defendant claimed in evidence, that as a part of the agreement the plaintiff was to give him a bond guaranteeing the payment of the rent, and that the parties mutually agreed that a formal lease should be prepared and executed before possession should be taken by the plaintiff. The plaintiff disputed the agreement that he was to give this bond. He admitted that there was an agreement to make a more formal lease. While his counsel now claim, and some attempt was made by him on the trial to claim, that this formal lease was not to be made until after the plaintiff had possession, we think his own evidence, as a whole, does not admit of this construction. But, whether this is so or not, it does not change the issue before the jury. That was, that the plaintiff claimed that the agreement

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made was a letting, and the defendant claimed that it was a mere agreement to lease.

The defendant requested the court to charge the jury that it was incumbent upon the plaintiff to prove that he had a written lease, and not an agreement for a lease; that the instrument executed by the defendant did not constitute a lease, and was not a sufficient memorandum to take the case out of the statute of frauds.

The court charged the jury that the principal issue to be decided was whether a lease was in fact made, and that if they found Exhibit A was signed by the defendant and delivered to the plaintiff, and that the plaintiff had not failed to carry out some condition resting in parol and collateral to the instrument and made at the time it was executed and a condition precedent to the right of the plaintiff to possession, and that the execution of no more formal instrument was contemplated, then Exhibit A was a valid lease.

The existence of an agreement to furnish the bond was in issue, and the verdict of the jury was conclusive that no such agreement existed.

The agreement to execute and deliver a formal lease was not in issue; both parties admitted the existence of this agreement. If the existence of this agreement to make a formal lease were decisive of whether Exhibit A were a lease, the jury should have been instructed that Exhibit A was not a lease.

That was not the legal situation. Whether the parties had agreed to make a lease or had made an agreement to lease, was to be determined "upon the intention of the parties as gathered from the language used when interpreted in the light of the surrounding circumstances." *Johnson* v. *Phoenix Mut. Life Ins. Co.*, 46 Conn. 92, 101. If the parties intended the agreement to be one of letting it will so operate, notwithstanding a formal lease is to be later on executed. If,

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on the other hand, the parties intended that their agreement should be as finally evidenced by a formal lease, until the execution and delivery of the written instrument the lease does not exist. *Sanders* v. *Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209, 213, 39 N. E. 75; *Franke* v. *Hewitt*, 56 N. Y. App. Div. 497, 501, 68 N. Y. Supp. 968.

The court, by its charge that Exhibit A was a lease unless it was made subject to collateral conditions and unless there was to be a formal lease delivered later, took the question of whether the parties had made a lease, or had merely made an agreement to lease, which defendant requested might be submitted to the jury, away from the jury, and this we think was error.

Nor can we properly say that the verdict, equivalent as it was in the light of the charge to a finding that the parties had not agreed to make a more formal lease, made this omission to charge harmless.

The question of what the parties intended, whether to make a lease or an agreement for a lease, was one of fact for the jury, and one which the jury, under the instruction of the court, did not have before it, for the court had not submitted it to them. And, further, the finding of the jury was exactly contrary to the undisputed evidence.

The jury should also have been instructed that if they found the agreement as made was one of lease, since it was oral and not to be performed within one year, under our statute of frauds (§ 1089) no action could be maintained upon it by the plaintiff unless there was a memorandum of it in writing signed by the defendant, the party to be charged; *Fisk's Appeal*, 81 Conn. 433, 437, 11 Atl. 559; and that Exhibit A, which admittedly evidenced the agreement, was a sufficient memorandum to take the case out of the statute of

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frauds, since it described the store to be leased with reasonable certainty, gave the term of the lease, the rent to be paid, the names of lessor and lessee, and was duly signed by the lessee, the present defendant. *Nichols* v. *Johnson*, 10 Conn. 192, 198; *Shelinsky* v. *Foster*, 87 Conn. 90, 96, 87 Atl. 35.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

RICHARD O. LIBBEY *vs.* J. E. LONERGAN COMPANY.

Second Judicial District, Norwich, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

The plaintiff sold packing to the defendant under an agreement that the defendant should pay therefor twenty-three cents per pound, with a two per cent discount for cash in ten days. The contract further provided that the defendant should be the general distributing agent for the packing and that profits and losses should be divided equally between the parties. The defendant received and paid for several shipments, but later refused to make further payments, claiming that the packing was not merchantable nor as represented by the plaintiff, a claim which the trial court found to be untrue. It did not appear from the finding that there were any losses or profits. *Held* that under these circumstances judgment was properly rendered for the plaintiff for the unpaid shipments, in an action upon the common counts for goods sold and delivered.

Argued October 16th—decided December 15th, 1917.

ACTION upon the so-called common counts to recover for merchandise alleged to have been sold and delivered to the defendant, brought to and tried by the Court of Common Pleas in New London County, *Waller*, *J.*; facts found and judgment rendered for the

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plaintiff for $150, and appeal by the defendant. *No error.*

The bill of particulars contained charges against the defendant to the amount of $130.52 for six hundred and sixteen pounds of Libbey's Percolating and Everlasting Metallic Packing. The defendant's answer was a general denial, with a counterclaim alleging that the packing was unsalable and not as represented, and, further, that the parties had entered into a contract, the terms of which are contained in the following letter:—

Philadelphia, Penna., March 16th, 1914.

Mr. R. O. Libby,
121 Broadway,
New York, N. Y.

Dear Sir: As per our verbal agreement of even date, we herewith confirm the same as follows:

From now until May 1, 1914, it is understood that you are to make up your Libby Packing, box and send it to us, and we are to pay you twenty-three cents per pound on goods we receive, with a two per cent allowance for cash in ten days, and it is further agreed that we are to be the general distributing agents and all profits are to be equally divided and all losses are to be shared pro rata.

At the time of shipment your account is to be credited with the amount of money due you, and also it is understood that when there is enough money on the credit side of your account to warrant it, we will in turn advance at all times upon demand a reasonable amount to cover traveling expenses.

If the arrangement is mutually satisfactory, and we decide to manufacture this packing for you after May 1, 1914, it is understood that we are to be credited with twenty-three cents per pound for the packing before division of the profits is made and if we find that

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this does not fully cover the costs of manufacture, that proper readjustment is to be made so as to reimburse us fully for the manufacture of this product.

Yours very truly,
J. E. Lonergan Co.,
M. A. Hudson, Vice-President.

Charles V. James, for the appellant (defendant).

Arthur F. Libby, for the appellee (plaintiff).

SHUMWAY, J. The finding of the trial court certainly sustains a judgment in favor of the plaintiff. The defendant contends that the finding is not supported by the evidence, and it requests the court to correct the finding in several particulars. Whether or not the finding should be corrected in any material parts depends upon the interpretation of the letter of March 16th, 1914, set out in the defendant's counterclaim. It is admitted that the packing mentioned in the plaintiff's bill of particulars was delivered to the defendant under the terms of a contract, the substance of which is contained in this letter. The claim of the defendant is that the letter shows that the parties had agreed to engage in a joint undertaking or venture, which, as between themselves, made them both liable for the losses incurred, and entitled to share in the profits of the venture, and since there were no profits, but, on the contrary, there were losses, the plaintiff could not recover in this action.

The trial court correctly interpreted the situation before it. It is evident that the parties contemplated that the plaintiff should manufacture the Libbey Packing, and the defendant was to pay the plaintiff twenty-three cents a pound. The defendant was to sell the same, and the profits from the sale, if any, were to be

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equally divided. This arrangement was to continue until May 1st, 1914, and thereafter the defendant was to manufacture the packing and receive therefor twenty-three cents a pound, before any profits were to be computed or divided. The plaintiff having performed his part of the contract, and delivered the packing, may recover under the common counts the price agreed to be paid.

The defendant's counterclaim was properly disallowed, as the court has found that the defendant had full opportunity to, and did, examine the packing, and all of it that was delivered was equally as good as that examined, and the defendant has never offered to return the same.

There is no error.

In this opinion the other judges concurred.

MICHAEL CASEY *vs.* THE CONNECTICUT COMPANY.

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

In crossing a street-railway track one is bound to make a reasonable use of his faculties to avoid being injured.

In the present case the plaintiff, while crossing an empty quiet street in the middle of a block about 10:30 o'clock on a fair evening, stepped in front of a rapidly moving trolley-car and was struck and injured. *Held* that the trial court was justified in setting aside a verdict in his favor.

Argued October 23d—decided December 15th, 1917.

ACTION to recover damages for personal injuries alleged to have been caused by the defendant's negligence, brought to the Superior Court in New Haven

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County and tried to the jury before *Greene, J.;* verdict for the plaintiff for $2,000, which the trial court, upon motion, set aside as against the evidence, and appeal by the plaintiff. *No error.*

Dennis W. Coleman, for the appellant (plaintiff).

Joseph F. Berry, for the appellee (defendant).

PER CURIAM. An examination of the evidence satisfies us that the court did not err in setting aside the verdict on the ground that the plaintiff failed to make reasonable use of his faculties in stepping in front of a rapidly moving trolley-car in an empty quiet street about 10:30 on a fair evening. Unless the car was already in sight when the plaintiff stepped off the sidewalk, it must have been running at headlong speed until within a few feet of the plaintiff, and it hardly needs the evidence before us to prove that under the conditions stated a trolley-car, although no signal is given, makes noise enough to attract the attention of a reasonably prudent person of good hearing who is about to cross the track diagonally in the middle of a block.

There is no evidence that the motorman had an opportunity to avoid the collision after it became apparent that the plaintiff was in a position of peril from which he was making no effort to escape.

There is no error.

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JOHN PETRILLO *vs.* THE CONNECTICUT COMPANY.

Third Judicial District, Bridgeport, October Term, 1917.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, JS.

A judgment of nonsuit is properly rendered if the evidence—as in the present case—unmistakably shows that the plaintiff's negligence was the proximate cause of the collision between his automobile and the defendant's trolley-car, and does not disclose a situation in which the plaintiff can successfully appeal to the doctrine of supervening negligence.

Argued October 24th—decided December 15th, 1917.

ACTION to recover damages for injuries to the plaintiff's automobile through a collision with a trolley-car alleged to have been caused by negligence of the defendant's motorman, brought to the Court of Common Pleas in New Haven County where the plaintiff was nonsuited in a trial to the jury before *Simpson, J.*, and from the refusal to set aside this judgment the plaintiff appealed. *No error.*

Joseph Koletsky, for the appellant (plaintiff).

Seth W. Baldwin, for the appellee (defendant).

PER CURIAM. Upon the evidence presented by the plaintiff, assumed to be true, it would have been impossible for a trier reasonably to find that he was free from contributory negligence. There was no substantial evidence to that effect worthy of being weighed and considered by the jury. On the contrary, the evidence unmistakably shows that the plaintiff's negligence was a proximate cause of the head-on collision between his car and the defendant's, in that he failed to discover, as in the exercise of ordinary prudence he should have

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done, the presence of the defendant's trolley-car approaching him from the front when it was some distance away and plainly visible, or omitted to take with reasonable promptness the simple precaution for his safety of turning his machine off from the defendant's tracks, over one rail of which his right-hand wheels at the time extended.

Nor does the evidence disclose a situation in which the plaintiff might successfully appeal to the doctrine of supervening negligence. It nowhere appears that the defendant's motorman, after he became aware, or in the exercise of due care should have become aware, of the plaintiff's peril and that he reasonably could not or would not save himself from harm, could by means reasonably within his power have prevented the collision which followed. *Nehring* v. *Connecticut Co.*, 86 Conn. 109, 120, 121, 84 Atl. 301, 524.

There is no error.

JOHN F. CRANEY *vs.* JOHN DONOVAN.

Second Judicial District, Norwich, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Words, spoken or written, charging one with adultery, are actionable *per se*.

Proof of the mere publication of defamatory words gives rise to a legal presumption that they were false and made without lawful excuse, that is, that they were malicious; and hence the plaintiff, in the absence of proof of the truth of the charge or that it was a privileged communication, is entitled to general damages.

If the plaintiff, in an action for libel, proves malice in fact, he may recover not only general or compensatory damages, but in addition so-called punitive or exemplary damages, which under the rule in this State are limited to the expenses of litigation less the taxable costs. All these damages, however, are in reality but indemnification for the injury.

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Compensation and not punishment is the foundation of our actions for slander and libel; and therefore instructions which permit the jury to increase the actual or compensatory damage according to the degree or amount of actual malice shown to have been exhibited by the defendant, are erroneous and prejudicial, especially when coupled with an instruction which practically leaves the amount of damages to be awarded in such contingency to the unlimited discretion of the jury.

While the presence of malice in fact is a circumstance which may enhance the injury suffered by a plaintiff, and for that reason justify an award of larger damages than would otherwise be proper, his recovery is still to be measured in all cases by the actual injury he has sustained; in other words, the presence or absence of malice in fact is of importance only in its effect upon the real injury to one's character or reputation. It results from this principle that the terms "aggravation" and "mitigation," when applied—as is frequently the case—to actual damage or compensation, are misleading and confusing; for it is impossible to increase or to diminish actual or compensatory damages.

Damages which are reasonably certain to accrue in the future may properly be taken into account in actions for defamation.

It is not error for a trial judge to express his opinion in commenting upon the evidence.

In the present case the jury were instructed that if they found the defendant had "testified falsely" in respect to a certain matter, they might consider that fact in deciding what weight they would give to his other testimony; that the law did not require the jury to disregard his testimony entirely, though they might do so if they were satisfied from it that he was "unworthy of belief." *Held* that the words last quoted were the full equivalent of the phrase that the witness had "knowingly testified falsely."

Argued October 16th—decided December 15th, 1917.

ACTION to recover damages for alleged slander, with a count for libel, brought to the Superior Court in New London County and tried to the jury before *Reed, J.*; verdict and judgment for the plaintiff for $5,500, and appeal by the defendant. *Error and new trial ordered.*

Jeremiah J. Desmond and *John H. Barnes*, for the appellant (defendant).

Joseph T. Fanning and *Roderick M. Douglass*, for the appellee (plaintiff).

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WHEELER, J. The complaint charges, in the first three counts, three separate slanders, and in the fourth count a libel. As to the first, second and fourth counts, the defendant admits the speaking and writing alleged. The charge in each count is adultery and hence constitutes words actionable in themselves.

The legal consequence of the speaking of the defamatory words was the creation of a legal presumption that the slanders were false and made without legal excuse, that is, with malice, and hence the plaintiff, in the absence of proof of the truth of the charge or that it was a privileged communication, would be entitled to general damage.

As to the libel, the defendant having given proof of his intention, and it not appearing that the defendant was requested in writing to retract the charge and had failed to comply, the plaintiff could not recover damages unless he proved that the defendant published the libel with actual malice, that is, with malice in fact. Upon such proof and in the absence of proof of the truth of the charge, or that it was a privileged communication, the plaintiff would be entitled to recover not only his actual or compensatory damages, but also what we term punitive or exemplary damages. The law presumes some damage from the use of defamatory words, and the person slandered is entitled to recover damages for all the injury done his reputation, and his feelings, and for all the mental suffering, which are the proximate result of the defamation.

In addition to the recovery of this general or compensatory damages, if the plaintiff prove that the defamatory words were uttered with actual malice, he may recover what is termed in our law punitive or exemplary or vindictive damages—damages by way of punishment, which by our rule are limited to the expenses of the litigation less the taxable costs. In fact

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and effect these damages, also, are compensatory, as CHIEF JUSTICE TORRANCE pointed out in *Hanna* v. *Sweeney*, 78 Conn. 492, 62 Atl. 785.

The jury found the issues for the plaintiff, and the findings present the case of unfounded charges of adultery persistently made against the plaintiff and with vindictive malice. If deductions for punitive damages of the most generous estimate be made, it would leave the general or compensatory damages at a very large sum. There is no claim of special damage, and there are no facts recited in the findings which show any disturbance of the feelings or the mind of the plaintiff.

Assuming the plaintiff's character as of the best, the actual or compensatory damages for injury to his reputation and feelings and for mental suffering were assessed by the jury at a higher value than in any similar case in our jurisdiction. In view of the conclusion we have reached in regard to the charge on the subject of damages, and to the fact that the evidence is not a part of the record, we omit passing upon the claim that the damages are excessive.

In different parts of the charge the trial court instructed the jury as to the subjects of compensatory damages and exemplary damages, in accordance with our rule and substantially as stated in *Hassett* v. *Carroll*, 85 Conn. 23, 37, 81 Atl. 1013. The trial court went further and, among other things, said: "If the plaintiff is not satisfied with such damages [that is, actual or compensatory damages] then the burden is on him to prove actual malice, or malice in fact, for the purpose of enhancing or increasing the damages." Again: "Malice is said to be the principal ingredient in actions of slander, and damages to a great extent depend upon its existence in fact." Again: "Actual malice may be proved, however, in such a case for the purpose of

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enhancing or increasing the damage, and the jury may consider all the evidence in the case in order to determine whether there was actual malice to determine the degree of malice which prompted the defendant's conduct." Again: "The absence of malice in fact in those cases where the law presumes malice, is not a defense to the action. However honest may have been the motive, if the words are in themselves slanderous, the fact that they were uttered without malice is never a full defense to the action. It is simply to be considered by you upon the question of damages. So that if there is much malice it is proper for you to assess more damages. If there is little or no malice, the damages should be only actual or nominal." Again: "If the jury find that the defendant has in bad faith pleaded a justification of the words uttered and published by him, and if he has attempted to support that plea by false testimony in court, it is proper for the jury to give, and it may give at its discretion, increased damages therefore." Again: "Upon the question of damages, the malice of the defendant will likely cut the largest figure in your deliberations." Again: "If you find for the plaintiff, the damages, being almost entirely within your judgment, may range anywhere from merely nominal to what is sometimes called exemplary or vindictive damages, according to the degree of the malice." Then follows a correct statement of our rule of exemplary damages.

Two principles of guidance, it is more than likely, the jury obtained from these instructions: 1. The greater the malice the greater the damage. 2. The amount of the damage is within the discretion of the jury.

Neither is sound. They savor of the common-law rule of punitive damages which does not prevail in this State. Compensation, not punishment, is the foundation of our action of slander and libel. These quota-

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tions from the charge sustain the defendant's criticism that these instructions left it open to the jury to aggravate or increase the actual or compensatory damage if they found the charges to have been made with actual malice. The correctness of this instruction is the main ground of the appeal. If the actual or compensatory damages can be thus increased, it must follow that their absence would mitigate the actual damage. While malice is said to be a necessary ingredient of the action of slander and libel it has, except in the aggravated cases of actual malice, no significance save to mark the defamation as one without legal excuse. It does not lessen one's injury to know that the slanderer did not intend the injury, or that he acted in good faith. No amount of proof that the slander was without actual malice will lessen the injury, and no amount of proof that it was made with actual malice can increase or enhance the damage which measures the reasonable compensation for the injury done. "The time, place, manner, and other circumstances of the preparation and publication of defamatory charges," as well as the language of the charge, are admissible facts tending to prove the extent of the injury to the reputation and feelings, and tending to prove the malice of the charge. *Hassett* v. *Carroll*, 85 Conn. 23, 37, 81 Atl. 1013.

The existence of actual malice is one of the relevant and material circumstances in an action of slander or libel. It may tend to spread the charge of the slander or libel, or it may induce the hearers or readers to treat it more lightly than they would an utterance from a less prejudiced source. It may be that the reputation will not suffer as much if the hearers and readers know the motive of the charge to be actual malice, as when they believe the charge is made in good faith and without malice, or it may be exactly the reverse. Each case must be governed by its own circumstances and

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setting. Further proof of actual malice may disclose the injury to be greater in consequence of the publication of the charge in actual malice, and hence the compensatory damages will be greater because assessed in proportion to the actual injury.

The effect upon the feelings of him against whom the charge is made, may be greater where he knows and must carry with him the knowledge that another entertains actual malice against him. So his mental suffering from the defamation may be greater from his consciousness of the malicious motive behind the charge. And such injury to his feelings and his mental suffering may arise whenever the knowledge that this charge was made in actual malice comes home to him. The injury may be increased by the presence of actual malice, and hence it is said that proof of actual malice may aggravate the damage. What it does is to increase the injury, and the damage which accrues is compensation for the increased injury.

This is the doctrine of the Massachusetts court; damages allowed are compensatory, punitive damages are never allowed. *Faxon* v. *Jones*, 176 Mass. 206, 208, 57 N. E. 359. In *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 245, 28 N. E. 1, Judge Holmes summarized their rule: "The damages recovered are measured in all cases by the injury caused. Vindictive or punitive damages are never allowed in this State. Therefore, any amount of malevolence on the defendant's part in and of itself would not enhance the amount the plaintiff recovered by a penny, and reasonable cause to believe the charges or absolute good will would not cut it down." Id. *Schattler* v. *Daily Herald Co.*, 162 Mich. 115, 128, 127 N. W. 42.

The true rule is that actual damages cannot be mitigated or enhanced, but every fact which tends to show that the injury was less or more than if these

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facts did not exist, is admissible, for these show the extent of the actual injury, and that measures the limit of the compensatory damages.

The terms "aggravation" and "mitigation" of damages are used in the books and in our own reports in connection with actual damage or actual compensation. Such a use of these terms is confusing. For example, it is often said that evidence of the plaintiff's character is admissible either in aggravation or mitigation of the damages. What is meant is, that the character of the plaintiff is one of the essential facts affecting the extent of the injury done. If it is good the damage is greater; if bad, less.

Our rule of punitive or exemplary damages has been applied from an early date to all tortious injuries which are wanton or malicious. *Linsley* v. *Bushnell*, 15 Conn. 225, 236; *Beecher* v. *Derby Bridge & Ferry Co.*, 24 Conn. 491, 498. We applied it in actions of negligence, trespass, deceit, and assault, but perhaps the first instance in a libel or slander action was in *Ward* v. *Dick*, 47 Conn. 300, 304. We have not always made the distinction between compensatory and punitive damages with clearness. Nor have we at all times kept clear the limitations which our rule places upon the award of punitive damages. Thus in *Haight* v. *Hoyt*, 50 Conn. 583, 586, it is stated: "Malice is a principal ingredient in the action of slander, and damages to a great extent depend upon its existence in fact." And in *Arnott* v. *Standard Association*, 57 Conn. 86, 93, 17 Atl. 361, it is said: "Damages are to be graduated by the degree to which the motive is unjustifiable and improper." In the first instance the court was treating of punitive damages, and what was said in this connection shows that the court had a clear conception of the distinction between compensatory and punitive damages. In the second instance the question of damages formed no

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part of the appeal, and whether the remark is applicable to compensatory damage or to punitive, we cannot tell. In *Ward* v. *Dick*, 47 Conn. 300, 304, we said proof of malice in speaking the words charged is admissible, "and may tend indirectly to increase the damages for speaking the slanderous words charged in the declaration by showing the degree of malice in speaking them. It is a circumstance to be considered in estimating damages for the cause of action alleged in the declaration and proved, but is not of itself a cause for which damages may be directly assessed in that suit." This may have referred to punitive damages, but if not, it does not permit the actual or compensatory damages to be increased. It says that the proof of malice may indirectly increase the damages, and this would be true in case the injury to the feelings was augmented or mental suffering increased by the fact that the charge was made in actual malice. That would be measuring the extent of the actual damage and giving compensation for it. It would not authorize an increase of the compensatory damages beyond the point of compensation for the injury done. Properly read, we think that neither *Ward* v. *Dick*, nor any of our decisions, reach the point of saying that the compensatory damages may be increased if actual malice be found.

Very generally the authorities hold that good intention, good faith and the absence of actual malice, are not admissible in mitigation of the actual or compensatory damage. *Taylor* v. *Hearst*, 118 Cal. 366, 50 Pac. 541; *Callahan* v. *Ingram*, 122 Mo. 355, 369, 374, 26 S. W. 1020; *Young* v. *Fox*, 26 N. Y. App. Div. 261, 271, 49 N. Y. Supp. 634; *Rearick* v. *Wilcox*, 81 Ill. 77, 81; *Garrison* v. *Robinson*, 81 N. J. L. 497, 501, 79 Atl. 278; *Candrian* v. *Miller*, 98 Wis. 164, 171, 73 N. W. 1004; *Clair* v. *Battle Creek Journal Co.*, 168 Mich. 467,

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473, 134 N. W. 443; *Massee* v. *Williams*, 124 C. C. A. 492, 505, 207 Fed. Rep. 222, 235; *Palmer* v. *Mahin*, 57 C. C. A. 41, 45, 120 Fed. Rep. 737, 741. Some of the authorities thus holding assert generally that actual malice has no place in a trial for the actual or compensatory damages and is only important in the claim for punitive damages. But this leaves out of consideration the fact that malice is one of the circumstances surrounding the defamation, and all such are necessary considerations in estimating the compensatory damage, and may affect the extent of the mental suffering and injury to the feelings.

The trial court did not limit the estimate of the compensatory damages in the case of proof of actual malice. On the contrary, it left open to the jury the extent of the increase of damages due to actual malice. It made the presence or absence of malice the factor upon which all but nominal damages should hang; and it left the amount of the damage to be measured wholly by the discretion of the jury if actual malice was found. This was erroneous; and the extraordinary damages found demonstrate that they accepted the instructions as conferring upon them a discretion without limit.

The other exceptions require but brief notice. The charge that the jury might consider future damages as one of the elements of recovery was correct. The damages were to be assessed once for all.

The court did not err in indirectly expressing its opinion in its comments upon the evidence. Nor were the instructions so argumentative in character as to be erroneous. The trial court was within our rule so frequently announced as to forbid present repetition.

Complaint is made of the charge: "But if you do find that he wrote them, and has testified here falsely about it, then you are at liberty to consider that circumstance

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in weighing his other testimony, for it is always proper for the jury, if they find a witness has testified falsely in one particular, to consider that in deciding what weight they will give to his other testimony. The doctrine is sometimes referred to as *falsus in uno, falsus in omnibus*—that is, false in one thing, false in all. But it is not a principle of law that if you find a witness false in one particular that you should disregard his testimony entirely. You may do so if you are satisfied from it that he is unworthy of belief, but it does not follow that you must do so."

It is said that the failure to state that the false testimony must have been made knowingly, wilfully or intentionally, made this instruction erroneous. While this addition would have conformed the instruction to that usually given, it was not essential in view of what the trial court did say. It said that if the jury found that the defendant had "testified falsely" in some particular, they might "consider that in determining what weight they will give to his other testimony," and that they might disregard the defendant's testimony "if satisfied from it that he is unworthy of belief." This later phrase was the full equivalent of the phrase "that he had knowingly testified falsely."

There is error and a new trial is ordered.

In this opinion Roraback and Shumway, Js., concurred.

Beach, J. (dissenting). I dissent because the charge of the court on the subject of damages appears to me to be correct. The court said, *inter alia:* "Under our law it is not the purpose of this action, that is, an action of libel and slander, to punish the defendant for his offense, but to compensate the plaintiff for his in-

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juries. . . . If you come to the question of damages, you will give the plaintiff such damages as in your opinion will fairly compensate him for the injury done to his reputation by reason of the defamatory words." Then, after correctly pointing out the considerations which might influence the jury in estimating general compensatory damages, and repeating the rule that "if the jury finds that the statements were false as claimed by the plaintiff, the plaintiff is entitled to such damages as would be a compensation for the injury sustained as the natural or probable consequences of the slander or libel," the court charged the jury upon the relation of actual malice to compensatory damages as follows: "Where the words uttered or published are in themselves actually libelous or slanderous, the mental suffering occasioned by the publication of the defamatory words may be taken into consideration by the jury for the purpose of estimating general and compensatory damages. And it has been held that because a libel or slander involves an injury to the feelings of the plaintiff as well as to his reputation, his injury may be greater if the defamatory words are uttered with express malice than if there is only the malice which the law implies from intentionally doing . . . that which in its natural tendency is injurious."

It was after thus correctly instructing the jury on the subject of general compensatory damages, that the court told the jury that the damages "being almost entirely within your judgment, may range anywhere from merely nominal to what is sometimes called exemplary or vindictive damages, according to the degree of malice," and then properly instructed them that "damages beyond the actual compensation for the injury" were to be limited to the expenses of litigation, less taxable costs.

When the above quoted portions of the charge are

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added to the collection of excerpts contained in the opinion, it seems to me that no logical basis is left for the conclusion that the court did not surround its charge upon the subject of damages with proper and sufficient limitations.

In this opinion PRENTICE, C. J., concurred.

HOMER N. POPE *vs.* HATTIE P. ROGERS ET AL., EXECUTORS.

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

The attestation by subscribing witnesses which the statute (§ 293) makes a prerequisite to the execution of a valid will, is designed to enable them to testify with certainty that the alleged testator put his name upon the identical piece of paper to which they attached their own signatures; and therefore a writing presented in court as a will does not satisfy the statutory requirements if it appears from the evidence of the so-called witnesses that the supposed maker did not sign the paper in their presence, and that for aught they know it was a mere blank sheet when they placed their own names upon it.

Argued October 24th—decided December 15th, 1917.

APPEAL from an order and decree of the Court of Probate for the district of Derby approving and admitting to probate a certain written instrument as the last will and testament of Frederick J. Pope of Derby, deceased, taken to the Superior Court in New Haven County and tried to the jury before *Tuttle, J.*; the court directed a verdict for the defendants, sustaining the will, and from the judgment thereon the plaintiff appealed. *Error and new trial ordered.*

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This typewritten will has no attestation clause. It bears the signature of Frederick J. Pope and also the names of three persons written by them before the word "Witnesses." The evidence concerning its execution was confined to that of these three persons, all of whom were pupils of Mr. Pope attending a school kept by him. Their testimony was in full accord and to the following effect: Mr. Pope, who had been seated at his desk in the schoolroom, left it carrying a paper in his hand and approached a table at which the three pupils were seated. He thereupon presented the paper, and asked the three in turn to "sign it." They complied by writing their names successively, the one under the other. Whether the word "witnesses," which now appears appended to their names, was then upon the paper does not appear, save as they testify that they saw nothing thereon except such of the previously written witnesses' names as were upon it at the time that they respectively signed. Immediately upon the completion of the signing of the three names, Mr. Pope returned to his desk without another word having been spoken and without the witnesses having received from observation, statements of Mr. Pope or otherwise any further information concerning the paper or its contents or the purpose of their act.

Harrison Hewitt and *Charles E. Clark*, for the appellant (plaintiff).

Charles S. Hamilton, for the appellees (defendants).

PRENTICE, C. J. The instrument before us presents upon its face the appearance of a valid will. Although its form is inartificial, it is sufficient to meet the requirements of a testamentary paper. Passing from the appearance of the instrument itself to the evidence offered to show conformity to statutory requirements

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in its execution, it appears that the subscribing signature which it bears is that of him whose will it purports to be, and that the three signatures purporting to be those of witnesses are the signatures of persons who attached their names to the paper at his request and in his presence.

Our statute (General Statutes, § 293) provides that no will or codicil shall be valid to pass any estate unless it be in writing, subscribed by the testator, and attested by three witnesses, each of them subscribing in his presence. The attestation by subscribing witnesses, which the law thus makes a prerequisite to the execution of a valid will, is designed to enable the witnesses who thus subscribe to testify with a great degree of certainty that the testator put his name upon the identical piece of paper upon which they placed their own. *Canada's Appeal*, 47 Conn. 450, 461. It imports knowledge on the part of the attesting witnesses of the existence of the testator's signature affixed to the paper subscribed by the witnesses, to the end that they may thereafter, when required, bear witness to that fact as a means of identifying the paper and its contents as the testator's own. *Canada's Appeal, supra*, 461.

To attest means "to bear witness to, . . . to affirm to be true or genuine." *McGuire* v. *Church*, 49 Conn. 248, 249. When, therefore, the statute prescribes that an instrument, to be a valid will, shall be attested by subscribing witnesses, it requires that these witnesses be competent to bear witness and affirm, if need be under oath, that those things existed and were done which the statute specifies shall exist and be done, and which they would be called upon to testify existed and were done when placed upon the stand for the purpose of proving the will. *Nunn* v. *Ehlert*, 218 Mass. 471, 474, 475, 106 N. E. 163.

One of the things which the law requires to be done

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in the execution of a valid will is the signature of it by the testator. This is an indispensable requisite of testamentary disposition, and one of the things therefore which witnesses called upon to attest are required to be able to bear witness to and by their subscription to bear witness to.

Turning now to the evidence presented in the present case in support of the admission of this will to probate, we find it utterly barren of proof that any one of its subscribing witnesses was qualified to attest the execution of the instrument by the person whose name is affixed thereto. The testator did not sign the paper in their presence, and no one of them saw his signature thereon at any time. For aught that they know the paper upon which, in response to the request that they sign it, they placed their names was a blank sheet without writing of any kind upon it. It is not even attempted to be proved by the statement of Mr. Pope, or by other evidence, that it was otherwise. There was no declaration by him that the paper bore his signature or contained his will, neither did he ask them to witness his will, his signature, or anything else. The three young men were left in complete ignorance of the purpose for which their signature was desired and of any fact to which they could bear witness, save that they and each of them in the presence of Mr. Pope placed their names upon a sheet of paper which, now that it is presented in court, bears a writing purporting to be a will, with his signature appended thereto. When the will was written or the signature affixed they have no knowledge, and they and we must rely upon pure conjecture based upon reasoning from probabilities for such belief as they or we may have. This certainly does not satisfy the requirements of the statute, and we have found no case, even among those which have gone to the greatest lengths in making a lax application

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of the statutory requirement of attestation, which furnishes a precedent or the least authority for upholding an attestation made under the circumstances revealed by this record.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

THEODORE BROWN *vs.* THE NEW HAVEN TAXICAB COMPANY.

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

One may be the "owner" of a motor-vehicle, within the meaning of that word in § 2 of Chapter 231 of the Public Acts of 1915, requiring the registration of such vehicles, although another has the strict legal title.

In the present case evidence was offered that the automobile was bought by and for the plaintiff with money advanced to him therefor by one M, who took a conditional bill of sale directly from the vendor to secure him, M, for his loan, and that the plaintiff had been in the exclusive use and possession of the car and received its earnings from the date of its purchase until its injury by the defendant in a collision. *Held* that this evidence entitled the plaintiff to go to the jury upon the question of his ownership of the automobile.

A trial judge has jurisdiction to set aside a verdict, although directed by him, if he afterward becomes satisfied that his instruction was erroneous and that the verdict is against the evidence.

Where the question of the propriety of a directed verdict which is afterward set aside as against the evidence, is raised by the appellee upon a bill of exceptions, it is open to this court to grant a new trial for error in such instruction.

Argued October 24th—decided December 15th, 1917.

ACTION to recover damages for injuries to the plaintiff and to his automobile, alleged to have been caused

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by the negligence of the defendant's servant, brought to the City Court of New Haven and tried to the jury before *Booth, J.;* the court directed a verdict for the defendant, but subsequently, upon motion of the plaintiff, set aside the verdict so rendered and granted a new trial, and from this decision the defendant appealed. *No error.*

Prentice W. Chase, for the appellant (defendant).

George W. Crawford, for the appellee (plaintiff).

RORABACK, J. At the close of the evidence in this case the defendant moved the court to direct a verdict upon the ground that the automobile which the plaintiff alleged and claimed to own was not properly registered as required by the provisions of § 19 of the Motor Vehicle Law (Public Acts of 1915, Chap. 231), the material portion of which is as follows: "No recovery shall be had in the courts of this State, by the owner or operator, or any passenger of a motor vehicle which has not been legally registered in accordance with section two or three of this act, for injury to person or property received by reason of the operation of such motor vehicle upon the public highways of this State, unless such motor vehicle is the property of a non-resident and is within the provisions of section ten of this act." Section 2 of this Act provides that "every owner of one or more motor vehicles shall file annually in the office of the secretary, on a blank furnished by said secretary: (a) a statement of his name, residence, and postoffice address; (b) a description of each motor vehicle owned or controlled by him, including the name of the maker, the number, if any, affixed by the maker."

The court, in directing a verdict, charged the jury.

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as follows: "The testimony disclosed that the Biever Motor Company . . . had given a conditional bill of sale of this car. The legal title, therefore, still remained in the Biever Motor Company until the final payment was made thereunder. I therefore sustain the motion for a directed verdict, and direct you—as the legal title, as distinguished from the equitable title, was in the Biever Motor Company at the time of the accident—to return a verdict for the defendant."

In this there was error. The words of a statute are to be interpreted in their natural and usual meaning unless the context indicates that a different meaning was intended. By our statute words and phrases are to be construed according to the commonly plain usage of language.

We know that the word "owner" is often used to designate the person having an interest in property under a special title, and it is our opinion that it was so used in the provisions of the statute relating to motor vehicles. 29 Cyc. 1549, and cases cited in the note. The word has different meanings, and must have its proper significance in each case in view of the subject, the object, and the provisions of the statute in which it is found. A bailor may have a general, and a bailee a special, ownership in the subject of the bailment. 2 Hale on Bailments, 56. See, also, *United States* v. *Ninety-Nine Diamonds*, 72 C. C. A. 9, 18, 139 Fed. Rep. 961, 970, 2 L. R. A. (N. S.) 185, 193.

This court has held that a person who hired a carriage for a limited time had a special property in it, in the meaning of a statute which provided a remedy against one who "shall . . . drive against another vehicle and injure its owner." *Camp* v. *Rogers*, 44 Conn. 291, 298.

The defendant, in support of its contention that the automobile was not properly registered in the name of

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the owner, places special emphasis on the case of *Stroud* v. *Water Commissioners*, 90 Conn. 412, 97 Atl. 336. The present case is unlike the *Stroud* case, in which the court held that one, who had falsely registered the automobile there in controversy in the name of another as owner who never had any interest therein, could not recover in his own name as the alleged owner or as one in the control of the car.

In the present case it is conceded that the car which the plaintiff alleged was injured and owned by him was registered in his name. The jury would have been warranted in finding from the evidence that the car in question was bought by and for the plaintiff, with money which he borrowed from one Cornelius Mayo, who took a conditional bill of sale from the vendor to secure him for the money which he had loaned to the plaintiff to pay for the car; that Mayo never claimed to own the car or control it, or in any manner exercised any acts of ownership or possession over it. The evidence also warranted the finding that the plaintiff had been in the exclusive possession and absolute control of the car from the time it was purchased until it was injured by the collision; that during this time the plaintiff received the earnings of the car in its operation by the plaintiff for jitney purposes. It also appears from the evidence that the arrangements claimed to have been made between Mayo and the plaintiff were made by parol. Whether or not they were made in good faith and not for the purpose of evading the law, as claimed by the plaintiff, were questions of fact. Such having been the situation upon the trial, we are of the opinion that the evidence as to the ownership of the car by the plaintiff was sufficient to entitle him to go to the jury on that question.

The defendant now contends that "the judge, after having directed the jury to bring in a verdict for the

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defendant, had no further jurisdiction in the case." We know of no law which forbids a trial judge from setting aside a verdict which is consistent with and in obedience to an instruction which is erroneous. The manner in which the jury has reached a verdict cannot effect the jurisdiction of the court to set it aside if contrary to the evidence. In setting aside the verdict of a jury, the court is not directly reviewing its own action, but the action of the jury. The court might direct the jury to render a particular verdict, and the jury might refuse to bring in a verdict as directed. It is plain, therefore, that the jurisdiction of the court to grant a new trial because the verdict was against the evidence was not lost because the court directed an erroneous verdict.

Again, the question embodied in the direction of the verdict has been presented to us by the plaintiff in a bill of exceptions authorized by the provisions of §§ 804 and 806 of the General Statutes. If necessary, this court could order a new trial upon the plaintiff's bill of exceptions as to the direction of the verdict if his exceptions are well taken.

There is no error.

In this opinion the other judges concurred.

GEORGE F. JACKSON *vs.* ELANSON H. LACY.

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

An assignment that the trial court erred in charging in certain particulars "as set forth in" a numbered paragraph of the finding, which paragraph contained the whole charge, does not comply with the statute (§ 802) and is too general to merit consideration.

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In an action by a broker to recover what his services were reasonably worth in effecting a sale of the defendant's realty, the answer admitted the services and nonpayment therefor, denied any promise to pay what they were worth and that they were worth $2,500 as claimed by the plaintiff, and then alleged that the plaintiff had expressly agreed to accept $1,250 for his services if he made a sale. *Held* that the real defense alleged and actually litigated, as disclosed by the record, was not an argumentative denial of an original employment for a reasonable compensation, but an affirmative defense by way of confession and avoidance, setting forth an agreement for a one per cent commission or $1,250; and that while the burden remained on the plaintiff throughout the case of proving that at the time of the original employment the parties were silent as to compensation, it was upon the defendant to show that the implied promise arising from the silence of the parties had been modified or superseded by a subsequent express agreement; and that the charge of the trial court, which was substantially to this effect, was correct.

Argued October 24th—decided December 15th, 1917.

ACTION to recover the reasonable worth of services rendered by a broker in effecting a sale of real estate, brought to the City Court of New Haven and tried to the jury before *Booth, J.;* verdict and judgment for the plaintiff for $2,652, and appeal by the defendant. *No error.*

The complaint is in the usual form, and alleges that the plaintiff rendered services in the sale of defendant's real estate under an agreement by the defendant to pay what the plaintiff's services were reasonably worth, and that they were worth $2,500, which has never been paid. The answer admits that the services were rendered and not paid for, but denies that the defendant promised to pay what they were reasonably worth, or that they were reasonably worth $2,500. The answer then goes on to allege a special agreement that the plaintiff should receive $1,250 commission if he effected the sale, and no more. An offer of judgment for $1,250 is annexed to the answer. Plaintiff replied denying the special agreement. Upon these pleadings the parties

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went to trial, and the plaintiff testified that his services were rendered without any agreement or understanding as to the amount of the commission, and offered evidence to prove that the usual commission for selling property of the same kind was two per cent. The defendant testified that before the contract for the sale of the property was executed the plaintiff expressly agreed with him to accept a commission of $1,250, being one per cent on the price for which the property was finally sold. The cause was submitted to the jury, and after they had deliberated about an hour and a half they returned to the court-room for further instructions, whereupon the following occurred:—

"A Juror: The jury wishes to know to what extent the burden of proof rests upon the defendant.

"The Court: I will refer again to the charge that I already made on that point. I will reiterate what I already said. 'The burden in this, as in all civil cases, rests upon the plaintiff throughout the entire case to convince you by a fair preponderance of the evidence that the contract of employment was as alleged by him, namely; to render services as a broker to the defendant in the sale of the property, under an implied promise at least that a reasonable sum should be paid for such services. If no specific agreement as to the price was entered into, the law will imply that a reasonable price was contemplated, and the plaintiff is under no burden to prove there was no specific agreement. His liability as to the burden of proof would end when he establishes the facts of employment and fulfillment of employment by producing a customer who is ready, able and willing to purchase the property on the terms prescribed by the owner.

"'If no contrary evidence is produced, he would prevail, for the law would supply by implying that a reasonable price was contemplated.

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"'If the defendant, as in this case, seeks to meet such allegations of the plaintiff by setting out a specific contract as to the price of such services, the burden is upon him to establish such contract by evidence which shall preponderate and overcome the evidence offered by the plaintiff upon this feature, and thus, while the burden of proving the essential allegations of his complaint never shifts from the plaintiff, but continues throughout the case, if the sufficiency of proof upon the affirmative allegations of the defendant's answer fails to predominate and overcome the evidence offered by the plaintiff upon these affirmative allegations, the defendant would fail in attempting to sustain them because that burden is upon him.' In other words, the burden of proving there was no specific agreement is not upon the plaintiff. The burden of proving there was a specific agreement is upon the defendant. All the plaintiff has to prove is that he rendered services at the request of the defendant, and having offered evidence as to their reasonable value, his burden is complete, unless the evidence offered by the defendant as to the specific contract outweighs the evidence of the plaintiff on that feature."

The jury then retired, and forthwith returned a verdict for the plaintiff calculated on the usual commission of two per cent.

J. Birney Tuttle, for the appellant (defendant).

Ralph H. Clark, for the appellee (plaintiff).

BEACH, J. The first reason of appeal does not comply with the rules, because it assigns as error that the court charged the jury as to certain particulars "as set forth in paragraph 9 of the finding," which paragraph contains the whole charge.

The second and only other reason of appeal is con-

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fined by reference to that portion of the charge above quoted, and brings up the single question whether the court erred in charging the jury "that plaintiff was under no burden to prove there was no specific agreement as to his commission, and that the burden of proof was upon the defendant to disprove plaintiff's allegations."

This paraphrase does not quite do justice to the charge of the court, but it effectually limits the assignment of error to that part of it which charges that the burden of proving there was no specific agreement was not on the plaintiff, and the burden of proving there was a specific agreement was on the defendant.

Upon the findings as to the claims actually made by the defendant at the trial, the charge was correct.

The fact of employment and of the rendition of services leading to the sale of the property having been admitted by the defendant's answer, the plaintiff offered evidence to prove that his services were rendered without any agreement as to the amount of compensation, and that the usual commission in such cases was two per cent. He thus made out a prima facie case.

The important fact is that the defendant did not deny *in toto* that the plaintiff's services were rendered without any agreement as to compensation, but limited himself to the claim that "before he signed the contract Exhibit A [which is the written contract for the sale of the property], and before he accepted the offer of the customers obtained by plaintiff, and before plaintiff produced any customer ready and willing to purchase the property on terms acceptable to him," the defendant told the plaintiff that he would pay only one per cent commission, and the plaintiff agreed to accept it.

The plaintiff, in rebuttal, claimed that nothing was said about paying only one per cent until after the contract, Exhibit A, was signed.

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The defense thus outlined is not necessarily inconsistent with the plaintiff's prima facie case, for it does not deny that the original contract of employment was silent as to terms of compensation, but alleges that at some time not definitely fixed, except by reference to the fact that Exhibit A was executed June 9th, 1916, an express agreement for one per cent commission was entered into.

The court in summing up the defendant's testimony fixes the claimed date of this alleged agreement as follows: "You will recall that the defendant testified that the specific agreement as to price was entered into June 9, 1916, at ten minutes to eleven, as he and the plaintiff left the door of Carpenter and Company, on Center Street, before they went to Mr. Notkins' office to see if an arrangement as to terms might be made whereby Mr. Lacy might get some cash out of the transaction, and that it was then and there that the plaintiff agreed to accept one per cent provided the deal went through."

That is to say, the defendant's actual claim was that the alleged agreement for $1,250 compensation was entered into on the morning of the day when the contract of sale was executed and on the way to the office of the purchasers for the purpose of arranging the final terms of a purchase already under consideration; and necessarily, therefore, after the plaintiff had at least begun to render services under the original contract of employment.

This statement by the court does not import verity, but it is fair to assume that, if materially inaccurate, it would not have passed unchallenged. It is consistent with the formal statement of defendant's claim in the finding, and the finding, when interpreted in the light of this part of the charge, explains more satisfactorily than before the ambiguity in the defendant's

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answer, and brings out more clearly than before the fact that the real defense alleged in the answer and actually litigated is not an argumentative denial that the original contract of employment was for a reasonable compensation, but an affirmative defense by way of confession and avoidance, alleging that the parties afterward agreed upon a one per cent commission.

Such being the real nature of the defense, the burden of proof remained on the plaintiff throughout the case of proving by a fair preponderance of all the evidence that at the time of the original employment the parties were silent as to the amount of his commission; and since the defendant made no attempt to prove an express agreement for one per cent commission at the time of the original employment, but claimed that the implied promise arising from the silence of the parties was superseded by a subsequent express agreement, the burden of proof was on him to establish such a modification of the original contract.

The charge of the court is in substantial accord with the views above expressed.

There is no error.

In this opinion the other judges concurred.

Walter H. Goodrich and Company *vs.* Louis Friedman et al.

Third Judicial District, Bridgeport, October Term, 1917.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

The nonexistence of a cause of action when suit is brought is a fatal defect.

A creditor who accepts a time note for a merchandise account thereby

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agrees to an extension of the credit and cannot maintain an action on the original demand during the term of the note.

Argued October 24th—decided December 15th, 1917.

ACTION to recover an alleged balance for merchandise sold and delivered to the defendants, brought to and tried by the City Court of New Haven, *Booth, J.;* facts found and judgment rendered for the plaintiff for $771, and appeal by the defendants. *Error and new trial ordered.*

The plaintiff is a corporation engaged in the business of selling oils, gasoline, and the like. The defendants, between the dates of July 15th, 1915, and December 13th, 1916, made purchases of oils, gasoline, and other products, and made payments for these articles as set forth in the bill of particulars and made part of the plaintiff's complaint. On or about November 6th, 1916, the plaintiff demanded payment of the defendants, who then owed the plaintiff $595.56, but the defendants were unable to pay in cash. The plaintiff requested the defendants to execute a note for the amount of the indebtedness then existing, and suggested a note payable in sixty days. The defendants refused to give a sixty-day note, but offered to execute a note payable in four months, whereupon a note in the following form was executed and delivered to the plaintiff:—

"$595.56 November 6, 1916.

Four months after date we promise to pay to the order of Walter H. Goodrich & Co., five hundred and ninety-six and 56/100 dollars at Union & N. H. Trust Co. Value received."

There was no agreement between the plaintiff and the defendants that this note was received in payment of

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the existing debt. The plaintiff indorsed the note and discounted it at the bank where it was made payable, where it was later protested for nonpayment. The plaintiff still holds the note, and it is unpaid. The note was at all times the property of the plaintiff. This action was instituted on December 19th, 1916, prior to the maturity of the note. The amount of the plaintiff's claim as it appears from its bill of particulars is $755.05; of this amount $156.49 represents sales which were made subsequent to November 6th, 1916, the date of the note. The defendants admitted the execution, delivery, and acceptance of the note by the plaintiff, but claimed that the plaintiff was precluded from obtaining a recovery for the sum of $596.56, the amount of the note, before it became due. The trial court overruled this claim, and rendered judgment for the full amount of the plaintiff's bill.

There are several reasons of appeal. In substance, the error assigned is the conclusion of the trial court that the plaintiff's acceptance of the negotiable promissory note and the negotiation of the same did not preclude a recovery of the indebtedness evidenced by the note before its maturity.

William J. McKenna, with whom was *Samuel C. Schlein*, for the appellants (defendants).

Samuel E. Hoyt, for the appellee (plaintiff).

RORABACK, J. This action was commenced about two and one half months before the maturity of the note. It is a general rule that the nonexistence of a cause of action at law when the suit is brought is a fatal defect which cannot be cured by the accrual of a right of action while the suit is pending. In other words, an action at law can be supported only on the facts

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as they existed when the action was commenced. *Woodbridge* v. *Pratt & Whitney Co.*, 69 Conn. 304, 305, 37 Atl. 688; *Dickerman* v. *New York, N. H. & H. R. Co.*, 72 Conn. 271, 275, 44 Atl. 228.

The acceptance of the note in the present case was at the least an agreement for delay, and the plaintiff could not commence an action on the original debt evidenced by the note until the note became due. 2 Parsons on Notes & Bills, 155. The reason for this rule is that the entering into a new agreement and undertaking subjected the defendant debtor to peculiar liabilities, or afforded the plaintiff creditor fresh and peculiar rights which constituted a good consideration for the extension of credit. *Judge* v. *Fiske*, 2 Speers (S. Car.) 436, 438, 42 Amer. Dec. 380, 381.

This note implied an agreement to suspend the remedy on the original demand during the term of the note. *Brabazon* v. *Seymour*, 42 Conn. 551, 554. See, also, 1 Corpus Juris, page 1148, and cases cited in note 43 at the bottom of page 1148.

It appears that when this action was commenced the note had been discounted and was in the control of the bank, a bona fide holder. The defendants at this time were liable to pay the note to a third party. To now hold that the defendants at this time were liable for the price of the goods for which the note was given, would be a plain evasion of the rule that a cause of action must be supported by the facts as they existed when the action was commenced.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

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UNITED GERMAN SILVER COMPANY *vs.* HOMER D. BRONSON.

Third Judicial District, Bridgeport, October Term, 1917.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

A corporation is under no obligation to pay for services rendered and expenses incurred in promoting its incorporation, unless required to do so by statute or by its charter. It may, however, recognize the equity and propriety of a claim for such services and expenses, and may issue shares of its stock in payment therefor, provided such issue is made in good faith and for value received, and is not prohibited by statute.

In the present case the directors of the plaintiff company, acting in good faith but not in conformity with a vote of the stockholders that the balance of the company's stock should be issued for cash only, voted that the defendant, who was also a director and the president of the company, should be given the fifty shares of stock for which he had subscribed, in full payment for valuable services theretofore rendered and expenses incurred by him in behalf of the company—which in fact were worth more than $2,500, the par value of his stock—and for similar services and expenses in the future. About ten months later the directors passed a resolution calling upon the defendant to pay cash for this stock and subsequently the corporation brought this action to recover the par value of the fifty shares. *Held:*—

1. That inasmuch as the services and expenses were found to have been of benefit to the corporation and were reasonable in amount and were not gratuities in fact or in intent, the action of the directors in paying for them with corporate stock would have operated as a sufficient recognition or adoption of them by the corporation, had it not been for the vote of the stockholders that stock should be issued only for cash.
2. That a compliance with this vote might be waived by the corporation, and was waived by it by instituting and maintaining this suit to recover the par value of the stock with full knowledge of the circumstances attending its issue; and that therefore the action of the directors became effective by way of adoption.

The Corporation Act of this State (Public Acts of 1903, Chap. 194, § 12) provides that shares of stock can be issued only for cash or its equivalent, and that if paid for otherwise than by cash a record of the kind of payment must be made upon the books of the corporation. *Held* that the failure of the directors to make the prescribed

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record in a given case did not raise a presumption that the stock was issued for cash.

The law will imply a promise to pay the par value of stock, a certificate for which, issued by the corporation to the recipient in his own name, is delivered to and accepted by him; and this promise may be enforced by and in the name of the corporation.

A corporation may obligate itself to pay for services and expenses incurred in promoting its incorporation, in case of a contract made by a promotor before its incorporation, by adopting the contract, either expressly or impliedly.

Express adoption of such a contract is by vote or resolution of the proper authority. Implied adoption is by acts, conduct, or acquiescence, such as would estop the corporation from denying that it had adopted the contract.

The law has placed certain safeguards about the adoption of the contract of the promotor in behalf of a corporation subsequently incorporated. Its adoption must be within its corporate powers and for its benefit, and the contract must be reasonable and good faith shown in its making and in its adoption.

Where there is no antecedent contract, the services performed and expenses incurred must be found to be of corporate benefit, to be reasonable in amount and not to have been mere gratuities.

Inasmuch as a corporation is powerless to reject services and expenses incurred prior to its incorporation, its mere retention of the benefits arising therefrom cannot be the basis for an estoppel of its right to deny its adoption of, and its liability to pay for, such services and expenses.

Submitted on briefs October 23d—decided December 15th, 1917.

ACTION to recover the par value of shares of the plaintiff's capital stock issued to the defendant, brought to and tried by the Superior Court in Fairfield County, *Curtis, J.*; facts found and judgment rendered for the defendant, and appeal by the plaintiff. *No error.*

Homer S. Cummings, Charles D. Lockwood, Charles M. Fessenden and *Matthew H. Kenealy*, for the appellant (plaintiff).

Nathaniel R. Bronson, Lawrence L. Lewis and *Charles E. Hart, Jr.*, for the appellee (defendant).

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WHEELER, J. The plaintiff was incorporated October 22d, 1914, under the laws of Connecticut, and was the successor of a corporation doing a similar business and both having capital stock.

The defendant was a stockholder of the predecessor company. He devoted a great deal of time and incurred personal expenses in securing subscribers to the stock of the plaintiff and in perfecting its organization. He subscribed for fifty shares of the plaintiff of the par value of $50 each, and the certificate for the same was duly delivered to him, but, except as hereinafter stated, he never paid for his subscription.

On October 22d, 1914, the stockholders of the plaintiff voted that stock of the plaintiff should be issued to the amount of $39,000 in exchange for certain real estate and personal property, and on October 26th, 1914, the stockholders voted that the balance of the stock, viz. $61,000, should be issued for cash only, and the directors were authorized to place this stock upon the market. The defendant, as a stockholder, voted for this resolution.

On October 26th, 1914, the defendant was duly elected a director and president of plaintiff, and so continued until July 8th, 1915.

The defendant rendered services and expended money for the plaintiff corporation after its incorporation. The defendant rendered these services and incurred these expenses without having a contract with plaintiff, and without having a record of them, and never presented the plaintiff with a bill for them.

At a meeting of the directors in December, 1914, it was voted that the defendant be given the fifty shares in full payment for services theretofore rendered the plaintiff and for similar services to be rendered in the future, and for moneys already expended or which should be expended by him in the future in similar

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manner. The value of the services rendered and the expenses incurred by the defendant prior to said meeting was greater than the par value of the stock, viz. $2,500. The defendant continued to perform valuable services for plaintiff so long as he continued a stockholder.

The directors, in all these steps taken, acted in good faith. The directors other than defendant knew of the defendant's services and expenses, and frequently discussed the subject at meetings of the directors. The stockholders of plaintiff never formally ratified the action of the directors in issuing to the defendant the fifty shares.

On or about July 14th, 1915, the defendant sold the fifty shares for $2,795. The plaintiff has duly demanded payment for the fifty shares from all subsequent holders of record of the same, and payment has been refused. These subsequent holders of the fifty shares purchased in the belief that they had been fully paid for.

On or about October 23d, 1915, the board of directors adopted a resolution that the defendant be required to pay, within five days from date of mailing him a copy of the resolution, $2,500 for the fifty shares of stock; the copy of the resolution was duly mailed and received by the defendant, but defendant refused and still refuses to make payment.

The issuance by the plaintiff corporation of the certificate for the fifty shares of stock in the name of the defendant, and its delivery to and acceptance by him, created a relation between him and the corporation from which the law implied a promise on his part to pay the corporation the par value of the stock, and gave the corporation a right of action in its own name to recover the unpaid subscription.

The chief error assigned is the overruling of the plaintiff's claim of law that the services rendered by the defendant, as a promoter, in securing subscriptions for

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the plaintiff corporation before its incorporation, was neither cash nor property, and thus could not be held to be a consideration for the subscription.

The services and expenses of the defendant preceding the incorporation and those following it constitute the entire consideration given by him for the stock.

Unless the charter or statute law otherwise provides, and the corporation does not, subsequent to the incorporation, obligate itself to pay, it is under no obligation to pay for the services or expenses incurred in promoting its incorporation.

Our law did not otherwise provide; our inquiry thus is whether the plaintiff, after its incorporation, obligated itself to make these payments. This it may do, in the case of contracts made by a promoter for its benefit before its incorporation, by adopting the contract, either expressly or impliedly.

Express adoption is by vote or resolution of the proper authority. Implied adoption is by acts or conduct or acquiescence, and among such acts are the receipt and retention of benefits. Acts or conduct from which this inference would arise would be those which would estop the corporation from denying that it had adopted the contract.

The law has placed certain safeguards about the adoption of the contract of the promoter in behalf of a corporation subsequently incorporated. It must be made within its corporate powers, for its benefit, be reasonable, and good faith must have surrounded its making and its adoption.

In *Stanton* v. *New York & Eastern R. Co.*, 59 Conn. 272, 22 Atl. 300, we held that a contract between the promoters of a railroad and Hungerford, that he should obtain rights of way and be paid for the same and for his services and expenses in procuring these, which

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had been adopted by express vote of the corporation after its incorporation, gave Hungerford a valid cause of action on the contract. We placed our decision upon the principle of ratification, but we pointed out that ratification as used meant the adoption of a previously formed contract.

Ratification and adoption are used interchangeably in the decisions. As it seems to us, adoption better expresses what takes place, for ratification presupposes a principal existing at the time of the agent's action. Clark on Corporations (3d Ed.) § 47. American authorities very generally apply the doctrine of adoption or ratification as we do in *Stanton* v. *New York & Eastern R. Co.*, 59 Conn. 272, 22 Atl. 300. Some of the later cases are: *Van Noy* v. *Central Fire Ins. Co.*, 168 Mo. App. 287, 295, 153 S. W. 1090; *In re Ballou*, 215 Fed. Rep. 810, 812; *City of Belfast* v. *Belfast Water Co.*, 115 Me. 234, 98 Atl. 738; *Munson* v. *Syracuse, G. & C. R. Co.*, 103 N. Y. 58, 76, 8 N. E. 355; *McArthur* v. *Times Printing Co.*, 48 Minn. 319, 51 N. W. 216. Massachusetts holds that unless the elements of a new contract are present there can be no recovery. *Koppel* v. *Massachusetts Brick Co.*, 192 Mass. 223, 78 N. E. 128. Logically followed, this would appear to eliminate the implied adoption which is in reality an application of the doctrine of estoppel.

Where, as in this case, there is no contract, but simply service performed and expenses incurred in the incorporation, before the corporation should be charged with their adoption they should be found to be of corporate benefit, reasonable in amount, and incurred under circumstances which show that they were not in fact, nor intended to be, mere gratuities.

The corporation has no choice in determining upon the acceptance of these, hence it cannot be held by retaining the benefits to have estopped itself from

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denying its adoption of them and its liability to pay for them.

The acts and conduct from which the adoption by a corporation can be inferred, are those only which it may voluntarily accept or reject. In *Smith* v. *New Hartford Water Co.*, 73 Conn. 626, 630, 48 Atl. 754, expenses incident to the incorporation of the corporation were expressly recognized by the directors and stockholders, and notes in payment of these were issued by the directors with the approval of the stockholders. We held that "those expenses having been incurred for the benefit of the defendant and the benefit having been accepted, it might lawfully undertake the obligation to pay them." That all of the stockholders approved did not change the situation from a legal standpoint; the directors had authority to adopt the contract. The express adoption by the directors appears to have been supplemented by the inference following the benefits received.

In the case before us there is the vote of the directors which, if within their authority, would be an express adoption without the cumulative force of the implied adoption. The conditions which we attach to the adoption by implication, leave no place for the claim that the recognition of promoters' services and expenses, incurred in the incorporation, exposes the rights and property of stockholders to the danger of spoliation through the machinations of promoters. *Maryland Apartment House Co.* v. *Glenn*, 108 Md. 377, 389, 70 Atl. 216; *Royal Casualty Co.* v. *Puller*, 194 Mo. App. 588, 186 S. W. 1099; *Schreyer* v. *Turner Flouring Co.*, 29 Or. 1, 43 Pac. 719.

The vote of adoption by the directors of the plaintiff, had it been within their authority, would have been a recognition that the defendant's services and expenses were a just claim against the plaintiff corporation.

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These the court has found to be of the value of $2,500, and this sum would thus have become a debt of the corporation after this vote.

In the absence of statute or vote of the corporation, there is no valid reason why the corporation could not issue, in good faith and for value, its stock in payment of services rendered and expenses incurred for it.

The plaintiff claims that under § 12 of the Corporation Act (Public Acts of 1903, Chap. 194) the stock could only be issued for cash or its equivalent, and that if paid for otherwise than by cash this must be placed upon the record book of the corporation, and as there is no such record it must follow that the stock was issued for cash. That does not logically follow. The statute requires that the stock should be paid for in full when issued. It imposes the duty upon the majority of placing upon the record the payments of stock otherwise than by cash. It does not, upon the failure of the directors to perform this duty, raise a presumption that it was paid for in cash.

The vote of the stockholders, that no stock other than a specified amount should be issued except for cash, was obligatory upon the board of directors. They could not by their vote override this and issue stock in payment for services; and an adoption by the corporation could not be found from a vote the board of directors were without authority to pass.

But the institution of this action and its maintenance for nearly two years, must be taken to be the act of the corporation. And this action is one to recover "the par value of these fifty shares of stock," as the plaintiff says in its brief. It is an action to compel the payment of the subscription price of this stock. It thus recognizes the issue of this stock and sues to recover its subscription price. The corporation cannot now be permitted to claim that the issue is invalid. The

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irregularity it might waive, and it has. And it took its action in full knowledge of the facts surrounding the issuance of the stock. Under these circumstances, as soon as this irregularity was waived by the bringing of this action, the adoption by the directors of this issue of stock in payment of services rendered and expenses incurred by the defendant became effective.

The rulings on evidence are controlled by the foregoing conclusions.

There is no error.

In this opinion the other judges concurred.

JOSEPH RICHARDS *vs.* INDIANAPOLIS ABATTOIR COMPANY ET AL. (INDIANAPOLIS ABATTOIR COMPANY ET AL. APPEAL FROM COMPENSATION COMMISSIONER.)

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

An injury to an employee may be said to arise "in the course of his employment" when it occurs within the period of his employment, at a place where he reasonably may be, and while he is reasonably fulfilling the duties of his employment, or is engaged in doing something incidental to it.

An employee after having worked outside in wintry weather for several hours, came in, and while awaiting his opportunity to use a freight elevator to carry up beef for his employer, sat down in front of the fire-box of the boiler, fell asleep, and a few minutes thereafter was awakened by finding his greasy clothing on fire. *Held* that upon these facts the commissioner, and the Superior Court upon appeal, properly ruled that the plaintiff's injury arose "out of and in the course of his employment," within the meaning of that expression in our Workmen's Compensation Act.

Submitted on briefs October 25th—decided December 15th, 1917.

APPEAL by the defendants from a finding and award of the Compensation Commissioner for the third dis-

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trict in favor of the plaintiff, taken to and tried by the Superior Court in New Haven County, *Warner, J.;* the court confirmed the action of the Compensation Commissioner and dismissed the appeal, and from this judgment the defendants appealed. *No error.*

The Commissioner found these facts: The plaintiff was a driver of the defendant employer, and on the day of the injury had been engaged in his employment from about six o'clock in the morning up to about twelve o'clock noon, during which his work had been hard. Shortly before noon the plaintiff came in from his route, did some duties about his employer's premises, and shortly after twelve o'clock started to take some beef upon an elevator which was used jointly by his employer and by another concern. The elevator was at that moment in use and was likely to be in use for a period of at least fifteen minutes. The course of duty of the plaintiff called for waiting until the elevator was free. While waiting for the elevator to become free, he sat down upon a nail keg about seven feet from the elevator and about four feet from a boiler used in connection with his employer's premises, and in front of the so-called fire-box of the boiler. The weather was cold, and the plaintiff sat upon the keg for the purpose of getting warm as well as for the purpose of waiting for the freeing of the elevator from other use. The sitting upon the nail keg while waiting for the elevator was a proper course of conduct on his part. The duties of the plaintiff involved carrying meat, and he properly wore an apron which naturally became greasy from the meat. There was no evidence as to whether the door of the fire-box was open or not. At the time he sat down, and also at the time of the injury, he was alone in that part of the premises. After sitting down, he dozed off and fell asleep, and a few minutes thereafter was awakened by finding himself

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afire. The falling asleep of the plaintiff was natural in the case of a man who had been engaged in hard work for the whole morning in the cold and who at the time was sitting in a hot place. The falling asleep was not the result of any conscious effort on the part of the plaintiff but came simply from drowsiness which crept over him as the result of his previous exertion, the cold to which he had been exposed, and the presence of the heat. Upon awakening he rushed out and the fire was extinguished by the efforts of fellow employees in another part of the building, after inflicting severe burns upon his legs. The fire in question resulted from the proximity of the plaintiff to the fire-box and boiler, and came either from the heat imparted by the fire-box or boiler, or from a flying bit of coal.

The defendants claimed that the injury did not arise out of and in the course of the employment. This claim was overruled by the Commissioner and by the court below.

Edmund Zacher and *William B. Ely*, for the appellants (defendants).

Frederick L. Perry and *Alfred W. Weil*, for the appellee (plaintiff).

RORABACK, J. Generally speaking, "an injury to an employee may be said to arise 'in the course of his employment,' when it occurs within the period of his employment, at a place where he reasonably may be, and while he is reasonably fulfilling the duties of his employment, or is engaged in doing something incidental to it." *Larke* v. *Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 97 Atl. 320; *Mann* v. *Glastonbury Knitting Co.*, 90 Conn. 116, 119, 96 Atl. 368.

The controlling question here presented is whether

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Richards, the plaintiff, when injured, was actually doing the work he was employed to do, or whether he was doing something substantially different. He was injured while on duty, in his working hours, when waiting for an opportunity to continue his service of employment. The accident occurred when the plaintiff was at a place where he might reasonably be. There was no turning aside upon his part, no attempt to serve ends of his own.

The fact that he fell asleep, under the circumstances set forth in the finding, was not decisive of his claim. This at the most was negligence, and our Compensation Act of 1913 expressly provides that in an action to recover damages for injuries sustained by an employee, arising out of and in the course of his employment, it shall not be a defense that the injured employee was negligent.

There is no error.

In this opinion the other judges concurred.

ISRAEL W. GOLDFARB ET AL. *vs.* JACOB COHEN.

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Under the rules (Practice Book, p. 247, § 155d) a plaintiff has the right to file an amended complaint within twenty days after a demurrer to the original complaint has been sustained.

A demurrer, although in form addressed to the whole complaint, is properly overruled if it reaches only one of two or more separate causes of action therein alleged.

In a so-called written guaranty the defendant promised to be responsible to the plaintiffs for $1,275, the contract price for electrical work on three houses which were being built for one Ruderman,

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"in the event of there not being enough money fifty days after the entire completion of the three houses." *Held* that the completion of the houses was not a condition precedent to the existence of the defendant's liability, but merely fixed the date at which the ability of the premises to respond to the plaintiffs' demand was to be ascertained; and that inasmuch as the houses after having been partly destroyed by fire were not completed but were abandoned to a mortgagee, the impossibility of the plaintiffs getting their pay out of the houses thereupon became an accomplished fact.

The amended complaint counted not only on the guaranty, but also charged the defendant with liability as the real owner of the houses and the undisclosed principal in the plaintiffs' contract with Ruderman. In this aspect of the case the defendant insisted that there could be no recovery until the contract had been fully performed, and that the destruction of the plaintiffs' work by fire before its completion cast the loss upon them. *Held* that this contention was inapplicable; that the action was not on the contract but on the promise which the law implied where the full performance of the special contract had been prevented by the fault of the person for whom the work was to be done.

A contractor working on a structure which is owned by his employer and the continued existence of which is essential to the full performance of the contractor's work, is entitled to recover the value of his work and material which have become a part of the building before its destruction by fire, if destroyed without his fault and before the completion of his contract.

The case of *School District No. 1* v. *Dauchy*, 25 Conn. 530, distinguished.

One who is in fact the secret owner of buildings for work upon which he appears as a mere guarantor, is liable to the contractor, after the latter discovers that fact, either as owner or as guarantor.

Evidence of statements made by the defendant when the written guaranty was delivered were received to show the circumstances under which it was given, and as tending to show that the defendant was the real owner of the premises. *Held* that there was no error in this ruling.

Inquiry was made of Ruderman as to whether the houses were insured and whether the fire loss had been paid. *Held* that these questions were relevant, and that while the finding did not show what, if any, answer was made to the latter question, a negative answer, if made, supplied a reason for the abandonment of the property to the mortgagee and also a basis for an inference that the inability to collect the insurance, and therefore to complete the houses, was due to some fault or neglect of the owner.

Ruderman was asked what the value of the property was as far as the buildings had progressed at the time of the fire. *Held* that this question was properly excluded, the plaintiffs having had no op-

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portunity to redeem before the fire and not being bound to redeem at any time.

Argued October 25th—decided December 15th, 1917.

ACTION to recover for labor and material furnished in doing electrical work on buildings which were alleged to have been owned by the defendant, and for which he was also a guarantor, brought to the Superior Court in New Haven County where a demurrer to the amended complaint was overruled (*Gager, J.*) and the cause was afterward tried to the jury before *Tuttle, J.*; verdict and judgment for the plaintiffs for $959, and appeal by the defendant. *No error.*

The plaintiffs entered into a contract with one Ruderman to furnish materials and perform work as electrical contractors on three houses then under construction, and in so doing they relied on a writing, signed by the defendant, in the following form: "This is to certify that I, Jacob Cohen of New Haven Lumber Company, will be responsible to Goldfarb and Schultz for the amount of twelve hundred and seventy-five dollars ($1,275) contract price on the three houses which is being built on Lake Place by Samuel Ruderman, in the event of there not being enough money fifty days (50) after the entire completion of the three houses. Jacob Cohen."

Plaintiffs had put about $900 worth of labor and materials into the houses when they were partly burned. After the fire a foreclosure suit was brought by the first mortgagee, to which both the plaintiffs and the defendant were parties as lienors, and the premises were redeemed by a subsequent incumbrancer, who took title and possession and employed other electrical contractors. The plaintiffs have never been paid, and by reason of the failure of Ruderman and of the defendant to redeem the premises, have been pre-

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vented from completing their contract, although able and willing to do so.

The original complaint was based wholly on the writing above quoted, and a demurrer to the complaint was sustained on the ground that it did not allege the completion of the houses, or that there was not money enough fifty days thereafter. An amended complaint was then filed charging the defendant with liability not only on the written instrument, but also as the real owner of the houses and the undisclosed principal in the plaintiffs' contract with Ruderman. A demurrer to the amended complaint based on substantially the same grounds as before, was overruled. The defendant answered, admitting the execution of the writing, the partial destruction of the houses by fire, and the failure to complete the houses or redeem the premises, but denying all the other allegations of the complaint.

The jury returned a verdict for the plaintiffs which, under the instructions of the court, may have been based either on a finding that the defendant was liable as owner of the houses and as undisclosed principal in the plaintiffs' contract with Ruderman, or on a finding that the defendant was liable only as a surety or guarantor.

The defendant appeals from the refusal of the court to set aside the verdict, and for alleged errors in permitting the plaintiffs to file the amended complaint, in overruling the demurrer to the amended complaint, in omitting and excluding evidence, and in charging and refusing to charge the jury.

Benjamin Slade, for the appellant (defendant).

Charles S. Hamilton, for the appellees (plaintiffs).

BEACH, J. The court did not err in granting the plaintiffs' motion for leave to file the amended com-

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plaint. In fact no motion was necessary, for the amended complaint was filed within twenty days after the demurrer to the original complaint had been sustained. Practice Book, § 155 (d), p. 247. No attempt was made to separate and strike out the cause of action based on the written instrument, which had already been successfully demurred to. The demurrer to the amended complaint was based substantially on the ground that the written instrument, which for the sake of brevity may somewhat inaccurately be called a guaranty, expressed the entire obligation of the defendant, whether as owner or as guarantor, and that it created no obligation on the part of the defendant until the expiration of fifty days after the entire completion of the houses.

The demurrer was properly overruled, because, although addressed to the whole complaint, it does not reach the cause of action based on the defendant's ownership of the premises. As owner and as the undisclosed principal of Ruderman, the defendant was liable on the plaintiffs' contract for electrical work and supplies, and also on the implied obligations arising out of that contract irrespective of the written guaranty.

We also hold that the amended complaint states a good cause of action upon the guaranty, notwithstanding the lack of any sufficient allegation that the houses had been completed. So far as the guaranty is concerned, the complaint rests the defendant's liability, not upon the completion of the houses, but upon the allegation that without the plaintiffs' fault and solely because Ruderman abandoned the completion of the houses, the plaintiffs were prevented from getting any money out of them.

According to the amended complaint, the guaranty was demanded because Ruderman's personal credit

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was unsatisfactory, and the plaintiffs were unwilling to proceed with the work without some better security than that which their right to a mechanic's lien would afford. The purpose of the written guaranty was to give them this additional security. The substance of the agreement is that the defendant will be responsible in case the plaintiffs cannot get their pay out of the houses, and the phrase "fifty days after the entire completion of the three houses," does not create the contingency upon which the guaranty shall become effective, but merely fixes the date at which the ability of the premises to respond to the plaintiffs' demand shall be ascertained. As guarantor, and in that character only, the defendant had no interest in the entire completion of the houses except as fixing such date. This is not a case where time is of the essence of the contract, for neither party agrees to do anything at or before the date named. The phrase in question merely fixes a date at which a fact is to be ascertained, and the date is fixed with reference to the expectation of the parties that a third person, Ruderman, will complete the houses. The houses were not completed, but abandoned to a mortgagee, and because they were not completed, the very fact to be ascertained—namely, that the plaintiffs could not get their pay out of the houses—became a fact accomplished. Under these circumstances it would defeat the primary purpose for which the guaranty was given, to hold that the completion of the houses was a condition precedent to the existence of any liability on the defendant's part.

This same claim, that the defendant could not become liable as guarantor unless and until the houses were completed and then not until fifty days thereafter, underlies all of the assignments of error which are directed to those portions of the charge dealing with the defendant's liability as guarantor. For the

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reasons already given, assignments of error numbered 10, 24, 42 and 43 are overruled.

Assignments of error 26 to 41, inclusive, involve the same claims, and in referring to those reasons of appeal the defendant's brief complains that the court repeatedly told the jury that it was the duty of the defendant to redeem the premises and complete the houses. This is a misinterpretation of that part of the charge which correctly states that the plaintiffs could not be deprived of the value of their materials and labor simply because the owner of the houses (whether Ruderman or the defendant) neglected or omitted to complete them. The court also observed that the neglect to redeem and complete the houses was "a sufficient admission that there was no money to pay the plaintiffs," and the brief objects to this phrase. It is immaterial whether the characterization of the defendant's conduct as an admission is correct or not, because, as already pointed out, the necessary effect of the decree of foreclosure was to make it impossible for the plaintiffs to get their pay out of the houses; and that being the indisputable fact, it makes no difference whether the defendant admitted it or not. The claim that the plaintiffs themselves were for any reason bound to redeem is plainly unsound, for the very purpose of the guaranty was to give them some other security than their lien upon the houses.

We come now to the assignments of error based upon the assumption that the defendant is the real owner of the premises. Assignments of error numbered 11 and 12 are based on the refusal of the court to charge in substance that there can be no recovery on an entire contract until it has been fully performed, and that the destruction of the plaintiffs' work by fire before its completion, cast the loss upon the plaintiffs. These requests were properly refused. The action here is

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not on the contract, but on the promise which the law implies in cases where the full performance of a special contract is prevented by the fault of the person for whom the work was to be done. *Valente* v. *Weinberg*, 80 Conn. 134, 135, 67 Atl. 369, and cases cited. The findings do not show that the plaintiffs' work was destroyed by the fire. Even if they did, the rule in *School District No. 1* v. *Dauchy*, 25 Conn. 530, on which the defendant relies, does not apply to the case of a contractor employed to do work upon an existing structure, which is already the property of the employer, and whose continued existence is essential to the full performance of the work. In such cases one of the implied conditions of the contract is that the building should continue to exist, and if it is destroyed by fire, without fault of the contractor, before the work is completed, the contractor may recover the value of the work and material which had become a part of the building before its destruction. *Angus* v. *Scully*, 176 Mass. 357, 57 N. E. 674.

Assignments of error 13 and 25 raise the additional claim that the defendant, even if the real owner of the houses, was liable only under the written guaranty, on the theory that all implied obligations of the defendant were merged in or excluded by the delivery and acceptance of the written obligation. It is, however, too plain for argument, that if the defendant, while holding himself out as a mere guarantor, was in fact the secret owner of the houses, the plaintiffs could, on discovering that fact, hold him liable either as owner or as guarantor.

Assignment of error numbered 44 relates to the part of the charge wherein the court pointed out that on the defendant's own construction of the guaranty, it must necessarily have been understood that the houses were to be reserved for the payment of the obligations on

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them, and then called the attention of the jury to the fact that the defendant had admitted receiving from Ruderman $2,000 of the proceeds of a building loan secured by mortgage on the premises, and had admitted applying this sum to the payment of the debt which Ruderman owed him for lumber supplied for another building on another street. This part of the charge was not erroneous in point of law, and it appears to have been justified in point of fact by the testimony quoted on the defendant's brief. It was also plainly relevant comment on the issue of the actual ownership of the premises.

The court did not err in refusing to set aside the verdict. There was plenty of evidence from which the jury might reasonably have inferred that the defendant was the real owner of the premises.

The testimony of Goldfarb as to the conversation he had with the defendant at the time when the written guaranty was delivered, was admissible to show the circumstances under which it was given, and also as tending to show that the defendant was the real owner of the premises.

The question asked of the witness Skerrit on cross-examination, "Now, you would like to see Cohen lose this case, wouldn't you?" was improper in form and rightly excluded.

The questions asked of Ruderman, whether the houses were insured and whether the fire loss had been paid, were relevant. It does not appear from the finding whether the latter question was answered, but if answered in the negative, it supplied a reason why the owner (whether Ruderman or Cohen) abandoned the property to the mortgagee. The jury might also properly infer from such an answer, and in the absence of any other testimony on the subject, that the inability to collect the insurance, and therefore the

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ability to complete the houses, was due to some fault or neglect on the part of the owner.

The question asked of Ruderman, "What was the value of the property as far as you had gone with it before the fire?" was properly excluded. The plaintiffs had no opportunity to redeem until after the fire, and they were not bound to redeem at any time. The other assignments of error are not pursued on the brief.

There is no error.

In this opinion the other judges concurred.

JOSEPH B. MORSE, TRUSTEE, *vs.* BROWNLEE ROBERTSON WARD ET ALS. (JOSEPH B. MORSE, TRUSTEE, APPEAL FROM PROBATE).

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

A decree touching separate and distinct matters, if erroneous as to one of them only, may be upheld as to the others.

A decree of a Court of Probate required a trustee to file his final account, and to turn over the balance of the fund to a certain person named therein. *Held* that these orders were separate and distinct, and that the one relating to the final account was valid and legal, even if, as the parties agreed, the Court of Probate exceeded its powers with respect to the other.

The broad general authority conferred upon Courts of Probate to require testamentary trustees "to account for and concerning the estates intrusted to their charge" (General Statutes, § 191), is not limited or restricted by the provision in § 383, that such trustees shall file annual accounts.

The "final account" of a testamentary trustee necessarily precedes the disposition of the trust fund, and does not involve a determination of those who are to take it thereafter, though when those are known the trustee may make distribution to them and file a report thereof.

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The jurisdiction of the Court of Probate over a testamentary trust fund and of the accounts of the trustee, continues until the approval of the final account, the ascertainment of those who are to take the trust property, and the return of its distribution to them by the trustee has been filed and accepted.

A testamentary trustee cannot justify his disobedience of an order of court requiring him to file his final account, merely because the order also directed him to turn over the fund to one to whom, as the trustee was advised by counsel, it did not belong; as his first duty is obedience and an appeal from the decree affords him ample protection.

Argued October 26th—decided December 15th, 1917.

APPEAL by the plaintiff from an order and decree of the Court of Probate for the district of Bridgeport removing him as trustee under the will of Lucinda J. Ward of Bridgeport, deceased, taken to and tried by the Superior Court in Fairfield County, *Curtis, J.*; facts found and judgment rendered setting aside the order and decree of the Court of Probate, and appeal by the defendant Brownlee R. Ward. *Error and judgment reversed.*

Lucinda J. Ward died in Bridgeport on April 14th, 1901, leaving a will and codicil, which were duly admitted to probate, in which the bulk of her estate was left in trust for the benefit of her three designated sons, and upon the death of the last survivor of these three the trustees were required to pay over the trust estate to "the heirs at law of my said three sons according to the laws of distribution of intestate estates in the State of Connecticut."

The plaintiff, Morse, was one of the trustees named under this trust, and duly qualified, and continued as such trustee until removed as hereinafter set forth.

The last surviving son died on March 16th, 1916, and on May 18th, 1916, Brownlee R. Ward brought his application to the Court of Probate for the district of Bridgeport, and upon hearing thereon the court

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ordered that the trustee make his final accounting on or before June 10th, 1916, and turn over and distribute the trust fund to the applicant.

Morse did not file any account of his trust, and on June 17th, 1916, the Court of Probate ordered Morse to appear on June 22d, 1916, and show cause why he should not be removed. Morse filed a response to the order to show cause, setting up that he had been advised by counsel that he could not distribute the estate or pay over the corpus thereof to any person without having had the advice of the Superior Court as to the construction of the will and a determination to whom the estate should pass; and, further, that he proposed to procure such adjudication, and, within the time limited by statute, to appeal from the order determining to whom the estate should be distributed and requiring him to distribute and pay over the entire corpus of the trust to Brownlee R. Ward. The trustee further alleged that the Court of Probate was without legal authority to order an accounting by him, in addition to those already filed, until the time fixed by statute for the annual accounting.

Morse had been so advised by counsel; and prior to June 3d, 1916, and on this day, the trustee stated to the court the ambiguity of the will and the divergent claims made by Brownlee R. Ward and Harriet M. Ward, and his purpose, by advice of counsel, to seek a construction of the paragraph in dispute.

On July 3d, 1916, Morse filed, under protest, an account of all his doings as trustee between the date of his last account, approved of by the court, and up to March 16th, 1916, the date of the death of the last surviving beneficiary under the will. In his response Morse reserved the right to question the power of the court to order such accounting.

On the third day of July, Morse appeared before the

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Court of Probate and admitted that as such trustee he had subsequent to March 16th, 1916, received and disbursed assets of the trust estate, but declined to render, and has not since rendered, any account thereof.

On July 10th, 1916, the Court of Probate, after hearing had, found that the trustee had disobeyed its order to file his final account as trustee, in that he had submitted an account which was not final and did not show the entire debit and credit items of the trust fund subsequent to February 7th, 1916, and thereupon passed an order removing Morse as trustee, and appointed a trustee in his stead.

Morse believed the orders of June 3d were indivisible orders, and in what he did acted under advice of counsel and in good faith. On July 3d, 1916, Morse, trustee, appealed, and the widow of the last survivor, Harriet M. Ward, appealed from the decree ordering the trustee to turn over to Brownlee R. Ward the entire trust estate.

William H. Comley, Jr., for the appellant (defendant Ward).

Robert H. Gould, for the appellee (plaintiff).

WHEELER, J. The parties agree that the Court of Probate exceeded its powers in ordering the delivery of the residue of the trust estate to Brownlee R. Ward, when the trustee and one of the claimants to the fund had made clear their intention to procure a construction of the will in order to determine who was entitled to the fund. Whether under other circumstances the court might have issued this order, we need not now inquire.

The court decreed (1) that the trustee file his final account, and (2) that he pay over the trust estate to

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Brownlee R. Ward. The trial court held that the orders of this decree were indivisible, and as one part was bad the whole was bad. If the decree was entire, the trial court was correct in its conclusion: if the decree was divisible, that part into which the error did not enter is good. *Selleck* v. *Rusco*, 46 Conn. 370, 373.

We think the court was in error in holding the parts of the decree indivisible. The subject-matters incorporated in this decree are entirely separate; each is independent of the other, and neither has relation to the other. While the two subjects are grouped in one decree, they are in form as separated as if they had been separate decrees instead of separate orders in one decree. No practical difficulty is apparent which would prevent the sustaining of one part of the decree as legal while holding another part illegal.

The trustee further claims that under General Statutes, § 383, the Court of Probate had the power to require of him as testamentary trustee the filing of an annual account, and that its power, except as to the filing of a final account, was exhausted by the requirement of the annual account, and as no annual account was due from him he was not in default.

The General Assembly, in 1881 (Public Acts of 1881, Chap. 36), conferred upon the Court of Probate for the first time the power to compel testamentary trustees to account, and to adjust and allow their accounts. Later, Chapter 110 of the Public Acts of 1885 specifically imposed upon the court the duty of requiring the filing of annual accounts by such trustees. In the Revision of 1902, § 191, Courts of Probate are given power to call trustees "to account for and concerning the estates intrusted to their charge," while § 383 imposes upon the court the duty of requiring annual accounts and specifies what they shall embrace. We think the broad provision of the Act of

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1881, retained in General Statutes, § 191, by itself gave the Court of Probate complete power, in the exercise of its reasonable discretion, to call upon the trustee at any time to file an account of his trust. General Statutes, § 383, was intended primarily to impose upon the trustee the statutory duty of filing his account annually, and upon the court the duty of seeing that this requirement was observed. It did not add to the power already possessed by the court, nor limit its power to require the filing of such accounts at its discretion. It merely provided for the filing once a year of an account. In ordinary cases this would be a sufficient supervision, but cases will arise which will make it indispensable that the court shall exercise its supervisory power over testamentary trustees by requiring additional accounts. It is not to be supposed that it was intended to leave such trusts and such trustees free from the supervision of the court in the period between annual accountings.

The trustee further claims that the decree of the court called for the filing of a final account, and that this order was pursuant to the provisions of Chapter 125 of the Public Acts of 1911, and that a final account is one which specifies to whom the trust fund is payable, and that Morse could not be compelled to file a final account until some court of competent jurisdiction had determined to whom the trust estate was payable. Public Acts of 1911, Chapter 125, specifically vests in the Court of Probate jurisdiction over the final accounts of testamentary trustees, and authorizes it "to hear, allow, and settle such final accounts." Whether this added anything to the power conferred by the Act of 1881, may be open to question, but together they settle beyond dispute the right of the Court of Probate to pass on all final accounts.

The trustee now insists that a final account is the

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final conclusive step preliminary to distribution, and cannot be required until "there has been a final determination of the residuary heirs and when ordinarily all other steps in administration have been taken," and should include a "payment or delivery of the property over to the persons entitled to it." This involves a contradiction. The account must precede the distribution, and upon its allowance the amount remaining for distribution is first known. When those to whom the trust belongs are known, the trustee may, after his final account, make distribution to these beneficiaries and thereafter file his account showing such payments. The account which precedes distribution is in our practice called a final account, and it was in such sense the statute of 1911 uses the term final account, and in such sense the Court of Probate used this term in its order. And it precedes and is the basis for the order of distribution. *Bancroft* v. *Security Co.*, 74 Conn. 218, 223, 50 Atl. 735.

Protesting the court's power to order him to account, the trustee filed an account of his trust from the date of his last annual account up to March 16th, 1916, the date of the death of the last of the *cestui que trust*. He refused to file his account beyond this date upon the theory that the court had no jurisdiction over the trust after that date. That is a palpably erroneous position. The court had control of the trust until the trustee had had his account approved, the persons to whom the trust estate should be turned over ascertained, and the trustee's return of the distribution made had been approved.

The trustee was ordered to file his final account on June 10th, 1916. Reasonable compliance with that order required that he file his account of the condition of the estate down to substantially June 10th, 1916. The account filed did not represent the condition of

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the estate on June 10th, 1916, for the trustee admittedly received income and made disbursements after March 16th, 1916. The order of the Court of Probate, that the trustee file his final account, was made within the court's jurisdiction and in the performance of its statutory duty. The trustee refused to comply with the order. He is not relieved from the burden of his default by having acted in good faith and upon the advice of counsel. Obedience to the order of the court was the trustee's first duty. An appeal would have protected his every right.

There is error, the judgment is reversed and the cause remanded with direction to the Superior Court to enter judgment in favor of Brownlee R. Ward on the appeal from probate.

In this opinion the other judges concurred.

JOHN S. SEYMOUR *vs.* THE CITY OF NORWALK.

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

A judgment-file which recites that "the issues" are found for the prevailing party, is equivalent to a finding that all the material issues are so found.

Only errors which affect the validity of the judgment rendered are entitled to consideration by this court.

The allegations of a complaint are to be interpreted in the light of a "more specific statement" made by the plaintiff, and the denials of the answer, subsequently filed, are to be given a like interpretation and coextensive effect, although the answer does not expressly refer to such statement.

Matters which, if material at all, are evidential only, may very properly be expunged from a pleading.

Argued October 30th—decided December 15th, 1917.

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ACTION to recover for professional services as an attorney at law under an alleged agreement with the defendant, brought to the Superior Court in Fairfield County where the plaintiff's demurrer to the answer "by way of further defense" was overruled (*Webb, J.*) and the cause was afterward tried to the court and judgment rendered (*Reed, J.*) for the defendant, from which the plaintiff appealed. *No error.*

The complaint alleges that the plaintiff, being an attorney at law, rendered services as such for the town of Norwalk at the request of the town, under an agreement that the plaintiff should charge and the town pay his reasonable fees, disbursements, and expenses; that the defendant city by its charter had assumed and agreed to pay all the obligations of the town, and that plaintiff had not been paid.

From a more specific statement, filed by order of court, it appears that the plaintiff claimed to have been originally employed by a committee appointed at a town meeting held in 1910 for the purpose of acting upon the proposed construction of a permanent bridge and park, and that he rendered the services enumerated in the more specific statement as counsel to this committee and to its successor, the Washington Street Bridge Construction Committee, created by Special Act of the General Assembly in 1911.

The defendant answered through the last-named committee, denying the allegations of the complaint, except that the plaintiff was an attorney at law, that it had succeeded to the obligations of the town, and that it had paid nothing to the plaintiff. By a so-called further defense the defendant also alleged that the town could not lawfully contract as alleged except through its selectmen, and that the Washington Street Bridge Construction Committee (which did have full power in the premises) did not come into existence

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until 1911, and denied that the last-named committee ever employed or ratified the employment of the plaintiff. The plaintiff demurred to the further defense, and, on the overruling of the demurrer, filed three replies to the further defense, denying its allegations, and alleging affirmative matters which were in turn denied by the defendant's rejoinders.

The parties went to trial on all the issues thus joined, and judgment was rendered for the defendant, from which this appeal is taken. The reasons of appeal relate only to the rulings of the court in ordering a certain exhibit to be expunged from the more particular statement, and in overruling the demurrer to the further defense.

John S. Seymour, for the appellant (plaintiff).

John J. Walsh and *John H. Light*, for the appellee (defendant).

BEACH, J. The record contains no memorandum of decision on the merits, and no finding of facts either in the judgment-file or for the purpose of appeal. The only intimation as to which of the many issues of fact were actually litigated and determined, comes from the recital of the judgment-file that the court, having heard the parties, "finds the issues for the defendant." Under Rule 197 (Practice Book, p. 258) this form of judgment-file is equivalent to a finding that all the material issues are found for the prevailing party, and we are bound to assume that the court so found in this case. *Wilson* v. *Cheshire Brass Co.*, 88 Conn. 118, 122, 89 Atl. 903, and cases cited. That being so, the reasons of appeal based on the overruling of the demurrer to the so-called further defense, more properly to be called a second defense, invite us to pass upon

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questions of law which, even if decided in the plaintiff's favor, would not affect the validity of the judgment.

The finding for the defendant of the issues raised by the first defense, which denies all the allegations of paragraph one of the complaint except that the plaintiff is an attorney at law, is decisive of the case, for the contract of employment alleged in paragraph one of the complaint lies at the foundation of the plaintiff's claim. The first defense does not in terms refer to the more specific statement, but the statement was filed before the answer, and the denials of the answer are necessarily coextensive with the allegations denied, as interpreted and made more specific by the statement.

In view of the earnestness with which it was argued that the case was not decided on its merits, it is unfortunate that no finding of facts for the purpose of appeal was asked for. But, as the record stands, the judgment-file necessarily imports a finding of fact that the plaintiff was not employed as alleged in paragraph one of the complaint, and that finding, standing unquestioned on this appeal, is sufficient of itself to support the judgment.

The court did not err in ordering Exhibit A to be expunged from the more specific statement. As indicated by its title—"The story of the bridge to date,"—it is not an official statement of the facts, and it does not purport to contain the records of any committee or town meeting. If material at all, it is only as evidential matter, and for all that appears it may have been admitted at the trial.

There is no error.

In this opinion the other judges concurred.

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THE MAX AMS MACHINE COMPANY *vs.* INTERNATIONAL ASSOCIATION OF MACHINISTS, BRIDGEPORT LODGE No. 30.

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

A recovery for expenditures made by a manufacturer whose workmen were out on strike, for special officers, watchmen and guards for the protection of the plant and its equipment, because of the alleged illegal acts and conduct of the strikers, should be limited to those incurred prior to the commencement of the action.

It is to be assumed that strikers will conform to the terms of an injunction order forbidding the commission of specified illegal acts by them, and therefore their former employer cannot recover for expenses incurred by him for protecting the plant, in the absence of competent evidence that the defendants have in fact continued to commit, or threatened to commit, such illegal acts after the issuance of such order.

While mere hearsay evidence or rumor that the strikers are to continue their illegal acts, may be sufficient to justify the employer, acting in his own interest and from his own standpoint, in continuing his expenditures for special officers and guards, it does not furnish a basis for charging such expenditures to the strikers; to accomplish that result, the plaintiff must prove that the striking defendants, or some of them, by their acts, conduct, speech or otherwise, furnished reasonable ground for the belief that past wrongdoing was to be continued notwithstanding the injunction.

Acts, words, or conduct, to constitute agencies of coercion, as the law employs that term, must not only be calculated to induce one to act against his free will and judgment, but must also be intended to so operate.

A plaintiff is entitled to nominal damages at least, if a previous determination of the equitable issues in the case has necessarily adjudicated in his favor all the facts upon which his claim for damages rests.

Orders for goods signed by a rubber stamp may be shown to be authentic or genuine by other evidence than their signatures, and prima facie proof of their authenticity is all that is required to render the orders admissible in evidence.

Argued October 26th—decided December 15th, 1917.

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SUIT to restrain the defendants from interfering with the business of the plaintiff by patrolling, picketing or loitering upon or near the streets or paths leading to its manufacturing plant, for the purpose of preventing by threats, intimidation or otherwise, persons from entering into its employment or from continuing therein, and for damages, brought to the Superior Court in Fairfield County where a temporary injunction was granted (*Gager, J.*) and later, by agreement, a permanent injunction, and the claim for damages was afterward tried to the jury before *Bennett, J.;* verdict and judgment for the plaintiff for $5,000 damages, and appeal by the defendants for alleged errors in the rulings and charge of the court. *Error and new trial ordered.*

The plaintiff is a manufacturing corporation operating its plant in Fairfield, just outside of the limits of Bridgeport. The defendants are a labor union and three individuals, one being the business agent of the union and the other two its members. The complaint alleges that the defendants conspired to do, and in the prosecution of the conspiracy did, various unlawful and harmful acts to the plaintiff and concerning the conduct of its business, in order that it might be compelled, against its will and in compliance with their demands, to discharge one of its employees and reinstate another who had previously been employed by it. The unlawful and harmful acts complained of were incidental to, and the attendants of, a strike which the defendant union had declared, and were participated in by its members, including the individual defendants. Among the persons so participating were all of the plaintiff's employees who were members of the union. Their acts included, as alleged, the picketing of the plaintiff's plant and its approaches, threatening, following, and systematically annoying with

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opprobrious epithets and insulting remarks and in other ways, even to the extent of using personal violence, seeking to intimidate its employees who refused to go out, members of their families, and persons seeking employment. These acts, it is alleged, were done for the purpose of preventing the plaintiff from procuring and retaining workmen, interfering with the efficient conduct of its business, and, through the harm and damage thus caused, coercing it to accede to the demands made upon it. These acts, it was alleged, resulted in great damage to the plaintiff in the loss of business and business profits, the cost of advertising for workmen to enable it to operate its plant efficiently, and the expense incurred in the hiring of special officers, watchmen and guards for the protection of its property and employees. Both equitable and legal relief were asked for; the first by way of both a temporary and permanent injunction restraining the unlawful acts, and the second by an award of damages.

An order to show cause why a temporary injunction should not issue, having been made after the return of the case, a hearing was had thereon. The court found that the acts complained of, save only those involving actual personal violence, had been and were being committed by the defendants as, and for the purpose, charged in the complaint, and issued a temporary injunction forbidding the further picketing of the plaintiff's premises and the further doing of the several acts complained of. Later, counsel filed a stipulation that a permanent injunction might issue, in form to be determined by the court after argument. Following such argument, the temporary injunction was made permanent. The case was then claimed for trial upon the claim for legal relief. This was had to the jury. The questions here presented all grow out of that trial.

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Hugh J. Lavery, with whom was *Lawrence S. Finkelstone*, for the appellants (defendants).

Ralph O. Wells, for the appellee (plaintiff).

PRENTICE, C. J. The plaintiff, under the instructions of the court, was permitted to recover for the expenditures incurred by it in the employment of special officers, watchmen and guards, from the time the picketing began down to a time about four months after the action was commenced, and two months after the temporary injunction was issued, when that employment ceased. It is apparent that this was irregular, in so far as the period subsequent to the beginning of the action was concerned. But the course pursued was taken without objection on the part of defendants' counsel, whether in the course of the admission of testimony or otherwise, that there could be no recovery in the action for expenditures so incurred after its commencement, and it is not complained of either in the reasons of appeal or in the brief or argument before us.

The first reason of appeal, indeed, does assert that the court erred in admitting evidence of payments made for the services of the officers and guards subsequent to the issuance of the temporary injunction. This claim, however, as clearly appears in the brief and argument of counsel, is not one based upon the fact that the right of action for them had not accrued when the action was begun, but upon the broader and more fundamental proposition that there could be no recovery in any event for expense incurred for protective purposes after the restraining order was issued, in the absence of proof that the plaintiff was justified in charging the same to the defendants by reason of acts or conduct on their part in violation or threatened

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violation of the injunction, or of acts or conduct of theirs indicative of a purpose entertained by them not to observe it and not to desist from conduct in disregard of the plaintiff's rights.

Upon the subject of this expense the court's instructions were quite correct, in so far as it charged that to justify the plaintiff's recovery of them it must appear that they were caused by the action of the defendants. But that statement was immediately followed by language which must have left the jury in the belief that recovery could be had by the plaintiff if its officers and agents, as ordinarily prudent men, were reasonably justified in the continuance of the employment of the officers and guards by reason of the conditions which had been created by the strike and the defendants' conduct in conducting it, quite apart from their attitude and conduct following the issuance of the injunction. The question the jury was called upon to decide was not one as to the reasonableness of the action of the plaintiff's officers in employing guards from the standpoint of the company's interests. Such action might well have been eminently wise and prudent as a precautionary measure taken in the company's interest, and yet not one whose cost could properly be chargeable to these defendants. The plaintiff was bound to show not only that the course pursued was reasonably justified as a matter of prudent management of its property and affairs, but that it was one that was rendered reasonably necessary by the conduct of the defendants following the issuance of the injunction, or their attitude and disposition in respect to compliance with its terms.

The plaintiff had no right to assume that there was to be noncompliance, and, without any sort of proof of a purpose or disposition on the defendants' part to disregard the order, to incur expenditures for precaution-

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ary measures to meet such contingency to be charged to them. Suspicion or fear that the wrongful acts would continue, notwithstanding the injunction, whether that suspicion or fear grew out of past conditions or idle rumors as to the defendants' plans and purposes for the future, might well justify precautionary measures. But neither suspicion nor fear would furnish a basis for charging the cost of those measures to the defendants. Such a basis could only be supplied by proof of some action, conduct, words or attitude of the defendants, or some of them, furnishing reasonable grounds for a belief, suspicion or fear, that past wrongdoing was to be continued notwithstanding the injunction. Precautions taken under other circumstances, although dictated by prudence from the standpoint of the plaintiff, would be for it to pay for like any other expenditure in its interest. They would not be chargeable to the defendants if there was no other reason for them than that furnished by past conditions. The defendants were in duty bound to obey the restraining order and desist from further wrongful acts, and it was to be assumed that they would do so. Unless and until some indication was furnished by them that their intentions were otherwise, the plaintiff would have no right to incur expense to be charged to their account to meet such contingency.

This the charge permitted. That it did so, clearly appears from a passage in it immediately following and connected with the instructions just referred to. In this passage the jury's attention was called to the evidence offered and admitted of "rumors" concerning the defendants' intentions which had come to the plaintiff's knowledge, as disclosing the conditions under which it acted. The only evidence which could have been thus referred to, or which, in so far as appears, could have been pointed out in the testimony

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as disclosing information had by the plaintiff, was that more fully stated in the finding as "rumors, reports, newspaper statements and other items indicating and suggesting an intention on the part of the defendants and their co-conspirators to injure the property of the plaintiff and to continue to harass and annoy its employees." Included in this evidence were confidential reports coming from the Manufacturers' Association of the county, purporting to contain information obtained by or through some person or persons present at the meetings of the defendant union held subsequent to the issuance of the injunction.

All the evidence thus referred to by the court as showing the plaintiff's information prompting it to take the action which it did, was pure hearsay, and inadmissible for any other purpose than as tending to establish reasons for the plaintiff's action in safeguarding its property and interest as a prudent precaution from the standpoint of the corporation. It was inadmissible as proof of the truth of the matters embodied in the rumors, reports and statement, and therefore inadmissible against the defendants to show that they were contemplating or intending to act as stated therein, to wit, in disregard of the restraining order. It might furnish ample justification for the plaintiff's officers to use precautions in the corporate interest: it could not bind the defendants so as to make them chargeable with the expense of the precautions taken. Justification for such a course could only arise out of their acts, conduct, words or attitude established by competent proof.

There appears to have been no evidence of any sort to show, or tending to show, that these defendants did not strictly conform their conduct to the terms of the injunction, or that they planned or purposed otherwise, or that they indicated by word or act that they

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harbored such plan or purpose, save only as these hearsay rumors and reports might have been held to so indicate. Under the instructions of the court, therefore, the jury might well have accepted these rumors and reports as sources of the plaintiff's information, justifying not only the adoption of precautionary measures reasonably called for by the defendants' conduct, but also the charging of them to the defendants.

Concrete illustrations are afforded by the admission against the defendants' objections of the reports coming from the Manufacturers' Association already noticed, and which is made the subject of the second reason of appeal. These reports were admitted, not as affording proof that the facts detailed in them were true, but as disclosing information in the light of which the plaintiff acted in continuing the employment of special officers and guards. The reasonableness of the plaintiff's conduct in so doing, however, was not, as we have seen, the determining issue in the case which sought to impose upon the defendants the burden of the expense thus incurred. That determining issue was one as to whether or not the defendants, by their acts, conduct, speech or otherwise, furnished justification for the course pursued. The court's charge not only failed to observe this distinction, but even prepared the way for the jury to bring in a verdict which should include the expense incurred subsequent to the issuance of the injunction, in the taking of precautionary measures upon the strength of hearsay testimony alone.

The court, while enumerating the various means by which coercion might be practised, told the jury that any act, suggestion or annoyance which tends to operate upon one's fears or will, as distinguished from his reason, constitutes coercion. This passage, contained in one of the plaintiff's requests to charge and given to the

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jury in its entirety, was erroneous, in that it altogether ignored the important element of intent. Acts, words or conduct to constitute agencies of coercion, as the law employs that term, must not only be calculated to induce one to act against his free will and judgment, but also must be intended to so operate. *State* v. *Stockford*, 77 Conn. 227, 238, 58 Atl. 769.

The defendants' complaint, that the court erred in its instruction that in view of the adjudications made when the equitable issues were determined, the plaintiff was entitled to a verdict for nominal damages in any event, is not well made. *Cox* v. *McClure*, 73 Conn. 486, 491, 47 Atl. 757.

The plaintiff, for the purpose of showing business losses, offered in evidence certain orders bearing a rubber stamp signature, testified to as received and rejected by reason of the conditions created by the conduct of the strike. Their admission, although accompanied by other proof tending to establish their authenticity, was objected to on the ground that they were not properly authenticated. The plaintiff was not confined to the signatures for the establishment of their authenticity. Prima facie proof of genuineness was all that was required to render the orders admissible, and that was supplied by proof outside the signatures. *Deep River National Bank's Appeal*, 73 Conn. 341, 346, 47 Atl. 675.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

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WILLIAM R. BURKE *vs.* ESTATE OF PATRICK BURKE (ELIZABETH A. FREELAND'S APPEAL FROM COMMISSIONERS).

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Ultimate conclusions of fact drawn by the trial court will not be disturbed on appeal unless the subordinate facts are inconsistent therewith.

Personal services in planting, raising and harvesting crops for the joint or common benefit of the family, rendered by one of several adult children who, with their aged father, live together as one household upon his farm, are presumably gratuitous, in the absence of an express agreement of the father to pay therefor; and the same is true of moneys expended by such son for grain, feed, and labor performed on the farm, especially if the father, in operating the farm and in maintaining the entire family, spent several times the amount contributed by the son.

Argued October 30th—decided December 15th, 1917.

APPEAL by an heir at law from the allowance by commissioners upon the intestate estate of Patrick Burke of Danbury, deceased, of a claim presented against his estate by the plaintiff, taken to and tried by the Superior Court in Fairfield County, *Reed, J.;* facts found and judgment rendered disallowing the claim, and appeal by the plaintiff. *No error.*

George Wakeman, for the appellant (plaintiff).

Thomas M. Cullinan, for the appellee (Elizabeth A. Freeland).

RORABACK, J. Patrick Burke, aged seventy-five years, died at Danbury, Connecticut, June 14th, 1915, intestate, leaving an estate valued at about $15,000.

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William R. Burke, the present claimant, was a son of the deceased. William claims to recover from his father's estate $4,850. Of this amount, $2,160 was for personal services rendered; $1,250 for the use of horses, wagons and the like; and $1,440 for money paid and expended for grain, feed and materials, and for labor performed on the Burke farm.

The finding discloses, among other things, that subsequent to the death of his wife in 1907, Patrick Burke continued to live in his home upon his farm in Danbury. The following named children continued to live with him: Mary A. Lavin, a widowed daughter; the claimant, William R. Burke, an unmarried son; Emma Frances Burke, an unmarried daughter, all of whom were adults; and Thomas Lavin, a son of Mary A. Lavin. During a part of said period Henry Burke, a married son, also resided with him. All of them lived together as one family.

Patrick Burke never entered into any express agreement, either oral or written, with William, to pay him for services rendered or for money expended by him, nor were any services rendered or money expended under such circumstances as would imply such an agreement on the part of the deceased. William never told his father, and his father never understood, that he (William) intended to charge for the use of the team of horses owned by William, or for his services while working upon the farm. The services rendered by William, and the money paid, laid out and expended by him, were such as were reasonably to be expected from one standing in the relation of parent and child. Substantially all of such services as were rendered by the son in the planting, raising and harvesting of crops upon the lands of Patrick, were done for the joint or common benefit of himself, his adult brothers and sisters, and his father, and were not for the special

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benefit of the father. The work of planting, raising and harvesting the crops raised upon the land of Patrick Burke, during the six years preceding his death, was performed by men hired and paid by William.

At this time William lived in the dwelling-house on Patrick Burke's lands, ate at the common table, used the barns and outbuildings for housing his livestock, and used the products of the land for the maintenance of his livestock, without paying anything therefor except such services as he may have rendered or such moneys as he may have expended in the cultivation and care of the lands. For a portion of this time William was a teamster and employed with his team on municipal and other work. Patrick Burke derived no benefit or advantage from any services rendered or moneys expended by William, other than the same advantage and benefit enjoyed by William himself, and by his adult sisters and brother and nephew, who lived on his lands. William was not induced to render such services or expend money by any statement made or promise given by Patrick Burke to pay him for it.

The appellant makes no complaint that the facts found are not sustained by the evidence. He bases his objections on the deductions drawn by the court below from the facts disclosed by the finding. Ultimate conclusions of fact, drawn by the trial court, will not be disturbed on appeal unless the subordinate facts are inconsistent therewith. Such is not the present case.

In *Cotter* v. *Cotter*, 82 Conn. 331, 73 Atl. 903, this court held that "from the rendition of services and their voluntary acceptance the law will ordinarily imply a promise upon the part of the recipient to pay for them; but where the services are rendered by members of a family, living as one household, to each other, no such implication arises. In order to recover for such services the plaintiff must affirmatively show

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either an express contract to pay, or that the circumstances under which they were rendered were such as give rise to a reasonable and proper expectation that there would be compensation."

Applying these principles of law to this case, it is apparent from the character of the services rendered and the circumstances under which they were performed, as disclosed by the record, that no promise to pay can be implied for the services rendered by the son William.

But the claimant contends that the rule of law applicable to his claim for services does not apply to his claim for money paid, laid out and expended. It is insisted that as a general rule, if one has paid money for the benefit of another which the latter was legally bound to pay, and has done so for a reasonable cause and not officiously, he can recover the amount of the party for whose benefit it was paid.

This proposition of law is undoubtedly correct, but the difficulty is that it is not applicable to the circumstances of the case now before us. It was not enough for the claimant, William, to show, as the trial court found, that he had paid $1,440 for labor performed upon his father's farm during a period of six years prior to his father's death. These parties were all living together upon this place as father and children, and receiving mutual benefits for the services which they rendered and the expenditures which were made. William, the son, well knew the legal status of the different members of the family. He could not rely upon any apparent legal and necessary dependence upon the father, of those with whom he was living. They were adults and capable of providing for themselves. It certainly cannot be said that these expenditures made by William were for the individual benefit of his father, nor for any one whom the father was

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legally bound to maintain. It is to be noticed that the trial court has found that the deceased, Patrick, during the six years before his death, expended about $5,500 which was largely used in the operation of his farm and in the support of the entire family.

From this and other facts which are fully set forth in the finding, the law cannot imply an agreement to pay, but will presume that these payments by the son were gratuitous, or that, at least so far as the father was concerned, William had been fully compensated for the money expended, by that which he received in his support and from the products of the farm.

There is no error.

In this opinion the other judges concurred.

SARAH PINS *vs.* THE CONNECTICUT COMPANY.
GEORGE PINS *vs.* THE CONNECTICUT COMPANY.

Third Judicial District, Bridgeport, October Term, 1917.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

While the occupants of a street-railway car are being guided by its conductor through a wooded path around an obstruction in the highway caused by a public improvement, the relation of passenger and carrier continues, and the railway company is bound to exercise ordinary care, at least, to see that the path is made reasonably safe for such travel.

Whether one has exercised that degree of care which a reasonably careful and prudent man would have used under like circumstances, is a pure question of fact for the jury, and their verdict upon conflicting evidence will not be disturbed.

Argued October 3d—decided December 15th, 1917.

ACTIONS by a married woman and her husband, to recover damages suffered by reason of personal injuries

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to the former, alleged to have been caused by the negligence of the defendant, brought to the Superior Court in New Haven County and tried together to the jury before *Gager, J.;* verdicts and judgments thereon in favor of the plaintiffs—for the wife for $4,000, and for the husband for $675,—and appeals by the defendant. *No error in either case.*

Sarah Pins, the plaintiff in one of these companion actions, at about ten o'clock in the evening, boarded a car of the defendant at a point in the town of Orange, and, paying her fare, became a passenger thereon bound for the city of New Haven. When the car had proceeded a portion of the way it reached a section of the highway which, by reason of a public work there in progress, was impassable not only for trolley-cars but also for travel in teams and on foot as well. This impassable condition of the highway at this point had existed for several weeks. In order that travel might not be wholly obstructed, the contractor in charge of the work in the street had opened up and in a measure prepared a path for foot travelers through a wooded tract which bordered the side of the road. The defendant, when the highway became impassable, was compelled to cause its through passengers to alight from the car they had first taken and transfer to another beyond the obstruction. The only practicable method of accomplishing this transfer was for the transferring passengers to walk through the path, some three hundred and sixty feet in length. This course had been pursued for something like six weeks prior to the day in question.

When the car in which Mrs. Pins was riding arrived at the obstructed section it stopped, and the conductor directed the passengers to change to a car ahead and beyond the obstruction. He thereupon got off the car, and saying, "This way, please," led the way to

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the forward car through and along the path. The passengers, of whom there were a large number, followed him. Mrs. Pins, accompanied by her daughter, was near the rear of the procession. When she had proceeded about halfway she fell and received injuries which the complaint alleged were sustained by reason of the unsuitable condition of the path, rendering it unfit for the use being made of it on account of its rough and uneven surface, the roots, twigs, and other obstructions therein, and the lack of suitable lighting.

Harrison T. Sheldon, for the appellant (defendant).

Arthur B. O'Keefe, with whom was *David E. Fitz-Gerald*, for the appellees (plaintiffs).

PRENTICE, C. J. One of the underlying questions in these cases is whether or not the defendant, at the time when and the place where Mrs. Pins received her injuries, owed her any duty in respect to the condition of the path she was traversing and its suitability for her travel over it.

The defendant contends that she had ceased to be its passenger when she alighted from the car at the transfer point, and that thereafter it had no responsibility for her safety until she should again enter a car to complete her journey. The court refused to so instruct the jury, and told them that her relation to the company as its passenger continued during the period of transfer, and that it owed her a duty in respect to her safety in the course of that transfer.

These instructions were in accord with the principles laid down by us in *Baldwin* v. *Fair Haven & Westville R. Co.*, 68 Conn. 567, 574, 37 Atl. 418, and with the decisions where analogous situations have arisen in other jurisdictions, in so far at least as they have come

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under our notice. *Powers* v. *Old Colony Street Ry. Co.*, 201 Mass. 66, 69, 87 N. E. 192; *Creenan* v. *International Ry. Co.*, 139 N. Y. App. Div. 863, 865, 124 N. Y. Supp. 360, 362; *Baltimore & Ohio R. Co.* v. *State*, 60 Md. 449, 463; *Bugge* v. *Seattle Elec. Co.*, 54 Wash. 483, 491, 103 Pac. 824; *Colorado Springs & C. C. D. Ry. Co.* v. *Petit*, 37 Colo. 326, 329, 86 Pac. 121; *Conroy* v. *Chicago, St. P., M. & O. Ry. Co.*, 96 Wis. 243, 256, 70 N. W. 486; *Killmyer* v. *Wheeling Traction Co.*, 72 W. Va. 148, 153, 77 S. E. 908; *Colorado & A. R. Co.* v. *Winters*, 175 Ill. 293, 302, 51 N. E. 901; *Keator* v. *Scranton Traction Co.*, 191 Pa. St. 102, 113, 43 Atl. 86.

They were also in accord with sound reason. The defendant had undertaken to transport Mrs. Pins to New Haven. Her contract of transportation was one which extended beyond the place of accident. At the time she left the car she first boarded and was making her way over the path for the purpose of reaching another in which she might continue her journey, she was subject to the reasonable direction of the defendant's servants as to how she should proceed to reach its end. The place at which she alighted was not the terminus of her trip. She did not alight because she had reached her destination, but in order that she might reach it. She alighted when she did because she could not proceed further as the defendant's passenger without so doing, and because she was directed by the defendant's agents to do so in order that it might be enabled to carry out its contract with her to transport her to New Haven. She traveled the path under the direction of the conductor and followed his leadership and guidance. When she fell she was doing just what she had been told to do to accomplish her trip, and was just where she had been invited and directed to be as incidental to her transportation.

These facts and circumstances certainly are suf-

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ficient to impose upon the defendant a duty in respect to Mrs. Pins' safety. Whether that duty was one arising from the relation of passenger and carrier, or from that of invitor and invitee, or from both in combination, is immaterial in so far as a determination of the existence of a duty imposed upon the defendant in the matter of the plaintiff's safety is concerned. The court in its instruction appears to have derived the existence of that duty from the continued existence of the relation of passenger and carrier. Whether it was altogether right in that proposition it is unnecessary to inquire as bearing on the existence of the duty of exercising some degree of care resting upon the defendant. *Powers* v. *Old Colony Street Ry. Co.*, 201 Mass. 66, 69, 87 N. E. 192. The case last cited, by reason of the almost complete identity of its facts with those of the case at bar, and the pertinence of the observations in the opinion of the court, deserves more than a passing notice. The court held that the existence of a duty to exercise care for the safety of transferring passengers under the existing conditions was one which would arise from the conduct of the company's agent (in that case the motorman) in giving directions for transfer similar to those in the present case, and in leading the way taken to reach the car in which the trip was to be continued, and perhaps also from a continuance of the relation of passenger and carrier.

The second of the fundamental questions of the case was one as to the measure of the duty which the defendant owed to the plaintiff at the time when and the place where she was injured. Was it that of exercising that high degree of care which a common carrier of passengers ordinarily owes to them, or was it only that it use that measure of care the lack of which constitutes ordinary negligence, that is to say, reasonable

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care and prudence under the circumstances? The trial court had to deal with this question; but under the circumstances presented here, and in view of the instructions under which the verdict was rendered, we are not now concerned with it. Those instructions were that the defendant's duty was confined to that of exercising ordinary care to see that the path was reasonably safe under the circumstances. Its responsibility was carefully limited to the doing of that which a reasonably careful and prudent man would do under like circumstances. The defendant surely cannot complain that too heavy a burden was imposed upon it if it owed any duty in the premises, and the plaintiff, having won from the jury a verdict in her favor under the instructions as given, has no occasion to do so.

The third question, whose determination was called for below under the instructions of the court, was one as to whether or not the defendant did in fact exercise that degree of care which a reasonably careful and prudent man would exercise under like circumstances. This was a pure question of fact, involving considerations of both surface and lighting conditions, and conflicting evidence as to both conditions. It was emphatically a question lying within the jury's province, and its conclusion in the negative was one which the trial court could not have disturbed rightfully. The same is true of other incidental questions of fact which the jury were required to pass upon, to wit, as to whether or not the plaintiff was injured in the way or to the extent claimed, and as to the compensation to be awarded her.

We find nothing in the evidence from which the jury reasonably could have found that Mrs. Pins was guilty of contributory negligence in following along, as she did, with the procession of transferring passengers led by the conductor, which was seeking the forward car

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in the only practicable way to reach it and thus accomplish her journey. Neither is there anything in the record to indicate that the defendant upon the trial so claimed. The court, therefore, did not err in that portion of its charge where it told the jury, in substance, that there was neither claim of that kind made in the arguments of counsel nor evidence to support one.

The second of the above-entitled cases, being one brought by Mrs. Pins' husband to recover for expenses incurred by him as a consequence of the injury to his wife, presents the same questions as does hers, and the same considerations control the decision.

There is no error in either of the cases.

In this opinion the other judges concurred.

The Bridgeport Projectile Company *vs.* The City of Bridgeport.

Third Judicial District, Bridgeport, October Term, 1917.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

As a general rule, the *situs* of personal property for purposes of taxation is the residence of its owner; and under our law (General Statutes, §§ 2323, 2328, 2329, Public Acts of 1907, Chap. 184, id. 1915, Chap. 153) this rule is applicable to New York bank deposits owned by a Connecticut manufacturing corporation and used here for its corporate purposes in connection with its local business. Such a deposit creates the relation of debtor and creditor, and the depositor is taxable not on the money which he no longer owns, but only on the intangible right to repayment on demand by check.

The fact that the State in which the deposits are made may use its power of control over the person of the debtor as a means of compelling the nonresident depositor to pay a second tax upon the

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same credit, does not impair the right of the State in which the depositor resides and in which the credit is employed from taxing such property.

This right to tax rests not only on the doctrine that movables follow the person of the owner, but also on the protection which the State affords to the privileges and business of its own corporations, in return for which they are justly bound to contribute to its support.

Argued October 30th—decided December 15th, 1917.

APPLICATION in the nature of an appeal from the action of the board of relief of the city of Bridgeport in assessing and valuing the personal property of the plaintiff for taxation, taken by the plaintiff to, and reserved by, the Superior Court in Fairfield County, *Curtis, J.*, upon an agreed statement of facts, for the advice of this court. *Judgment for defendant advised.*

The essential facts agreed on are: (1) On September 1st, 1915, the plaintiff, a Connecticut corporation located in Bridgeport, owned land, buildings, machinery and local bank credits, properly assessable in Bridgeport, at $159,090. (2) It also had on deposit in the Guaranty Trust Company of New York City, $300,943.79. (3) If this latter item was legally assessable by the city of Bridgeport, the plaintiff's property should be taxed at $460,033.79, plus ten per cent for failure to file list. (4) If this item was not taxable in Bridgeport, its property should be assessed at $159,090, plus ten per cent for failure to file list.

The question reserved for advice is stated as follows: "Whether or not said 'cash on deposit in the Guaranty Trust Company of the City and State of New York, amounting to three hundred thousand nine hundred forty-three dollars and seventy-nine cents ($300,943.79)' was and is legally assessable and taxable by the City of Bridgeport."

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Carl Foster, for the plaintiff.

William H. Comley, Jr., for the defendant.

BEACH, J. The only question is whether the city of Bridgeport has power, under our statutes, to tax the plaintiff corporation on its New York bank credit.

The material parts of the statutes are as follows: Section 2323 of the General Statutes, in defining taxable property, includes "moneys, credits, choses in action," and excludes "money or property actually invested in merchandise or manufacturing carried on out of this State." Section 2328 provides that "the whole property in this State of every corporation organized under the laws of this State"—with exceptions not now material—"shall be set in its list and liable to taxation in the same manner as the property of individuals." Section 2329, as amended by Chapter 184 of the Public Acts of 1907 and Chapter 153 of the Public Acts of 1915, after dealing with real and personal property located in other towns in this State, provides that "all other personal property of such corporation shall be set in the list of the town in which such corporation has its principal place of business, or exercises its corporate powers."

Plaintiff claims that the words "in this State," in § 2328, impose a special limitation on the power to tax corporations; but, in view of the general policy of our law and the above-quoted portions of the statutes, it is impossible to attribute such an intent to the General Assembly. The plain meaning of § 2328 is that the whole property of such corporations within the taxing jurisdiction of this State shall be taxed.

Pope v. *Hartford*, 82 Conn. 406, 74 Atl. 751, does not support the plaintiff's claim that bank deposits are to be taxed at the *situs* of the bank. In that case the

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question was whether cash in hand or on deposit in this State, belonging to a foreign corporation and derived from sales made in the course of its business carried on here, was taxable. Under these circumstances we held that it was taxable in accordance with the recognized rule that capital permanently employed in carrying on business in any State, together with the proceeds of such business, may be taxed where so employed, notwithstanding the fact that it may have assumed, for the time being, the form of an intangible bank credit owned by a nonresident. *New Orleans* v. *Stempel*, 175 U. S. 309, 20 Sup. Ct. 110, and cases cited; *State Board of Assessors* v. *Comptoir National D'Escompte*, 191 U. S. 388, 24 Sup. Ct. 109; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395, 27 Sup. Ct. 499. Our own statute, § 2323 above quoted, recognizes this principle, and exempts from local taxation money invested in carrying on certain kinds of business out of the State.

The familiar rule as to the *situs* of personal property for taxation is stated in *State Board of Assessors* v. *Comptoir National D'Escompte*, 191 U. S. 388, 402 (24 Sup. Ct. 109): "It may be taken as a general rule of the law of taxation of personal property that such property can only be taxed at the residence of the owner, or at such place as it has acquired a *situs*, which will subject it to the taxing power of the State where found. In its application to tangible property, there is little difficulty in applying this principle. The difficulty arises in determining whether a credit or chose in action has acquiried a local *situs* in contemplation of law at a place other than the domicile of the owner in such sense as will permit the State to tax it in the place of its localization."

No facts appear on this record which take the case out of the general rule above stated. There is no sug-

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gestion that the credit in question is actually invested in merchandise or manufacturing carried on out of this State. On the contrary, the necessary inference from the agreed statement of facts is that it is to be employed for the corporate purposes of the plaintiff in connection with its Bridgeport business. That being so, it was properly taxed at the plaintiff's residence in Bridgeport.

A general deposit in a commercial bank creates the relation of creditor and debtor. *Lippitt* v. *Thames Loan & Trust Co.*, 88 Conn. 185, 194, 90 Atl. 369. After the deposit is made the depositor no longer owns any tangible property in the money deposited. "The specific money when loaned, and received by the borrower, is no longer the property of the creditor." *Kirtland* v. *Hotchkiss*, 42 Conn. 426, 438. It follows that the plaintiff cannot be taxed on the money which it no longer owns, but only on the intangible right to repayment on demand by check. This remains strictly and logically true, although in common speech a tax on bank credits is called a tax on "money in bank." "The receipt of money by a bank, although it only creates a debt, is in a popular sense the receipt of money for safe-keeping." *Engel* v. *O'Malley*, 219 U. S. 128, 136, 31 Sup. Ct. 190. This popular inaccuracy of thought and language may be of little importance so long as the depositor and the bank are within the same taxing jurisdiction, but it must not be allowed to obscure the issue when the right of a State to tax its own residents on bank balances due from banks in other States is drawn in question. In such cases the intangible nature of the credit must be recognized.

The undoubted rule is that, for the purposes of taxation, a debt is property at the residence or domicil of the creditor. *Kirtland* v. *Hotchkiss*, 42 Conn. 426;

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Same v. *Same*, 100 U. S. 491; *Buck* v. *Beach*, 206 U. S. 392, 401, 27 Sup. Ct. 712. It may also acquire a local *situs*, and then the question arises whether the local *situs* is, for taxing purposes, exclusive or merely additional. Confining the discussion to the subject of bank credits, it has been held, in the cases already cited, that they may acquire a local *situs* if the capital which they represent is employed in a local business. It has also been held, in *Blackstone* v. *Miller*, 188 U. S. 189, 23 Sup. Ct. 277, that the State of New York may lay an inheritance tax on the transfer of a balance due from a New York bank to the estate of a deceased nonresident depositor, without falling foul of the Federal Constitution. Although Mr. Justice Holmes suggests in the opinion that there is a practical similarity between what is commonly called money in bank and coin in the pocket, which has for taxing purposes more or less obliterated the legal difference, the case was not disposed of on that theory, but on the orthodox principle that the bank was indebted to the estate of the decedent, and because of the practical fact that the State of New York had power over the person of the debtor. "Power over the person of the debtor confers jurisdiction, we repeat." p. 206. Carried to its conclusion, this would authorize any credit to be taxed to the creditor at the domicil of the debtor; but, as pointed out in the opinion, the result is not to deprive the State of the creditor's domicil of its undoubted right to lay a similar tax. It simply subjects the credit to double taxation.

So in this case, the right of the State of Connecticut to tax the resident plaintiff corporation on a New York bank credit which represents capital employed, or to be employed, in a business carried on here, is not affected by the possibility that the State of New York may use its control over the debtor as a means of com-

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pelling the plaintiff to pay a second tax on the same credit.

This conclusion does not rest wholly on the so-called fiction that movables follow the person of the owner, which when applied to a purely intangible credit still remains a necessity rather than a fiction. It rests also on the protection which this State affords to the plaintiff's corporate privileges and business. "The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys." *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 498.

The question reserved for our advice is answered in the affirmative, and the Superior Court is advised to render judgment accordingly; costs in this court to be taxed in favor of the defendant.

In this opinion the other judges concurred.

ALEXANDER CAMPBELL, ADMINISTRATOR, *vs.* THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY ET ALS.

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

The plaintiff claimed that his intestate, an employee of an oil company, while painting one of its cars upon a track in its yard, was struck and killed either by being caught between two cars or by being knocked down and run over when an engine and several other cars backed into the car ahead and drove it against the car upon which he was at work. The oil company and the railroad company each contended that the accident happened otherwise, and that even on the plaintiff's version, the decedent should have protected

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himself by placing a blue flag in the track in front of the car upon which he was at work, as required by an alleged rule and practice of the yard. *Held:*—

1. That assuming the flag system was in existence at the time of the accident, it must further appear that the intestate had been instructed regarding it before he could be charged with negligence.
2. That inasmuch as there appeared to be a conflict in the testimony as to whether it was the duty of the decedent or of the foreman of the repairmen to place the flag, that question was one for the jury.
3. That it was also for the jury to determine whether the decedent had been instructed as to the rule respecting the use of a flag.
4. That the evidence respecting the place and manner of the accident was not so overwhelmingly in favor of the contention of the defendants as to require the trial court to set aside a verdict for the plaintiff.
5. That there was no duty upon the railroad company to see that the decedent was not working upon or near the cars to be moved; and that the facts in evidence, upon any theory of the case, failed to support the conclusion that all or any of the railroad crew were negligent.

The trial court charged the jury that the railroad crew while operating the train within the yard of the oil company were the latter's servants, and directed a verdict for the railroad company. *Held* that the ground of this instruction was erroneous: that merely telling the railroad conductor where the incoming cars were to be placed in the yard, and which were the outgoing cars, was not such an exercise of direction or control upon the part of the oil company as to make the train crew its servants.

Argued October 31st—decided December 15th, 1917.

ACTION to recover damages for negligently causing the death of the plaintiff's intestate, brought to the Superior Court in Fairfield County and tried to the jury before *Williams, J.;* verdict and judgment for the plaintiff for $5,000 as against the defendant Standard Oil Company and, by direction of the court, in favor of the defendant Railroad Company, from which the Standard Oil Company and also the plaintiff appealed. *No error on either appeal.*

Joseph P. Tuttle and *Thomas J. Spellacy*, for the appellant (defendant Standard Oil Company).

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Howard W. Taylor and *Nehemiah Candee*, with whom was *John T. Dwyer*, for the appellant (plaintiff).

William L. Barnett, for the appellee (defendant Railroad Company).

WHEELER, J. The case was tried to the jury, but it appears from the record that most of the facts were not in dispute. The Standard Oil Company, on August 17th, 1911, owned and used a yard for the storing of petroleum and its products. In the yard were five spur tracks, and one main track which passed through the gates of the yard to a connection with the defendant railroad outside the gates. These tracks were numbered from one to six. The railroad brought daily into the yard cars loaded with material for the Oil Company or empty cars owned by the Union Tank Company, which were loaded by the Oil Company with its products and transported out of the yard and to their destination by the railroad. An employee of the Oil Company gave to the conductor of the train upon reaching the gates instructions, oral or written, as to the location in the yard of the incoming cars, and as to which were the outgoing cars. The train would not enter the yard until an employee of the Oil Company opened the gates and threw the semaphore at a crossing of a trolley road outside the gates.

The Oil Company had no control over the operation of the train in or out of the yard, and no control over the train crew; these remained under the exclusive control of the railroad. The Oil Company exercised no other duties in connection with the train except to open the gates, to throw the semaphore, and to hand the conductor of the train his instructions as to the location of the incoming cars and as to the cars to be taken out of the yard.

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Under its agreement with the Tank Company, the Oil Company repaired the cars of the Tank Company when found necessary, and it had on the day in question three men so employed, McInnis, Morrow, and the deceased Leinster, and a part of their work was the painting of the cars in the yard requiring painting, and under as well as over all other parts of the cars. The cars were repaired on all of these tracks.

On the day in question, an engine and four cars with a crew consisting of an engineer, a firemen, two switchmen, and a conductor, ran to the yard and received at the gate instructions as to incoming and outgoing cars. The engine then pushed into the yard four cars to be left there, and the crew was proceeding in due course with their work when Leinster, one of the three men engaged in repair work, was either caught between two cars on track five, or knocked down by the impact of two cars, while he was either at work under one of the cars, or standing near one of the cars and outside the track.

The plaintiff claimed the injury occurred on track four, the defendants near track five. The jury found, by its answer to an interrogatory, that it occurred on track five, and on the evidence this fact must be taken as conclusively established. The plaintiff claimed to have proved that the car was pushed against the car under which Leinster was at work without notice to him of the approach of the train. The defendants claimed to have proved that Leinster had been instructed to place a blue flag in front of the car on which he was working, as a warning to the train not to approach, and that he had failed to do this. The plaintiff also claimed to have produced evidence that Leinster was engaged in the due course of his work painting underneath the car when he received his injury. The defendants claimed to have proved that Leinster had

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no duty on track five, and was not then engaged upon the Oil Company's work, nor under instruction from it, under which all work done by him was begun and pursued. The Oil Company also contends that the verdict was against the evidence.

The case against the Oil Company must rest upon proof, by a fair preponderance of the evidence, that Leinster was at work in the course of his employment in painting a car on track five, and that, without notice to him of the approaching train, the Oil Company permitted the train to be pushed against the car Leinster was working on, or against the car next to the car he was working on, causing this car to strike the car he was working on, throwing him down, and the train immediately being pulled out the car passed over him causing him the injuries from which he died.

The plaintiff's witness, Martin, testified that Leinster was on track four, the proof showed that he was on or near track five. The defendants argue that this tends strongly to discredit Martin. But we think the jury might have reached another view, and found that Martin was mistaken in the track, but not mistaken in what he saw Leinster doing.

The two questions of fact decisive of this motion to set aside the verdict are: 1. Did the train cause Leinster to be knocked down and run over without his having been notified of its approach? 2. At the time of his injury was Leinster engaged in his master's work and by his express or implied command?

We briefly discuss in order these questions. A number of witnesses in behalf of the defendants testified to the existence of a rule and practice of the yard by which a blue flag was required to be placed upon the track in front of the car on this track which was being repaired, and that this flag was notice to the railroad crew to keep its train off this track. And several testi-

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fied that it was the duty of the employees on the repairs to place these flags, and that at the time of the accident there was no flag on track number five. If these were the only facts in evidence, and Leinster had notice of this rule, it would follow that Leinster was negligent in not having protected himself by complying with the rules of his master. But Crofut, the assistant yardmaster at the time of the accident, testified that this flag system was inaugurated after the accident. If we assume that the jury ought to have found that the flag system was in existence at the time of the accident, this does not conclude the question of Leinster's negligence, as the defendants seem to assume. It must further appear that Leinster had been instructed to protect himself by placing one of the flags on the track on which he was at work. Mills, the local manager of the Oil Company, and McInnis, testified that it was Leinster's duty to have placed a flag on the track on which he was at work; and McInnis testified that he had instructed Leinster as to this duty. Morrow, on the contrary, whose deposition was taken by the plaintiff and introduced in evidence by the defendants, testified that it was the duty of McInnis, the foreman, to have placed these flags. Here was a conflict of testimony, and it was for the jury to decide whether Mills and McInnis, or Morrow, was correct. And it was also for the jury to find whether McInnis in fact gave Leinster such instruction. If the jury found that Morrow was correct, they must necessarily have found that there was no occasion for McInnis to give such instructions, and they were at liberty to find that he did not give them. If the jury found that Leinster did not receive these instructions, their finding that he did not know of the approach of the train and that he was not negligent, would have been permissible and logical.

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There remains the question whether or not Leinster at this time was engaged in his master's work and at a place where he had the right to be. McInnis said that when he and Morrow went to the gate Leinster was at work painting at the rear of car two on track four, and that Leinster worked under his orders, and that he had given him no order to work on cars on track five, but only on those on track four. Martin, the only eye-witness of the accident, testified that at the time of the accident Leinster was painting under the car. Martin's testimony is assailed as unworthy of belief. That he was in the yard at the time of the accident is undoubted; that he then claimed to be an eye-witness is equally certain. The defendants claim that Martin's location of the track as number four, shows that he never saw the accident. McInnis' statement that they were working on track four is unsupported, and Morrow says he can't say on which track they were working. The principal significance of Martin's testimony is that he saw Leinster painting under the car when the accident occurred. Crofut, testifying for the plaintiff, says it was the custom to caulk the seams and nuts of the cars when they came in and before they went out by painting them. The cars on track five were to be moved out of the yard that day. It was for the jury to find whether Crofut or McInnis was correct. It cannot be held as matter of law that the jury could not have found that Leinster was engaged in painting under the car at the time of the accident; and if he was so painting, it was a fair inference for the jury whether he was engaged in work for his master and under his employment, or was working contrary to orders or on his own business. It evidently was his duty to keep on with his work. Why should he turn from working, standing by the side of car two on track four, where McInnis says his employ-

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ment directed him to work, to go to track five and work underneath either car one or two? No reason has been suggested and none suggests itself to us. It was for the jury to weigh McInnis' testimony, and we cannot say that the jury's failure to follow it was manifestly going against the overwhelming weight of the evidence. The refusal of the trial court to set aside the verdict was not error.

The charge of the court, that the railroad crew while at work operating the train within the yard were the servants of the Oil Company, and that it had not been shown that they were the fellow-servants of Leinster, and that the negligence of the crew was the negligence of the Oil Company, is assigned as error by the plaintiff and by the defendant Oil Company.

The crew of the railroad would have become the servants of the Oil Company, although remaining in the general service of the railroad, provided the crew were engaged in a service for the Oil Company within the yard, and were there acting under its orders and subject to its control. Before the train entered the yard the Oil Company instructed the conductor of the train as to where incoming cars should be placed, and which were the outgoing cars. That comprised all the control over the operation of the train by the Oil Company. None of the train crew while in the yard were subject to the order or control of the Oil Company. The train crew shifted the cars, and made up the train at its own will and controlled its own time. The case of *McInerney* v. *Delaware & Hudson Canal Co.*, 151 N. Y. 411, 416, 45 N. E. 848, upon which the railroad relies, is distinguishable in that the engine crew in that case were engaged in the service of the owner of the premises, and were acting under his orders and subject to his control. "The test is whether, in the particular service which he is engaged to perform,

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he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired." *Coughlin* v. *Cambridge*, 166 Mass. 268, 277, 44 N. E. 218.

The court directed a verdict for the railroad upon a wrong principle, but it does not follow that the result reached is incorrect. The facts in evidence, on any theory of the case, do not support the conclusion that all or any of the crew of the railroad were negligent. There was no duty upon the railroad to see that Leinster was not working upon or near the cars to be moved. When the conductor was given the list of locations of incoming cars and the list of outgoing cars, he had the right to assume that he could move these cars in the usual course. While the railroad was charged with knowledge that repairs were made on cars on any of the tracks in the yard by the Oil Company, they were entitled to believe when they received these lists that no repairs were then in progress on the cars on these tracks. And if the jury found that it was the rule and practice to put flags in front of cars on which repairs were being made, and that the railroad knew this, there was no flag on track five and no notice to the railroad that an employee of the Oil Company was at work on any of these cars. The railroad was under no duty to look under the cars it moved. Its operation was usual and not negligent. *Earley* v. *Hall*, 89 Conn. 606, 611, 95 Atl. 2.

In view of this conclusion, we do not consider the instruction complained of as to whether the train crew, if servants of the Oil Company, were fellow-servants of Leinster.

The verdict was properly directed in favor of the Railroad.

There is no error on either appeal.

In this opinion the other judges concurred.

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PATRICK MOYNAHAN *vs.* THE WATERBURY REPUBLICAN, INC.

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

While the existence of a privileged occasion casts upon the plaintiff in an action for libel the burden of proving express or actual malice upon the part of the defendant in publishing the defamatory matter, it has no other or further effect, and therefore affords no justification for a publication which is shown to have been actuated by express malice and to have been made for the purpose of injuring the plaintiff's character and reputation.

Whether the published statements are false and malicious or not, is a question of fact for the trier upon all the evidence in the case.

The evidence in the present case reviewed and *held* to warrant a finding of express malice.

Evidence of conditions and occurrences observable in a municipal almshouse prior to the time referred to in the alleged libel, is not admissible to prove the truth of the charges made therein.

Argued October 23d, 1917—decided January 3d, 1918.

ACTION for libel, brought to and tried by the Superior Court in New Haven County, *Bennett, J.*; facts found and judgment rendered for the plaintiff for $1,000, and appeal by the defendant. *No error.*

The plaintiff was superintendent of the Brookside Home, an institution for the care of indigent persons in the city of Waterbury. This home was under the charge and direction of the board of charities of the city. In connection with the home there was maintained the City Hospital, all under the management of the superintendent. The alleged libelous article was published in the Waterbury Republican on the 3d day of February, 1916, and it purported to be an interview with Ella A. Grimes, in which publication it was charged directly or by innuendo that the plain-

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tiff had refused to improve conditions at the City Hospital when necessary, had provoked a spirit of hostility between nurses and patients, had unlawfully appropriated money and products of the farm connected with the Brookside Home to his own use, and had furnished the inmates of the home with unwholesome food; that he had permitted the home to become dirty and infested with vermin, had neglected to keep the furniture of the hospital in a fit condition to use, had compelled patients to perform labor for which they were to receive compensation, and then diverted the money to improper uses, had entertained his friends with expensive meals and paid for them with public funds; and that he was degraded, unprincipled, and dishonest.

Lawrence L. Lewis, for the appellant (defendant).

James M. Lynch, with whom was *Francis P. Guilfoile*, for the appellee (plaintiff).

SHUMWAY, J. There are two questions presented by the appeal in this case, as stated in the defendant's brief: (1) Did the trial court err in holding and ruling that the publication was made with express malice? (2) Did it err in its rulings on evidence?

That the alleged libel was published by the defendant, and that the matter was libelous if malicious, is not questioned. The larger portion of the numerous reasons of appeal relate to the refusal of the court to find certain facts which, if found, would show, the defendant claims, that the finding of the court was against the evidence. The court has found that the "publication was false and malicious. The statements were made without sufficient occasion or excuse, recklessly, and in disregard of the plaintiff's rights and reputation,

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and of the consequences that might result to him therefrom, and for the purpose of injuring him in his character and reputation, and of holding him up to ridicule and contempt." The defendant having in its answer alleged the truth of the statements contained in the publication, the finding of the court does not rest upon the presumption that the statements were false, but upon the evidence offered by the plaintiff to prove their falsity. It is elementary that there rests upon every one a general duty to publish no defamatory matter, "unless he possesses evidence of its truth so certain that he can establish his charge in a court of justice;" and the fact of publication of such matter is of itself proof of malice, as a legal presumption. The defendant, however, in its answer, alleges that the statements made in the publication "were given to a reporter of the defendant in the usual course of business by one Ella A. Grimes, a nurse formerly in the employ of the city of Waterbury, who . . . had charge of . . . the welfare of the patients in the City Hospital at the Brookside Home, a public institution in Waterbury, and the defendant, without malice, . . . published said article in good faith in its news columns, and honestly believed the statements . . . were true, and these matters were proper subjects to lay before the citizens of Waterbury."

The facts stated in the answer, if proven, show an "occasion" of privilege. While the publication of defamatory matter upon an occasion of privilege casts upon the plaintiff the burden of proving malice in fact, and the presumption of malice arising from the publication no longer prevails, yet the fact that the defamatory matter was published on an occasion of privilege is not a justification, and does not make such matter a "privileged communication." The question whether the communication was privileged or not still

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remains as a question of fact, to be determined by the trier. *Atwater* v. *Morning News Co.*, 67 Conn. 504, 513, 34 Atl. 865.

The finding of the court that the publication was false and malicious is conclusive, certainly if based upon legal evidence. The defendant has made a part of the record in this court all of the evidence, and alleges as error that the trial court did not find as facts the statements contained in very many of the paragraphs of the defendant's request and draft-finding. These statements, condensed, are: The defendant merely published an interview between its reporter and the nurse, Miss Grimes; other similar articles had appeared in Waterbury papers. The same story was published in the Waterbury American the day before. The editor of the defendant's newspaper was out of town at the time of the publication. Miss Grimes called at the defendant's newspaper office and desired to make a statement. The defendant knew the same statements had been made by another nurse. No representative of the press was permitted to be present at the hearing before the board of charities when investigating the charges made by Miss Grimes against the superintendent of the Brookside Home. None of the editors or reporters in the defendant's service had more than speaking acquaintance with the plaintiff, Moyanhan. Miss Grimes told the editor that her charges were known to the mayor of Waterbury and the board of charities. The plaintiff, when called upon by some representative of the defendant, refused to make any comment on the charges before their publication. These are the facts as summarized in the defendant's brief, which it claims proves the absence of malice in the publication.

All these facts, if proven, were proper matters for the court to consider in determining whether the de-

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fendant acted in good faith and with an honest belief that the charges were true, and also whether in making the publication it had an honest intent to perform a duty to the people of Waterbury to make public a deplorable condition in Brookside Home and the City Hospital, as well as to show that the superintendent was unfit to have the management of them. But such facts are by no means conclusive that the defendant was actuated only by an honest intent to perform a duty to the public. The court was bound to consider and weigh all the evidence in the case. That there was evidence from which the court could find malice is clear. If nothing more appeared in evidence, the caricature published in the defendant's newspaper subsequent to the defamatory article, purporting to portray pictorially the conditions at the Brookside Home, as detailed in the libelous publication, might justify a finding of malice. It was evidently designed to expose the plaintiff to scorn and ridicule. Indeed, the evidence fully sustains the finding that the statements of the publication were made recklessly and without sufficient excuse, and the defendant cannot expect this court to retry questions of fact.

There is no error in the rulings on evidence. The principal complaint of the defendant is that the court excluded evidence as to the conditions in the Brookside Home, prior to Miss Grimes' employment. The defamatory article contained the story of Miss Grimes as to the conditions and occurrences observed by her. The defendant, in attempting to justify them by proving the truth of her statements, "was bound to meet the averments of the complaint in every substantial particular, and the justification must be as broad as the charge and must justify the charge claimed to be libelous." Evidence of what other persons may have seen prior to Miss Grimes' employment does not tend

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to prove what the conditions were later, neither does testimony of witnesses as to other occurrences before those related by Miss Grimes, of which she had no knowledge save from the declarations of those who claimed to have witnessed them, tend to corroborate her.

There is no error.

In this opinion the other judges concurred.

CHARLES W. WING *vs.* WILLIAM E. EGINTON.

Third Judicial District, Bridgeport, October Term, 1917.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Although one is driving an automobile on his own side of the road he is nevertheless bound to exercise reasonable care to avoid a collision with an automobile approaching from the opposite direction; but whether he should have turned out still further in a given case cannot be determined as matter of law; that must depend upon what an ordinarily prudent man would have done under like circumstances,—a question properly submitted to the jury.

Argued October 25th, 1917—decided January 3d, 1918.

ACTION to recover damages for personal injuries alleged to have been caused by the defendant's negligence, 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. *No error.*

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

Arthur B. O'Keefe, with whom was *William C. Mueller* and, on the brief, *David E. FitzGerald*, for the appellee (defendant).

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SHUMWAY, J. The plaintiff in his complaint stated, and upon the trial attempted to prove, this case: That between the hours of ten and eleven o'clock in the evening of November 13th, 1915, the plaintiff, while a passenger in an automobile on a public highway in the village of Montowese, was thrown out and injured. The plaintiff had no part in the operation of the automobile in which he was riding, and which at the time named was proceeding in a southerly direction. At the same time and place the defendant was operating an automobile going in a northerly direction, and was driving recklessly, and as he approached the automobile in which the plaintiff was riding he, the defendant, suddenly "slewed" and turned his automobile to his left, and so brought it upon his left side of the highway, and without any signal or other warning, drove his machine against the one in which the plaintiff was riding, whereby the latter automobile was overturned severely injuring the plaintiff.

The defendant's answer was a denial of the material allegations of the complaint.

Upon the trial to the jury the issues were found in favor of the defendant.

The evidence upon the trial as to the cause and place of the accident was contradictory. The evidence of the plaintiff was to the effect that the collision between the two automobiles occurred upon his right side of the highway; that there was sufficient room for the defendant to pass upon the plaintiff's left, and that the accident was caused by reason of the defendant's failure to drive his car upon his right side of the highway. It appears that the highway at the place of the accident runs nearly north and south. It was improved or macadamized about twenty feet in width, and on the easterly side of the way were located the railroad

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tracks of the Connecticut Company, the cars of which are driven by electricity.

The defendant offered evidence tending to prove that the collision between the automobiles occurred on the easterly side of the highway. The defendant testified that he turned his automobile to the extreme easterly side, and that the right-hand wheels of his machine had passed off the improved highway and were passing along some six inches easterly of the westerly rail, and that he was struck by the other automobile in that position. The defendant testified on cross-examination that he should think that the distance between the rails might have been four feet and six or eight inches, and that he could have turned his automobile four feet further to his right before reaching the easterly rails. This cross-examination of the defendant is made a part of the record on the plaintiff's motion to correct and add to the finding.

During the argument on the trial, counsel for the plaintiff orally requested the court to charge the jury as follows: "That if the defendant saw or knew, or, by the exercise of reasonable care on his part, ought to have known, that the automobile in which the plaintiff was riding was in a position of danger, and that, if it kept on, there apparently would be a collision between the automobile of the defendant and that in which the plaintiff was riding, it was the duty of the defendant to turn out as far as he could on the highway to allow the other automobile to pass, and to use all reasonable efforts on his part in proportion to the danger and the surrounding circumstances to avoid a collision, and that, if he did not do so, he was liable, notwithstanding the fact that the driver of the vehicle in which the plaintiff was sitting had originally placed that vehicle . . . in a position of danger."

Assuming that this request correctly stated the law,

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there was no occasion for, or propriety in, its application by the jury, unless they should find that the collision did not occur in the manner and place as the plaintiff had alleged and attempted to prove, and that it did occur where and as the defendant claimed. A pertinent inquiry may be made whether, in view of the right of the defendant to know the case which he is called upon to defend, the plaintiff would be permitted to recover upon a state of facts which are nowhere alleged; but that question is not raised here. However, the evidence offered by the defendant tended to show that the vehicle in which the plaintiff was riding was seen by the defendant coming toward him on the side of the highway, on the defendant's right hand, and where the defendant, observing the law of the road, was properly driving his car. He saw the oncoming vehicle, as he expressed it, "zigzagging," that is, making frequent sharp turns, and he drove his machine to the easterly side of the highway and his right-hand wheels between the trolley tracks, leaving nearly the whole width of the highway unobstructed, and while his car was going very slowly the other automobile came in collision with his, and tore off the tire and rim of the left front wheel. Whether it would have been the defendant's duty to have turned his car further to the right, would depend, probably in this very case, upon so many conditions, or facts, which do not appear in the record, that it is not possible to determine just what the defendant's duty was, any further than he would be bound to use reasonable care.

But the court did comply with the plaintiff's request in substance. Quoting from the charge: "The plaintiff makes one further claim, based upon the theory that you may conclude that it [the collision] did not happen where the plaintiff says it happened, but happened on the other side of the road where the plain-

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tiff's machine had no business to have been. And the plaintiff has claimed to you in argument, that as those machines came towards each other, the defendant had opportunity and notice, and that it was his duty to make a further turn to the right, and that if he had done that he could have avoided the injury. And the rule of law perhaps is fairly enough stated in this way: 'that if the defendant, after seeing the danger of the plaintiff—no matter how the plaintiff got into it—could, in the exercise of reasonable care, have turned further and so have avoided the injury, it was his duty to do so.' That I suppose is the law fast enough, as the plaintiff orally requested me to say to you. That is, it is an application of the general principle that, even although another man be careless, it won't do for you to continue being careless if you have a chance to be otherwise. . . . And the plaintiff claims that if it did not happen as his witnesses swear it did, and did happen somewhere else, that still the defendant could have prevented it if he had swung over into the trolley track further. . . . Where the standard is reasonable care, the conduct of these men . . . has got to be considered and interpreted with reference to the situation as it existed and the time and means of observation."

After the jury had retired to consider the case, they returned into court and requested further instruction upon this very point, and the court again repeated what it had already said. The question asked by the jury was: "Whether the defendant, when, as claimed, he was running his right wheel six or more inches on the left-hand trolley track, and when certain that a collision was evident, was he obliged by law to turn further to the right . . . onto the trolley track?" The court said in part: "As it strikes me now I do not think it is capable of being answered as a proposi-

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tion of law, but it is a question of the discretion of the ordinarily prudent man with the picture as it existed in his eyes at the time."

The plaintiff's complaint as to the whole charge is not well founded. The court charged the jury that the negligence of the driver of the car in which the plaintiff was riding could not be imputed to the plaintiff, and virtually instructed them that there was no evidence to justify a finding that his own negligence contributed to his injury. Some of the passages taken from the charge claimed to be erroneous are only a statement by the court of the claims of the parties, involving no question of law, and there is nothing to show that the claims were not correctly stated.

The decisive question of fact upon the plaintiff's case was where and how the injuries were received, and this was fairly submitted to the jury.

There is no error.

In this opinion the other judges concurred.

William G. Viall *vs.* The Lionel Manufacturing Company.

Third Judicial District, Bridgeport, October Term, 1917.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

A former judgment for the recovery of instalments of salary or wages then due under a contract with the defendant, is not a bar to a subsequent action to recover damages for the defendant's breach of the contract, since the causes of action are different; and therefore a transcript of the evidence which was given in the first action is not admissible in the second, for the purpose of showing that the former judgment was for the same cause as that alleged in the second action.

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The record in the former action was laid in evidence. *Held* that this established the execution and validity of the contract in question, and that such action was for salary due and not for breach of contract, in so far as that issue was one of fact.

A demurrer to a defense which this court had already determined to be insufficient on appeal, is properly sustained on the retrial of the cause.

An immaterial amendment of a complaint furnishes no adequate reason for refiling a defense which has once been adjudged insufficient on demurrer.

Argued October 26th, 1917—decided January 3d, 1918.

ACTION to recover damages for the neglect and refusal of the defendant to carry out an alleged written agreement to employ the plaintiff and to pay him the salary prescribed therein after a certain date, brought to and tried by the Court of Common Pleas in Fairfield County, *Walsh, J.;* facts found and judgment rendered for the plaintiff for $1,030, and appeal by the defendant. *No error.*

The action was brought to recover damages for the breach of a contract of employment. On the trial to the court it found, in substance, the following facts: The agreement in question was made between the parties on October 4th, 1913, by which the defendant agreed to employ the plaintiff for fifteen and a half months from October 15th, 1913.

On December 8th, 1913, the plaintiff brought an action against this defendant to recover the sum of $216 claimed to be due at that time to the plaintiff. The case went to trial, and on June 16th, 1914, judgment was entered for the plaintiff to recover said sum, which the defendant paid.

From December 8th, 1913, to the end of the term of the contract, the plaintiff was willing and ready to perform his part of the agreement, but the defendant neglected and refused to perform its part.

On October 12th, 1913, the parties orally agreed that

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the defendant should send samples for the plaintiff to work upon at home until January 1st, 1914, at $27 a week, unless the defendant called upon him to work in the factory, in which event he should receive the full salary agreed, at the rate of $2,000 a year. The defendant neglected to send any samples to the plaintiff and refused to employ him in the factory. The court in this action gave the plaintiff damages to the amount of $1,030.62.

The case was before this court at its June term, 1916, and is reported in 90 Conn. 694, 98 Atl. 329.

The defendant's answer set up the former judgment as a bar to this action, in a second defense, but a demurrer to this defense was sustained.

Harrison T. Sheldon, for the appellant (defendant).

Henry E. Shannon, for the appellee (plaintiff).

SHUMWAY, J. The decision of this court, when this case was before it on the plaintiff's appeal, disposes of all the questions of law involved in the second trial, except the ruling on evidence; but even the single ruling which the defendant claims was erroneous did not affect it harmfully. The evidence on which the ruling was given was the testimony of *Judge Scott*, as to the evidence before him on the trial of the first case. As *Judge Scott* was unable to appear on this trial, it was stipulated that his notes of the evidence should be received in place of his oral testimony. These notes were read to the court. The court ruled them out for the purpose for which they were first offered. Counsel stated that the fundamental claim was to show that the first action was a bar to this. The court excluded the notes for that purpose, but ruled them in for the purpose of showing when the breach of the contract by the defendant occurred.

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There was no error in ruling out the evidence for the purpose for which it was first offered. It is apparent that the first action was to recover the $27 a week, which the plaintiff was to receive under the modification of the first contract, and the amount of the first judgment was for salary due by reason of the fact that the plaintiff was ready and willing to perform the work, and not due for any actual labor performed.

All of the facts that were in issue in the first case were adjudicated by the judgment in that case, including the fact that the parties entered into the contract; and so far as it was a question of fact, that the first action was for salary due to December 8th, 1913, and not for damages for breach of contract. For the purposes of the case it is wholly immaterial whether the plaintiff even worked in the defendant's factory or not, so long as he was ready and willing to work and was prevented from doing so by the defendant's act.

There was no error in sustaining the demurrer to the second defense which raised the very question this court had decided adversely to the defendant's contention; no more was it error for the court to deny the defendant's motion to file the same defense after the plaintiff had amended his complaint. That amendment did not change the plaintiff's complaint any further than that it may have removed any ground to claim that he was seeking to recover a salary rather than damages for breach of contract.

In all of the defendant's fifteen reasons of appeal none of them afford the defendant any good cause to complain of the judgment, unless the first case was in fact a bar to an action to recover damages for a breach of the contract.

There is no error.

In this opinion the other judges concurred.

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WILLIAM G. SHAW, TRUSTEE, *vs.* ANN R. JACKSON.

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

An inhabitant of Connecticut does not cease to be such by a temporary residence for three years in another State.

A mortgagee of real estate, after the debt has been paid, has nothing but a naked legal title, although he holds under a recorded deed which is absolute on its face; and therefore one who attaches his interest is in no better position, unless he was misled by such apparent ownership and gave it credit in his dealings with the mortgagee. A plaintiff who sues the apparent owner in tort and attaches his interest, cannot, however, avail himself of this principle, inasmuch as he could not have been misled to his injury by such ostensible ownership.

The question of costs in an equitable action is one entirely within the discretion of the court.

Argued October 31st, 1917—decided January 3d, 1918.

SUIT to remove an attachment of real estate constituting an alleged cloud upon the plaintiff's title, brought to the Superior Court in Fairfield County where a demurrer to certain paragraphs of a plea in abatement was sustained and an issue of fact upon the remaining paragraph was found for the plaintiff (*Case, J.*), and the cause was afterward tried to the court, *Gager, J.*; facts found and judgment rendered for the plaintiff, and appeal by the defendant. *No error.*

The record contains a finding of substantially these facts: At the time of bringing this action the plaintiff was an inhabitant of this State, residing in the town of Norwalk. The land, the subject of this action, is situated in the town of Norwalk and valued at not less than $3,000. In September, 1914, the defendant attached the land in an action based upon an alleged tort, against one Leslie Gamble. On December 17th,

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1913, the plaintiff owned said land as trustee, and on that day borrowed of Gamble the sum of $500, and to secure the payment of the loan he, by his unconditional deed, conveyed the land to Gamble. It was understood between the plaintiff and Gamble that the deed should not be recorded unless it became necessary to do so to protect his rights. On March 14th, 1914, the daughter of Gamble by mistake lodged the deed for record. The plaintiff in April, 1914, obtained from Gamble, a receipt for the deed, in which Gamble stated that the deed was received as "security for advances made by me to said W. G. Shaw, to the amount of $500 upon payment whereof with interest I shall reconvey the said land to said Shaw or his appointee." Prior to the attachment of the land by the defendant, the plaintiff, about April 24th, 1914, paid the loan to Gamble, and Gamble afterward surrendered the note evidencing the loan to the plaintiff's attorney. The note was dated December 18th, and the deed the 17th of December, 1913.

On May 15th, 1915, Gamble conveyed the premises to the plaintiff by his deed of that date. The delay from April, 1914, when the loan was paid, to May, 1915, when the land was conveyed back to the plaintiff, was a matter of convenience to the parties. The defendant was in no wise injured or deceived by anything the plaintiff did or failed to do, and the transaction between the plaintiff and Gamble had no connection with the tort action brought by the defendant against Gamble. The said action is still pending in court. It did not appear on the trial that any person, other than the plaintiff, had any interest in the land, though in the deed to him he was described as William G. Shaw, trustee.

The defendant filed a plea in abatement, alleging that the plaintiff was not an inhabitant of this State

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and had given no bond for costs. An issue of fact, joined on the allegation respecting inhabitancy, was found for the plaintiff, and the other paragraphs of the plea were adjudged insufficient on demurrer.

The defendant also filed a demurrer to the complaint, which was overruled, and upon the trial to the court the issues were found for the plaintiff, and judgment was rendered dissolving the attachment on the land with an award of costs to the plaintiff.

Joseph A. Gray, for the appellant (defendant).

John H. Light, for the appellee (plaintiff).

SHUMWAY, J. The demurrer to paragraphs one and three of the plea in abatement was properly sustained.

The court, upon issue joined upon paragraph two of the plea, found as a fact that the plaintiff was an inhabitant of this State at the time of bringing the action. There is nothing inconsistent in the finding and the evidence, that the plaintiff had resided for three years in New York, if he had come into the State with an intention of remaining before bringing the action. But the evidence showed that his residence in New York was not at any time intended to be permanent, and that he regarded this State as his place of residence.

The defendant's demurrer to the complaint was properly overruled. The court, in its memorandum on the demurrer, clearly and correctly stated the law of the case as follows: "A mortgagee, as such, has no attachable interest in the land mortgaged. If a mortgagee by absolute deed has an interest it must be as a result of the state of the record as interpreted under the recording Acts. The record, however, does not seem to be conclusive for all purposes. In the present

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instance the plaintiff at the time of the attachment had the equitable title to the entire beneficial interest in the land attached. An attaching creditor of the plaintiff Shaw could have held the land as against Gamble, the mortgagee, free of Gamble's lien before payment. *Ives* v. *Stone*, 51 Conn. 446. By the payment of the debt Gamble's lien as mortgagee was discharged and he held a mere naked legal title. The courts appear to hold that to entitle an attaching creditor to rely upon the record title in such cases the debt must have been created upon the faith of the apparent record title. No such claim can be maintained in this case because the defendant's attachment was made in an action of tort. The reasoning of the court in *Waterman* v. *Buckingham*, 79 Conn. 286 [64 Atl. 212], and the cases there cited, appears to be applicable to the facts of this case and to be conclusive." The facts found by the court, as above set out, are substantially the allegations in the complaint which were before the court on demurrer. None of the allegations of the complaint were directly denied by the defendant's answer.

The defendant has brought before this court all the evidence in the case, on a motion to correct the finding. Some of the facts asked to be inserted in the finding are immaterial, if found to be true; and some of the paragraphs contain simply statements of evidence. All of the testimony in the case, other than the documentary evidence, came from Shaw and Gamble, and the court evidently believed them, as it undoubtedly was justified in doing.

The matter of costs in this action was entirely within the discretion of the court.

There is no error.

In this opinion the other judges concurred.

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THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY *vs.* BENJAMIN A. ARMSTRONG ET ALS.

Second Judicial District, Norwich, April Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, GAGER and CASE, Js.

The title to the soil under the navigable waters of a cove below low-water mark is in the State as trustee for the public, subject to whatever privileges or franchises adjoining proprietors may have.

Subject to the paramount right of Congress to control the navigation of those waters in the regulation of commerce, the State may grant or dispose of the land thereunder for any public use, when that can be done without substantial impairment of the general interest.

The grant of such land for the construction of a railroad thereon is for an undoubted public purpose, and the acceptance of the grant by the railroad company puts an end, *pro tanto*, to the rights of adjoining riparian proprietors in such land.

In the present case the railroad company was authorized and empowered (4 Private Laws, p. 967) to locate, construct and finally complete a single, double or treble railway from some suitable point in New Haven to some suitable point in New London, and to lay out its road "not exceeding six rods wide" through its whole length. In 1851 a single-track road was laid out, located and constructed, and in 1892 another track was added. Across the tide waters of Shaw's Cove near New London these tracks were built upon piles and wooden trestles. Apparently there was no vote of the railroad company designating any particular layout or location, or defining its width, except that the center line of the road as constructed was the center or middle line of its right of way. *Held:*—

1. That under these circumstances there was no presumption that the railroad company had located its right of way to the full width permitted by its charter.
2. That actual occupancy by the railroad company within the limits of the six-rod strip had determined, up to the present time, the width of the railroad location, including in it, however, such additional space adjoining the trestle and piling as might be reasonably required for its security and support, or for that of a more solid and permanent viaduct should that be substituted.
3. That the grant suspended all right of entry by adjoining riparian owners upon the six-rod strip over the navigable waters of Shaw's Cove; and that in the present case such suspension would continue in force until an abandonment of the grant by the railroad company.
4. That the plaintiff had not exhausted its right of location by laying

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two of its tracks at different times, inasmuch as the charter clearly contemplated future growth and necessities and a gradual utilization of the six-rod strip.

5. That the question whether the plaintiff had abandoned its right of option to make a further location, while of great public importance, was one of fact upon which the trial court had not passed.
6. That the grant was limited to railroad uses and purposes, and conferred upon the plaintiff no riparian rights which were incident to the ownership of uplands; and that no such riparian rights were vested n the plaintiff by virtue of a city vote or by a deed from an individual.

The defendants owned upland to the north and west of the plaintiff's trestle, and had filled in the intervening space and built thereon an oil plant; and on the southeasterly side of the trestle, and within the six-rod strip, had recently erected a platform to which gasoline and oil, intended for sale, were to be carried by three large pipes running through the railroad trestle and piling. *Held:*—

1. That assuming the defendants and their predecessors were riparian owners contiguous to the six-rod strip, a finding that they had either been compensated for any injury to their rights as such owners or had abandoned such rights, was a reasonable inference of fact as to that part of the six-rod strip over which the plaintiff had in fact laid out its railroad, but not as to the rest of the strip, upon which the railroad company had not exercised its right of location.
2. That under its grant, the space occupied by the railroad company was permanently devoted to its exclusive use for railroad purposes; that the use which the defendants proposed to make of the railroad property was inconsistent with its control by the railroad and dangerous to public safety; and that it was the plaintiff's imperative duty to keep such pipes, although not attached to the trestle, away from its location.

Argued April 25th, 1917—decided January 22d, 1918.

SUIT to restrain the defendants from constructing a platform or wharf in New London harbor upon land alleged to belong to the plaintiff, and for an order requiring them to remove certain piling and piers already built, brought to and tried by the Superior Court in New London County, *Shumway, J.;* facts found and judgment rendered partly in favor of each party, but denying the relief asked for, from which each party appealed. *Error on plaintiff's appeal; no error on defendant's appeal.*

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In 1848 the General Assembly of Connecticut granted the plaintiff's predecessor in title a charter, portions of which are printed in the foot-note. 4 Private Laws, p. 967.

The plaintiff's predecessor duly accepted said char-

"Section 1. . . . And said company is hereby authorized and empowered to locate, construct and finally complete a single, double or treble railway or railroad, from some suitable point in the city of New Haven . . . to some suitable point in the city of New London. . . . And for the purpose of constructing said railroad or way, the said company is hereby authorized to lay out their road not exceeding six rods wide through the whole length, and for the purposes of cutting and embankments and for the purpose of necessary station houses, turnouts and for obtaining stone and gravel, may take as much more land as may be necessary for the proper construction and security of said road."

"Sec. 7. . . . And it shall be lawful for said company to enter upon and use all such franchises, lands and real estate as may be necessary for them, in the manner and for the purposes set forth in the first section hereof; . . . *Provided*, that said railroad shall not be worked upon or opened across the lands of any person, until the damages assessed to such person shall have been paid or secured to be paid to his satisfaction, . . . *Provided*, that it shall not be necessary in order to the location of said road by the directors and the approval thereof by the commissioners, that the width thereof shall be definitely established by said directors or commissioners, previous to said location; but before the damages shall be assessed to any landholder by the appraisers, the width of said railroad shall be definitely fixed and established by said directors over and across the land so taken, upon one or both sides of the line so located."

"Sec. 9. That said company is hereby authorized to construct, erect, build, make and use a single, double or treble railway or road, of suitable width and dimensions, to be determined by the directors of said company, on the line or course by them designated."

"Sec. 10. That whenever it shall be necessary for the construction of their single, double or treble railroad or way to intersect or cross any stream of water or watercourse, or any road or highway, it shall be lawful for said company to construct said railroad across or upon the same; but the said company shall restore the said stream or watercourse, or road or highway thus intersected, to its former state or in sufficient manner not to impair its usefulness."

"Sec. 19. Whenever said railroad shall cross any streams, coves or creeks, navigated by vessels at or above the place of such crossing, the said company shall erect draws of such width, or culverts of such height, as will suitably and conveniently accommodate such navigation."

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ter, and in 1851 lawfully laid out, located and constructed its single track railroad in New London to and across the tide and navigable water known as Shaw's Cove where the same adjoins the Thames River; the center line of said location is the center line of the railroad bed and construction, as the same was then made and as it now exists.

In 1892 the plaintiff located, laid out and constructed another track. Both of these tracks were constructed upon piles and trestles closely built.

Over the part of this six-rod strip occupied by these tracks and trestle, the plaintiff and its predecessor have exercised the exclusive, continued use and control under a claim of right. When the plaintiff's predecessor constructed its single track in 1851, the waters of the cove flowed over all of the said six rods. The plaintiff built a drawbridge across Shaw's Cove over a part of its track, and through this, over the waters of the cove, navigation has been, and may be, had by the defendants and others.

In 1899 the defendants acquired title to a strip of land bounded northerly thirty feet on Bank Street and southerly by the waters of Shaw's Cove. Since their purchase the defendants have filled in between their upland and the southwest side of the trestle work of the plaintiff, and an oil plant has been constructed on the west side upon the land so filled. On or about June 2d, 1910, the defendants began constructing spiling for a platform on the southeasterly side of the plaintiff's tracks within the said six-rod strip. The defendants, at about the time of bringing this action, had placed three large pipes designed to carry gasoline and oil through the trestle and spiling from the proposed tanks upon the platform on the southeast to the tanks upon the filled-in land upon the northwest of the trestle. If the defendants are permitted to maintain the struc-

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ture occupied by the Texas Oil Company on the west of the railroad, or to occupy the said six-rod space southeast of the trestle, the plaintiff will be cut off from approach to its trestle and tracks from either side.

The plaintiff, in the development of its business, will need to construct more railroad tracks upon and through said six-rod strip, and for such purpose will need to occupy more of said strip for the construction of its trestle, roadbed and tracks.

The plaintiff can replace or repair its trestle and tracks, upon the trestle, but this method increases the expense and danger to railroad and the public, and is attended with more delays to trains, than if the work could be done on either side of the trestle.

Leonard M. Daggett and *Frederick H. Wiggin*, for the appellants (defendants).

Hadlai A. Hull and *Charles B. Whittlesey*, with whom were *Frank L. McGuire* and *C. Hadlai Hull*, for the appellant (plaintiff).

WHEELER, J. We have incorporated in the foregoing statement, facts which the motion to rectify and the motion to correct do not successfully criticize. We omit those facts which are especially pertinent to the title of those who claim, or are claimed, to be upland owners, since in our view the case may be decided without passing upon their title.

The motion to correct should be sustained in part. Certain material facts of the finding, as we read the evidence, do not appear to be supported by it. The findings that the railroad's location and layout was six rods in width across Shaw's Cove, and as such was duly approved, adopted and accepted by the railroad, and

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that it has, ever since its location in 1851, occupied said space throughout its whole width of six rods, being three rods on each side of the center line of its location, and has exercised continued use and control of the same under a claim of right, and that the plaintiff and its predecessor have always claimed that their charter gave them the right to build six rods wide over and across Shaw's Cove,—are not supported by the evidence. We are unable to find testimony of a layout six rods wide, or of the acceptance by vote of a layout of any named width. Nor do we find testimony of any act of occupancy, except the location of the trestle with the two tracks. Nor do we find any testimony that the plaintiff has exercised, on the southeasterly side of its railroad, a right of approach for the purpose of repairing the trestle and tracks, nor that it has repaired the trestle by approach by water from either side of the trestle, or over the land filled in on the west by the defendants. The finding that the railroad possesses such a right of approach, we regard as one of law.

The finding that the defendants' predecessors, if entitled to compensation, had been compensated for interference with any wharf and reclamation rights belonging to them, or had abandoned claim to the same, was justified as a reasonable inference as to the part occupied by the trestle and its necessary support, but not as to the rest of the six-rod strip. The finding that the defendants' pipes were designed to carry other highly inflammable materials in addition to gasoline and oil, is unsupported by the evidence. Paragraphs 44 g, n, and o, of the motion to correct, should have been allowed. These relate to the existence of the foot-bridge maintained for upward of twenty-five years by the city of New London across this cove, attached to the trestle, and to the spur-track laid for the benefit of defendants over this strip. Both the foot-bridge

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and spur-track are shown on Exhibit A, which should have been attached to the finding in the form it was in when admitted in evidence. The defendants' motion to rectify the appeal should be allowed, and the finding corrected by striking out paragraph 31, and by including the fact that the figures and lines mentioned in paragraphs 7 and 63½ were superimposed upon a copy of defendants' Exhibit A after the hearing, and cannot be seen by an inspection, and were not seen by the trial court upon the examination of the premises. Paragraph 57 of the finding we regard as a conclusion of law and not as a finding of fact.

These corrections being made, we think the plaintiff entitled to a judgment, and hence there is no error on defendants' appeal.

As we view the case, it will be unnecessary to consider what, if any, rights of reclamation and wharfage the defendants may have in Shaw's Cove. We shall assume, without deciding, that the defendants are riparian owners on either side of the six-rod strip in controversy. The title to the soil under the waters of Shaw's Cove below low-water mark was in the State as trustee for the public, subject to whatever privileges or franchises adjoining proprietors might have. *Richards* v. *New York, N. H. & H. R. Co.*, 77 Conn. 501, 505, 60 Atl. 295. In the exercise of its sovereignty, the State had the right to grant the land under these waters for any public use "when that can be done without substantial impairment of the public interest, and subject to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce." *Saunders* v. *New York Central & Hudson River R. Co.*, 144 N. Y. 75, 85, 38 N. E. 992; *Shively* v. *Bowlby*, 152 U. S. 1, 47, 14 Sup. Ct. 548; *Illinois Central R. Co.* v. *Illinois*, 146 U. S. 387, 13 Sup. Ct. 110.

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The State's grant to the plaintiff's predecessor was for an undoubted public pupose, and, so far as the grant was accepted, the franchise of these riparian owners ended. Whether the grant to locate and lay out the railroad across Shaw's Cove could be made without compensation for any rights of adjoining riparian owners found to exist, need not now be determined. The charter is to be construed in all its parts as an entirety. Section 10 is an express authorization to the plaintiff's predecessor to construct its railroad across this cove, provided the watercourse be restored so as not to impair the usefulness of the waters of the cove. This was accomplished by building a drawbridge opening into the cove. The grant empowered the railroad to locate, construct, and finally complete a single, double, or treble railroad between named *termini*, and authorized it to lay out the road "not exceeding six rods wide through the whole length."

A public grant by charter to a railroad to lay out its road six rods wide, followed by an acceptance of the charter and the construction of a single-track railroad upon the six-rod strip, might well be held to constitute in law an acceptance of the location and layout of the railroad for the entire six rods, even though the precise width of layout was not specified in the vote of acceptance. The legislature would then have established the width of the railroad, and the railroad company could not lay out one of lesser width; hence, if it accepted the charter, it accepted the width of the right of way as determined by the legislature.

The charter granted to the plaintiff's predecessor, however, did not authorize a location and layout of a fixed width, but one "not exceeding" six rods wide, and by the terms of § 1, this width extended over the whole length, which included the location over this cove.

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Some of the cases hold that a railroad having an optional grant of this character, in the absence of affirmative action on its part limiting its appropriation of its right of way other than its entry upon and construction of its road over and through a part of the way granted, must be conclusively presumed to have taken and held all of the location to the full width permitted by the charter. *Prather* v. *Western Union Tel. Co.*, 89 Ind. 501, 525; *Williams* v. *Delaware, L. & W. R. Co.*, 255 Pa. St. 133, 99 Atl. 477. Other cases appear to hold the contrary: *Philadelphia & Reading R. Co.* v. *Obert*, 109 Pa. St. 193, 1 Atl. 398; *Leidigh* v. *Philadelphia, H. & P. R. Co.*, 215 Pa. St. 342, 64 Atl. 539; *Fort Wayne, C. & L. R. Co.* v. *Sherry*, 126 Ind. 334, 25 N. E. 898. Before the law can draw this presumption, there must be a probable inference—which our common sense, enlightened by our knowledge and experience, draws from the fact of entry upon a part of this right of way granted—that the railroad in fact located and laid out its road over the whole six-rod right of way which the charter gave it the right to do. The application of this test does not satisfy us that this presumption is a probable inference in this case. The railroad might have evidenced its acceptance of the entire location by defining the location and layout, and the extent of its designation would measure the extent of the acceptance of the grant. Or the acceptance and designation of the location and layout might have been evidenced from acts of possession, as by setting out monuments, or by the physical location of roadbed and tracks. In the case before us, the vote of the railroad was duly passed, and approved by the commissioners, designating the center line of the road, including that across Shaw's Cove. No vote of the railroad designating the acceptance of any particular location and layout appears to have been passed. It may, or it may not, be to its

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advantage to possess the entire six-rod strip. If it does possess it, all the liability of ownership follows, and burden of taxation and of responsibility for injuries attach. The charter gave the railroad the right to take some or all, and the law ought not to take away from it its right to exercise its option. We have no setting of monuments in the record. The railroad's only acts of possession are its location of first one and then another track, and its building of the trestle. We have no occasion to refer in detail to cases in other jurisdictions, since in *Williams* v. *Hartford & N. H. R. Co.*, 13 Conn. 397, we held that, in the case of a charter providing for a location not exceeding six rods wide, the definite establishment by the railroad of a center line only did not define the width of location, and therefore there was no roadway in existence which could be appraised in condemnation proceedings. The same rule was admitted by counsel and recognized by the court in *New York & N. E. R. Co.* v. *New York, N. H. & H. R. Co.*, 52 Conn. 274, 279. The rule so adopted and recognized is decisive that the acceptance of the grant and the mere establishment of the center line does not define the width of the location. It necessarily follows that no presumption can be drawn that the railroad company has taken and held all of the location to the full width permitted by the charter. So much of this six-rod strip as the railroad has actually occupied constitutes, up to the present, the limits within which the railroad company has seen fit to exercise its option under its grant. A mere acceptance of a charter granting to a railroad company the right to locate and lay out its railroad not exceeding a named width, followed by its occupation for railroad purposes of a part of this named width, does not create a presumption that the railroad intended to locate and lay out, or has located and laid out, its road over the entire width of the strip.

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Williams v. *Hartford & N. H. R. Co.*, 13 Conn. 397; *New York & N. E. R. Co.* v. *New York, N. H. & H. R. Co.*, 52 Conn. 274.

The defendants concede that the occupation of a part of this strip, first for a single track and later a double track, located and laid out the railroad to the extent at least of the physical user. The mere physical occupation of the trestle does not and should not mark the extent of the location and layout. The spiling may require support above the bed of the cove, now or hereafter; some of the soil on the outer side of the spiling may be required to provide security for the spiling. The space and bed of the cove outside the line of the spiling, so far as they may be reasonably necessary for these purposes, are and should be included as a part of the location and layout of the plaintiff. It is also reasonable to hold that the trestle of wood may in due course give place to a permanent way of masonry, or rock and filling, or of bridging built of other material. Additional space too, may be required for additional supports, or wings or embankments, if any of these substitutions should be made. Whatever space is reasonably required for these purposes lying outside the lines of the present trestle, must be presumed to have been included as a part of the occupation of the trestle. No narrow rule should be adopted in passing upon the acceptance of a public grant where the welfare of the public is involved. How much additional space to that occupied by the present trestle will be required to furnish to it adequate support, or to provide for the substitution for it by way of a permanent way, or another form of trestle or bridging, does not appear in the finding. That it will be a substantial addition to the space actually occupied by the trestle, is evident, and that the defendants have encroached upon this space on either side of the trestle is likewise evident

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from the proximity of the reclaimed land, and the platform they assert ownership over.

We have assumed, for the purposes of this case, that the defendants are riparian owners contiguous to this six-rod strip, and, in the absence of the grant to the railroad, entitled to build across it and beyond it subject to the rights of navigation and the public use.

The finding that defendants' predecessors, if riparian owners, have either been compensated for this strip or have abandoned claim for compensation thereto, is a reasonable inference of fact as to the part of the six rods over which the plaintiff has in fact laid out its railroad, in view of the provision in the charter for compensation and from the long occupation and absence of claim for compensation. As to the rest of the strip, no compensation can be presumed to have been made, for over it the plaintiff has not exercised its right to locate and lay out its railroad.

The grant, by its charter, to the plaintiff's predecessor to locate, lay out and construct its railroad over Shaw's Cove, permanently devoted the space which the railroad company occupied under its grant to the exclusive use of the railroad company for railroad purposes. We read this purpose in the charter, and we find it a thoroughly settled principle of our law. *Fitch* v. *New York, P. & B. R. Co.*, 59 Conn. 414, 419, 20 Atl. 345; *New York & N. E. R. Co.* v. *Comstock*, 60 Conn. 200, 209, 22 Atl. 511. The defendants recognize this general rule of law, but attempt to qualify it by the limitation that the exclusive occupation is only "so far as this is necessary or convenient for the safe and proper operation of the railroad business." The practical effect of such a qualification would place upon the railroad company the burden of proving, in each case, the necessity or convenience, and give to the riparian owner a right of passage over the tracks and a right to lay pipes

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or build a conduit under the tracks. Railroading is a dangerous business; the railroad company's right of way and tracks must be under its control; consideration for the safety of the public should forbid any save the railroad employees from being upon the tracks, and forbid any foreign uses of the railroad, trestles, its embankments, or way upon or below the surface of its tracks. There is no other way of safely conducting the business. When repairs or renewals are to be made, the railroad company ought not to be required to care for pipes and apparatus running through its location, or to wait until the owner of these has been found and has cared for them. It could not, under the suggested qualification of this rule, permit pipes in which gasoline and kerosene oil flowed to be maintained through its wooden trestle. The liability of a break in the pipes through an accident upon the railroad, or otherwise, and the danger that the inflammable oil would be ignited, with the consequent destruction of trestle and rolling stock upon it, impose upon the plaintiff an imperative private and public duty to keep these pipes from its location. In the cases cited, we gave reasons for our holding that a railroad company had the exclusive use of its location and layout for railroad purposes, which seem to us controlling. Those cases upon which the defendants rely, which hold that the owner of the way has the right to minerals under the railroad easement, deny his right to enter upon the railroad location to take them, and compel him to drive a tunnel from his own adjoining land, leaving sufficient support for the railroad easement. The adjoining owner may not enter upon the railroad location, for, these cases say, its business requires exclusive possession of the surface by the railroad. In a case cited by the defendants, *Southern Pacific R. Co.* v. *San Francisco Savings Union*, 146 Cal. 290, 79 Pac. 961, it is held (p. 295) that "under the

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condemnation the railroad company acquires the permanent and exclusive control of the surface of the land." The trestle, or the embankment, are above the bed of the cove, that is, above the surface of the land, and under this class of cases no right of an adjoining owner exists to enter *in invitum* upon the railroad location, or to run pipes through trestle or embankment in the absence of legislative authority. It is immaterial that these pipes are not attached to the trestle, they are within the railroad location, of which the railroad company has the exclusive possession, interference with which is a violation of a clear legal right.

We have already pointed out one effect of the failure of the railroad to locate and lay out its road over any part of this strip not actually occupied by its road. Let us see the situation the unlocated part of the grant to the railroad company is left in. The grant suspended all right of entry by adjoining riparian owners upon this six-rod strip over the waters of Shaw's Cove. So long as the grant continued, the riparian owners could not lawfully enter upon this strip. There were only four ways in which the grant could be terminated: by formal act on the part of the General Assembly, by judgment of court, by a voluntary surrender, or by an abandonment of the grant by the railroad company. No judgment of court has been rendered. The General Assembly has not sought to terminate the grant, and the railroad company has made no effort to surrender it; therefore, unless the railroad company has lost its right to exercise its option of location by an abandonment of this privilege, it still remains. We have not failed to consider the defendants' claim that the plaintiff has exhausted its right of location by the exercise of its option and the laying at different times of its two tracks. We do not think the railroad company was required to exercise its option on any single occasion or

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occasions, or within any precise period of time. The terms of the charter seem to plainly indicate this, for the railroad is authorized "to locate, construct and finally complete a single, double and treble railroad." The grant was intended to provide a railroad between named *termini*, not only for the then present, but for the long future. It was not expected that the new line would in the beginning utilize for operation its entire location. The single track was sufficient for 1851, the double for 1892. Public necessity may later on require an additional track, and the General Assembly contemplated by its grant provision for future growth and needs. If the railroad company's exercise of its option under the grant can be exhausted by the exercise of its option to lay first one and then another track, the same reason exists for finding an exhaustion of power in one exercise of its option as in two. But neither the defendants nor any one else has ever claimed that the railroad company exhausted in 1851 its right to thereafter locate another track; and no one claims that the location of 1892 is not valid. This concession makes it logically impossible to contend that the railroad company exhausted its power of location by its location of 1892.

Whether the railroad company has abandoned its option of further location over this six-rod strip, is a question of fact, *Chatfield Co.* v. *O'Neill*, 89 Conn. 172, 175, 93 Atl. 133, and one not found by the court nor passed on by it. The finding is not sufficiently explicit in its presentation of the subordinate facts upon which the conclusion of abandonment must rest, to admit of a finding, much less to permit such a conclusion as one of law. The high public importance of this finding make it one for the exercise of great care and large wisdom.

The plaintiff claims, in addition, certain rights in this six-rod space, through its possession of riparian rights of ownership by virtue of the grant from the State over

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the waters of Shaw's Cove, the land conveyed to it by Brown, and by the vote of the city. The grant from the State was to locate, lay out and construct a railroad for the purposes of a railroad. The railroad right of way in such a case is held only for railroad purposes, "and does not include the riparian rights which are incident to the ownership of uplands." *In re City of Buffalo*, 206 N. Y. 319, 320, 99 N. E. 850. The vote of the city to authorize the railroad company to construct its road upon and across certain lands of the city, which included Shipyard Street, was not intended to convey anything further than a railroad easement. The Brown deed, which conveyed a strip adjoining this street, by its terms intended to exclude from its grant riparian rights. The land adjacent to and southerly of the land conveyed by Brown, acquired by the railroad company by condemnation, gave to it no riparian rights. The land conveyed by the Perkins deed appears to convey riparian rights, but of this we cannot be certain, for the finding does not locate the premises conveyed, and the evidence is not sufficiently definite to locate them; we incline to the opinion that the land therein granted was located, as the defendants claim, at the opposite side of Shaw's Cove, but of this we cannot be certain.

There is no error on defendants' appeal.

There is error on plaintiff's appeal, the judgment is reversed and the cause remanded for hearing as to the extent of the actual occupation of the plaintiff upon said six-rod strip, and a judgment in favor of plaintiff is directed in accordance with prayers 2 and 3 as to said part of said strip, and also a judgment in favor of plaintiff in accordance with prayer 4, all as set forth in this opinion.

In this opinion the other judges concurred.

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HATTIE MAY FITCH *vs.* THE CITY OF HARTFORD.

First Judicial District, Hartford, October Term, 1917.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Whether a municipality is negligent or not in permitting a defect in a sidewalk which, while not glaring or pronounced is something more than a trifling inequality in its surface, to remain for years in that condition, is a question of fact for the jury under all the surrounding circumstances.

While a municipality is bound to anticipate and provide for all defects and obstructions in a highway which may reasonably be expected to arise in the performance of work by a licensee for his own private benefit, it is not an insurer of the safety of travelers on its highways, and therefore is not bound at its peril to provide in advance against unnecessary and unexpected dangers such as may be created by the negligence of its licensee; its duty is only to use reasonable care in ascertaining such neglect and in averting its harmful consequences.

The action of the trial court in setting aside a verdict, although placed upon the wrong ground, will not be disturbed by this court on appeal, if it appears from the appellee's exceptions to the charge that the verdict was based upon an erroneous instruction.

Argued October 2d, 1917—decided January 22d, 1918.

ACTION to recover damages for personal injuries alleged to have been caused by the negligence of the defendant in maintaining a defective sidewalk, brought to the Superior Court in Hartford County and tried to the jury before *Kellogg, J.*; verdict for the plaintiff, which was set aside as against the evidence, and appeal by the plaintiff. *No error.*

This case comes here on plaintiff's appeal from the action of the court in setting aside the verdict, and on defendant's bill of exceptions to the charge.

Plaintiff's evidence was that in stepping down from a raised platform which formed a part of the traveled sidewalk, she caught her foot between two flagstones on

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the lower level of the walk. The space between the flagstones was admittedly $10\frac{1}{2}$ inches long, $2\frac{1}{2}$ inches wide, 1 inch deep measured from the upper surface of one stone, and $2\frac{1}{2}$ inches deep measured from the other. This opening had existed for some years, and the plaintiff had observed it. At the time of the accident it was concealed by loose dirt thrown upon it by a licensee of the city, who had dug a hole in the sidewalk, not far away, under a permit issued by the city.

It seems to have been conceded that the city had no actual notice of the changed condition caused by the concealment of the alleged defect, and that the dirt which concealed it might have been thrown there very shortly before the accident.

One portion of the charge, included in the defendant's bill of exceptions, is as follows: "A municipality is responsible for the negligence of one who, acting under its license or permission lawfully granted, creates any defect or obstruction, which endangers the safety of persons using the streets. . . . Notice of the defect or obstruction is not necessary in such cases."

William H. Fogerty, for the appellant (plaintiff).

Francis W. Cole, for the appellee (defendant).

BEACH, J. Whether the city was negligent in permitting a defect of the size and character above described to remain for an indefinite time at the place where it was located, was a question for the jury to determine in view of all the surrounding conditions.

The plaintiff's story was one which the jury might reasonably believe, and the alleged defect was more than a negligible inequality of surface. Its location and dimensions were definitely ascertained, so that the jury could intelligently pass upon the question whether

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under all the circumstances of location and travel it was a dangerous defect either in its normal condition or when concealed by loose dirt. So far as these issues of fact are concerned, there was no reason for setting aside the verdict. Nevertheless the court might properly have set it aside on an entirely different ground, because it was based upon a misdirection in charging the jury as set forth in the statement of facts.

When a municipal corporation, charged with the duty of maintaining its highways in reasonably safe condition for travel, grants a permit for specified work to be done within the limits of a highway for the private benefit of the licensee, it is, of course, notified in advance of all defects and obstructions in the highway which may reasonably be expected to arise in the performance of that particular work at the given time and place, and in the exercise of reasonable care it is bound to anticipate and provide for all such defects and obstructions. *Boucher* v. *New Haven*, 40 Conn. 456; *Cummings* v. *Hartford*, 70 Conn. 115, 123, 38 Atl. 916.

Since the duty of exercising reasonable care rests continuously on the municipality, it must also use reasonable care to protect travelers against the negligence of its licensees by a reasonable supervision and control of the work. *Carstesen* v. *Stratford*, 67 Conn. 428, 434, 35 Atl. 276. But it is not an insurer of the safety of travelers on the highway, and therefore it is not bound at its peril to provide in advance against unnecessary and unexpected dangers such as may be created in the highway by the negligence of its licensees. In such cases the rule is, not that the municipality is liable for the negligence of the licensee, but that it is bound to use reasonable care in ascertaining the neglect and averting its harmful consequences; and that in the absence of actual notice of a defect due solely to the negligence of the licensee, it is not liable unless it has

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failed to use reasonable care in discovering the existence of the defect. See 4 Dillon on Municipal Corporations (5th Ed.) § 1723, as modified by *Boucher* v. *New Haven*, 40 Conn. 456.

The defendant's bill of exceptions to that part of the charge quoted in the statement of facts is sustained, and the case must therefore stand for a new trial.

There is no error.

In this opinion the other judges concurred.

MARY E. BANKS *vs.* ALBERT D. HOWLETT COMPANY ET AL. (ALBERT D. HOWLETT COMPANY ET AL. APPEAL FROM COMPENSATION COMMISSIONER).

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

A contract of employment made in New York but having sole and specific reference to a job to be performed in Connecticut, comes within the operation of the Workmen's Compensation Act of this State, in case of personal injury to the employee while at work here pursuant to such employment.

Argued October 25th, 1917—decided January 22d, 1918.

APPEAL by the defendants from a finding and award of the Compensation Commissioner of the fifth district in favor of the plaintiff, taken to and tried by the Superior Court in New Haven County, *Warner, J.*; the court affirmed the award and dismissed the appeal, and from this judgment the defendants appealed. *No error.*

The defendant employer is a Massachusetts corporation having an office in New York City. One Rourke, a skilled painter, applied at its New York office for

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employment at his trade. The defendant employer's superintendent in charge of the office was acquainted with Rourke, and hired him to do some painting in New York. After Rourke had worked a few days in New York, the New York office of the employer was notified to send some men to Waterbury in this State, to do some painting on a building there in process of erection. Its superintendent thereupon spoke to Rourke about going with others to Waterbury to perform the work, which, he said, would probably occupy two or three weeks, and informed him, Rourke, that, if he were minded to go, he would be paid the regular price of $5 a day and have his railroad fares and board paid. Rourke accepted the proposition, and went to Waterbury to work on the job. When he had been so working two or three days, and while engaged in his work, he fell from a ladder and sustained injuries from which he died a few days later. His injuries were not induced or contributed to by either intoxication or misconduct on his part. At no time was anything said between his employer or its representative and him concerning the matter of compensation in the event of his receiving injuries, or in respect to the law which should be applicable in such case.

William B. Ely, for the appellants (defendants).

Clayton T. Klein, for the appellee (plaintiff).

PRENTICE, C. J. Rourke received the injuries resulting in his death while he was engaged at work for a Massachusetts employer in Connecticut. The contract of employment between him and his employer was entered into in New York. In the latter State, as in this, workmen's compensation legislation was then in force creating rights and obligations arising out of

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contracts of employment which were contractual in their nature and capable of extra-territorial operation. *Matter of Post* v. *Burger & Gohlke*, 216 N. Y. 544, 554, 111 N. E. 351.

The question here at issue is whether or not the Superior Court acted properly in confirming an award, made under Connecticut law, to the claimant as a total dependent of the deceased. The commissioner's finding of dependency is not contested. The appellants' sole attack upon the award arises out of the fact that it was made by application of the Connecticut law. Their claim is that the New York statute governs the situation and determines the rights of the parties.

The argument made in support of this claim is based upon the assumption that the contract of employment made in New York was a general one, having no reference to services to be rendered in Connecticut, and not made in contemplation of such services. Such, however, is not the situation presented upon the record. Although the contract under which Rourke was working when he was injured was made in New York, it was one made with specific reference to the rendition of services in Connecticut. It was made subsequent to the time of his original employment by the employer defendant, and while he was engaged in work thereunder. While so engaged he was approached by his employer's superintendent, who spoke to him of the Waterbury job, and made him a proposition that he go there to work upon it, if he was so minded. This proposition stated the terms upon which he would be employed if he went, and they differed from those under which he was then employed. Rourke was thus given the option to go or to refuse to go. He accepted the proposition made to him, and thereupon and under the arrangement thus made went to Waterbury. Here was a substitution of a new contract for the old. *American Radiator Co.* v.

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Rogge, 86 N. J. L. 436, 437, 92 Atl. 85, 94 id. 85. This substituted contract was the one under which he was working when injured, and it was made with distinct and sole reference to a Connecticut employment. As such, it had incorporated in it, automatically, the provisions for compensation in the case of injuries prescribed by our law. *Douthwright* v. *Champlin*, 91 Conn. 524, 527, 100 Atl. 97.

The rule thus invoked (although perhaps limited in its practical application), to wit, that a Connecticut employment which is the specific and sole subject of the contract of employment, wherever made, comes within the operation of the Connecticut law governing the payment of compensation in cases of personal injury arising therefrom, appears to be one better calculated than any other to make for uniformity of treatment, both as between those engaged upon a given work and as between persons employed in Connecticut work generally, for simplicity and convenience in remedial proceedings, and for the preservation to Connecticut citizens of the benefits which it has seen fit to prescribe for the protection of Connecticut workmen.

There is no error.

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

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ISAAC FLEISCHER *vs.* LOUIS WEIN.

Third Judicial District, Bridgeport, October Term, 1917.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

The question to whom a vendor of goods extended credit, is one of fact, and its determination by the trial court is final unless the conclusion reached is legally inconsistent with the subordinate, evidential facts, or is one which could not reasonably be drawn from them.

In the present case the trial court found, upon conflicting evidence, that credit had been given by the plaintiff to the defendant's father, who owned the store when and where the goods were sold and delivered, and not to the defendant himself. *Held* that this conclusion was not inconsistent with the evidential facts, nor was it an unreasonable deduction from them.

Argued October 31st, 1917—decided January 22d, 1918.

ACTION to recover for merchandise alleged to have been sold and delivered to the defendant, brought to and tried by the Court of Common Pleas in Fairfield County, *Walsh, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiff. *No error.*

The defendant, a resident of Greenwich, was, for a period of time prior to July 29th, 1915, the owner of a grocery store in that town, which, until sometime in May, 1915, he personally conducted. In May, 1915, he accepted employment as a chauffeur, and the store was then conducted by his brothers. July 29th, 1915, he made a bona fide sale of the business, for valuable consideration, to his father, Abraham Wein, who thereupon took it over and carried it on. On July 9th, 1915, a statutory notice of intent to sell was filed by the defendant in the town clerk's office of Greenwich, and the bill of sale given by him to his father on the 29th was recorded the next day. In August, 1915, the defendant, while still acting as chauffeur, broke his leg, and was compelled to give up his employment in that capacity.

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On or about September 15th, having recovered sufficiently from his injuries, he entered into his father's employment as manager of the store, at an agreed wage of $15 per week. During all the time from July 29th, 1915, until his return to the store about the middle of September, he had nothing whatever to do with its conduct. After the middle of September he continued, through the whole period covered by the transactions involved in this case, to conduct the store as his father's agent and in his father's pay. The latter lived and carried on another business in the adjoining town of Port Chester, New York. He was unfamiliar with the conduct of a store, and did not participate personally in the conduct of the one he had purchased from his son.

The plaintiff was a baker. Early in November, 1915, he for the first time sold and delivered certain goods to the store in Greenwich, and continued to do so until sometime in February, 1916. The total amount of his sales so made was $137.83. Of this amount $25 was paid to the plaintiff by Abraham. The remainder has not been paid. The goods were ordered by the defendant in charge of the store, and the same were entered upon the plaintiff's books as charged as follows, to wit, the first two pages of entries to "Wein," "Greenwich," and the remainder to "Louis Wein." All bills contracted in the conduct of the business at the store were paid either by checks of Abraham Wein or by cash taken in at the store.

The store bore no sign, inscription or notice indicating to whom the business belonged. During the time covered by the plaintiff's sales, or at least some portion of it, the name of Louis Wein appeared in both the general and telephone directories of Greenwich as the proprietor of the store, but it was placed therein before the sale, and when Louis was the proprietor. In the store at the time of sale were certain blank order slips

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with the name of Louis Wein thereon. These slips were, for reasons of economy, used subsequent to the sale as receipts for goods delivered, and such receipts were given to the plaintiff. The plaintiff made no examination of the records in the town clerk's office, and no evidence was given of representations made by either Louis or Abraham as to the ownership of the store. Demand for payment of the plaintiff's bill was made by him of Abraham personally, he having gone to the latter's house in Port Chester for the purpose. In March, 1916, Abraham was adjudicated a bankrupt. The plaintiff extended credit to the owner of the store and not to Louis.

Robert R. Rosan, for the appellant (plaintiff).

Frederick G. Schmidt, for the appellee (defendant).

PRENTICE, C. J. The plaintiff seeks recovery for goods sold and delivered by him, upon order, to a store in Greenwich. Abraham Wein, the defendant's father, was the proprietor of this store. The defendant, during the whole period covered by the plaintiff's dealings with it, had no other connection with it, or interest in the business there carried on, than as his father's agent in its management. He cannot, therefore, be held liable for the plaintiff's account, a rightful charge against his father, unless the goods whose sale and delivery furnish the basis of it, were sold and delivered upon the defendant's credit.

The court has found that the plaintiff, in his transactions with the store, extended credit to its owner, the defendant's principal, and not to the defendant. This is a finding of fact. If it is to stand, the judgment exonerating the defendant from liability necessarily follows. It must stand unless as an ultimate fact it is

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inconsistent with the subordinate evidential facts which are found, or its deduction from those subordinate facts was one which could not reasonably be made.

We are unable to discover such inconsistency or unreasonableness, especially in view of the facts that the only credit appearing upon the plaintiff's account was for a payment made by Abraham, and that the plaintiff sought out Abraham to make personal demand of him for payment of the balance due. In the face of these facts, strongly suggestive of the plaintiff's knowledge of Abraham's proprietorship and of a giving of credit to him, a trier might reasonably regard the other facts upon which the plaintiff relies, as furnishing less convincing indications as to the person, whether the principal or the agent, upon whose credit the sales were made. The original entry in the plaintiff's books is as readily explainable upon the theory that it was used to indicate the place of business, as of the place of residence of its proprietor, and the use of the order slips was an incident of the transactions with the plaintiff entirely consistent with knowledge of the true proprietorship. The absence of a sign possesses only such negative significance as arises from an absence of a representation of ownership by that method, and the directory entries, speaking the truth when made, possess no importance touching the plaintiff's knowledge, since it does not appear that they ever came to the plaintiff's notice.

There is no error.

In this opinion WHEELER, BEACH and SHUMWAY, Js., concurred.

RORABACK, J. (dissenting). I am unable to agree with the conclusion just announced, although it may

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be conceded that the defendant purchased the goods in question as agent.

It is well settled that it "is the duty of the agent, if he would avoid personal liability on a contract entered into by him on behalf of his principal, to disclose not only the fact that he is acting in a representative capacity but also the identity of his principal, as the person dealt with is not bound to inquire whether or not the agent is acting as such for another." 2 Corpus Juris, p. 816, § 491, with notes; 2 L. R. A. 811, 812, notes bottom of pages; 47 L. R. A. (N. S.) 232, 234, notes bottom of pages; *Hall* v. *Bradbury*, 40 Conn. 32; *Merrill* v. *Kenyon*, 48 Conn. 314; *Johnston* v. *Allis*, 71 Conn. 207, 215, 41 Atl. 816.

It is not claimed that the defendant gave any express notice of his agency to the plaintiff; neither does it appear that there was anything in the attendant circumstances from which the plaintiff could have fairly inferred that the defendant was not conducting the business of the Greenwich store in his own name and behalf. He was residing in Greenwich, Connecticut, where the store was located, and was in the absolute control and possession of the place of business where the goods were sold and delivered. His father, Abraham, at this time was living and carrying on a different kind of business in Port Chester, New York. There were no indications, by signs or otherwise, on or about the store, that the father was interested in the business at this place, when these goods were purchased, and there was no intimation or suggestion from anyone that there was any agency or that the purchases were for Abraham.

Upon the other hand, it is distinctly found that in making these purchases, the defendant used slips with his own name thereon, which were filled out by him and given to the plaintiff as receipts for his goods.

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It is well known that telephone and city directories are the sources generally relied upon for information as to the locations of different branches of business and the owners thereof. It appears that when the transactions now under question were being carried on in Greenwich, the defendant's name appeared in both the city and telephone directories of Greenwich as proprietor of this store. The defendant should not be relieved from liability because the plaintiff failed to make an examination of the land records of the town of Greenwich. It is true that one who purchases land without making an examination of the registry of deeds is presumed to be negligent. This case does not concern the matter of titles, and we have seen the defendant was not bound to make any inquiry. If there were any duty resting on the plaintiff in this connection, it is plain that he acted with due diligence.

It appears that the goods were charged to the defendant and not to the father, Abraham. The finding shows that in the plaintiff's books, which appeared in evidence, the first two pages of the entries of this account for merchandise were charged to "Wein, Greenwich." This clearly was Louis, the defendant, then living in Greenwich, where the store was located, and not his father, Abraham, who lived and was doing business in Port Chester, New York. The remaining pages of the account for merchandise were regularly charged to "Louis Wein."

The facts found do not show that the only credit upon the plaintiff's account was for a payment made by Abraham, by his check. As the finding reads, the most that can be claimed relative to this payment is that it was made from cash taken in at the store, or by Abraham's check. It is fair to infer that if this payment had been made by check, the court below would so have found in no uncertain terms. At least the

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date would appear when the check was gi
was the best evidence upon this subject. It
that if this payment was made with cash
store, which was in the control and under th
ment of the defendant's son, the matter o
would be of no value as evidence for the
It is not possible to attach any significar
alleged payment on account, or to the den
for the balance unpaid, as it does not ap
these facts occurred. It is almost unnecessa
that if this were done after the goods in qu
been sold and delivered, after the transactio
practically closed, and when the defendant
had been established, these facts would not
defendant any relief from his liability. A p
demand before a liability had been establ
be one thing, and like conduct after the good
sold and delivered might be quite another.

From the special facts found, the trial cou
that the plaintiff extended credit to the ow
store, and not to Louis. Such an inference
legally drawn from the facts set forth in t
In the light of these facts, the only reasonabl
was that credit was given to the defendant, L
as the apparent owner of the store where t
were sold and delivered. A memorandum
may "be resorted to as indicating a con
law controlling the decision." *Rogers* v. *He*
Conn. 260, 267, 82 Atl. 586; *Phœnix Ins. Co*
80 Conn. 426, 433, 434, 68 Atl. 993. In this
it is of interest to quote from the memo
decision, made a part of the record in this cas
the trial court states that the plaintiff, "evi
not inquire as to the ownership of the stor
he know, apparently, if you judge from
evidence, to wit, his first charges in the book,

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the store, except that it was owned by a Wein and it doesn't appear that he ever made any inquiries, nor that he was ever told by anybody that the defendant owned that store or claimed to own the store, and, when he brought the action in the present suit, he made no inquiries but simply assumed, on the strength of what he had seen, that the defendant and not his father was the owner of the store."

It is apparent that the trial court in its decision acted upon the theory that it was the plaintiff's duty to make inquiries, and that he could not rely upon the strength of what he saw. Such is not the law.

Aside from this, if we assume that the trial court properly reached the conclusion that the plaintiff extended credit "to the owner of the store," this would not absolve the defendant from liability. In other words, it appears from the finding, as it now reads, that the defendant is personally liable from his own showing. It is fair to assume that the finding of the court as to the matter of extension of credit by the plaintiff is as broad and comprehensive as the disclosure upon which the conclusion upon this subject is predicated. When so considered, it appears that the substance of the disclosure made by the defendant was only to the effect that he was acting as agent "for the owner of the store." Such a disclosure falls far short of the naming of the principal in the sense that the law requires. It is a universal rule that it is not sufficient that the third person has knowledge of facts and circumstances which would, if reasonably followed by inquiry, disclose the identity of the principal; actual knowledge on his part of the principal's identity is necessary to exonerate the agent. 2 Corpus Juris, 820.

The disclosure claimed to have been made by the agent in this case is too indefinite to exonerate him

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from liability. The owner of the store cou
or be sued without naming him.

In the language of an eminent jurist: "I
sible to suppose, that the other contractin
willing to enter into a contract, exonerating
and trusting to an unknown principal, wh
insolvent or incapable of binding himself."
Agency (8th Ed.) § 267, p. 339.

It follows from what I have said that I can
in the majority opinion that there is no erro

MICHAEL LIBRETTO *vs.* FERDINANDO SE

First Judicial District, Hartford, January Term,
PRENTICE, C. J., RORABACK, WHEELER, BEACH and S

Under our present system of pleading and rules of prac
Statutes, § 609, Practice Book, p. 250, § 160), a def
suit when brought was premature, must be raised by
kind, otherwise it is not open to the defendant to ur
tion.

Argued January 3d—decided January 22d, 191

ACTION to recover for services as a real-est
in procuring a purchaser of the defendant's
brought to and tried by the Court of Com
in Hartford County, *Smith, J.*; facts found
ment rendered for the plaintiff for $725, a
by the defendant. *No error.*

The complaint, seeking recovery of the
worth of services rendered, alleges that th
a real-estate broker, was employed by the
at a reasonable compensation to procure a pu
a saloon business owned and conducted by

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and that the plaintiff did procure such purchaser, to whom the business was sold. The answer, putting at issue all the allegations of the complaint, contained a special defense, that the services were rendered under an agreement that the plaintiff's commission should be $200. The court found in accordance with the allegations of the complaint, and rendered judgment for the reasonable worth of the plaintiff's services.

The court's conclusion that the plaintiff had fulfilled the conditions of his employment is founded upon the following subordinate facts: The plaintiff brought to the defendant a prospective purchaser. The two agreed upon terms of sale mutually satisfactory. They committed this agreement to writing and signed it. By its terms $300 was to be paid down by the purchaser, and such payment was made. The balance of the purchase price was to be paid when the license under which the saloon operated was transferred. It was stipulated that the plaintiff should forthwith make application for such transfer, and that if the county commissioners should refuse to grant one, then the agreement should be null and void and the $300 refunded. The license was transferred on the day following the beginning of the action, and on that day the transaction was consummated.

Joseph H. Lawler, with whom was *Francis P. Rohrmayer*, for the appellant (defendant).

John W. Coogan and *Francis J. Conti*, for the appellee (plaintiff).

PER CURIAM. It is not denied on the defendant's behalf that upon the facts found the plaintiff is entitled to recover from him the amount for which judgment was rendered against him. The only error assigned in the reasons of appeal is the failure of the court to hold that

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the action was prematurely brought and to
for that cause. That assignment of error, pu
nical and unrelated to the substantial righ
parties, is sufficiently met by the statement
not one which our rules of practice entitle hi
sue, since he did not plead nonmaturity of th
action either in abatement or in bar. His only
was by way of answer, confined to denial and
defense asserting that the plaintiff's employ
for a stipulated price. *Southey* v. *Dowling*,
153, 157, 39 Atl. 113; General Statutes, § 609;
Practice (1908) p. 250, § 160.

There is no error.

ALEXANDER JACQUEMIN ET AL. *vs.* THE TUR
SEYMOUR MANUFACTURING COMPANY (T
NER AND SEYMOUR MANUFACTURING C
APPEAL FROM COMPENSATION COMMISSIONE

First Judicial District, Hartford, January Term, 19
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUM

An injury "arises out of" an employment, within the mea
expression in our Workmen's Compensation Act, when
the course of the employment and is a natural and n
cident or consequence of it, though not foreseen or expe
an injury may arise either directly from the employ
incident to it, or from the conditions and exposure surr
employment.

Injuries which are likely to occur because of the character of
or of the conditions under which it is carried on, and wh
should have been, contemplated by the employer, are p
to "arise out of" the employment; but a personal injur
ployee resulting from a quarrel and fight with anoth
over a ladle for pouring molten metal, which each desir
once in order to finish his work and get away for the da
which "arises out of" his employment; at least in the s

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finding of the existence of some reasonable causal connection between such injury and the employment or the conditions under which it is pursued.

Argued January 2d—decided March 12th, 1918.

APPEAL by the defendant from a finding and award of the Compensation Commissioner of the fifth district in favor of the plaintiffs, taken to and tried by the Superior Court in Litchfield County, *Maltbie, J.;* the court confirmed the award and dismissed the appeal, and from this judgment the defendant appealed. *Error; judgment to be rendered vacating the award.*

The Commissioner found the following facts: The Turner and Seymour Manufacturing Company is engaged in making iron castings. The casters, when they have poured the molten metal into the molds, leave for the day. The company did not desire to have too many casters around the cupola, where the molten metal is drawn out, and did not desire the casters to get through their work too early. As one means of accomplishing these two results, the company supplied a limited number of ladles. As a result of this condition each caster desired to get a ladle as soon as possible so as to pour his molds and get away.

On April 10th, 1917, O'Shaugnessy, a caster, located quite a distance from Jacquemin, another caster, received permission from a caster to use a ladle which had been in use by him. O'Shaugnessy and his helper were pouring from this ladle when Jacquemin and his helper started to pick up another ladle which stood in front of Jacquemin's floor and had been placed there by Jacquemin. O'Shaugnessy ordered him to let it alone or he would get in trouble. Angry words passed between the men, and O'Shaugnessy, leaving his own ladle partly filled, started for Jacquemin, who advanced to meet him. They scuffled and fell to the floor, first one and

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then the other was on top. O'Shaugnessy got Jacquemin in a position where he was likely to spoil the mold. Jacquemin called this to the attention of O'Shaugnessy and he let Jacquemin up, and immediately Jacquemin started for him again. Thereupon O'Shaugnessy struck Jacquemin in the region of the heart and the blow resulted in his death. No personal animosity existed between the men, and neither was quarrelsome. The controversy arose over the possession of a tool which each wanted to use in order that he might get through his work and get away.

A. Storrs Campbell, for the appellant (defendant).

Walter Holcomb, for the appellees (plaintiffs).

WHEELER, J. The argument upon the appeal was confined to the single point, did the injury "arise out of" the employment of Jacquemin.

In *Larke* v. *Hancock Mutual Life Ins. Co.*, 90 Conn. 303, 309, 97 Atl. 320, we held that an injury "arises out of" an employment when it occurs in the course of the employment and is a natural and necessary incident or consequence of it, though not foreseen or expected; and that such an injury may arise either directly from the employment or as incident to it, or to the conditions and exposure surrounding it. If one employee assaults another employee solely to gratify his feeling of anger or hatred, the injury results from the voluntary act of the assailant and cannot be said to arise either directly out of the employment, or as an incident of it. But when the employee is assaulted while he is defending his employer, or his employer's property, or his employer's interests, or when the assault was incidental to some duty of his employment, the injuries he suffers in consequence of the assault will, as a rule, arise out of the

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employment. He will then be serving his employer's ends and not his own. Many cases have arisen where watchmen, gamekeepers, or other employees have suffered injury through assault while protecting their employers' interests or while engaged in fulfilling the duty arising out of their employment. Examples of these are: *Ohio Building Safety Vault Co.* v. *Industrial Board*, 277 Ill. 96, 115 N. E. 149; *Shafter Estate Co.* v. *Industrial Accident Commission*, 175 Cal. 522, 166 Pac. 24. Examples of cases of assaults originating solely through the anger or vindictiveness of an employee, are: *Griffin* v. *Roberson & Son*, 176 N. Y. App. Div. 6, 162 N. Y. Supp. 313; *Union Sanitary Mfg. Co.* v. *Davis* (Ind. App.), 115 N. E. Rep. 676.

Between these classes of cases is a class of cases which seems to be an exception; in reality these cases concern injuries which are incidental to the employment. Thus, in *McNicol's Case*, 215 Mass. 497, 102 N. E. 697, recovery was allowed for injuries from an assault by an employee known by the superintendent in charge to be in the habit of drinking to intoxication, and when so, to be quarrelsome and dangerous, and with such knowledge the superintendent permitted him to continue at work. In *State ex rel. Anseth* v. *District Court*, 134 Minn. 16, 158 N. W. 713, a bartender was struck by a glass thrown by a patron of a saloon who was so drunk he did not know the nature of his act. In holding that the injuries of the bartender arose out of the employment, the court said: "The court will take judicial notice that the position of bartender, patron, or spectator in a saloon, especially in one situated where rough characters are apt to congregate and carouse, is quite apt to be one of peculiar danger. Barroom assaults are not of infrequent occurrence." Injuries so arising are such as the character of the business or the conditions under which it is carried on make likely, and the result

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either was, or should have been, in the co
of the employer. They are correctly held
of the employment.

The Commissioner conceived that the
quemin fell within this distinction. He h
method of conducting the business, so tha
would naturally crowd about the cupola an
insufficient number of ladles should be pro
casters, would naturally lead to dispute a
and that Jacquemin suffered his injury
quence, and hence it arose out of his emplo
Superior Court reached a similar conclus
"The injury in the case before us seems to
directly resulted from the circumstances
ployment of the decedent, as they are det
finding of the Commissioner. Human n
what it is, that altercations and blows wou
tween the workmen would be a result reas
anticipated."

The finding does not disclose that the
under which this business was conducte
before occasioned a similar trouble, or th
the men were quarrelsome. There was not
the employer on notice. It was the duty
ployees to do their work under the establi
tions. O'Shaughnessy asserted a right o
min's ladle which he did not have. He
quarrel and fight. These were purely pers
had no relation to the special conditions of
so far as the finding shows. And when Jac
full opportunity to have desisted from t
chose to renew it and thereafter received
The fight occurred in the course of the empl
it did not originate in it or arise as a con
incident of it. These men turned tempo
their work to engage in their own quarre

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their employer required of them would necessarily provoke them to a quarrel, nor could this have been reasonably anticipated. The fact that employees sometimes quarrel and fight while at work, does not make the injury which may result one which arises out of their employment. There must be some reasonable connection between the injury suffered and the employment or the conditions under which it is pursued.

The case at bar resembles closely *Union Sanitary Mfg. Co.* v. *Davis* (Ind. App.), 115 N. E. Rep. 676, where a molder was injured as a result of a quarrel with a fellow employee over the repair of a ladle and his duty did not include such repairing. It was held that the injury did not arise out of the employment. The Commissioner relied for his authority upon *Heitz* v. *Ruppert*, 218 N. Y. 148, 112 N. E. 750. That case may perhaps be distinguishable from this because Heitz, unlike Jacquemin, was passive and he was injured while actually at his work. Whether we should upon the same facts reach a like conclusion need not now be determined. Certainly the case bears some resemblance to the cases of skylarking or horseplay. Guth slapped Heitz on the shoulder, and as he turned Guth's finger stuck in Heitz's eye. It is not easy to see how the slapping of Heitz can be said to be an incident of the employment any more than any other form of horseplay.

There is error, the judgment is reversed and the cause is remanded with direction to the Superior Court to render judgment sustaining the appeal from the Commissioner and vacating his award.

In this opinion the other judges concurred.

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CATHERINE GRACE FOURETTE *vs.* THOMAS I

First Judicial District, Hartford, January Term,
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SI

In a house occupied by two or more tenants, the door op
common passageway into the separate apartment of
the "outer door" of his home, which an officer servi
has no right to open and enter against the known w
pant.

The fact that the tenant was in the hall or common passag
refused to allow the officer to enter her apartment
inasmuch as one's dwelling-house is not only for his
protection but also for the protection of his property
it is used as a residence.

An instruction which authorizes the jury to treat the alle
wrongdoing of the defendant as a mere accident, un
by the evidence, is prima facie misleading and h
plaintiff against whom the verdict is rendered.

Submitted on briefs January 2d—decided March 12

ACTION to recover damages for an alleg
and assault, brought to the Superior Court in
County and tried to the jury before *Tuttle*,
and judgment for the defendant, and app
plaintiff. *Error and new trial ordered.*

On the 13th day of March, 1915, a writ
was placed in the defendant's hands for se
Arthur P. Fourette and in favor of one
Noxon, for certain articles of household furn

Under the direction of this replevin writ,
ant, in company with an expressman, went t
where the plaintiff and her family lived and
articles to be replevined were kept, and t
were seized, taken and carried away by the
Arthur P. Fourette, the defendant in the re
was the husband of the plaintiff, but he wa
living with his wife. This house was so con

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to afford separate and distinct habitations for four different families. The plaintiff and family occupied all the rooms on the first floor of this building. The outer door of the house and the lower hall was used by all of the different tenants of the house. The door which led from the common hall on the lower floor into the plaintiff's apartment opened into the sitting-room. After the defendant had gained entrance into the common hall, through the main front door, he had some talk with the plaintiff who was then in the hall, and she then refused to allow him to go into her rooms. The door of her apartment was then shut and fastened with a knob. As the defendant turned the knob of the door leading into the sitting-room, the plaintiff called to her brother inside the room to lock the door. He jumped against the door, slammed it together and bolted it. The officer, by the pressure of his shoulder against the door, then broke the bolt, opened the door, and entered the rooms of the plaintiff and her family. In substance these facts were uncontroverted.

The plaintiff complains of the refusal of the court to charge as requested and of several portions of the charge as it was given.

This case involves an inquiry as to the right of an officer to break open a door of a dwelling-house when engaged in the service of civil process. In that part of the charge which dealt with this subject the jury were instructed as follows: "If the common front door was the outer door of the plaintiff's home, of course the claim upon this branch of the case fails, because that door was passed by the defendant without any breaking. In my view of the law it matters little in the present case which of these doors is held to be the outer door of the home; for upon the admitted facts, this plaintiff had no right to undertake to exclude the defendant from the tenement while she and the officer

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both remained outside. She knew at this time officer wanted and the authority which bro there. She did not bar herself within her apart refuse to permit him to enter. No act of occasioned by any fear of bodily harm or of a to her home or property other than the remo specified articles therefrom. Under these circu she called to her brother to lock the door, an the express purpose of preventing the off carrying out the mandate of his writ. Hearin and knowing its purpose, the officer hastene vent its execution. If you find that the lock door by the brother and the breaking of it b fendant were practically simultaneous acts, officer is not to blame for the breaking of this the principle sought to be invoked by the plai not apply, unless you find he broke the do tionally."

Daniel J. Donahue, for the appellant (plain

Frank D. Haines, for the appellee (defenda

RORABACK, J. The court was mistaken proposition: "It matters little in the pre which of these doors is held to be the outer d home; for upon the admitted facts, this plaint right to undertake to exclude the defendant tenement while she and the officer both rema side." The rights of the plaintiff and her fa the door leading into her apartments, and th as to the common front door, were materially and the jury should have been so inform rooms occupied by the plaintiff and family co and in themselves formed, a separate and habitation for the plaintiff and her family. T

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entitled to the use and occupancy of these rooms and the door leading from them into the hall, as if they were a part of a distinct structure. The common outer door of this house served as a passageway for the occupants of these different habitations. All the rights which the plaintiff and her family had in and to this outer door was the right to use it in common with the other tenants. It is a familiar principle of law that where there are different apartments of a house, having a common outer door, the door of the apartment of each separate occupant is his outer door which cannot be broken open to serve civil process. 1 Swift's Digest, 607; *Swain* v. *Mizner*, 74 Mass. (8 Gray) 182, 69 Amer. Dec. 244.

The law is also well settled that if the outer door is shut and latched, although not fastened, an officer has no right to open it and enter without the permission of the owner. The fact that the plaintiff was upon the outside of the door leading from the hall into her apartments, when the door was opened, did not alter her rights if the entry was contrary to her known will and objection. A man's dwelling-house is not only for his own personal protection, but it is also for the protection of his family and his property therein while it is occupied as a residence. 1 Swift's Digest, 606; *Curtis* v. *Hubbard*, 4 Hill (N. Y.) 437, 40 Amer. Dec. 292; *Ilsley* v. *Nichols*, 29 Mass. (12 Pick.) 270, 22 Amer. Dec. 425.

The court below, in that part of its charge already quoted, also stated to the jury: "If you find that the locking of the door by the brother and the breaking of it by the defendant were practically simultaneous acts, then the officer is not to blame for the breaking of this door, and the principle sought to be invoked by the plaintiff does not apply, unless you find he broke the door intentionally." The language of these remarks is susceptible to the interpretation that there was evidence

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from which the jury might find that the all
ing of the door was accidental and not intent
serious fault with this instruction is that
discloses that there is no foundation for th
that the breaking of the door by the officer w
tal. The most favorable statement of the
contention upon this part of the case is to
his own statement of his claims to the jur
appears that he offered evidence to prove anc
have proven that he "turned the knob c
leading into the room of the said tenement
opened the door slightly the plaintiff ca
brother inside of the room to lock the d
jumped against the door, slamming it to
bolting it against the officer, the pressur
shoulder against the door at the same time
breaking the bolt, whereupon the defendan
entered the room." It is plain that the rem
court upon this part of the case were misl
that the jury might have been lead to a h
clusion thereby.

There is error, the judgment is set aside
trial is ordered.

In this opinion the other judges concurre

BENJAMIN WHITMAN *vs.* JERRY F. AN

First Judicial District, Hartford, January Term,
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SH

Performance by a vendor of an absolute and unconditiona
sell and deliver daily at his farm a certain number of
of a specified quality, is not excused nor rendered

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because his cattle and all the products of his farm are afterward quarantined, if the contract does not require that the milk shall be produced on the farm or from any particular stock.

Argued January 2d—decided March 12th, 1918.

ACTION to recover damages for an alleged breach of the defendant's obligation to supply the plaintiff with milk, brought to and tried by the Court of Common Pleas in Hartford County, *Smith, J.;* facts found and judgment rendered for the plaintiff for $119, and appeal by the defendant. *No error.*

On the 5th day of March, 1914, the parties entered into a contract in writing, whereby the plaintiff agreed to purchase and the defendant agreed to sell at least one hundred and seventy-five quarts of milk each day from April 1st, 1914, to April 1st, 1915. The contract contained the following: "The said Whitman is to come and get the milk at No. 1 Wawarme Avenue, in the City of Hartford." The premises of the defendant are known as No. 1 Wawarme Avenue.

On the 23d day of November, 1914, by an order of the Commissioner of Domestic Animals for the State, all the defendant's cattle and products of his farm were quarantined. The defendant was quarantined and he was not allowed to go from the premises. Shortly after the quarantine order, all the cows on the farm were killed.

The quarantine was intended to prevent, as far as possible, all persons and animals from going on or off the premises, as well as to prevent the removal of products of all kinds that might carry infection of the "hoof and mouth disease," then prevalent among the defendant's cattle. From November 22d, 1914, the defendant failed to furnish, or offer to furnish, milk until March 13th, 1915. From a judgment in favor of the plaintiff the defendant has appealed.

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Francis P. Rohrmayer, for the appellant (c

James B. Henry, for the appellee (plaintifi

SHUMWAY, J. This was an absolute an tional undertaking by the defendant to sell milk daily, of the specified quality and amoun fendant's claim is that he was excused from tl ance of the contract by reason of the quaran made it illegal for him to leave his premises away any products of his farm or any articles carry infection. The quarantine order did n illegal to deliver milk, nor make it illegal fendant to procure its delivery. This much i

But the defendant contends that the cla contract, to wit, "The said Whitman is to get the milk at No. 1 Wawarme Avenue," is a part of the contract, and as delivery was to the place named, therefore delivery under th the contract was illegal. There is nothing in to show that the defendant could not perfor tract. While it may be true that the plaintif enter the defendant's house or go upon oth the premises which were under quarantine, i follow that the contract could not be perfo stantially if not literally. The contract w deliver milk produced on the premises. Al be said is that the defendant was under a disability to perform his contract. He is not released from the obligations of his contract was difficult or impossible to perform them, the performance was not illegal. *School Dis* v. *Dauchy*, 25 Conn. 530; *Worthington* v. *C Life Ins. Co.*, 41 Conn. 372, 401.

There is no error.

In this opinion the other judges concurred

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THE TOWN OF CHAPLIN *vs.* THE TOWN OF BLOOMFIELD.

First Judicial District, Hartford, January Term, 1918.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

General Statutes, § 2469, relating to the settlement of paupers, provides, among other things, that no inhabitant of any town in this State shall gain a legal settlement in any other town unless he shall have "resided" four years "continuously" in such town. *Held* that in computing this period of four years, the time spent in another town in an insane hospital to which the person in question was committed, was to be excluded, inasmuch as the statute contemplated an actual, stated residence, and not one resting in theory or presumption.

Argued January 3d—decided March 12th, 1918.

ACTION to recover for the support of a pauper alleged to belong to the defendant town, brought before a justice of the peace and thence by the defendant's appeal to the Superior Court in Windham County and tried to the court, *Bennett, J.*; facts found and judgment rendered for the plaintiff for $40, and appeal by the defendant. *No error.*

Albert C. Bill, for the appellant (defendant).

Samuel B. Harvey, for the appellee (plaintiff).

WHEELER, J. This cause is brought to determine whether the town of Bloomfield is responsible for support furnished by the town of Chaplin to Copeland, a pauper, between January 11th, 1916, and March 27th, 1916.

On October 31st, 1908, Copeland had a settlement in Bloomfield. On this date he moved to Hartford with the intention of making his home there. From this date to March 20th, 1911, Copeland resided con-

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tinuously in Hartford with the exception
months' summer vacation in Chaplin in 1
three months' temporary residence in Som

On March 20th, 1911, Copeland was co
the Connecticut Hospital for the Insane at
by the Court of Probate for the district of H
remained there until July 5th, 1913, when
charged, maintaining himself, or being ma
his estate, from March 31st, 1908, to the
discharge. The same court, in 1911, appoi
servator of his person and estate. The fi
not state the residence of Copeland after h
from the Hospital for the Insane, except
sided in Chaplin when furnished the suppc
the subject of this action.

Unless Copeland acquired a settlemen
morancy in Hartford, his settlement in Bloc
tinued. He never intended to change his res
Hartford to Chaplin or Somers; his residen
places was temporary and did not break the
of his residence in Hartford. *Salem* v. *Lym*
74, 80; *Clinton* v. *Westbrook*, 38 Conn. 9.

When he was committed to the Hospital
sided in Hartford nearly two years and fi
He resided in the Hospital until discharged,
two years and three months. To gain a se
Hartford, Copeland must have resided four
tinuously in that town, and have maintai
and family during the whole of said peri
becoming chargeable to such town. Gener
§ 2469. Copeland maintained himself with
ing chargeable to Hartford from the time h
Hartford until his discharge from the Hos
who "resides" in a town, within the inte
this statute, is one who is an actual, stated
distinguished from a transient dweller, even

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have a technical domicil elsewhere. *Kelsey* v. *Green*, 69 Conn. 291, 301, 37 Atl. 679. Copeland must have resided in Hartford four years continuously, in order to be an actual dweller therein and come within the statute and gain a settlement by commorancy. *Fairfield* v. *Easton*, 73 Conn. 735, 739, 49 Atl. 200; *Salem* v. *Lyme*, 29 Conn. 74, 80.

The four-year period cannot be made up without counting the time Copeland remained in the Hospital. The case turns upon whether one committed to an asylum continues, during his committal, to be an actual resident of the town in which he resided when committed. Twice we have had occasion to consider whether a period of imprisonment, for crime, constitutes any portion of the continuous residence required under the earlier form of this statute, to establish a legal settlement. In holding that the period of imprisonment could not be counted, we pointed out that it could not be known whether the prisoner would have continued to reside in the town he had resided in during the period of his imprisonment. And had he continued residing there, the town could at any time, if he was a pauper, before he had acquired a settlement, have removed him to the town to which he belonged. But while he was in prison the town could not change his residence, and hence if his residence continued to be in the town he would acquire a legal settlement despite the desire of the town, or of himself, to the contrary. *Reading* v. *Westport*, 19 Conn. 561, 565; *Washington* v. *Kent*, 38 Conn. 249, 252.

There is no substantial difference in principle between the committal for crime, or for insanity, so far as the question of residence is concerned. In neither case can the one committed exercise his will in relation to his residence. The statute intends an actual, stated residence, not one resting in presumption. One who

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acquires a settlement by commorancy de
place of his settlement in the exercise of l
and not by the will of another. A settleme
actual residence, not upon domicil, althou
and domicil may be, and usually are, conc

The trial court was correct in holding th
had not had such actual, continuous reside
ford as to give him a legal settlement ther

There is no error.

In this opinion the other judges concurr

SAMUEL ROSENBAUM, GUARDIAN, *vs.* THE NEWS COMPANY (SAMUEL ROSENBAUM, APPEAL FROM COMPENSATION COMMISS

First Judicial District, Hartford, January Term
PRENTICE, C. J., RORABACK, WHEELER, BEACH and

An employee whose injury, arising out of and in the c
ployment, is due primarily to the wrongdoing of
may voluntarily settle his claim for damages with
but in that event his employer is entitled to ratify
and to have the amount so paid applied in dischar
as the case may be, of his liability for compensati
ciple results from the legal relation of the parties c
ter 288, § 2, of the Public Acts of 1915, amending §
men's Compensation Act, although the statute in
refers in terms only to the apportionment and app
pulsory payments made by the tort-feasor after h
has been established by a judgment.

Argued January 3d—decided March 12th, 1

APPEAL by the plaintiff from a finding of t
sation Commissioner of the first district in
defendant, taken to and tried by the Super

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Hartford County, *Gager, J.;* the court affirmed the action of the Commissioner and dismissed the appeal, and from this judgment the plaintiff appealed. *No error.*

On March 12th, 1916, the claimant's minor ward, David Rosenbaum, sustained an injury, arising out of and in the course of his employment, "under circumstances apparently creating in the New York, New Haven and Hartford Railroad Company a legal liability to pay damages in respect thereto." The injury resulted in an amputation of the right leg at the knee joint.

On June 24th, 1916, the claimant and the railroad company entered into a written agreement, whereby the claimant, in consideration of the payment and receipt of $3,000, released the railroad company from all rights of actions, claims, or demands, for or by reason of any injuries sustained by David Rosenbaum at the station at Hartford on March 12th, 1916.

As a further consideration for this release the railroad company agreed, in substance, that if the Supreme Court of the State of Connecticut should hold that David Rosenbaum was not entitled to compensation under the Workmen's Compensation Act, it would pay to Rosenbaum the further sum of $1,092 and expenses, that being the amount of compensation payable under the statute for an injury resulting in loss of leg at the knee joint.

The Commissioner held that the right of the claimant to compensation under the Act had been satisfied by the payment made by the railroad company to the claimant of a sum in excess of the statutory compensation, and the Superior Court sustained the action of the Commissioner and dismissed the appeal.

Madison G. Gonterman, for the appellant (plaintiff).

Charles Welles Gross, for the appellee (defendant).

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BEACH, J. The question is whether Rosenbaum is entitled to his statutory compensation, notwithstanding the fact that he has already received, through his guardian, an amount in excess thereof as the consideration for the release of a claimed right of action against the railroad company, arising out of the same injury for which compensation is demanded.

That depends on the construction to be put on § 2 of the Workmen's Compensation Act of 1915 (Public Acts of 1915, Chap. 288), relating to injuries arising out of and in the course of his employment, "under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto."

The Commissioner has found that the injury in question was sustained under circumstances "apparently" creating such a liability in the New York, New Haven and Hartford Railroad Company, and that finding, taken in connection with the contract of release and settlement, is sufficient for the purposes of this appeal. The written contract does not, of course, establish the legal liability of the railroad company, nor can that be done in a proceeding to which the railroad company is not a party. But so far as the claimant is concerned, the contract assumes the existence of such a liability, and in this proceeding between the injured employee and the employer, the claimant cannot equitably be permitted to take any other position than that the $3,000 was received in partial satisfaction of a valid claim for damages.

Section 2 provides, in substance, that an employee who sustains an injury arising out of and in the course of his employment, by reason of the fault or neglect of a third party, may claim compensation under the Act without prejudice to his common-law right to sue the tort-feasor; that an employer who has paid, or by award become obligated to pay, compensation, may sue the

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tort-feasor in his own name, with a view to reimbursement; and that, if either sue, the other is entitled to notice and an opportunity to join in the action. Then follow the provisions for the apportionment of damages between the injured employee and the employer, which supply the principles on which this case must be decided: "In the event that such employer and employee shall join as parties plaintiff in such action and any damages are recovered, such damages shall be so apportioned that the claim of the employer shall take precedence over that of the injured employee, and if the damages shall not be sufficient, or shall be only sufficient to reimburse him for the compensation which he has paid, or by award has become obligated to pay, with a reasonable allowance for an attorney's fee, to be fixed by the court, and his costs, such damages shall be assessed in his favor; but if the damages shall be more than sufficient to reimburse him, damages shall be assessed in his favor sufficient to reimburse him for the money he has paid, with a reasonable allowance for an attorney's fee, to be fixed by the court, and his costs, the excess shall be assessed in favor of the injured employee."

There is nothing in § 2 which requires the injured employee to claim compensation before he sues the tort-feasor, or which prevents the employer from joining in such an action before he has by award become obligated to pay compensation. The injured employee may sue the tort-feasor, and the employer may join in the action before compensation is claimed or awarded, and if, in such a case, damages are recovered in excess of a reasonable attorney's fee for the employer, such excess shall, as the Act directs, "be assessed in favor of the injured employee," with the necessary result that the employer is discharged, *pro tanto*, from his inchoate liability to pay compensation. So if the employer has

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become obligated to pay compensation, but has not paid it, and the damages recovered are greater than the amount of compensation the employer has become obligated to pay, together with a reasonable attorney fee, the entire excess is directed to be assessed in favor of the injured employee, with the consequence of discharging the employer from his ascertained liability under the award.

So far as damages paid under compulsion of a judgment are concerned, § 2 plainly makes the tort-feasor primarily liable for the injury, and either reimburses or discharges the employer out of the first moneys available for the payment of damages.

True, the statute states only the rule for the apportionment and application of compulsory payments made by the tort-feasor after his legal liability has been ascertained by a judgment, but the rule is based on the legal relation of the parties as defined by the Act, namely, that the tort-feasor is primarily liable, and that, as between the employee and employer, the latter is entitled to precedence for the purpose of reimbursement or discharge.

The legal relation of the parties, being thus ascertained, furnishes the principle for the apportionment and application of all payments made by the tort-feasor for the purpose of obtaining a release from his primary liability. Suppose, for example, that a joint action, brought before any award of compensation, is settled before trial by the payment directly to the injured employee of a sum greater than the amount of the employer's attorney fee. Evidently the employer is discharged to the same extent and upon the same principle as if the payment had been made after a judgment for a like sum had been rendered. And the same must be true of a settlement made before suit is brought, whether the employer takes part in the negotiations or

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not. If the settlement is made behind the back of the employer, he will not be bound by it. But, if it is for his advantage to do so, he must be permitted to ratify it, and to assert his right, arising out of the legal position assigned to him by § 2, to be discharged *pro tanto* by the settlement. Otherwise, the injured employee might first settle with the tort-feasor for a sum in excess of his statutory compensation, on the correct basis that the tort-feasor was primarily liable for the whole damages, and then recover his statutory compensation also.

It is argued that the employer's right to reimbursement does not arise until he has paid, or by award become obligated to pay, compensation, and then not until the legal liability of the tort-feasor has been ascertained in an action at law. But, as already pointed out, the Act contemplates, not only the reimbursement of an employer who had paid compensation, but also his discharge from an ascertained or inchoate obligation to pay compensation, by the payment of damages directly to the injured employee. And since the Act expressly provides that the claim of the employer shall take precedence over that of the employee, the employer is entitled to have the first moneys so paid to the employee applied to the discharge of his obligation.

The only material question which the language of the statute does not answer, is whether this principle applies to voluntary payments made directly to the injured employee before the legal liability of the tort-feasor has been ascertained by judgment, and for the reasons given we have answered that question in the affirmative.

There is no error.

In this opinion the other judges concurred.

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EVELYN C. BOYLE *vs.* JOHN J. MAHONEY ET AL. (JOHN J. MAHONEY ET AL. APPEAL FROM COMPENSATION COMMISSIONER).

Third Judicial District, New Haven, January Term, 1918.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Although the business of running an amusement park and pavilion and transporting persons and express matter in boats in connection therewith, may not require the constant daily attendance and service of all of one's employees, yet if each of them has stated duties to perform whenever called upon, for which he receives a fixed wage, and none of them have any other occupation, they are to be treated as "regular" and not as "casual" employees, in determining whether their employer is subject to the provisions of Part A of our Workmen's Compensation Act.

In the present case the management gave dances twice a week in suitable weather in the pavilion, for which an orchestra of at least three performers was supplied by two different leaders under a contract made with one of them for each occasion. *Held* that these facts were sufficient to sustain the finding of the Compensation Commissioner that the musicians were in the employ of the owner or lessee of the amusement park and pavilion, notwithstanding the leader of each orchestra furnished the men and stipulated what compensation they should receive.

The evidence in the present case reviewed and *held* to warrant the inference, drawn by the Compensation Commissioner, that the deceedent, an employee, was drowned while attempting to get into his employer's boat in the course of his employment, and not while he was in the act of showing off his prowess or skill as a swimmer.

Argued January 15th—decided March 12th, 1918.

APPEAL by the defendants from a finding and award of the Compensation Commissioner of the third district (acting for and in behalf of the Commissioner of the fourth district) in favor of the plaintiff, taken to and tried by the Superior Court in Fairfield County, *Curtis, J.*; the court refused to amend the Commissioner's finding, but affirmed his action and dismissed the appeal, and from this judgment the defendants appealed. *No error.*

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The material facts on this appeal are these: The claimant, Evelyn C. Boyle, is the widow of William R. Boyle. On July 1st, 1915, William was drowned. At the time of his death he was in the employ of Mahoney & Tierney. As partners, they were conducting an amusement park and hall, and carrying for hire passengers and express matter in boats. They also gave dances in the pavilion on the premises controlled by them. There was sold upon the premises "soft drinks," by a person with whom Mahoney & Tierney had a contract that they should have half the profits from the sale of such drinks. In connection with the dances the partners furnished music. The dances were given, in suitable weather, each Wednesday and Saturday. The music was furnished by an orchestra of three pieces at least, and the orchestra was supplied by two different leaders under a contract made for each occasion, two different orchestras being employed, one or the other, as was convenient, being engaged at a price fixed by the leader. One Webb Clark was employed by Mahoney & Tierney in the way of teaching the regular boatman how to run the boats, to keep the boats in order, making repairs upon them, and on some occasions running one of the boats. John Bone had worked for a former owner of the business, and spent his time about the property of the appellants, acting as watchman on Sundays, and doing odd jobs. Tickets were sold in connection with the business, and these were sold by Tierney, sometimes assisted by his niece, who received no salary. Boyle's duties were to run the boats. On the day he was drowned he was in charge of a power boat and started from a point on the Housatonic River to carry some passengers up the river about three miles. After leaving the passengers at their destination, he ran the boat to another landing, having in the boat a young woman who was not a passenger for

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hire. As Boyle landed the boat at the "upper landing" and stepped upon the dock, the boat slipped away from the dock, and he attempted to get back into the boat, and leaped from the dock toward the boat, and landed in the water. He caught hold of the bow of the boat, and the young woman in the boat asked if she should assist him. Boyle shook his head, and dropping from the boat began to swim upon his back toward the stern of the boat. When he was about twenty feet from the bow he sank and was drowned. On the way up the river Boyle had stated to the young woman who was in the boat that he was a good swimmer.

Arthur B. O'Keefe, for the appellants (defendants).

Charles F. Roberts, for the appellee (plaintiff).

SHUMWAY, J. The law places under the Workmen's Compensation Act, all employers who regularly employ five or more persons. It would seem at first glance that in order to ascertain the number of persons employed by any employer, all that need be done was to count them, and as so determined, the number of employees at any given time would be purely a question of fact, if the fact of employment be granted; and therefore the finding of the Compensation Commissioner would be conclusive.

But one of the questions presented by appellants is whether some of the persons employed were in their employ or in the employ of an independent contractor; and, if in their employ, whether they were "casual" employees. It is conceded by the appellants that Webb Clark, John Bone, and Boyle at the time of his death, were in their employ, but they claim that some of them at least were "casual" employees.

If the nature of the business which the appellants

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were carrying on is considered, it will be seen that the business did not require the constant daily service of all of them. Clark repaired the boats and kept the machinery in order whenever called upon; Boyle kept the boats in operation when needed; and Bone was the watchman to care for the property. All of them drew pay from the appellants, and none of them having any other occupation, nothing more need be added to make it clear that their employment was not of a casual nature and that they were not otherwise employed than for purposes of their employers' business.

The appellants further contend that the musicians employed to lead the dancing were not employees of the appellants, but were in fact employees of their leaders, who were independent contractors. The providing of a place to dance and musicians to lead the dances, was as much a part of the appellants' business as running the boats, and while the appellants very likely did not control the actual production of music by the orchestra, yet the duration of the employment each day and the place where the musicians were to play were under the direction and control of the appellants, and it appears that the musicians were regularly paid by them. These facts sustain the finding of the Commissioner that the musicians were in the employ of the appellants, even though the leader furnished the musicians and stipulated the amount of compensation they should receive.

Among the reasons of appeal, one, that the deceased Boyle committed suicide, is abandoned in this court. It is, however, contended that Boyle's death did not arise out of and in the course of his employment. It is insisted the evidence does not justify the finding and ruling of the Commissioner, that after Boyle had fallen into the water and began to swim upon his back toward the stern of the boat, such act was not a departure

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from the course of his employment. An examination of the evidence shows that it was just as reasonable to infer that Boyle was attempting to get into the boat, as that he was making an exhibition of his skill as a swimmer, of which he had just previously been boasting.

There is no error.

In this opinion the other judges concurred.

JOSEPH B. MORSE, TRUSTEE, *vs.* HARRIET M. WARD ET ALS.

Third Judicial District, New Haven, January Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

A testamentary provision which contravened the statute against perpetuities which was in existence when the will was made, is validated when the will is ratified and confirmed by a codicil executed after the repeal of the statute.

The word "heirs" has so often been used in a will to include all those who would inherit either real or personal estate, that there is no longer any good reason for insisting upon its technical significance, that is, as limited to those who would inherit real estate only, unless the intention to use it in that sense is apparent.

In the present case a testatrix left all her property in trust for the benefit of her three sons during their lives, and upon the death of the survivor it was to be "divided equally among the heirs at law" of said sons "according to the laws of distribution of intestate estates" in this State. None of the three sons left issue, but two of them left widows, and a fourth son, who had died before the execution of the will, left one son who survived the testatrix. *Held* that the words last quoted referred to the persons who were to take under the statute of distribution, and thus gave to the term "heirs at law" its secondary and not uncommon meaning; and that under this construction the property passed in three equal parts to the wives or widows of the two sons and to the sole grandchild.

Argued January 15th—decided March 12th, 1918.

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SUIT to determine the validity and construction of the will of Lucinda J. Ward of Bridgeport, deceased, brought to and reserved by the Superior Court in Fairfield County, *Curtis, J.*, upon an agreed statement of facts, for the advice of this court.

In 1894 Lucinda J. Ward of Bridgeport executed a will by which her entire estate, both real and personal, was left to trustees, the income, and at their discretion, the principal, to be paid to her three sons, Charles, Edward, and Harry, during their lives, the issue of any deceased son to take the share of his or her parent. After the death of the three sons the property was to be disposed of as directed by the will of Charles, "and should he fail to make such will, the residue and remainder shall be divided equally among the heirs at law of my three sons according to the laws of distribution of intestate estates in the State of Connecticut."

In July, 1898, Charles died leaving neither widow nor issue and without executing the power. In January, 1900, the testatrix executed a codicil in which she ratified and confirmed her will with some minor exceptions not now material.

In April, 1901, the testatrix died. Edward died without issue in 1907, leaving a widow Mary Elizabeth Ward. Harry died without issue in 1916 leaving a widow Harriet M. Ward. A fourth son of the testatrix, George, died before the will was executed, leaving a son, Brownlee Robertson Ward.

Plaintiff is the sole trustee under the codicil, and the following claims are made upon the funds in his hands. Brownlee Robertson Ward claims the whole fund as the only "heir at law" of his three uncles. Harriet M. Ward and Mary Elizabeth Ward claim to be entitled to share in the fund as persons entitled to take "according to the laws of distribution of intestate estates in the State of Connecticut." Mary Elizabeth claims,

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also, as executrix of the estate of her husband, on the theory that the remainder over to the heirs at law of the three sons was void under the statute against perpetuities, and that the fund in question is intestate estate of the testatrix.

Robert H. Gould, for the plaintiff.

A. Heaton Robertson, for Brownlee R. Ward.

Samuel F. Beardsley, for Harriet M. Ward.

William A. Redden, for Mary Elizabeth Ward.

John A. Spafford, for estate of Edward Trumbull Ward.

BEACH, J. The claim of Mary Elizabeth Ward as executrix of her husband's estate, based on the theory that the remainder to the heirs at law of the three life tenants is void under the former statute against perpetuities, is dismissed, on the ground that the trust was ratified and confirmed by the codicil of 1900 executed after the statute had been repealed. *Eaton* v. *Eaton*, 88 Conn. 286, 91 Atl. 196. It is not void under the common-law rule.

All the other claims depend upon the answer to the question whether, under the proper construction of the residuary clause, the fund is to be divided among the heirs at law of the three sons, or among those entitled to share in intestate estates according to the statute of distribution.

Our decisions recognize the fact that the phrase "heirs at law" is sometimes used by testators in the latter sense. "The term 'legal heirs,' in legal strictness, signifies those who would inherit real estate. *Ruggles* v.

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Randall, 70 Conn. 44, 38 Atl. 885. It is also used to indicate those who would take under the statute of distribution. *Tingier* v. *Chamberlin*, 71 Conn. 466, 469, 42 Atl. 718." *Dickerman* v. *Alling*, 83 Conn. 342, 345, 76 Atl. 362. In fact, the word "heirs" has been so often used and construed as including all who would inherit either real or personal estate, that there is no longer any good reason for insisting upon its technical significance, except where the intention to use it in that sense is apparent.

In this context the phrase "heirs at law" cannot reasonably be used in its technical legal significance. In order to do so it would be necessary to construe the words "according to the laws of distribution of intestate estates," as referring only to the rule for the division of the estate among the heirs at law of the three sons; but the testatrix has already adopted her own rule of division by the word "equally." And if it be attempted to escape that difficulty by reading in the words "*per stirpes*," then collateral heirs are excluded, and under the circumstances of this case the whole fund becomes intestate. The only construction which will avoid inconsistency or intestacy, is that the words "according to the laws of distribution of intestate estates" refer to the persons who are to take, and so construed, they give to the term "heirs at law" its secondary, but not uncommon, significance.

The Superior Court is advised that the residue and remainder of the estate of Lucinda J. Ward under the provisions of her will and codicil should be divided equally between Harriet M. Ward, Mary Elizabeth Ward and Brownlee Robertson Ward, and that judgment should be rendered accordingly.

In this opinion the other judges concurred.

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THE E. R. THOMAS MOTOR CAR COMPANY *vs.* THE TOWN OF SEYMOUR.

Third Judicial District, New Haven, January Term, 1918.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

As a general rule, the burden of proving the agent's authority rests upon the party who asserts the liability of the principal.

In this State the authority of an agent to act in behalf of a town must be expressly conferred either by statute or by a vote of the town: such agents have no implied or general powers.

One who undertakes to deal with a town through the medium of committees or other municipal agents, must take notice, at his peril, of the scope and measure of their powers.

In the present case the defendant town voted to appropriate $4,000 toward purchasing a chemical and hose truck, provided the balance necessary to purchase it be obtained from other sources; and appointed a committee to buy such truck as they should judge most suitable, when the necessary funds had been secured. *Held* that no authority to make the purchase was conferred upon the committee until the necessary funds had been obtained; that the burden of proving the fulfilment of this condition rested upon the plaintiff company which sought to hold the town responsible for $5,500, the price of the truck in question; and that for its failure to make such proof the plaintiff was properly nonsuited.

Argued January 16th—decided March 12th, 1918.

ACTION to recover for a chemical hose and pumping engine alleged to have been sold to and purchased by the defendant town, brought to the Superior Court in New Haven County where the plaintiff was nonsuited in a trial to the court, *Case, J.*, and from its refusal to set aside said judgment the plaintiff appealed. *No error.*

The written instrument relied upon by the plaintiff purported to be a contract between the parties wherein the plaintiff agreed to sell and the defendant to buy a combination chemical hose and pumping engine for $5,500. The signers upon the part of the town were the individuals constituting the board of selectmen and

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those constituting the board of fire engineers of the town.

The town of Seymour in town meeting on February 10th, 1916, passed the following votes:—

"Voted. That the sum of four thousand dollars be appropriated towards defraying the expense of the purchase of a combination auto chemical and hose truck, provided that the balance of the sum necessary for the purchase of such truck be obtained from other sources.

"Voted. That the selectmen and the Board of Fire Engineers of the town of Seymour be and they are hereby appointed a committee to purchase such combination auto chemical and hose truck as they shall judge most suitable for the needs of the town when the necessary funds for such purchase shall have been secured."

George E. Beers and *Robert J. Woodruff*, for the appellant (plaintiff).

Edward A. Harriman, for the appellee (defendant).

SHUMWAY, J. The question presented to this court is the claimed error of the trial court in denying the motion to set aside the nonsuit.

Towns in this State can make a contract only through their authorized agents. As a general rule in any case, when it appears that the principal is acting by an agent, the burden is upon the party claiming that the principal is bound by the agent's acts, to prove the authority of the agent to represent and act for the principal, and such authority usually is express or implied. There can be no implied authority for any agent to act for a town. Such authority must be expressly given, either by statute or by a vote of the town. Agents of towns have no general authority; their powers

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are limited by the express language in which the authority is given, or by the implication necessary to enable them to perform some duty cast upon them by express language.

Persons dealing with towns through the medium of committees or other agents of the towns, must at their peril take notice of the scope and measure of the powers of such committee or agent. *Turney* v. *Bridgeport*, 55 Conn. 412, 12 Atl. 520.

Laying aside the obvious mistake in describing the defendant as the *city* of Seymour, as well as any suggestion that the committee named by the vote of February 10th, 1916, had in no event any power to bind the town for the payment of any sum in excess of $4,000—the amount appropriated—, there is presented the question as to the power delegated to the committee to bind the town for the payment of any sum, as the purchase price of an "auto chemical and hose truck." As the town was undertaking to authorize the purchase of the fire apparatus, the two votes or parts of a vote, appointing the committee and making an appropriation, should be considered together as one vote. There can be no doubt that the town intended to limit the expenditure of the public funds to $4,000. That the vote of the town did not confer any authority upon the committee to make the purchase, unless "the balance of the sum necessary for the purchase of such truck be obtained from other sources," is clear, and only "when the necessary funds for such purchase shall have been secured," did this committee possess any power whatever to bind the town. The votes of the town were as much a part of the contract, so far as fixing liability upon the town, as they would have been had they been included in the written agreement. It would not be claimed that if the balance of the sum above $4,000 had not been obtained from other sources, and thus was

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available either for town or the committee in order to pay for the machine, that there could be any liability on the part of the town to pay the entire purchase price.

It is not a mere technicality to place upon the plaintiff the burden of proving the fulfilment of a condition that must attach to and become a part of the agreement, since no obligation rests upon the town with respect to the agreement until the condition is fulfilled; while if the funds had been obtained and were at the disposal of the town or its committee or agent, the plaintiff would have no difficulty in proving it.

Involving, as it must, the expenditure of public funds, for which each individual taxpayer of the town is liable, it is proper that the plaintiff be required to prove every step necessary to show that the expenditure was obligatory upon the town. The plaintiff failed to prove that the sum necessary to pay for the truck had been obtained from other sources than the town treasury, and it was therefore properly nonsuited.

There is apparently a claim by the plaintiff that there is a liability on the part of the town to pay for the machine because it had been accepted. So far as can be gleaned from the evidence, the plaintiff failed to prove that the truck was accepted, and the plaintiff was notified soon after its arrival in Seymour that it was not, and it was requested to remove it.

There is no error.

In this opinion the other judges concurred.

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Frank DeLucia *vs.* Adolph Witz.

Third Judicial District, New Haven, January Term, 1918.
Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

It is now well settled that no action can be maintained for the direct enforcement of an agreement which is within the statute of frauds, and no damages can be recovered for its breach.

The plaintiff claimed damages for an alleged breach of an oral promise of the defendant to release a fourth mortgage, owned by him, upon such portions of the plaintiff's land as the plaintiff might at any time redeem from the operation of three prior mortgages which were then in process of foreclosure. *Held* that such an agreement was one for the sale of real estate or an interest therein, for a breach of which no action at law would lie.

The plaintiff claimed that in relying upon the defendant's promise he had lost his right to redeem the earlier mortgages, and that the defendant, who did redeem them, had thus acquired an unconscionable advantage. *Held* that upon an equitable proceeding the evidence might be such as to estop the defendant from asserting an absolute title to the property, and thus, in effect, to restore to the plaintiff all that he had lost; but that such a case was not the one now before the court.

Argued January 16th—decided March 12th, 1918.

Action to recover damages for an alleged breach of an oral contract relating to real estate, brought to and tried by the Superior Court in New Haven County, *Case, J.*; facts found and judgment rendered for the defendant, and appeal by the plaintiff. *No error.*

The plaintiff's substituted complaint alleged, in substance, that on the 1st day of March, 1915, he was the owner of a piece of land in New Haven, upon which there were four mortgages, each of the first three of which covered a portion only of the land, and the fourth, held and owned by the defendant, covered the entire piece, subject to the other three earlier mortgages. At that time there were pending actions to foreclose the

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first three mortgages, and later judgment was rendered, fixing the time within which the owner of the equity of redemption could redeem—in one case, called the Crawford mortgage, the time fixed was May 3d, 1915, one case, called the Humiston mortgage case, July 5th, 1915, and one case, called the Andrew mortgage case, the first Tuesday in July, 1915.

The fourth, fifth and sixth paragraphs of the substituted complaint were as follows:—

4. On or about May 1, 1915, the plaintiff was desirous of redeeming said Crawford mortgage, and the defendant then stated to the plaintiff that if the plaintiff would at any time arrange to redeem all said mortgages the defendant would release his said mortgage and would convey to the plaintiff any portions of all said parcel of land described in paragraph one, upon which the defendant had by redemption of mortgage or otherwise taken title.

5. Relying upon said promise and upon said statement made by the defendant, the plaintiff permitted the redemption day upon said Crawford mortgage to pass, and the defendant took title to said piece of land covered by said Crawford mortgage.

6. Thereafter and on or about the first day of July, 1915, the plaintiff obtained a new mortgage covering all said first described parcel of land, and notified the defendant that the plaintiff was ready to pay the defendant his said $1,385 mortgage and interest thereon, and to take up said remaining mortgages, and requested and demanded from the defendant a release of his said mortgage and a conveyance of said piece of land covered by said Crawford mortgage.

Philip Pond, for the appellant (plaintiff).

Harry L. Edlin and *Samuel J. Witz*, for the appellee (defendant).

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SHUMWAY, J. Out of the multitude of decisions involving the statute of frauds, no rule can be found more firmly established at the present time than this, that no action can be maintained for the direct enforcement of any agreement which is within the statute, and no damages can be recovered for its breach. *Townsend* v. *Hargraves*, 118 Mass. 325.

The plaintiff alleges an agreement by the defendant to convey the real estate described, and claims damages for his refusal to perform it. On the trial to the court the plaintiff offered to prove the agreement alleged, and upon objection by the defendant that the evidence offered tended to prove by parol an agreement which by the statute of frauds should be in writing, the court sustained the objection, and the plaintiff offering no further evidence, was nonsuited. The plaintiff contends that the defendant is estopped from asserting that the agreement was within the statute, because otherwise the statute would be an instrument of fraud in the hands of the defendant. There is no case cited by the plaintiff where it has been held that any party to an agreement which the law requires to be in writing has been held guilty of fraud because he insists that no action can be maintained upon such an agreement. There are many cases where the courts have held that whenever an agreement within the statute has been made and a valuable consideration has actually passed, the party parting with such consideration may maintain an action to recover it; because to permit one to retain a consideration for an agreement which is not enforceable would be a wrong, and may be likened to a fraud. *Wainwright* v. *Talcott*, 60 Conn. 43, 53, 22 Atl. 484.

The plaintiff's case, as alleged, is that when judgment foreclosing the mortgages had been rendered, the defendant stated to the plaintiff that if he would arrange to redeem the mortgages the defendant would convey

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to him any portion of the land included in the mortgages. The plaintiff, relying on this promise, lost his right to redeem. It is apparent that the plaintiff's loss is simply the right to redeem and no more, and it appears from the allegations that this right was valuable. No such case is before the court.

On the record, it may be that the defendant, if he has obtained an unconscionable advantage, would be estopped from asserting that his title had become absolute, if it should clearly appear that the defendant had made the promise alleged, and the plaintiff had tendered the amount due on the mortgages even after the time fixed by the court for redemption had expired. The plaintiff would thus be restored to all he has lost, even if he had lost the right to redeem by relying on the defendant's promise.

There is no error.

In this opinion the other judges concurred.

The Alderman Brothers Company et als. *vs.* The Westinghouse Air Brake Company.

Third Judicial District, New Haven, January Term, 1918.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

The plaintiff sued to recover the value of an alleged deficiency of nearly 40,000 pounds in three carloads of brass turnings or chips, bought by its assignor of the defendant in Pennsylvania at the rate of 15½ cents per pound. It appeared from uncontradicted testimony that there was a considerable shortage in the metal upon its arrival in New Haven, and the material question was whether the loss should fall upon the plaintiff or upon the defendant. The transaction was an oral one, followed by a letter from the defendant to the buyer "to confirm our verbal sale to you this day of . . . our

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accumulation of brass turnings (not less than 200 tons) at 15½ ¢ per lb. . . . f. o. b. cars Wilmerding, Pa. Terms sight draft on arrival at destination." *Held:*—

1. That whether the letter embodied all the terms of the antecedent contract, obviously could not be determined until it was known what those terms were, and therefore the objection that parol evidence to vary the terms of the letter was inadmissible, was not well taken and should not have been sustained.
2. That testimony was properly admitted to show that the accumulation of brass turnings, in a pile by itself on the floor, was pointed out to the buyer at or before the making of the contract; and that evidence of the seller's agent as to the entire transaction was admissible, including the custom of the trade respecting the sale of scrap metal to persons without established credit, and also the real reason for using the expression "sight draft on arrival at destination."
3. That in view of the evidence before the trial court it did not err in admitting testimony as to the fact and amount of the shortage in the weight of the turnings upon their arrival in New Haven, as compared with the weight called for by the bills of lading and sight drafts; though assuming that such evidence tends to prove only a loss in transit and not a deficiency in shipment, it might or might not be admissible upon a new trial, depending upon the conclusiveness of the evidence then received as to the time the parties intended the title to the goods to pass.

Where there is a present sale or an unconditional contract to sell specific goods, in a deliverable condition, at an agreed price per pound, the title passes at once (Sales Act, § 19, Rule 1; § 22), and the risk of loss during transportation falls upon the buyer. Under such circumstances the drawing of a bill of lading to the seller's own order reserves to himself the *jus disponendi*.

A delivery to a carrier in accordance with § 46 of the Sales Act is a delivery to the buyer within § 22, notwithstanding the fact that because of the seller's reservation of the *jus disponendi*, a right also contemplated by the Act, the buyer cannot have possession of the goods until the seller is paid.

The expression f. o. b. in a letter confirming an oral contract of sale indicates an agreement of the buyer to pay the freight from the place named.

In the present case the bills of lading, with sight drafts attached, were drawn to the defendant's own order, were indorsed by the defendant in blank and forwarded by mail to the defendant's agent. *Held* that an instruction which placed the risk of loss during transportation upon the defendant seller, because of the form of the bills of lading, was erroneous and harmful.

Argued January 15th—decided March 12th, 1918.

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ACTION to recover a portion of the purchase price paid by the plaintiff for three carloads of brass chips, because of an alleged shortage therein, brought to the Superior Court in New Haven County and tried to the jury before *Greene, J.;* verdict and judgment for the plaintiffs for $6,182, and appeal by the defendant. *Error and new trial ordered.*

The complaint alleges that the defendant sold to Jacob Svirsky of New Haven three carloads of brass chips containing 244,160 pounds, at the rate of 15½ cents per pound; that the defendant sent the three carloads of metal to New Haven and bills of lading accompanied by sight drafts; that Svirsky assigned all his right, title and interest to the plaintiff, who paid the drafts and now owns the goods; and that upon weighing the metal which reached New Haven there was found a shortage of 39,625 pounds, amounting, at 15½ cents a pound, to $6,141.87.

The answer admits and alleges that the defendant "agreed to sell" to Svirsky certain brass chips as per a verbal contract entered into between Svirsky and the defendant, "confirmed in defendant's letter to Svirsky on that day." The material part of the letter, which was signed by the defendant, but not signed by Svirsky, is as follows: "April 26th, 1916. Mr. J. Svirsky. Dear Sir. We wish to confirm our verbal sale to you this day of the following material. Our accumulation of brass turnings (not less than 200 tons) . . . at 15½ ¢ per lb. . . . All of the above prices are f. o. b. cars Wilmerding, Pa. Terms sight draft on arrival at destination."

The answer further alleges that pursuant to the contract the defendant delivered to the carrier at Wilmerding three carloads of brass chips weighing 244,160 pounds, consigned to the defendant, care of J. Svirsky, and that sight drafts accompanying the bills of lading

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were sent to the defendant's agent in N
"notify Mr. J. Svirsky."

The plaintiff's reply denied that the
delivered to the carrier "for shipment to J

Upon these pleadings the parties went t
the fact of a considerable shortage at New I
established by uncontradicted testimony, t
tial question was whether the loss should
plaintiff or on the defendant. Upon this c
court charged the jury, in substance, that
occurred in transit without the fault of e
the title at the time of the loss was in the
and that therefore the loss must fall upon i

The material rulings on evidence are
stated in the opinion.

Frederick H. Wiggin, for the appellant (c

Benjamin Slade and *Charles Cohen*, for t
(plaintiffs).

BEACH, J. One Forrester, called by the
testified that he was the agent of the def
wrote the letter, Exhibit G, and handed it t
defendant's factory at Wilmerding, and t
previously, on the same day, had a conver
Svirsky about the sale of the brass turnings
in Exhibit G. He was asked to state the c
and on objection the court ruled that par
was inadmissible to vary the terms of t
stated in Exhibit G. On the same groun
idence was excluded which was offered for
of showing that Svirsky had no credit on
books, that by the custom of the trade s
when sold to customers without established
shipped "sight draft against bill of lading,

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at Svirsky's request the phrase "sight draft on arrival at destination" was substituted for the sole purpose of extending the time of payment.

These rulings were erroneous. The letter, Exhibit G, does not purport to be a written contract, for it is not signed by both parties. It was argued that the defendant was estopped by the form of its answer from claiming that the entire contract was not embodied in the letter. That cannot be so, for both the answer and the letter refer to the contract as an antecedent verbal contract, characterized in Exhibit G as a verbal sale. Exhibit G identifies the subject-matter and states the terms of price, delivery and payment, but all this is by way of confirming the antecedent verbal sale, and until that is inquired into we cannot tell whether or not all the terms of the contract are embodied in Exhibit G.

Testimony was properly admitted to the effect that the accumulation of brass turnings was pointed out to Svirsky at or before the making of the contract, and while it lay in a pile by itself on the floor; and Forrester's testimony as to the entire transaction was admissible, including the custom of the trade and the real reason for using the phrase "sight draft on arrival at destination."

As we cannot tell what testimony may be offered at the new trial, it is desirable to point out what effect should be given, under the Sales Act, to the fact that the bills of lading were drawn to the seller's order, indorsed in blank, and forwarded to the seller's agent in New Haven with sight drafts attached.

If the verbal transaction of April 26th was a present sale or an unconditional contract to sell the whole of a specific accumulation of brass turnings, in a deliverable condition, at an agreed price per pound, then the title and risk had already passed to Svirsky before Exhibit G was written. Sales Act, § 19, Rule 1, and § 22. In

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such a case the seller cannot reserve a title already passed to the buyer, and therefore of drawing the bills of lading to the seller merely to reserve the *jus disponendi*. If it sho that the goods were sold by description or ascertained, the question of subsequent app would come up, and under Rule 4 of § 19, a pr of unconditional appropriation would arise fr livery of the goods to the carrier f. o. b. at W subject, however, to the provisions of § 20. I appear that at the time of the contract son mained to be done by the seller to put the deliverable condition, the title would not that was done. Section 19, Rule 2. Presun were in a deliverable condition when shipp that is so, a presumption arises that the title or before delivery to the carrier f. o. b. Wilmer ject again to the provisions of § 20. Sectio with the reservation of the right of possessior property in, goods shipped to the buyer. It distinction that if the bill of lading is drawn t of the buyer or his agent, and is retaine seller or his agent to secure payment of the seller reserves only the right of possession of but if the bill of lading is drawn to the or seller or his agent, "the seller . . . reserves erty in the goods." This last statement is, qualified by the next succeeding words: "But for the form of the bill of lading, the prope have passed to the buyer on the shipment of the seller's property in the goods shall be dee only for the purpose of securing performan buyer of his obligations under the contract."

Manifestly, the intention is to make some distinction between a reservation of title w to remain the owner of the goods for all pur

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a reservation of title for the sole purpose of securing payment of the price. The legal effect of this distinction is pointed out in § 22: "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, . . . except that (a) where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery." In this case the delivery of the goods to the carrier f. o. b. at Wilmerding was authorized by the buyer, and § 46 provides that "where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is deemed to be a delivery of the goods to the buyer, except in the cases provided for in Section 19, Rule 5 [where the seller contracts to deliver the goods to the buyer or at a certain place, etc.], or unless a contrary intent appears."

A delivery to a carrier in accordance with § 46 is a delivery to the buyer within the meaning of § 22, notwithstanding the fact that the buyer cannot have possession of the goods until the seller is paid, because the Sales Act contemplates that the seller may at his option reserve the *jus disponendi*.

It makes no difference to a buyer who has agreed to pay the freight, whether a sight draft is presented to him attached to a bill of lading drawn to his own order, or to a bill of lading drawn to the order of the seller and indorsed in blank. In either case he must pay his draft in order to get possession of the goods, and in either case his rights, on paying the draft, are the same.

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The risk of loss unquestionably passes to th
the former case, as soon as the goods are d
the carrier, and § 22 of the Sales Act provi
shall pass to the buyer at the same time in
case, provided the seller's purpose in drawi
of lading to his own order was merely to secur
of the draft. This resolves for us any conflict
on the point, and gives to the maxim *res pe*
an interpretation which makes the risk follo
eficial interest according to the intent of tl
and not the legal title held merely as securi
payment of the price. The court erred in ch
jury that because of the form of the bills of
risk of loss in transit rested upon the defend

The court correctly charged the jury that
f. o. b. indicated an agreement by the buy
freight from the place named; and that
"Terms sight draft on arrival at destination
in and of themselves operate to defer the vest
in the buyer, and did not in and of themselv
an agreement that the goods should not b
until delivered at New Haven, or an agr
deliver them at New Haven. As already st
dence of the circumstances under which tl
was adopted as one term of the contract w
sible in aid of its proper interpretation, and
is true of any other term in Exhibit G.

Upon the evidence before it, the court d
in admitting testimony as to the fact and an
shortage in the weight of the goods at New
compared with the weight called for by tl
lading and the amount of the drafts. Assu
this testimony tends to show only a loss in t
not a deficiency in shipment, it may or m
inadmissible on the new trial, according as th
may or may not conclusively show that the

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tended the title to pass to the buyer at or before shipment.

Other assignments of error in charging or refusing to charge require no separate mention in view of the construction put upon the Sales Act.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

HUBERT E. WARNER, JR., *vs.* JAMES McLAY.

Third Judicial District, New Haven, January Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH AND SHUMWAY, Js.

It is the duty of the trial court to give the jury instructions which are correct in law, adapted to the issues, and sufficient for their guidance in determining such issues upon the ultimate facts as they may reasonably be found from the evidence.

A building contractor who has been wrongfully prevented by the owner from completing his contract, is entitled to recover as damages not only his expenditures theretofore incurred in the partial completion of the structure, but also such profits as he would have realized had his undertaking been fully performed; and the measure of such profits would be the contract price, less the cost of the labor and material required to complete the building.

In the present case the jury were instructed, in substance, that the plaintiff was entitled to recover his necessary expenditures and also a reasonable profit upon his contract, which might be ten per cent, as claimed by the plaintiff. *Held* that this instruction was clearly insufficient for the guidance of the jury upon the question of profits.

The credibility of witnesses and the weight to be given to their testimony are matters peculiarly within the province of the jury; and this is true although the defendant offers no evidence. Accordingly, an instruction that the jury "would be obliged to take the evidence as submitted to them by the plaintiff" is incorrect, though it may not be prejudicial, as in the present case, when read in connection with other portions of the charge.

An assignment of the plaintiff's claim shortly before trial will not de-

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feat the action (General Statutes, § 622), and ther
tion of evidence to prove such assignment, when
defendant, is harmless.

A subcontractor testified as to the amount the plaintif
for work and materials upon the job. *Held* tha
was plainly admissible in support of the allegatio
plaint respecting damages.

Argued January 17th—decided March 12th,

ACTION to recover damages for the def
fusal to permit the plaintiff builder to ca
agreement for the construction of a garag
to a contract between the parties, brought
Court of New Haven and tried to the
Booth, J.; verdict and judgment for the
$495, and appeal by the defendant. *Error a
ordered.*

The theory of the plaintiff, as shown b
plaint and prayer for relief, is that he is
recover damages for expenditures and los
occasioned by the breach of a written buildi
It is apparently conceded that there was
abrogation of this contract by the defend
important question presented by the app
the measure of damages.

Upon this branch of the case the jury we
the plaintiff also "claims he is entitled
cent profit upon this contract. Of course, i
of a breach of contract, and the contract
the evidence discloses that; there is no dis
it; the contract was broken by Mr. McL
to allow it to proceed, and he does not deny
fore, the contract having been broken, if
was willing and ready to carry out his pa
was prevented by Mr. McLay from doin
entitled to any damage he may suffer by re
failure of Mr. McLay to allow him to p

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he would be entitled to recover any amount of money he was obliged to expend in the securing of materials, and also a reasonable profit upon his contract, which he says is ten per cent. I haven't the figures. He gave you figures of the different parts of the building showing that there would be a profit."

The jury were also instructed that they were to be "guided by the evidence submitted before you, and there is no conflict of evidence, because the defendant has offered none, so you will then be obliged to take the evidence as submitted by the plaintiff."

Arthur B. O'Keefe and *John Cunliffe, Jr.*, for the appellant (defendant).

Carl A. Mears, for the appellee (plaintiff).

RORABACK, J. It is a familiar principle of law that it is the duty of the trial court to give the jury such instructions as are correct in law, adapted to the issues, and sufficient for its guidance in the determination of the issues upon the evidence and upon the ultimate facts as they may reasonably be found to be established by the evidence.

In the present case the plaintiff had the right to recover such sum in damages as he would have realized in profits if the contract had been fully performed. To ascertain this, it was necessary to find the cost and expense of the work and materials necessary to complete the contract. This sum, deducted from the contract price, would have given a balance which would be the profit which would have accrued to the plaintiff out of the contract, if it had been fulfilled. This the plaintiff had a right to receive in addition to his expenditures for work and labor supplied toward the completion of the contract. *Fox* v. *Harding*, 61

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Mass. (7 Cush.) 516, 523; *United States* v. U. S. 338, 4 Sup. Ct. 81.

The substance of the instruction to th this branch of the case was that the plai titled to recover for his necessary exper also a reasonable profit upon his contract, be, as the plaintiff claimed, ten per cent parent that these instructions were not s the proper guidance of the jury upon the profits. There was no attempt to make ar of the principle of law which we have just c was no attempt to define profits, nor any given as to how these profits were to b The remarks of the court upon this poin been proper as a statement of the plaintif damages, but adopting this claim as the for damages, was making these claims the jury, instead of directing their attention t legal principles applicable to such a situati

The trial court was incorrect in stating that they would "be obliged to take the submitted by the plaintiff." The credib nesses and the weight to be given to thei are matters peculiarly within the province *McDonough* v. *Cohen*, 90 Conn. 469, 473, *Allis* v. *Hall*, 76 Conn. 322, 340, 56 Atl. these remarks been all that the court said upon this subject, we should hesitate to h jury were not misled by them. But in ot of the charge we find that they were in in this, as in all civil cases, the duty is incu the plaintiff, the man who brings the actio all the material allegations of his com fair preponderance of the evidence. The told that "if you find that the plaintiff h the allegations of his complaint, then yc

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have to decide the amount of damages to which he is entitled." They were furthermore instructed that "should you decide the plaintiff has failed to sustain the allegations of his complaint, your verdict should be for the defendant." The incorrect instructions, when read as they should be with the further observations of the court to which we have just alluded, could not have misled the jury.

The court did not err in rejecting testimony offered by the defendant as to an assignment by the plaintiff of the claim now in controversy, which was made after the commencement of this action and within a few days before it was tried in the court below. The admission of this testimony would not have defeated the plaintiff's action, and therefore its rejection was harmless. General Statutes, § 622.

The evidence of the subcontractor Russell, as to the amount which the plaintiff had paid him, was plainly admissible to sustain the allegations and claim of the plaintiff as to the amount of his expenditures for work and material furnished in part performance of his contract.

There is error, the judgment is reversed and a new trial ordered.

In this opinion the other judges concurred.

George E. Crawford *vs.* The City of Bridgeport.

Third Judicial District, New Haven, January Term, 1918.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

In taking land *in invitum* for public use, a municipality must comply with all statutory or charter requirements, and this must appear upon the face of the proceedings.

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The layout of a highway enlargement and extension
appointed by the common council pursuant to § 5
Charter of the City of Bridgeport (Special Laws
is an essential step in the proceedings prescribed
for the establishment of such an improvement
perfunctory approval and signing of a city engin
arately and at different times, by individuals wh
been appointed as such committee by the comm
who, after their appointment, did not meet toge
action whatever with reference to the subject,
tute a valid layout by the committee.

An amendment of the charter (Special Laws of 1917,
vided that before proceeding to assess benefits a
any public improvement, the board of apprais
written notice, containing the names of the lan
by the proposed improvement, to be filed and
town clerk's office; and that no assessment therea
be effective except as to those named in such noti

1. That it was competent for the legislature to pr
requisites to the acquisition of land for public use,
of the board of appraisal to give the required no
defect, of which a landowner, unless estopped,
vantage upon appeal from the assessment proceed

2. That there was no ground for any claim of estop
in the present case.

To constitute an estoppel there must have been a r
concealment of material facts, knowingly made,
thereof, with intent that the latter should act in
and the achievement in fact of such intent.

A waiver is the intentional relinquishment of a known
The case of *Manners* v. *Waterbury*, 86 Conn. 573, disti

Argued January 18th—decided March 12th

APPLICATION in the nature of an appeal
tiff landowner from the action of the auth
defendant city in attempting to extend
Cannon Street in said city, and from ar
of benefits and damages on account ther
to and tried by the Superior Court in Fairf
Curtis, J.; facts found and judgment rende
and setting aside the city's action, and ap
defendant. *No error.*

On July 23d, 1917, the common counci

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fendant city ordered a hearing to be held on the 6th day of August, 1917, in relation to widening and extending Cannon Street in Bridgeport. Notice of this hearing was given to the plaintiff. The plaintiff was the owner of certain land and buildings, a portion of which would be taken by the city for the purpose of this public improvement. The public hearing was held on August 6th, 1917. Upon the same day the common council of the city of Bridgeport, after this hearing, adopted the following resolution: "Resolved, That Cannon Street at the junction of Cannon Street and Fairfield Avenue be and hereby is ordered widened and enlarged by extending the south street line of said Cannon Street and by prolongation of the south street line on Cannon Street as it at present exists east of Courtland Street from the westerly line of Courtland Street until it intersects the southerly line of Fairfield Avenue." Upon the same day, and after the common council of the city of Bridgeport had adopted this resolution, the common council also adopted the following resolution: "Resolved, That F. L. Black, Harry F. Jewett and Morris W. Brown be and they hereby are appointed a special committee to make the layout, extension, widening and enlargement above ordered and report in writing their doings to this Common Council, which report shall embody particular descriptions of such layouts, extensions, widenings and enlargements." Upon the same day the special committee's report was presented to the common council signed by Black, Jewett and Brown, purporting to be the report of the special committee. Before the meeting of the common council, Black, who at this time was Assistant City Engineer of the city of Bridgeport, prepared this written report and he, Harry F. Jewett and Morris W. Brown, separately and at different times, before the meeting and before

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their appointment as such committee, s
port and left the same with the city
city of Bridgeport. On the 6th day of A
following the resolution of the commor
pointing Black, Jewett and Brown a speci
the written report signed by them was
the common council and was adopted b
ferred to the board of appraisal of benefits
Black, Jewett and Brown did not meet to
time either before or after their appoi
special committee, but on the 6th day of
and prior to their appointment did separ
and sign the proposed report above des
board of appraisal proceeded to assess
damages for this public improvement,
proceeding with such assessment failed
be filed in the office of the town clerk c
Bridgeport a written notice setting fort
of the persons owning, or having an int
land to be affected by this improvemer
notice was ever filed in the office of the
connection with these proceedings for th
of benefits and damages. On the 27th da
1917, the board of appraisal reported i
the common council of the city of Br
awarded to the plaintiff $62,720 damag
above all benefits as resulting to the plain
public improvement, although the plai
$229,000. On the 4th day of Septembe
report was adopted by the common cou
the 6th day of September, 1917, the resolu
this report was approved by the mayor
Bridgeport, and on the 10th day of Sept
the report was duly published, as prov
charter of the defendant city.

The plaintiff received actual notice of th

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before the board of appraisal, and appeared before it and made claims, and offered evidence in their support, as to the amount of damages and benefits accruing to him from this public improvement, and neither before that board, nor thereafter before the common council, did the plaintiff make any claim that the proceedings were illegal or invalid.

The plaintiff bases his cause of action upon two grounds: The first, because of the irregularity in the report made by the special committee said to have been appointed by the common council to make this layout; and second, the failure of the board of appraisal to file in the office of the town clerk written notice as required by the provisions of the charter. These claims the Superior Court sustained.

William H. Comley, Jr., for the appellant (defendant).

Carl Foster, for the appellee (plaintiff).

RORABACK, J. Where the land of an individual is taken *in invitum* for public use, under the provisions of positive law, every requisite of the statute must be complied with, and this must appear on the face of the proceedings for taking the land. *Nichols* v. *Bridgeport*, 23 Conn. 208; *Edwards* v. *Stonington Cemetery Asso.*, 20 Conn. 466, 476. See also *New Milford Water Co.* v. *Watson*, 75 Conn. 237, 242, 52 Atl. 947, 53 id. 57. Clearly there never has been a proper layout of the street extension. The charter of the defendant city requires that if, after a hearing, "the common council shall resolve to make any such public improvement, it shall appoint a committee, whose duty it shall be to make a layout of such public improvement, and to report in writing its doings to the common council, which report shall embody a survey and particular

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description of any such public improvement. If such report shall be accepted and approved by the common council, it shall be referred to the board of appraisal of benefits and damages for action by it." Special Laws of 1907, p. 518, § 59. The finding discloses that the report of the committee as to this purported layout was signed and made by them before their appointment. It appears that no action whatever was taken by the committee after they were appointed. The layout of this highway as it was to be extended was one of the essential steps to be taken by the city to meet the requirements of the statute under which the city was bound to act. To lay out a highway is to locate it and define its limits. A survey and particular description by some person or committee duly appointed and authorized to act could do this. *Gregory* v. *Bridgeport*, 52 Conn. 40, 43, 44. The preliminary survey and maps made at the instance of the officers of the city, may have facilitated the work in making this public improvement, but that alone, without proper action by the committee after their appointment, was not sufficient to establish a lawful layout of this highway, nor was it a substantial compliance with the express provisions of the statute relating to this subject.

Another serious objection raised by the plaintiff to the validity of these proceedings, is the neglect of the board of appraisal to cause a notice of their proceedings to be filed in the office of the town clerk. The charter provides: " . . . Before proceeding to assess benefits and damages for such public improvement the board of appraisal of benefits and damages shall cause a written notice setting forth the names of the persons owning or having an interest in any land, so far as disclosed by the land records, to be affected by such public improvement, together with a general

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description of such land, to be filed in the office of the town clerk. Such notice shall be recorded by the town clerk in a volume to be specially kept for such purpose and the name of each person included therein shall be separately indexed. Such notice shall name the person so affected as of the date when it is filed with the town clerk. Such notice shall be signed by a majority of the board of appraisal of benefits and damages, and the description of the land therein contained shall be sufficient if it shall indicate approximately the frontage of such land upon any public street. . . . No proceedings hereafter taken for the assessment of benefits and damages shall be effective except as to the persons so named in the notice filed as aforesaid with the town clerk; nor shall any amendment thereof constitute notice of any proceedings theretofore taken to any person who shall, prior to such amendment, acquire any interest in any such land." Special Laws of 1917, p. 845, § 8.

It is not always easy to determine from the statutory provisions in a given case whether the matter of filing a copy of the proceedings is a prerequisite to the assessment. There is no difficulty, however, in the case here presented, as the charter clearly provides that this notice, to be effective, must be filed before proceeding to assess benefits and damages. The statutory requirements as to notice and the record thereof are manifestly important, and they are in harmony with the well-settled policy of our law that every man's title to his real estate, so far as practicable, shall appear of record. It was competent for the legislature to prescribe the manner and formalities by which the title to lands of this kind might be transferred from the proprietor and be secured for public uses; and when it provided the manner in which such transfer should be accomplished, as has been done by the sections

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of the charter above recited, a compliar requirements prescribed is just as essent that the owner may be divested of title, a tion of a deed of conveyance would be in of real estate from one person to another. *Tisdale*, 2 Wis. 153, 185, 60 Amer. Dec. 40

The defendant contends that "the plai pearing before the board of appraisal anc claim there as to the alleged invalidity proceedings, was estopped from claiming perior Court that such proceedings were these proceedings were instigated as a coll upon the validity of this assessment, the estoppel might be seriously considered. speaking, to constitute estoppel the follow must be present: "(1) There must have b sentation or concealment of material fa representation must have been made witl of the facts; (3) the party to whom it was have been ignorant of the matter; (4) it been made with the intention that the would act upon it; (5) the other party mus induced to act upon it." 2 Words & Series) p. 337, and cases there cited upon

Not one of the essential elements of est found in connection with the plaintiff's before the board of appraisal. It is not the plaintiff had any knowledge of these i when he appeared before this board. conditions it cannot be said that he knc cealed material facts with an intention th party should act upon them. Neither do that the defendant city has been deceived c because the plaintiff failed to make the the board of appraisal that this assessm valid because of the irregularities then ex

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proceedings. This is not a case where the plaintiff stood by and withheld his objections until the municipality had incurred great expense in making a public improvement, and then by a collateral attack attempted to invalidate an assessment. It here appears that the plaintiff, by a proper remedy within the time limited by law, has by appeal made a direct attack upon the validity of this assessment.

Much that we have just said in relation to the matter of estoppel is applicable to the defendant's claim "that the plaintiff by taking an appeal to the Superior Court waived any irregularity or defect in the prior proceedings relative to said public improvement." In this connection it may also be stated that a waiver "is the intentional relinquishment of a known right." An examination of the plaintiff's appeal, now before us, does not disclose any acts or conduct upon his part showing an intention of renouncing any right that he might have had to contest the validity of this assessment. In fact the contrary appears.

This case is unlike *Manners* v. *Waterbury*, 86 Conn. 573, 86 Atl. 14, upon which the defendant relies. The *Manners* case was not one involving the right to take a man's land by eminent domain proceedings. The municipality in that case was simply attempting to enforce the payment of an assessment made for the benefit of the plaintiff's property which did not touch the proposed highway at any point. The difference between the powers to be exercised in the two cases clearly distinguishes the *Manners* case from the present one.

There is no error.

In this opinion the other judges concurred.

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THE MERIDEN TRUST AND SAFE DEPOSIT COMPANY, EXECUTOR, *vs.* RUTH CURTIS SQUIRE ET ALS.

Third Judicial District, New Haven, January Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Although an absolute estate once given by will may be cut down to a lesser interest by subsequent provisions clearly showing an intent to diminish the gift, yet in order to have that effect the qualifying language must not be of doubtful meaning or uncertain in its indication of the testamentary purpose.

In the present case a testatrix, who died April 1st, 1914, gave the residue of her property, which comprised by far the larger part of it, in equal shares and in fee simple to her son George and to her granddaughter Ruth, the latter's share, together with its increase, to be paid to her when she reached twenty-one. The same section of the will then provided that in the event of Ruth's death, either before or after the decease of the testatrix, without lawful issue living at the time of her (Ruth's) decease, her portion should go to George in fee; and also "provided further," that if at Ruth's death without lawful issue or descendants thereof then living, George should not be living and should have left no lawful issue or descendants, the residue of the estate should go in equal portions to specified ecclesiastical corporations and a library. The will was executed in April, 1908, when the testatrix was about seventy-five years old; George was then nearly fifty-one, and Ruth, who was the daughter of a deceased daughter, was twelve, and has never married. At that time George had one child, a daughter, who was married in 1910 and has two children, one born in 1911 and one in 1914. In a suit to construe the will the main question was whether the reference to Ruth's death "without issue living at the time of her decease," in the first proviso, and her death without "lawful issue or descendant thereof at the time of her decease," in the second proviso, meant her death whenever that might occur, or her death within a limited time; and if the latter, what that period was. *Held:*—

1. That it could not be supposed that the testatrix, in creating a contingency upon which her son should take the granddaughter's share, contemplated one that in the ordinary course of nature would not occur until long after the son's death; that it was more probably her intention, in the first proviso at least, to confine or limit the operation of the defeasance clause embodied therein, to the period during which Ruth's share was to remain in the exec-

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utor's hands awaiting her arrival at full age; and that such a conclusion was aided by the familiar principles of law which encouraged the early vesting of estates, preferred the first to the second taker, and looked with disfavor upon defeasance provisions.

2. That the second proviso, standing alone, could have no direct or immediate effect in defeating the titles upon which the residue of the estate was now held, since the conditions of defeasance therein prescribed had become impossible of fulfilment by the death of George leaving issue surviving at his death; and therefore that no right, title or interest in the residue of the estate could pass to the ecclesiastical societies and library named in this clause as contingent donees.
3. That the title by which George held his half of the residue became absolute and indefeasible in his estate immediately upon his death leaving surviving issue.
4. That the second proviso was, however, to be considered in connection with the first in arriving at the testatrix's meaning and intent, in so far as that might be uncertain or ambiguous with reference to the disposal of Ruth's share.
5. That while the decease of Ruth "without lawful issue or descendant thereof living at the time of her decease," as prescribed in the second proviso, did seem to convey the idea of a longer outlook than that required for Ruth to reach her majority, viz, nine years, it did not necessarily follow that the two provisos had reference to the same point of time, and that the first must therefore be extended to Ruth's death whenever that might occur; that in view of the inequalities and complications which would be likely to arise from such a construction, as well as the general scheme of the will to treat the two branches of the family, each represented by one person, with substantial equality, it certainly could not be said that Ruth's absolute estate previously given by the will, had been intentionally cut down to the extent claimed by those in opposition; and that having reached her majority, Ruth now had an absolute title to her share, and the right to receive it from the executor.

Unless otherwise explained by its context, the phrase "dying without issue" means without issue living at such death.

Argued January 18th—decided March 12th, 1918.

SUIT to determine the construction of the will of Augusta M. Curtis of Meriden, deceased, brought to and reserved by the Superior Court in New Haven County, *Webb, J.*, upon the facts alleged in the complaint, for the advice of this court.

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Augusta M. Curtis died April 1st, 1914, possessed of real and personal property and leaving a will executed April 15th, 1908, with a codicil thereto, possessing no present importance, dated October 9th, 1911. Her only heirs-at-law were a son, George M. Curtis, who was nearly fifty-one years of age when the will was executed, and Ruth Curtis Squire, a daughter of a deceased daughter of the testatrix, then twelve years old and still unmarried. George M. Curtis at that time had one child, a daughter, who was old enough to be married two years later. Of this marriage were born two children, one in 1911 and the other in 1914. All of the persons above named as descendants of the testatrix are now living, except George M. Curtis, who died August 28th, 1915.

Mrs. Curtis' will, duly probated, contains the following seventh paragraph:—

"All the rest and residue of my property I give, bequeath and devise as follows, to wit: the same to be equally divided between my son, George M. Curtis, and my granddaughter, Ruth C. Squire, daughter of Agnes Curtis Squire, deceased, the same to be paid to her together with the increase thereof upon her arriving at twenty-one years of age, to them, their heirs, executors and assigns forever;

"Provided, however—in the event of the death of said Ruth Curtis Squire, either before or after my decease, without lawful issue living at the time of her decease, then her portion to go to my son, George M. Curtis, his heirs, executors and assigns forever:

"Provided further—if at the time of the decease of said Ruth Curtis Squire, without lawful issue or descendant thereof living at the time of her decease, the said George M. Curtis shall not be living and shall leave no lawful issue or descendants, then all the rest and residue of my estate, after the provisions of sec-

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tions two, three, four, five and six have been satisfied, I give, bequeath and devise unto St. Andrew's Parish of Meriden, Connecticut: The Trustees of Donations and Bequests for Church Purposes of the Diocese of Connecticut for the use of St. Andrew's Parish of Meriden, Connecticut; and to the Meriden Trust & Safe Deposit Company, in trust to pay over the increase thereof to the directors of the Curtis Memorial Library for its use and benefit so long as it exists, equally to be divided between them, and if no public library is in existence at such time, then the bequest to said library to go to St. Andrew's Parish—, to have and to hold the same, to them, their successors and assigns forever."

All of the questions presented for advice arise out of this paragraph, and no other portion of the instrument is claimed to furnish assistance in giving their answer. George M. Curtis was named as executor. He settled the estate which is now ready for distribution. The property in his hands consisted entirely of personal estate. His final account, approved March 29th, 1915, showed that the residue for distribution amounted to $302,844.24. The Court of Probate thereupon ordered a distribution and appointed distributors. They distributed one half of this amount, to wit, $151,422.12, to George M. Curtis, subject to the second proviso of the seventh paragraph of the will, which the distribution recited. This was followed by the resignation of Mr. Curtis as executor and the appointment of the plaintiff in his stead. The plaintiff charged itself with the remaining one half of the $302,844.24, which was delivered over to it by Mr. Curtis. Its account, rendered May 23d, 1917, and approved June 1st, 1917, showed that accumulations had brought the fund in its hands up to $168,915.72. The following month the plaintiff presented its peti-

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tion to the Court of Probate alleging that Ruth had reached her majority, that she was the sole beneficiary of the property in its hands subject to the second proviso, and asking the court to order a distribution of it. The Court of Probate found that Ruth had arrived at the age of twenty-one, and ordered the plaintiff to hand over the property, which, upon a supplemental accounting, was found to amount to $169,311.53, to Ruth, subject to the provisions of the will. From this order both the plaintiff and Ruth appealed, such appeals being the two cases stated in the footnote.

THE MERIDEN TRUST AND SAFE DEPOSIT COMPANY, EXECUTOR, APPEAL FROM PROBATE.

RUTH CURTIS SQUIRE'S APPEAL FROM PROBATE.

Argued January 18th—decided March 12th, 1918.

APPEALS from an order and decree of the Court of Probate for the district of Meriden directing the executor of the will of Augusta M. Curtis to hand over personal property amounting to $169,311, comprising the undistributed portion of the estate in its hands, to Ruth Curtis Squire, subject to the provisions of the will, taken by the executor and by Ruth Curtis Squire, respectively, to, and reserved by, the Superior Court in New Haven County, *Webb, J.*, upon the facts alleged in the reasons of appeal and in the answers thereto, for the advice of this court.

The order of probate from which these appeals were taken, and the facts involved, are fully stated in connection with the case seeking a construction of the will.

George A. Clark and *Harrison Hewitt*, for the Meriden Trust and Safe Deposit Company, Executor.

Leonard M. Daggett and *J. Dwight Dana*, with whom was *John W. Bristol*, for Ruth Curtis Squire.

Arthur L. Shipman, for Agnes M. Church *et als.*

PRENTICE, C. J. The questions presented by these two appeals, argued together and immediately following the argument of the principal case, are largely technical in their character, and, in view of the judgment to be rendered in that case upon our advice, their answer has

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Harrison Hewitt and *George A. Clark*, for the plaintiff.

Arthur L. Shipman, for the defendants Agnes M. Church *et als.*

Leonard M. Daggett and *J. Dwight Dana*, with whom was *John W. Bristol*, for the defendant Ruth Curtis Squire.

Francis T. Bennett, for the defendant the Trustees of Donations and Bequests for Church Purposes for the Diocese of Connecticut.

Frank S. Fay, for the defendant St. Andrew's Parish of Meriden.

Albert R. Chamberlain, for the defendant the Curtis Memorial Library.

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become of no possible practical importance. It having been determined that Ruth Curtis Squire is, by force of her grandmother's will, entitled to the property in the hands of the executor, to be held by her in absolute and unqualified ownership, the objections made by the parties appellant to the order of the Court of Probate directing the executor to hand over the property to her, and any incidental questions relating to details and procedure which are raised, have become of not the slightest moment. Consideration of them may, therefore, be passed over, and action by the Superior Court advised which shall in the simplest and most direct way lead to the result which has already been determined upon as the proper one. This will be accomplished by a modification and amendment of the order appealed from, in such manner that it shall recite fully and concisely the facts found upon which it is based, and in conclusion order the Meriden Trust and Safe Deposit Company to pay and deliver over to Ruth Curtis Squire the net estate held by it in the execution of the provisions of Mrs. Curtis' will, taking proper receipts therefor, and make return thereof to the Court of Probate.

The Superior Court is advised to modify the order of the Court of Probate in conformity with the suggestions above outlined.

No costs in this court will be taxed in favor of any of the parties.

In this opinion the other judges concurred.

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PRENTICE, C. J. All the questions here at issue concern the testatrix's disposition of the residue of her estate, comprising by far the larger part of it. They arise out of the provisions of the seventh paragraph of her will, which is the only portion of that instrument which either concerns the disposition of the residue or throws light upon the testatrix's intentions therein. In its opening sentence, forming the whole of the main portion of the paragraph, she uses apt and unambiguous words of gift to her son George of one half of that residue, to vest in him in point of both right and possession and enjoyment immediately upon her death, thereby giving him an unqualified estate in fee simple in any real estate and an absolute estate in the personalty, and of gift to her granddaughter, Ruth Curtis Squire, of the remaining one half, to vest in her in point of right at her grandmother's death, and in possession and enjoyment when she should reach the age of twenty-one. *State* v. *Main*, 87 Conn. 175, 180, 87 Atl. 38. Pursuant to these provisions Ruth, upon her arrival at the age of twenty-one, would become vested with an unqualified fee in the real estate forming a portion of the one half which should be her share, and an absolute estate in the personal property. She has already passed her twenty-first birthday, so that the undoubted effect of the introductory portion of paragraph seven, if it stood alone, would be that at the present time she would be vested with an absolute and unqualified estate in the property comprising the fund in the plaintiff's hands.

An estate once given by will in absolute terms may, however, be cut down to a lesser one by subsequent provisions of the instrument clearly showing that it was the testator's intention to give such lesser estate. The subsequent language, to have that effect, must not be of doubtful meaning or uncertain in its indica-

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tion of the testamentary intent, and be equivalent to a positive provision. *Clark* v. *Baker*, 91 Conn. 663, 666, 101 Atl. 9; *Strong* v. *Elliott*, 84 Conn. 665, 671, 81 Atl. 1020; *Mansfield* v. *Shelton*, 67 Conn. 390, 394, 35 Atl. 271.

The subsequent language relied upon in the present case as cutting down the gifts to both the son George and the granddaughter Ruth, to determinable or defeasible fees or estates, is that found in the two provisos immediately following that portion of the paragraph above noticed.

The first of these provisos has to do with Ruth's share alone. Its effect unquestionably was to cut down the estate she took in her share, in that it was made defeasible in case of her death at some time without leaving issue. Whether or not the condition of defeasance thus provided is one which now renders her title a defeasible one, depends upon the period of time within which her death without issue should occur to have the effect of determining her title. If, by her death, the testatrix meant her death whenever occurring, then her title is open to defeat down to the moment of her decease, which may not occur in the next three score years. If, on the contrary, the testatrix intended to provide for her youthful granddaughter's death without issue during some shorter period, and that period has already elapsed, then, the happening of the condition having become impossible, Ruth's title has become an absolute one, and the proviso has become as though it never was. *Friedman* v. *Steiner*, 107 Ill. 125, 131; 4 Kent's Commentaries, 9.

The testatrix failed to expressly state her intention as to when, or within what period of time, Ruth's death without issue should occur to accomplish the defeat of the estate given to her and the passing of it over to her uncle George, his heirs and assigns. Reading the sev-

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enth paragraph down to this point and no further in the light of the circumstances surrounding the will, it would, however, not be difficult to discern that intention and the meaning she desired to be attached to the language she used. She had given the one half to Ruth with direction that the possession and enjoyment of it should be withheld from her until she should arrive at her majority. Ruth at the time was only twelve years old. Nine years would elapse before she could come into the possession and enjoyment of the property. Meanwhile, should she die, it might well be anticipated that she would die without issue. Under such circumstances, which readily might occur within George's lifetime, it was natural that the testatrix should wish that Ruth's share of the residue still in the hands of the executor be paid over and belong to George. If, on the other hand, Ruth should live out the allotted span of human life, the ultimate vesting of an indefeasible estate would be postponed for three score or more of years. George, who at the time of the execution of the will was a man over fifty years of age, would then be dead. His only child, older by a number of years than Ruth and old enough to be married two years later, would probably not be alive, and her children, born respectively in 1911 and 1914, and any child or children they might have, might not be surviving. In such case—not out of the ordinary course of nature—the benefit to be derived from a termination of Ruth's estate, would first enure to persons five, or conceivably six, generations removed from the testatrix. Considering these circumstances and looking at the will no further than the first proviso, it would be hard to believe that the testatrix intended to make a disposition of her property which might easily lead to such results, and much more reasonable to believe that her intention was to confine the operations of the de-

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feasance clause, embodied in the first proviso, to the period during which the property was to remain in the hands of the executor awaiting Ruth's arrival at full age. In aid of this conclusion would be the familiar principles of law that the law favors the early vesting of estates, prefers the first to the second taker, and looks with disfavor upon defeasance provisions. *Carpenter* v. *Perkins*, 83 Conn. 11, 16, 74 Atl. 1062; *Cody* v. *Staples*, 80 Conn. 82, 85, 67 Atl. 1; *Eaton* v. *Eaton*, 88 Conn. 269, 277, 91 Atl. 191. In support of this construction see also *Donnell* v. *Newburyport Homeopathic Hospital*, 179 Mass. 187, 189, 60 N. E. 482; *Gerting* v. *Wells*, 100 Md. 93–97, 59 Atl. 177; *Colby* v. *Doty*, 158 N. Y. 323, 327, 53 N. E. 35; *Huff* v. *Browning*, 96 Ill. App. 612, 616.

There then remains for consideration the second proviso, whose provisions, not happily conceived and couched in unfortunate language, furnish the occasion for most of the questions, and the most perplexing ones, which gather about the instrument. This proviso concerns not only the share given to Ruth, but also that given to George. It provides for the gift over of the whole residue in a certain event which, by necessary implication, carries with it a determination of the estates previously given to both Ruth and her uncle George.

As far as the direct effect of this proviso upon the titles by which the residue of Mrs. Curtis' estate is now held is concerned, that question, which under other conditions might possess large importance, may now be dismissed. Ruth having survived her uncle and he having died leaving issue, the conditions fixed by the proviso as those upon the happening of which there should be a defeat of the prior gifts, have become impossible of existence. These conditions were (1) that Ruth should die without surviving issue, and (2)

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that her uncle should not then be living and should have died leaving no lawful issue or descendant thereof. The accepted rule of construction in this State is, that in the absence of express direction or other indication of testamentary intent to the contrary, the phrase "dying without issue" or its equivalent shall be taken to mean dying without issue living at such death. *St. John* v. *Dann*, 66 Conn. 401, 407, 34 Atl. 110; *Hudson* v. *Wadsworth*, 8 Conn. 348, 360. That the testatrix's language itself fully harmonizes with that construction is apparent.

It results from these considerations (1) that nothing of right, title or interest in the residue of Mrs. Curtis' estate can ever pass to the donees in the remainder named in the second provision, or to any one of them; (2) that the title by which George held his half of the residue became absolute and indefeasible immediately upon his death; and (3) that the title which Ruth has to the property in the plaintiff's hands, representing the other half of the residue, is not made determinable by the direct operation of any provision of the second proviso.

This latter proviso, however, may not be dismissed thus summarily. Although the time has come when by its direct operation it cannot by possibility have effect upon the titles by which, pursuant to the prior provisions of the will, the residue estate is owned and held, its contents are to be considered in connection with those prior provisions, in arriving at the testatrix's meaning and intent therein, in so far as it may be hidden in uncertain or ambiguous language. We have, then, to revert to the first proviso and to extend our consideration of its uncertain language, which has thus far ignored the presence of the second, to include such further indications of the testatrix's intent as the latter may suggest.

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Counsel for the defendants whose interests are opposed to those of Ruth, exclusive of those named in the second proviso as donees in remainder, point to the language of the second proviso where the first condition of defeasance is stated to be the decease of Ruth "without lawful issue or descendant thereof living at the time of her decease," and argue forcibly that here is a plain indication that Mrs. Curtis was looking forward to and providing for a determination of the titles given to Ruth and George at some time farther removed than the nine years which would bring Ruth to her majority. This passage, and the inferences drawn therefrom, are the main reliance of those parties whose counsel press it upon our consideration as affording convincing proof that the testatrix in both her provisos was providing for a determination of the absolute estate once given in terms to Ruth, in the event of her death without issue whenever it should occur.

There can be no doubt that the language thus relied upon, if used with full appreciation of its natural import, is well calculated to convey the idea of a longer outlook than nine years, but the deductions sought to be drawn from that fact, as applicable to the first proviso, require the satisfactory establishment of two propositions, to wit: (1) that the testatrix in both the first and second provisos had reference to the same point of time; and (2) that the considerations arising from the use in the second, of the words "or descendant thereof," are sufficient to outweigh those to the contrary otherwise appearing, so that all things taken into account it is clearly apparent that the testatrix intended to make the estate once given to Ruth in absolute terms defeasible in the event of her death at any time without leaving issue.

The first of these propositions is a debatable one, to say the least, since the testatrix has described the two

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contingencies in different language. In the first proviso it is expressed to be the death of Ruth without lawful issue then living; in the second, as the death of Ruth without lawful issue or descendant thereof living at the time. In so far as the language is concerned, two very different contingencies may have been intended, to wit, in the one case the failure of immediate issue, and in the other failure of issue in any degree. *Hoadley* v. *Beardsley*, 89 Conn. 270, 277, 93 Atl. 535.

If it be assumed that such was not the case and that both provisions are referrable to the same point of time, there is yet a failure to make it clear that that point of time was one postponed to Ruth's death whenever occurring. We have already had occasion to notice some cogent considerations against the intentional suspension of the vesting of an absolute title for so long a period as would be quite possible under such a construction. The second proviso furnishes others. It will be noticed that it contains no cross remainder in favor of Ruth, should her uncle die before her and without issue. Nowhere in the will is to be found such provision or other disposition of his share in such event. Would his heirs, legatees or devisees, and their successors in title, take subject to their being deprived of the property at some time possibly many years in the future when Ruth should die? The general scheme of the will evidently looks to the treatment of the two branches of the testatrix's family, each represented by one person, with substantial equality. The tender years of one was a fact which called for recognition and appropriate provision. If the contention of those who are opposed to Ruth's claim to her share in absolute ownership, be accepted, the possibility of a wide distinction is created between what she and her uncle received, and a distinction which, as events have transpired, would be a very real one. If the period during

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which these possibilities might take form in actualities be reduced to the nine years of Ruth's minority, they would become of little moment, but if that period be stretched out to cover a half-century or more, they would assume very different proportions and involve many perplexing problems liable to arise. It cannot be lightly assumed that the testatrix, without apparent reason, intended to make a testamentary disposition so full of possibilities of inequalities and of legal complications and perplexities innumerable. *White* v. *White*, 52 Conn. 518, 522. We are convinced that the strong preponderance of reasons is in favor of the construction of the first proviso which limits its operation to the period of Ruth's minority. Certainly it is at least far from clear that the testatrix intended thereby to cut down the absolute estate previously given to her to the extent contended for.

The Superior Court is advised to render judgment adjudging:—

(1) That the title of George M. Curtis to the one half of the residue of the testatrix's estate distributed to him became absolute and indefeasible immediately upon his decease and thereupon became vested absolutely and unqualifiedly in his estate. (2) That Ruth Curtis Squire now has the absolute title to the remainder of said residue and by the terms of the will is entitled to receive the same from the plaintiff. (3) That the legatees and devisees in remainder named in the second proviso of the seventh paragraph of the will have neither right, title or interest in any portion of the residue of the testatrix's estate, and can take nothing by force of the provisions of said seventh paragraph.

No costs in this court will be taxed in favor of any of the parties.

In this opinion the other judges concurred.

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WILLIAM THOMAS GHERARDI *vs.* THE CONNECTICUT COMPANY (THE CONNECTICUT COMPANY'S APPEAL FROM COMPENSATION COMMISSIONER).

First Judicial District, Hartford, January Term, 1918.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Without attempting to phrase a complete and exhaustive definition of the word "dependent," as used in our Workmen's Compensation Act, it may be said in a broad and general way, that aside from those conclusively presumed to be dependents by the statute, no one whose financial resources are sufficient, unaided, to sustain himself and family in a manner befitting his class and position in life, is entitled to be regarded as a dependent or partial dependent. While a claim of dependency is not to be defeated by mere proof that the claimant can by the exercise of his best endeavors support himself and family by his own unaided efforts, yet, inasmuch as it is not the purpose of the law to give aid and comfort to slackers in respect of their obligations as members of society, such a claim will meet defeat if it appears that the claimant, by the expenditure of such efforts as under all the circumstances ought fairly and reasonably to be expected of him, is able to support himself and family in a manner suitable to his or their station.

In the present case the plaintiff, a single man twenty-two years old, claimed to be a "dependent" of his father, who died while employed as a lineman of the defendant. The son had been working steadily for three months prior to his father's death and continued to do so down to the time of the hearing before the Compensation Commissioner eleven months thereafter, earning thirteen dollars per week and during all of this period was self-supporting. He was not physically strong and at times had been irregular in his work, and when idle his father had helped him financially, but there was no evidence of such assistance for several months next prior to his father's death. *Held* that inasmuch as the claimant was apparently capable of earning enough to support himself and his idle periods were due to parental indulgence and folly, he was not a "partial dependent" within the meaning of the Workmen's Compensation Act.

Argued January 2d—decided April 30th, 1918.

APPEAL by the defendant from a finding and award of the Compensation Commissioner of the first dis-

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trict in favor of the plaintiff, taken to and tried by the Superior Court in Hartford County, *Burpee, J.;* the court confirmed the award and dismissed the appeal, and from this judgment the defendant appealed. *Error and judgment set aside.*

December 26th, 1915, Joseph Gherardi, a long-time employee of the defendant as a lineman, while engaged in his work, was, after an unusually strenuous day's exertion in the repair of its lines and poles thrown into disorder by a severe snow and wind storm, seized by what the Compensation Commissioner has found was an acute dilation of the heart, and shortly thereafter on the same day died therefrom. The finding of the Commissioner is that the heart attack was caused by the deceased's unusual expenditure of strength immediately prior thereto, and was the result of an injury arising out of and in the course of his employment.

The deceased was forty-nine years of age and a widower. The claimant was his only child and lived with his father, both boarding. At the time of his father's death he was twenty-two years of age. The finding of the Commissioner, in so far as it bears further upon the relations of the father and son, was as follows: "The claimant was not physically strong, nor did he present the appearance of a robust young man. He was irregular in his work, and during periods when he was idle he always secured financial aid from his father, whom he saw every Sunday. During the month of September prior to the aforesaid injury, when the claimant was out of employment, his father had given him board, clothing, spending money and car fare, to the amount of $35. During the previous June he had paid his board and given him money to the amount of $25. Other assistance was given from time to time as needed. No books were kept, and it is not possible from the testimony to arrive at

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the exact amount which the father had given the son during the few months previous to his death. At the time of the father's death the son was working for the New Departure Manufacturing Company, in Elmwood. He had tried the line of work at which his father was engaged and had to give it up on account of his health. There was no evidence of any contributions by the father to the support of the son during the months of October, November, and December."

The record sent up by the Commissioner also shows certain other conceded facts testified to by the claimant. He began work for the New Departure Manufacturing Company, as stated in the finding, in September, 1915, earning $13 a week, and remained in that employment continuously until his father's death and down to the hearing before the Commissioner, which took place November 13th, 1916. During all this time he was self-supporting.

Upon these facts the Commissioner ruled that the claimant was a partial dependent of his father at the time of the latter's death, and awarded him compensation as such partial dependent.

Seth W. Baldwin, for the appellant (defendant).

Frank P. McEvoy, for the appellee (plaintiff).

PRENTICE, C. J. The Compensation Commissioner, with evident hesitation, held that this claimant was, at the time of his father's death, a partial dependent of the latter, and awarded him compensation accordingly. This conclusion and award appear to have been largely, if not entirely, controlled by the fact that the son had been from time to time in receipt of financial aid from his father, and that, brought up as he had been, he had become accustomed to rely upon such contributions for his maintenance.

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The customary receipt of financial assistance from another, although supplying a welcome and helpful aid to self and family support, does not suffice to convert the recipient into a dependent or partial dependent of the donor, nor does it suffice that the donee has come to rely upon the contributions so made in the provision of that support. It is indeed true that dependency arises only where financial aid has been furnished and has come to be relied upon by the recipient for purposes of support. But those are by no means the only conditions that must exist to create dependency, as our Workmen's Compensation statute uses that term. There must, in addition, be a reliance on the assistance received for the purpose, and for no other or broader purpose, than that of providing self and family with the means of living, judged by the class and position in life of the recipient. *Powers* v. *Hotel Bond Co.*, 89 Conn. 143, 152, 93 Atl. 245; *Blanton* v. *Wheeler & Howes Co.*, 91 Conn. 226, 231, 99 Atl. 494; *Simmons* v. *White & Bros.*, 80 Law Times Rep. 344, 345.

Nor is that all. Dependency involves the existence of another important condition. One may live in idleness and actual dependence without being what our compensation law regards as a dependent. No such encouragement is given to sloth and conditions inducive of pauperism, as would result from the continuance at an employer's expense of habits of indolence on the part of would-be dependents. Parents may, if they will, pamper their children and indulge them in habits of nonexertion and reliance upon others, but the law does not accept situations thus created as ones it is called upon to foster or aid in continuing. In other words, the law does not necessarily accept conditions as they exist at the time of a workman's decease through the creation of the parties responsible for them, as conclusively determining a state of dependency. It rather

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looks to all the circumstances to discover what in fairness and right they ought to be. One who, as the result of parental affection, indulgence, weakness or folly, has been permitted to grow up in idleness and a love of ease, may not, for that reason alone, successfully pose as a dependent entitled to continued assistance. If there are other reasons why he may not under all the circumstances reasonably be expected to be self and family supporting by the exercise of reasonable efforts to that end which he is competent to make, the situation becomes fundamentally changed and the conditions of dependency begin to appear.

We have no purpose to attempt to phrase a complete and exhaustive definition of the word "dependent" as our statute uses it. But this much may be said broadly and generally, that no one, not belonging to the enumerated classes of persons conclusively presumed to be dependent, is entitled to be regarded as a dependent or partial dependent, whose financial resources, at his command or within his power to command by the exercise of such efforts on his part as he reasonably ought to exert in view of the existing conditions, are sufficient to sustain himself and family in a manner befitting his class and position in life without being supplemented by the outside assistance which has been received or some measure of it. See *Blanton* v. *Wheeler & Howes Co.*, 91 Conn. 226, 231, 99 Atl. 494. Of course, a claim of dependency is not to be defeated by mere proof that the claimant can by the exercise of his best endeavors support himself and family by his own unaided efforts. *Howells* v. *Vivian & Sons*, 85 Law Times Rep. 529, 530; *Powers* v. *Hotel Bond Co.*, 89 Conn. 143, 152, 93 Atl. 245. But as it is no purpose of the law to give aid and comfort to slackers in respect of their obligations as members of society, so it is that a claim of dependency will meet defeat if it appear that

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the claimant, by the expenditure of such efforts as under all circumstances ought fairly and reasonably to be expected of him, is of ability to be self and family supporting according to the proper measure of such support.

Turning now to the situation as disclosed by the Commissioner's finding, we learn that the claimant, at the time of his father's death, was a man grown, single, and past his majority. For the three months immediately prior to that event he had been working steadily at a living wage in a mechanical establishment, and was still so working when the hearing was had some eleven months later. He had previously worked intermittently. The finding supplies no details as to where, when, or how long continued, such previous employments were, or why they became terminated, save that he had attempted to work as a lineman, as his father was doing, and had given up that employment as not suited to his health and strength. The finding is barren of reasons why, as a full grown single man he could not reasonably have been expected to be self-supporting as readily as the ordinary man of his years, save that he was not physically strong or robust in appearance and had felt unequal, for reasons of health, to continuing the strenuous activities of a lineman.

It would seem that his fourteen months of continuous shop experience had furnished a fair degree of demonstration that he was not laboring under a serious physical handicap, and there is nothing in the finding to indicate that he was. Prior to his going to work where he is now employed, to wit, in the month of September preceding his father's death, he had periods of nonemployment, but whether these arose for other reasons than parental indulgence or disinclination to labor, we are not informed.

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The Commissioner's memorandum of decision, made a part of the finding, contains, however, the suggestive statement that there was evidence that the claimant was unduly pampered by his father, and that possibly he was somewhat lacking in enterprise. This is followed by the Commissioner's dismissal of that phase of the case as possessing no present importance, and with the observation, in substance, that it was not his function as a trier to pass upon the proper standard of bringing up children and parental control and management, and that his duty was confined to accepting situations as he found them, whether or not they met his approval. Here is clearly disclosed the fundamental error into which the Commissioner fell in making his award. It is quite true that it is not for him in his official capacity to dictate to parents as to their methods of parental control and treatment, but it is for him, acting in that capacity, to deal with the results of such control in so far as they are disclosed in the conduct and inclinations of children grown to manhood and womanhood who assert claims to be treated as dependents. He is not to accept abnormal conditions not resulting in incapacity, simply for the reason that he finds them in existence, due though they be to parental indulgence and folly, and provide for their continuance at the expense of the parent's employer after he has gone. If parental pampering has induced disinclination to labor and fondness for a life free from personal effort, a Compensation Commissioner is not thereby called upon or justified in either continuing the work the parent has mistakenly begun, or in accepting the conditions as those existing and therefore to be maintained at the expense of an employer.

This may not be a case of the character just described, but the Commissioner was in error in dismissing, as he did, summarily and without inquiry, a

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phase of it which the evidence naturally suggested to his mind, and we are unable to discover in the facts found by him, any justification for a conclusion that the claimant was a partial dependent, consistent with the application of a just and true standard.

This conclusion renders it unnecessary to consider the employer's remaining claim, that the Commissioner erred in his finding that the deceased's death was caused by injuries arising out of and in the course of his employment.

There is error, the judgment of the Superior Court is set aside and the cause remanded to that court for the rendition of judgment vacating the award of the Compensation Commissioner.

In this opinion RORABACK, BEACH and SHUMWAY, Js., concurred.

WHEELER, J. (dissenting). The reasons of appeal are in reality only two. First, that there is not sufficient evidence to sustain the finding and award based thereon, that the deceased died of an injury arising out of and in the course of his employment; and second, that there is not sufficient evidence that the deceased was a "partial dependent" within the meaning of our Compensation Act. The injury to the deceased, as found by the court, was the acceleration of a previously existing heart disease due to his employment. If the employment accelerates or aggravates a predisposing physical condition, the employment is the immediate occasion of the injury and it arises out of it. *Brightman's Case*, 220 Mass. 17, 107 N. E. 527; *Hartz* v. *Hartford Faience Co.*, 90 Conn. 539, 97 Atl. 1020; *Linnane* v. *Aetna Brewing Co.*, 91 Conn. 158, 99 Atl. 507. There was evidence from which the trial court might have made this finding. We cannot determine from our

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examination of the evidence that the findings of the Commissioner in the particulars involved were so unreasonable as to justify judicial interference, and to have required the Superior Court to have so held.

The second question likewise depends upon whether the trial court found the facts upon which its conclusion of partial dependency rests, and if so, whether its conclusion is correct. The question of dependency is one of fact, expressly made so by § 6 of Chapter 288 of the Public Acts of 1915. The finding of the fact of dependency will not be reviewed unless found without evidence, or contrary to the evidence, or in violation of law. *Powers* v. *Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245; *Kennerson* v. *Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372. None of the facts found, from which the conclusion of partial dependency was drawn, can be held to have been found without evidence, or contrary to the evidence. The question resolves itself to this: can the conclusion of partial dependency be legally drawn from the subordinate facts found?

The question of dependency is, whether the contributions were relied upon by the dependent for his means of living, judging this by the class and position in life of the dependent. *Powers* v. *Hotel Bond Co.*, 89 Conn. 143, 152, 93 Atl. 245; *Mahoney* v. *Gamble-Desmond Co.*, 90 Conn. 255, 96 Atl. 1025. The trial court has found that the claimant did rely for his means of living upon the contributions of his father during the periods when he was not working. The three months preceding the death of the deceased he was at work and received no assistance from the deceased, but in the four months preceding this he had been assisted for the greater part of two months, and generally the deceased assisted the claimant from time to time when he was out of work. We have already decided that partial dependency may exist, though contributions be at irregular intervals,

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and in irregular amounts, and though the dependent have other means of support. *Powers* v. *Hotel Bond Co., supra.* Under the authority of this decision the question of partial dependency was one of fact.

The defendant asserts that the receipt of support by the claimant when he did not work will not furnish a basis for a claim of partial dependency when he was working after September and at the time of the decease of Gherardi, unless the finding is to be read to mean that the claimant's period of idleness was due to his health. I do not think the finding is to be read in this way. Nor can it be assumed that these periods of idleness were wilful. A consideration of the evidence shows that the only evidence upon the subject was that of the claimant, and that the periods of idleness in September and June were spent in looking for a job. I think the finding of the Commissioner as to partial dependency was one of fact, and that he committed no error of law in making it.

We have reiterated our adherence to the test of dependency announced in *Powers* v. *Hotel Bond Co.* (*Blanton* v. *Wheeler & Howes Co.*, 91 Conn. 226, 231, 232, 99 Atl. 494), and other jurisdictions have cited this as the standard in Connecticut for ascertaining a "dependent" under the Act. The authorities generally adopt this test. The finding fully satisfies the conditions of fact upon which the test rests, and no question is made in the opinion as to the correctness of these findings and conclusions of fact. The majority opinion accepts this test, but adds "another important condition." It holds that dependency must be determined by looking at all the circumstances to discover what in fairness and right the conditions ought to be, and if the circumstances do not measure up to this standard dependency cannot exist. This test, I think, is too uncertain and variable to predicate a rule of law

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upon. Perhaps for these and the like reasons we do not find that the many courts which have had the question of dependency before them since Compensation Acts were first enacted, have ever adopted this test, with the possible exception of Kansas. Applying its test the opinion holds that no one, not belonging to the enumerated statutory classes of dependents, can be a dependent who can support himself and family as befits his station in life by the exercise of such effort as he reasonably ought to make. In the application of this test, necessarily in each case the trier must ascertain all of the many family conditions, and then decide whether or not the alleged dependent ought or ought not to have been earning his living while he was receiving support from the injured. The same standard must apply to male and female,—and since "fairness and right" may decree that in many cases the female, and in some cases the male, should not be required to earn their living because of incapacity through disuse, or through failure to have become accustomed to such service, the courts must in each case decide when the claimant dependent shall work, what he shall work at and how much. This ruling will be apt to divide claimant dependents into classes, particularly women. Those women who have never been accustomed to work for a living and receive support will be held to be dependents, and those who have been accustomed to work for a living and don't, through receiving support, will be held to be nondependents. I regard such a rule of law as imposing upon courts a duty at once incapable of impartial and uniform adjudication, whose application might prove harmful and even dangerous to society. Each Commissioner will have his own standard of what is fair and right in each case. Some States have legislated upon this subject; this would have been wholly unnecessary if it had been thought that their

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courts could adopt this test of dependency. This question was decided in accordance with the foregoing doctrine in *Blanton* v. *Wheeler & Howes Co.*, 91 Conn. 226, 232, 99 Atl. 494. Among the classes conclusively presumed by our Compensation Act to be wholly dependent, is (c) "any child under the age of eighteen years, or over said age but physically or mentally incapacitated from earning" etc. There was no occasion for this definition if "dependent" was intended in the Act to have the meaning the majority opinion gives it.

Turning to the facts of this case the opinion points out, and with accuracy, that although the claimant was supported by his father in the periods when he was not at work, the reason for his failure to work does not appear in the finding. The memorandum of decision of the Commissioner suggested that the claimant may have been unduly pampered by his father, and that possibly he was somewhat lacking in enterprise. The opinion recognizes that the finding is inadequate, as indeed it is, to differentiate this case as one of this character, for it says, "This may not be a case of the character just described." But since the Commissioner said in his memorandum: "It is not the function of the trier to pass upon the proper standard of bringing up children or the best parental methods of enforcing application and thrift in young men," but rather "to find the facts as they exist and apply the law to them whether he approves of the facts or not," the opinion holds that when these facts appear they must be considered in resolving the question of dependency; and it holds that the Commissioner was in error in failing to consider these facts in making up his award.

It disposes of this ground of error to point out that the issues raised by the reasons of appeal do not include this point. It is not before the court, and it is not among those exceptional considerations which will

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sometimes justify the court in consider
error upon appeal, although outside th
appeal and the arguments of counsel. I
had desired a finding upon the cause of
irregularity in work, it could have aske
in some authoritative way these facts we
in the finding and the conclusion of de
shown to be unfounded, it must stand
examine the evidence we should find
evidence offered upon this point was to
the irregularities in the claimant's work
difficulty in securing a job although he
effort. If the opinion is correct that t
not determine whether the irregularity
claimant was due to his own disincli
and to the pampering of his father, or to
cause, and the Commissioner failed t
phase of the case which the evidence
hearing might show, it does not follow th
be a reversal and a directed judgment
reversal and a new trial. Otherwise i
the cause will be decided upon a set of fa
and which a new trial would not estab

BENJAMIN E. S. BABCOCK ET ALS. *vs.*
METHODIST EPISCOPAL ZION SOCIE

First Judicial District, Hartford, January
PRENTICE, C. J., RORABACK, WHEELER, BEACH

In 1862 an ecclesiastical society conveyed its churc
ford to three persons, "in trust" for its own
as a place of worship, and "in further trust"
the land and building when, in the concurr
grantors and grantees, it should be for the

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society; and in case of such sale, then to invest the avails in another house of worship for its use. The deed also provided that in case of the death of either of the three grantees, the remaining trustees might fill the vacancy. All of the trustees are dead and none of them appointed a successor or made any conveyance of the premises. In 1898 the Court of Probate for the district of Hartford, upon application of the society, appointed three trustees to fill the vacancies, one of whom is still living. The City of Hartford made an offer for the property, and certain members of the society brought this application to the Superior Court praying for an order for the sale of the property, or for the appointment of trustees to carry out the purposes of the trust. *Held:*—

1. That the provisions of § 1034 of the General Statutes applied to the situation, inasmuch as there had been "a change of circumstances" since the creation of the trust, in consequence of which its execution "in exact accordance with the terms of the deed" had become impossible; and therefore the Superior Court had jurisdiction to appoint successors to the original trustees to carry out the purposes expressed in the deed; and that such appointees might sell and convey the church property provided they concurred with the society that such a sale was for its best interest.
2. That the Court of Probate had no jurisdiction to appoint trustees in 1898, since the statute (§ 249) relied upon to justify such appointment expressly provided that it should not apply where provision "is made by law" for the contingency of the death of the original trustee; and that § 1034 supplied such provision.
3. That the terms of the trust did not confer any personal discretion upon the original trustees which was not also given to their successors.

Aside from the statutory provision (§ 1034) for filling a vacancy caused by the death of a trustee, the plaintiffs claimed that this contingency had been provided for, in the present instance, by the terms of the trust deed itself. *Held* that a determination of this question was unnecessary.

A trust will not be allowed to fail for want of a trustee to administer it.

Argued January 2d—decided April 30th, 1918.

SUIT to obtain an order for the sale of church property, or for the appointment of new trustees to carry out the trust created by a deed of the property in 1862, brought to the Superior Court in Hartford County where a demurrer to the complaint and a motion to expunge were overruled (*Shumway, J.*), and the cause was afterward tried to the court, *Burpee, J.*; facts found

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and judgment rendered appointing trus
for, and appeal by the defendants. *No*

The complaint claimed, first, an ord
of the church property of the society o
in Hartford, and the investment of the p
in other Hartford real estate, and the
court might deem proper to secure the
trust created by the trust deed of Marc
second, the appointment of a trustee to
purposes of the trust; and, third, such
ther relief as the court might deem equit

The society made default of appear
plaintiffs, the defendant Hill, and othe
the society who were made defendants
motion, appeared, and were at issue to t

The court found the following facts: '
society is a duly-organized ecclesiastical
in Hartford, and the plaintiffs are meml
March 1st, 1862, it owned land, with a c
situated on the south side of Pearl Stree
A parsonage also now stands on the l
day the society's committee, duly empo
of the society, executed and delivered
Hosmer, Thomas Smith and Samuel Co
ford, a deed of said premises, "in tru
confidence that the said grantees shall at
and permit the said Ecclesiastical Soci
the 'African Methodist Episcopal Zion S
and occupy said land and building for th
place of religious worship, and for all the
said Ecclesiastical Society may lawfully
and in further trust to sell and convey
and building whenever in the concurre
the grantors as expressed by their vote a
ing duly called, and the grantees it sh
best interest for said Ecclesiastical Soci

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same, and in case of such sale then in further trust to invest the avails of such sale in another lot of land and house of worship for said Ecclesiastical Society." The deed contained the further provision that "in case of death or resignation of either of the aforesaid trustees the grantees, the remaining trustees, may fill the vacancy."

Since the delivery of this deed, said Hosmer, Smith and Coit have died without making any conveyance of the premises and without appointing any successor.

On November 16th, 1898, the Court of Probate for the district of Hartford, on the application of the society, appointed Jackson Ross, Morris Hill, and Vigil Wilson, to be trustees under the deed, to fill the vacancies caused by the deaths of Hosmer, Smith, and Coit, and the trustees so appointed accepted the trust and qualified as such trustees.

Since said appointment by the Court of Probate, Ross and Wilson have died without making any conveyance of the premises, and no successors have been appointed. The defendant Morris Hill is the sole surviving trustee.

The property is worth about $75,000, and the City of Hartford has offered $56,500 for it. The bishop of the diocese has approved the offer, but the society is unable to convey title to the premises to the city because it is now impossible to comply with the provisions of the trust deed.

In connection with the city's offer, the society now holds the option to buy the Methodist Episcopal Church and parsonage on Windsor Avenue in Hartford for $36,000, which would leave a residue from the purchase money to be paid by the city of $20,500, to be used for the benefit of the society. The Pearl Street premises are incumbered by a mortgage, on which $1,500 is still due, and which, being paid out of the

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$56,500, would leave a net residue of $1
Hill, the sole surviving trustee, did not
approve, the sale of the premises to the
ford.

The Superior Court reached the followi

1. That the plaintiffs were entitled tc
lief. 2. That a sale and purchase as p
be advantageous to said society, but t
doubt as to the sufficiency of the price
Pearl Street property. 3. That the inte
deed was that the Pearl Street prope
sold and conveyed whenever, in the conc
of the society, as expressed by vote at a
duly called, and of the trustees named i
should be for the best interests of the so
4. That there was doubt as to the legality
meeting at which it was voted to acce
the city of Hartford for the Pearl St
5. That under existing circumstances t
no such concurrent vote as was require
6. That it was not advisable to order t
Pearl Street property to the City of Ha
investment of the proceeds in the Wi
property. 7. That if such sale and re
made, it should be made in conformity v
of said trust deed. 8. That the Superi
power and jurisdiction to appoint thr
carry out the purposes of the trust creat
of 1862. 9. That by concurrent vote o
and said society, the offers of the city and
on Windsor Avenue might be accepted
veyance made. 10. That the trustees to
should include said Hill.

The Superior Court rendered judgmen
plaintiffs' second prayer for relief and ap
Hill, the Hartford Trust Company, and

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and Trust Company, to carry out and execute the purposes of the trust created by said deed, and all the defendants, except said society, appealed to this court.

Herbert S. Bullard and *Alvan Waldo Hyde*, for the appellants (defendants).

William F. Henney, for the appellees (plaintiffs).

GREENE, J. The defendants' appeal sets up nine reasons of appeal. The first is that the court erred in overruling the second ground of demurrer to the complaint, which was that the allegations of the complaint do not show "a change of circumstances or in the conditions of such real estate" within the meaning of § 1034 of the General Statutes. The complaint shows that the original trustees are dead, and that they appointed no successors. The trust deed contemplated a sale and conveyance either by them or by successors to be appointed by them. It is evident that there has been such a change of circumstances as prevents the execution of the trust in exact accordance with the terms of the deed. There is no merit in the first reason of appeal.

The second reason is the overruling of the third ground of demurrer to the complaint, which was that the allegations of the complaint do not show that the execution of the trust in exact accordance with the terms of the deed is, or will become, impossible, or that the execution of the trust must fail to secure the objects manifestly intended by the grantors. The same facts which show that there is no merit in the first reason show that there is no merit in the second.

The third reason is the overruling of the demurrer to the second claim for relief, the ground of which is

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that the Superior Court had no power
or delegate to, the appointee of the Cc
the power to determine whether it is b
ciety to make the proposed sale, purch
ment of the balance of the purchase n
Superior Court did not bestow on, or d
appointee such powers, there is no me
reason of appeal.

The fourth reason of appeal is that th
holding that the power of sale in the
not cease to exist on the death of the o
Whether the power of sale ceased wit
the original trustees, depends on the
grantors, as shown by the language of
in the light thrown on it by their circum
intended that the church property sho
the society as long as its interests re
and sold when its interests required sell
of selling might arise at any future tim
the deaths of the original trustees as du
The grantors provided for other trustees
original ones, and it is reasonable to be
intended the successors to act for the goo
when its good required a sale. To prov
pointment of trustees who would be u
essential part of the duties, for the doin
trust was created, would be very im
that the grantors so intended is very im
find nothing in the language of the tru
indicate that a personal discretion wa
original trustees which was not also give
cessors. The fourth reason of appeal is

The fifth reason is that the court er
that the power to fill vacancies did not
upon the death of the original trustees
involves either one or both of two claim

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that the power to fill vacancies was given by the deed only to the original trustees, so that their successors had no power to fill vacancies. The successors appointed by the Court of Probate made no attempt to fill vacancies, and whether they, or any other successors, could, under the trust deed, fill vacancies, was not decided by the Superior Court, and is an irrelevant question. The second claim possible under this reason is that no court has power to fill vacancies. This claim conflicts with the rule that a trust will not be allowed to fail for want of a trustee to administer it. *Dailey* v. *New Haven*, 60 Conn. 314, 22 Atl. 945. The fifth reason of appeal is insufficient.

The sixth reason of appeal is that the court erred in holding that the Court of Probate had no jurisdiction to appoint successors to the original trustees. The seventh reason of appeal is that the court erred in holding that the Superior Court had jurisdiction to appoint trustees after the Court of Probate had assumed jurisdiction of the trust, and while one of its appointees survived. These two reasons may be considered together. The defendants claim that the Court of Probate had power to appoint successors to the original trustees under General Statutes, § 249, which existed in the same form when the Court of Probate made the appointment in 1898. This statute, omitting such clauses as are irrelevant to this case, provides as follows: "When any person shall have been appointed trustee of any estate, . . . and no provision is made by law or by the instrument under which his appointment may be derived for the contingency of his death, . . . the Court of Probate of the district within which such estate shall be, . . . may, on the happening of any such contingency, appoint some suitable person to execute such trust, taking from him a probate bond." This statute confers no jurisdiction on the

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Court of Probate in cases where, first, : is made by law for the contingency of death, or, second, where any provision is instrument under which his appointmen rived for the contingency of his death. the Court of Probate had no jurisdictio cause there was a provision made by lav tingency of the trustee's death. This found in General Statutes, § 1034, whic in the same form since the Revision of 1 appears as § 778. This statute reads as all cases where real estate is held by a tr trust created by deed, and by reason o circumstances, or in the condition of suc since the creation of such trust, the exec in exact accordance with the terms of s or shall become impossible, or must nece secure the objects manifestly intended b in said deed, the Superior Court in the cc such real estate is situated may, on the the trustee or any party beneficially int trust, order the sale of said real estate, thereof, and the investment of the proce other real estate or as trust funds general law invested, for the benefit of the part interested in such trust, in such manner may deem the most proper to secure t which said trust was originally created, a be, according to the intent of the origina pearing in the original deed. All parties said real estate, by reason of said trust, sioners, shall be made parties to any a statute covers the present case. Here holding real estate under a trust created b deed required the duties thereby create formed by the original trustees, or by s

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pointed by the original trustees. The original trustees died without performing certain duties which might become requisite and which now require performance, i. e. to sell the land, and without appointing successors. The circumstances have thus changed since the creation of the trust, so that the execution of the trust in exact accordance with the terms of such deed is now, and had become at the time of the action of the Court of Probate, impossible. Under such circumstances, the Superior Court was by this statute authorized, on the death of the original trustees without appointing successors, to order the sale of the land, and to appoint trustees to make the sale. As the object of the statute is "to secure the object for which said trust was originally created, as near as may be, according to the intent of the original grantor appearing in the original deed," and as the intent of the grantors was that the sale should not be made until the interests of the society required it, it would have been proper for the Superior Court, in 1898, when the Court of Probate acted, to have appointed trustees to hold the real estate until it should be determined in the manner provided by the deed that the interests of the society required a sale, and then to make a sale and conveyance. The action of the Court of Probate was unauthorized and void, and the Superior Court had jurisdiction to appoint trustees. There is no merit in the sixth and seventh reasons of appeal.

The plaintiffs claim not only that provision is made by law for the contingency of the deaths of the original trustees, but also that provision is made by the trust deed for such contingency. Whether this is true depends on the meaning of the statutory language. A provision was made by the deed that the original trustees should appoint successors, but by their failure to appoint successors the provision in the deed for the

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contingency of their death became ineff
is therefore a question whether "provi
the instrument," means provision which
of the deed appeared sufficient, or provi
fact, proved sufficient. It is unnecessary
question.

It appears from the foregoing that the
in the eighth reason, which claims tha
pointed by the Superior Court cannot
power of sale created by the trust deed.

As to the ninth reason of appeal, whic
in appointing trustees under the claims
appointment is proper under the second
appointment of a trustee to carry out a
purposes of said trust."

There is no error.

In this opinion the other judges concu

ABRAHAM STONE *vs.* HOVHANNES B. MOO

Third Judicial District, New Haven, January
PRENTICE, C. J., RORABACK, WHEELER, BEACH a

In apportioning, among lienors, the balance due fr
building to the original contractor, all mechani
who have given notice of their intention to cla
seasonably filed their certificates, stand upon the
share in the fund pro rata (§ 4138), notwithsta
may be entitled, because of a payment made t
tractor by the owner after having received not
to enforce his lien for such further sum, not exc
of such payment, as may be necessary to satisfy

Lienors are in no true sense creditors of the owner of
contract relations are with the contractor, who
hands of the owner, constitute the fund to whic
by statute to look for the satisfaction of their cl

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As a general rule a court of equity will not marshal securities between two creditors unless it appear that they are creditors of the same debtor, that there are two funds belonging to that debtor, and that but one of them has the right to resort to both funds.

Where the contested issues involve not only the rights of the parties respondent in a fund which the plaintiff brings into court, but also the personal liability of the plaintiff in addition, it is error to allow him counsel fees upon the theory that the case is one of interpleader.

Argued January 16th—decided April 30th, 1918.

SUIT to foreclose a mechanic's lien, brought to and tried by the Superior Court in New Haven County, *Case, J.;* facts found and judgment rendered that the plaintiff receive the sum of $774.11 and his costs, amounting to $72.96, out of a fund in the hands of the defendant Moomjian, and that the balance of said fund, amounting to $2.93 only, be divided pro rata among four other defendants, and appeal by the last-named parties. *Error and judgment reversed.*

On August 15th, 1915, the defendant Moomjian, the owner of a building lot in New Haven, contracted with the defendant Ruderman for the construction thereon of a two-family dwelling-house for the agreed price of $3,500. The building was completed according to the contract, save for the failure to conform in certain respects to the specifications, and the contract price, less a deduction of $250 by reason of that failure, was earned by the contractor. The plaintiff and four of the parties defendant, to wit: Bernstein, Rappaport, the Connecticut Adamant Plaster Company, and Setlow and Finkelstein, did work or furnished material, or both, in the construction of the building as subcontractors under Ruderman. As the work progressed Moomjian made five payments to Ruderman amounting in the whole to $2,200, thus leaving $1,050 due the latter. This amount remains unpaid. The last one of the payments was made January 20th, 1916. At that

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time the construction of the building was
progress.

November 1st, 1915, the plaintiff served upon
jian notice of his intention to claim a lien. P
to that date two of the owner's payments to t
tractor, amounting to $1,000, had been mad
other subcontractor had then served a notice,
one thereafter did so until February 18th, 1916
one of the defendants made such service. On
23d, 25th and 31st following, the three remainii
contractor lienor defendants named above, f
suit. All of these four parties likewise filed cert
of lien for the several sums claimed to be due
amounting in the whole to $1,006.75. The p
filed his certificate for $712.81 on December 17th
and before the last two payments, amounting t
were made by Moomjian to Ruderman. No q
is made as to the validity of any of these fiv
and the certificates correctly state the amoun
to each of the parties. One other lien was filed
defendant Catania. The trial court found tha
ing was due to him, and disallowed his claim.
this ruling and decision he has not appealed.

The plaintiff brought his action by complaint
ing a foreclosure of his lien and $1,000 damage
defendant Moomjian answered setting up in his
defense that $1,300, less a deduction for noncom
of the work according to the contract, clai
amount to $750, was due from him to Ruderma
he made no claim to the money represented
balance due and unpaid, that the lienor def
asserted conflicting claims to it growing out
liens, that he was ready and willing to pay o
amount remaining unpaid by him to those ent
receive it as determined by the court, and ask
court to so determine, first having ordered the

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parties in interest to interplead and state their respective claims.

At this stage the plaintiff's lien was, pursuant to the statute (§ 4139) and the method thereby prescribed, dissolved, and a bond for $3,500, conditioned upon the payment to the p aintiff or his assignees of such amount as a court of competent jurisdiction should adjudge to have been secured by the lien with interest and costs, substituted therefor. The defendants Moomjian and Kebabian were respectively the principal and surety on this bond. Following this substitution the plaintiff, as provided by statute, amended his complaint so that its allegations should conform to the changed situation, and by modifying its prayers for relief so that they contained a claim for $1,000 damages and for an adjudication as to the sum secured by the plaintiff's lien, and for a judgment against Moomjian and Kebabian, as principal and surety on the bond, for the amount so ascertained together with the interest thereon and costs. Kebabian was also added as a party defendant.

The defendant lienors thereupon answered, setting forth the bases of their respective claims and claiming to be entitled to an apportionment, as provided by statute, of any sum found due from Moomjian to Ruderman.

Moomjian's three payments, made subsequent to the service of the plaintiff's notice, were induced by Ruderman's refusal to proceed with the work unless he was paid as agreed, and were made in good faith.

By the judgment the defendant Moomjian was given an allowance of $200 for counsel fees to be retained by him out of the fund in his hands.

Bernard E. Hoffman, for the appellants (defendants).

Charles Cohen, with whom was *Barnett Berman*, for the appellee (plaintiff).

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Louis Sachs and *Joseph I. Sachs*, wi
Harry W. Asher, for the appellee (defe
jian).

PRENTICE, C. J. Under the pleading
the issues presented for determination
tentions of counsel in argument relate:
portionment, among the plaintiff and th
ant lienors adjudged to have valid liens,
$1,050 in the defendant Moomjian's hai
ance of the contract price unpaid to
Ruderman, together with the interest t
the right of the defendant lienors to s
plaintiff in the apportionment of a large
one made up of the $1,050 with intere
the total of the payments made by
Ruderman subsequent to the receipt of
notice of intention to file a lien; (3) t
responsibility incurred by Moomjian by
payments to Ruderman, and the extent o
the bearing of that responsibility, if a
apportionment to be made. These issu
interested parties into three contendin
wit, the plaintiff, the four defendant lieno
jian, the property owner.

All parties apparently concede that
entitled to have his claim in some mann
Whether or not this concession is one
compels to be accepted as a starting pc
termination of the rights of the several
shall have occasion to inquire later on
with a consideration of the position whi
occupies. He at least asserts that suc
and that is the burden of the argumen
behalf. As for other incidental question
source or sources from which he is to ob

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ment, which were the main subjects of discussion before us, he expresses little concern.

The defendant lienors present two alternative contentions. The first is that what they are entitled to share in, is a pro rata division among all the lienors of the unpaid fund of $1,050 and interest thereon, plus the $1,200 paid by Moomjian following his receipt of the plaintiff's notice. The second is that the plaintiff, for the extinguishment of the indebtedness to him, should be relegated to his claim against the property-owner Moomjian growing out of the latter's payments, greater in amount than that indebtedness, which he made to Ruderman subsequent to his receipt of the plaintiff's notice, thereby leaving the $1,050 fund to be divided between them to the substantial satisfaction of their claims.

Moomjian, on the other hand, asserts that no apportionment of the $1,050 fund should be made which will leave any portion of the plaintiff's claim unsatisfied, and, therefore, that so much of that fund as may be necessary for the purpose be first apportioned to its satisfaction in full, and only the balance be shared by the other lienors.

The result of Moomjian's contention, as will readily be seen, is that he will escape with the payment of the contract price and no more, while the lienors, other than the plaintiff, will go substantially unpaid. The lienors' contentions, on the other hand, lead to an almost diametrically opposite result, in that they will be paid in full or substantially so, and Moomjian be required to make a second or double payment of the $1,200 or some considerable portion of it.

The trial court adopted the view that the plaintiff was entitled to payment in full, and in accordance with the contention of Moomjian's counsel ordered that the plaintiff take so much of the $1,050 fund as was

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necessary to satisfy his claim with int
and that the other lienors share pro
itesimal balance.

Whatever equitable considerations m
support of the apportionment thus r
standing fact remains that such divisi
formed by the unpaid balance of the
earned, is directly opposed to the pla
mandate of the statute. Section 4138
Statutes, which deals with this subject
vides that the unpaid price, in the eve
sufficient to satisfy the claims of all subc
claimants, shall be apportioned among tl
tion to the amount of the debts due ther
This statutory direction has no limitati
and is explicit in forbidding the recognit
edence among subcontractor lienors in s
sion of the $1,050 in Moomjian's hands

What, then, should be done in the ad
conflicting claims of the parties in order
tory regulations may be complied wi
it be, some one or more must suffer loss
tion is as to where that loss must fall
that the plaintiff and defendant lienors
the same position in all respects, althou
statute placed upon an equality as rega
of any unpaid balance. The plaintiff fil
intention to claim a lien when only $
paid by the owner and $2,250 of the co
mained to become payable. When the
like action, $2,200 had been paid the
only $1,050 remained to become payal
intervening $1,200 payments were mad
owner owed the defendants no duty in r
He was free to make them since they
in advance of the terms of the contract

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have no right to look for the satisfaction of their claims beyond the unpaid balance in Moomjian's hands. It was not so with the plaintiff. He had filed his notice, and by that act had come into a position in which, as prospective lienor, Moomjian, by force of statute, owed him some duty and assumed some corresponding burden of responsibility and liability. What was that duty and burden?

The answer to this question depends upon the provisions of our statutes and the interpretation to be given to them. The defendant Moomjian contends that his duty, which he fulfilled, was to retain in his hands out of the moneys due the original contractor a sum equal in amount to the plaintiff's claim as, in the progress of the work, it should prove to be. This might well be if our law gave to the plaintiff, as the subcontractor who first served his notice of intention duly followed by the filing of his certificate of lien, or the one who had first filed his certificate of lien, or the first to take both steps, a priority of lien of such a nature that he would be entitled to have his claim first satisfied out of any unpaid balance in Moomjian's hands. But such is not the provision of our law. A subcontractor lienor, who serves his notice of intention to file a lien, does not, by reason of the promptness of his action, acquire any right or inchoate right of precedence over one taking a similar step later, save as intervening payments may be concerned. Neither does one, by filing a certificate of lien, thereby come into a position superior in any respect to that which others, who may follow his example, will come to occupy. The consequence in neither case is to cause any sum already due or to become due to the original contractor to be set aside as security through the resulting lien for the payment of the lienor's particular claim and that alone. No way to accomplish that result is provided.

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Whatever lack of clarity and definit
shortcoming there may be in our mech
utes, one thing stands out in them clea
takably, and that is that subcontracto
upon a perfectly equal footing as respe
in the unpaid earned contract price. N
can acquire a security which he may
upon to share with others, and neith
owner nor any man can, until sixty
completion of the work, tell what retai
be necessary to afford protection to a
contractor. This is a fact of large imp
determination of the rights and obligat
statutes create and impose. In the pres
it has importance in that it interposes
barrier to the defendant Moomjian's c
his duty created by the receipt of the p
was fully performed since it appears t
tained a greater sum than the amount
plaintiff has a lien, although, under the
to obtain only some portion insufficien
claim. The security which a notifying
obtains is not such an evanescent thing
were this claim, presented on behalf of
made.

There are two provisions of our statu
read together, indicate clearly the meas
for the protection of the plaintiff, unde
jian came upon his receipt of the pl
when only $1,000 had been paid to F
his responsibility for any breach of that
that which we have just been conside
that which accords to notifying lienors
not given to prospective lienors whose
remain unserved. This latter provisic
determining the amount to which any li

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attach upon any land or building, the owner of such land or building shall be allowed whatever payments he shall have made, in good faith, to the original contractor or contractors, before receiving notice of such lien or liens." General Statutes, § 4138. Here is no express prohibition of additional payments. What is forbidden is an allowance to the owner on account of them if the subcontractor lienors who have served their notices are to suffer thereby. By the service of his notice a prospective subcontractor lienor who thereafter duly files his certificate of lien, acquires the right to find in the property owner's hands such an amount, within the limits of what is due to the original contractor at the time of the service or what shall thereafter become due, as will suffice in its division and distribution pursuant to statute to satisfy his claim as it shall prove to be. The owner may make such payments as he chooses, but in making them he acts at his peril. The risk he runs is that of holding the notifying lienors harmless by reason of them. They and all other lienors are entitled to share in the final sum unpaid. If their claims are thus satisfied all is well, and the owner is protected. If not, he must, to the extent of his payments, make good the loss the notifying lienors have been compelled to suffer by reason of the depletion of the fund which should be available for their additional security. His overpayment is measured, not by his actual payments but by the amount of them which is required to furnish the notifying lienors the security to which they are entitled by virtue of their notices. As regards a subcontractor lienor who has given no notice until after a payment is made, the owner is, as we have already observed, free to make it, and to make it without entailing any responsibility therefor even indirectly. His sole duty is to those who have given notice, and his responsibility for non-

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performance of that duty is to save the
his mistaken or indiscreet action.

The observations already made effect
both of the claims of the defendant lie
pose of their primary claim that the d
are entitled to share with the plaintif
division of not only the $1,050 and i
but also the additional sum of $1,200
tablish that the payments, which mak
amount, were not made by Moomj
vention of any duty he owed to the
quence they are in no position to ask
repayments in whose division they ma
they be permitted to share in any re
by him. The only person who has an
plain of Moomjian's payments is the p
therefore, is the only party who is e
protection therefrom through their b
though they had not been made.

They also dispose of the secondary
plaintiff, following the method of mar
ties in equity where one creditor has a
funds of a debtor to either of which
while other creditors of the same debt
only one, should be required to resort
tion of his indebtedness to his claim aga
thereby leaving the $1,050 fund to
among them. He has no claim against
yond that he be saved from any los
befall him by reason of the payment
Consequently he has no right to look
of Moomjian's indebtedness to Ruder
between them, was liquidated by the
ments, as furnishing security for any g
that required to make him whole.

Beyond that the situation is not on

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equitable principles of marshalling securities are applicable. "As a general rule . . . before a court of equity will marshal securities between two persons, it must appear (1) that they are creditors of the same debtor, (2) that there are two funds belonging to that debtor, and (3) that one of them alone has the right to resort to both funds." *Quinnipiac Brewing Co.* v. *Fitzgibbons*, 73 Conn. 191, 196, 47 Atl. 128. Neither the plaintiff nor the defendant lienors are in any true sense creditors of Moomjian, nor is he their debtor. There is no contract relation between them. The fund to which they may look is money earned by Ruderman and primarily his. They are his creditors entitled by statute, in effect, to appropriate his money in Moomjian's hands for the satisfaction of their claims.

These conclusions lead to the result that the Superior Court should have ordered the fund in the defendant Moomjian's hands, comprising the unpaid balance due to Ruderman, to be divided pro rata between the several lienors, to wit, the plaintiff and the four defendants found to have valid liens, and should have rendered judgment in favor of the plaintiff against the defendants Moomjian and Kebabian for the recovery of the balance of the plaintiff's claim, principal and interest, remaining unsatisfied after such division.

The allowance to Moomjian for counsel fees was also erroneous. It was doubtless made upon the theory that the case, at least as it was decided, was essentially one of interpleader where the controversy concerned the division of the fund in Moomjian's hands to which he made no claim and which he was ready and willing to pay over to the parties entitled to receive it. The issues and the contested issues were much wider in their range, and directly involved Moomjian's personal interests and responsibility and the extent of the latter. The amount of the fund in question was left

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to adjudication, Moomjian himself presenting for deductions which called for such adjud They involved, moreover, a determination of jian's personal liability arising from his payme sequent to the receipt of the plaintiff's notice. distinctly a litigating party having personal i involved in the result, as the outcome clearly strates.

There is error, the judgment is set aside a cause remanded for the rendition of a judgment ing that the unpaid balance found due from fendant Moomjian to Ruderman, principal a terest, be apportioned pro rata between the lienors, to wit, the plaintiff, Stone, and the defe Bernstein, Rappaport, the Connecticut Adamar ter Company, and Setlow and Finkelstein, and ing to the plaintiff, as against the defendants Mo and Kebabian, a judgment for the recovery of t ance of the plaintiff's claim, principal and i remaining unsatisfied after such apportionmen

In this opinion the other judges concurred.

JANE NEARY *vs.* THE METROPOLITAN LIFE INSU COMPANY ET ALS.

Third Judicial District, New Haven, January Term, 19

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMW

While the beneficiary named in a death-benefit certificate, iss fraternal benefit association and providing for a change ciary, takes nothing more than a mere expectancy, this is essarily true of the beneficiary named in an ordinary life policy, although the right to change the beneficiary in a p manner is reserved therein.

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The method prescribed in an ordinary life insurance policy for changing the beneficiary named therein, must be complied with, in order to render an attempted change effective against the rights of the original beneficiary.

In the present case a wife joined with her husband in an application for a policy of insurance upon his life, in which she was named as the beneficiary. The policy, which was issued as requested, provided that the insured might designate a new beneficiary by a written notice filed at the home office accompanied by the policy itself, the change to take effect upon its indorsement upon the policy by the company. A written notice of a change of beneficiary was left with the local agent and transmitted by him to the company, but the policy remained in the hands of the wife who paid all the premiums and had no knowledge of any attempt to change the beneficiary until after her husband's death. *Held* that under these circumstances the insurance company was bound to see that the terms of the policy were complied with before assenting to a change of beneficiary; and that the change attempted was not effective to deprive the wife of her rights as the original beneficiary under the policy. (*One judge dissenting.*)

Submitted on briefs January 17th—decided April 30th, 1918.

ACTION in the nature of interpleader to determine the respective rights of several claimants in and to the amount due under a policy of life insurance, brought to and tried by the Superior Court in New Haven County, *Greene, J.;* facts found and judgment rendered in favor of the defendant Catherine Neary, wife of the insured, from which the plaintiff, the insured's mother, appealed. *No error.*

In 1913 John Neary and Catherine, his wife, joined in an application to the Metropolitan Life Insurance Company for insurance upon the life of John. The policy in question was issued on that application naming Catherine as the beneficiary. All premiums on the policy were duly paid by Catherine, the last payment on August 2d, 1915, and the policy itself has at all times been in the possession of Catherine. The policy provided for a change of beneficiary, and that the insured might designate a new beneficiary by a notice in

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writing filed at the home office of the compai accompanied by the policy itself, the change t effect upon the indorsement of the same by th pany on the policy.

On July 28th, 1915, John Neary signed and ered to the agent at New Haven, for transmis the home office of the company, an applicatio change of beneficiary from his wife, Catherine, mother, Jane Neary. The application was for to and received by the home office at some da otherwise shown than by the following indor thereon, "Recorded in policy register. J. F. B. J. F. B." It was not accompanied by the polic no indorsement of any change of beneficiary wa made on the policy. On September 2d, 1915, Jo Jane joined in an application for a loan upon the which was made by the company's check to th order of John and Jane Neary. John died Sep 12th, 1916, and the amount of the policy less th is admittedly due and payable to the rightful ciary.

George E. Beers and *Charles F. Roberts*, for the lant (plaintiff).

George E. Hall, for the appellee (defendant Ca Neary).

BEACH, J. It is not claimed that the atte change of beneficiary was completed in the r provided for in the policy, by surrender of the and indorsement of the change thereon by th pany. On the contrary, the finding is that the remained continuously in the possession of the c beneficiary, Catherine, who paid all the pr thereon and was never asked to give it up. She

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knowledge of any desire or attempt to change the beneficiary until she went to the company's office to prepare the proofs of death.

The plaintiff's claim is that the formalities prescribed in the policy for carrying out the reserved right of changing the beneficiary were solely for the benefit of the insurance company, and that it might and did waive their performance by treating Jane as the substituted beneficiary in making the loan of September 2d, 1915.

This claim is based on the supposition that Catherine had no legal interest in the fruits of the policy, but merely an expectancy of which she could be deprived without notice. It is true that a beneficiary named in a death-benefit certificate issued by a fraternal benefit association, and providing for a change of beneficiary, takes nothing more than a mere expectancy. *Supreme Colony* v. *Towne*, 87 Conn. 644, 648, 89 Atl. 462; *Order of Scottish Clans* v. *Reich*, 90 Conn. 511, 514, 97 Atl. 863. But that is not necessarily true of beneficiaries named in an ordinary life insurance policy, although the right to change the beneficiary in a prescribed manner is reserved. "In case of an ordinary policy (of insurance), the right of the person for whose benefit a policy is issued cannot be defeated by the separate or joint acts of the assured and the company, without the assent of the beneficiary." *Masonic Mutual Benefit Asso.* v. *Tolles*, 70 Conn. 537, 544, 40 Atl. 448. It seems logically to follow, that the insertion in such a policy of a provision for changing the beneficiary in a prescribed manner ought not to extinguish the interest of the beneficiary, but to qualify it. The later decisions so hold. *Indiana Nat. Life Ins. Co.* v. *McGinnis*, 180 Ind. 9, 101 N. E. 289; *Filley* v. *Illinois Life Ins. Co.*, 93 Kan. 193, 144 Pac. 257; *Christman* v. *Christman*, 163 Wis. 433, 157 N. W. 1099.

Moreover, companies authorized to carry on a gen-

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eral life insurance business may contract direct a beneficiary who has an insurable interest in of the assured; and there seems to be no reas the interest of such a beneficiary may not be s or qualified according to the terms of the polic

In this case the wife, having an insurable in the life of her husband, joined in the applica a policy which, on its face, provided for the pa tion of the policy to the company, for indor before any change of beneficiary should becom tive. She took the policy into her own pos apparently relying on that provision for her pro and paid all the premiums. Under these circum she had an interest in the policy of which she co be deprived except in the manner prescribed

Assuming, without deciding, that she was bo deliver up the policy to the assured on dema finding is that no such demand was made. V she had a lien upon the policy for premiums adva at least to the extent of its cash surrender valu not be determined. She had a legal interest, tinguished from a mere expectancy, of which sh not be deprived except in the manner prescribed policy, and therefore the provisions as to the n changing the beneficiary were not solely for the of the insurance company. Even if they were tended by the company, they hold out on their inducement for the payment of premiums by a ciary to whom the policy is delivered. In the la the payment of premiums inures to the benefit company, and if a beneficiary pays premiums faith of an apparent protection afforded by the t the policy, he ought equitably to be protected a the terms of the contract will protect him.

It does not appear from the finding whetl company knew that the premiums were being p

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the beneficiary. It did know that she joined in the application, that she had an insurable interest in the life of the assured, and the policy contained provisions on the faith of which she might suppose herself to be protected in paying premiums. Under such circumstances it is not asking too much of insurance companies to see that the terms of the policy are complied with before assenting to a change of beneficiary.

This conclusion makes it unnecessary to pass on the somewhat doubtful question whether the company did in this case assent to an informal change of beneficiary.

There is no error.

In this opinion PRENTICE, C. J., RORABACK and SHUMWAY, Js., concurred.

WHEELER, J. (dissenting). The Metropolitan Life Insurance Company issued its policy of ordinary life insurance upon the life of one John Neary, upon an application signed January 17th, 1913, by him and his wife, Catherine Neary. The application expressly provided that "the right to change the beneficiary hereby designated without the consent of said beneficiary is reserved."

The policy provided that the insured reserved "the right of revocation of the beneficiary named and the right to designate a new beneficiary." The assured could exercise this right by filing written notice of such change in the home office of the company, together with the policy itself. The change became effective upon the company indorsing such change of beneficiary upon the policy.

On July 28th, 1915, the assured signed and delivered to the agent of the insurance company in New Haven, an application for a change of beneficiary from his wife to his mother, Jane Neary. Upon the policy register

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of the company at its main office is endorsed, "Recor in policy register. J. F. B. 9/8/15 J. F. B." On S tember 2d, 1915, John Neary made written applicat signed by the plaintiff, Jane Neary, for a loan of upon this policy, and this loan was duly made an check given for the same payable to John and J Neary. It was the practice of the company to m loans to the insured and not to the beneficiary, in application for which, in some cases, the benefici joined. The court reached the conclusion that the l was insufficient to prove a waiver by the compa because is was not proved that the company knew the attempted change of beneficiary when it was ma

The application fee for said insurance and all p miums thereon were paid by the defendant Cathar Neary, and she always had possession of the poli and had no knowledge of an attempt to change beneficiary or of the making of said loan until after death of her husband.

The member of a mutual benefit society may chan at will, the beneficiary named in his certificate of surance. In the ordinary life insurance policy the sured may not change the beneficiary without his c sent. The reason for this distinction is found in fact that in the ordinary life policy the beneficiary a vested right in the benefits of the policy, while in benefit certificate the beneficiary has no vested right the proceeds, merely the expectancy of an interest case the assured die without having changed the ben ciary. *Masonic Mutual Benefit Asso.* v. *Tolles*, 70 Co 537, 544, 40 Atl. 448; *Shepard & Co.* v. *New York L Ins. Co.*, 87 Conn. 500, 504, 89 Atl. 186. But ordinary life policy may contain a provision reservi the right to change the beneficiary, and when the pol so provides, the assured may exercise his right to char the beneficiary at will, since the beneficiary has

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vested interest in the policy. *Townsend* v. *Fidelity & Casualty Co.*, 163 Iowa, 713, 721, 144 N. W. 574; *Waring* v. *Wilcox*, 8 Cal. App. 317, 96 Pac. 910; 25 Cyc. 893; 4 Cooley, Briefs on Insurance, p. 3762; 14 Ruling Case Law, § 554. In *Denver Life Ins. Co.* v. *Crane*, 19 Colo. App. 191, 200, 73 Pac. 875, the court said of an ordinary life policy: "The policy provided, in explicit language, that the insured might, without the plaintiff's consent, diminish the amount of the insurance or appoint another beneficiary in her place. She, therefore, had no vested interest, but only an expectancy, which might at any time be defeated by the act of her husband." May on Insurance (Vol. 2) § 399 M, thus states the rule: "In those companies, however, that expressly permit a change of beneficiary without consent of the former appointee, the person first designated acquires no vested interest during the life of the insured, but only an expectancy." Concerning such a provision in a life policy, the court said in *Hopkins* v. *Northwestern Life Assur. Co.*, 40 C. C. A. 1, 4, 99 Fed. Rep. 199, 202: "The right of the beneficiary is inchoate, and a mere expectancy, during such lifetime, and does not become vested until the death of the insured happens with the policy unchanged." In *Hopkins* v. *Hopkins*, 92 Ky. 324, 327, 17 S. W. 864, the court says: "This [rule of the straight life policy] does not hold true, however, where the contract of insurance provides that the insured may change the beneficiary. In such a case it vests conditionally only. The right of the one named in the policy is then subject to be defeated by the terms of the very contract naming him as the beneficiary. It is a condition of the contract, and his right is therefore subject to it." Since a policy of this character is wholly the property of the assured, it can be taken by his creditors as one of his assets. The court so holds in *In re Orear*, 102 C. C. A. 78, 81, 178 Fed. Rep. 632,

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635: "Under this provision the insured was uneq
ocally given the right and power to change the ber
ciary in each policy without the concurrence of
beneficiary named in the policy and even against
will of such beneficiary. Not only so, but this po
was one which he could exercise for his own ben
To illustrate: He could have borrowed money and h
changed the beneficiary so that the lender would h
held the policy as security for the repayment of
money. . . . He further could have exercised
power so as to have made the policy payable to his
estate. He still further could have exercised this po
by naming as the beneficiary some trustee for all
creditors. . . . This being so, the policies were prope
which, under section 70, subd. 5, above mention
passed to the trustee upon the adjudication of Den
a bankrupt." Id. *In re Herr*, 182 Fed. Rep. 716.

The policy in suit was an ordinary life policy wh
reserved to the insured the right of changing the nan
beneficiary. It also gave the assured a right to sec
a loan upon the policy and the right to secure its s
render value. Not only did the policy reserve the ri
to change the beneficiary, but the application for
policy expressly reserved in the assured this right, s
the beneficiary named in the policy, Catherine Nea
who is a defendant in this action, joined in signing t
application. After the issuance of this policy there
no moment when the assured could not have designa
a new beneficiary by complying with the conditions
the policy and filing notice of such change at the ho
office accompanied by the policy itself for indo
ment thereon. The beneficiary could not stop
change. The ownership of the policy was in the assu
and it could have been taken by his creditors.

The interest of the first-named beneficiary was a c
tingent or conditional interest, effective upon the de

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of the assured without having made such change. Her interest was hence a mere expectancy in the lifetime of the assured. The payment of premiums by the beneficiary did not affect the contract of insurance entered into between the assured and the insurance company. It did not deprive the assured of the ownership of the policy, or take away from his creditors their right to appropriate its benefits to their debt. It did not vest in the beneficiary an interest in the policy. The payment of the premiums gave the beneficiary the right to have the proceeds of the policy applied to the payment of the premiums with interest, before the proceeds could be diverted elsewhere. That is the only protection either law or equity will give to the first-named beneficiary. She will be made whole. She cannot secure a profit on her investment, if any there be.

Under the terms of the policy the assured could exercise his right to designate a new beneficiary by filing written notice of such change in the home office of the company, together with the policy, and the change became effective upon the company's indorsing such change of beneficiary upon the policy. Since the beneficiary had no vested interest in the policy, it did not concern her whether the policy was filed with the company and the change indorsed thereon. Until the death of the assured a valid change might be made, and her interest did not begin until the death of the insured without having made a change of beneficiary. Provisions in a policy prescribing the method for changing the beneficiary do not affect the contract of insurance between the assured and the insurance company.

Some of the decisions hold that provisions of this character qualify the right of the assured to make the change only in the prescribed way; and that the beneficiary has an interest in the policy subject to be defeated by the change of beneficiary. This is a misconstruction

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of the contract of insurance. The beneficiary takes no interest until the death of the assured. The provisions requiring the filing of the policy and the indorsement thereon of a change of beneficiary, were not inserted for the benefit of the assured but for the insurer. Where these provisions are not followed, the insurance company is not required to recognize the attempted change. But since these provisions are for its benefit it may waive them. When the life policy permits a change of beneficiary without the consent of the beneficiary and upon the sole application of the assured, I see no reason, any more than did the court in *Townsend* v. *Fidelity & Casualty Co.*, 163 Iowa, 713, 721, 144 N. W. 574, why the construction obtaining as to similar provisions in beneficial certificates should not be given to the similar provision in the life policy. The provisions in the benefit certificates are for the benefit of the insurer and so are those in the life policy. The one may be waived and a like privilege must be accorded to the other. 4 Cooley, Briefs on Insurance, p. 3772, states the rule of law concerning benefit certificates: "The rule requiring the surrender of the old certificate, and indeed most of the rules of procedure, in effecting a change of beneficiaries, are intended only for the benefit of the association, and may therefore be waived by it." In *French* v. *Provident Savings Life Assur. Soc.*, 205 Mass. 424, 91 N. E. 577, the court held that the provisions of the policy as to a change of beneficiary had not been complied with. In the course of his discussion Mr. Justice Rugg was careful to point out that the question of whether the company had waived these provisions, was not involved: "Moreover the defendant did not waive the provisions of the policy and accept the new designation as valid. Apparently its responsible officers had no notice or knowledge of it until after the decease of the insured. These circum-

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stances, if present, would make a different case from that before us, where other considerations would need to be discussed." In *Freund* v. *Freund*, 218 Ill. 189, 75 N. E. 925, the court said: "It is said by counsel for appellee that the provisions in regard to consent and indorsement, and in regard to the mode of changing the name of the beneficiary, were solely for the protection of the company, and, therefore, could be waived by the company. This is true, provided the acts, alleged to amount to a waiver, were performed during the lifetime of the assured."

The trial court reached the conclusions to which I have come. 1. "The first beneficiary . . . acquired no vested interest in the policy or its proceeds by being made beneficiary." 2. The assured "could not change the beneficiary without doing so in the way provided by the insurance contract, that is, the policy." 3. "But the company or society may waive the requirements of its contract or of its laws as to the change of beneficiary." "The question in the case," said the trial court, "is therefore whether the company's action in loaning waived the surrender of the policy." Whether the company waived these requirements of the policy, is the remaining question which we are called upon to decide.

The application for a change of beneficiary was in approved form, and was produced from the custody of the company. It was delivered by the assured to the local agent of the insurer in New Haven. No evidence other than the following was introduced to show that the company received the application prior to the decease of the assured. Exhibit A, which is a part of the finding, bears upon its face, in print: "Recorded in policy register," and immediately following it, upon the same line, in writing, "J. F. B. 9/8/15 J. F. B." This indorsement means that this application was re-

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corded in the policy register on September 8th, 1915, a date prior to the decease of the assured. The application was therefore in the possession of the company at its home office before the decease of the assured. The fact that the company accepted the application without the policy, is persuasive evidence that it waived the provision requiring the filing of the policy. It also appears in the finding that the assured, subsequent to the filing of his application for a change of beneficiary, joined with the new beneficiary in an application for a loan upon the policy, which the company made by check to the order of the assured and the new beneficiary. The policy provided that "the company will loan on the sole security thereof up to the limit secured by the cash surrender value, on proper and lawful assignment and delivery of this policy." It further provided that the assignment of the policy must be executed upon the blanks of the company and filed at its home office. To make the loan, an assignment and delivery of the policy was essential. No assignment of the policy was made, nor was there any delivery of the policy to the company. Since the loan was made, the company must have waived this provision, for the policy was never surrendered to the company. Unless Jane Neary had been accepted as a beneficiary by the company, there was no reason for having her a party to the loan. The company treated her as a beneficiary and thereby waived the requirement that the policy should be presented with the application and the change indorsed thereon. It might have insisted upon these requirements, in which case the loan could not have been made. The company's waiver is the only logical conclusion to draw from these facts.

The trial court was in error in holding that the loan was the only evidence of waiver. The indorsement upon the application was strong evidence of this fact.

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It was also in error in holding that it had not been proved that the company knew of the attempt to change the beneficiary when the loan was made. The loan was made to the assured and the new beneficiary. The new beneficiary would not have been included in the loan had the company not known of the change of beneficiary. No other conclusion is logically permissible.

In its answer the company admits that the insured had exercised his right to designate a new beneficiary under the policy upon forms furnished by the company, and that the company had accepted the said change of beneficiary.

Since compliance with these formalities of the policy were for the benefit of the company, it had the right to admit compliance, and its admission is conclusive upon this point against the defendant Catherine Neary.

The conclusion of the trial court, that the waiver of the company had not been established, is contrary to the proven facts.

In my opinion there is error and the judgment should be set aside.

WILLIAM H. CORBIN, TAX COMMISSIONER, *vs.* HENRY H. TOWNSHEND, ADMINISTRATOR C. T. A.

Third Judicial District, New Haven, January Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

In ascertaining the net amount of the estate of a decedent domiciled in Connecticut, for the purpose of computing the succession or inheritance tax under the provisions of Chapter 332 of the Public Acts of 1915, taxes paid by the executor or administrator to other States, and to the United States under the Revenue Act of September 8th, 1916, as amended by the Act of Congress passed March 3d, 1917, are to be treated as "expenses of administration" and to be deducted from the appraised value of the estate.

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Any expenditure arising by operation of law which is a charge against, or which must be paid out of, the estate, is an "administration expense" within the meaning of that expression as used in § 5 of the Act of 1915.

Argued January 17th—decided April 30th, 1918.

APPEAL by the plaintiff from an order and decree of the Court of Probate for the district of New Haven determining the amount of the inheritance or succession tax due the State from the estate of Mary H. Townshend of New Haven, deceased, taken to and reserved by the Superior Court in New Haven County, *Webb, J.*, upon a demurrer to the reasons of appeal, for the advice of this court. *Judgment sustaining demurrer advised.*

Henry H. Townshend, for the defendant, in support of the demurrer.

George E. Hinman, Attorney-General, and *Charles W. Cramer*, for the plaintiff, in opposition to the demurrer.

WHEELER, J. Mary H. Townshend deceased in New Haven leaving a will by which all of her property was divided between her two children. The judge of probate deducted from the appraisal value of the estate plus the gains, as a part of the expenses of the estate, the items of taxes paid various States in the United States other than Connecticut, and the Federal estate tax of September 8th, 1916, and computed the succession tax after deducting the amount of these taxes.

The Tax Commissioner appealed from this ruling and sets forth, among his reasons of appeal, that these deductions should not have been made either as part of the administration expenses, or as claims allowed and paid, or in any other manner.

The appellee demured, principally because under § 5

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of Chapter 332 of the Public Acts of 1915, these deductions were proper to be made in ascertaining the net estate for inheritance taxation purposes, either as an administration expense, or as a claim allowed, or as a loss incurred in reducing choses in action to possession.

When we were required to interpret and construe our first "Act providing for a Succession Tax," passed in 1897, we held that the real estate within this State and all the personal property of a decedent domiciled in Connecticut was to be taken into account in computing the amount of the succession tax; that this tax was not a tax upon property, but upon the right or privilege of succession to the property of a decedent; and that the amount of the tax was computed upon the value of the property inventoried "remaining after claims of creditors and charges of administration have been satisfied." The estate subject to the tax under the Act was the net proceeds or residuum remaining for distribution or transfer in any form, to the persons entitled, deducting therefrom certain exemptions and property exempt. *Gallup's Appeal*, 76 Conn. 617, 57 Atl. 699; *Nettleton's Appeal*, 76 Conn. 235, 56 Atl. 565; *Hopkins' Appeal*, 77 Conn. 644, 60 Atl. 657.

The Succession Act of 1915 re-enacts, with few changes, the Act of 1897, and uses practically the language of that Act which we construed in these cases. The changes in the Act of 1915 do not affect the provisions whose construction we have referred to, and we think it clear that the General Assembly intended a re-enactment of these provisions in the light of their settled construction. This we had in mind when we said of this tax: "It is levied upon that portion, and that only, of the estate which by operation of the law and its machinery will pass to beneficiaries designated by will or statutes regulating inheritances." *Sherman* v. *Moore*, 89 Conn. 190, 193, 93 Atl. 241. Section 6 of the Act

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expressly provides that it is the net estate which shall be liable to this tax; and § 5 determines the method by which the net estate for taxation shall be ascertained, and specifies the deductions which may be made from the value of the inventoried estate. The 1913 amendment (Chap. 231, § 9) definitely specified the deductions to be made, and the Act of 1915, in § 5, specifies practically the same deductions.

By the provisions of the Act of 1915, the succession tax is measured by the value of the property passing to a beneficiary, and hence it is his share of the net estate after the claims against the estate and the charges of administration have been deducted. Inheritance taxes, whether required to be paid to the Federal government or to another State, are not included in the deductions expressly specified in the Act. The enumeration of certain items of deductions excludes all items which are neither within the express designation nor within the necessary implications of the designations made. Before inheritance taxes paid to the United States, or to any of the States other than Connecticut, can be deducted from the appraisal value in order to ascertain the net estate upon whose value the succession tax is to be paid, all of the parties to the appeal agree that these taxes must be found to fall within the items of claims paid, expenses of administration, or losses incurred in the reduction of choses in action to possession; for these are the only items specified in § 5 of the Act of 1915, under which they could, by any possible construction, fall.

The Federal estate tax and the State taxes are obligations accruing subsequent to the death of the decedent. Claims against his estate are those which he contracted or assumed, or which arose in his lifetime and became by operation of law charges against him. Obligations originating subsequent to his death may fall

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within the class of expenses of administration, but in no event can they be regarded as claims against his estate. *Merwin's Appeal*, 72 Conn. 167, 43 Atl. 1055; *McCurdy* v. *McCurdy*, 197 Mass. 248, 83 N. E. 881; Blakemore & Bancroft, Inheritance Taxes, p. 268.

The inheritance taxes due the State of Connecticut are measured by the amount of property passing to the beneficiary, which is his share of the net estate ascertained in the manner specified in § 5 of the Act. This, by § 10, is required to be paid by the administrator or executor from the funds passing to the beneficiaries.

The Federal tax under the Revenue Act approved September 8th, 1916 (39 U. S. Stats. at Large, p. 777, §§ 200–212), and amended March 3d, 1917, imposes (39 U. S. Stats. at Large, p. 1002, § 201) a tax "upon the transfer of the net estate" of every decedent dying after the passage of the Act. It is an estate tax levied on the entire estate, less a named exemption and certain designated deductions, without reference to the interest of beneficiaries. By § 208 the intent of the Act is expressed to be, so far as is practicable and unless otherwise directed by the will of the decedent, that "the tax shall be paid out of the estate before its distribution." The Federal Act of 1916 imposes a tax payable out of the estate before distribution, thus differing from the Federal inheritance tax of 1908, payable by the individual beneficiaries. It is not a tax upon specific legacies nor upon residuary legatees. It is taken from the net estate "before the distributive shares are determined rather than off the distributive shares." Its payment diminishes *pro tanto* the share of each beneficiary. The executor or administrator must pay the tax out of the estate before the shares of the legatees are ascertained. It is an obligation against the estate, and payable like any expense which falls under the

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head of administration expenses. The tax paid is no part of the estate at the time of distribution; it has passed from the estate and the share of the beneficiaries is diminished by just so much.

Administration expenses embrace any expense incurred by an executor or administrator in the care, preservation and conservation of the assets of the estate, in converting the assets, and in paying the debts and legacies, and also all expenses incurred by operation of law and in turning over the assets remaining to the residuary legatees or distributees.

We have not failed to consider the claim of the Tax Commissioner that the expenses of administration are such only as are imposed as matter of law. The argument in support of this proposition, enforced as it is by the citations from Minnesota and New York, does not appeal to us as sound, as applied to the construction of our own statute. Any expense arising by operation of law which is a charge against, or must be paid out of, the estate, is an administration expense within the meaning of this term as used in § 5 of the Act of 1915. The payment of the Federal tax is an expense of the estate, as much so as any expense of administration. Until this charge is paid the executor cannot receive his discharge, nor can the beneficiary receive his share. *Hooper* v. *Shaw*, 176 Mass. 190, 57 N. E. 361.

The inheritance taxes imposed by other States are upon the same basis as the Federal tax: they must be paid before the executor or administrator can reduce the bonds or stock to possession. These cannot be transferred until the State tax is paid, and the value of the security so transferred is reduced by the amount of the tax which the executor or administrator has had to pay. *Van Beil's Estate*, 257 Pa. St. 155, 101 Atl. 316; *Bullard* v. *Redwood Library*, 37 R. I. 107, 119, 91 Atl. 30, 34; Blakemore & Bancroft, Inheritance Taxes, p. 273.

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The Superior Court is advised to render judgment sustaining the demurrer.

No costs in this court will be taxed in favor of either of the parties.

In this opinion the other judges concurred.

EDWARD R. HOLMES, TRUSTEE, *vs.* THE CONNECTICUT TRUST AND SAFE DEPOSIT COMPANY, EXECUTOR, ET ALS.

First Judicial District, Hartford, March Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

This court will hesitate to give advice in the construction of wills with respect to contingencies which have not arisen, and especially so if the persons whose interests would be involved are not, or may not be, in existence.

As a general rule, a testator has the right to impose such terms as he pleases upon a beneficiary as conditions precedent to the vesting of an estate in him, or to the enjoyment of a trust estate by him as beneficiary. He may not, however, impose conditions that are uncertain, unlawful, or opposed to public policy.

A testator who died in February, 1915, gave the bulk of his property, consisting of personal estate only, in trust, to pay over the net income to his son *C* during his life, upon condition that he abstain from the use of liquor and tobacco, and that he spell the family name as the testator and his ancestors spelled it, T–y–r–r–e–l. The seventh paragraph then provided that "in the event of the death of" *C*, the income should be equally divided between *C's* two children, Florence and Bertha, under the same conditions upon which *C* took it, and that if they married, such conditions should apply to and be observed by their husbands; also that if more children were born to *C*, all were to share alike in the income. In paragraphs eight and nine further limitations over were made upon the death of one or both of *C's* children, and for the ultimate vesting in absolute ownership of the fund when all the life uses had terminated. *C* died intestate in June, 1917, leaving a widow and the two children above named. Florence married and her husband is

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also living. In a suit by the trustee for a construction of the will, it was *held:*—

1. That the testator, in referring to *C's* death, meant his death at any time, whether before or after his own decease.
2. That the gift of income in equal shares to Florence and Bertha was certainly unobjectionable, if taken by itself; and that the inclusion of after-born children, if any, did not contravene the rule against perpetuities, since the gift to all children was to a class and would have vested in the two living at *C's* death and opened to let in after-born members.
3. That even if the gift to unborn children were invalid, it would not vitiate the bequest of income to Florence and Bertha, since the two provisions embodied separate, alternative gifts, the latter being a substitute for the first in the contingency of after-births—a contingency which never occurred and which by *C's* death had become impossible, thus leaving the substitutionary provision as though it never had existed.
4. That the conditions respecting the use of liquor and tobacco were lawful so far as the beneficiaries of the income were themselves concerned, but were opposed to public policy and void in so far as they were made dependent upon the conduct of the beneficiaries' husbands.
5. That the condition relating to the spelling of the family name, while not happily expressed, was sufficiently definite to be valid and enforceable as against Florence and Bertha; and that it was unnecessary to determine now whether every one who might hereafter be entitled to some share of the income of the trust fund would be affected by this condition.

Argued March 5th—decided April 30th, 1918.

SUIT to determine the validity and construction of the will of Edwin M. Tyrrel of New Hartford, deceased, brought to and reserved by the Superior Court in Litchfield County, *Maltbie, J.*, upon the facts alleged in the complaint and admitted in the respective answers, for the advice of this court.

Edwin M. Tyrrel died February 2d, 1915, leaving no widow, personal estate only, and a last will and testament with two codicils thereto. The defendant, the Connecticut Trust and Safe Deposit Company, is the executor of his will, which has been duly proved. The plaintiff is the duly-appointed and qualified trustee of

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a trust fund established by the will, and as such trustee has in his possession property of the estate amounting, approximately, to $32,878, which was paid over to it by the executor in the course of its administration of the estate.

The first three paragraphs of the will make disposition of certain property, small in amount, which has no present interest. By the fourth paragraph he gives to his son, Clifford, who was his only child, the farm which he then owned but ceased to own before his decease. In connection with this gift the will provides that if the son neglects or refuses to comply with certain conditions, the farm should be sold by his trustee, subsequently named, and the proceeds added to the property covered by the succeeding paragraph. These conditions were, in the language of the will, "that he entirely abstain from the use of tobacco, and the use of all kinds of intoxicating liquors as a beverage, and that on all occasions when necessary to write or spell the name of Tyrrel he shall spell it as it is spelled in this instrument and was spelled by my ancestors." By the fifth paragraph, as amended by the codicil, he gave all his bonds, stocks, notes or other evidences of indebtedness that should belong to him at the time of his decease, to the plaintiff in trust for purposes subsequently defined.

The first of these purposes is stated in the fifth paragraph to be that the interest and income therefrom should be paid to his son, Clifford, during his lifetime, subject to the conditions written in the preceding paragraph. This latter provision is elaborated in the sixth paragraph, wherein it is provided that if in any calendar year Clifford should neglect or refuse to comply with the conditions, the income was to be added to the principal. The first two sentences of the seventh paragraph read as follows: "In the event of the death of said Clifford J. Tyrrel the income of the investments is to be

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equally divided between his children Florence J. Tyrrel and Bertha Tyrrel under the same conditions and limitations as hereinbefore stated, which conditions are to apply to and be observed by their husbands, if they shall marry. If there should be more children born to said Clifford all are to share alike."

Then follows, in the remainder of paragraph seven and paragraphs eight and nine, somewhat extended provisions for further limitations over in the event of the death of one or both of Clifford's children, and for the ultimate vesting in absolute ownership of the trust fund when the life uses provided for should have terminated.

Clifford survived his father and died intestate June 27th, 1917. He left a widow, Jean A. Tyrrel, and two daughters, the oldest of whom was born in 1894 and the youngest in 1898. These daughters were the only children born to him. Both are now living, and the oldest, Florence, is married, and her husband is also living. Clifford's widow, Jean A. Tyrrel, is the administratrix upon his estate and the guardian of the estate of the younger daughter. No grandchild of his has ever been born.

During the lifetime of Clifford the plaintiff paid to him the net income of the trust fund. Subsequent to his death the Connecticut Trust and Safe Deposit Company as executor of the will of the testator, made demand upon the plaintiff for the principal of the trust fund, on the ground that the continuation of the trust established by the will and administered by the plaintiff beyond the life of Clifford was in contravention of the rule against perpetuities, and that, therefore, the trust was terminated and the principal of the fund become intestate estate of the testator which should be administered by the demanding company as executor of his estate. Thereupon the plaintiff instituted the

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present action. The questions propounded for advice, as they are stated in the complaint, are as follows, to wit:—

First: Whether the trust created, or attempted to be created, by the said will and codicils, and whereof the plaintiff is trustee, is valid, legal and operative, since the decease of the said Clifford J. Tyrrel, and capable of being carried out in legal manner, and if so, how; and whether the said trust is now valid and subsisting trust, or whether the same is not void by reason of the general equitable rule against perpetuities.

"*Second:* Whether the conditions set forth in the fourth paragraph of the said will, and referred to in the sixth and seventh paragraphs of the same respecting the abstention from tobacco and intoxicating liquors as a beverage, and respecting the spelling of the word "Tyrrel," are valid as applicable to the said children of Clifford J. Tyrrel, and as to the husband of the said Florence J. Tyrrel Marsh, and necessary to be observed by the plaintiff in respect of the administration of his said trust, should the same be valid, or whether the said conditions as applicable to the said daughters, or as applicable to the said husband of one of them are void.

"*Third:* Whether the principal of said trust fund is now intestate estate and should be delivered and paid by the plaintiff to the defendant, the Connecticut Trust and Safe Deposit Company, as executor of the estate of Edwin M. Tyrrel.

"*Fourth:* If said trust is no longer a valid and subsisting one, to whom and in what proportions the principal of said trust fund goes and of right belongs."

Wilbur G. Manchester, for the plaintiff.

Samuel A. Herman, for the Connecticut Trust and Safe Deposit Company.

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Howard F. Landon, for Jean A. Tyrrel, administratrix, *et als.*

PRENTICE, C. J. The questions propounded for advice are in form four in number. As we understand them they resolve themselves in effect into two, both of present importance under conditions which have arisen and now exist. The somewhat elaborate provisions of the will suggest that other questions touching them may come to possess importance as events develop. Were advice asked concerning them, we should hesitate to give it, since the contingencies to which they relate have not arisen, and the persons whose interests would be involved are or may not be in existence. Our advice, therefore, will be confined to the two questions of present pertinence above referred to, to wit: (1) whether the trust which the plaintiff is called upon to administer has been fully executed, or is a subsisting one requiring his continued holding of the trust estate for its execution; and (2) whether or not, if the trust is a subsisting one, the conditions prescribed in the will as conditions precedent to the right of the beneficiaries of income to receive the same as it shall from year to year accrue, are valid and operative. These two questions, it will be observed, are quite independent of each other, so that those portions of the will which give rise to the second or subordinate one may, for convenience sake, be ignored in answering the first.

The testator's son, Clifford, having died and his only children being still living, and the trust, in so far as it was one in his favor as a beneficiary of income, having been fully executed, the existing circumstances are those which are dealt with, and exclusively dealt with, in the first two sentences of the seventh paragraph of the will. The first question to be answered is, therefore, one whose answer is to be found in that portion of

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the will which is entirely separable from and independent of every other portion of the instrument.

The first pertinent inquiry suggested by these two sentences is occasioned by the opening words which make the provisions of the paragraph operative only in the event of Clifford's death. Did the testator intend to make provision in the event of his son's death at any time, or only in the event of his death before the testator's? A reading of the will in its entirety leaves no room for doubt that the testator's intention was to provide for the contingency of Clifford's death whenever it should occur. *Butler* v. *Flint*, 91 Conn. 630, 636, 101 Atl. 19.

If the first of the sentences stood alone, there could be no question of its validity and sufficiency as entitling Clifford's daughters, Florence and Bertha, as *cestuis que trust*, to share between them the income of the fund in the plaintiff's hands. It is charged, however, that the next following sentence, which provides that if other children shall be born to Clifford all should share equally, is one which contravenes the rule against perpetuities, and taints the whole limitation over to Clifford's children, including Florence and Bertha. In neither of its aspects is this contention well made. A testamentary gift to children born and unborn, of a living parent, is not invalidated by the rule against perpetuities for the reason that one or more of the children may come into existence more than twenty-one years and the period of gestation after the testator's death. If one or more of the children are living at the death of the testator, the gift will be upheld as a gift to a class, vesting in its members living at the testator's death and opening to let in after-born members. *Jones' Appeal*, 48 Conn. 60, 67; *Belfield* v. *Booth*, 63 Conn. 299, 304, 27 Atl. 585; *Hoadley* v. *Beardsley*, 89 Conn. 270, 279, 93 Atl. 535.

Neither is it true that if the gift, as expressed in the second sentence, were invalid, the prior one to Florence

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and Bertha would fail. The two sentences embody two separate, alternative provisions, that in the second to be substituted for the one in the first in the contingency of after-births. That contingency never having occurred, the substitutionary provision became ineffective and as though it never were. *Sumner* v. *Westcott*, 86 Conn. 217, 222, 84 Atl. 921.

The trust being a subsisting one in favor of Florence and Bertha as beneficiaries of the income of the fund held by the plaintiff, the question propounded for advice as to the validity and effect of the terms attempted to be imposed upon them and their husbands, as conditions precedent to their right to receive from the trustee the income as it annually accrues, becomes one of present pertinence. These conditions, as expressed in the will, are that they and their husbands abstain from the use of tobacco and all kinds of intoxicating liquor as a beverage, and on all occasions when necessary to write or spell the name of Tyrrel they spell it as it is spelled in the will and was spelled by the testator's ancestors.

As a general rule, a testator has the right to impose such conditions as he pleases upon a beneficiary as conditions precedent to the vesting of an estate in him, or to the enjoyment of a trust estate by him as *cestui que trust*. He may not, however, impose one that is uncertain, unlawful or opposed to public policy. The conditions here attempted to be imposed, in so far as they are made dependent upon the conduct of husbands, falls within the last named class. It is clearly one opposed to public policy. A consequence of such a condition, were it enforceable, would be that a wife entitled to property or income, might be penalized for conduct which she was powerless to control. A situation would thus be created which would be fraught with infinite injustice to her, provocative of marital discord, and

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conducive of longings to escape from the marriage relation. Nor is that all. The husband, in such a situation, would be furnished with a ready and oftentimes potent means of exercising a domination over his wife, through her fear of the consequences of noncompliance with his wishes, which, in the interest of right and of domestic harmony and happiness, should not be permitted.

In so far as the conditions are made dependent upon the conduct of beneficiaries of income themselves, in the present instance Florence and Bertha, no one of them can be said to be contrary to public policy or unlawful. Nor is there any uncertainty about the two which concern the use of tobacco and intoxicating liquors. The language in which the third, relating to the spelling of the family name, is couched, was not as happily chosen as it might have been. It, however, sufficiently indicates that the testator's purpose was to contribute to the perpetuation of the ancestral spelling of the surname he bore, and that in furtherance of that end he intended to exclude from the enjoyment of any portion of the annually-accruing income of his estate left in trust, persons who, in so far as they should make use of that name in the designation of themselves or their families, did not habitually use it as thus spelled. Whether or not he was successful in carrying out that intention as to every person who by possibility might become entitled to receive some share of the income of the trust fund, we have no occasion to inquire. His efforts in that direction, appearing in more than one part of the instrument, are apparent, and as far as Florence and Bertha are concerned were successful. As thus interpreted the condition is sufficiently definite to be valid and enforceable.

The Superior Court is advised to render judgment (1) that the trust committed to the plaintiff is a subsisting one, in the execution of which the plaintiff is

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entitled under present conditions to the continued control and management of the trust fund in his hands, paying over the net income thereof to the defendants Florence J. Tyrrel Marsh and Bertha M. Tyrrel during their joint lives in equal proportions between them; and (2) that the conditions prescribed by the will as prerequisites of the receipt of income as it accrues from year to year by the beneficiaries thereof, including Florence J. Tyrrel Marsh and Bertha M. Tyrrel, are valid in so far as they are made dependent upon the conduct of the beneficiaries themselves, but void in so far as they are made to depend upon the conduct of the husbands of such beneficiaries.

No costs in this court will be taxed in favor of any of the parties.

In this opinion the other judges concurred.

Thomas F. Young's Appeal from County Commissioners.

First Judicial District, Hartford, March Term, 1918.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

Where two statutes are clearly antagonistic, the later one must be taken to express the final legislative intent.

Chapter 263 of the Public Acts of 1917, approved May 10th, 1917, permits the county commissioners to grant a renewal license to sell liquor, for a period not later than the first Monday of the *second month* after a town shall have voted no license; while Chapter 322, approved May 16th, 1917, declares that the license vote of a town "shall become operative" on the first Monday of *the month next succeeding* that in which it was had. *Held* that the two Acts were plainly irreconcilable, and that the county commissioners had no authority to renew a license to sell beyond the date when the no-license vote became "operative" under the terms of the later Act.

Argued March 5th—decided April 30th, 1918.

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Young's Appeal.

APPEAL from the refusal of the County Commissioners of Litchfield County to grant the renewal of a liquor license to the applicant, Thomas F. Young, taken by him to, and reserved by, the Superior Court in Litchfield County, *Maltbie, J.*, for the advice of this court. *Superior Court advised to affirm the action of the County Commissioners.*

Leonard J. Nickerson and *John F. Addis*, for the applicant, Thomas F. Young.

John T. Hubbard, for the County Commissioners.

SHUMWAY, J. This case comes to this court by reservation from the Superior Court in Litchfield county. It appears from the record that the town of New Milford, on the first Monday of October, 1917, voted against the granting of licenses to sell intoxicating liquors. At that time the appellant, Thomas F. Young, was a licensed dealer in said town. Young applied to the county commissioners for a renewal of his license until the first Monday in December, 1917, under the provisions of Chapter 263 of the Public Acts of 1917. The county commissioners ruled that they had no authority to renew the license.

The question of law upon which the Superior Court asks the advice of this court is in substance whether the ruling of the commissioners was correct.

The legislature of 1917 enacted two measures. One, Chapter 263, entitled "An Act amending an Act concerning Ballot on the License Question," approved May 10th, 1917, and the other, Chapter 322, entitled "An Act amending an Act concerning Ballot on the Question of License," approved May 16th, 1917; both of these Acts in terms amending Chapter 224 of the Public Acts of 1909.

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One of the rules for the construction of statutes, first to be applied, is: "Later statutes repeal prior contrary statutes." Whatever limitations or exceptions to this rule there may be, there are none which in any manner qualify the proposition that if two statutes are expressly contrary, the later one is the law. When once the legislative will is discovered, the courts are not at liberty to disregard it, by invoking any rule of construction. The two statutes now under consideration are clearly antagonistic. It seems impossible to find any interpretation to uphold the contention that both are in force and effective.

Chapter 263 permits the county commissioners to renew any license to sell intoxicating liquors, after the town has voted no license, for a period not later than the first Monday of the second month after the vote is taken. While Chapter 322 provides that whenever a vote is taken on the question of granting licenses, "the" vote shall become operative on the first Monday of the month next succeeding the town meeting. It needs only to state the terms of the two statutes to show that their provisions are irreconcilable. A no-license vote does not become "operative" at the given time if the county commissioners can renew all existing licenses for one month longer.

The Superior Court is advised to affirm the action of the County Commissioners.

In this opinion the other judges concurred.

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THE TUNGSTEN COMPANY OF AMERICA *vs.* FREDERICK C. BEACH ET AL.
THE LONG HILL QUARRIES COMPANY *vs.* THE TUNGSTEN COMPANY OF AMERICA.

* First Judicial District, Hartford, March Term, 1918.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

By the terms of its contract with the original lessee, the plaintiff, a tenant of undeveloped mining property containing tungsten-bearing minerals, agreed not only to make the monthly payments of rent required by the terms of the original lease, but also to make payments of not less than $500 each month, which were to be credited by its landlord on the purchase price of the property, in case the tenant elected to buy it and completed the purchase; otherwise they were "to be paid and received as consideration for the current monthly enjoyment of the rights and privileges hereby granted." *Held:*—

1. That the $500 monthly payments were not "rent," within the meaning of § 4045 of the General Statutes, which excused the tenant from the payment of rent for a tenement which was, without his fault or neglect, so injured as to be unfit for occupancy.
2. That the premises in question were not occupied as a "tenement" within the meaning of the statute, especially as the fire, which destroyed the old and dilapidated buildings, did not render the premises unfit for occupancy for the purpose of developing the mine and extracting ore therefrom, which was obviously an important consideration in the minds of the contracting parties.

The owner of the premises agreed to carry a reasonable amount of fire insurance on the leased premises and to apply the amount received of the insurance company in the event of a fire, to the restoration of the property destroyed. He neglected however to take out any insurance. *Held* that if the application of a reasonable amount toward the cost of restoration by the owner, would be of no avail or benefit to the tenant unless the tenant expended a much larger sum from its own pocket, a court of equity would not compel the owner to go ahead in the restoration of the property, in the absence of an allegation or finding that the tenant had obligated itself to make the necessary supplemental expenditure.

Argued March 5th—decided April 30th, 1918.

* Transferred from third judicial district.

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ACTION to recover damages for an alleged breach of contract to keep premises occupied by the plaintiff insured against fire for its benefit, in which the Long Hill Quarries Company, one of the defendants, filed a cross-complaint against Beach, the other defendant, for damages and for an adjudication of their respective rights in and to the premises; also an action by the Quarries Company against the Tungsten Company to recover possession of the leased premises, for a cancellation of the sublease, and for other equitable relief; brought to the Superior Court in Fairfield County and referred to a committee who found and reported the facts; the court (*Malbie, J.*) accepted the committee's report, found the statements thereof to be true, and reserved the causes and questions arising therein for the advice of this court.

On May 28th, 1915, the defendant Beach leased to the Quarries Company a tract of about sixty acres of land on which was located an undeveloped mine containing tungsten-bearing minerals, with buildings and machinery more or less adapted to the operation of the mine, for a term of five years with the privilege of renewal for ten years, and an option of purchase for $25,000, both lease and option running to the lessee's assigns. The lease also contained the following provision which gives rise to this litigation: "The lessor will carry a reasonable amount of fire insurance on the property hereby leased, and in the event of partial or total destruction by fire, will apply said insurance funds, if so requested by the lessee, to the restoration of the property destroyed."

In January, 1916, the Quarries Company entered into a contract with Lyons and Grey, which is claimed by the Tungsten Company to be an absolute assignment of the lease, and by the other parties to be an operating lease of the mine and a contract for the sale

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of the Quarries Company's option of purchase, at an agreed price of $125,000, payable in monthly instalments of not less than $500 during the continuance of the term.

The Tungsten Company, as the successor in interest of Lyons and Grey, entered into the enjoyment of the premises, made certain improvements required by its contract, and operated the mine until May 20th, 1916, when the buildings were totally destroyed by a fire of unknown origin. The buildings were old and dilapidated, with an actual value of $11,000 and a replacement cost—allowing for salvage of foundations—of $28,000. A reasonable amount of insurance to be carried was $8,000. After the fire it developed that Beach had not kept his agreement to carry fire insurance.

Shortly after the fire the Tungsten Company made a demand upon Beach for the payment to it of a reasonable amount of fire insurance to be applied in restoring the destroyed property. The Quarries Company made a similar demand. Later the Tungsten Company made demand on Beach and on the Quarries Company for the application of a reasonable amount of fire insurance to the restoration of the premises, and notified the Quarries Company that under § 4045 of the General Statutes it was not liable to pay rent, although remaining in possession, because the premises had been rendered untenantable by a fire occurring without its fault or neglect.

Thereafter the Tungsten Company ceased to operate the mine, and failed to make the payments of rent and instalments of purchase price required by the terms of the contract. Other material facts are stated in the opinion.

Spotswood D. Bowers of New York City, for the Tungsten Company.

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Arthur M. Marsh and *Philo C. Calhoun*, for the Long Hill Quarries Company.

Edward K. Nicholson, for Frederick C. Beach.

BEACH, J. All of the questions arising in the two cases were argued together, and as they arose out of the same transaction or series of transactions and, in the view which we take, depend, except as to the cross-complaint, upon the same questions of law, they will be discussed in one opinion.

The first question is whether the Tungsten Company is entitled to recover damages in its action against Beach and the Quarries Company, and we are of opinion that it is not so entitled, for the reason that by its continued default in the payment of rent and of instalments of the purchase price it has lost all right and interest in the premises.

The Tungsten Company claims that its admitted default in making these payments is excused by § 4045 of the General Statutes, which provides, in substance, that the tenant of a tenement which is, without his fault or neglect, so injured as to be unfit for occupancy, shall not be liable to pay rent so long as the premises remain untenantable. We think this statute does not apply to this case. In the first place it applies only to rent, and all payments required by a lease as a condition of occupancy are not necessarily and for that reason only to be regarded as rent or additional rent. *Filene's Sons Co.* v. *Weed*, 245 U. S. 597, 38 Sup. Ct. 211. Under this contract the obligation of the Tungsten Company was not only to make monthly payments of rent based on the terms of the original lease from Beach to the Quarries Company, but also to make monthly payments of not less than $500, which are expressly described in the contract as monthly instalments to be credited on the purchase price in case the purchase is

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completed, otherwise "to be paid and received only as consideration for the current monthly enjoyment of the rights and privileges hereby granted." It is argued that this language characterizes the payments as additional rent; but on the face of the contract and in view of the undeveloped speculative value of the mine, we are of opinion that the two classes of payments called for by the contract are distinct and based upon separate considerations.

One of the specific agreements of the Tungsten Company was to develop the mine as speedily as possible. It was important that the value of the mine—assuming that it had value—should be promptly ascertained, and the provision for the payment of at least $500 a month on the purchase price was intended and adapted to prevent any delay on the part of the Tungsten Company in carrying out its agreement to speedily develop the mine. In short, this was the price paid for the continued enjoyment of the right to purchase the Quarries Company's option.

The statute does not apply to instalments of the purchase price of leased property, but only to rent, and the consequence of a default in the payment of such instalments, continued for thirty days, is fixed by the contract, which provides that in such case the Quarries Company, at its option, may terminate the contract and recover possession of the premises. This it has elected to do, and, on the facts found, the rights of the Tungsten Company under the contract are at an end.

There are other reasons why the statute does not apply to this case. These premises are not, in our opinion, occupied as a "tenement" within the meaning of the statute. The original Act, passed in 1869, referred only to a "building," and the substitution of the word "tenement" in the Revision of 1875 was perhaps with reference to including parts of buildings also. The

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Act was so construed in *Miller* v. *Benton*, 55 Conn. 529, 13 Atl. 678. It is not likely that the revisers intended to so enlarge the statute as to cover all kinds of real estate. In fact JUDGE BALDWIN remarked in *Gulliver* v. *Fowler*, 64 Conn. 556, 565, 30 Atl. 852, speaking of another change in the original Act made by the revisers, that the change in the phraseology "was evidently made simply for the sake of brevity, and did not affect its legal construction."

At any rate, it is safe to say that the property must be of such a nature and occupied for such a purpose as to be rendered substantially untenantable for that purpose, before the liability to payment ceases. In this case the occupancy of the Tungsten Company was not only that of a tenant under an operating lease, but also that of a purchaser under an agreement to develop the mine and to pay instalments on the purchase price; and the finding of the committee is that the property "was not rendered by the fire unfit for occupancy or untenantable for the purpose of development of the mine nor for extracting ore therefrom commercially. The same was rendered by the fire unfit for occupancy and untenantable for the purpose of concentrating and refining tungsten ore." That is to say, the premises were untenantable for some of the purposes for which they were occupied and not untenantable for others, and we cannot say that the purposes for which they were still tenantable are not just as important under the contract as the purposes for which they were unfit for occupancy.

The conclusion that the Tungsten Company has lost all right and interest in the premises under the contract, determines the judgment which must be awarded as between the plaintiff and the defendants in the case of the Tungsten Company v. Quarries Company and in the case of the Quarries Company v. Tungsten Company.

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The remaining question relates to the cross-complaint in the first-named case, brought by the defendant Quarries Company against the defendant Beach, for damages and for a decree settling the rights and obligations of the parties to the cross-action.

As to the claim for damages, it is enough to say that the committee has not found that the Quarries Company has suffered any damages.

As to the second prayer for relief, the committee has found that $8,000 is the reasonable amount of fire insurance which Beach agreed to carry, and the proceeds of which he agreed to apply, if requested, to the restoration of the buildings destroyed. It is also found that it would cost $28,000 to restore the buildings, and not found that the expenditure of $8,000 by Beach would substantially benefit the tenant. A court of equity will not compel Beach to expend $8,000 for the benefit of the tenant, unless the tenant would be benefited thereby. Possibly the lessee might, by a supplemental expenditure out of its own pocket, make the expenditure of $8,000 by Beach so beneficial as to warrant a decree requiring Beach to make it. Such possible action by a court of equity could, however, be taken only after the tenant had obligated itself to make the necessary supplemental expenditure, and no allegation or finding to that effect appears on the record.

The Superior Court is advised to render judgment for the defendants in the case of the Tungsten Company of America v. Frederick C. Beach; to render judgment for the plaintiff to recover possession of the premises in the case of The Long Hill Quarries Company v. The Tungsten Company of America; and to render judgment for the defendant Beach in the cross-action by the Quarries Company against Beach.

In this opinion the other judges concurred.

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THE STATE OF CONNECTICUT *vs.* AMY E. ARCHER GILLIGAN.

First Judicial District, Hartford, March Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Upon a prosecution for murder by poison, evidence of other unconnected murders committed by the accused, by similar means, is generally inadmissible. Such evidence ordinarily has no direct tendency to prove the specific crime charged, but only indicates that the accused is possessed of a bad character or of a disposition to commit crimes of that nature; and its admission in chief violates the rule of policy which forbids the State from attacking the character of the accused except in rebuttal, and from proving it even then by evidence of particular acts. On the other hand, this rule of policy has no application whatever to evidence of any crime which directly tends to prove that the accused is guilty of the specific offense for which he is on trial.

Evidence of other murders may, however, be admitted in certain cases, for the limited purpose of excluding the existence of an innocent intent upon the part of the accused in administering the poison, as well as to eliminate the probability of accident and mistake in its administration. But in every such case it must appear that the act is equivocal, that is, that its commission by the accused is consistent with an innocent as well as with a criminal intent; and also that the accused did commit the act.

In the present case the accused was indicted for murder in administering arsenic to the decedent in his food, which she prepared and served to him while an inmate of a home kept by her for aged and infirm persons; and the evidence of the State connecting the accused with the death, not only tended to negative the probability of accident or mistake, but rendered it practically impossible for the jury to reach any other conclusion than that of guilt if they accepted the State's claims as true. *Held* that under these circumstances the admission in chief of the evidence of the other murders, including the financial transactions attending them, as indicative of motive, was as unnecessary as it was objectionable, and constituted ground for a new trial.

The State also claimed this evidence, and the trial court admitted it, for the purpose of excluding the theory of suicide. *Held* that for this purpose the evidence was irrelevant and inadmissible.

Argued March 6th—decided April 30th, 1918.

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INDICTMENT for murder in the first degree, brought to the Superior Court in Hartford County and tried to the jury before *Greene, J.;* verdict and judgment of guilty as charged, and appeal by the accused. *Error and new trial ordered.*

The accused in one indictment was charged in separate counts with five separate murders in the first degree by means of poison. She kept a home for aged and infirm persons at Windsor, and, as the result of a succession of deaths among the inmates under circumstances exciting suspicion, the bodies of some of the deceased were exhumed, and the accused indicted of four murders by arsenic and one by strychnine. At the opening of the trial, the court granted a motion that the State be required to proceed upon one count, and the State elected to proceed upon the first count charging the accused with the murder of one Andrews by arsenic.

The material facts upon which the State relied were substantially as follows: The accused was an experienced nurse, and for some years had the sole ownership and management of the so-called Archer Home for aged and invalid persons at Windsor. She was engaged largely in the business of taking care of people for life, under written contracts to provide room, board, care, nursing, and in some cases a decent burial; the consideration for such contracts being a sum varying from $450 to $1,000 which was paid upon the execution of the contract.

Andrews entered the Archer Home at the age of sixty years, in September, 1912, under such a life contract, for which he paid $1,000. Early in May, 1914, a Mr. and Mrs. Gowdy of Hartford sought admission to the Home, inspected the place, and agreed to come provided they could have the room occupied by Andrews and his roommate, Ramsey, and they were then told

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that they could have that room about June 1st. At that time there was only one vacant room in the house, and that suitable for one person only. The Gowdys agreed to come to the Home on the proposed terms, and the accused, after putting them off with false excuses, telegraphed them immediately on the death of Andrews that the room was ready and urged them to come. A few weeks before Andrews died the accused borrowed $500 from him under a pledge of secrecy. After his death the accused denied having borrowed the money, and his savings-bank book, showing the withdrawal of this amount, was in her possession. On May 26th, 1914, the accused purchased two ounces of arsenic at the local drug-store, saying that she wanted it for rats, although at that time there were no rats about the premises. On May 29th Andrews ate a hearty supper, which was prepared and served by the accused, taking his food from individual dishes placed before him, as was the custom of the Home. About nine o'clock he went to bed, and at five the next morning his roommate, Ramsey, was awakened by Andrews, who was vomiting. Ramsey called the accused and suggested that she send for a doctor. She went at once to Andrews' room, but did not summon any doctor until about six o'clock that evening. The physician diagnosed the case as an attack of acute indigestion, and did not then think that Andrews was dangerously ill. He was summoned again by the accused about nine o'clock the same evening, and found Andrews practically dead. Throughout the day the deceased was attended by the accused only. In answer to questions by the physician the accused stated that Andrews had suffered from gastric ulcers, that they had undoubtedly caused his death, and the death certificate so stated. The symptoms were, however, consistent with arsenic poisoning. As soon as the doctor left, the accused sent for an under-

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taker, who removed the body to Hartford, where it arrived about eleven o'clock that same night. About ten o'clock, when Andrews had been dead one hour, the accused called his sister in Hartford on the telephone and told her that Andrews was sick, that she was afraid he would not get well, but that it was not necessary for his relatives to come that night. When Andrews' sister came next morning she was told by the accused that Andrews had died shortly after ten the night before. When asked the cause of his death, the accused replied that he had suffered with boils and abscesses for a long time and they must have struck to his stomach. In fact Andrews had never been troubled with boils or abscesses, and there was no indication of such a trouble in his appearance alive or dead. The motive of the accused was to escape from the continuing obligation under her life contract with Andrews, to avoid repaying the $500 loan, and to make room in the Home for Mr. and Mrs. Gowdy. Andrews' body was embalmed with a fluid containing no arsenic, and when exhumed two years after his death the body was in a state of good preservation. Arsenic in large quantities was found diffused through the organs of his body, and a larger quantity, many times a fatal dose, was found in crystal in his stomach. The principal expert for the State gave it as his opinion upon his direct examination that one dose of arsenic had been administered ten or twelve hours before death, and another very large dose a short time before death, which latter dose remained in his stomach after death, some of it in the form of undissolved crystals of arsenious acid.

The State was then allowed to prove, against the objection and exception of the defense, that three other persons died of arsenical poisoning in the Archer Home, one Gilligan on February 20th, 1914, one Smith on April 9th, 1914, and a Mrs. Gowdy on December 3d,

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1914; and in each case the State was allowed to introduce, against the objection and exception of the defense, circumstantial evidence tending to prove that in each of these cases the accused administered arsenic with malice aforethought, wilfully, deliberately, with premeditation and with a specific intent to kill.

Benedict M. Holden and *Josiah H. Peck*, for the appellant (the accused).

Hugh M. Alcorn, State's Attorney, for the appellee (the State).

BEACH, J. The most important assignments of error, both in the admission of evidence and in charging the jury as to its effect, relate to the admission, in the State's case in chief, of evidence to prove that the accused committed three other murders by arsenic poisoning, two before and one after the date of the crime for which she was on trial.

The argument against admitting evidence of other similar but unconnected crimes is not that it has no probative value. As Wigmore said: "It is objectionable, not because it has no appreciable probative value, but because it has too much" (§ 194); meaning, of course, that its appeal is not confined to the intellect or to the precise issue. Such evidence, when offered in chief, violates the rule of policy which forbids the State initially to attack the character of the accused, and also the rule of policy that bad character may not be proved by particular acts. Wigmore, § 57. These two rules of policy are firmly established, and they mark one important difference between the Anglo-American criminal procedure and the French. On the other hand, evidence of crimes so connected with the principal crime by circumstance, motive, design, or

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innate peculiarity, that the commission of the collateral crime tends directly to prove the commission of the principal crime, or the existence of any essential element of the principal crime, is admissible. The rules of policy have no application whatever to evidence of any crime which directly tends to prove that the accused is guilty of the specific offense for which he is on trial. The objection on the ground of policy applies exclusively to evidence of crimes which are logically unconnected with the principal crime. That is to say, to evidence the probative effect of which is indirect, in the sense that its direct application is exhausted in showing that the accused was possessed of a bad character or of a disposition to commit the particular crime of which he is accused, and thereby it furnishes a justification for a conviction rather than proof of guilt of the specific offense. The general rule upon the subject is well stated by Cushing, C. J., in *State* v. *Lapage*, 57 N. H. 245, 289: "I think we may state the law in the following propositions: (1) It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character. (2) It is not permitted to show the defendant's bad character by showing particular acts. (3) It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged. (4) It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing on the issue on trial other than such as is expressed in the foregoing three propositions."

This record does not present the case of relevant or connected crimes. No claim was made that the evidence as to the Gilligan, Smith and Gowdy murders, was properly admissible for the purpose of directly

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proving the commission of the principal murder, or the existence of any essential element thereof. It was claimed and admitted upon an entirely different theory, under the rule which in certain cases permits evidence of otherwise irrelevant similar acts by the accused for the limited purpose of eliminating innocent intent in the commission of the principal act, and to exclude the probability of accident and mistake.

The theory upon which evidence of other similar but unconnected acts of the accused is admitted for these purposes, involves two antecedent hypotheses: that the particular act in question is equivocal, in the sense that its commission by the accused is consistent with an innocent as well as with a criminal intent, and that the accused did commit the act. These hypotheses being assumed, the argument, as Wigmore (§ 302) states it, "is purely from the point of view of the doctrine of chances,—the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all." As applied to cases of murder by poisoning, the argument is this: it is possible that one may administer a fatal dose of arsenic to one person by mistake or accident, but that he should administer arsenic to four persons with fatal result in one year by mistake is in the highest degree improbable. The administration of arsenic in fatal doses with innocent intent is abnormal; and the multiplication of similar acts tends to exclude this abnormal element in each case. It will thus be seen that the criminality of the other or collateral administrations of arsenic has nothing to do with the argument. In this case, for example, the evidence of the Gilligan, Smith and Gowdy poisonings, if admissible at all, was admissible solely for the purpose of reducing the probability that the accused could

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have administered the arsenic to Andrews accidentally —assuming that she did administer it,—by showing that she had done the same thing with the same fatal result four times in the same year. It is plain enough that evidence of the repetition of equivocal acts, with their results, does not necessarily violate any rule of policy. It is also plain enough that when the guilty intent necessarily accompanies the act, evidence of other unconnected crimes is as unnecessary as it is objectionable. But when, as in this case, the principal act is claimed to be equivocal and the commission of similar unconnected acts cannot be shown without at the same time showing that they were done with criminal intent, a conflict may arise between the general rule of policy and the special rule, for in such cases the legitimate argument "purely from the . . . doctrine of chances" is likely to be overshadowed by the inadmissible argument that because the accused is possessed of a disposition to murder by arsenic, she probably administered the arsenic to Andrews—assuming that she did administer it—with murderous intent.

The authorities on the subject are so numerous, and the relation between the commission of one offense and of another similar offense depends so much upon the nature of the offense and on the circumstances of each case, that we confine our discussion to the crime of murder by poisoning, except for a brief reference to two cases already decided by this court.

In *State* v. *Ward*, 49 Conn. 429, 440, which was a prosecution for receiving stolen goods knowing them to be stolen, evidence of the prior receipt by the accused of other goods from the same thief, knowing them to be stolen, was admitted to show guilty knowledge; and in *State* v. *Raymond*, 24 Conn. 204, we held that, on a prosecution for keeping intoxicating liquors with intent to sell, evidence of prior sales at the same place was

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admissible to show the intent with which the liquor was kept at that place. These cases evidently belong to the class of connected crimes. In the *Ward* case the evidence was not admitted for the purpose of multiplying unconnected instances of the receipt of stolen goods until the probability of their receipt with innocent intent was overwhelmed, but for the direct purpose of showing that the accused knew that he was dealing with a thief in the specific case. And in the *Raymond* case the continuing nature of the offense charged, coupled with the presumption of a continuance of the intent to sell manifested by the prior offense, afforded equally direct evidence of guilty intent in the specific case.

Returning to the subject of unconnected murders by poisoning, there is a conflict of authority upon the point which we regard as decisive of the present appeal, viz: whether in such case evidence in chief of other similar poisonings by the accused is always admissible, or whether it is admissible only when the administration of the poison is under the circumstances of the particular case reasonably consistent with a possible defense of accident or mistake.

In *People* v. *Molineux*, 168 N. Y. 264, 61 N. E. 286, which is the leading case in support of the latter doctrine, the New York Court of Appeals reversed a conviction of murder by poisoning, because the trial court admitted evidence of another similar, unconnected murder by poisoning by the accused, for the purpose of disproving innocent intent; saying that on the facts, as the State claimed to have proved them, no reasonable doubt could exist that the accused—if he committed the act in question—must have done it with criminal intent. The reasoning of the court is that the proof of unconnected crimes is contrary to the general policy of the law, and therefore inadmissible unless the hypothesis is first established on which the special

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exception is founded, viz, that the particular act in question is equivocal. Three justices dissented from the result in that case, on the ground that the two crimes were logically connected because the poison used was so rare and the mode of its administration so peculiar, that the commission of the collateral crime by the accused tended directly to show that he committed the principal crime also.

The leading case in this country in support of the other doctrine, that in poisoning cases the commission of similar unconnected poisonings may always be shown to eliminate accident or mistake, is *State* v. *Hyde*, 234 Mo. 200, 232, 136 S. W. 316. In that case a new trial was ordered, but the court proceeded to discuss the theory upon which evidence of other unconnected poisonings by the accused was admissible, saying: "It is true that the evidence in the record raises no question of intent. It may also be conceded that if the defendant knowingly administered deadly poison, the intent may be inferred from the act, and no further proof is required. But it must be remembered that in a criminal case the defendant files no written pleading. . . . It is a part of the State's case to show criminal intent, and in so doing to negative accident or mistake, by any proof competent for that purpose. The State was not required to rest upon the assumption that the proof would show that the intent accompanied the act, nor to hold back, for rebuttal, evidence showing intent." And in the course of its opinion the court quoted from *Trogdon* v. *Commonwealth*, 31 Gratt. (72 Va.) 862, 873 (a case of obtaining money under false pretenses), where the court observed that it could not tell what evidence of intent would satisfy the jury beyond a reasonable doubt, and put the question, "What would be thought of a judge who would thus prejudge the case and invade the province of the jury?"

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We think this argument ignores the essential fact that the underlying question which confronts the court is not simply whether the State has sufficiently proved criminal intent, but whether the particular evidence offered upon that issue is admissible. Courts are not infrequently required in criminal cases to pass upon preliminary questions of fact in order to determine the admissibility of evidence, and no doubt courts are vested with considerable discretionary powers in passing upon such preliminary questions. In this case the question is whether evidence, generally objectionable, shall be admitted for the limited purpose of eliminating accident or mistake, and we think it would be an abuse of discretion to permit proof of similar but unconnected poisonings in a case where the State's evidence had already gone so far toward eliminating accident or mistake as to leave no reasonable doubt, in the absence of rebutting evidence, that the poison, if administered by the accused, must have been knowingly administered. Otherwise evidence inadmissible on the general issue would be admitted for the special purpose of characterizing an equivocal act, when the act in question was not equivocal, and so the only practical effect which the evidence could have would be to prejudice the accused and violate the policy of the criminal law. In such cases the State should exhaust its other evidence of criminal intent before resorting to proof of other unconnected acts for that purpose, and it should not resort to such proof until it has also exhausted its evidence connecting the accused with the death. Then if evidence of other similar but otherwise irrelevant poisonings is offered for the limited purpose of reducing the probability of accident or mistake, it is the duty of the court to determine whether the administration of the poison, if done by the accused under the circumstances claimed by the State, is, in the absence

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of rebutting evidence, reasonably consistent with innocence, accident or mistake. If not, the evidence must be excluded without prejudice to its possible admission in rebuttal.

Applying these conclusions to this record, it is apparent that a large part of the circumstantial evidence which the State offered for the purpose of connecting the accused with the death of Andrews, necessarily tended also to negative the probability of accident or mistake. As stated upon the defendant's brief, this evidence included (1) secrecy in regard to the $500 loan matter; (2) plans for the reception of the Gowdys, with promises and lying statements made to them; (3) the purchase of arsenic four days before Andrews' death, with a false reason assigned for its purchase; (4) the fact that Andrews received at least two doses; (5) delay in calling the doctor the first time and again in calling him the second time; (6) false statements as to the nature of Andrews' illness to the doctor and others; (7) unreasonable failure to notify Andrews' relatives; and (8) the unseemly haste in getting rid of the body. We think it is evidently impossible that the jury should have accepted the State's claims in these particulars as true, without necessarily eliminating from their own minds any possibility that the accused administered the poison by accident or mistake. The single fact that the principal expert for the State gave it as his opinion that the deceased had received two doses of arsenic, one of them a very large dose administered shortly before death, is extremely significant upon this issue. Without going into any of the details, it would seem that the distribution of diffused arsenic in the body of Andrews and the quantity of undissolved crystals of arsenious acid found in his stomach, could hardly be explained upon any other hypothesis than that two doses, at least, were administered,

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and at or about the times suggested by the State's expert. If this is true, and if the poison was administered by the accused, it puts an end at once to any reasonable possibility of accident or mistake.

In this case the evidence in question was also admitted for the purpose of excluding suicide. For this purpose we think it was irrelevant and inadmissible. Suicide is a voluntary act, and it is impossible to see how the fact—if it were so—that the accused murdered three other persons by arsenic, one of whom survived Andrews, could increase or diminish any inclination toward suicide which Andrews might be supposed to have; especially as there is no evidence that Andrews suspected that they were murdered. The evidence indirectly tends to negative suicide, by showing that the accused was possessed of a disposition to murder by poison; but for that purpose it was inadmissible. Wigmore, § 363 (2A), appears to justify the admissibility of other instances of death by poison under similar circumstances to negative suicide, but the principle of anonymous intent to which he refers (§ 303) is more appropriately applied to other attempts on the life of the deceased.

The conclusions reached cover the evidence as to financial transactions between the accused and Smith and Gilligan, which was admitted for the purpose of showing that the accused had a motive for poisoning them, and also so much of the evidence of Mason as relates to purchases of arsenic connected with other poisonings and not connected with the poisoning of Andrews.

The charge of the court in so far as it is based upon the evidence as to other poisonings is erroneous, because inapplicable to the present case. That part of the charge which instructs the jury that evidence of other poisonings might be considered in determining

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whether the deceased committed suicide was also erroneous. In the other portions of the charge excepted to we find no error.

In view of the result it is unnecessary to pass upon the motion to correct the finding.

There is error and a new trial is ordered.

In this opinion PRENTICE, C. J., and SHUMWAY, J., concurred; RORABACK and WHEELER, Js., concurred in the result, but not in the opinion.

GEORGE E. TAFT *vs.* CHARLES E. LORD, DEPUTY SHERIFF.

First Judicial District, Hartford, March Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

To constitute one a fugitive from justice, within the meaning of that expression in the Federal Constitution (Art. 4) and laws of Congress relating to interstate extradition, two things are essential: first, that having been in the demanding State he has left it and is within the jurisdiction of another; and second, that he incurred guilt before he left the former State and while he was bodily present therein.

In the present case a man living in New York with his wife and children, after making financial provision for their temporary support, came to this State to look for a place where he could establish a home, intending to send for them to join him here, which he did about a month later. After a short residence in this State the parents quarreled, and the wife and children returned to New York, while the husband and father continued to live here. Since their return to New York he had not provided in any way for the support, nurture or education of the children, in alleged violation of a statute of that State, for which he was indicted there, and his extradition demanded. *Held* that the conduct of the father prior to leaving the State of New York was in no respect criminal, and that his offense, if any, against the laws of that State, was one which had its conception and consummation while he was bodily present in this State; and therefore that he was not subject to extradition as a fugitive from justice.

Argued March 7th—decided April 30th, 1918.

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APPLICATION for a writ of habeas corpus to determine the legality of the arrest and detention of one William Schumann, Jr., under a warrant of extradition issued by the Governor of this State upon the demand of the Governor of New York, made to the *Hon. Edward L. Smith*, judge of the Court of Common Pleas for Hartford County; writ issued and a hearing had as to the sufficiency of the defendant's return; facts found and judgment rendered discharging the said Schumann from custody, and appeal by the defendant. *No error.*

February 8th, 1917, the prisoner, William Schumann, Jr., then a resident of and located in this State, was indicted in the County Court in the County of Kings, State of New York, for the crime of abandonment of children as defined by the statute law of that State. Thereafter extradition proceedings in due form were instituted, and on March 10th, 1917, the Governor of New York requested the Governor of this State to cause Schumann's arrest and his delivery to an agent of the State of New York for return to that State to answer to the indictment. On March 14th, 1917, the Governor of this State honored the request and issued a warrant for the arrest and delivery for return of Schumann as requested. This warrant was placed in the hands of the defendant, a deputy sheriff for Hartford County, for service. Thereupon, in conformity with the directions of the warrant, the defendant arrested Schumann, and was holding him in custody for the purpose of further executing the warrant, when these habeas corpus proceedings were begun. The defendant made return to the writ that in arresting and holding Schumann in custody he was acting in obedience to the authority of the above recited warrant of the Governor of this State, delivered to him for execution.

When the Governor of this State issued his warrant

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he had no other evidence or information before him than such as was contained in the requisition of the Governor of New York.

The facts agreed upon and found by the trial judge show the following additional facts: Schumann, from his early boyhood and until his coming to this State in 1916, lived in Brooklyn in New York State. In 1908 he there married his present wife. Subsequent to the marriage the couple lived together and continued to reside in Brooklyn. There the three children were born to them whose abandonment is charged in the indictment. On or about April 17th, 1916, Schumann left his home in Brooklyn and came to Connecticut with the intention of sending for his wife and children to join him in the latter State after he had found a place where he could establish his home there. When he left he gave his wife money for her and his children's maintenance until he could send them more money or bring them to Connecticut. On May 22d, 1916, Schumann sent for his wife and children, and remitted money to defray the expense of their removal to join him in the town of Avon in this State, where he then was. In response, his wife and two of the children came to Avon, and thereafter Schumann and wife lived together in that town until on or about June 2d, 1916. On that day they quarreled, and Mrs. Schumann thereupon returned to Brooklyn, taking her two children with her. She has since continued to live in that city with her children, and Schumann has continued to live in Avon, and was living there when arrested. Since his wife's return to Brooklyn he has failed to make provision in any way for the support, nurture or education of his children.

Harry G. Anderson of New York City, with whom was *Hugh M. Alcorn*, State's Attorney, for the appellant (respondent).

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Josiah H. Peck and *Francis E. Jones*, for the appellee (Schumann).

PRENTICE, C. J. The detention of Schumann by the defendant, attempted to be justified as one step in the performance of a duty imposed upon the executive authority of this State by § 2 of the Fourth Article of the Federal Constitution and statutes enacted in aid thereof, and in the exercise of authority incident thereto, is unlawful if it lies outside the field of that duty, or is in excess of that authority. In such case he is entitled as a matter of right to his enlargement. *Innes* v. *Tobin*, 240 U. S. 127, 131, 36 Sup. Ct. 290; *Ex parte Morgan*, 20 Fed. Rep. 298, 301; *Farrell* v. *Hawley*, 78 Conn. 150, 153, 61 Atl. 502.

The constitutional provision referred to defines and prescribes the limits of interstate extradition or rendition. The duty is imposed upon the several States to cause to be apprehended and delivered up for removal to another State, upon demand of its executive authority, persons charged with crime in the latter State when, and only when, such persons have fled from justice as administered by and under its laws. The flight contemplated by this provision need not be precipitate, or induced by a desire to escape the consequences of crime. But there must be, on the part of the person whose return is sought, a departure from the demanding State under such conditions as to constitute him a fugitive from justice, within the meaning of that term as it is used in this connection. Otherwise his arrest and detention in interstate extradition proceedings is not within the authority and protection of the Federal Constitution and is unlawful.

To constitute one a fugitive from justice, as administered in a given State, two things are essential, to wit: (1) that he, having been in that State, has left

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it and is within the jurisdiction of another; and (2) that he incurred guilt before he left the former State and while he was bodily present in that State. *Roberts* v. *Rielly*, 116 U. S. 80, 97, 6 Sup. Ct. 291; *Hyatt* v. *People ex rel. Corkran*, 188 U. S. 691, 713, 23 Sup. Ct. 456; *Jones* v. *Leonard*, 50 Iowa, 106, 108. One who is without the jurisdiction of the State when he is there wanted to answer to a criminal charge does not, by reason of his absence alone, become a fugitive from justice. *Hyatt* v. *People ex rel. Corkran*, 188 U. S. 691, 712, 23 Sup. Ct. 456. Neither does he from the mere fact that he has rendered himself liable to criminal prosecution in that State. *Hyatt* v. *People ex rel. Corkran*, 188 U. S 691, 712, 23 Sup. Ct. 456. The United States Supreme Court, whose pronouncement upon this subject, which concerns the interpretation and meaning of our Federal Constitution and laws, is authoritative, has in a comparatively recent case stated the conditions under which, and under which alone, one becomes subject to interstate rendition as a fugitive from justice, in the following clear and unmistakable language: "We think it plain that the criminal need not do within the State every act necessary to complete the crime. If he does an overt act which is and is intended to be a material step towards accomplishing the crime, and then absents himself from the State and does the rest elsewhere, he becomes a fugitive from justice, when the crime is complete, if not before. . . . For all that is necessary to convert a criminal under the laws of a State into a fugitive from justice is that he should have left the State after having incurred guilt there, . . . and his overt act becomes retrospectively guilty when the contemplated result ensues." *Strassheim* v. *Daily*, 221 U. S. 280, 285, 31 Sup. Ct. 558.

This statement of principle is one which we are bound to accept and apply. No utterance of that court is

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more complete, comprehensive or specific. Whereas its former expressions upon the subject had been couched in general terms, as, for instance, that guilt must have been incurred, or the crime charged committed, in the demanding State before his departure therefrom in order to justify a person being regarded as a fugitive from its justice, here is given a particular statement of what that more general language is to be interpreted as meaning. This expository statement makes it clear beyond mistake that no one can be considered a fugitive from justice and extraditable as such who has not either committed some crime in the demanding State, or therein done some overt act which was, and was intended to be, a material step in the accomplishment of a crime subsequently consummated somewhere. Acts wholly innocent in themselves and not intended as a step toward the accomplishment of a crime, are not acts incurring guilt, and cannot be made the basis of a charge that the actor, leaving the State, flees from justice as there administered.

It only remains to apply these principles to the facts in the present case. Examining them as they are spread upon the record, we fail to find any act done by Shumann prior to his departure from New York which, by the wildest flight of the imagination, could be regarded as either criminal in itself or as intended as a step in the accomplishment of a crime subsequently consummated. He resided there, was married there, cohabited with his wife there, and begat children by her there. That is the sum total of his doings in New York until he conceived the purpose of coming to Connecticut. These acts certainly cannot rationally be regarded as having any connection with the crime charged through being material steps taken for its accomplishment.

When we come to his departure, we find that it was

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taken, after financial provision for the temporary support of his wife, in search of a place where he could establish a new home for his family, and with a purpose of sending for his family to establish that home if he should succeed in the object of his search, and of sending them further means of support until he could do so. Not only was there nothing criminal in any of this, but the finding at this point completely negatives the existence in Schumann's mind of an intention to accomplish an abandonment of his family.

We have no need to follow further the family history. Schumann has been followed to Connecticut with his skirts clear, and he has never returned to New York. Whatever he has since done or failed to do, his shortcoming has been while his bodily presence was in Connecticut, where he has continuously remained. It is interesting, however, to note that after he had been in this State less than a month he found a place for the establishment of a home; that he then sent for his family and forwarded them the means of defraying the expense of their removal; that they came in response to that request; that thereupon the reunited parties resumed their family relations, which had been temporarily interrupted by the father's quest; and that those relations continued, although for a brief space, until a quarrel arose, when, as its result, the wife, taking her children with her, left her husband behind and returned to Brooklyn, where she and they have since remained. Who was the party at fault in this quarrel we have no means of knowing, and for the purpose of the present proceedings that question possesses no importance. The narrated events, however, are of interest in that they emphasize the conclusion already arrived at, that Schumann did not incur guilt of the offense charged against him prior to his leaving the State of New York, and clearly disclose that his offense

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against the laws of that State, if any he has committed, is one which had its conception and consummation while he was bodily present in this State. It well may be that by his conduct toward his children he has rendered himself answerable to the State of New York for a violation of its criminal laws, but clearly he is not a fit subject for a compulsory return to that State as a fugitive from justice therefrom in order that he may be required to answer to such charge. *Hyatt* v. *People ex rel. Corkran*, 188 U. S. 691, 712, 23 Sup. Ct. 456.

There is no error.

In this opinion the other judges concurred.

YETTA CARTENOVITZ ET AL. *vs.* ANGELO CONTI.

First Judicial District, Hartford, March Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Evidence certified upon appeal in support of exceptions to the finding, will not be expunged or disregarded merely because some of it was obtained by the trial court upon a view of the premises; at least in the absence of a definite statement by the trial judge, as required by the rule (Practice Book, p. 269, § 11), that it was impossible to incorporate in the finding the results of his inspection.

Statements by an owner of land adjoining that of the plaintiffs', respecting his alleged encroachments, made in the course of an interview with the attorney for the plaintiffs with a view to an amicable settlement or compromise, are prima facie privileged communications and inadmissible in evidence against him.

During such interview, area-ways connected with the defendant's building were claimed to be encroachments upon the plaintiffs' property; to which the defendant replied that he knew nothing as to that, as the area-ways were there when he bought the property. *Held* that such statement did not tend to prove a disclaimer of any title or interest in the land occupied by the area-ways, but rather the reverse.

By the undisputed possession for more than fifteen years of that part of

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the air occupied by a fire-escape projecting beyond the face of a building and extending over the boundary line, and of the space occupied by the swing of the blinds attached to such building, without the license or consent of the owners of the adjoining property, the owner of such building acquires by adverse possession the right to maintain the fire-escape and to have the blinds swing as they had been wont to do. The ouster thereby effected is not one of the soil, but only of the space above it.

The evidence in the present case reviewed, and certain findings relative to adverse possession, corrected as requested by the appellant.

Argued March 7th—decided April 30th, 1918.

ACTION to secure the removal of alleged encroachments made by the defendant upon the plaintiffs' adjoining property, brought to and tried by the City Court of Hartford, *Bullard, J.;* facts found and judgment rendered for the plaintiffs, and appeal by the defendant. *Error and new trial ordered.*

In this court the plaintiffs filed a motion to expunge the oral evidence from the record. *Motion denied.*

The defendant acquired on March 1st, 1893, the premises on the northwest corner of Front and Temple streets, in Hartford, facing east on Front Street, upon which then and ever since has stood a brick building containing a number of tenements. The plaintiffs on May 12th, 1911, acquired the premises adjoining on the north.

In the north cellar wall of defendant's building, extending below the present level of the adjacent ground, are five cellar windows which have remained substantially unaltered since the building was erected. In front of each window is a walled area-way which extends from the wall the full width of the window, built of brick, existing at the time of defendant's purchase, and maintained and cleaned by him ever since. From time to time defendant broadened and deepened these, until now they extend some two feet beyond the boundary line of the defendant's property.

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Attached to the north wall of defendant's building, at a time unproved, and maintained by him, are two leaders extending perpendicularly from the ground and projecting a few inches northerly of said boundary line.

On or before August 13th, 1896, defendant, under order of the city of Hartford, erected a fire-escape which projected two and one half feet beyond this boundary line, and has since maintained this.

Prior to the commencement of this action, and after the fire-escape had been maintained for over fifteen years, the defendant disclaimed any right, title or interest in or to any of the land lying north of this boundary line.

The trial court concluded that the area-ways, fire-escape, and conductors, constituted encroachments upon the plaintiff's land, which had not existed so as to give the defendant a right to the same by prescription, adverse use, or otherwise.

Joseph P. Tuttle and *Albert C. Bill*, for the appellant (defendant).

Robert P. Butler and *Charles Sudarsky*, for the appellees (plaintiffs).

WHEELER, J. The first question for decision is the plaintiffs' motion that the evidence be expunged from the record, on the ground that the trial court viewed the premises. Its decision controls the correction of the finding asked for. The motion is based upon § 11, Practice Book (1908) page 269. It proceeds upon the theory that the case is one where it is impossible to certify up material evidence obtained upon such view, and hence, under a proper interpretation of the rule, none of the evidence will be so certified or considered upon appeal. The essential condition for the non-

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certification of the evidence under the rule is the finding of the trial court of the impossibility of certifying to the things seen upon the view. No statement of this character appears in the finding, nor do we understand how it could have been placed there. None but the exceptional case will fall within the rule. In the absence of a definite finding by the trial court that it is impossible to certify what he has seen on the view, we shall assume the contrary. The interpretation of the rule as sought by the plaintiffs, would make obligatory upon all litigants their refusal to consent to a view of the premises. Such view is occasionally helpful to a proper understanding of a complicated situation, or of a fact difficult of explanation by word of mouth alone.

The two rulings on evidence relate to the same class of testimony. The former attorney of the plaintiffs had, in their behalf, written the defendant relative to certain claimed encroachments upon the plaintiffs' premises. As a consequence, the defendant came to the attorney's office, and together they discussed the subject of these claimed encroachments with a view to an amicable settlement of the differences. The plaintiffs offered in evidence certain statements of the defendant, made in the course of this interview, as tending to prove that the defendant did not then claim any rights other than such as were determined by the regular boundary. The evidence of these statements was objected to, upon the ground that they were "offers of compromise." They were a part of the discussion relative to the subject of encroachments, and were as much a part of the effort at an amicable adjustment as any other part of the interview. As such they appear to have been inadmissible. But this evidence, if admitted, did not prove or tend to prove, as the court has found, that "the defendant disclaimed any right, title or interest in or to any land lying immediately north of

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said boundary line." In the course of the interview the plaintiffs claimed that the area-ways were encroachments, to which the defendant replied that he knew nothing as to that, because they were there when he first acquired the property. This position does not tend to prove a disclaimer, but, as we understand the evidence, the reverse. With this evidence out, we know of no evidence which would justify the finding of the disclaimer as stated in paragraph thirteen of the finding.

The evidence is undisputed that the defendant had been in undisputed possession ever since his purchase of the premises of that part of the air occupied by the fire-escape and of the space occupied by the swinging of the blinds. He was entitled to this finding as he requested, and, had he requested it, to the further finding that this possession was without the license or consent of the owners. With these findings, the conclusion would follow that the defendant had acquired the right by adverse possession to maintain the fire-escapes where they were, and to have the blinds swing as they had been accustomed to.

Upon these facts, read in connection with the finding, the ouster as to the fire-escapes and blinds was not of the possession of the soil, but only of the space above the soil. *Goodwin* v. *Bragaw*, 87 Conn. 31, 35, 86 Atl. 668.

The finding as to the area-way shows an exclusive possession of a part of it for over fifteen years, but how much this is does not appear. The clear weight of the evidence was that the area-ways had existed as they were ever since the defendant had owned the premises.

The correction asked for in paragraph nine of the draft-finding, so far as it relates to the area-way, is granted, to correspond with the evidence.

The finding does not cover as to these encroachments

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the facts constituting the elements of adverse possession, nor do the corrections asked for cover these. *Carney* v. *Hennessey*, 74 Conn. 107, 111, 49 Atl. 910.

Inasmuch as there must be a new trial, we do not at this time consider the corrections in the finding asked for relating to the conductor pipes and the flag walk.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

Clara Schmidt *vs.* The Town of Manchester.

First Judicial District, Hartford, March Term, 1918.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

In an action for a personal injury alleged to have been caused by a defective highway, the written notice to the town, dated October 2d, 1915, stated that the plaintiff, while walking along the sidewalk or side path on the north side of Hartford Road near the James Loomis place, so-called, on Tuesday evening, September 28th, stepped into a gully, which, as the plaintiff had been informed, had existed at that place for several months, and fell down, suffering severe sprains and breaking one or more of the ligaments of her foot. Upon a demurrer to this notice it was *held*:—

1. That the place, cause, and nature of the injury were sufficiently described, and that the statement as to the time, while not full and complete, was not so indefinite as to render it absolutely invalid, especially when read, as it must be, in connection with the date at the head of the notice.
2. That in determining the legal sufficiency of the notice, it was essential to consider the Act of 1917 (Chap. 66), which provides that certain unintentional inaccuracies, unless misleading, shall not invalidate the notice.

Courts take judicial notice of the coincidence of the days of the week with the days of the month, and of the latter with those of the year, and may refer to an almanac for this purpose.

Judicial notice takes the place of proof, and as a means of establishing facts it is superior to evidence.

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An error of the trial court, due to overlooking a material statute, is subject to review upon appeal, although the Act was not referred to by either party during the trial; for the court and also the litigants are conclusively presumed to know the law.

Argued March 7th—decided April 30th, 1918.

ACTION to recover damages for personal injuries alleged to have been caused by a defective highway, brought to the Superior Court in Hartford County where a demurrer to the complaint because of the insufficiency of the notice was sustained (*Burpee, J.*), and judgment was afterward rendered for the defendant (*Gager, J.*), from which the plaintiff appealed. *Error and new trial ordered.*

Herbert O. Bowers, for the appellant (plaintiff).

Olin R. Wood and *Alexander Arnott*, for the appellee (defendant).

RORABACK, J. The complaint in this case was demurred to upon the ground that it appeared that no sufficient notice descriptive of the plaintiff's injuries, and of the time, place and cause of their occurrence, was given as required by § 2020 of the General Statutes as amended by Chapter 168 of the Public Acts of 1909. The notice in question, signed by the plaintiff, reads as follows:—

"South Manchester, Conn., Oct. 2, 1915.

Town of Manchester,
South Manchester, Conn.

I hereby give you notice that on Tuesday evening, September 28th, while walking along the sidewalk or sidepath on the north side of Hartford Road near the James Loomis place, so called, I stepped into a gully which I am informed has been in existence at that place

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for several months, and sustained a fall. By reason of the fall I suffered severe sprains and one or more of the ligaments of my foot were broken. I am now under the care of Dr. Rice. I intend to claim damages therefor."

We may assume that there was but one sidewalk on the north side of the Hartford Road; therefore the notice necessarily implies that the place of the accident was upon the sidewalk on the north side of this Hartford Road. After this follows the statement that the plaintiff was injured near the James Loomis place. It does not appear that there was another person by that name thereabouts. The defect is described as a gully in the sidewalk which, it is indirectly stated, had been in existence for several months. Such a defect could have been easily identified, unless we are to assume that there were several such defects in that immediate vicinity. Thus we have the four facts which identify the place of the injuries, the name of the road, the side of this road, that it was near the residence of a certain individual, and a gully in the walk which had been in existence for months. This indicates clearly enough the place of the accident.

Counsel for the defendant contend that the cause of the accident is not stated in the notice with reasonable clearness. The substance of the statement upon this subject is that the plaintiff was injured by stepping into a gully in the sidewalk by reason of which she sustained a fall. These facts were sufficient to direct the attention of the town with reasonable certainty to the cause of the accident so that an intelligent investigation could be made by the officers of the town. This satisfied the spirit and purpose of the statute. *Delaney* v. *Waterbury & Milldale Tramway Co.*, 91 Conn. 177, 182–184, 99 Atl. 503.

The notice attacked states that as a result of the accident the plaintiff suffered severe sprains, one or

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more of the ligaments of her foot were broken, and that she was under the care of Dr. Rice. The defendant urges that this part of the notice is vague and uncertain. The purpose of such a notice is not to allege all the circumstances necessary to support an action, but to give to the municipality a general description of the injuries complained of. This has been done in the present case. *Cassidy* v. *Southbury*, 86 Conn. 45, 49, 50, 84 Atl. 291.

The notice is not full and complete as to the time of the accident, but not so indefinite as to render it absolutely invalid. It is dated October 2d, 1915, which was Saturday. It is stated that the plaintiff was injured on Tuesday evening, September 28th. An examination of the calendar shows that September 28th, 1915, was Tuesday. The notice should be interpreted as a whole, and when this is done its natural and ordinary meaning is that it related to an occurrence which happened four days before the date of the notice. Judicial notice takes the place of proof, and as a means of establishing facts it is superior to evidence. Thayer's Cases on Evidence (2d Ed.) 20, 21. Courts take cognizance as to the coincidence of the days of the week with the days of the month, and of the days of the month with those of the year, and an almanac may be referred to in this connection. 1 Chamberlayne on Evidence, §§ 704, 727. When this notice is so considered in its entirety, it is hardly conceivable that any person in the exercise of ordinary care and intelligence could have been misled as to the date of the accident because the notice failed to directly state that it occurred in 1915. In reaching the conclusion that this notice was not defective, we have considered a statute relating to this subject, enacted in 1917, which contains these provisions: "No notice given under the provisions of this section [General Statutes, § 2020] shall be held invalid or insufficient by reason of an inaccuracy in describing the injury, or in stating the

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time, place or cause of its occurrence, if it appear that there was no intention to mislead or that such town, city, corporation or borough was not in fact misled thereby." Public Acts of 1917, Chap. 66. This Act applied to pending cases and took effect upon its passage, which was March 28th, 1917. The record discloses that the decision by the court below upon the demurrer interposed by the defendant was rendered July 17th, 1917, about four months after this statute took effect. This Act, although retroactive, did not affect rights, but did embrace the mode of redress. The latter may properly be kept open for modification by statute. *Atwood* v. *Buckingham*, 78 Conn. 423, 426–429, 62 Atl. 616; *Hubbard* v. *New York, N. H. & H. R. Co.*, 70 Conn. 563, 565, 40 Atl. 533.

It does not appear that the Act of 1917 was brought to the attention of the Superior Court, nor that it was relied upon by the plaintiff. "It was, however, the law of the land, which the parties and the court were conclusively presumed to know. Errors arising from the absence of actual knowledge in such a case are always the subject of review." *Cunningham* v. *Cunningham*, 72 Conn. 157, 160, 44 Atl. 41; *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 751, 7 Sup. Ct. 757, 30 L. Ed. 825.

The omission to state in the body of the notice the year when the accident occurred does not warrant the defendant's claim that the notice was absolutely defective on this account. When the notice is read as a whole, as it should be, it cannot be fairly said that it now appears that there was any intention to mislead the town as to the time when this accident occurred, or that the town was in fact misled thereby.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

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EDWARD S. PLASIKOWSKI *vs.* JACOB ARBUS.

First Judicial District, Hartford, March Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

It is assumed that one who accepts employment as a chauffeur is familiar with the ordinary parts of an automobile, and is a competent driver. Accordingly, if the brakes on his car become defective and fail to hold, and because of such defect the car runs into and injures a pedestrian, the employer is not liable in damages to his employee for expenses incurred by the latter in defending himself against a prosecution for reckless driving and for assault and battery; for under such circumstances the defect in the brakes is at least as obvious to the operator as to the owner of the car, who therefore is under no legal obligation to warn the driver of the danger, nor to instruct him in matters which, it may fairly be supposed, he understands as well as if not better than his employer.

Argued March 8th—decided April 30th, 1918.

ACTION by a chauffeur against his employer to recover expenses incurred by the plaintiff in defending himself against a criminal charge of reckless driving and of injuring a pedestrian in the highway, a result alleged to be due to the insufficient and defective brakes upon the car, a fact alleged to be known to the defendant but not to the plaintiff, and for damages for the humiliation caused by the plaintiff's arrest and prosecution upon said charges,—brought to the Court of Common Pleas in Hartford County where a demurrer to the complaint was sustained and judgment rendered for the defendant (*Markham, J.*), from which the plaintiff appealed. *No error.*

The complaint in question, consisting of two counts, contains a statement of the facts upon which the plaintiff relies. The defendant, by demurrer, contends that these facts are insufficient to constitute a cause of action. The court below sustained the demurrer, and we are to inquire whether it erred in holding as it did.

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The material allegations of the first count, relied upon, are that in 1916 the defendant employed the plaintiff as a chauffeur to operate the defendant's automobile; that the plaintiff entered upon such employment and operated this automobile in various parts of Connecticut as directed by the defendant; that "when the plaintiff entered upon said employment and began to operate said automobile, the same was in such a defective condition that it was not only unsafe but dangerous to use the same in public streets or highways where there was any considerable travel, said condition being due to defective brakes which were wholly insufficient to enable the plaintiff or any operator to control said automobile, which condition was unknown to the plaintiff, but was well known to the defendant"; that "while operating the same in and through the Town of Cromwell, and because of the inability of the plaintiff to control said automobile, caused by the aforesaid defective condition of said automobile, the said automobile struck and seriously injured a female pedestrian"; that the plaintiff, by reason thereof, although he was wholly innocent, was charged by the State of Connecticut with reckless driving and with assault and battery; that he was compelled to and did employ an attorney to defend him and protect his rights, and that he necessarily expended for the fees of his attorney, stenographic fees, and transportation, the sum of $160. The allegations of the second count do not differ in substance from those of the first, except in claiming damages for the great humiliation suffered by the plaintiff on account of his arrest.

John J. Dwyer, for the appellant (plaintiff).

Birdsey E. Case, for the appellee (defendant).

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RORABACK, J. The cause of action in the case now before us is based upon the assumption that the defendant's negligence subjected the plaintiff to arrest, the expense of defending himself, and to humiliation caused by such arrest. As bearing upon this claim the plaintiff contends that "there was an implied contract on the part of the defendant to indemnify the plaintiff for his loss in defending himself, and for the damage otherwise sustained." An employer is under no obligation to warn an employee of dangers which are obvious, nor to instruct him in matters which he may fairly be supposed to understand. Nor is it the duty of the master to admonish his servant to be careful, when the servant knew or ought to have known the danger and the importance of using care to avoid it. *McGorty* v. *Southern New England Telephone Co.*, 69 Conn. 635, 643, 38 Atl. 359. As stated by Morton, J., in *Kenny* v. *Hingham Cordage Co.*, 168 Mass. 278, 282 (47 N. E. 117): "The question in each case is not whether the employee has actually observed and by a conscious act of the will assumed all of the risks involved, but whether the risks are incident to and naturally grow out of the employment in which he is engaged, and are such as, taking his age, intelligence, and experience into account, he must be held to have appreciated if he saw, and such as, if he did not see, he could have seen and understood if he had looked. If the risks are of this character, then they are said to be obvious, and the employee assumes them." See, also, *Hayden* v. *Smithville Mfg. Co.*, 29 Conn. 548. It appears that the plaintiff was not a boy placed by the defendant in the performance of labor with which he was unfamiliar. From the position which he occupied we must assume that he was a person faimliar with the ordinary parts of an automobile and that he was a competent operator. From information which the

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plaintiff's complaint affords, it appears that he had driven this particular automobile through various parts of Connecticut when it was in the same condition as on the day of the accident. The elements of danger upon which the plaintiff now relies must have been visible to him, and it cannot now be supposed that his management of this automobile at the time of the accident would have been affected by any information that the defendant could have given him as to the alleged defect. Much less could the defendant have had reason to believe that a man of the plaintiff's knowledge, skill and experience with his automobile, who knew or ought to have known much more about its brakes and the danger connected with the operation of the machine than the defendant, need be told of the possibility that some person might be injured because of the defect upon which the plaintiff now bases his cause of action. In other words, upon the most favorable view of the plaintiff's case which can be taken from his own statement of the facts, there was no information which the defendant could have imparted to the plaintiff which he did not already possess, or by ordinary observation could not have obtained. Under such circumstances, it was not the duty of the defendant to admonish the plaintiff of the danger which the plaintiff knew or should have known. Certainly there was nothing in the situation that was not as obvious to the plaintiff as it was to the defendant. The complaint, viewed in this aspect, shows it to be insufficient. It fails in not showing that there was any duty on the part of the defendant to notify the plaintiff of this alleged defect. It is clear from the plaintiff's own statement of his case that the danger upon which he now relies was an obvious risk, incident to his employment by the defendant, and as such was assumed by the plaintiff.

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There are several other important questions suggested by the demurrer which do not now require our consideration.

There is no error.

In this opinion the other judges concurred.

ARTHUR A. GREENHILL *vs.* THE CONNECTICUT COMPANY.

* First Judicial District, Hartford, March Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

A verdict is properly directed where the conclusion reached is the only one to which the jury could reasonably have come upon the evidence before them.

In the present case the plaintiff sought to recover damages for personal injuries caused by a collision between his automobile and a trolley-car. *Held* that the evidence, viewed in the most favorable light for the plaintiff, would not have warranted the jury in reaching a conclusion that he was free from contributory negligence at the time of the collision, and that there was therefore no error in directing a verdict for the defendant.

Argued March 8th—decided April 30th, 1918.

ACTION to recover damages for personal injuries alleged to have been caused by the defendant's negligence, brought to the Superior Court in Fairfield County and tried to the jury before *Bennett, J.;* the trial judge, upon motion of the defendant, directed a verdict in its favor, and from the judgment thereon the plaintiff appealed. *No error.*

Philo C. Calhoun, for the appellant (plaintiff).

Joseph F. Berry, for the appellee (defendant).

* Transferred from third judicial district.

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PER CURIAM. The testimony of the plaintiff, supported by that of the other witnesses offered in his behalf, was to the following effect: The injuries, of which he complains, were sustained by him by reason of a collision between an automobile, which he was operating, and a trolley-car operated by the defendant. The collision occurred in the night season at or near the junction of Connecticut and Stratford avenues in the town of Stratford near the Bridgeport line. The plaintiff was proceeding eastward along Connecticut Avenue toward the junction, on his way to his home in Stratford. The trolley-car was proceeding in the opposite direction. Its route from Stratford extended along Stratford Avenue to the point where Connecticut Avenue joins it, and then followed Stratford Avenue as it swings to the south and continued for some distance southerly of Connecticut Avenue, upon which there were no tracks. The tracks on Stratford Avenue, as they approach Connecticut Avenue from the east, were laid in a curve having a four hundred foot radius and did not present a straight-a-way appearance to a traveler on the latter avenue. The natural and proper course for vehicles proceeding along Connecticut Avenue in the direction of Stratford led them across the trolley-tracks at the junction of the two avenues, in order that they might gain the right side of Stratford Avenue. The plaintiff, as he approached the junction, was intending to take this course, and was going at a moderate rate of speed, estimated by him at from ten to twelve miles an hour. When he was four hundred feet away from the point of crossing he saw a lighted trolley-car carrying an arc headlight, approaching from the east and about one thousand feet on the other side of the crossing. The car was proceeding at a speed of about fifteen miles an hour. When he reached a point about one hundred feet from the crossing the car was still visible and appeared to him,

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as he testified, to be about five hundred feet away and standing still. He continued on, and when he had arrived at a point about twenty-five feet from the crossing he looked and saw the car in what seemed to him to be an unchanged position. He still continued to go forward to cross the tracks, proceeding at the somewhat lessened speed of about ten miles an hour, when his automobile, while upon the tracks, was struck. He was neither blinded, nor prevented from seeing the road and where he was going, by the car's headlight. There was nothing to obstruct his clear view of the car at any time after he first saw it. When he was twenty-five feet away from the tracks he could easily have stopped his automobile before reaching them.

Under these conditions, which are those disclosed by the evidence most favorable to the plaintiff, it was not reasonably open to the jury to find that the plaintiff had succeeded in establishing that he was free from contributory negligence. On the other hand, the conclusion was inevitable that he either failed to make reasonable use of his senses to ascertain the position and movement of the car, whose approach was known to him, or, having made such use, either neglected to exercise common prudence in reasonably conforming his conduct to the conditions his observations must have disclosed to him, or was reckless in his endeavor to beat the car in making the crossing.

In view of this conclusion, it is unnecessary to inquire whether or not, upon the evidence, the jury might reasonably have found that the defendant was guilty of negligence.

There is no error.

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MARY SARACENO *vs.* ANTONIO R. CARRANO.

First Judicial District, Hartford, March Term, 1918.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

An option to purchase land for a given sum if the owner desires or elects to sell it for that amount, is of but little value as a contract, since it cannot be enforced by either party against the will of the other.

An option to purchase land under an absolute agreement to sell must be exercised within a reasonable time, if no time is prescribed in the agreement; and the same rule applies to an owner who has the option to sell or not.

An owner will be presumed to have elected not to sell his property after refusing to part with it for nine years or more.

In the present case the plaintiff agreed to convey her land to the defendant for $11,200 when she might "elect" to do so, "meaning and intending to give to" the defendant "the option upon the purchase of said property, if" the plaintiff "at any time should desire to sell said property." *Held* that this created a double option: a promise to sell at the plaintiff's option to the defendant at his option; that such an agreement was manifestly unenforceable either by an action for specific performance or for damages for its breach, unless the plaintiff elected to sell and the defendant to buy at the same time; and that inasmuch as the plaintiff had retained her property for nine years or more, it would be presumed that she had made her choice and elected not to sell.

In all contracts to convey property at the option of the buyer or the seller, time is of the essence of the agreement.

Argued March 8th—decided May 8th, 1918.

ACTION to quiet the title to real estate and to remove an alleged cloud upon the plaintiff's title, brought to and tried by the Superior Court in Hartford County, *Gager, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiff. *Error.*

The trial court has found these facts. On December 26th, 1907, the plaintiff and her son, being at that time the owners of the real estate described in the substituted complaint, made a contract with the defendant, agreeing to convey to him the said real property for the sum

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of $11,200, on or before January 10th, 1908, and the defendant paid to the plaintiff and her son $500, as part of the purchase price. On January 10th, 1908, the parties to the contract, with their lawyers, met at the office of a real-estate broker. The defendant desired the conveyance to be completed as agreed, and was ready and willing to pay the price in the manner stated in the contract, but upon the request of the plaintiff, and wholly by reason of such request, the defendant released the plaintiff and her son from the agreement to sell. The plaintiff paid to the defendant $500, the amount paid her on December 26th, 1907, and in addition thereto the sum of $500 as damages for the plaintiff's failure to perform her contract, and the defendant gave a written receipt for the same.

Thereupon the plaintiff, with her son, made another agreement, in which they obligated themselves, in substance, as follows: that they would convey the property described to the defendant "at any future time" when they, the plaintiff and her son, "may elect." The agreement, after prescribing the manner in which payment of the purchase price should be made, further stipulated that the defendant should pay the cost of any substantial improvements made upon the buildings on the property, in case the plaintiff should sell. The agreement then concludes as follows: "Meaning and intending hereby to give to the said A. R. Carrano the option upon the purchase of said property, if said parties of the first part [the plaintiff and her son] at any time should desire to sell said property."

This agreement was signed only by the plaintiff and her son, and was recorded in the land records of Hartford by the defendant. The defendant, at the same time, made another agreement, stipulating in substance that if the plaintiff and her son should convey to him the property described within one month from

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date, he would return to the plaintiff $200, or the sum of $100 if the property was conveyed to him in two months from date. Shortly after these agreements were made the plaintiff purchased her son's interest in the property and it was conveyed to her. The trial court held that the plaintiff was obligated to sell her property to the defendant for $11,200 if she desired or elected to sell it at any time during her life.

John T. Robinson, for the appellant (plaintiff).

Ralph O. Wells, for the appellee (defendant).

SHUMWAY, J. The agreement made by the plaintiff is one which cannot correctly be defined as a bond conditioned to convey real estate, nor as an agreement to convey; and possibly, strictly speaking, not even as an agreement to sell the property named at the option of the defendant. The agreement, appearing in the record as Exhibit C, in form is like a bond without penalty, but, however, containing an agreement to convey the property whenever the plaintiff should "elect" to do so. It appears that whatever the parties had in mind, it was put into apt and clear language in the final sentence of the document, as follows: "Meaning and intending hereby to give to the said A. R. Carrano the option upon the purchase of said property, if said parties of the first part at any time should desire to sell said property." The only meaning of this language is that the defendant could purchase the property if he so desired for $11,200, if at the same time the plaintiff desired to sell the property at that price. Thus was created a double option, a promise on the part of the plaintiff to sell the property at her option to the defendant at his option. It is manifest that an agreement of this kind is one which neither party can

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enforce, either by an action for specific performance or by compensation in damages for its breach, unless the plaintiff elected to sell and the defendant elected to buy at the same time. No court would attempt to order the plaintiff to elect to sell or to give the defendant damages for her failure to so elect. In a Kentucky case, *Magoffin* v. *Holt*, 1 Duv. (62 Ky.) 95, it was held that an agreement to purchase land at the election of the owner was the counterpart of an agreement by the owner to sell at the election of the buyer, and that the rules governing the two agreements were substantially the same. There is no good reason why this should not be the rule. In this case there is no agreement by the defendant to purchase even if the plaintiff elects to sell. How much more potent the reason that the plaintiff should have the right to avail herself of any privilege that the law gives in making her election, either to sell or not to sell. In the case of an absolute agreement to sell at the option of the purchaser, if no time is mentioned within which the choice is to be made, it is the law that the option must be exercised within a reasonable time. That the parties themselves did not contemplate that the agreement was one which bound the plaintiff to sell her property to the defendant for $11,200, if at any time during her life she desired to sell, irrespective of its value at the time she might entertain the desire to sell, is apparent from the agreement, Exhibit D, in the record. The plaintiff had paid the defendant $500 to be released from her agreement of December 26th, 1907. This sum was received by him in full payment and satisfaction of the damages he had sustained by reason of the nonperformance of the plaintiff's contract. The defendant thereupon agreed, in case the plaintiff elected to sell the property to him within one month, to return $200 of the amount received, and in case she elected to convey the

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property to him within two months, to return $100. It is not unreasonable to infer that the parties at that time understood that if the plaintiff did not elect to sell the property within two months, it might be considered as the exercise of her right to elect not to sell the property for $11,200 to any one. In all contracts to convey property, at the option of the buyer or the seller, time is the essence of the agreement, and it would be unreasonable to hold that the plaintiff could not, during her lifetime, exercise her right not to sell, and at the same time, if she had agreed to sell the property at the defendant's option, that such option must be exercised by the defendant within a reasonable time.

The plaintiff had a right to elect not to sell her property for $11,200. The defendant acquired no right beyond the privilege of purchasing if the plaintiff elected to sell, for the price named, and after the lapse of nine years it is to be presumed that she made the choice and elected not to sell. The agreement, therefore, has no longer any effect or validity.

There is error, the judgment is set aside and the Superior Court is directed to render judgment cancelling the agreement Exhibit C and discharging the plaintiff's property of all incumbrance or liens by reason thereof.

In this opinion the other judges concurred.

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THE ASTON MOTOR CAR COMPANY *vs.* THOMAS MANNION.

Third Judicial District, Bridgeport, April Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

A re-enactment of certain portions only of an existing statute, in an amending Act which purports to be a substitute for the former, effectually repeals the provisions of the original Act which are omitted from the substitute.

The right of appeal from the City Court of Bridgeport to the Court of Common Pleas, given by § 119 of the city charter (15 Special Laws, p. 493), was repealed by the omission of that provision from the Act of 1917 (17 Special Laws, p. 1005) amending that section of the charter.

Argued April 10th—decided May 8th, 1918.

APPEAL by the defendant from a judgment of the Court of Common Pleas in Fairfield County, *Booth, J.*, erasing from the docket for want of jurisdiction an appeal to that court by the defendant from an adverse judgment of the City Court of Bridgeport. *No error.*

Section 119 of the charter of the City of Bridgeport, as revised in 1907 (15 Special Laws, p. 493), provided for the existence of a City Court, fixed its jurisdiction, prescribed its procedure, and defined the rights of the parties litigant therein. Among other things it provided that an appeal might be taken to the Court of Common Pleas for Fairfield County, at its next return day, from any judgment or decree of the court except one following a jury trial. In this particular the charter remained unchanged until the 1917 session of the General Assembly. At that session § 119 was amended to read as recited in the amending Act. In its amended form that portion of the original section above referred to, which gave the right of appeal from a judgment or decree rendered, was entirely eliminated and no pro-

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vision authorizing such appeal appears in it. This amendment took effect before the present attempt to take an appeal was made.

John A. Cornell, Jr., for the appellant (defendant).

John Smith, for the appellee (plaintiff).

PER CURIAM. The amendment of 1917 substituted § 119, as therein recited, for the section as it had previously existed. Those portions of the original section which were omitted from the section in its new form, ceased to be the law and were as effectually repealed as it was possible to accomplish a repeal. The defendant's attempted appeal was, therefore, without authority, and conferred upon the Court of Common Pleas no jurisdiction over the case.

There is no error.

ISAAC L. TROWBRIDGE *vs.* THE JEFFERSON AUTO COMPANY.

Third Judicial District, Bridgeport, April Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

A valid contract can be abrogated or modified only with the consent of both parties.

An unequivocal refusal to perform a contract unless the other party, who is not in default, will consent to a modification of its terms, is a breach for which damages are recoverable.

Such a repudiation excuses the other party from making a tender, and authorizes him to treat the agreement as rescinded and to sue in damages.

The defendant sold and agreed to deliver a new automobile to the plaintiff for $1,295, and credited him with $400 for his old car which it received. Later it refused to deliver the new car unless the plain-

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tiff would accept $250 for the old one, which he declined to do. *Held:*—

1. That the defendant's refusal was without justification, and that under the circumstances the plaintiff was excused from tendering the balance of the purchase price before rescinding the contract and suing for damages.
2. That inasmuch as the controlling issue upon the trial was whether the defendant had broken its contract, the fact that the plaintiff might have bought a car from a relative of his and saved payment of the commission, was not a relevant or material subject of inquiry, and the exclusion of a question upon the plaintiff's cross-examination, directed to that end, was not a sufficient reason to interfere with a judgment for the plaintiff.

Argued April 9th—decided May 28th, 1918.

ACTION to recover damages for an alleged breach of contract to deliver an automobile, brought to and tried by the District Court of Waterbury, *Makepeace, Deputy-Judge;* facts found and judgment rendered for the plaintiff for $419, and appeal by the defendant. *No error.*

This action was brought to recover damages from the defendant for its failure to deliver an automobile according to the terms of a written contract entered into between the parties, a copy of which was made a part of the plaintiff's complaint. This agreement was dated January 11th, 1916, and signed by the parties. The essential portion of the agreement is as follows:—

"Jefferson Auto Company:

"You are hereby authorized to enter my order for one Paige model 6–46 Fairfield with standard factory equipment, for which I agree to pay the sum of twelve hundred and ninety-five dollars ($1,295) F. O. B. factory. I agree to deliver my Interstate touring car at once as part payment, valued at four hundred dollars ($400), as initial payment that this order may take effect immediately.

"I agree to pay the balance, together with freight and charges for extras, when notified that car is ready,

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for delivery. Notice may be sent by mail to the address given below.

"The initial payment shall be forfeited as liquidated damages if subsequent payment is not made within two days of notice that the car is ready for delivery.

"Payment of the above initial payment and balance of final payment, together with freight and cost of extras, entitles me to the Paige car scheduled for delivery from the factory, on or about February 1, 1916, subject to any delays from causes beyond the control of the Jefferson Auto Company. It is understood that this car is sold under the warranty of the factory, as published by them.

"I hereby agree that your liability for failure to deliver within a reasonable time is hereby limited to the return of the initial payment hereby paid.

"It is expressly agreed in the event this order is cancelled because of your inability to deliver, any second-hand car which may have been taken in exchange in part payment of purchase price and sold by the Jefferson Auto Company, previous to such cancellation, shall be accounted for by it at the price sold, less cost of handling, and not at the price which may have been allowed for same in exchange. . . .

I. L. Trowbridge, Purchaser.

Price of car	$1,295.00
Price of extras:	
Freight	47.00
	$1,342.00
Initial payment by old car	400.00
Balance due	$942.00

"Order and initial payment received this 11th day of January, 1916.

"Jefferson Auto Company, Per E. E. Guilbert, Salesman."

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The plaintiff's complaint alleges that he was ready and willing to perform his part of the agreement, and a breach of it by the defendant in failing to deliver the Paige car mentioned in the contract, although it had the ownership of the plaintiff's car since the contract was made, January 11th, 1916, and although the plaintiff had demanded payment for his car.

The answer admitted the execution of the contract and denied all the other allegations of the plaintiff's complaint.

The defendant also filed a counterclaim in which it averred that the plaintiff's car was not in the same condition when it was delivered to it as it was when the contract was made; that on February 12th, 1916, it tendered to the plaintiff the car described in the contract which was sold to him, but the plaintiff refused to take it and pay for the same.

The trial court found all the issues for the plaintiff, and rendered judgment that he recover the price of his car as agreed upon in the written contract.

The special finding of facts shows that on February 16th, 1916, the defendant's manager called the plaintiff on the telephone and notified him that the Interstate car for which he was allowed $400 was only worth $250, and that unless he would agree to this allowance the defendant would not carry out the contract, and that the plaintiff was to come and get his old Interstate car. The plaintiff declined to discuss the matter over the telephone and advised the defendant's manager to write him a letter. In reply to this, the defendant wrote to the plaintiff, advising him that it would not allow but $250 on his Interstate car; that unless the plaintiff would take the Paige car with such allowance, the defendant would call the deal entirely off and hold the Interstate car at the plaintiff's disposal.

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John J. O'Neill, for the appellant (defendant).

Clayton L. Klein, for the appellee (plaintiff).

RORABACK, J. The pleadings and finding show that the defendant has not only broken its contract, but has refused to go on further with it unless the plaintiff would consent to a very material reduction of the contract price that he was to receive for his old car. It is a familiar principle of law that a valid contract cannot be abrogated or modified unless both parties assent, and if one of the parties, when the other is not in default, manifests in unequivocal language his intention not to perform the contract unless it is modified, he breaches the contract, and is liable therefor.

As we have seen, the complaint alleges the execution and delivery of the contract. This contract contains a description of both cars and the prices agreed upon for them. It also contains a statement that the initial payment of $400, agreed upon as the price of the plaintiff's car, had been received by the defendant at the time of the execution of the contract. This the defendant, by reason of its answer, concedes to be true. Thus it appears by the admitted facts that it was incumbent upon the defendant to notify the plaintiff when its car was ready for delivery. By the terms of the contract the plaintiff was then to be allowed two days within which to make payment of the balance due as the exchange price of the cars. But it appears that no such notice was given, and that the defendant absolutely refused to perform its contract unless the plaintiff would agree to take $250 for his old car. If read in the light of what has gone before, this was such a repudiation of its agreement by the defendant that it not only excused the plaintiff from making a tender, but also authorized the plaintiff to rescind

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the contract upon his part and bring an action for his damages.

But it is suggested by the defendant that it does not appear that the plaintiff was ready and willing to perform his part. It does appear, however, that the plaintiff, when this notification was given to him by the defendant, had delivered his car and that the defendant had examined and accepted it for the sum of $400 in part payment for the new car. The plaintiff was personally bound by his contract to pay the balance then unpaid, and the proper way for the defendant to have tested the willingness of the plaintiff to pay was to have tendered performance upon its part in conformity with the terms of the contract. This it failed to do. In this connection it may be noticed that upon the trial the defendant claimed that on January 12th, 1916, when the Interstate car was left at its place at Waterbury, it was not in the same condition as when the allowance of $400 in exchange was fixed, and as the plaintiff admitted some damage, for which he agreed to pay, it was the duty of the plaintiff to get together with the defendant and adjust the amount of damage if possible. The court properly overruled this claim. It is not found, neither does it appear, that any such change in the plaintiff's car took place; and further than this, it is not shown that the defendant ever made any such claim to the plaintiff before it absolutely refused to perform its contract unless the plaintiff would consent to a very material change in the price agreed upon for his car. Upon this point the defendant has moved to correct the finding, so that it would sustain the defendant's claim just noticed as to the change in the condition of the plaintiff's car. The record discloses that the question as to the change of the condition of the plaintiff's car was raised by the defendant in its counterclaim. The averments of the defendant's counterclaim upon

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this branch of the case were denied by the plaintiff, and under the issue thus presented the defendant assumed the burden of proof to establish this proposition. This it failed to do. An examination of the evidence which the defendant has caused to be certified by the court below upon this subject, when read in connection with the finding, falls far short of establishing the defendant's contention in this respect. It necessarily follows that this motion to correct should be denied.

Upon his cross-examination the plaintiff was asked whether his son-in-law, a man by the name of Lindsley, had an arrangement with the Bradford Auto Company for a special agency for Paige cars of the same make as the one now in question. On objection this question was excluded. It does not appear that this question was answered, although the defendant claimed that the purpose of asking it was to show that the plaintiff did not want to carry out his contract, and that his motive in taking this position was that after making the agreement with the defendant he made another arrangement for a car with his son-in-law so that he could save the agent's commission in the purchase price of a car. The controlling issue in the trial of the case in the court below was whether the defendant had broken its contract by refusing to deliver its car unless the plaintiff would consent to accept a reduced price for his automobile. This question depended upon the written contract between the parties and the action of the defendant shown in its letter, in which it absolutely refused to perform on its part unless the plaintiff would consent to a very material modification of the terms of the written contract. This, as we have already stated, was for unjustifiable reasons. If the plaintiff had a son-in-law engaged in the sale of automobiles, and it appeared that Trowbridge could have saved the agent's commission by making a purchase of this relative, this

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fact would not, under the circumstances of the present case, have justified the defendant in its refusal to perform upon its part. This ruling is therefore insufficient to warrant an interference with the judgment.

There is no error.

In this opinion the other judges concurred.

Lydia C. Flint *vs.* The Connecticut Hassam Paving Company.

Third Judicial District, Bridgeport, April Term, 1918.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

The duty which one personally injured through the negligence of another, owes to the latter, is not merely to act in good faith in procuring medical advice and treatment—as the jury were instructed in the present case—, but the exercise of ordinary care in efforts to effect a cure. Such an instruction is harmless, however, if it appears that the plaintiff did all that careful and prudent conduct required in consulting a physician of good standing and in following his advice as to treatment.

The trial court excluded a question as to whether the street at the place of the accident was unlighted on other nights than the one on which the plaintiff was injured. *Held* that so far as appeared from the record this ruling was correct, the condition of the highway as to lights on other evenings not being material; and that a similar inquiry was properly excluded with respect to the conditions of lights between the date of the injury and the time of the trial.

Rulings upon questions of evidence resting in the discretion of the trial court, even if erroneous, cannot be made the ground for a new trial.

Argued April 9th—decided May 28th, 1918.

Action to recover damages for personal injuries alleged to have been caused by the defendant's negligence, brought to the Superior Court in New Haven County and tried to the jury before *Reed, J.;* verdict

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and judgment for the plaintiff for $1,500, and appeal by the defendant. *No error.*

Seymour C. Loomis, for the appellant (defendant).

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

SHUMWAY, J. The claimed error of the court in the charge to the jury is contained in the following paragraph taken from the charge, where the court was dealing with the question of damages: "In arriving at the amount of your verdict you should make no deductions on any theory that she [the plaintiff] might have been cured earlier by different treatment. For, if you find that she, in good faith, employed such medical aid as she thought suitable and endeavored to cure herself, it makes no difference whether she used the best methods in such endeavor to cure herself or not. She should not suffer anything or any loss, even if you come to the conclusion that another kind of medical treatment might have effected a cure."

The plaintiff on the trial had offered evidence that she had sustained injuries which were permanent; that as soon as possible after the infliction of her injury she had procured medical treatment from a physician and surgeon in good standing and long experience, and that she had followed his advice and taken his treatment. The defendant offered evidence that the "plaintiff did not act with reasonable care endeavoring to cure herself of her injuries, but that had she received proper treatment she would have recovered much sooner."

It is contended by the defendant that the court should have left to the jury, as a question of fact, whether the plaintiff had exercised ordinary care in her efforts to effect a cure. It is true that it was the duty of the plaintiff to use ordinary care to cure and restore

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herself, and that reckless or negligent conduct on her part, if thereby her injuries were enhanced, cannot be charged to the defendant. The charge was erroneous but harmless. It does not appear that the defendant requested the court to give the jury any instructions upon this question, nor does it appear what act of omission or commission on the part of the plaintiff by which her cure was retarded, was imprudent or negligent, but, on the contrary, it does appear that she did do all that careful and prudent conduct required in consulting a physician of good standing and following his advice as to treatment. It does not seem that the jury could have been misled by the charge, though as an abstract proposition it is the law that it was not a question of good faith on the part of the plaintiff, but one of ordinary care. But the court correctly informed the jury that no diminution of damages should be made if some other "kind of medical treatment might have effected a cure," that is, always upon the condition that the plaintiff exercised ordinary care in selecting a physician and the treatment she was to follow.

There are, in the reasons of appeal, five alleged errors of the court in admitting and excluding evidence. It appears that one of the questions in the case was whether the street, when the plaintiff received her injuries, was properly lighted, and the witness Rees was asked if on other nights than the one on which the plaintiff was injured he had seen the street unlighted. This question was properly excluded, as the condition of the highway as to lights on other evenings was not material, so far as appears by the record. The question asked of the witness Sucher does not appear to be material. Sucher was superintendent of gas distribution in New Haven, and he was asked whether or not there had been any perceptible difference in the light from October 17th, 1916, up to the present time.

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This question was properly excluded, as the condition of the light during the interval between the date of the injuries, October 17th, 1916, and the time of the trial, November, 1917, does not appear to be in any manner material. The questions ruled in during the cross-examination of the witnesses Harriet M. Bradley, Nicholas Patiano, and Frederick F. Budd, were questions the admission of which was in the discretion of the court. The ruling does not appear to be erroneous, but if erroneous cannot be made the ground for a new trial.

There is no error.

In this opinion the other judges concurred.

Nellie Smith *vs.* Benedict E. Hausdorf.

Third Judicial District, Bridgeport, April Term, 1918.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

Assignments of error which are not pursued by the appellant may be treated as waived.

To entitle alleged errors to consideration by this court they should be "specifically" assigned, as provided by § 802 of the General Statutes; and therefore an assignment to the effect that the charge was inadequate for the guidance of the jury in reaching their verdict, is too vague and general to merit attention.

A judge in his charge may, at his discretion, comment upon the evidence and express his opinion as to its weight, provided he leaves all questions of fact to be determined by the jury as they see fit, without direction or restraint; and the exercise of such discretion, unless abused, will not be reviewed by this court upon appeal.

A plaintiff's witness was asked if he told some one that the stairway upon which the plaintiff had fallen was defective. *Held* that this called for an answer which was plainly hearsay, and that the question was properly excluded.

A statement as to what caused the accident, made by the plaintiff to her physician, is a mere narrative of a past event and objectionable as hearsay.

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Whether a photograph is a correct representation of the premises as they appeared at the time of the accident, is a preliminary question of fact to be decided by the trial judge before the admission of the photograph in evidence.

In the present case the alleged defective stairway had been fixed up or repaired before the picture was taken, and the trial court excluded the photograph. *Held* that it could not be said there was error in such ruling.

Submitted on briefs April 9th—decided May 28th, 1918.

ACTION by a tenant against her landlord to recover damages for personal injuries alleged to have been caused by his negligence in failing to repair a decayed and defective common stairway, brought to the Superior Court in New Haven County and tried to the jury before *Bennett, J.;* verdict and judgment for the defendant, and appeal by the plaintiff. *No error.*

The defendant owned a tenement house in the city of Waterbury, with stairs leading to the second floor of the house from the door-yard. The plaintiff, a tenant, with another family, occupied the second floor of this house, and both used the stairway as the only means of passing between their apartments and the yard. The plaintiff alleges that the stairs leading from the ground to the house at the entrance on the side were broken, out of repair, dangerous and defective, and that this condition was known or ought to have been known to the defendant; that on a certain day the plaintiff left her tenement on the second floor and was proceeding down these steps when, in the exercise of due care, in stepping upon one of these stairs, it gave way and precipitated her down to the ground, and that she suffered, as a result of this fall, many severe and painful bruises about the limbs and body.

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

Francis P. Guilfoile, for the appellee (defendant).

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RORABACK, J. The action of the trial court in refusing to charge as requested, in the charge as given, and in its rulings upon the admission of evidence, were assigned as errors by the defendant. Eight of the assignments of error, relating to the refusal of the court below to charge as requested, were not pursued and may be treated as waived. By the ninth assignment, the plaintiff contends that the charge was insufficient in law for the guidance of the jury in reaching a verdict. This assignment is too general, and raises no question we are bound to consider. General Statutes, § 802. It may also be stated, in relation to this assignment, that the record discloses that the charge as it was given presented the issues raised by the pleadings in a plain, concise and proper manner, that the law relating to these issues was fully and correctly stated, and was amply sufficient for the guidance of the jury.

The principal contention of the plaintiff was that the charge was argumentative, that the court was unfair in its comments upon the evidence, and that in several parts of the charge, pointed out in the appeal, the judge usurped the province of the jury. It is well settled by this court that a judge in his charge to the jury may comment upon and express his opinion on the weight of the evidence, provided all questions of fact are left to the jury without any direction by the court as to how the same shall be determined. Upon this point it is only necessary for us to refer to two or three recent cases in which the comments of the court on matters of fact were more strongly expressed than in the present case. *Dick* v. *Colonial Trust Co.*, 88 Conn. 93, 89 Atl. 907; *Temple* v. *Gilbert*, 86 Conn. 335, 85 Atl. 380; *Crotty* v. *Danbury*, 79 Conn. 380, 65 Atl. 147. This power of comment is to be exercised at the discretion of the trial court, and its action will not be reviewed by us upon appeal unless such discretion has been abused. It ap-

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pears from the record in the present case that the trial judge submitted all of the questions of fact to the jury without any direction as to how they should find the facts, and there is nothing to indicate any abuse of his discretion in his method of presenting the case to the jury.

A witness called by the plaintiff was asked if he told an Italian family that the stairs were bad, and the girl telephoned to the landlord. This was objected to and excluded. It is sufficient to justify this ruling that the question called for an answer which was plainly hearsay.

A doctor called by the plaintiff was asked if, when he first went to the plaintiff's house, he inquired of her as to the injuries she had received. This was objected to, and claimed by counsel for the plaintiff upon the ground that he wanted "to show what was the cause of the injury, if the lady told him at the time, just what produced the injury we are claiming damages for, we are entitled to it." This question was properly excluded. It called for the narration of a past event which was clearly objectionable as hearsay. *McCarrick* v. *Kealy*, 70 Conn. 642, 645, 40 Atl. 603.

There was no error in the exclusion of a certain photograph of the stairway in question, offered in evidence by the plaintiff. The photographer who made it testified that after the accident he fixed up the broken stairway with boards that he found nearby, and then photographed these stairs as they then appeared. The sufficient verification of a photograph is a preliminary question of fact to be decided by the trial judge. Its value as evidence may depend upon extraneous circumstances. *McGar* v. *Bristol*, 71 Conn. 652, 42 Atl. 1000. Its accuracy must have been shown before it could have been properly admitted. From the facts disclosed by the record this was a matter for the trial court. We certainly cannot say that this photograph was a correct

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representation of these stairs at the time the plaintiff was injured. *Cunningham* v. *Fair Haven & Westville R. Co.*, 72 Conn. 244, 249, 250, 43 Atl. 1047.

There is no error.

In this opinion the other judges concurred.

THE STATE OF CONNECTICUT *vs.* PHILIP SHIFFRIN.

Third Judicial District, Bridgeport, April Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Public-service automobiles are required by § 24 of Chapter 333 of the Public Acts of 1917, to display distinctive number-plates and to have interior lights; and § 1 of the same Act prescribes that a public-service automobile shall include any motor-vehicle operated as a jitney, "and any motor vehicle used for the purpose of soliciting and receiving passengers upon any public highway and carrying such passengers upon the payment of an individual fare." *Held* that upon a prosecution for a violation of § 24, it was incumbent upon the State to prove that the automobile in question, not being a jitney, was used for the purpose of soliciting, receiving and carrying passengers for hire; and that an instruction that it was enough for the State to show merely that the accused had accepted and carried a passenger for hire, was erroneous and prejudicial.

Solicitation need not be evidenced by the voice, nor involve importunity or personal persuasion: any acts or conduct intended and calculated to invite the patronage of expectant passengers amounts to solicitation, as that term is used in the statute.

Argued April 10th—decided May 28th, 1918.

INFORMATION for a violation of the motor-vehicle law, brought to the Criminal Court of Common Pleas in New Haven County and tried to the jury before *Simpson, J.;* verdict and judgment of guilty, and appeal by the defendant. *Error and new trial ordered.*

The evidence in this case was confined to that given on behalf of the State by a deputy automobile inspector.

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That portion of his testimony which concerned the public-service character of the automobile which the accused was operating, was to the effect that on the evening of December 20th, 1917, at about six-thirty o'clock, he observed it standing near the curb in a portion of College Street in New Haven which had been officially designated as a public stand for motor-vehicles, hacks, express wagons, and so forth; that the accused was standing on the sidewalk beside it; that the witness thereupon approached the accused, then personally unknown to him, and asked him if he would take the witness down to the station as a public-service driver; that the accused replied in the affirmative; that the witness then entered the accused's automobile, which was forthwith driven by him in the direction of the station; that after proceeding about two blocks the witness changed his destination, and that after reaching the latter he alighted from the car and paid the regular fare of fifty cents, which the accused accepted.

Arthur B. O'Keefe, for the appellant (defendant).

Edwin S. Pickett, Prosecuting Attorney, for the appellee (the State).

PRENTICE, C. J. The defendant was convicted upon an information which charged him with operating a public-service motor-vehicle without complying with the requirements of § 24 of Chapter 333 of the Public Acts of 1917 concerning the display of the public-service registration number-plates, and the maintenance of interior lights. That there was noncompliance with these requirements was not denied. The defense was that the motor-vehicle which the accused was operating was not operated as a public-service one within the meaning of the statute.

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The Act, in its first section, contains a definition of terms employed in it. Among these definitions is one of public-service motor-vehicles, which, it is said, "shall include any motor vehicle operated as a jitney and any motor vehicle used for the purpose of soliciting and receiving passengers upon any public highway and carrying such passengers upon the payment of an individual fare, but not including omnibuses running regularly between railway stations or boat-landings and hotels."

The court instructed the jury that by force of this definition a motor-vehicle was to be regarded as having a public-service character, and therefore subject to the regulations and requirements of § 24, which was operated either as a jitney, or for the purpose of soliciting and receiving passengers upon a public highway, or for carrying passengers upon the payment of an individual fare. This instruction was supplemented by the further one, that the State did not claim that there was proof either that the accused was using his car as a jitney, or that he had solicited passengers therefor, and that, therefore, the statute, in so far as it dealt with those conditions, might be dismissed from consideration. The jury were then told that the claim of the State was that it had established that the accused did accept and carry a passenger for hire, and that if such fact was found by them to have been proven they were justified in finding that he was operating a public-service vehicle. Under the evidence offered by the State and uncontradicted, this was equivalent to an instruction that a verdict of conviction should be returned upon no other proof than that the accused had carried a passenger for hire.

These instructions were founded upon a mistaken interpretation of the language of the statute defining public-service motor-vehicles. That language, in its

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first portion, brings all motor-vehicles operated as jitneys within the public-service class. In its second portion it extends and elaborates the definition, so that all motor-vehicles, whether properly termed jitneys or not—save only an excepted class with which we are not now concerned—which are used for the purpose of soliciting and receiving passengers upon a public highway and carrying such passengers upon payment of an individual fare, are embraced within it.

There are not two independent conditions prescribed in this portion of the definition, either one of which being satisfied the public-service character of the motor-vehicle is established. There is only one, and that one embraces soliciting, receiving and carrying for hire. The grammatical construction of the sentence inevitably leads to that conclusion. The insertion of the "and" after the word "jitney," the nonrepetition of the words "any motor vehicle" or words of similar import before the word "carrying," and the use of "such" after "passengers," evidently referring to those who had been solicited and received, are clear indications of the legislative intent not to be ignored, and especially in a penal statute such as this in its present aspect is. It is too plain to be mistaken that all the language following the words "any motor vehicle," where they appear the second time in the definition, is used in its entirety as qualifying that term.

While this is true, it by no means follows, as counsel for the accused urge, that in order to give a motor-vehicle a public-service character there must be in connection with its use a solicitation of patronage in the sense of personal persuasion or earnest entreaty or importuning. Indeed, there may be no resort whatever to the use of the voice. Solicitation may be practised by other means than words. Any acts or conduct intended and calculated to invite the patronage of intending pas-

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sengers amounts to solicitation, as that term is used in the statute. Whether or not the jury in the present case, upon the evidence before it, reasonably might have found the accused guilty of soliciting as well as carrying for hire, we have no occasion to inquire, since that question was taken away from them by the court's instructions and a verdict of guilty authorized upon no other proof than that the accused carried a passenger for hire.

There is error and a new trial is ordered.

In this opinion the other judges concurred, except RORABACK and WHEELER, Js., who dissented.

THE S. J. CORDNER COMPANY *vs.* OSCAR MANEVETZ.

Third Judicial District, Bridgeport, April Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

An oral promise by the president of a trucking corporation to pay for oil to be furnished to its drivers pursuant to his request, is an original undertaking and not one within the statute of frauds.

The question to whom credit was originally given in a sale is always one of fact.

An express finding that the original credit was given to the defendant is not essential, if the facts as detailed preclude the possibility of any other rational conclusion.

Argued April 10th—decided May 28th, 1918.

ACTION to recover for merchandise sold, brought to and tried by the Court of Common Pleas in New Haven County, *Simpson, J.;* facts found and judgment rendered for the plaintiff for $211, and appeal by the defendant. *No error.*

The substituted complaint contains two counts, and

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the following facts appear in the record. The plaintiff is a partnership with its principal place of business in Springfield, Massachusetts, with a branch in New Haven, where gasoline, motor oils, and kindred articles were kept for sale. The goods were sold for cash and on credit. The wife of one of the partners was in charge of the New Haven station. The defendant was president and treasurer of a corporation in New Haven called the New Haven Trucking Company. This company was formed in 1916, and acquired and carried on the business before conducted by a partnership called Jacques & Company. About July 21st, 1916, the defendant went to the plaintiff's station in New Haven and informed the person in charge of the business that he had taken over the business of Jacques & Company, and that thereafter the business would be conducted under the name of the New Haven Trucking Company, which had been incorporated, and at the same time requested the manager of the plaintiff's station to let the drivers of the Trucking Company have what oil and gas they called for and charge the same to him, and he would pay for it.

The manager of the New Haven station delivered to the drivers of the Trucking Company the gas and oil as they called for it, and made out sale slips in the name of the Trucking Company. These slips were sent to Springfield, and from there bills were sent to the New Haven Trucking Company in New Haven.

About August 1st the defendant paid a bill rendered in the name of the Trucking Company. The bill was paid by check of the Trucking Company and was signed by the defendant as president, and included in the bill were items for gas and oil delivered to Jacques & Company.

In October, 1916, the Trucking Company went out of business, and the defendant took the property and

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carried on the business in his own name. He continued to buy gas and oil of the plaintiff and it was charged to him. The bill for materials after the defendant took over the business is the cause of action in the second count in the complaint. The defendant admitted this bill to be properly charged to him.

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

Robert J. Woodruff and *Claude B. Maxfield*, for the appellee (plaintiff).

SHUMWAY, J. Of the several reasons of appeal, the third contains substantially all the alleged errors of the trial court. This is "whether or not the oral promise of an executive officer of a corporation to pay for goods sold to and upon the credit of said corporation and charged and billed to said corporation binds such an officer individually."

This reason of appeal, if it correctly stated the ruling of the trial court, would show that such ruling was erroneous. The record does not sustain the assertion that the court so ruled. It does not appear in the record that the goods were sold "upon the credit of the corporation," the New Haven Trucking Company, though the goods were charged to that company and were received and used by the company for its benefit. These facts are, indeed, evidence, more or less convincing according to circumstances, tending to prove that the original credit was given to the Trucking Company, but they are not conclusive.

The promise required by the statute of frauds to be in writing is a promise to answer for the debt of *another*, not the promissor's own debt. The only question in the case is, was this the defendant's own debt, which it is admitted he agreed to pay, or was it in a legal sense

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the Trucking Company's debt. To whom was the credit originally given? This is always a question of fact. Cases may be found where it has been held that the evidence does not justify the conclusion of the trier upon this question, but none that hold that it is a question of law. The finding in this case does not state in direct terms that the court finds as a fact that the original credit was given by the plaintiff to the defendant, but states that the court reached this conclusion: "That the promise of the defendant to pay for the gas and oil . . . was an original undertaking and not an undertaking to an answer for the debt . . . of another." Whether this conclusion be regarded, as intended by the court, as one of fact or of law is of no importance in this case, because the facts detailed in the finding justify the conclusion as a fact, that the credit was given to the defendant, and no other rational conclusion is possible. The case of *Loomis* v. *Smith*, 17 Conn. 115, sustains this conclusion.

There is no error.

In this opinion the other judges concurred.

HARRY SCHINE *vs.* DAVID J. JOHNSON ET UX.

Third Judicial District, Bridgeport, April Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

The rule is well settled that oral evidence is inadmissible to prove that an absolute, unconditional indorsement of a promissory note was intended and understood by the immediate parties thereto to be one "without recourse"; nor is such evidence admissible under the guise or theory of proving a conditional delivery of the note, since the condition thus sought to be shown in defense is in reality one attached to the contract itself and not to the delivery of the instru-

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ment. If such a mutual mistake was in fact made, the defendant might have applied to a court of equity to reform the contract of indorsement by inserting therein the words "without recourse."

Argued April 10th—decided May 28th, 1918.

ACTION by the indorsee against the indorsers of a promissory note, brought to and tried by the Court of Common Pleas in Fairfield County, *Walsh, J.*; facts found and judgment rendered for the plaintiff for $631, and appeal by the defendants. *No error.*

The note in suit was for $600, with interest at the rate of five per cent, payable in semiannual instalments of $50 each to the order of the defendant David J. Johnson, and contained an agreement that if any semiannual payment remained unpaid when due the whole unpaid principal should become due and payable on demand.

The complaint alleged that David J. Johnson indorsed the note to the other defendant, Clara L. Johnson, who indorsed it to the plaintiff; that the semiannual payment due June 1st, 1914, was not paid when due, though demanded; that notice thereof was duly given to the defendants; and that there was now due the plaintiff on said note $550 with interest.

The answer alleged that at the time the note was indorsed to the plaintiff the defendants were indebted to the plaintiff on another note on which a balance of $450 was due and payable; that the plaintiff agreed, in consideration of the delivery of the note in suit and other valuable consideration, to accept the note in suit and to look to the security for its payment, and not to hold the defendants liable thereon. In another paragraph it is alleged that the defendants paid $75 in cash and interest and delivered the note in suit to the plaintiff, upon the condition that the plaintiff should accept the same in satisfaction of the former note, and that he

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would not hold the defendants liable on their indorsements. The reply to this answer was a general denial.

At the trial the defendants offered parol evidence of the agreements and conditions alleged in the answer, which was objected to, ruled out, and exceptions taken.

John C. Chamberlain and *Elbert O. Hull*, for the appellants (defendants).

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

BEACH, J. The Negotiable Instruments Act provides that as between the immediate parties to the instrument "the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument." General Statutes, § 4186. This was so before the Act. *McFarland* v. *Sikes*, 54 Conn. 250, 7 Atl. 408; *Trumbull* v. *O'Hara*, 71 Conn. 172, 177, 41 Atl. 546. In this case there is no question but what the delivery was for the purpose of transferring the property in the instrument, for the note in suit was given and received in part payment of an outstanding promissory note which was received back by the defendants for cancellation; and the answer alleges that the intent of the transaction was to make the note available to the plaintiff at once as an obligation of the makers. To that extent the delivery was absolute and unconditional.

Was there a conditional delivery of the instrument so far as the contract of indorsement was concerned? We think not. The conditional delivery of a written contract necessarily implies that the delivery may become absolute and the contract obligatory according to its terms, in case the condition precedent is performed or broken as the case may be. Thus in *McFarland* v. *Sikes*, 54 Conn. 250, the condition on which

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the note was delivered to the plaintiff's attorney was that if the defendant failed to appear upon a certain day the note was to become effective as a note according to its tenor. Here, however, the alleged condition is that the contract of indorsement, though absolute in form, was never to become operative at all; and so it is evident that the defendants are seeking to attach a condition to the contract itself which is not therein expressed, and are not seeking to attach the condition to the delivery of the contract.

Their real defense is that they never contracted as written, and that the indorsements, although absolute in form, were intended by both parties to be indorsements without recourse. Assuming that to be so, it is too well settled for discussion that the contract which the law implies from an unconditional indorsement cannot be varied or contradicted by parol evidence, in defense of an action on the note. *Burns & Smith Lumber Co.* v. *Doyle*, 71 Conn. 742, 43 Atl. 483.

If it is true, as claimed, that the plaintiff is fraudulently attempting to take advantage of a contract which neither the plaintiff nor the defendants intended to enter into, the proper remedy is to appeal to a court of equity to have the contract reformed by inserting the words "without recourse" in the indorsement.

There is no error.

In this opinion the other judges concurred.

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EDWARD STROSNICK *vs.* THE CONNECTICUT COMPANY.

Third Judicial District, Bridgeport, April Term, 1918.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

The plaintiff while riding on the tailboard of his employer's motor-truck, or while in the act of resuming his seat thereon which he had temporarily left to follow the truck on foot over a bridge, was injured by a head-on collision between the truck and a trolley-car of the defendant. By direction of the trial court the jury returned a verdict for the defendant, and the plaintiff appealed. *Held* that the existence of contributory negligence, which was the main defense, was not so clearly established by the evidence as to warrant the withdrawal of that issue from the jury's consideration, and that the trial court was therefore in error in directing a verdict for the defendant.

A third person has a right to assume that those in control of vehicles which are rapidly approaching each other upon the highway in plain sight, will act as ordinarily prudent men should, and to regulate his own conduct in view of such assumption.

Argued April 11th—decided May 28th, 1918.

ACTION to recover damages for personal injuries alleged to have been caused by the defendant's negligence, brought to the Superior Court in New Haven County and tried to the jury before *Curtis, J.;* the court directed a verdict for the defendant, and from the judgment thereon the plaintiff appealed. *Error and new trial ordered.*

At the time the plaintiff received his injuries, an automobile truck, owned by L. Armstead & Son and driven by one of the members of that partnership, was proceeding northerly from New Haven between Mt. Carmel and Cheshire. It was traveling upon the main highway known as Whitney Avenue. The plaintiff, an employee of Armstead & Son, was going with the truck and riding upon the tailboard or rack with his feet hanging over behind. The accident, out of which

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the present action arose, occurred in the immediate vicinity of a bridge known as Willow Bridge, which spans a stream crossed by the highway. The ordinary traveled part of the highway lies upon its east side. Upon its west side and within its limits is laid the single track of the defendant. This track is raised a foot or more above the traveled path and is separated from that path by a shoulder of earth. The highway at this point is straight for a considerable distance on each side of the stream, so that there is no physical obstruction to a clear view of vehicles or cars upon the highway or tracks to or from any point within a distance of five hundred feet southerly of the stream and fifteen hundred or more northerly of it. The highway to the north of the stream descends toward it at an easy grade. Across the stream is a bridge designed for ordinary highway travel. Close beside it is another bridge, built and designed for the exclusive use of the defendant's cars.

The plaintiff offered evidence to prove the following additional facts: On the day in question the ordinary traveled path of the highway was rendered practically impassable for automobile travel, through accumulations upon it of snow which had fallen a week or more previously. By reason of these accumulations motor-vehicles were accustomed, as they had been at all times when fallen snow impeded travel along the ordinary traveled way, to make use of the raised trolley-tracks from which the snow had been cleared. Upon either side of these tracks on the day in question, the snow, which had been removed therefrom, was banked up so that passage between the tracks and the ordinary traveled roadway was rendered difficult, save at points where users of the tracks had cleared away turnouts to enable trolley-cars and other vehicles using the tracks to pass each other. At the time of the accident

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the general course of travel, other than that in sleighs, was, and for several days had been, along the trolley-tracks and across the trolley-bridge. This was not invariably so, however. In some cases vehicles approaching the bridge along the tracks turned back upon the main traveled way just before reaching the bridge, crossed the highway bridge, and then returned to the tracks.

The truck in which the plaintiff was riding followed the former course. It approached the stream along the trolley-tracks and crossed on the trolley-bridge. As it neared the bridge the plaintiff jumped from the truck and walked over the bridge behind it. After the bridge was crossed he looked up and saw a southbound trolley-car coming into view as it rounded the curve at the top of the hill some fifteen hundred to eighteen hundred feet distant. He continued walking behind the truck as it proceeded along the tracks to the north. He paid no further attention to the car, and shortly started to climb back to his former position on the truck when, at a point some fifty to seventy-five feet beyond the bridge, the car and truck collided and he received his injuries.

After the truck had passed the bridge it followed the tracks for the purpose, as its driver testified, of reaching a turnout some three hundred feet ahead. Before reaching that point he saw, as he said, that the car was not going to stop, and thereupon started to swing out to the right to avoid a collision.

The collision occurred at some time between 6:30 and 7:10 o'clock on the evening of March 13th, 1916. The plaintiff and driver of the truck testified that the lights of the truck were lighted before the stream was reached. The latter also testified, in answer to a question as to the condition of light, that it was plain, the ground all white with snow, and if he remembered aright, that the moon was nearly full.

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The plaintiff's witnesses testified that the trolley-car was going at a high rate of speed; the defendants, that it was running from twenty-five to thirty-five miles an hour, a rate neither unusual nor improper considering the time and place.

George E. Beers, with whom was *Claude B. Maxfield*, for the appellant (plaintiff).

Harrison T. Sheldon and *Charles E. Clark*, for the appellee (defendant).

PRENTICE, C. J. It is too clear to justify discussion, that the evidence bearing upon the issue as to the defendant's negligence was such as to entitle the plaintiff to its submission to the jury.

The question whether or not that which related to the issue as to the plaintiff's contributory negligence, is one presenting more substantial difficulty. Had the plaintiff been walking upon the trolley-tracks with nothing intervening between him and the trolley-car, which, as he says, he saw bearing down upon him when it was some one quarter of a mile or more distant, his conduct in not stepping aside, as he easily might, into a position of safety, would have been irreconcilable with the exercise of ordinary prudence. Such, however, was not the situation in which the plaintiff found himself. That situation, as the jury might have found it, was one in which, between him and the trolley-car, was an automobile truck immediately preceding him, and traveling in the darkening light following sunset along the trolley-tracks in the same direction as himself and with its lights lighted.

Under these conditions a determination of the reasonableness or unreasonableness of the plaintiff's conduct involved a consideration of what assumptions and de-

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ductions he was fairly entitled to make and act upon in respect to the imminence of danger to himself calling for independent action upon his part when, having become aware of the approach of the trolley-car, he, without further observation, resumed his place upon the rear of the truck or attempted to do so. Was he not, for instance, in view of the distance between the truck and the trolley-car, when their respective drivers ought to have become aware of each other's approach upon the same line of travel, reasonably entitled to assume that a collision was not to be anticipated? He was entitled to assume that the persons in control of the situation, to wit, the motorman and driver of the truck, would act as ordinarily prudent men should, and to regulate his conduct accordingly. *Andrews* v. *New York & N. E. R. Co.*, 60 Conn. 293, 299, 22 Atl. 566; *Morrissey* v. *Bridgeport Traction Co.*, 68 Conn. 215, 218, 35 Atl. 1126; *Hayden* v. *Fair Haven & W. R. Co.*, 76 Conn. 355, 364, 56 Atl. 313; *Riley* v. *Consolidated Ry. Co.*, 82 Conn. 105, 108, 72 Atl. 562. Was he not reasonably justified in assuming and acting upon the assumption that they would not only so act, but also that so acting, the truck would have an opportunity to get clear of the tracks before the car should attempt to pass it, and that, therefore, he was in no real danger while remaining with the truck? Was the situation, as it presented itself to him, so fraught with possibilities of danger that the dictates of ordinary prudence should have led him to fly from the tracks for safety? To what extent, if at all, does his failure to observe the movements of the approaching car after he first saw it, evince a lack of prudence on his part, and what bearing and significance ought to be given to that failure in passing judgment upon the plaintiff's conduct viewed in all its aspects? These are questions of large importance in a determination of whether or not the plain-

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tiff was negligent, and their answers are not so clear that only ones unfavorable to the plaintiff could reasonably be given. We are of the opinion that they, and the ultimate question of the plaintiff's negligence or freedom from negligence, with which they are closely involved, should not have been withdrawn from the jury's consideration by the direction of a verdict for the defendant.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

NEHEMIAH L. RICH *vs.* ALBERT W. JOHNSTON.

Third Judicial District, Bridgeport, April Term, 1918.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

A defendant may contradict any statement of fact made by a witness for the plaintiff upon his direct examination, with or without laying a foundation for such contradiction upon cross-examination.

A witness for the plaintiff having testified upon his direct examination that he had been discharged from the defendant's employment for forgetting to lock up a dog, was asked upon his cross-examination if it was not for dishonesty, and answered in the negative. The defendant failed to follow up this insinuation of dishonesty, and the trial court in its charge criticised counsel for making such an apparently unjustifiable imputation. *Held* that such criticism was quite proper, as the cross-examiner was not attacking the credit of the witness—in which case he might have been precluded from contradicting the answer—, but was attempting to show that the witness had testified falsely on his direct examination, a fact open to proof by the defendant at any time during the introduction of his evidence.

Upon the simple question of whether the plaintiff had warranted his preparation for trees to be harmless and effective, his knowledge or lack of knowledge of its injurious character is not material; and therefore an instruction to the jury which imposed upon the

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losing defendant the burden of proving not only the warranty in fact, but also that the plaintiff knew or ought to have known that the preparation was injurious, is misleading and harmful.

In an action upon an express contract for work and labor and materials furnished, to be paid for upon a cost basis plus a percentage, the fact that the work was worthless or useless is no defense.

Argued April 11th—decided May 28th, 1918.

ACTION to recover the balance of an account alleged to be due for pruning, spraying and treating trees on the defendant's premises, brought to the Court of Common Pleas in Fairfield County and tried to the jury before *Walsh, J.;* verdict and judgment for the plaintiff for $360, and appeal by the defendant. *Error and new trial ordered.*

The defendant paid for and was satisfied with the work done and materials furnished in pruning and spraying the trees, but denied liability for the scraping and painting of a number of trees; and by way of second defense alleged that the scraping and painting of the trees was done under an express agreement that the men to be furnished for this work should be competent, and that the plaintiff warranted his preparation to be harmless and effective in preventing injury by the hickory bark borer; that many of the men furnished were incompetent; that the preparation used was ineffective and injurious; and that the plaintiff's work in scraping and treating the trees was wholly worthless. These allegations were also incorporated in a counterclaim for damages for killing and injuring a number of the trees. There was no dispute as to the terms of payment, both complaint and answer alleging that the plaintiff was to be paid upon a cost plus percentage basis.

It appears from the finding that the defendant offered evidence to prove, and claimed to have proved, his allegation of an express warranty that the prepara-

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tion was harmless and effective, and that the plaintiff, on the other hand, claimed to have proved that he told the defendant that the mixture was somewhat experimental, and that the defendant so understood.

But two errors are assigned. A witness for the plaintiff, having testified on the direct examination that he was discharged from the defendant's employ for a trivial reason, was asked upon cross-examination whether he had not been discharged for dishonesty, and answered in the negative. The insinuation of dishonesty was not followed up by the defendant, and in the course of the charge the court criticised counsel for taking advantage of a witness and imputing dishonesty to him without any apparent justification. This is assigned as error.

The court charged the jury, in substance, that if they found the defendant's trees were killed and injured by the plaintiff's treatment, and also found that the plaintiff had expressly warranted his preparation to be harmless and effective, then their verdict should be for the defendant, and that if they found that both parties understood that the treatment was experimental, then their verdict should be for the plaintiff. The court then summed up the case in the following language, which is the subject of the second assignment of error: "The main question as raised by the defendant is that the work was worthless and ineffective and injurious because of the quality of the preparation. That seems to be the really main question in the case, and it is, therefore, necessary for you to consider very carefully and determine whether or not the defendant's contention in this respect or the plaintiff's contention in this respect is correct. That is, was the preparation improper and, therefore, ineffective and injurious to the trees, and that the plaintiff knew, or should have known from his experience of ten years

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in the treatment of trees, that the preparation was injurious and harmful, and that, when he made this statement to the defendant relative to the same, he knew or should have known that it was harmful and injurious to trees of this character and would, probably, have just the effect which the defendant claims that it did have."

Wilbur S. Wright, for the appellant (defendant).

Raymond E. Hackett, for the appellee (plaintiff).

BEACH, J. As to the first assignment of error, the defendant's theory is that the comment which the court made upon the impropriety of imputing dishonesty to a witness without any apparent reason for doing so, was erroneous, because the rule in this State as to attacking the credit of a witness on cross-examination, by asking about particular instances of misconduct not necessarily indicating a lack of veracity, permits such questions to be asked at the discretion of the court, but requires counsel to take the answer, and does not allow him to raise an issue thereon by introducing evidence to contradict the witness. This is undoubtedly the rule laid down in *Shailer* v. *Bullock*, 78 Conn. 65, 69, 70, 61 Atl. 65, but it has no application to this case. Here the cross-examiner was not attacking the credit of the witness, but was attempting to show that he had testified falsely on the direct examination as to the reason for his discharge. The witness had already undertaken to avoid any suspicion of misconduct which might have been attached to the fact of discharge, by claiming that he was discharged for forgetting to lock up a dog. Of course, the defendant might contradict that, or any other statement of fact made by the witness on his direct examination

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with or without laying a foundation on the cross-examination; and the court was quite right in criticising counsel for imputing dishonesty as the real cause of discharge, without making any effort to prove it. It should be said, however, in justice to counsel, that he then believed he had such evidence, but mistakenly supposed that under the rule in *Shailer* v. *Bullock* he could not use it.

The other assignment of error is well taken. The court, after charging the jury correctly as to the legal effect of the principal claims made by the parties, then used the language quoted in the statement of facts, which is not appropriate to any defense made by the pleadings or to any state of facts claimed to have been proved at the trial, so far as this record shows. Coming at the end of the charge and emphasized as the main question in the case, this part of the charge must have lead the jury to suppose that the defendant was bound to show, not only that the plaintiff warranted his preparation to be harmless and that it was in fact injurious, but also that the plaintiff knew or ought to have known that it was injurious, and that his statement to the contrary—if he made it—was recklessly and carelessly made. Since there is nothing in the pleadings or in the findings of fact which indicates that the defendant made any claim that the plaintiff knew or ought to have known that the preparation was injurious, this instruction was misleading and harmful.

One other matter may be mentioned, though not assigned as error. The court charged the jury, at the defendant's request, that it was a good defense in this case if the jury found that the work was worthless, and if they so found their verdict should be for the defendant. This instruction overlooks the fact that the plaintiff was not suing for the reasonable value

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of his work and materials, but was suing upon an express contract under which he was to be paid on a cost plus percentage basis; and if the jury found there was no warranty he would still be entitled to his agreed pay, though the work was useless.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

NATHAN GURFEIN *vs.* CHRISTOPHER RICKARD.

Third Judicial District, Bridgeport, April Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

In an action to recover damages for injury to plate glass through its negligent transportation, the evidence of both parties was to the effect that the breakage was caused by "improper loading" which the exercise of merely ordinary care would have prevented; and the main issue was whether the defendant had undertaken to do the whole job, as the plaintiff claimed, or only to furnish the horses, truck and driver, as the defendant insisted. The jury returned a verdict for the plaintiff and the defendant appealed. *Held* that under these circumstances it was not material whether the defendant contracted as a common carrier or as a private carrier, since he would have been obliged to exercise ordinary care at least in either capacity, and therefore was responsible for the injury due to his failure to observe such care; and that for this reason the trial court was not bound to distinguish between the degree of care to be observed by public and by private carriers, especially as such instructions would have tended only to confuse the jury in deciding the case before them.

The sufficiency of a charge is to be determined with reference to the claims actually made by the parties and passed upon by the jury, as they appear in the finding, and not upon those which theoretically might have arisen on the pleadings.

While statements made in a charge with reference to testimony before the jury do not import verity, they may, unless questioned, be assumed to be correct for the purpose of aiding this court to understand the claims as set forth in the finding and the issues of fact actually litigated.

Argued April 11th—decided May 28th, 1918.

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ACTION to recover damages for injuries to four cases of plate glass which the defendant was alleged to have undertaken to transport as a common carrier, brought to the Court of Common Pleas in Fairfield County and tried to the jury before *Walsh, J.;* verdict and judgment for the plaintiff for $1,790, and appeal by the defendant. *No error.*

The complaint alleged that the defendant was a common carrier and negligently failed to transport safely and deliver certain packages of plate glass entrusted to him for that purpose. The second defense admitted that the defendant was a common carrier of certain kinds of goods, not including plate glass, and alleged that on the occasion in question he rented to the plaintiff a truck with a driver and team of horses for the transportation of certain plate glass, upon the express undertaking that the plaintiff should assume full responsibility for its safe transportation. The jury found for the plaintiff, and from the judgment entered upon the verdict the defendant appeals for alleged errors in the charge.

Thomas M. Cullinan, for the appellant (defendant).

Henry E. Shannon, for the appellee (plaintiff).

BEACH, J. The basic question of fact was whether the defendant agreed to transport the glass at all, or whether he simply rented a team, truck and driver to the plaintiff for that purpose. In the latter case the defendant would owe no other duty to the plaintiff than to furnish him a team, truck and driver reasonably suitable for the transportation of plate glass; and since the findings show that the plaintiff made no claim that the team, truck and driver were not suitable for the purpose, the verdict of the jury could not

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have been for the plaintiff, unless they found, as their verdict indicates, that the defendant did agree to transport the glass. This disposes of the second defense, and also of the denials in the first defense that the plaintiff received the glass for transportation.

The other question raised by the pleadings is whether the defendant transported the glass as a common carrier or as a private carrier, and that question is material only as it affects the degree of care which the defendant was bound to exercise in transporting the glass. All of the assignments of error pursued on the brief are based upon the theory that the jury was not adequately instructed on this point with reference to the various issues of fact in the case. It is apparent, however, from the findings, that the actual issues litigated were much narrower than those which might theoretically have arisen on the pleadings. It was claimed by both parties that the damage was caused by improper loading and insecure bracing of the glass upon the truck, which caused it to tip over against an electric light pole. The plaintiff and the defendant made the same claims as to the cause of the damage, and in the same words, except that each claimed that the improper loading and bracing was done exclusively by the employees of, and under the direction of, the other party.

The phrase "improper loading," used by both parties to describe the cause of the damage, implies a want of ordinary care and skill which a truckman—though acting at the time as a private carrier—is supposed to exhibit and possess. Besides, it appears from the charge of the court in summing up the testimony, that three bystanders, two called by the plaintiff and one by the defendant, testified that the lack of care and skill exhibited by the persons loading the truck was so apparent that each of them, acting independently, remonstrated and pointed out the danger of

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attempting to transport glass so loaded and braced. Although the charge of the court does not import verity, it may, if not questioned, be assumed to be correct for the purpose of aiding in the understanding of the claims as stated in the finding and of the issues of fact actually litigated. *Jackson* v. *Lacy*, 92 Conn. 256, 102 Atl. 584.

It is therefore beyond question that both parties, by their claims and by the testimony they adduced, agreed that the damage was caused by a lack of ordinary care on the part of those responsible for the loading of the truck. The real controversy of fact, upon this branch of the case, was whether the admittedly negligent loading was done by the servants of the plaintiff or by the servants of the defendant, and upon this issue the jury has found in favor of the plaintiff.

The assignments of error pursued on the brief are based on the alleged failure of the court to explain to the jury, in accordance with defendant's requests to charge, the degree of care devolving upon the defendant if certain facts were found proven; and also upon the alleged error of the court in instructing the jury that the defendant had admitted that he was a common carrier. The legal effect claimed for these alleged errors is that the defendant may have been held to a higher obligation than that of exercising ordinary care. But, as already stated, the distinction between the obligation of the defendant as a private carrier to exercise ordinary care and the obligation of the defendant as a common carrier to exercise a higher degree of care, lost its materiality when the damage was traced by common consent to a specific cause involving want of ordinary care on the party responsible for the loading of the truck. The trial court was not bound to charge the jury at large upon the liability of carriers public and private. It was dealing only with

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the concrete case on trial, and the sufficiency of the charge is to be determined with reference to the claims actually made by the parties and passed upon by the jury as they appear in the finding. Since these findings show that both parties agreed in attributing the damage to improper loading of the truck involving want of ordinary care, the court was not bound to confuse the issue by legal distinctions not applicable to the case on trial.

There is no error.

In this opinion the other judges concurred.

Charles H. Hawes *vs.* Johanna F. Engler.

Third Judicial District, Bridgeport, April Term, 1918.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

In charging the jury it is not necessary for the court to adopt the language of the requests, provided the instructions given are clear, full, and adequate for the jury's guidance.

An appellant can take no advantage of the omission of the court to instruct the jury upon points which were not raised either in the pleadings or by the parties during the trial of the cause.

Argued April 11th—decided May 28th, 1918.

Action to recover a commission as a real estate broker, brought to the City Court of Bridgeport and thence by the defendant's appeal to the Court of Common Pleas in Fairfield County and tried to the jury before *Walsh, J.;* verdict and judgment for the plaintiff for $225, and appeal by the defendant. *No error.*

This action was brought by Charles H. Hawes to recover from the defendant a broker's commission

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claimed to be due him for the sale of certain real estate situated in the town of Milford, Connecticut, which it is alleged and claimed by the plaintiff was owned and controlled by the defendant. This suit is based upon the claim that the defendant entered into an agreement with the plaintiff whereby he was to act as agent for the sale of this property and was to have as his commission all that was received in excess of $6,000 for the property. The property at this time belonged to the defendant and to her husband, Julius H. Engler, and remained in their names upon the land records of Milford until the transfer in question. Johanna at one time prior to this transfer was conservator for her husband. The disability of the husband had been removed before the conveyance of the property. Although the husband joined in executing the deed when this real estate was transferred, it was not claimed that he had any negotiations with the plaintiff as to his commission for the sale of the property.

Omar W. Platt, for the appellant (defendant).

Frank L. Wilder, with whom was *John Smith*, for the appellee (plaintiff).

ROBABACK, J. A verdict was rendered for the plaintiff, and the case is here on assignment of errors relating to the action of the trial court in denying a motion to set aside the verdict as against the evidence, the failure to grant certain requests to charge, and also to certain portions of the charge as it was given.

To entitle the plaintiff to recover he was bound to show that there was a sale of the property for more than $6,000, that there was an agreement that he was to have as his commission all that was received for the property in excess of $6,000, and that he was the

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procuring cause in making the sale of this property. There was no question about the sale. The principal questions were as to the alleged agreement, and whether the plaintiff was the procuring cause of the sale. These were questions of fact for the jury, and there was no error in the refusal of the trial court to set aside the verdict as being against the evidence. See *Anderson* v. *Snyder*, 91 Conn. 404, 406, 99 Atl. 1032; *Roma* v. *Thames River Specialties Co.*, 90 Conn. 18, 19, 96 Atl. 169

The defendant complains because the court below failed to charge the jury as requested that: "If you find that the purchasers' attention was first called to the property in question by notices and other advertising matter of the defendant, and that it was by these means that they first learned that the property was for sale, and that they later visited the defendant unaccompanied by the plaintiff or any one representing him and there consummated the purchase of said property, then the plaintiff has failed to establish the second material allegation of his complaint . . . and your verdict should be for the defendant." This objection is without merit. It appears that the court below instructed the jury fully and in detail upon this branch of the case. About one page of the record is filled with its remarks upon this subject. While the court did not adopt the exact phraseology of the defendant's requests to charge in this connection, yet the instructions upon this point were full and clear, and it is apparent that the jury could not have been misled or prejudiced thereby.

Upon the trial of the case no claim was made that the defendant was not personally liable for her acts as conservator or agent, for the nonperformance of this agreement, when acting within the scope of her authority as such conservator or agent. This proposition

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is now embodied in one or more reasons of appeal. While it is the duty of the trial court to state to the jury the issues presented to it in a plain and concise manner, and to correctly state the law applicable to those issues so that the instructions will be sufficient for the guidance of the jury, yet in the present case it does not appear that the question alluded to above was raised by the pleadings or by the parties in the trial of the case in the court below. Under these circumstances the defendant should not now complain of the omission of the trial court to instruct the jury upon this point.

There is no error.

In this opinion the other judges concurred.

GEORGE H. NICHOLS *vs.* HARVEY HUBBELL, INC.

Third Judicial District, Bridgeport, April Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

For negligence in the performance or nonperformance of a master's duty toward his servant, whereby the latter is injured, the servant is entitled to recover damages, whether the specific act of neglect be that of the master himself or one of his agents.

The defendant, a corporation, undertook to make certain alterations and repairs upon its property, including the construction of a brick oven for baking japanned ware, which collapsed and injured the plaintiff, a carpenter, while he was removing the woodwork supporting the arched roof, after the mortar and cement had set and hardened. The fall was due to the faulty and impractical design of the roof, the arch being too flat, and with no provision for cross-rods or buttresses to enable the side walls to resist the thrust of the arch. The defendant's representative employed M, a building contractor, to supervise the changes, including the construction of the oven, at a *per diem* compensation plus an allowance of fifty cents per day for each man he employed

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to work upon the job, and the plaintiff was hired and paid by such supervisor with money furnished by the defendant's representative, but the latter retained and exercised the power to direct what should be done and the control of those employed upon the work. The plaintiff had judgment for $6,500 damages, and upon an appeal by the defendant it was *held*:—

1. That certain conclusions reached by the trial court, in so far as they were inferences or conclusions of fact, were reasonable and proper and were warranted by the evidence.
2. That the trial court was also fully justified in finding that the defendant's representative was responsible for the faulty design which was the cause of the accident.
3. That even if M had been in fault in the first instance in erecting the oven in conformity with a defective design and specifications, that fault would not have availed the defendant; as the selection of design and the furnishing of construction specifications were matters which lay within the field of the master's duty, for negligence in the performance of which the defendant master would be liable.
4. That in respect to design and specifications, M was the agent and representative of the defendant, and not a fellow-servant of the plaintiff.
5. That the ruling that M was not an independent contractor was correct upon the facts as the trial court had found and was justified in finding them.

An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of his work.

Argued April 12th—decided May 28th, 1918.

ACTION to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, brought to and tried by the Superior Court in Fairfield County, *Gager, J.*; facts found and judgment rendered for the plaintiff for $6,500, and appeal by the defendant. *No error.*

Robert E. DeForest, for the appellant (defendant)

Carl Foster, for the appellee (plaintiff).

PRENTICE, C. J. The plaintiff was injured while he was engaged as a carpenter in the construction of a

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brick oven designed for the baking of japanned ware for use in the manufacture of electric light reflectors, and located upon property standing in the name of Harvey Hubbell. The oven was fourteen feet square, outside measurement, with walls from six to eight feet in height and one foot thick, and having a four inch air space between the outer and inner tiers of brick properly tied together. The roof was also of brick, designed and built in the form of an arch with a two foot spring, and supported by the side walls upon which it rested. For the construction of the roof false work, intended for its support during the process of construction and while the mortar was hardening and setting, was erected on the inside of the oven after the exterior walls were in position. The roof having been constructed by the masons and given proper time to set, the plaintiff, then engaged elsewhere about the premises, was ordered to remove the false work. He was occupied in this work when the structure collapsed and fell upon him. The collapse was caused by the outward thrust of the arched roof, which the side walls of the oven were unable to resist when the support furnished by the false work was removed.

The side walls were of ordinary construction and ordinarily well constructed. The accident was due to the faulty and impractical design of the roof or the inadequate provision for its support, in that it was too flat to be self-supporting and there was no provision of cross-rods or buttresses to enable the side walls to resist the thrust of the arch.

The plaintiff was in the immediate employment of one Moon as a workman at day wages, and it was he who directed the plaintiff to remove the false work. Moon was a building contractor, who had been engaged by one Abbott to supervise the repairs, alterations and additions to be made upon the Hubbell

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property, including the construction of the oven. His compensation was a *per diem* one for his own work and a bonus or allowance of fifty cents a day for each man whom he should employ to work on the job. The selection and employment of these men rested with him. He received his pay, and the money required to pay the others employed upon the work, by the hand of Abbott, and in turn paid the men out of what he so received. Abbott, in making the improvements, alterations and repairs upon the premises, and in engaging Moon to supervise them, was acting at the suggestion of Hubbell, in consequence of some agreement with him, and occupying some relation to him. Hubbell was the owner of a very large majority of the capital stock of the defendant corporation, its manager, and practically the sole authority in the direction and control of its affairs.

The facts above stated, found by the court, are unquestioned. Its finding, however, does not stop there. It goes further, and finds certain other vitally important facts, which serve to characterize the relations which the several persons named bore to each other, substantially as follows: (1) That in so far as Hubbell acted in the premises he acted for and in the interest of the defendant; (2) that the oven was a part of the increased manufacturing facilities which the defendant was to furnish Abbott at its expense; (3) that the relation of Abbott to Hubbell, and through him to the defendant, was that of agent to principal, and that the former represented the defendant in all matters connected with the planning, construction, and supervision of construction, of the improvements and changes made upon the Long Hill property, including the oven; (4) that Abbott's employment of Moon was one in which the former, as the agent of the defendant, retained and exercised the power to direct what should

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be done, and the oversight, direction and control of the work and of those employed upon it; and (5) that the responsibility for the faulty design of the oven, which was the cause of the accident, rested upon Abbott.

As conclusions of law from these facts, the court held: (1) That Moon was not an independent contractor; (2) that the negligence which occasioned the plaintiff's injuries was not that of a fellow-servant; (3) that at the time those injuries were sustained the relation of master and servant existed between the defendant and the plaintiff; and (4) that the injuries were sustained by reason of the defendant's failure in the performance of the duty which it owed to the plaintiff as his master.

The reasons of appeal challenge these conclusions, both those of fact and those of law. Their challenge, however, is primarily addressed to the former, it being charged that they were without justification in the evidence. Our examination of the testimony satisfies us that this charge has no substantial basis in any particular. It is quite voluminous, and of such a character that a review of it sufficiently adequate to indicate all its pertinent features would likewise be lengthy. A comparatively brief statement of the salient features of the situation before the court, as they are revealed in the testimony of Hubbell, Abbott and Moon, the chief actors in the drama, and nowhere controverted, will, however, suffice to disclose that the court's conclusions of fact above enumerated were not made without warranty of testimony and did not transgress the legal bounds of reasonable deduction.

Abbott was a former employee of the defendant corporation, which was and is engaged in the manufacture of electrical goods and appliances. Some two years prior to the accident in question he had left that employment and established himself in a small leased

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shop, where he engaged in the manufacture upon his own account of appliances used by the defendant in connection with its business. These appliances, including electric light reflectors, he sold largely to the defendant. In the late spring or early summer of 1913 the demands of the defendant had so increased that Abbott had become unable to manufacture fast enough to supply them. The defendant was desirous that this condition be obviated, and also that Abbott extend his field of manufacture so that it should include additional products. Among other things it required a new line of reflectors, which Abbott was not in a position to produce owing to his lack of facilities. Hubbell took the matter up with Abbott, and as a result they together made investigations and examinations of plants and locations for the purpose of finding a place which could be utilized to provide the increased facilities which the defendant's needs required that Abbott should have. It was finally decided that the property at Long Hill, which Hubbell owned, could, by alterations, additions and repairs, be so utilized and that that course be pursued. Hubbell was about to sail for Europe when this decision was reached. He thereupon told Abbott to go ahead and make certain improvements upon the property, for which he agreed to pay, and a day or two later, early in July, sailed. Abbott went ahead, employed Moon, whom Hubbell had suggested as foreman of construction, and proceeded to direct much more extensive alterations and additions than he and Hubbell had talked of. These had progressed so far that bills therefor had been incurred when, in the latter part of August, Hubbell returned. At this time the oven was in progress, but had not reached the point at which its collapse occurred. Immediately upon Hubbell's return he visited the property and there met Abbott. He saw what had been done and was in

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under Abbott's directions, and became aware aracter and extent. He thereupon acquiesced Abbott had done and projected, concurred in nuance of the work, and O. K'd bills for that d been done in his absence. These bills he file in the office of the defendant, awaiting n and approval, and payment of them was he defendant out of its own funds immediately approval of them. All this was done prior llapse of the oven, which occurred about a r. The work upon the alterations and ims, with Hubbell's authorization, continued nterruptions or change, and under Abbott's direction, until September 21st, when the defendant took a lease of the property from Hubbell and assumed the management and operation of the plant, with Abbott as its operating manager receiving a stated salary. During this period payments were made by the defendant, upon the O. K. of Hubbell, on account of the work which had been done. The projected improvements were not finished on September 21st, and were continued for a considerable time thereafter, and the bills therefor to a considerable amount were paid by the defendant. During the summer and prior to Hubbell's return from Europe, a telephone in the defendant's name was placed on the property.

From this outline of the outstanding general features of the situation as testified to by the chief participants in the transactions involved, especially when the light is thrown upon them which is supplied by sundry detail features of the evidence and such significant admissions, for instance, as those of Hubbell, that before the decision to utilize the Long Hill property was reached he had determined, on account of the defendant's necessities, to furnish Abbott the facilities required to enable him to supply its requirements, that

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upon his return he assumed the investment wh
being made in the develop[illegible] proper
that shortly following the accident his compa
up the matter of accident insurance for it, cov
operation at Long Hill, it is easy to see tha
stantial basis was furnished by the testimony
of the court's first three conclusions of fact abo

The fourth is amply supported by the test
both Abbott and Moon. Their evidence is
uncontradicted that Moon's employment wa
ing in part for his personal participation in
and for his oversight as foreman of what Abb
require to be done, and that Abbott retained and exercised the right to direct what that should be and how it should be done, and the oversight, direction and control of the work and of those who should be engaged in the execution of it.

The court was also fully warranted in finding that the responsibility for the faulty design, which was the cause of the accident, was Abbott's. That conclusion follows naturally and inevitably from the finding as to the relation he held to the work as the representative of the defendant and the person in immediate authority and control of the work. It is quite immaterial as regards this matter of responsibility, whether Abbott or Moon personally, or both in consultation, determined upon the design of the structure which fell or the insufficient specifications for its construction. The ultimate responsibility would in either case be upon Abbott as the man in superior authority.

Were it so, however, that Moon was in the first instance at fault in causing the structure to be built in conformity with a defective design and specifications, that fact would not help the defendant. The selection of design and provision of construction specifications were matters which lay within the field of the master's

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[redacted] so far as the factor of provision of a reasonable place in which employees might work was involved in [redacted] they were especially so. Whoever, whether A[redacted]r Moon, was the man whose negligence was the [redacted]diate cause of the setting of the trap in which the [redacted]iff was caught, the responsibility goes back to [redacted]ster. The negligent person, agent though he was [redacted]ngaged in an attempt to perform the master's duty [redacted]or nonperformance of it the master is liable. *Mc[redacted]* v. *Randolph*, 61 Conn. 157, 162, 22 Atl. 1094; *[redacted]cotti* v. *O'Brien Contracting Co.*, 77 Conn. 617, [redacted], 60 Atl. 115. Neither would the defendant, could it succeed in establishing that the immediate act of negligence in the matter of design and construction specifications was Moon's, relieve itself from liability, through a conversion of the negligence into that of a fellow-servant. Moon, in respect to these matters, whatsoever position he may have occupied as regards others, was not a fellow-servant of the plaintiff. He was the master's agent and representative attempting to perform the master's duty. *McElligott* v. *Randolph*, 61 Conn. 157, 164, 22 Atl. 1094; *Gilmore* v. *American Tube & Stamping Co.*, 79 Conn. 498, 502, 66 Atl. 4.

Upon the facts found, and which, as we have seen, must stand, the court's ruling that Moon was not an independent contractor was correct. "'An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work.'" *Alexander* v. *Sherman's Sons Co.*, 86 Conn. 292, 297, 85 Atl. 514. These conditions were not satisfied in the case of Moon's employment. Upon the subject of the contractee's liability, see also *Douglass* v. *Peck & Lines Co.*, 89 Conn. 622, 629, 95 Atl. 22.

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The three remaining rulings hereinbefore [redacted] ated have already had such incidental consider[redacted] our discussion of the findings of fact, that furt[redacted] sideration of them is rendered unnecessary. [redacted] facts have been found and must remain, th[redacted] ultimate conclusion that the defendant, as t[redacted] tiff's master, is legally responsible to him for [redacted] to perform, either by itself or through its a[redacted] duty owed to him as its servant to use reaso[redacted] to provide him a reasonably safe place in [redacted] work, and therefore liable to him for the co[redacted] of the negligent conduct of its agent or age[redacted] in this case, was the correct one.

The defendant's final claim, that the court erred in not finding that the plaintiff was guilty of contributory negligence, is without foundation in the evidence. We are unable to find any which tends to show that he knew, or ought to have known, that the work in which he was engaged, pursuant to the orders of his foreman, was in any respects dangerous, either inherently or as the result of the inadequacy of the design of the oven or of its structural details.

There is no error.

In this opinion the other judges concurred.

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WALTER J. HANFORD ET AL. (BABYLAND AMUSEMENT COMPANY) *vs.* THE CONNECTICUT FAIR ASSOCIATION, INC.

Third Judicial District, Bridgeport, April Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, JS.

Where all the facts bearing thereon are undisputed, the question whether a given act or contract is contrary to public policy or not, is one of law.

A fair association having agreed to give a baby show upon its grounds under the direction and management of the plaintiffs, is excused from the fulfilment of its contract by the outbreak of an epidemic of infantile paralysis which admittedly made the holding of such an exhibition highly dangerous to the public health of the community; for the holding of the proposed show under such circumstances would, as matter of law, be contrary to public policy, and therefore the abandonment of the enterprise upon such a contingency must be treated as an implied qualification of, or exception to, the absolute undertaking of the association.

Argued April 12th—decided May 28th, 1918.

ACTION to recover damages for a breach of contract, brought to the Court of Common Pleas in Fairfield County where a demurrer to the third defense was overruled (*Scott, J.*) and the cause was afterward tried to the court, *Booth, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiffs. *No error.*

William W. Bent, for the appellants (plaintiffs).

Warren B. Johnson and *Harry W. Reynolds,* for the appellee (defendant).

SHUMWAY, J. This is a civil action wherein the plaintiffs count upon a written contract and claim damages for its breach. The complaint alleges that the plain-

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tiffs agreed to promote and manage a baby show at Charter Oak Park, in Hartford, on September 6th, 7th and 8th, 1916. The contract annexed to the complaint discloses that the plaintiffs agreed to supply one hundred and twenty prizes, certain printed matter for advertising the show, and to do certain other things not material to the present inquiry. The defendant agreed to furnish a room in which to hold the show and to pay the plaintiffs $600.

The defendant in its answer alleged that during the middle and latter part of August and early in September, 1916, a disease popularly known as infantile paralysis was epidemic in the city of Hartford, and throughout the State of Connecticut, which disease attacked children, and particularly babies and young children, in large number. Said disease proved fatal in a large proportion of the cases, and permanently crippled many of those afflicted with it; and for some time prior to, and at the time of the proposed baby show referred to in said alleged contract, was so widespread and so serious as to make assemblies of children, and especially young children, highly dangerous to the health of the children of the community; and by reason of said facts it was contrary to public policy to hold a baby show of the nature and at the time provided for in said alleged contract. The answer further alleged that the defendant notified the plaintiffs about the middle of August that it wished to cancel the contract for the reason above set forth, and thereafter the contract was definitely and finally cancelled for the reason named.

To this answer the plaintiffs demurred. The court overruled the demurrer, and this ruling furnishes the only reason of appeal.

It appears that the contract was a joint undertaking by the plaintiffs and defendant. Each of them was to

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furnish and do such things as were deemed essential to attract a number of babies to the grounds and buildings controlled by the Fair Association. Presumably the babies were in some manner to be exhibited, and it was expected that at least one hundred and twenty prizes would be awarded for such excellent and desirable traits as the babies might be adjudged to possess upon an inspection and comparison. Such an assembly of children it is alleged would be "highly dangerous" to the health of the community, and against public policy. For the present purpose it must be assumed that it would be dangerous to the public health. However, it seems that whenever all the facts bearing upon the question of public policy in any given case are undisputed, whether or not the acts or contracts are contrary to public policy, is a question of law. *Connors* v. *Connolly*, 86 Conn. 641, 86 Atl. 600. Then the allegation in the answer, that the performance of this contract was contrary to public policy, must be treated as a statement of a legal conclusion, and not a fact which is admitted by the demurrer. In the case of *Connors* v. *Connolly*, *supra*, the court quotes with approval this passage from Greenwood on Public Policy, page 5: "The question of the validity of the contract does not depend upon the circumstance whether it can be shown that the public has, in fact, suffered any detriment, but whether the contract is, in its nature, such as might have been injurious to the public. . . . The law looks to the general tendency of such contracts."

It is conceded that if a contract is contrary to public policy it is void. As it is admitted that the holding of a baby show under the circumstances narrated would be highly dangerous to the health of the community, it must follow that such a show would be contrary to public policy. This court is now considering the suf-

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ficiency of an allegation, not how that allegation can be proved. The allegation that the baby show would be dangerous to public health might be avoided by the plaintiff by alleging, if such is the fact, that effectual precautions had been taken to prevent the communication of the disease from one child to another, or by setting up any other fact making it clear that no harm could result to the public from the show. But the court cannot regard the averment that the assemblage of a number of children as proposed would be "highly" dangerous to the public health, other than as a fact which the plaintiff must answer, either by denial or matter in avoidance.

The court will not require the performance, or award damages for a breach, of a contract in which the public have so great an interest as the preservation of health, if the health is in fact endangered, any more than it would require one to be performed the tendency of which was immoral or one which interfered with the right of everyone to earn a livelihood by a lawful occupation. *Connors* v. *Connolly*, 86 Conn. 641, 86 Atl. 600. The plaintiffs in their brief rely upon these cases: *Libby* v. *Inhabitants of Douglas*, 175 Mass. 128, 55 N. E. 808; *Dewey* v. *Alpena School District*, 43 Mich. 480, 5 N. W. 646; and *Gear* v. *Gray*, 10 Ind. App. 428, 37 N. E. 1059. These appear to be actions brought by school teachers to recover salary when the schools had been closed by reason of the prevalence of some contagious or infectious disease in the community. There is a difference between a contract to teach school, and one to promote and manage a baby show. Teaching proper subjects can never be unlawful or contrary to public policy, though the assemblage of a number of children in one room might become very harmful. The teacher has usually no control over the attendance in his school. The baby show, however, would be

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highly dangerous to health, and this is just what the parties have agreed to promote and carry out for their mutual profit.

The plaintiffs contend that the defendant's undertaking was absolute and unqualified, and they cite in their brief the case of *School District No. 1* v. *Dauchy*, 25 Conn. 530. The trial court appears to have had this case in mind in overruling the demurrer, and applied the principle there enunciated. Even though in this case the promise was absolute and unqualified, yet neither party contemplated that the show would be held if the public health would be endangered thereby, and therefore the contract impliedly contains a provision to that effect. The trial court so held.

There is no error.

In this opinion RORABACK and WHEELER, JS., concurred.

BEACH, J. (dissenting). I dissent from the broad proposition that whenever an otherwise lawful act becomes dangerous to the public health, it automatically becomes contrary to public policy and therefore unlawful, without any statute or order intervening to make it so.

Confining the statement to things which are inherently lawful,—such as a baby show—but which may become dangerous to public health because of an external temporary condition, the public policy of Connecticut as regards the taking of prophylactic measures, appears to me to be manifested by the establishment of a complete system of State, county and municipal health officials armed with all necessary powers. It is our public policy, I think, that a determination of the preliminary question whether the public health is endangered, should be left to the responsible medical

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experts appointed for that purpose, and not to the *judicium rusticum* of a jury; also that these official experts should determine in advance what, if any, preventive measures ought to be taken, instead of leaving that question to be determined, after the event, by a jury.

For these reasons I think the demurrer to the answer ought to have been sustained, on the ground that it did not appear that the holding of this baby show had been prohibited by an order of the county or State health officials.

In this opinion PRENTICE, C. J., concurred.

LOUIS FINE *vs.* THE CONNECTICUT COMPANY.

First Judicial District, Hartford, May Term, 1918.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, JS.

No issue foreign to the facts in evidence, or in respect to which no evidence has been offered, should be submitted by the court to the jury. The violation of this rule may not in every instance constitute harmful error; but it will if, as in the present case, the improper submission was calculated to prejudice the rights of the appellant.

In an action for personal injuries caused by a collision with a trolley-car on a highway crossing, the trial court after instructing the jury as to negligence and contributory negligence, voluntarily and without any request, told them that notwithstanding the negligence of the plaintiff in placing himself in a dangerous situation, the defendant would be liable if its motorman by the exercise of ordinary care could have avoided hitting the plaintiff but failed to do so; as in that case the accident would be the result of the motorman's negligence as an intervening cause. *Held:*—

1. That there was nothing in the situation as disclosed by the evidence which warranted any reference to the so-called doctrine of the last clear chance or supervening negligence, and that its importation into the case improperly opened a door for the plaintiff's escape

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from the consequences of his own negligence, if the jury were satisfied that he had been negligent.

2. That the instruction as given was so vague and general that the jury could have derived no accurate understanding of the rule they were called upon to apply.

The last clear chance or supervening negligence doctrine applies only where the following conditions co-exist: first, the injured party must have already come into a position of peril; second, the injuring party must then or thereafter have become aware, or should in the exercise of ordinary prudence have become aware, not only of the other's peril but also that the latter cannot, or will not, escape therefrom; third, that the injuring party subsequently has the opportunity by the exercise of reasonable care to save the other from harm; and fourth, that he fails to exercise such care.

Argued May 7th—decided May 28th, 1918.

ACTION to recover damages for injuries to the person and property of the plaintiff by a collision on the highway, which was alleged to have been caused by the negligence of the defendant, brought to the Superior Court in Hartford County and tried to the jury before *Kellogg, J.;* verdict and judgment for the plaintiff for $656, and appeal by the defendant. *Error and new trial ordered.*

Joseph F. Berry, for the appellant (defendant).

Philip Roberts, with whom was *Royal W. Thompson*, for the appellee (plaintiff).

PRENTICE, C. J. This case was before us upon a former occasion when the plaintiff appealed from a judgment in the defendant's favor, for the reason that a defendant's verdict was directed by the court. *Fine* v. *Connecticut Co.*, 91 Conn. 327, 99 Atl. 700. We then held that the evidence relating to the issue as to contributory negligence, as well as that respecting the defendant's negligence, was of such a character that the plaintiff was entitled to its submission to the jury,

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and accordingly ordered a new trial. Upon the present trial the evidence was passed upon by the jury and adversely to the defendant. It now appeals, saying that the court erred in not setting aside the verdict for the reason that the evidence furnished no reasonable basis for a conclusion that the plaintiff was free from contributory negligence. The evidence submitted upon the present trial does not differ in its essential features from that produced at the first. Of that evidence we said, in passing upon the appeal taken in that case, that it was such as to preclude the trial judge from saying that no conclusion thereon could reasonably be reached by the jury which would exculpate the plaintiff from the charge of negligence contributing to his injuries. We see no occasion to change our views as then expressed.

The court incorporated into its charge the following instruction: "If you should find from the evidence in this case that the plaintiff was negligent in the manner in which he crossed or attempted to cross the tracks and did not use his senses when he ought to have done so, and did not keep a proper lookout for approaching cars, or you find that he was not aware of their approach; and you further find that notwithstanding his negligence, the motorman, after the plaintiff had so placed himself in the dangerous situation, could, by the exercise of ordinary prudence and reasonable care, have avoided hitting him and injuring him with his car, and did not do it, the defendant would be liable; as in that case the accident would be the result of the negligence of the motorman as an intervening cause, after the plaintiff was or ought to have been known by him to be in danger."

The defendant does not complain of this passage as containing an incorrect statement of the law. Its complaint is of the inappropriateness and misleading

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character of such or any similar instruction, because of its plainly-implied recognition that there might reasonably be found from the evidence that a situation existed in respect to which the doctrine of supervening negligence was applicable, and might be invoked to the plaintiff's advantage. The burden of its grievance is that in its instruction the court went outside of the case and imported into it an issue which had no place in it, and thereby opened a door for the plaintiff's escape from the consequences of his own negligence which the evidence, in any reasonable view of it, did not permit to be open to him.

The finding is utterly barren of facts attempted to be proved by either party furnishing a reasonable basis for a conclusion that conditions existed enabling the plaintiff to invoke the aid of the doctrine of supervening negligence. It certainly could not be claimed that the defendant, subsequent to the plaintiff's exposure of himself to peril, introduced into the situation a new and independent act of negligence without which the plaintiff would not have been injured. *Nehring* v. *Connecticut Co.*, 86 Conn. 109, 119, 84 Atl. 301, 524. Neither is there anything in the facts sought to be established tending to show that the defendant failed to use its best endeavors to avoid a collision subsequent to the time when the plaintiff had come into a position of danger, and the motorman knew, or ought to have known, that the plaintiff either could not reasonably escape therefrom, or apparently would not avail himself of opportunities of escape which were open to him. *Nehring* v. *Connecticut Co.*, 86 Conn. 109, 120, 84 Atl. 301, 524; *Hygienic Ice Co.* v. *Connecticut Co.*, 90 Conn. 21, 23, 96 Atl. 152. When, after starting up his horse, he was proceeding on his way to that position, his negligence in so doing, if negligent he was, concurred with that of the defendant

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to produce the result which followed. *Nehring* v. *Connecticut Co.*, 86 Conn. 109, 122, 84 Atl. 301, 524.

The case, as the parties presented it, was the ordinary one involving the ordinary issues of negligence, contributory negligence, and their concurrence, uncomplicated by unusual conditions existing in some cases which make it necessary to examine the situations there presented in the light of certain differentiating principles which go to make up the so-called doctrine of the last clear chance or supervening negligence. The plaintiff plainly so regarded it. He offered no evidence to prove that a situation calling for or permitting the application of that doctrine existed, he made—in so far as the record discloses—no claim to that effect, and presented no request to charge upon that subject. Apparently it was due to the voluntary action of the court that the issue of supervening negligence was imported into the case.

It is the duty of the court to submit to the jury no issue foreign to the facts in evidence, or in respect to which no evidence has been offered. *Water Commissioners* v. *Robbins*, 82 Conn. 623, 74 Atl. 938. Such submission, while improper, may not, under all conditions, constitute harmful error. It will, however, if the improper submission is calculated to prejudice the rights of the appellant. *Fourette* v. *Griffin*, 92 Conn. 388, 103 Atl. 123. This is a case of the latter class, so direct was the implication that the evidence was susceptible of a reasonable conclusion therefrom which would justify a verdict against the defendant notwithstanding that the plaintiff was guilty of negligence in attempting to cross the tracks as he did, and so strongly did the plaintiff's injury appeal for relief.

In order that we may not be understood as approving of the portion of the charge recited as embodying a correct exposition of the law, we ought to add a few words

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upon that subject. The court manifestly was undertaking to state the law applicable to a limited class of cases, to wit: those in which, after the injured party had come into a position of peril, there was neither the introduction into the situation of a new and independent act of negligence on the part of the injuring party without which the injury would not have been caused, nor the continuance by the party injured of active negligence contributing to produce the result which ensued. An examination of the language used in *Nehring* v. *Connecticut Co.*, 86 Conn. 109, 120, 84 Atl. 301, 524, in dealing with situations of this character, and the somewhat more elaborated statements upon the same subject in *Hygienic Ice Co.* v. *Connecticut Co.*, 90 Conn. 21, 23, 96 Atl. 152, and in *Petrillo* v. *Connecticut Co.*, 92 Conn. 235, 236, 102 Atl. 607, will show that the conditions which entitle an injured party's negligence to be relegated to the position of a remote cause of injuries suffered by him, and the other party's negligence to be regarded as the sole proximate cause of them, are stated too broadly to afford the jury an accurate rule for their guidance. Situations coming within the operation of the principles attempted to be stated by the court are those in which four conditions co-exist, to wit: (1) that the injured party has already come into a position of peril; (2) that the injuring party then or thereafter becomes, or in the exercise of ordinary prudence ought to have become, aware not only of that fact but also that the party in peril either reasonably cannot escape from it or apparently will not avail himself of opportunities open to him for doing so; (3) that the injuring party subsequently has the opportunity by the exercise of reasonable care to save the other from harm; and (4) that he fails to exercise such care.

In the instruction given certain of these conditions,

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while perhaps not wholly ignored, were left to be inferred rather than clearly stated. Take, for instance, the important matter of the point of time when the defendant's duty would, in the application of the doctrine of the last clear chance, take on a different aspect from that which it had when the situation of peril was in the making, and his negligence assume a new and more intimate relation to the resulting injury than had his previous want of care. That time is determined by two factors, to wit, the creation and existence of a situation of peril into which the injured party has come, and the possession by the other party of knowledge, either actual or constructive, of certain things concerning the injured party's position in respect to that peril. The instruction given, in so far as it may be said to cover this ground, is so vague and general that the jury could hardly have derived an accurate understanding of the rule they were called upon to apply. Furthermore, the test of the defendant's liability appears to have been made dependent, in some measure at least, upon the actual result rather than upon the exercise, or failure to exercise, reasonable care to avoid that result.

There is error and a new trial is ordered.

In this opinion RORABACK, BEACH and SHUMWAY, Js., concurred.

WHEELER, J. I concur in the result, but prefer to place the decision upon the ground that the plaintiff did not, on the evidence, make out a case.

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CHARLES H. MITCHELL *vs.* THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY.

First Judicial District, Hartford, May Term, 1918.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

In an action in the nature of trespass to recover damages for maintaining and operating a telephone system in the highway in front of the plaintiff's premises, the complaint is demurrable if it fails to allege the nonconsent of the person who owned the land at the time the wires and poles were erected; since the consent of the then owner precludes the erection from constituting an invasion of his rights, and thereafter both he and his successor in title are remitted to the remedy prescribed in § 3907 of the General Statutes, and cannot maintain an action at law for trespass.

Argued May 7th—decided May 28th, 1918.

ACTION to recover damages for maintaining and operating a telephone system in the highway in front of the adjoining premises of the plaintiff, without his consent, brought to the City Court of New Britain and thence by the plaintiff's appeal to the Court of Common Pleas in Hartford County, where a demurrer to the complaint was sustained (*Smith, J.*), and upon the refusal of the plaintiff to amend his complaint judgment was rendered for the defendant, from which the plaintiff appealed. *No error.*

The complaint alleges, in substance, that on September 14th, 1914, the plaintiff became the owner of a tract of land situated upon the west side of and adjoining Lincoln Street in New Britain, the same being described in the deed to him as having as its east boundary the west line of the street; that he thereupon entered into possession of the premises and has since continued the owner in possession thereof; that by virtue of this conveyance and ownership he became and still is the

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owner of the fee in that part of the highway which adjoins the tract conveyed to him, such portion extending along his whole front and having an undefined width; that seven years prior to his acquisition of the land the defendant, in the construction of a portion of its telephone system, strung its wires along and over the highway in front of the land the plaintiff now owns and along and over that portion of it whose fee is in the plaintiff by virtue of his adjoining ownership; that since that time the defendant has maintained the wires so located and continually used them in the conduct of its telephone business, and that it has so maintained and used them since the conveyance to the plaintiff and is now so maintaining them and using them without his consent. There is no allegation that the wires were unlawfully strung, or that the then landowner or county commissioners did not give consent to their being placed where they were and are. The only allegation touching consent is that above stated.

It also appears by the complaint that the defendant, under a contract with the plaintiff, has, during the whole period of his ownership of the premises, supplied him at his dwelling thereon with its service for hire.

Charles H. Mitchell, for the appellant (plaintiff).

William F. Henney, for the appellee (defendant).

PRENTICE, C. J. Six grounds of demurrer are alleged, of which four are quite independent of each other. As the one first stated is sufficient to justify the action of the court in adjudging the complaint inadequate as a statement of a cause of action, it is unnecessary to notice either of the others. That one charges that the complaint is insufficient since it does not allege that consent was not given by any of the

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plaintiff's predecessors in title, but only that he has not given his consent.

It appears by the complaint that the wires in question are located within the limits of the highway and were placed where they now are seven years before the plaintiff acquired title to the premises he now owns. They were so placed in pursuance of legislative authority given to the defendant as a telephone company to construct and maintain telephone lines upon any highway. General Statutes, § 3903. If, in addition, the defendant's location and erection of them was with the consent of the then adjoining landowner, there was in that action, regardless of any statute, no invasion of his rights. Its entry upon the land and construction thereon of its lines of wire was not unlawful. If it be assumed that the consent given amounted to nothing more than a revocable license, no act of revocation appears. But that is not all. In so far as the maintenance of the lines subsequent to their erection is concerned, whether during the ownership of the consenting landowner or during that of his successors in title, our statutes regulating the general subject of the location, construction and maintenance of telegraph and telephone lines and the redress to be obtained by aggrieved landowners, have large importance. General Statutes, §§ 3903–3907; Public Acts of 1917, Chap. 310. An examination of them makes it evident that it was the legislative purpose to place telegraph and telephone lines, located and erected with the consent of adjoining landowners, in the same position as that occupied by those located and erected upon the consent of the public utilities commission, and to give to the former consent the same force and effect as that attached to the latter, in that in neither case might the company be sued in an action at law for trespass. Consent in either form having been obtained, any claim

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for damages then or thereafter suffered by the landowner, whether arising from the imposition of an additional servitude or from a direct injury to his adjoining property, is left to be pursued in the manner provided in § 3907. The plaintiff's complaint, therefore, which alleges no more than that the plaintiff has not during his period of ownership consented to the maintenance and operation of the wires, is insufficient. See *Mitchell* v. *Southern New England Telephone Co.*, 90 Conn. 179, 182, 96 Atl. 966.

There is no error.

In this opinion the other judges concurred.

JAMES FALLETTI *vs.* ANTONIO R. CARRANO ET AL.

First Judicial District, Hartford, May Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

An outside salesman of a wholesale grocery house, with unrestricted powers of sale and collection, has implied authority to contract for the future delivery of the merchandise he sells.

Parol evidence is admissible to explain technical or incomplete terms in a written agreement, if such explanation is not inconsistent with the words of the writing.

In the present case there was a memorandum of sale of 50 barrels of "Daisy flour in 98 lot, at 8.90, to be taken from the car, terms cash." *Held* that the place of delivery was not so indefinite as to render the contract void under the statute of frauds, at least until the trial judge had brought to his aid in its interpretation all the light afforded by the collateral facts and circumstances, in proof of which parol evidence should have been received.

Argued May 7th—decided May 28th, 1918.

ACTION to recover damages for the refusal of the defendants to deliver fifty barrels of flour alleged to have

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been sold by them to the plaintiff, brought to and tried by the Court of Common Pleas in Hartford County, *Smith, J.;* facts found and judgment rendered for the defendants, and appeal by the plaintiff. *Error and new trial ordered.*

The plaintiff is a retail grocer and the defendants are wholesale grocers, both of Hartford. A written memorandum of the sale was introduced in evidence by the plaintiff as Exhibit A, which reads as follows: "Sold to James Faletti 50 bbl. Daisy flour in 98 lot. at 8.90 to be taken from the car. terms cash. Carrano & Nobile—N. F. R." This memorandum was signed by Nathan F. Rivkin, an agent of the defendants.

The principal controversy between the parties was over the authority of Rivkin to make the agreement contained in Exhibit A, and the legality of this document. Rivkin's authority as agent was derived from a written agreement made by him with the defendants, which agreement was in evidence as Exhibit B. One clause of this contract stated that because of the expert knowledge and experience of Rivkin, the defendants agreed to employ him as an outside salesman and collector. By the terms of the agreement, Rivkin's employment was to commence on January 1st, 1916. One clause of this contract provided that as compensation for his services Rivkin was to receive $25 per week, and also to be allowed one third of the net profits on the entire volume of business made by the defendants as the same might appear from their books from January 1st, 1916. The ninth clause of the contract of agency provided that Rivkin at all times should be considered as a salesman and collector and be charged with the duty and responsibility of collecting for all goods sold by him while in the employ of the defendants.

The trial court reached the following conclusions: "(1) Rivkin had no authority under Exhibit B to make

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a contract for future delivery as set forth in Exhibit A. (2) Exhibit A does not constitute such a memorandum as required by section 4 of Chapter 212 of the Public Acts of 1907."

At the close of the plaintiff's evidence, defendants' counsel moved to strike out Exhibit A, because the facts shown did not establish that Rivkin was authorized either by his contract of agency or by his course of dealing to execute plaintiff's Exhibit A. The motion was granted and the plaintiff took an exception.

Josiah H. Peck, for the appellant (plaintiff).

Ralph O. Wells, for the appellees (defendants).

RORABACK, J. There is no ground for the assumption of the trial court that Rivkin did not have authority to make a contract for the future delivery of the flour as set forth in the memorandum of sale. Rivkin's authority was that of an outside salesman of a wholesale grocery house, with unrestricted powers of sale and collection. "It is a familiar principle of the law of agency, that every authority given to an agent, whether general or special, express or implied, impliedly includes in it, and confers on such agent, all the powers which are necessary, or proper, or usual, to effectuate the purposes for which such authority was created. It embraces the appropriate means to accomplish the desired end. This principle is founded on the manifest intention of the party conferring such authority, and is in furtherance of such intention." *Benjamin* v. *Benjamin*, 15 Conn. 347, 356. "An agent clothed with general power to sell personal property without restrictions, has implied authority to select the purchaser, to fix the price, and to agree upon such ordinary incidental matters as the time and place of delivery,

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and the other ordinary and usual terms of a sale." 1 Mechem on Agency (2d Ed. 1914) § 854. See also 1 Clark & Skyles on Agency (1905) § 245.

We cannot presume that Rivkin, the defendants' agent, was not authorized to make delivery of the merchandise sold by him unless such deliveries were made in the same manner as salesmen who carried their goods with them. His employment as an outside salesman by a wholesale grocery house necessarily implied authority to make contracts for the future delivery of the goods which he sold. This was indispensable in the business which he was employed to conduct.

The defendants also insist that the place of delivery mentioned in the memorandum of sale, which states that it was "to be taken from the car," is so indefinite that the contract fails to meet the requirement of the statute of frauds. In the absence of any explanation, the meaning of this term is hardly intelligible, but the judge of the court below was not at liberty to pronounce this writing void until he had brought to his aid in its interpretation all the light afforded by the collateral facts and circumstances. This could have been done by parol. *Kilday* v. *Schancupp*, 91 Conn. 29, 32, 33, 98 Atl. 335; *Shelinsky* v. *Foster*, 87 Conn. 90, 97 87 Atl. 35. Where an agreement in writing is expressed in technical or incomplete terms, parol evidence may be admissible to explain that which, taken alone, would be unintelligible, when such explanation is not inconsistent with the written terms of the instrument. Thus, if the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments or boundaries, to several writings; or the terms be vague and general, or have divers meanings, as "household furniture," "stock," "freight," "factory prices," and the like; in all these and the like cases, parol evidence

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is admissible of any extrinsic circumstances, tending to show what person or persons, or what things, were intended by the party, or to ascertain the meaning in any other respect. 1 Greenleaf on Evidence (16th Ed.) § 288, p. 416. In the case of *Barrett Mfg. Co.* v. *D'Ambrosio*, 90 Conn. 192, 198, 199, 96 Atl. 930, upon which the defendants rely, a material provision had been entirely omitted from the written document. We there held that this omission could not be supplied by oral proof.

Several questions are presented by the appeal, but we have occasion to consider only two of them. One, whether the court erred in holding that the agent, Rivkin, had no authority to make a contract for the future delivery of the flour as set forth in the memorandum of sale. This we have already decided adversely to the defendants. The record discloses that the court below struck out the memorandum of sale which lay at the very foundation of the plaintiff's case, and in effect nonsuited the plaintiff. It also appears that the principal reason given by the trial court for ruling out the agreement of sale was as follows: "The memorandum does not purport to be a sale, a contract for a future sale of flour, but purports to be a contract or rather a sale of existing flour; and, therefore, under the statute of frauds, or § 4 of the Sales Act [Public Acts of 1907, Chap. 212], neither this witness nor any other witness can prove by parol that this contract was a contract for the sale of flour to be delivered at some future time, nor can this witness nor any other witness give oral testimony to add to or further define the terms of the contract." In this there is error.

In view of these considerations we find no occasion to consider the other assignments of error.

There is error and a new trial is ordered.

In this opinion the other judges concurred.

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E. MILANESEO *vs.* JOHN CALVANESE.

First Judicial District, Hartford, May Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Agreements in restraint of trade, so-called, if reasonable in respect to time and place, are not unlawful.

A promise not to engage in a certain kind of business for three years in a given town, is not unlawful on its face; and if claimed by the promissor to be invalid, when sued for a breach thereof, the facts and circumstances relied upon to support such claim must be pleaded.

Whether the consideration for a promise is adequate or not is a conclusion of law upon the facts alleged; and therefore the allegation that the consideration for the defendant's promise was "grossly inadequate," is insufficient, in the absence of any averment of fact or circumstance justifying such conclusion.

Argued May 7th—decided May 28th, 1918.

SUIT for an injunction to restrain the defendant from violating his contract with the plaintiff not to engage in a certain kind of business within the town of Southington for the period of three years, brought to and tried by the Court of Common Pleas in Hartford County, *Smith, J.*; facts found and judgment rendered for the plaintiff, and appeal by the defendant. *No error.*

George W. Crawford, for the appellant (defendant).

Noble E. Pierce, for the appellee (plaintiff).

SHUMWAY, J. The only error assigned on the appeal is the action of the court in sustaining the demurrer to the defendant's answer.

The plaintiff's cause of action is founded upon a contract commonly called an agreement in restraint of

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trade, and it appears that the defendant agreed that he would not "engage directly or indirectly in the fruit, ice-cream, confectionery and vegetable business within the town of Southington, except in employ of the vendee [plaintiff], for a period of three years from date." Agreements of this character are not unlawful, but on the contrary such an agreement—if the restraint imposed upon the promissor is only partial, is reasonable, and founded upon good consideration—is valid in law; and what is a reasonable restraint must depend upon the circumstances of each case. If upon an inspection of the contract, it appears that the restriction as to time and space does not go beyond what is necessary for the protection of the other party to the contract, the contract upon its face is valid.

In this case the burden was upon the defendant, in order to avoid the obligations of the contract, to set up in his answer some facts or circumstances whereby the contract became unlawful. The answer fails to allege any such facts. It appears by the answer that at the time the contract was made the plaintiff and defendant were engaged in conducting a business in Southington, if not in company at least under some arrangement by which it was expected that articles forming a legal partnership would be signed by them. But such divisions and controversies had arisen that it became inexpedient to continue the business in company and made a separation desirable for both parties. Under those circumstances the defendant sold out to the plaintiff and made the agreement which is the subject of this action. So far, the answer discloses nothing in the circumstances surrounding the contract which renders the restraint upon the defendant, to which he has agreed, unfair or unreasonable. The town of Southington is a territorial division of the State, limited in area, and a limitation by the defendant of his right

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to engage in the business described in this town does not appear to be unreasonable, or more than is necessary for the plaintiff's protection.

However, in paragraph twelve of the answer, the defendant has alleged that in view of the value of his labor and efforts in the business, the consideration for his agreement was "grossly inadequate." If the consideration was grossly inadequate, the defendant is entitled to be relieved from his obligation. The adequacy of the consideration for a promise is a conclusion of law, as much as the determination of the question whether the consideration is good or valuable. The mere allegation of inadequacy of consideration, without alleging any fact or circumstance justifying the conclusion, is certainly insufficient. It appears by the contract that the plaintiff paid the defendant $1,000. There is nothing in the answer to indicate that the sum named was not all the stock in trade was worth, and something more, to pay the defendant for agreeing not to go into the same businesss in Southington. In view of these conclusions it is unnecessary to consider the defendant's counterclaim.

There is no error.

In this opinion the other judges concurred.

Hartford-Ætna National Bank *vs.* Oscar Anderson.

First Judicial District, Hartford, May Term, 1918.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

Notice to a guarantor by a bank that it has accepted his guaranty is not essential when the writing was prepared by the bank and after it had been signed was handed to the borrower who delivered it

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to the bank as authorized by the guarantor; for the whole form and environment of the transaction indicates that the bank invited the execution of a guaranty which, unless rejected because of the signer's financial irresponsibility, was intended by both parties to become effective on delivery.

The guaranty in question was not to cover notes in excess of $10,000 outstanding at any time. *Held:*—

1. That this was clearly a limitation of the guarantor's liability, and not a restriction upon the credit which the bank might extend to the borrower.
2. That assuming the bank was negligent in discounting notes to the amount of $40,000, this defense was unavailing to the guarantor under his limited liability; and furthermore, that the guarantor himself was negligent in not keeping himself informed as to the amount borrowed, inasmuch as it was within his power to terminate his liability, except as to notes then outstanding, at any time upon written notice to the bank.

Argued May 8th—decided May 28th, 1918.

ACTION upon a written guaranty for the prompt payment at maturity of promissory notes, to an amount not exceeding $10,000, of a certain corporation when indorsed by its president and discounted at the plaintiff bank, brought to the Superior Court in Hartford County where a demurrer to the special defenses of the answer was sustained (*Gager, J.*) and the cause was afterward tried upon the other issues to the court, *Curtis, J.;* facts found and judgment rendered for the plaintiff for $10,650, and appeal by the defendant. *No error.*

The written guaranty was in the following form:—"WHEREAS I have requested the Hartford National Bank to discount notes signed by the Pierson Engineering & Construction Co. (Inc.) of Bristol and Hartford, Conn., said notes to be endorsed by Martin E. Pierson.

"NOW, THEREFORE, for value received, and for considerations which I hereby acknowledge, I guarantee to said Hartford National Bank the prompt payment at maturity of any and all notes signed by said The Pierson Engineering & Construction Co. (Inc.) of

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Bristol and Hartford, Conn., when endorsed by Martin E. Pierson, and discounted at the said bank.

"This guarantee shall expire only upon written notice from me to the bank and shall hold good until the payment in full of all notes discounted at the time notice is given, but it shall not cover notes in excess of ten thousand dollars ($10,000) as a total amount outstanding at any one time.

"This guaranty is intended to apply in all its conditions to such notes as are under discount at the present time at the Hartford National Bank.

"WITNESS MY HAND AND SEAL this 1 day of October, 1912.

Oscar Anderson. (L. S.)"

The bank acted on this guaranty, and notes to the amount of $40,000 were discounted in 1916, when the Pierson Company became insolvent. The sum of $32,662.90 is now due and payable on these notes, and the defendant refuses to pay $10,000 on his guaranty.

The case turns on the validity of certain special defenses, which are sufficiently outlined in the opinion.

Newell Jennings and *Josiah H. Peck*, for the appellant (defendant).

Harry W. Reynolds, for the appellee (plaintiff).

BEACH, J. The assignments of error challenge the rulings of the court in sustaining the plaintiff's demurrers to the special defenses set up in the defendant's answer. After these demurrers had been sustained, the defendant failed to plead over and the case was heard, as if it were a defaulted case, upon the complaint alone.

The first defense, by denying that the defendant was notified by the bank that it had accepted him as guar-

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antor and acted on the guaranty, raises the question whether the defendant was entitled to such notice. For the purpose of testing that question, we may look, not only to the complaint itself, but to the findings based upon its allegations. *Scott* v. *Scott*, 83 Conn. 634, 78 Atl. 314. From these it appears that the guaranty was prepared at the bank and handed to Pierson, who induced the defendant to sign it and return it to him with authority to deliver it to the bank, which was done, and the bank at once acted on it.

The facts are substantially the same as in *United States Fidelity & Guaranty Co.* v. *Riefler*, 239 U. S. 17, 36 Sup. Ct. 12, where the Fidelity Company gave to one Dooling, an applicant for a surety bond, a blank form of indemnity bond, and the defendants, at Dooling's request, signed it and authorized Dooling to deliver it to the Fidelity Company, which was done, and that company at once acted on it and became surety for Dooling. The court said (p. 24): "The only ground for hesitation is that seemingly the bond in suit might have been rejected by the company as unsatisfactory, and that therefore it may be argued that Riefler and Hall were entitled to notice that it had been accepted. But we are of opinion that in the circumstances of this case it is reasonable to understand that they took the risk. They were chargeable with notice that by their act their bond had come into the hands of the company. The bond on its face contemplated that the company would accept and act upon it at once, and disclosed the precise extent of the obligation assumed. It seems to us that when such a bond, carrying, as a specialty does, its complete obligation with the paper, is put by the obligors into the hands of the obligee and in fact is accepted by it, notice is not necessary that a condition subsequent to the delivery by which the obligee might have made it ineffectual has not been fulfilled."

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This reasoning is applicable to the case at bar. The writing is in form a specialty carrying its complete obligation with the paper. It is not an offer requiring acceptance, and the circumstances under which it was executed confirm the legal effect of the contract. It was delivered to the bank, not as an offer originating with the guarantor, but in answer to the requirement of the bank that Pierson should procure this very paper to be signed by a responsible guarantor. No doubt the bank reserved the right to reject the guaranty on the ground that the signer was not acceptable, but the whole form and environment of the transaction indicates that the bank invited the execution of a guaranty which, unless rejected for that reason, was intended by both parties to become effective on delivery. We think the defendant, having executed and, by his agent, delivered this specialty to the bank, is in no position to deny that he intended the bank to accept it and act upon it at once and without notice.

The second defense and demurrer thereto raise the question whether it was a condition of the guaranty that the bank should not discount the notes of the Pierson Company to an amount exceeding $10,000 as a total amount outstanding at any one time. We think not. The phrase in question is plainly a limitation of liability and not a limitation of credit. The request for an extension of credit is not limited, and in this respect the case differs sharply from those relied on by the defendant. It is hard to see how the defendant could be effectually protected by limiting the credit of the principal debtor at one bank alone. At any rate this guaranty does not attempt to do so.

The third defense alleges, in substance, that the plaintiff bank negligently and unreasonably increased its discounts of the Pierson Company notes to $40,000, without notifying the defendant, whereby the liabilities

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of the company and of the defendant on his guaranty were increased. This defense was also demurred to.

The principle attempted to be invoked is that negligence by the creditor in his relations with the debtor, which enhances the guarantor's loss, will release the latter *pro tanto.*

Assuming, without deciding, that the third defense sufficiently charges the bank with negligence in discounting the Pierson Company's notes to the amount of $40,000, the defense is not open to the defendant in this case. In the first place, the guaranty is limited so that the liability intended to be assumed by the guarantor cannot be unreasonably and unexpectedly increased in amount by the creditor's negligence, as was the fact in the two cases cited by defendant, where the guaranty was not limited in amount and the creditor negligently extended credit far in excess of the reasonable requirements of the debtor's business.

In the second place, the defendant had it in his power to terminate his liability, except as to notes then outstanding, whenever it appeared prudent to do so. He did not keep himself informed as to the amount of the Pierson Company's indebtedness to the bank, but, according to his own answer, allowed three and one half years to elapse without finding out whether the guaranty had been acted on at all. His loss is attributable as much to his neglect of his own interests as to any alleged negligence on the part of the bank.

There is no error.

In this opinion the other judges concurred.

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THE EQUITABLE TRUST COMPANY, EXECUTOR, *vs.* FRANK C. PLUME ET ALS.

Third Judicial District, New Haven, January Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

An appeal to this court from a judgment erasing the case from the docket, should ordinarily be taken within ten days thereafter, since no finding of facts or other action of the trial judge is required to properly present the question of law for review; but if a motion to reopen the judgment and restore the cause to the docket is made and entertained, it operates to defer the time for filing an appeal until that motion is finally decided.

No notice of appeal is required where the appeal itself is filed within the time limited for filing the notice.

A motion to erase a cause from the docket should address itself solely to the facts of record, and not contain affirmative allegations requiring proof.

The common law of this State does not preclude a corporation from serving as an executor or administrator; but under the provisions of Chapter 131, §§ 1 and 2, and Chapter 194, § 81, of the Public Acts of 1903, no foreign trust company can act as administrator in this State, though it may act as the executor of a Connecticut resident if named by the latter in his will, after it has appointed in writing the Secretary of State as its attorney to receive service of process; and therefore a judgment or decree of a Court of Probate appointing a foreign trust company as an ancillary administrator or executor of a nonresident decedent is beyond its jurisdiction and is a nullity.

A jurisdictional defect may be taken advantage of at any time, and directly or collaterally.

The qualification of an administrator or executor in a foreign jurisdiction does not give him the right to administer upon assets here, or to sue for a debt due here: he must first take out ancillary administration. He may, however, lawfully collect assets in this State if they are voluntarily delivered to him.

An appointment of an administrator or executor by a Court of Probate in this State is conclusive of the appointee's right to act as such, provided the court had jurisdiction to render such judgment.

Argued January 17th—decided June 11th, 1918.

SUIT by an alleged creditor of the beneficiary of a testamentary trust to secure the appropriation of the

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income accruing upon the trust property to the payment of the creditor's claim, and for other relief, brought to the Superior Court in New Haven County where the cause, upon motion of one of the defendants, was erased from the docket by the court, *Case, J.*, for the lack of jurisdiction, from which judgment the plaintiff appealed. *No error.*

In this court the appellees filed a plea in abatement and also a motion to erase, to which the appellant demurred. *Plea and motion overruled.*

Ulysses G. Church, for the appellant (plaintiff).

Charles S. Hamilton, and *Frederick Seymour* of New York City, for the appellees (defendants).

WHEELER, J. The plaintiff's claim is the same as that made in *Coyne* v. *Plume*, 90 Conn. 293, 97 Atl. 337. While that case was before this court Coyne, a nonresident, died, and the present plaintiff, having been appointed ancillary executor by the Court of Probate for the district of Waterbury, was allowed by this court to appear and prosecute the action. The judgment for the plaintiff was on appeal reversed. Thereafter the plaintiff trust company, as ancillary executor, was admitted as a party plaintiff in the Superior Court, where the judgment was reversed in accordance with the decree of this court.

The plaintiff, as ancillary executor, seeks to secure payment of the debt of Plume out of the income of a trust fund in which Plume had a life use.

The defendants Plume, Willard and Seymour are nonresidents. Willard and Seymour claim an interest in this income through certain assignments from Plume to them. Hamilton, a resident, claims an interest in the income as attaching creditor.

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In this action a writ of foreign attachment was served on the Colonial Trust Company, and subsequently it was appointed temporary receiver, and as such is now holding the income from this fund.

Each of the defendants specially appeared and filed a plea in abatement and to the jurisdiction, to each of which the plaintiff demurred.

The defendant Seymour also filed a motion to erase the case from the docket for want of jurisdiction. The several demurrers and the motion to erase were heard together, but the trial court concluded that one of the questions raised by the motion to erase made it unnecessary to consider the pleas in abatement or the other questions raised by the motion. It accordingly granted the motion upon the ground that the plaintiff trust company had no right to sue as executor.

The motion to erase in this court is an incorrect method of meeting all of the issues raised upon this motion.

The pleas in abatement covered by paragraphs one and two raise the question of the validity of the appeal.

The judgment erasing the case from the docket was rendered on July 19th, 1917, a notice of appeal was duly filed, and the appeal filed on October 25th following. The necessity of filing the appeal in July and August was suspended. This is fairly within the intendment of Chapter 24 of the Public Acts of 1905, p. 264. But since no finding of facts or other action of the judge was necessary to properly present the questions in the cause upon the judgment erasing the case, the appeal must have been taken within ten days unless the judge had granted a further extension of time. General Statutes, § 791; *Hart* v. *Farchau*, 83 Conn. 316, 318, 76 Atl. 292; *Cramer* v. *Reeb*, 89 Conn. 667, 669, 96 Atl. 154. Under our application of the provision for granting an extension of time in which to file an

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appeal, litigants in all classes of appeal may apply for such extension, and, as we have before pointed out, "the practice of our trial judges in granting such extensions is neither narrow nor illiberal" When, however, a motion is made to restore a case to the docket which has been stricken from it, and this motion is entertained, it operates to defer the time for filing an appeal until the motion is finally decided. *Sanford* v. *Bacon*, 75 Conn. 541, 544, 54 Atl. 204; *Beard's Appeal*, 64 Conn. 526, 535, 30 Atl. 775. The motion to reopen the judgment erasing this case from the docket, is similar to the motion to restore a case to the docket, and is within the principle of these decisions, since it was entertained by the court, an answer to it filed, and a reply to this answer filed, and the court, upon the issues thus joined, heard the motion and rendered its decision. If this were not the ruling, it would be necessary to file the appeal within ten days after the motion to erase was granted, and then to file an additional appeal within ten days from the denial of the motion to reopen the judgment. This would unnecessarily cumber the record to no good purpose.

No notice of appeal was filed after the motion to open the judgment had been denied, but within six days thereafter the appeal was filed. An appeal filed within the time the notice of appeal is required to be filed serves a double purpose, as a notice of appeal and as an appeal itself. There was no occasion for filing an additional notice of appeal. The demurrer to the pleas in abatement and to the jurisdiction in this court is sustained.

Both the plea in abatement and the motion to erase, filed in the trial court, contain affirmative allegations requiring proof. These are out of place in a motion to erase. Such a motion is to be determined as a demurrer or a motion to quash is determined, by the facts of

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record. The trial court decided the motion to erase and not the pleas in abatement, and it decided merely the question of law arising upon the facts of record and ignored consideration of questions dependent upon facts extraneous to the record.

The ground upon which the trial court granted the motion to erase, was that upon the facts of record the plaintiff trust company did not have the right as executor to maintain this action in Connecticut. That question was fairly raised from the motion to erase. After the judgment was entered erasing the case, the trust company moved to reopen this judgment and to add as plaintiff a resident ancillary administrator on the estate of Coyne, whose appointment it alleged it was ready and willing to apply for and had already applied for. These two questions constitute the sole ground of the appeal: the first is the only one of real importance.

We held in *Farmers Loan & Trust Co.* v. *Smith*, 74 Conn. 625, 627, 51 Atl. 609, that every testator could select his executor from any class of persons, unless such class was by the common law or statute excluded from such appointment. The claim was there made that under our common law a corporation could not be made an executor. We did not find it necessary to decide this, but we expressed the view that in the light of the legislation of recent years it could not be said to be the settled policy of the State that corporations as such were necessarily excluded from being executors. Public policy must rule the decision, and there is no declared public policy against their so acting. On the contrary, in the sixteen years which have passed since this decision many trust companies have been organized under legislative sanction, and invariably these have been given power to act as executor and administrator, a power all trust companies organized theretofore possessed. As a consequence, it must be held to be the

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established policy of the State to grant to corporations organized to do a trust company business the privilege of acting as executors and administrators; and, therefore, we now hold that the common law of this State does not deny to a corporation the right or privilege to serve as an executor or administrator.

The qualification of an administrator or executor in a foreign jurisdiction does not, as such, give him the right to administer upon assets here, or to sue to recover a debt due here. He must first take out ancillary administration. *Hobart* v. *Connecticut Turnpike Co.*, 15 Conn. 145, 147; *Riley* v. *Riley*, 3 Day, 74, 88. But such executor or administrator may lawfully collect assets in this State which are voluntarily delivered to him. *Selleck* v. *Rusco*, 46 Conn. 370, 372. Under our practice, which is the general American practice, an exemplified copy of the foreign will, duly proved and authenticated, will, after citation and hearing, be ordered filed and recorded, and letters testamentary issued to the executor named in the will. While the ancillary appointment is founded on comity, it is a recognized right which our courts will concede to the foreign executor, and upon provision being made for our own creditors, the balance will either be remitted to the principal executor, or distributed here in conformity with the title and rights conferred by the will. *Marcy* v. *Marcy*, 32 Conn. 308.

The appointment of the plaintiff trust company as executor by the judgment of the Court of Probate for the district of Waterbury, unappealed from, was conclusive of the right of the trust company to act as executor in Connecticut in accordance with the authority of this judgment, provided the court had jurisdiction to render such judgment. If it had no such jurisdiction its judgment is a nullity and open to attack in this action. In *Farmers Loan & Trust Co.* v. *Smith*, 74 Conn. 625, 629, 51 Atl. 609, we decided that

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our Corporation Act denied to foreign corporations the privilege of acting as executor in Connecticut. While the case called for a decision as to the right of a foreign corporation engaged in the business of a trust company to act as executor of a testator resident in Connecticut, it necessarily involved a consideration of whether our Corporation Act accorded to a foreign trust corporation the privilege of acting as executor or administrator in Connecticut of a resident, or of acting as ancillary executor or administrator of a nonresident. "It is clear," we held, "that § 51 permits corporations established under the laws of other States to exercise in this State their appropriate corporate powers in the transaction of any kind of business permitted to a domestic corporation formed under the Corporation Act of 1901; and forbids corporations of other States to engage in any kind of business in this State which is not permitted to domestic corporations formed under said Act. . . . We are satisfied that the laws of our State do not permit the formation of a company under our Corporation Act for the purpose of transacting the business of executor or administrator, whether that business is associated with other business appropriate to a trust company, or is associated with manufacturing, trading, or other lawful business, or is the sole purpose of the corporation. It follows that § 51 denies to foreign corporations the privilege of transacting such business within this State." The court especially relied for its construction of this section upon the latter part: "but no foreign corporation shall engage or continue in any kind of business in this State, the transaction of which is not permitted to domestic corporations by the laws of this State." Section 81 of Chapter 194 of the Public Acts of 1903 repealed § 51, and substituted in its stead: "but no foreign corporation belonging to any of the

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classes excepted in Section 62 of this act shall engage in or continue, in this State, the business authorized by its charter or the laws of the State under which it was organized, unless empowered to do so by some general or special law of this State, except for the purpose of carrying out and renewing existing contracts heretofore made." In the classes named in § 62 are trust companies; so that this amendment to the Corporation Act forbids any foreign trust company to act as executor or administrator in Connecticut unless empowered so to do by some general or special law of this State.

The only "special law" of this State conferring upon a foreign corporation the privilege of acting as executor in Connecticut, is Chapter 131 of the Public Acts of 1903. By §§ 1 and 2 of that Act the foreign corporation, authorized by its charter to act as executor, and named as executor in the will of a resident of this State, may qualify as such, but shall not act until it shall appoint in writing the Secretary of State to be its attorney upon whom process may be served. The plaintiff trust company, authorized to act as executor or administrator by its charter, is, under our Corporation Act as amended, permitted to act as executor where so named in the will of a resident of this State. In all cases it is debarred from acting as administrator within this State.

It may be that there is greater reason in permitting a foreign trust company to act as ancillary executor in this State, than to act as executor of the will of a resident. That is a legislative consideration with which we have no concern. Before the foreign trust company can act as executor of a resident of Connecticut, the legislature deemed it important that it be required to appoint the Secretary of State as its attorney. If this plaintiff were permitted to act, there would be no similar safeguard.

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We do not think there is any merit in the claim that the subject-matter of this action is not within the jurisdiction of the court. The Court of Probate was without power to appoint the plaintiff trust company executor, and therefore its judgment was a nullity. Nor do we think that the court's action in *Coyne* v. *Plume*, 90 Conn. 293, 97 Atl. 337, in admitting the plaintiff trust company to appear and prosecute, determined its right to act as executor. That court was without power to confer upon the plaintiff this power. A jurisdictional defect may be taken advantage of at any time, and directly or collaterally. The remaining ground of appeal is not well taken.

The motion to open the judgment was predicated, not upon present facts, but upon what it was hoped might be made facts in the future. No facts are alleged in the motion which furnish the slightest basis for opening the judgment.

There is no error.

In this opinion the other judges concurred.

THE STATE OF CONNECTICUT *vs.* SAMUEL S. GREENBERG.

First Judicial District, Hartford, March Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Whether alleged perjured testimony was material or not, is a question of law.

Testimony that tends of itself, or in connection with other evidence, to influence the result, directly or indirectly, is material.

Upon a prosecution for receiving and concealing stolen goods, a son of the accused, who was called in his behalf, testified that at the time of the alleged theft he, the witness, was in Hornell, New York, which witnesses for the State afterward contradicted, stating that they had talked with him concerning the theft at his father's ware-

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house at the time in question. *Held* that under these circumstances the son's testimony as to his whereabouts was material, since it affected, or might have affected, his credibility as a witness.

The submission of a question of law to the determination of the jury is harmless error, if their verdict shows that they decided it correctly.

The trial judge may, but is not ordinarily bound to instruct the jury that the expression of belief in the guilt of the accused by the State's Attorney and the filing of an information by him should not influence them in reaching their verdict.

An instruction that evidence of good character is available to the accused and is always entitled to consideration; that in a close case it serves a useful purpose and may be sufficient in itself to raise a reasonable doubt, though if the case is clearly made out it is not a defense,—is customary and unexceptionable.

This court has no power to set aside a verdict of the jury rendered upon conflicting evidence.

A motion for a postponement is addressed to the discretion of the trial court, and its action will not be reviewed unless the record indicates that rights of the accused were thereby prejudiced.

The accused complained of certain remarks of the State's Attorney as improper and prejudicial. *Held* that the statements made did not so far exceed the limits of fair advocacy as to entitle the accused to a new trial.

The admission of questionable evidence respecting an undisputed fact in the case is harmless.

Argued March 6th—decided June 11th, 1918.

INFORMATION for perjury, brought to the Superior Court in Hartford County and tried to the jury before *Case, J.*; verdict and judgment of guilty, and appeal by the accused. *No error.*

Benjamin Slade, for the appellant (the accused).

Hugh M. Alcorn, State's Attorney, and *Newell Jennings*, Assistant State's Attorney, for the appellee (the State).

WHEELER, J. The accused, Samuel S. Greenberg, was tried for perjury in giving testimony upon the trial

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of his father, Jacob Greenberg, for receiving and concealing certain tobacco, knowing the same to have been stolen.

The State claimed to have proved that Samuel S. Greenberg, with his father, constituted the copartnership of Jacob Greenberg and Sons, who were engaged in business as tobacco dealers and had a warehouse in East Hartford; that Jacob Greenberg induced Moiger, with two other men, to steal from the tobacco shed of Mrs. Larsen forty bundles of tobacco on the night of December 6th, 1916, and that this was delivered in a shed adjacent to the Greenberg warehouse in East Hartford on the evening of December 7th, and early on the morning of December 8th was placed in the said warehouse, and that Greenberg paid these three men for the same.

After the State had closed its case in chief, the accused, Jacob Greenberg, offered as a witness in his own behalf the said Samuel S. Greenberg, who testified that he was in partnership with his father in the leaf tobacco business in East Hartford. He also testified as to the location of the said warehouse used in their business, its proximity to the nearest house and to this shed, and as to the artificial light in that locality; that this light shone upon the warehouse door and upon the shed, and that these lights were public lights and burned all night at this time; that persons could be seen putting tobacco in this shed if this were done in the night time, and that there was a light right opposite the entrance to the main warehouse. He also testified that he kept the book required to be kept by the government and made therein the entries in relation to the tobacco purchased on December 8th, and that this was made in the regular course of business; and that subsequently he crossed off this entry when the tobacco was redelivered by them to Mrs. Larsen. He also testified that he and his

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brother Max were the only ones who had keys to the warehouse, and that Jacob Greenberg and Sons were accustomed to purchase leaf tobacco of different peddlers, and that at the time of the claimed theft he was in Hornell, New York, and did not return until after December 8th.

The State offered in rebuttal the testimony of Mitchell and Brooks, State policemen, that they went to the Greenberg warehouse on the afternoon of December 8th, to look for the Larsen tobacco, and there talked with Samuel S. Greenberg, who denied knowing Moiger and said his father had not bought any tobacco, and had had no transaction with Moiger, and that if he could find that Moiger had brought stolen tobacco into his place he would leave nothing undone to locate him for the officer.

The information in the case before us charges Samuel S. Greenberg with having testified under oath, in the trial of State against Jacob Greenberg, that on December 8th, 1916, he was not at the warehouse of Jacob Greenberg and Sons, but in Hornell, New York, whereas he was in fact in East Hartford and at said warehouse.

Counsel for this accused maintains that the testimony so given by him, and all of his testimony given upon the trial of Jacob Greenberg, was immaterial to the proper determination of any of the main or subordinate issues raised at that trial. Error is also predicated upon the failure to charge that the testimony set forth in the information upon which the charge of perjury was based, was not material to the issue involved in the trial of Jacob Greenberg; and, further, that the court erred in leaving to the jury the decision of the question whether this testimony was material or not.

In this case all of the facts which the State claimed proved that the testimony was material were before

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the court, and if the jury found these facts to have been established it became the duty of the court to instruct the jury whether the testimony was material or not. The question of materiality, as we think, is, on the better reason and the better authority, in the final analysis, a question of law. 1 Wharton on Criminal Evidence (10th Ed.) § 86; *State* v. *Brown*, 128 Iowa, 24, 32, 102 N. W. 799; *Partin* v. *Commonwealth*, 154 Ky. 701, 159 S. W. 542; *State* v. *Richardson*, 248 Mo. 563, 569, 154 S. W. 735; *People* v. *Bradbury*, 155 Cal. 808, 815, 103 Pac. 215; *Saucier* v. *State*, 95 Miss. 226, 48 So. 840; *Gordon* v. *State*, 48 N. J. L. 611, 7 Atl. 476. The court was in error in leaving the determination of the materiality of the testimony to the jury, but the error was harmless, since the verdict of the jury meant that it found the testimony to be material, and we think this was the conclusion which the court should have reached.

Samuel S. Greenberg testified for Jacob Greenberg, his partner and father. His testimony as to the location of the warehouse and the lights near it, and the probability that the delivery of tobacco at the warehouse, as the State claimed, would have been seen, was for the obvious purpose of disproving the criminal intent and helping the claim of the defense that the transaction was a valid sale and not a purchase of goods known to have been stolen.

When Samuel testified he was in Hornell at the time of the alleged crime, it was for the purpose of relieving himself from complicity in or knowledge of this crime. It was permissible for the State then to show that he was not at Hornell but at the warehouse, when and as the State claimed, and if the jury disbelieved his statement as to his being in Hornell it might well have affected his credibility as a witness. Such testimony was made relevant and material by the manner in which the testimony of the witness was given: the extent

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of the materiality is entirely unimportant. "Any testimony in a case that tends of itself, or in connection with other testimony, to influence the result on a direct or a collateral issue, is material." 1 Wharton on Criminal Evidence (10th Ed.) § 89. If the testimony would, if believed, tend to affect the verdict of the jury, it meets the test of materiality. If the testimony affects the credibility of the witness, or if the cross-examination develops circumstances which are subsequently shown to be untrue and these affect the credibility of the witness, the testimony will be held to be material. 1 Wharton on Criminal Evidence (10th Ed.) §§ 86, 89; Clark on Criminal Law (3d Ed.) p. 445; 2 Bishop's New Criminal Law, § 1038; *Wood* v. *The People*, 59 N. Y. 117, 123; *State* v. *Hunt*, 137 Ind. 537, 547, 37 N. E. 409. By any of these tests this testimony was material.

The request to charge that the expression of belief in the guilt of the accused by the State's Attorney and the filing of an information by him, should not influence the jury in the finding of the facts or in the verdict reached, belonged to the class of requests which ordinarily may be given to the jury or not, according as the judgment of the trier may determine.

The requests to charge as to the interest of the police officers, and as to the place of the presumption of innocence in a criminal trial, were sufficiently covered by the charge.

The appellant selects as a ground of error a part of the charge as to the evidential value of good character. "That," said the court, "is always available to one accused of crime, but you will give it its proper place in the case. The jury must always consider it. But in a case clearly made out, evidence of good character does not, in itself, avail as a defense. It sometimes serves a very useful purpose in a close or doubtful case.

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In a close and doubtful case it may be sufficient, in itself, to raise a reasonable doubt of guilt of the accused." This conforms to our customary charge upon this point, and appears to us to be unexceptionable. The appellant excepts to the latter part of this charge and fails to consider this in connection with the first part, that good character is always to be considered.

The error predicated upon the refusal of the court to set aside the verdict and order a new trial is not well taken. That issue involves merely a consideration of conflicting evidence, and this is beyond our power to determine, and clearly was within the province of the jury.

The failure of the court to grant an adjournment was not so clearly an abuse of discretion as to amount to error. So far as we can ascertain from the record, the rights of the accused were amply protected and did not suffer through the failure to secure an adjournment.

We have examined those parts of the argument of the State's Attorney to the jury which are claimed to have been improper and prejudicial to the accused. We are not prepared to hold, making reasonable allowance for the heat and deep interest aroused by zealous advocacy, that the State's Attorney carried his argument beyond the limits of fair advocacy so as to make a new trial necessary.

The rulings on evidence remain to be considered. The article from the *Hartford Times*, of the theft of the tobacco of Mrs. Larsen, was, so far as this record shows, hearsay in the trial of Jacob Greenberg. Whether, because of this fact, it would have been admissible in this case, we need not determine. It concerned an undisputed fact in the case, and its admission in this case could have done no harm.

The other objections to evidence which are pursued in the brief, are to the materiality of the testimony. We

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have examined this evidence in the light of the test of materiality as adopted by us, and by that test we find almost all of the evidence offered was material to this issue, and those parts whose materiality was open to question cannot be held to have affected the result in any appreciable measure.

There is no error.

In this opinion the other judges concurred.

NICHOLAS MCEVOY, ADMINISTRATOR, *vs.* THE CITY OF WATERBURY ET AL.

Third Judicial District, Bridgeport, April Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

The plaintiff's intestate, while walking along a city street, stumbled and fell over a telegraph pole which had been left in the gutter near the curb. It was raining slightly and the weather was misty. *Held* that the question of contributory negligence was properly left to the jury to determine as one of fact.

After the case against the city had been pending for more than a year, the telegraph company, which owned the pole, was made a codefendant, and pleaded the statute of limitations. *Held:*—

1. That this was a valid defense and justified the trial court in directing a verdict in favor of the telegraph company.
2. That such verdict and judgment thereon could not affect the city's right to sue the telegraph company for indemnity, since that cause of action was altogether different from that involved in the present suit, and one which would not accrue until the liability of the city to the plaintiff had been finally adjudicated.

Until a cause of action accrues the statute of limitations does not begin to run.

Argued April 9th—decided July 23d, 1918

ACTION to recover damages for personal injuries to the plaintiff's intestate alleged to have been caused

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by the negligence of the defendants, brought to the Superior Court in New Haven County and tried to the jury before *Bennett, J.;* verdict and judgment for the plaintiff for $1,200 as against the defendant city of Waterbury, and in favor of the other defendants, from which said city appealed. *No error.*

Francis P. Guilfoile, for the appellant (defendant City of Waterbury).

William E. Thoms, for the appellee (plaintiff).

Lawrence L. Lewis, for the appellee (defendant Postal Telegraph-Cable Company).

WHEELER, J. The plaintiff's intestate was injured on July 15th, 1915, by falling over a telegraph pole which lay in the gutter near the curb of a sidewalk in a street of the defendant city of Waterbury.

The city supports its assignment of error for the denial of its motion to set aside the verdict against it, principally upon the ground that the plaintiff's intestate, by her own negligence, materially contributed to her injuries, since she should, in the exercise of reasonable care, have known of the existence of the pole and safely passed over it.

There was evidence from which the jury might reasonably have found that the plaintiff's intestate was walking at a reasonable gait, that it was raining slightly and the weather was misty. Under these circumstances, we think that even though the jury found she knew of the existence and location of this pole, she was not, as a matter of law, herself negligent in falling over it. The issue of contributory negligence was, under all the surrounding circumstances, one of fact for the jury to find.

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The court directed a verdict in favor of the defendant Postal Telegraph-Cable Company, upon the second defense of its answer, the statute of limitations. The facts upon which this verdict was directed were these: This action was brought by writ dated October 4th, 1915, and came to trial in December, 1916. The Postal Telegraph Company was named as codefendant, but on the trial it developed that the owner of the pole was not this defendant, but was the Postal Telegraph-Cable Company. This company was subsequently, on December 15th, 1916, made a codefendant, and it appeared and pleaded among its defenses the statute of limitations, because the action against it was not begun within one year from the date when the plaintiff's intestate received her injuries. The direction of the verdict in favor of the Postal Telegraph-Cable Company, upon the ground stated in this defense, is the remaining reason of appeal requiring consideration.

The action by the plaintiff against this defendant was not begun within one year from the date when the plaintiff's intestate received her injuries, and under the statute (Public Acts of 1903, Chap. 149) the defense of the statute of limitations was good, and the verdict upon this ground in favor of this company properly directed.

The city of Waterbury contends that the effect of the court's action in directing this verdict was to deny the city its action over against this company. This cannot be true. The cause of action in the plaintiff's case against the city, or against the Telegraph-Cable Company, is a totally different action from that of the city against the Telegraph-Cable Company. The latter action had not accrued when the accident occurred. Until the final judgment was obtained by the plaintiff against the city, it could not have been known with certainty that the city would ever have a cause of action

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over against the Telegraph-Cable Company. The statute of limitations, in the action by the plaintiff against this company, did not bar the action of the city against this company, since no statute of limitations as to this cause of action began to run in favor of the Telegraph-Cable Company until the final judgment against the city and the right of action over against the Telegraph-Cable Company accrued. The statute of limitations does not begin to run until the accrual of the action. *Hull* v. *Thoms*, 82 Conn. 647, 652, 74 Atl. 925; *Gay's Appeal*, 61 Conn. 445, 451, 23 Atl. 829. The authorities upon the precise question are not numerous, but those which we have seen support the conclusion that any cause of action of the city of Waterbury against the Postal Telegraph-Cable Company could not accrue until the final judgment against the city was entered. *Lincoln* v. *First National Bank*, 67 Neb. 401, 405, 93 N. W. 698; *Ashley* v. *Lehigh & W. B. Coal Co.*, 232 Pa. St. 425, 431, 81 Atl. 442; *Louisville* v. *O'Donaghue*, 157 Ky. 243, 245, 162 S. W. 1110; *Veazie* v. *Penobscot R. Co.*, 49 Me. 119, 127; 2 Wood on Limitation of Actions (4th Ed.) § 179; 17 Ruling Case Law, p. 765, § 130.

There is no error.

In this opinion the other judges concurred.

William O'Neil et al. *vs.* The Manufacturers National Bank.

Third Judicial District, Bridgeport, April Term, 1918.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

A condition precedent to the recovery of money paid by mistake, is a finding that the receiver ought not in equity and good conscience to retain it. Accordingly, the payment, under mistake, of a forged

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note, by its purported maker, does not entitle him to recover the sum so paid, if that amount was in fact due from him to the one to whom it was paid.

To avoid circuity of action and useless expense, the law does not require the payment of money by one to another which the latter is bound to immediately refund.

A conflict between the finding as made, and certain paragraphs of the draft-finding marked "proven" and "not proven," which was apparently due to the inadvertence of the trial judge and does not affect the merits of the case, will not avail the appellant.

During the argument in this court the appellee contended that the appeal should be dismissed because the appellant had not stated, in his request for a finding, the questions of law he desired to have reviewed. *Held* that it was a sufficient answer to this contention that it came too late.

Argued April 10th—decided July 23d, 1918.

ACTION to recover money alleged to have been paid by the plaintiff William O'Neil to the defendant through mistake, brought to the City Court of Waterbury whence it was transferred, upon motion of the defendant, to the District Court of Waterbury, and tried to the court, *Makepeace, Deputy-Judge;* facts found and judgment rendered for the plaintiff William O'Neil for $156, and appeal by the defendant. *Error; judgment to be entered for defendant.*

James J. O'Keefe discounted at defendant bank a note for $400, dated June 14th, 1906, and payable two months after date, made by William O'Neil to him as payee and indorsed by him and Dan O'Neil.

Partial payments were made by O'Keefe upon this indebtedness, and with each payment the bank took from O'Keefe a note for the amount of the unpaid balance upon the preceding note, which, in each case, purported to be made by William O'Neil and to be indorsed by said Dan O'Neil and himself.

On February 28th, 1907, this indebtedness had been reduced to $150, and a note for this sum, purporting to be made by William O'Neil to James J. O'Keefe

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as payee and indorsed by said O'Keefe and Dan O'Neil, was discounted by the defendant bank.

The bank received each of said notes from O'Keefe as payment for the preceding note, without presentment or notification to William O'Neil or Dan O'Neil, and either cancelled or surrendered to O'Keefe each preceding note. The names of said William O'Neil and Dan O'Neil on each of these notes, except the original note of $400, was a forgery, and each was executed by O'Keefe without the knowledge of either William or Dan O'Neil.

On April 30th, 1917, William O'Neil received notice that the note for $150 was due, and he paid the same to the defendant bank.

The signature of William O'Neil upon said note bears no resemblance to his real signature.

The defendant bank negligently accepted each of the notes with forged names thereon, in partial satisfaction of the preceding note.

On the same day he paid this note William O'Neil discovered that his name upon it was forged, and demanded repayment from defendant, which was refused.

Edward F. Cole, for the appellant (defendant).

Andrew D. Dawson, for the appellee (plaintiff).

WHEELER, J. The defendant bank was a holder of the original note in due course. From time to time a payment was made to the bank upon the loan, and a new note was given for what then remained due upon the original debt. The notes given subsequent to the original note were forgeries as to the names of the maker, William O'Neil, and the indorser, Dan O'Neil. These forged notes cannot be held to have ever paid in full or in part the original indebtedness. They were mere

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pieces of paper, in no wise affecting the liability of the original maker to the bank. His liability to the bank was evidenced by the original note, and until the indebtedness so evidenced was paid or discharged it continued.

As we read the finding, it is that $150 of this original indebtedness was represented by the last forged note and was due and unpaid at the time of trial. It must follow, that the maker of the original note is still liable for this indebtedness unless the defendant bank has discharged him from liability directly, or by its course of conduct. The finding shows that there has been no direct discharge. The claim is made that the defendant bank, by negligently accepting this forged paper, has prejudiced the rights of the maker by preventing his successful action over against O'Keefe, the payee. The facts found do not support this claim. The maker was primarily liable to the bank, and, so far as we know, he has no action over against the payee, O'Keefe.

The appellee presses upon us his contention that there is a serious and irreconcilable conflict between the paragraphs of the draft and counter-finding marked "proven" and "not proven," and the finding as made. It is quite true that there is some conflict, arising, we presume, through inadvertence of the trial court in the marking of these paragraphs. But we do not think this conflict affects the substantial merits of the case. The appellee correctly interprets the situation: its case depends upon the finding of the existence of an obligation arising at the time of the making of the original note for $400; and on the immediate point of the existence of such obligation there is no conflict. The trial court marked "not proven" the paragraphs specifying the existence of an obligation on the part of the plaintiffs, who were not only the maker, but O'Keefe the payee and indorser as well. In all probability the

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trial court had in mind the fact that the liability of O'Keefe as indorser upon the original note no longer existed, since he received no notice of protest of this note, while the liability of the maker, William O'Neil, continued. He was under no obligation to pay the forged note for $150, and it is clear that he paid it under a mistake. It does not follow that he is entitled to recover the sum paid. At this time he in fact owed the bank the sum which this note purported to represent.

A condition precedent to the recovery of money paid by mistake is a finding that the receiver ought not in good conscience to retain it. The circumstances surrounding this payment do not make such a finding permissible. *Mansfield* v. *Lynch*, 59 Conn. 320, 327, 22 Atl. 313. Since this amount is due on the indebtedness evidenced by the original note, the bank may at any time recover it. The folly of compelling the bank in this action to repay the maker the $150 paid on the forged note, and immediately pay back to the bank the sum, is apparent. The injustice of penalizing the bank with a bill of costs and the vexation and cost of maintaining another action, indicate the injustice of compelling it to now return the sum received upon the forged note.

The plaintiff William O'Neil has not suffered through the acceptance of this forged note by the bank, nor by his payment of the face of the note, since his payment liquidated his indebtedness due the bank created at the time of the making of the original note.

The appellee claims that the appeal should be dismissed, because the defendant failed to present, in its request for a finding, any questions of law which it desired to have reviewed. The trial court has made its finding without reference to this omission by the appellee, who has permitted the case to reach the argument upon the merits of the appeal before raising the

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point. It is a sufficient answer to the claim to point out that it is too late to make it.

There is error and the cause is remanded with direction to enter judgment for costs in favor of the defendant.

In this opinion the other judges concurred, except PRENTICE, C. J., and BEACH, J., who dissented.

THE WILLIAMS BROTHERS MANUFACTURING COMPANY *vs.* NAUBUC FIRE DISTRICT.

First Judicial District, Hartford, May Term, 1918.
PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

In assessing a manufacturing company upon the "average amount of goods kept on hand" during the preceding year (General Statutes, § 2342), the taxing power of a fire district is confined to the value of the goods which were actually within its limits, and does not extend to the entire product of manufacture, most of which, like the greater part of the plant itself, was not within the district.

Section 2329 provides that when a corporation shall have two or more establishments for transacting its business in different towns or taxing districts, it shall be assessed and taxed for every such establishment, and for the personal property attached thereto or connected therewith, in the town or taxing district in which such establishment is located. *Held* that "establishment" as thus used meant those agencies which served for transacting the business of the corporation; and therefore any building in which any part of the business of the corporation was carried on was an "establishment" within the meaning of the statute.

A construction of a statute which leads to double taxation should be avoided, as also one which imposes taxes upon property which cannot possibly receive any benefit therefrom.

Argued May 7th—decided July 23d, 1918.

APPLICATION in the nature of an appeal by the plaintiff from the refusal of the board of relief for the defend-

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ant district to reduce the valuation ($79,000) placed by the assessors upon the plaintiff's property alleged to be taxable in said district, brought to and tried by the Superior Court in Hartford County, *Gager, J.*; facts found and judgment rendered in favor of the plaintiff, and appeal by the defendant. *No error.*

Alvan Waldo Hyde, for the appellant (defendant).

Stewart N. Dunning, for the appellee (plaintiff).

WHEELER, J. The defendant, the Naubuc Fire District, is a municipal corporation, and the plaintiff is a manufacturing corporation; each is organized under the laws of Connecticut and is located in the town of Glastonbury. The plant and principal office of the plaintiff is in Glastonbury. A small portion of its land and the building containing its general offices, and a part of one of its factories, are situated in the Naubuc Fire District. The larger part of its land and the rest of its manufacturing buildings, and the factory office from which the factory is operated, are situated in Glastonbury and outside the limits of this District.

The plaintiff, in October, 1915, made return of its property subject to taxation, to the assessors of Glastonbury, and included in this list was an item showing the "average amount of goods on hand of manufacturers for whole or part of year preceding date of listing, including raw stock, and finished and unfinished product, $79,000." On June 12th, 1916, the assessors of this Fire District gave the plaintiff notice that the value placed upon its real estate was $35,283, and that the value placed upon the average amount of goods in its hands during the preceding year was the said amount of $79,000. Upon the plaintiff's appeal the board of relief of the District reduced the value of the real estate

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of the plaintiff by $8,283, and refused to reduce the assessment of $79,000, placed upon its goods on hand.

The plaintiff, claiming to be aggrieved by the action of the board of relief, took this appeal to the Superior Court. The court found that "the average value of the plaintiff's goods on hand during the year preceding the date of listing, including raw stock and finished and unfinished product in its entire plant in the town of Glastonbury, was $79,000, and the value of such goods actually within this Fire District was $9,000." The court held that the assessment should include only the value of the goods on hand in the District, and that the assessment of $79,000 should be reduced to $9,000.

The issue raised by the appeal is as to the true rule of assessment by the District of the goods on hand of the plaintiff, including raw stock and finished and unfinished product. The Fire District claims that under the statutes (1) a manufacturing business, carried on within the limits of the Fire District, was subject to taxation there; (2) that the statutory rule of assessment of such a business was the average amount of goods kept on hand for sale during the year preceding the date of assessment; (3) that the manufacturing business of the plaintiff was located and carried on in the District; and (4) that the average amount of goods kept on hand in connection with said business in the town of Glastonbury must be included in determining the value of the business.

The defendant Fire District was authorized to lay and collect taxes for the purposes for which it was organized, viz., to sprinkle and light streets. Public Acts of 1915, Chap. 192. This statute does not contain any specific regulations prescribing the method of taxation or the property to be taxed, but General Statutes, § 2001, provides that the laws relating to school districts shall apply to fire districts. And the

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law classifies the property upon which the levy of taxes by a school district shall be had, specifying, among these, any manufacturing business subject to taxation located or carried on in the district. Public Acts of 1913, Chap. 13.

General Statutes, §§ 2328 and 2329, contain the provisions under which the property of corporations in the defendant District may be taxed for its benefit. These, in substance, provide that the "real estate shall be set in the list of the town in which such real estate is situated, and its personal property shall be set in the list of the town in which it has its principal place of business or exercises its corporate powers; and when it shall have two or more establishments for transacting its business in different towns or taxing districts, it shall be assessed and taxed for every such establishment, and for the personal property attached thereto or connected therewith, in the town or other taxing district having the power of taxation in which such establishment is." *Field* v. *Guilford Water Co.*, 79 Conn. 70, 71, 63 Atl. 723. The amendment of § 2329 (Public Acts of 1907, Chap. 184) has not substantially changed this analysis of these sections. "Establishment," as used in this statute, refers to those agencies which serve for transacting the business of the corporation. All such, together with the personal property attached thereto or connected therewith, come within this provision of this statute. It is subject to assessment in the town or taxing district in which the establishment is situated; and any building in which any part of the business of the corporation is carried on is an establishment within the meaning of this statute. That this is the true construction of the word "establishment," is apparent from a reading of the amendment of the original Act made by Chapter 17 of the Public Acts of 1868.

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Section 2329 applies to all "municipal divisions," of which the defendant Fire District is one; and the personal property situated within the District is to be taxed in that District.

If this section were the only one relating to the levy of taxes upon corporations, no controversy would have arisen. But the Fire District insists that General Statutes, § 2342, furnishes a special rule of assessment for the levy of taxes upon property of this kind belonging to a corporation situated in the Fire District. This section provides that the property of any trading, mercantile, manufacturing, or mechanical business belonging to an individual or a corporation, shall be assessed in the name of the owner or owners in the town, city, or borough where the business is carried on; and that "the average amount of goods kept on hand for sale during the year, or any portion of it when the business has not been carried on for a year, previous to the first day of October, shall be the rule of assessment and taxation." As originally passed, this section of the Act (Chap. 47, § 12, Public Acts of 1851) related exclusively to trading and mercantile business, but later on was made applicable equally to corporations engaged in any manufacturing or mechanical business. It clearly contemplates a going business, and the rule of assessment is applicable only to such. We can see no reason why this rule may not apply to each of the two or more establishments situated in different towns, cities, or boroughs. So construed, the statutes can stand together. Moreover, § 2342 does not appear to relate to any municipal division except towns, cities, and boroughs.

The contention of the District, that the plaintiff's business was carried on where its office was, is not sound. The business was carried on where the various parts of the plant are located. We so construed this

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section in the case of *Jackson* v. *Union*, 82 Conn. 266, 270, 73 Atl. 773, and held that the place of office did not control, but the place where the timber was cut and prepared. If the personal property of the plaintiff was taxed in the District, where its office was, as the District claims, then such parts of the personal property as were located outside this District and in an adjoining District would be also subject to taxation in this District. A construction leading to double taxation should be avoided. Since the defendant can lawfully light and sprinkle streets only within the District, the plaintiff's property outside the District could receive no benefit from the District, and a construction which imposes taxes with no possibility of benefits should be avoided.

There is no error.

In this opinion the other judges concurred.

ELLA F. SCHRAYER, ADMINISTRATRIX, *vs.* HUBERT E. BISHOP ET AL.

Third Judicial District, New Haven, June Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, JS.

After delivering a motor-truck load of merchandise, the defendants' servant, on his return trip, about half past twelve o'clock, deviated from the direct route to go to his own home for dinner, and while so doing collided with the plaintiff's intestate, a boy of fifteen, who was riding a bicycle in the opposite direction. Evidence offered by the plaintiff, though contradicted by the defendants, tended to prove that the servant had for two years or more been accustomed to use the motor-truck to go to his dinner with the knowledge and consent of the defendants' manager. *Held* that under these circumstances the defendants could not complain of the charge of the trial court which permitted the jury to determine

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as a question of fact whether the servant was acting within the scope of his employment at the time of the accident.

Respecting the duty of the boy, the jury were instructed that he, too, was bound to use reasonable care, but that the law did not ordinarily ask of a boy the same care that it expected from a man; that the boy must exercise such degree of care as might reasonably be expected from an ordinarily prudent boy of his years similarly circumstanced; that he could not be heedless, but was bound to use his faculties and do what he reasonably could to avoid threatened danger. *Held* that these instructions correctly defined the duty of the plaintiff's intestate.

With respect to damages, the jury were told that so far as they could, they were to base them upon the loss that would come to the estate of the decedent by reason of his untimely death, or in other words to award a sum which would fairly compensate for the loss of net earnings during the period of the decedent's expectancy after he reached twenty-one. *Held* that while this instruction did not contain all the elements of damage, it did the defendants no harm; and that the evidence was sufficient to sustain the verdict of $5,000.

The estate of a decedent whose death is caused by negligence, is entitled to some damages for the death alone, without considering the decedent's expectation of life or his probable accumulations.

Argued June 4th—decided July 23d, 1918.

ACTION to recover damages for personal injuries resulting in the death of the plaintiff's intestate and alleged to have been caused by the negligence of the defendants, brought to the Superior Court in Fairfield County and tried to the jury before *Maltbie, J.;* verdict and judgment for the plaintiff for $5,000, and appeal by the defendants. *No error.*

Carl Foster, for the appellants (defendants).

Nehemiah Candee and *John F. Dwyer*, for the appellee (plaintiff).

SHUMWAY, J. The material facts which present the question of law the defendants raised by the appeal are these: The plaintiff's intestate, George L. Kavano, a boy about fifteen years old, was killed on April 19th,

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1917. He was struck by an automobile truck on Main Street, in the city of Norwalk. He was riding a bicycle and George Ayrault was driving the truck. Ayrault was employed by the defendants as a truck driver at the time. He was returning from a trip made to deliver merchandise for the defendants. It was about half past twelve o'clock, and it was his intention to go home for his dinner. Ayrault had been accustomed to use the truck to go to his house for dinner, from two to four times a week, for a period of from two to four years, with the knowledge and consent of the employer's manager. No question is made on the appeal that the injury to the plaintiff's intestate was not caused in part at least by Ayrault's negligence.

The defendants claim that the court erred (1) in submitting to the jury, as a question of fact, whether Ayrault at the time was acting within the scope of his employment; (2) in charging the jury upon the question of Kavano's duty, as a boy of fifteen years, to exercise reasonable care; and (3) in charging the jury on the measure of damages.

The first question above stated has been before this court in a number of cases, from *Stone* v. *Hills*, 45 Conn. 44, to *Carrier* v. *Donovan*, 88 Conn. 37, 89 Atl. 894. But the rule in this State is laid down in *Ritchie* v. *Waller*, 63 Conn. 155, 28 Atl. 29, and is the one uniformly applied. In the last case the court uses this language (p. 161): "In cases where the deviation is slight and not unusual, the court may, and often will, as matter of law, determine that the servant was still executing his master's business. So too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury."

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The court in leaving to the jury, as a question of fact, whether this act of the defendants' servant, in intending to go home to his dinner under the circumstances, was a departure from his master's service, was as favorable to the defendants as the facts in the case permitted. Ayrault was on his return trip; the outward trip was confessedly in the line of his employment, and it cannot be said that a simple intention on his part to go home with the truck for his dinner, with the consent of his employer, was a departure from his master's business. The deviation, if any, may have been so slight that the court might have properly instructed the jury as a matter of law that the servant was acting within the scope of his employment. It does not appear how far from the most direct route to defendants' yard, where presumably the truck was placed when not in use, Ayrault had departed at the time of the accident, but it does appear that the direct route from the point where he came upon Main Street, after delivering his load of merchandise, was in a southerly direction, while he turned to go northerly. It would not be contended that if Ayrault's house had been on the direct route to the yard, his purpose to stop for his dinner on the way would be a departure from his master's business, and neither can it be said as a matter of law that taking a more indirect way constituted such departure, because, so far as appears, the deviation may have been so small as to be no deviation at all, even if it is assumed that it was his intention to depart wholly from the master's service.

Upon the question of due care on the part of the boy Kavano, the court said: "The same rule applies to the boy with reference to what he should do as applies to the man; each must use reasonable care; but there is this distinction: you do not ordinarily ask of a boy the same care which you ask of a man, and the law does not.

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The law says that what a boy must do is to use that degree of care which a boy of the same degree of intelligence, of the same age, of the same experience, might reasonably be expected to exercise. It is not now the care of an ordinarily prudent man, it is the care of an ordinarily prudent boy similar to the boy in question in these various respects. So that the burden which rests upon the plaintiff in regard to the care which this boy should exercise is, did he act as a boy of that age and experience and intelligence and general surroundings might be expected to act?"

This extract may be open to objection if stated in connection with Ayrault's duty under the circumstances, because it would not be his duty to use the same precautions to avoid injury to this boy that he would be required to use with a child just beginning to walk. He is only bound to regulate his conduct by that which by due attention he could see. He could not see the boy's intelligence and experience in life. But the court also said: "The boy cannot be heedless and careless. . . . He is bound to use his faculties. He is bound to do what he can reasonably to avoid injury, to see and hear and use generally his faculties; and if he finds himself in a position where danger is imminent, he is bound to do what he can reasonably to avoid it." This correctly defines the duty of the plaintiff's intestate.

The court charged the jury in regard to the damages in substantially the language of this court in *Broughel* v. *Southern New England Telephone Co.*, 73 Conn. 614, 48 Atl. 751, as follows: "Just as far as you can you base it on the loss which would come to his estate by reason of his untimely death." But the trial court said further: "So that the rule, as I say, is the lump sum which will fairly give compensation for the loss of the net earnings for the space of time which you may fairly

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expect this boy to live after he gets to be twenty-one." The rule thus stated does not contain all the elements of damage named in the case above cited. However, as stated, it did the defendants no harm. Quoting from that case (p. 620): "Under these statutes the right to recover a limited compensation for death alone, as one of the results or consequences of a wrong inflicted upon a man in his lifetime, survives to, or is vested in, his executors or administrators for the benefit of certain designated beneficiaries, and is thus in a certain sense made a part of his estate, regarded as that aggregate of rights and possessions which a man leaves at his death." So the law is that a man's estate is entitled to some compensation for death alone, without wandering into the somewhat hazy realm of an individual's expectation of life or his probable accumulations, though these latter are in some cases proper subjects of consideration on the question of damages.

The evidence was sufficient to sustain the verdict for the damages awarded in this case.

There is no error.

In this opinion the other judges concurred.

BARNITH SACHS *vs.* JENNIE NUSSENBAUM ET AL.

Third Judicial District, New Haven, June Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

The proceeding upon an application to a judge, under the provisions of General Statutes, §§ 857, 858, to reduce or dissolve an alleged excessive attachment, is both in fact and in form entirely distinct from and independent of the action in which such attachment was made; and an order dissolving the attachment and thus terminating the proceeding is a final judgment from which an appeal will

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lie to this court under § 807, provided such order involves a ruling or decision upon any question or questions of law.

From the limited nature of the issue in such a proceeding, the order made will ordinarily involve the determination of questions of fact only, and therefore be conclusive and unappealable.

The power or jurisdiction of the judge, upon an application of this nature, is confined by the language of the statute (§ 858) to the sole and simple question whether the value of the property attached so far exceeds the plaintiff's apparent claim as to be excessive; he has no power to test the legal sufficiency of the complaint nor to weigh the chances of the plaintiff's recovery of his claim; and therefore an order dissolving an attachment made by the appellant, upon the ground that the allegations of his complaint showed that the action was premature and would not justify any recovery against the owner of the attached property, is unauthorized, and for that reason is erroneous.

Argued June 4th—decided July 23d, 1918.

APPLICATION under § 857 of the General Statutes, by the defendants in an action pending in the Superior Court in Fairfield County, to secure the reduction or dissolution of an attachment made therein of the real estate owned by each of them respectively, brought to and heard by the *Hon. William M. Maltbie,* a judge of the Superior Court, who granted the application in so far as the realty of the defendant Silverman was concerned, from which judgment the plaintiff appealed. *Error and order of dissolution set aside.*

Jennie Nussenbaum and Fanny Silverman are, respectively, principal and surety upon a bond given to the appellant December 20th, 1917, pursuant to a judicial order and in substitution for a mechanic's lien for $8,300 filed by him against the property of the principal obligor, which was thereupon dissolved. The condition of the bond, after reciting the nature, existence, and amount of the lien, proceeds as follows: "NOW, THEREFORE, if the said Nussenbaum shall pay or cause to be paid to Barnith Sachs or his assigns any judgment that may be rendered against her by any

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court of competent jurisdiction not exceeding the amount of $8,300, the amount claimed under the lien with interest and costs on demand, then this bond shall be void, otherwise to remain in full force and effect."

On December 31st, 1917, Sachs instituted an action against the obligors on the bond, both principal and surety. The complaint set out the existence of the lien, its dissolution, and the substitution therefor of the bond in suit pursuant to an order of *Judge Curtis*. Judgment was asked (1) upon the bond in such an amount as the court might adjudge to have been secured by the lien with interest and costs, and (2) for $10,000 damages. In this action real estate of both defendants was attached. They thereupon brought an application under § 857 of the General Statutes to *Judge Maltbie*, and pursuant to that application the plaintiff was summoned to appear before him, as prescribed in the statute, and for the purposes therein specified. He appeared, and after a hearing *Judge Maltbie* ordered that the attachment, in so far as it concerned the property of Jennie Nussenbaum, stand as made, and that the attachment made of the property of the defendant Silverman be dissolved for the reason, in substance, that no apparent claim against her was stated in the complaint, since she could not be made liable until a court had determined the amount secured by the lien and until there had been a failure to pay it.

The plaintiff, desiring to appeal from the order in so far as it directed the dissolution of the Silverman attachment, requested *Judge Maltbie* to make a finding of facts. The appellees thereupon filed their objections to compliance with such request, claiming that no appeal would lie from the order. The objections were overruled, a finding made, and thereafter this appeal taken.

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Frank L. Wilder, for the appellant (plaintiff).

Robert E. DeForest, for the appellees (defendants).

PRENTICE, C. J. On the threshold of this case we are met with the question of this court's jurisdiction, raised by the appellees' objections to the allowance of an appeal from the order of dissolution. They then insisted, and now insist, that our statute authorizes no appeal from such orders. The statute governing the situation presented is § 807 of the General Statutes. It is there provided that "when the jurisdiction of any matter or proceeding is or shall be vested in a judge of the Superior Court, . . . any party to such matter or proceeding who feels aggrieved by any of the decisions or rulings of such judge upon any questions of law arising therein, may appeal from the final judgment of said judge in such matter or proceeding, in the manner hereinbefore provided for an appeal from the judgments of said courts respectively, to the Supreme Court of Errors," etc. Two conditions are thus fixed as conditions precedent to the right of appeal, to wit, first, that final judgment in such matter or proceeding has been rendered, and second, that the judge has made a ruling or decision involving a question of law.

The proceeding before *Judge Maltbie* was one seeking relief from a claimed excessive attachment made in an action brought to the Superior Court. As such, jurisdiction over it was confined to a judge of that court. General Statutes, § 857. The court in which the action in connection with which the attachment was made, was without power to act in the matter, and under the statute could not be given such power. The proceedings before *Judge Maltbie* were, therefore, not only in fact and form, but also of necessity, entirely independent of that action and not incidental to it. It began with the bring-

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ing of the application and ended with the order of dissolution. When that order was made the matter was at an end and the proceeding and parties were, save for the possibility of appeal, out of court. The order could not be regarded as in any sense an interlocutory one made in progress of the pending suit. That progress was not concerned with or in any way affected by it. The order made final disposition of a judicial or *quasi*-judicial proceeding authorized by statute, and therefore was a final judgment within the meaning of our statutes regulating appeals. *Barber* v. *International Co.*, 74 Conn. 652, 657, 51 Atl. 857; *Bunnell* v. *Berlin Iron Bridge Co.*, 66 Conn. 26, 37, 33 Atl. 533; *Fayerweather* v. *Monson*, 61 Conn. 431, 440, 23 Atl. 878.

It is evident from a reading of § 857 and the following section, that proceedings for relief in cases where attachments have been made which are alleged to be excessive, will rarely present an appealable question. From the limited nature of the issue they present, the order made in them must in the great majority of cases involve the determination of questions of fact only, and be conclusive. By possibility, however, the order may be based upon or involve a decision in a matter of law, as for example, one as to the extent of the authority conferred upon the judge and as to whether that authority has not been exceeded. That is the situation in the present case as the appellant presents it.

While the reasons of appeal call in question the judge's power to do what he did, they do not in terms state the appellant's real grievance. Upon the face of their statement they appear to rest upon the proposition that the judge erred in concluding upon an examination of the complaint that the action, in so far as it concerned the defendant Silverman, was prematurely brought and that no judgment thereon under the facts

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disclosed could be obtained against her. Had it been open to the judge to pass upon the sufficiency of the complaint, we could not agree that his action was erroneous, as claimed by the appellant. The surety's obligation to the plaintiff was one solely on the bond which she signed. The extent of it was fixed by its terms and cannot be enlarged. Those terms create a condition precedent to her liability. The complaint fails to show that that condition had been satisfied. It was, therefore, insufficient to support a judgment against her.

But that by no means ends the matter nor exhausts the question of power to which the plaintiff has appealed, although not aptly. His real grievance, if he has one, arises from the fact that the judge in the exercise of the power conferred upon him by the statute did not limit himself to an inquiry as to whether or not the attachment made was excessive, in that the value of the property attached exceeded the plaintiff's apparent claim, but went further and subjected the complaint to an examination, as upon demurrer, to discover whether or not it stated a good cause of action against the applicants and whether or not, in his opinion, a judgment could be rendered against them in the action brought, and made his order upon his conclusion reached after such examination. This possible grievance underlies those set out in terms in the reasons of appeal, and may fairly be said to be involved in them.

The statute, which prescribes the duty and power of the judge to whom applications for relief from excessive attachments are made, defines the conditions under which such relief may be given by him thereon. These conditions are that the value of the property attached so far exceeds the plaintiff's apparent claim as to be excessive. When it is remembered that the application for relief is not to be made to the court having jurisdic-

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tion of the action to which the attachment is incidental, or for that matter to any court, but to a judge sitting in chambers and powerless to adjudicate in the cause which is not before him, and when the long accepted liberal policy of this State in the matter of attachments is borne in mind, there can be no doubt as to the meaning and intent of the language which the statute employs, and as to the scope of the authority thereby conferred.

The subject-matter of the inquiry, which the judge is empowered to make as furnishing the basis of his action, is limited to a comparison between the value of the property attached and the plaintiff's apparent claim. In arriving at the amount of this apparent claim, the judge is authorized to summon the plaintiff before him, and call upon him to state under oath what its amount is, that he believes it to be justly due, and to furnish a bill of particulars or circumstantial statement of it. Doubtless he is also vested with authority to so far take cognizance of the complaint in the action as to inform himself not only of the demand for damages therein but also of the extent of the recovery which the plaintiff seeks and claims. In these ways he may seek to gain a true measure of the plaintiff's claim as it really is. But that is a very different thing from making a judicial examination of the complaint to test its sufficiency as a statement of a cause of action. That is for the court before which the action is pending to do in proper course, if so required. The office of the judge before whom the application is pending, is to discover the amount of the plaintiff's apparent claim, and not to pass upon its legal validity or to weigh the chances of recovery upon it. Our statutes of long standing permit one who, however mistakenly, claims that he has a right of action against another, to institute an action against him and, as

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auxiliary to that action, to make an attachment to secure his recovery. The validity of the claim made is left for the determination of the court. Until that determination is made the attachment may not be attacked upon the ground that the plaintiff has failed to state a claim which will stand the test which, in the course of the progress of the action, will be applied to it.

The language of § 858 furnishes a striking indication that the dissolution of an attachment for the weakness of the plaintiff's claim upon which he is seeking recovery, was not within the legislative contemplation. It assumes that the plaintiff has an apparent claim, and the redress provided for is such release of attached property as will prevent the value of the property attached being so much in excess of that claim as to render it excessive. There is no suggestion of a discharge by the judge of an attachment in its entirety, which would be the only logical relief if it was intended to afford relief in cases where the legal insufficiency or invalidity of the plaintiff's claim was disclosed upon the pleadings. Dissolution is provided for only in the event that the attaching creditor fails to appear in response to the citation to him. Under all other conditions it is the reduction of the attachment, or release of a portion of the attached property, which is spoken of.

A cogent reason in support of the limited provisions of the statute is to be found in the harsh consequences which might readily follow if attachments might be dissolved for no other cause than that the plaintiff's attorney had failed to draft a good complaint, or one which the judge mistakenly considered insufficient. These consequences are too apparent to justly specific enumeration.

In the present proceeding *Judge Malbie* did not dissolve the attachment against the surety's property for the reason that he found it excessive, as being for

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an amount unreasonably large to secure the judgment against her which the plaintiff claimed to be entitled to or which might properly be rendered against her if the facts set out in the complaint would under the law sanction a recovery, but on the sole ground that an examination of the allegations of the complaint convinced him that the plaintiff could not have judgment for any amount against the defendant Silverman. In so doing he acted in excess of his powers.

There is error in so much of the order as dissolves the attachment made of the property of the applicant Silverman, and the same is set aside.

In this opinion the other judges concurred.

NELSON DESSUREAULT, ADMINISTRATOR, *vs.* FRANK M. MASELLY.

Third Judicial District, New Haven, June Term, 1913.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

In an action for negligently killing the plaintiff's intestate, a nonsuit was granted upon the ground that the decedent, a boy about eleven, had failed to exercise ordinary care. *Held* that the evidence, much of which was uncontradicted, would have supported a verdict for the plaintiff, and that the trial court erred in refusing to set aside the nonsuit.

Argued June 4th—decided July 23d, 1918.

ACTION to recover damages for negligently causing the death of the plaintiff's intestate, brought to the Superior Court in New Haven County where the plaintiff was nonsuited in a trial to the jury before *Bennett, J.*, and from the refusal of the trial court to set aside said judgment the plaintiff appealed. *Error and new trial ordered.*

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Clayton L. Klein, for the appellant (plaintiff).

Lawrence L. Lewis, for the appellee (defendant).

PER CURIAM. The evidence offered by the plaintiff tended to prove the following facts: The plaintiff's intestate was about eleven years old and his mentality was below that of the average child of his years. The defendant owned and operated a heavy motor-truck which was used in the transportation of freight. This ran into the child. The accident in question happened on November 3d, 1916, about six o'clock in the afternoon, at a freight yard in the city of Waterbury. When the accident occurred there were only three persons present, the defendant's servant, Angelo Colantonio, the driver of the car, a brother of the plaintiff's intestate by the name of Nelson, and the boy William who was killed. The testimony as to the direct acts of negligence was limited to that of Nelson, the brother of the deceased. From his testimony it appears that on the afternoon of the day when the accident happened, the two boys went to the freight station in Waterbury upon the invitation of Colantonio, the defendant's servant. When they reached the freight yard it was about dusk. The defendant's servant told the boys to get off the truck and see if he was backing up straight to the freight-car door. The boys then got off the truck. Nelson jumped into the box-car and William remained upon the ground about four feet at the right of the freight-car door in which his brother was standing. At this time the rear of the motor-truck was about seven feet distant from the freight-car. While the boys were occupying these positions the truck was stationary and not directed straight toward the freight-car door. Nelson, who was standing in the door, shouted to the operator of the car to go ahead. Instead of going ahead as directed by the boy, Colantonio backed the car up

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swiftly in a diagonal direction, so that the rear of the truck caught William between the truck and the freight-car, crushing his head and skull, which resulted in his death.

From the uncontradicted testimony of the brother Nelson, it is a little difficult to understand in what respect the deceased boy failed to exercise ordinary care. The record discloses that the trial court found that the defendant's agent was negligent, but granted a motion to nonsuit, on the ground that the evidence did not show that the deceased boy was free from contributory negligence. In the latter ruling there is error.

The question of contributory negligence, as the evidence appeared, was one for the jury; and furthermore, it could not be said as matter of law that the plaintiff's intestate was not in the exercise of due care for one of his years and mental capacity. The jury might have found that the defendant's servant knew, or should have known, that the deceased was mentally abnormal; that the injured boy was about four feet to the right of his brother, who was standing in the car door; and that the boy who was killed had reason to think that the rear of the truck would not come back diagonally but would be guided straight toward the open freight-car door, where his brother was standing. It is fair to assume that he heard the direction of the brother to go ahead, and that he acted accordingly. Instead of going ahead the driver of the car caused it to go backward swiftly in a diagonal direction toward the deceased, which gave no reasonable chance for the boy to escape the injury which caused his death. This evidence was uncontradicted and would have supported a verdict, and the judgment of nonsuit should not have been granted.

There is error, the judgment of nonsuit is set aside and a new trial is ordered.

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GAETANO GRIPPO *vs.* SUSAN L. DAVIS.

Third Judicial District, New Haven, June Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, JS.

Payment of instalments of the price of land under a written agreement for its purchase and sale in that way, creates an equitable interest in the vendee or his assignee.

A provision in the contract requiring weekly payments is one which may be, and is, waived by the vendor by accepting without objection payments made in varying amounts and at irregular times, generally monthly, continued for a period of several years.

As a general rule a waiver, which is the intentional relinquishment of a known right, must be found as a fact; but where the intent, though not expressly found, is the necessary inference or conclusion from the specific facts detailed in the record, the intent may be inferred as a matter of law.

The waiver of a contract provision respecting the time within which instalments of the purchase price of land must be paid, does not preclude the vendor from subsequently insisting upon the renewal or enforcement of this provision as to future payments; but before this is done notice thereof must in fairness be given to the purchaser, with a reasonable opportunity to comply upon his part. A mere refusal to accept a payment tendered at the customary time, coupled with notice that the vendor rescinded the contract, is wholly nugatory. Under such circumstances the vendee is excused from tendering the weekly payments called for by the contract, since the vendor's conduct has made it clear that such a tender would be a useless act.

In such a situation the vendee may either wait a reasonable time for the vendor to withdraw his rescission, or insist at once upon the contract provisions and make the payments accordingly, or he may, as in the present case, tender in full the balance of the purchase price.

The admission of an averment that the plaintiff tendered the "entire balance of the purchase price" to the defendant, precludes the latter from claiming that the tender was inadequate for failing to include interest.

Argued June 4th—decided July 23d, 1918.

ACTION to secure a conveyance of land from the defendant, under a contract made with her, or for dam-

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ages, brought to and tried by the Superior Court in New Haven County, *Case, J.;* facts found and judgment rendered for the defendant, and appeal by the plaintiff. *Error and judgment reversed.*

The plaintiff succeeded to all rights which his father secured by virtue of an agreement with the defendant on June 26th, 1906, for the purchase of certain lots of land, and by another agreement with the defendant on May 15th, 1907, for the purchase of other lots. Each of these agreements contained substantially identical terms, except as to the purchase price and as to the terms of payment. Each provided for the payment of the purchase price by weekly payments, and for execution of a warranty deed to the buyer when the purchase price was paid in full. The agreement of June 26th provided that "if the weekly payments shall be more than four weeks delinquent, . . . the seller may at his option either declare the entire balance of the purchase price due and collectible, or he may rescind this contract to sell and convey said lots and take possession thereof at his option."

The agreement of May 15th had a similar provision, except that the period of delinquency was two weeks instead of four.

The father made payments during his lifetime at irregular intervals and in varying amounts and not in accordance with these agreements, and these were accepted and receipted for by the defendant. After the transfer to the plaintiff, payments were made by him and accepted by the defendant, not in accordance with the agreements, but as a rule once a month in sums of $10 each.

The plaintiff made a payment as usual of $10 in January, 1916, and on February 1st, 1916, tendered the defendant $10, which she declined to receive, and at this time orally notified him that she rescinded the

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contract and offered to return the gross amount, $732, paid to her by the plaintiff and his father, with an additional sum of $100, but the plaintiff declined this offer. On February 1st, 1916, there was due on these contracts $693, and both contracts were long in default of their final payment under their terms. On April 8th, 1916, the plaintiff tendered payment to the defendant of $693, which was all that was due the defendant under these contracts. The defendant declined the tender and refused to give the plaintiff a deed of the premises. After this tender the defendant in writing gave the plaintiff notice of her intention to rescind the contracts.

Arthur B. O'Keefe, for the appellant (plaintiff).

Charles Cohen, with whom was *Barnett Berman*, for the appellee (defendant).

WHEELER, J. The principal grounds of error assigned in the appeal are the overruling of the plaintiff's claims of law: (1) that the defendant had waived the provisions of the agreements as to payments; (2) that the acceptance of the payments other than as provided in the agreements amounted to a substitution payment for the payments of the original agreements; (3) that the defendant did not have the right to rescind the agreements; and (4) that the plaintiff was entitled to a decree for specific performance.

The agreements to purchase the defendant's lots, followed by payments upon the purchase price, gave the plaintiff's father an equitable interest in these lots to which the plaintiff succeeded. *Miller Co.* v. *Grussi*, 90 Conn. 555, 557, 98 Atl. 90. The plaintiff, ever since acquiring this interest, and his father, for a long period, failed to make the weekly payments as provided in the agreements. The provision for weekly payments was one which the defendant might waive. This she might

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do by express declaration, or by a course of conduct equivalent to such a declaration. The receipt of payments by the defendant on account of the purchase price, in varying amounts and at irregular times through a long period, continued during the period of interest of the plaintiff until the refusal to accept the payment tendered on February 1st, 1916, constituted a waiver of the provision for weekly payments during this time. As a general rule, a waiver must be found as a fact, since the intentional relinquishment of a known right is the foundation of a waiver, and this intent, to be found, must be proved. But when the intent, though not expressly found, is yet the necessary inference from the facts found, as in this case, the intent may be inferred as matter of law. *First National Bank* v. *Hartford Life & Annuity Ins. Co.*, 45 Conn. 22, 44.

While we are of the opinion that these payments constituted a waiver of the provision for weekly payments so long as they continued, we do not think they abrogated this provision of the agreements and substituted the practice of payments for those provided. The defendant was at liberty at any time to insist upon the resumption of this provision. Before she could do this she must in fairness give the plaintiff notice of her intention so to insist, and a reasonable opportunity to comply. 2 Black on Rescission & Cancellation, pp. 1395, 1396.

Having received for so long a time payments of substantially $10 a month, she was not at liberty to decline to receive the payment tendered on February 1st, without prior notice of such intent. She had the right at this time to give notice of her intent to thereafter insist upon the weekly payments. This she did not do. On the contrary, she refused the payment tendered and orally gave notice that she rescinded the contract.

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Since the defendant had waived the weekly payments by accepting, substantially, monthly payments, and had accepted a payment made in January, 1916, and given no notice of her intention to resume the provision for weekly payments, the plaintiff was not in default on February 1st, when the last tender of payment was refused. Much less was the plaintiff in default for four or two weeks, conditions precedent by the terms of the agreements to her right to rescind.

The defendant's attempt to rescind was wholly nugatory. Neither then, nor at any time in the future, did the defendant notify the plaintiff of her purpose to require the weekly payments. Her refusal to accept the usual payment and her abortive attempt to rescind the contract, relieved the plaintiff from the necessity of subsequently tendering the weekly payments. The plaintiff was not compelled to make this tender, since the defendant's conduct made it clear that this would be a useless act.

In this situation three courses of action were open to the plaintiff. He might wait a reasonable time for the defendant to withdraw her rescission, or insist upon his right to carry out the agreements according to their terms by making the weekly payments therein provided, or he might tender in full the amounts due under the agreements. He chose the latter course and made tender of $693, which sum, the complaint alleged, was the entire balance of the purchase price agreed upon, and the answer admitted this. Having done this he had done all that he could do.

The defendant has an erroneous view of the situation. The plaintiff was not in default on February 1st nor at any time since. By her attempted rescission, the defendant had signified her understanding that the agreements were at an end, and her purpose to act upon that understanding, and this relieved the plaintiff

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from making tender of the weekly payments. Assuming that the plaintiff had the right to make a tender of the amount due, the defendant insists that the tender was inadequate because it failed to include interest upon the overdue payments. Whether interest shall be added to a principal sum depends upon the circumstances. These may negative such a claim. The admissions of the pleadings in this case recite that the tender was of the entire balance of the purchase price agreed upon. It could not have been this if in addition to this balance a substantial sum by way of interest ought to be added. In view of this admission we think the question of the addition of interest to the weekly payments due did not arise, and that the tender must be held to be adequate. The time of performance was waived by the acceptance of the payments.

There is error, the judgment is reversed with direction to the Superior Court to enter judgment in accordance with prayer for relief, upon payment to defendant of $693.

In this opinion the other judges concurred.

James Brundrett *vs.* Max Rosoff.

Third Judicial District, New Haven, June Term, 1918.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

In an action by a tenant against his landlord for personal injuries caused by an alleged defective cellar stairway used by the tenants of the building in common, parol evidence is admissible to show that the cellar, although not mentioned in the written lease, was in fact provided by the landlord and was intended by the parties to be used as an appurtenance to the rooms upon the upper floors occupied by the respective tenants.

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The trial court left it to the jury to determine whether the plaintiff tenant used a portion of the cellar as an appurtenance to his five rooms upon the top floor of the building, or only as a mere licensee through the courtesy of the landlord, and the jury decided this question adversely to the defendant. *Held* that the intention of the parties respecting the use to be made of the cellar was a question of fact, and that its submission to and determination by the jury left no basis for the defendant's claim of nonliability upon the theory that the plaintiff was a mere licensee.

Argued June 5th—decided July 23d, 1918.

ACTION by a tenant against his landlord to recover damages for personal injuries due to a fall upon the cellar stairs used in common by the occupants of the building, which were alleged to be unsafe and out of repair and known to be so by the defendant, brought to the Superior Court in New Haven County and tried to the jury before *Curtis, J.;* verdict and judgment for the plaintiff for $2,358, and appeal by the defendant. *No error.*

George E. Beers, with whom was *Claude B. Maxfield,* for the appellant (defendant).

Samuel E. Hoyt, for the appellee (plaintiff).

SHUMWAY, J. Of the numerous reasons of appeal, it is apparent that the treatment by the trial court of what the defendant calls a "vital" question of fact, is the controlling question in this case. This question is, what was the relation of the parties with respect to the stairway leading from the ground floor of the building to the cellar? It was clearly shown that the plaintiff was injured while using this stairway. The plaintiff contended that he was properly using this stairway and by reason of the defective and dangerous condition of the stairs, which resulted from the negligence of the defendant, he was injured.

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The finding discloses that the plaintiff was a tenant in a building owned by the defendant. The plaintiff occupied a part of the building under a written lease. The first or ground floor of the building was fitted and used for stores, and the floor or floors above contained a number of apartments and were rented for dwellings. The written lease did not mention the cellar. At the time the plaintiff was negotiating for the lease he was informed by the defendant that there was a cellar in the building for use of the tenants, and that therein each tenant had a compartment for coal, wood and goods, and the plaintiff would have one of the compartments. After the plaintiff moved into the building he was told by the defendant that the compartment in the cellar designated for his use would be marked with his name, and the plaintiff found his name on one of the compartments and used the same from July, 1916, until the November following. The cellar was reached by a stairway from the hall of the first floor, which hall and stairway were used in common by the tenants of the building.

The court in its charge to the jury stated that among the facts the plaintiff must prove were these: (1) "that the cellar in said building was used in common by the various tenants in connection with their apartments, as a place for coal, wood and other storage, with consent of the defendant; (2) that the entrance to said cellar was by a stairway from a hallway used in common by the tenants in the building, and that said cellar stairway was used in common by the tenants and was reserved and intended by the defendant for use in common by the tenants." The court also said to the jury, as to the first fact above quoted, that "the plaintiff claims on that evidence that that fact is proven. I do not recall any evidence that seriously disputes that fact." As to the second fact, the court said: "This, the de-

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fendant denies. That fact, also, the plaintiff must prove by a fair preponderance of the evidence. The plaintiff claims that the condition of the cellar, divided up into compartments in connection apparently with the tenements above, the dumb-waiter which goes from the cellar to the floor above, all indicate that the facts just recited to you in this paragraph are proven; and, as I recall, the defendant upon the stand did not testify as to that feature of the case. The plaintiff, therefore, claims that that fact is proven."

A review of the entire evidence now before this court sustains the comment of the court as to the testimony; but the defendant contends that the rulings and charge of the court were erroneous because the court did not charge the jury in accordance with his request, to wit: "If the plaintiff had no right to use the stairs under his contract of letting, but was simply allowed to use them through courtesy, there is no liability on the part of the defendant." If the court's treatment of the question involved in this request was correct, it disposes of all the questions raised by the appeal.

First, the defendant objected to parol evidence that the defendant designated the apartment in the cellar the plaintiff was to use and occupy in connection with his tenement on the upper floor. The ruling of the court was correct. The plaintiff could show what was intended by both parties to the lease to be included within it. Such testimony does not alter the terms of a written agreement. The only description of the tenement contained in the lease is "five rooms on the top floor of the building as living rooms." The plaintiff surely could show what five rooms were leased, and necessarily there passed with the rooms all other appurtenances provided by the landlord and intended by him to be used by the tenant in connection with

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his occupancy of the rooms. The intention of the parties was a question of fact, and this was properly submitted to the jury by the court, and found adversely to the defendant's claims.

This finding in effect disposed of the defendant's contention that as a matter of law the plaintiff was occupying the apartment in the cellar not under and by virtue of his lease, but by the permission of the landlord, and that the plaintiff was a mere licensee. All of the claimed errors of the court hinge upon this ruling. If the plaintiff was occupying the cellar and using the stairway as a tenant, all the other rulings of the court were obviously correct.

There is no error.

In this opinion the other judges concurred.

HAROLD ZETERSTROM *vs.* HERBERT C. THOMAS.

Third Judicial District, New Haven, June Term, 1918.

PRENTICE, C. J., RORABACK, WHEELER, BEACH and SHUMWAY, Js.

Bailment may be defined as a delivery of property in trust, upon a contract, express or implied, that the trust shall be duly executed and the property restored by the bailee as soon as the purpose of the bailment shall be answered.

In the present case the plaintiff, who owned a motorcycle, had collided at night with an automobile and both he and his cycle were injured; and the latter was left at the place of the accident when its owner was taken to the hospital. Early the next morning the police department called up the defendant by telephone and asked him to go up to the scene of the accident and get the motorcycle which he agreed to do, but upon his arrival he found that the machine had been secretly removed during the night. *Held* that under these circumstances the defendant was not responsible for the loss of the motorcycle upon the theory that he was a bailee and as such was negligent in the discharge of his duty.

Argued June 5th—decided July 23d, 1918.

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ACTION to recover damages for an alleged breach of duty as bailee of the plaintiff's motorcycle, brought to the Court of Common Pleas in New Haven County and tried to the jury before *Wolfe, J.;* verdict for the plaintiff for $150, which the trial judge set aside as against the evidence, and from this action the plaintiff appealed. *No error.*

Walter J. Walsh, for the appellant (plaintiff).

Charles F. Roberts, for the appellee (defendant).

RORABACK, J. The complaint alleges that in October, 1916, the plaintiff was riding a motorcycle upon a highway in the town of Orange, when he collided with a motor vehicle and was seriously injured; that certain police officials of the town of Orange took charge of the motorcycle, and one of them authorized and employed the defendant to remove the machine in question, which was slightly damaged because of this collision; that the defendant accepted such employment and undertook to remove the motorcycle from the highway to his garage in the town of Orange, but negligently and carelessly left the same unsecured, without anyone to guard it, so that the motorcycle was taken by some person or persons unknown to the plaintiff, and the plantiff has never been able to recover possession of the machine.

The defendant's motion to set aside the verdict was properly granted, for it appears from the evidence that about nine thirty o'clock at night on October 10th, 1916, the plaintiff and a companion were riding a motorcycle along the highway in the town of Orange, when he collided with an automobile. The force of the collision threw the plaintiff off his machine, caused a severe injury to him, and he was removed to the hospital. The fact of the collision was communicated to

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the police headquarters of the town of Orange. The chief of police of this town requested the defendant to send a car to take him to the place of the accident. The defendant took a light touring-car and carried the officer to the place of the collision, which was about four miles distant from the defendant's garage. This was about eleven o'clock at night. The defendant refused to permit the motorcycle to be loaded into his car because of its size and weight. After an unsuccessful attempt to remove the motorcycle from the highway, the defendant carried the officer back to police headquarters, where a report was made of the collision. After the matter had been reported to police headquarters, the defendant went to his home. Early in the morning of October 11th, the defendant was called up by an officer of the police department and requested by him to go up in the morning and get the plaintiff's machine. This the defendant agreed to do. When the defendant attempted to obtain possession of the plaintiff's machine it could not be found, as some one had removed it during the latter part of the night.

It is plain from the evidence that the defendant did not stand in the relation of bailee of the plaintiff when his property was surreptitiously taken from the highway. While it is true that there are a number of different kinds of bailments, the different kinds are of the same general character, and for the purposes of this case the word may be defined to be "a delivery of goods in trust, upon a contract, express or implied, that the trust shall be duly executed, and the goods restored by the bailee, as soon as the purpose of the bailment shall be answered." This is a standard definition of this word, and in the present case there can be no difficulty in understanding its application to the facts presented by the record. The evidence plainly shows that the plaintiff's property was never for a moment in the

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defendant's possession as bailee, nor does it appear that there was any acceptance of the article by the defendant, as the law of bailment requires. The record clearly indicates that the verdict of the jury was one which could not have been reasonably reached from the evidence, and that it was properly set aside by the court below.

There is no error.

In this opinion the other judges concurred.

The New Haven Bank, National Banking Association *vs.* The Jordan Company et als.

Third Judicial District, New Haven, June Term, 1918.

Prentice, C. J., Roraback, Wheeler, Beach and Shumway, Js.

The mere fact that one of several accommodation indorsers of the original note did not indorse the last of a series of so-called "renewal notes," does not relieve the indorsers of that note from liability to a holder in due course, whatever may be its effect upon the rights of the indorsers between themselves as co-sureties; for the law treats each of said notes as a new and independent contract.

Argued June 5th—decided July 23d, 1918.

Action by the indorsee against the maker and indorsers of a promissory note, brought to the Superior Court in New Haven County where demurrers to the answers of three of the defendants were sustained (*Warner, J.*) and judgment was rendered for the plaintiff for $15,350 against all the defendants, from which the defendant Sisk appealed. *No error.*

In an action against the defendants as maker and indorsers of a promissory note, the defendants, other-

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than the maker of the note, filed answers admitting the execution of the instrument and due notice of non-payment, and set up, in substance, the following: that the note in suit was a renewal note, the first being dated the 10th of May, 1916, the next the 10th of July, 1916, the third the 11th of October, 1916, and the note in suit the 11th of January, 1917; that the note of the 10th of May, 1916, was also indorsed by one B. M. Hibbard; that Hibbard died solvent between May 10th and July 10th, 1916, and that administration was granted on his estate before July 10th, 1916, and that plaintiff knew it before that date; that each of the notes of July 10th, October 11th, and January 11th, and others for the same obligation which antedated them, were negotiated by the maker with the plaintiff and discounted by it for the maker's use, and that the defendants, understanding that said notes were renewals, indorsed each of them in the reasonable belief and expectation that the estate of Hibbard would, with defendants, indorse the same before the plaintiff would discount them for the maker; that the plaintiff knew, or should have known, that the several notes took the place of the old notes, and that plaintiff took the note of July 10th, 1916, without the indorsement of Hibbard's estate and without informing the defendants; that the plaintiff, without informing defendants, delivered the note of May 10th to some unknown person, who delivered the same to the Hibbard estate; that the plaintiff took no steps to hold the Hibbard estate liable for the indorsement of Hibbard on the note of May 10th; and that the Hibbard estate now has possession of said note of May 10th, and claims to be free from all liability because of the same.

The plaintiff demurred to the answer and the Superior Court sustained the demurrer.

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

Henry Stoddard, for the appellee (plaintiff).

SHUMWAY, J. The holder of the note is, on the pleadings, prima facie a holder in due course, and the indorsers, contesting their liability, in order to prevail must allege, and have the burden of proving, at least one of the following facts: that the note was not complete and regular on its face; that the plaintiff did not become the holder of the note before it was overdue; that the plaintiff did not take the note in good faith and for value; that the plaintiff, at the time the note was negotiated to it, had notice of some infirmity in the instrument or defect in the title of the person negotiating it. Negotiable Instruments Act, General Statutes, § 4222.

The defendants' answer will be searched in vain to find any such allegation or its equivalent. The averment that the note in question was a renewal of a note for like amount, does not change the relation or liability of the parties in any particular. Indeed, the law knows no "renewed negotiable note," though that term is often used to denote a transaction wherein a note is used to pay and discharge a prior note of like tenor, without the payment, it may be, of any money. But, even so, the holder of such a note is a holder in due course. The contract is a new and independent one, and does not differ from the one implied in law upon the initial note. The defendants have alleged that the plaintiff surrendered a note bearing date May 10th, 1916, made by the Jordan Company and indorsed by these other defendants with one B. M. Hibbard, that Hibbard's indorsement was prior to that of the defendants O'Brien and Stone, and that the defendants indorsed the note in suit in the expectation

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that the Hibbard estate would also become an indorser.

The expectation on the part of the other indorsers, that some representative of the Hibbard estate would indorse the note, is not a sufficient defense to this action. That fact does not constitute any infirmity in the note, or defect in the title of the one negotiating it. A note in the form of this one is negotiated when it is indorsed and delivered by any holder to the transferee, and it makes no difference, so far as the liability of such indorsers to a holder in due course is concerned, that the indorsers are accommodation parties. Even if such holder knows that one or all of the indorsers are accommodation indorsers, that does not change the indorser's liability. So, also, mere knowledge or reasonable belief on the part of the holder of the note that the several indorsers expected other accommodation parties to indorse it, even if the expectation is not realized, cannot relieve the other indorsers of their obligation.

The liability of the indorsers to the holder of the note is not affected by any agreement among the indorsers not appearing upon the note; therefore the right of co-sureties to a contribution, or the effect of the release of one surety upon the obligations of the others, has no application in the case now before the court, whatever may be the rights and liabilities of the indorsers as between themselves.

There is no error.

In this opinion the other judges concurred.

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MEMORANDA OF CASES

NOT REPORTED IN FULL.

ABRAHAM R. ALDERMAN *vs.* BENJAMIN YASMER ET AL.

Third Judicial District.

Argued April 9th—decided May 28th, 1918.

ACTION to recover for merchandise sold, brought to the Court of Common Pleas in New Haven County and tried to the jury before *Wolfe, J.*; the jury returned a verdict for the defendants, which the court, upon motion of the plaintiff, set aside as against the evidence, and from this action the defendants appealed. *No error.*

Joseph Koletsky, for the appellants (defendants).

Jacob Caplan, for the appellee (plaintiff).

Opinion filed with the clerk of the Court of Common Pleas in New Haven County.

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APPENDIX.

OBITUARY SKETCH OF WILLIAM S. PARDEE.*

William Scranton Pardee, born in New Haven September 16th, 1860, died there June 18th, 1918. There his ancestors had resided since New Haven existed and there he passed his entire life. In 1882 he graduated from Yale College, and two years later from the Yale Law School, after studying in the office of one of its distinguished professors, Simeon E. Baldwin, later Chief Justice and Governor of the Commonwealth. For the first eight years he was associated with the writer in a diversified practice, including that of associate town counsel—a most congenial service—which he performed with assiduity and enthusiasm. It was a little later, while practicing alone, that he became interested as a lawyer in a line of work which ultimately led him out of his profession but into a competence. After a few years of general practice with William A. Wright he found that his business interests, which by this time had become quite extensive, required all his time and he then terminated his career as a practicing lawyer.

Mr. Pardee represented New Haven in the lower House of the State legislature in 1913, but this was the only elective office he ever filled. His time, ability and resources were, however, freely given to public matters, and he was keenly interested in the agitation for increased representation for the larger communities in the State, both in the legislature and in the conventions of the leading political parties. He advocated the constitutional convention of 1902 and was the author of the first Act adopted in Connecticut to prevent corrupt practices at elections. He originated the novel idea of making several towns out of the territory and population of each of the larger municipalities of the State and in this way, by multiplying the units, of increasing the representation in the lower House of the General Assembly. That this idea was not carried out in legislation in no way detracts from the merit of its author nor from the respect due to his courage in fathering a seemingly hopeless cause. Indeed it may be fair to assume that the

* Prepared by James P. Pigott, Esq., of the New Haven County Bar, at the request of the Reporter.

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change effected in the representation in the Senate of this State was in a large measure due to the movements referred to with which he was identified.

As a lawyer he needed no code of ethics for his guidance. His instinctive sense of right ever led him to the right road. As a man and citizen, disinterested devotion to the welfare of others was one of his controlling characteristics. His generosity and timely subscription of a substantial amount were instrumental in getting the further sums needed to assure the erection of the Bela Pratt statue of Nathan Hale on Yale's Campus. Of the fortune he had accumulated he gave by far the greater part—and in fact the whole of it not given to near relatives—amounting to about one fourth of a million dollars, to public purposes. He passed away as he had lived. He labored for the community, and gave to the people, for their benefit, the savings of his lifetime. He was an honor to our profession and an ornament to the community he loved. May we not hope that his example will endure as a model for those who are to come, both in the profession and outside of it.

OBITUARY SKETCH OF JOHN R. BUCK.*

John Ransom Buck, born in East Glastonbury, Connecticut, December 6th, 1835, died at his home on Forest Street in Hartford on February 6th, 1917. Mr. Buck's ancestry in this country goes back to 1694. The family descendants were distinctively farmers, and it was upon his father's farm and by hard work, economy and perseverance, coupled with a studious pursuit of books in his leisure hours, that Mr. Buck laid the foundation of his success in his profession. He went to school in Glastonbury, then studied at Wilbraham Academy in Massachusetts, and for a year at Wesleyan University in Middletown. Some years later Wesleyan bestowed upon him the degree of B. A. He taught school to eke out a limited income, and in 1859 entered the office of Wells & Strong in Hartford and began the study of law. He was admitted to the bar in 1862, and not long thereafter became a partner of Julius L. Strong, under the firm name of Strong & Buck, which continued until the death of Mr. Strong in 1872. Afterward he formed a partnership with Arthur F. Eggleston, and this firm, known as Buck & Eggles-

* Prepared mainly from an address of Edward M. Day, Esq., of the Hartford County Bar.

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ton, was one of the most prominent and successful in Hartford. Judge Eggleston died in November, 1909, and was succeeded in the partnership by John Halsey Buck, a son of the subject of this sketch.

Mr. Buck was prominent in public affairs for many years during his early career. In 1864 he was assistant-clerk of the Connecticut House of Representatives and subsequently clerk of the House and of the Senate. In 1868 he was president of the Court of Common Council of the City of Hartford, and from 1871 to 1873 City Attorney. Treasurer of Hartford County from 1873 to 1881, he was elected in 1879 to the State Senate from the then first district, composed of Hartford with several other towns. In 1880 the electors of the First Congressional District sent him to Washington as their Representative in Congress and reëlected him in 1884. Upon retiring from Congress in 1886 he devoted himself exclusively to his profession.

Mr. Buck was of the true New England type, equipped by inheritance with that courage, self-reliance and independence of thought characteristic of New England's best men. Coupled with ingrained honesty and strong purpose, he had native shrewdness and a knowledge of human nature, and he believed that good rather than evil motives guided men in their conduct. Conscious of the limitations imposed by his lack of a complete education, and with no assured position waiting ready-made for him, he knew no other road to success than by hard and conscientious work, day by day. He left the ways of his fathers, coming from the country to the town, worthily ambitious of making as much as possible of his life.

While he was studying law, at the outbreak of the Civil War, the whole country was alive with political discussion and Mr. Buck's associates were men of political convictions and activities. With a native endowment of political sagacity, he early became interested in studying the political questions and conditions of the hour. Political honors came to him later with professional success and he grew to be one of the leading men in this State, rendering excellent service in the Senate of Connecticut and the Congress of the United States. Had the fates so decreed, Mr. Buck would have been a most useful member of the United States Senate.

In the practice of his profession, Mr. Buck was at his best in matters of wide scope to which he could give time for study and thorough investigation. Working slowly, he went to the bottom of his problems and when he had finished a subject, it was covered. The fundamental principles of law and the reasons for them he had studied out for himself. Clear in statement, sincere in his claims, his arguments, laid on broad and solid foundations, carried con-

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viction. In matters of negotiation he was tactful and shrewd and his judgment as a counselor was admirable. He had a wide knowledge of the statutes of this State, especially those governing corporations.

In the many important matters with which he dealt during his long and active life, he had the confidence of courts, legislators, clients and the public, because of his honesty, his stern sense of duty, and the support which he gave to the right. Meanness or dishonesty were as foreign to his nature as light to darkness. He was a man of intense and earnest loyalties to the persons whom he loved and the institutions in which he believed.

To nature he gave a deep and genuine affection, taking an unaffected delight in all her forms, and he loved good books with enthusiasm and discrimination, for their interpretation of life and its problems. A man of discernment, of sympathy and kindness, of charity for human frailty, he filled a large place in his generation.

Let us hope that the kindly tradition of the bar will not allow such a man soon to be forgotten.

OBITUARY SKETCH OF CHARLES H. BRISCOE.*

Charles Henry Briscoe, a descendant, in the eighth generation, of Nathaniel Briscoe who came to Newtown, Massachusetts, in 1631, was born in Newtown, Connecticut, December 20th, 1831, and died suddenly at Hartford, January 21st, 1918. For sixty-four years he practiced law in the courts of this State, and in his death the bar of Hartford County lost a venerable and respected member.

His early education was obtained in the schools of his native town, after which he studied law with the Hon. Amos B. Treat (See 54 Conn. 601) in Newtown, was admitted to the bar in 1854, and then came to Enfield where he always resided. Three years later (1857) Enfield chose him to represent her in the legislature, and elected him again in 1864 and in 1878; on the latter occasion he was made Speaker of the House. He was a member of the State Senate in 1861 and chairman of the important committee on Military Affairs. In 1868, when the Court of Common Pleas was established, he became its judge, a position he held with exceptional ability and satisfaction until his return in 1875 to the active practice of his profession. While he was on the bench only nineteen appeals were taken from his decisions or judgments, and of these, fifteen

* Prepared by the Reporter.

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were affirmed and only four reversed—a remarkable showing. From 1877 to 1881 he was a partner in the firm of Briscoe & Maltbie, and from 1882 to the end of 1893 it was the privilege of the writer to be his associate. The death of his son Willis in April, 1913 (See 87 Conn. 713), saddened his few remaining years.

Judge Briscoe's wide acquaintance brought him clients from all walks of life, and to their service he gave his time and his energy without reserve—and usually with results pleasing alike to them and to him. He was above all a jury lawyer and a most successful one, though it is not easy to discover the secret of his power. One of his few surviving contemporaries, writing of his ability as a verdict-getter, says: "He made no pretense of being an orator or of displaying any great learning, but somehow he got hold of the hearts and minds of the jury and held them to the end in a quiet homely way. During the last forty years of his practice at the Hartford bar he was, to say the least, the equal if not the superior of any brother lawyer. When he and Judge Eggleston joined their efforts before a jury—and they were many, many times together—how very few cases you can recall in which they were not victorious. In saying these things about his power with a jury, I am not intimating that when he thoroughly studied a question of law you could lightly dispute him in his conclusions, for you would be very apt to find yourself in the wrong if you did."

Judge Briscoe did, however, possess the ability to look a fact in the face and to appreciate its full weight and significance, whether *pro* or *con*. In other words, he sized up a situation as the man in the street, the ordinary, average, every-day man, regarded it; and this gift—for it was a gift—not only enabled him to settle the bad cases, but gave him an immense advantage in knowing how to approach the "twelve good men and true" in the jury-box. He always looked for justice, and if he found that, he spent but little time in trying to bolster up the case with rules of law or judicial precedents. Naturally he became a conservative, safe adviser, and the arbiter of incipient quarrels and neighborhood differences.

By his friends and associates at the bar he was esteemed for his loyalty, his genial wit, his unswerving honesty, his kindly sympathy, his courtesy and willingness to oblige. During his later years he gradually relinquished practice, but he still came to his office and with a keen sense of humor would recall his earlier experiences at the bar with the giants of those days. He was well informed generally, and in conversation rarely failed to add something of value to the discussion. With a sweet and lovable personality his memory will long remain a fragrant one to his professional brethren.

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ADJOINING LANDOWNERS—*Continued.*
come a charge upon that land, at least so far as the maintenance of the wall was necessary to preserve the rights of the upper proprietor. *Ib.*
3. Such a wall becomes as much a part of the realty upon which it stands as the earth had been which the wall replaced, and with the same incidents and burdens of ownership. *Ib.*
4. In the case at bar the retaining wall had been built long before either of the present owners had acquired their respective titles, and each sought to compel the other to rebuild and maintain the wall, parts of which had already fallen and injured the lower premises owned by the plaintiff. *Held* that while the plaintiff was entitled to recover for the damage already done to her land, irreparable injury was not so clearly disclosed by the record as to warrant the granting of a mandatory injunction to compel the defendant to restore the wall to its original condition. *Ib.*
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APPEAL TO THE SUPREME COURT.

Motion to correct; exceptions; date for filing.

1. A motion to correct the finding under General Statutes, §§ 795, 796, should contain written exceptions to particular findings or to the refusal to find as requested. If made under § 797, it ought not to anticipate, but to follow within one week, the filing of the finding. *Plum Trees Lime Co.* v. *Keeler*, 1.

Jury's conclusion final, unless.

2. A jury's conclusion as to what the evidence establishes is final unless it appears that it was one which could not have been reached reasonably and without indicating the influence of partiality, corruption, prejudice, or other impropriety. *Ott* v. *Connecticut Co.*, 85.

Summary process reviewable only on writ of error.

3. Proceedings in summary process can be reviewed by this court only upon a writ of error. *Fort Orange Barbering Co.* v. *New Haven Hotel Co.*, 144.

Form of finding in case tried to jury.

4. A finding in a case tried to the jury should state what the respective parties offered evidence to prove and claimed to have proved, and also such facts, if any, as were admitted by either party upon the trial. *Mills* v. *Davis*, 154.

Same; procedure to rectify the appeal.

5. If such finding is incorrect either in its statements or because of its omissions, and the trial judge upon request refuses to make the desired change, the proper procedure is an application to this court to rectify the appeal, supported by depositions, as prescribed by § 801 of the General Statutes. *Ib.*

Same; statement of finding sufficient, when.

6. If the facts alleged to have been admitted or undisputed were not such in reality, it is sufficient, and all that the appellant can properly ask, if the finding states that he offered evidence to prove and claimed to have proved them. *Ib.*

Inadvertent marking of draft-finding.

7. A finding will not be changed to accord with a paragraph of the draft-finding marked "proven," if it is quite clear upon examination that such marking was inadvertent or through a misunderstanding of the paragraph's apparent purport, and that the finding proper states the court's real and intended conclusion in the matter. *White* v. *Lansing Chemical Co.*, 186.

Errors to be " specifically " assigned.

8. Alleged errors must be "specifically stated" in the reasons of appeal (General Statutes, § 802), in order to entitle them to consideration in this court. Accordingly, an assignment to the effect that the appellee did not prove his case with the certainty required by law, and that on the whole case judgment should have been rendered for the appellant, is too general and does not comply with the statute. *Avery* v. *Ginsburg*, 208.

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APPEAL TO THE SUPREME COURT—*Continued.*

Presumption de action of trial court.

9. It is to be presumed that where there is any competent evidence in support of a certain fact set forth in its finding, the trial court relied upon that rather than upon other evidence which was excluded as hearsay. *Ib.*

Finding of harmless fact.

10. The finding of a fact which is harmless to the appellant, even if not fully justified by the evidence, does not warrant the granting of a new trial. *Ib.*

Claims not supported by the record.

11. The trial court found that the defendant, who was driving his automobile, violated the law of the road by negligently colliding with the plaintiff's wagon going in the same direction, and awarded the injured plaintiff $800 damages. *Held* that there was nothing in the record to substantiate the defendant's claim that this award was excessive, or that in fixing that sum the court erred. *Ib.*

Verdict conclusive on material facts.

12. The existence or nonexistence of a material fact in issue, which is properly submitted to the jury, is conclusively settled by their verdict. *Garber* v. *Goldstein*, 226.

New trial on appellee's bill of exceptions.

13. Where the question of the propriety of a directed verdict which is afterward set aside as against the evidence, is raised by the appellee upon a bill of exceptions, it is open to this court to grant a new trial for error in such instruction. *Brown* v. *New Haven Taxicab Co.*, 252.

Assignment of error held too general.

14. An assignment that the trial court erred in charging in certain particulars "as set forth in" a numbered paragraph of the finding, which paragraph contained the whole charge, does not comply with the statute (§ 802) and is too general to merit consideration. *Jackson* v. *Lacy*, 256.

Finding of "the issues" includes all of them.

15. A judgment-file which recites that "the issues" are found for the prevailing party, is equivalent to a finding that all the material issues are so found. *Seymour* v. *Norwalk*, 293.

Material errors only entitled to consideration.

16. Only errors which affect the validity of the judgment rendered are entitled to consideration by this court. *Ib.*

Ultimate conclusions of fact must stand, unless.

17. Ultimate conclusions of fact drawn by the trial court will not be disturbed on appeal unless the subordinate facts are inconsistent therewith. *Burke* v. *Burke*, 306.

Demurrer properly sustained on retrial.

18. A demurrer to a defense which this court had already determined to be insufficient on appeal, is properly sustained on the retrial of the cause. *Viall* v. *Lionel Manufacturing Co.*, 342.

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APPEAL TO THE SUPREME COURT—*Continued.*

Verdict set aside; action sustained on other grounds.

19. The action of the trial court in setting aside a verdict, although placed upon the wrong ground, will not be disturbed by this court on appeal, if it appears from the appellee's exceptions to the charge that the verdict was based upon an erroneous instruction. *Fitch* v. *Hartford*, 365.

View of premises; exceptions to finding; evidence.

20. Evidence certified upon appeal in support of exceptions to the finding, will not be expunged or disregarded merely because some of it was obtained by the trial court upon a view of the premises; at least in the absence of a definite statement by the trial judge, as required by the rule (Practice Book, p. 269, § 11), that it was impossible to incorporate in the finding the results of his inspection. *Cartenovitz* v. *Conti*, 546.

Error due to overlooking material statute.

21. An error of the trial court, due to overlooking a material statute, is subject to review upon appeal, although the Act was not referred to by either party during the trial; for the court and also the litigants are conclusively presumed to know the law. *Schmidt* v. *Manchester*, 552.

Rulings on evidence in discretion of trial court.

22. Rulings upon questions of evidence resting in the discretion of the trial court, even if erroneous, cannot be made the ground for a new trial. *Flint* v. *Connecticut Hassam Paving Co.*, 576.

Assignments not pursued treated as waived.

23. Assignments of error which are not pursued by the appellant may be treated as waived. *Smith* v. *Hausdorf*, 579.

" Specific " assignment of errors essential.

24. To entitle alleged errors to consideration by this court they should be "specifically" assigned, as provided by § 802 of the General Statutes; and therefore an assignment to the effect that the charge was inadequate for the guidance of the jury in reaching their verdict, is too vague and general to merit attention. *Ib.*

Comments upon evidence and its weight.

25. A judge in his charge may, at his discretion, comment upon the evidence and express his opinion as to its weight, provided he leaves all questions of fact to be determined by the jury as they see fit, without direction or restraint; and the exercise of such discretion, unless abused, will not be reviewed by this court upon appeal. *Ib.*

Statements in charge as aids to this court.

26. While statements made in a charge with reference to testimony before the jury do not import verity, they may, unless questioned, be assumed to be correct for the purpose of aiding this court to understand the claims as set forth in the finding and the issues of fact actually litigated. *Gurfein* v. *Rickard*, 604.

Omission to charge on points not raised.

27. An appellant can take no advantage of the omission of the court

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APPEAL TO THE SUPREME COURT—*Continued.*

to instruct the jury upon points which were not raised either in the pleadings or by the parties during the trial of the cause. *Hawes* v. *Engler*, 608.

Erasure from docket; appeal to be taken when.

28. An appeal to this court from a judgment erasing the case from the docket, should ordinarily be taken within ten days thereafter, since no finding of facts or other action of the trial judge is required to properly present the question of law for review; but if a motion to reopen the judgment and restore the cause to the docket is made and entertained, it operates to defer the time for filing an appeal until that motion is finally decided. *Equitable Trust Co.* v. *Plume*, 649.

Notice of appeal not required, when.

29. No notice of appeal is required where the appeal itself is filed within the time limited for filing the notice. *Ib.*

Correct determination of law by jury, harmless.

30. The submission of a question of law to the determination of the jury is harmless error, if their verdict shows that they decided it correctly. *State* v. *Greenberg*, 658.

Verdict upon conflicting evidence must stand.

31.. This court has no power to set aside a verdict of the jury rendered upon conflicting evidence. *Ib.*

Motion for postponement within court's discretion.

32. A motion for a postponement is addressed to the discretion of the trial court, and its action will not be reviewed unless the record indicates that rights of the accused were thereby prejudiced. *Ib.*

Evidence of undisputed fact, harmless.

33. The admission of questionable evidence respecting an undisputed fact in the case is harmless. *Ib.*

Conflict between finding and draft-finding.

34. A conflict between the finding as made, and certain paragraphs of the draft-finding marked "proven" and "not proven," which was apparently due to the inadvertence of the trial judge and does not affect the merits of the case, will not avail the appellant. *O'Neil* v. *Manufacturers National Bank*, 668.

Dismissal of appeal; motion made too late.

35. During the argument in this court the appellee contended that the appeal should be dismissed because the appellant had not stated, in his request for a finding, the questions of law he desired to have reviewed. *Held* that it was a sufficient answer to this contention that it came too late. *Ib.*

See also ASSIGNMENT; ATTACHMENT, 10–12; BILLS AND NOTES, 2; BROKERS; CHARGE OF COURT; EVIDENCE, 10; FINDING OF FACTS; HOMICIDE, 3, 13–15; INTEREST; INTERPLEADER; JUDGMENT, 1, 2; LANDLORD AND TENANT, 8; LIBEL AND SLANDER, 4; MASTER AND SERVANT, 3–7, 9; NEGLIGENCE, 12, 13, 15, 17, 18, 23, 24; SALES, 8, 9, 11, 13, 17; TAXATION, 6; TRUSTS AND TRUSTEES, 8; VENDOR

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ASSAULT AND BATTERY.

1. In an action for assault and battery, a plaintiff's verdict for $300 for severe bruises, a broken nose, two weeks' inability to work, and an outlay of $87 on account of the injuries, is not excessive. *Tierney* v. *Marlone*, 93.
2. Evidence that while the plaintiff and the defendant husband were struggling together upon the ground, the latter's wife struck the plaintiff several times with a piece of wood, justifies a verdict for a joint assault. *Ib.*

See also MASTER AND SERVANT, 1.
ASSESSMENT
OF BENEFITS AND DAMAGES. See EMINENT DOMAIN, 10; MUNICIPAL CORPORATIONS, 1.
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ASSIGNMENT.

An assignment of the plaintiff's claim shortly before trial will not defeat the action (General Statutes, § 622), and therefore the rejection of evidence to prove such assignment, when offered by the defendant, is harmless. *Warner* v. *McLay*, 427.

ASSIGNMENT OF ERRORS. See APPEAL TO THE SUPREME COURT, 8, 14, 23, 24.

ATTACHMENT.

Machinery in stone quarry.

1. General Statutes, § 831, provides that attachments of machinery, engines, or implements, situated and used in any "manufacturing or mechanical establishment," may be made without removal of the property, if in the opinion of the officer it cannot be moved without manifest injury. *Held* that the statute was intended to include all establishments outfitted with machines used in conducting such operations as the business required, and therefore a stone quarry equipped with hoisting-engines and compressed-air machines which were used for getting out the stone, constituted a "mechani-

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ATTACHMENT—*Continued.*

cal establishment" within the fair meaning of the statute. *Coast & Lakes Contracting Corporation* v. *Martin*, 11.

Same; statements in officer's return.

2. That it was not essential to the validity of the attachment—which was made in this case without a removal of the machines—that the officer's opinion as to injury in case of removal should be set forth in his return, especially as it was admitted that he in good faith believed a removal of the property at the time of its attachment would be injurious to it, and the trial court found as a fact that the machines could not have been moved without injury. *Ib.*

Levy of execution; posting notice.

3. In the absence of an outer door, the posting of a notice of the levy of an execution in a conspicuous place upon the inside wall of the shed or structure in which the hoisting-engine is contained, is a sufficient compliance with the provisions of § 911 relating to the levy of executions on machinery. *Ib.*

Same; description of property held sufficient.

4. In the present case the property attached and levied upon was described in the notice as "compressed-air machinery" and "three hoisting-engines." *Held* that as against one who bought the property "subject to existing liens," this description was sufficient. *Ib.*

Bankruptcy; rights of attaching creditor.

5. An adjudication in bankruptcy does not dissolve attachment liens acquired more than four months before the filing of the petition; but the attaching creditor, upon obtaining judgment, must collect it out of the property attached, and the judgment, upon request, should be so restricted. *Ib.*

Officer's receipt; purpose of recitals; estoppel.

6. The very purpose of the recital in an officer's receipt for property attached, to the effect that the signer is "estopped" from denying that the property therein described is the property of the defendant in the attachment suit, was to preclude him from subsequently raising that question; and therefore evidence that someone else in fact owned the property is inadmissible in behalf of the receiptor when sued by the officer upon the receipt. *McNerney* v. *Downs*, 139.

Same; receiptor's undertaking is valid.

7. Such an undertaking voluntarily entered into is not prohibited by statute, nor is it opposed to public policy. *Ib.*

Same; judgment in original action; collateral attack.

8. The validity of the judgment in the original action in which the property was attached, is not open to collateral attack by the receiptor, when sued by the officer upon the receipt. *Ib.*

Mortgagee's interest after payment a mere naked legal title.

9. A mortgagee of real estate, after the debt has been paid, has nothing but a naked legal title, although he holds under a recorded deed which is absolute on its face; and therefore one who attaches his

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ATTACHMENT—*Continued.*

interest is in no better position, unless he was misled by such apparent ownership and gave it credit in his dealings with the mortgagee. A plaintiff who sues the apparent owner in tort and attaches his interest, cannot, however, avail himself of this principle, inasmuch as he could not have been misled to his injury by such ostensible ownership. *Shaw* v. *Jackson*, 345.

Dissolution of excessive attachment; appeal.

10. The proceeding upon an application to a judge, under the provisions of General Statutes, §§ 857, 858, to reduce or dissolve an alleged excessive attachment, is both in fact and in form entirely distinct from and independent of the action in which such attachment was made; and an order dissolving the attachment and thus terminating the proceeding is a final judgment from which an appeal will lie to this court under § 807, provided such order involves a ruling or decision upon any question or questions of law. *Sachs* v. *Nussenbaum*, 682.

Same; decision generally unappealable.

11. From the limited nature of the issue in such a proceeding, the order made will ordinarily involve the determination of questions of fact only, and therefore be conclusive and unappealable. *Ib.*

Same; jurisdiction of judge limited.

12. The power or jurisdiction of the judge, upon an application of this nature, is confined by the language of the statute (§ 858) to the sole and simple question whether the value of the property attached so far exceeds the plaintiff's apparent claim as to be excessive; he has no power to test the legal sufficiency of the complaint nor to weigh the chances of the plaintiff's recovery of his claim; and therefore an order dissolving an attachment made by the appellant, upon the ground that the allegations of his complaint showed that the action was premature and would not justify any recovery against the owner of the attached property, is unauthorized, and for that reason is erroneous. *Ib.*

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1. Bailment may be defined as a delivery of property in trust, upon a contract, express or implied, that the trust shall be duly executed

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BAILMENT—*Continued.*

and the property restored by the bailee as soon as the purpose of the bailment shall be answered. *Zeterstrom* v. *Thomas*, 702.

2. In the present case the plaintiff, who owned a motorcycle, had collided at night with an automobile and both he and his cycle were injured; and the latter was left at the place of the accident when its owner was taken to the hospital. Early the next morning the police department called up the defendant by telephone and asked him to go up to the scene of the accident and get the motorcycle which he agreed to do, but upon his arrival he found that the machine had been secretly removed during the night. *Held* that under these circumstances the defendant was not responsible for the loss of the motorcycle upon the theory that he was a bailee and as such was negligent in the discharge of his duty. *Ib.*

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BILLS AND NOTES.

1. The plaintiff, who was the payee of sixteen promissory notes for $25 each, maturing at intervals of one week, presented them weekly and as paid surrendered them to their makers, the defendants; but through inadvertence or otherwise surrendered two notes, numbers fifteen and sixteen, which had not matured, and retained two, twelve and thirteen, that had matured and been paid, upon which—and one other note (the fourteenth) not then due and which the defendants paid before trial—the plaintiff based her present cause of action. *Held* that the mistake or confusion in the surrender and retention of the notes, paid and unpaid, did not alter the contract rights of the parties, nor prevent the payments as made from applying to and extinguishing the notes in the order in which they became due. *Schwartz* v. *Dashiff*, 135.

2. That inasmuch as the alleged cause of action was based in part upon two notes which had been paid and therefore had no legal existence when the suit was commenced, the plaintiff certainly could not complain of a judgment in her favor for $50 and costs upon this branch of the case, although without interest. *Ib.*

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BILLS AND NOTES—*Continued.*

3. The rule is well settled that oral evidence is inadmissible to prove that an absolute, unconditional indorsement of a promissory note was intended and understood by the immediate parties thereto to be one "without recourse"; nor is such evidence admissible under the guise or theory of proving a conditional delivery of the note, since the condition thus sought to be shown in defense is in reality one attached to the contract itself and not to the delivery of the instrument. If such a mutual mistake was in fact made, the defendant might have applied to a court of equity to reform the contract of indorsement by inserting therein the words "without recourse." *Schine* v. *Johnson*, 590.

4. The mere fact that one of several accommodation indorsers of the original note did not indorse the last of a series of so-called "renewal notes," does not relieve the indorsers of that note from liability to a holder in due course, whatever may be its effect upon the rights of the indorsers between themselves as co-sureties; for the law treats each of said notes as a new and independent contract. *New Haven Bank* v. *Jordan Co.*, 705.

See also ACTION, 2; PAYMENT, 1; SALES, 4.

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BROKERS.

In an action by a broker to recover what his services were reasonably worth in effecting a sale of the defendant's realty, the answer admitted the services and nonpayment therefor, denied any promise to pay what they were worth and that they were worth $2,500 as claimed by the plaintiff, and then alleged that the plaintiff had expressly agreed to accept $1,250 for his services if he made a sale. *Held* that the real defense alleged and actually litigated, as disclosed by the record, was not an argumentative denial of an original employment for a reasonable compensation, but an affirmative defense by way of confession and avoidance, setting forth an agreement for a one per cent commission or $1,250; and that while the burden remained on the plaintiff throughout the case of proving that at the time of the original employment the parties were silent as to compensation, it was upon the defendant to show that the implied promise arising from the silence of the parties had been modified or superseded by a subsequent express

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BROKERS—*Continued.*
agreement; and that the charge of the trial court, which was substantially to this effect, was correct. *Jackson* v. *Lacy*, 257.
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RUNNING OF STATUTE. See STATUTE OF LIMITATIONS.
CHANGE
OF BENEFICIARY. See INSURANCE, 5–7.
CHARACTER
GOOD, OF ACCUSED. See CHARGE OF COURT, 11.
CHARGE OF COURT.
Opinion of judge de the evidence.
1. It is not error for a trial judge to express his opinion in commenting upon the evidence. *Craney* v. *Donovan*, 237.
False testimony; equivalent expression.
2. In the present case the jury were instructed that if they found the defendant had "testified falsely" in respect to a certain matter, they might consider that fact in deciding what weight they would give to his other testimony; that the law did not require the jury to disregard his testimony entirely, though they might do so if they were satisfied from it that he was "unworthy of belief." *Held* that the words last quoted were the full equivalent of the phrase that the witness had "knowingly testified falsely." *Ib.*
Wrongdoing not to be treated as a mere accident.
3. An instruction which authorizes the jury to treat the alleged intentional wrongdoing of the defendant as a mere accident, unless warranted by the evidence, is prima facie misleading and harmful to the plaintiff against whom the verdict is rendered. *Fourette* v. *Griffin*, 388.
Duty of court generally.
4. It is the duty of the trial court to give the jury instructions which are correct in law, adapted to the issues, and sufficient for their guidance in determining such issues upon the ultimate facts as they may reasonably be found from the evidence. *Warner* v. *McLay*, 427.

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CHARGE OF COURT—*Continued.*

Credibility of witnesses for jury; erroneous instruction.

5. The credibility of witnesses and the weight to be given to their testimony are matters peculiarly within the province of the jury; and this is true although the defendant offers no evidence. Accordingly, an instruction that the jury "would be obliged to take the evidence as submitted to them by the plaintiff" is incorrect, though it may not be prejudicial, as in the present case, when read in connection with other portions of the charge. *Ib.*

Transportation of glass; duty of carrier.

6. In an action to recover damages for injury to plate glass through its negligent transportation, the evidence of both parties was to the effect that the breakage was caused by "improper loading" which the exercise of merely ordinary care would have prevented; and the main issue was whether the defendant had undertaken to do the whole job, as the plaintiff claimed, or only to furnish the horses, truck and driver, as the defendant insisted. The jury returned a verdict for the plaintiff and the defendant appealed. *Held* that under these circumstances it was not material whether the defendant contracted as a common carrier or as a private carrier, since he would have been obliged to exercise ordinary care at least in either capacity, and therefore was responsible for the injury due to his failure to observe such care; and that for this reason the trial court was not bound to distinguish between the degree of care to be observed by public and by private carriers, especially as such instructions would have tended only to confuse the jury in deciding the case before them. *Gurfein* v. *Rickard*, 604.

Test of sufficiency of instruction.

7. The sufficiency of a charge is to be determined with reference to the claims actually made by the parties and passed upon by the jury, as they appear in the finding, and not upon those which theoretically might have arisen on the pleadings. *Ib.*

Language of requests need not be followed.

8. In charging the jury it is not necessary for the court to adopt the language of the requests, provided the instructions given are clear, full, and adequate for the jury's guidance. *Hawes* v. *Engler*, 608.

Submission of improper issues to jury.

9. No issue foreign to the facts in evidence, or in respect to which no evidence has been offered, should be submitted by the court to the jury. The violation of this rule may not in every instance constitute harmful error; but it will if, as in the present case, the improper submission was calculated to prejudice the rights of the appellant. *Fine* v. *Connecticut Co.*, 626.

State's attorney's belief in guilt not to influence jury.

10. The trial judge may, but is not ordinarily bound to instruct the jury that the expression of belief in the guilt of the accused by the State's Attorney and the filing of an information by him should not influence them in reaching their verdict. *State* v. *Greenberg*, 658.

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CHARGE OF COURT—*Continued.*

Evidence of good character; charge upheld.

11. An instruction that evidence of good character is available to the accused and is always entitled to consideration; that in a close case it serves a useful purpose and may be sufficient in itself to raise a reasonable doubt, though if the case is clearly made out it is not a defense,—is customary and unexceptionable. *Ib.*

See also APPEAL TO THE SUPREME COURT, 13, 14, 19, 24–27; BROKERS; CONTRACTS, 9; DEATH, 1; FRAUD, 1; HOMICIDE, 2, 8, 13–15; LANDLORD AND TENANT, 8; LIBEL AND SLANDER, 4, 5; MASTER AND SERVANT, 9; MOTOR-VEHICLES, 3; NEGLIGENCE, 12, 17, 18, 23; SALES, 17; TRIAL, 2; VERDICT, 2; WARRANTY.

CHARITABLE USES

BEQUESTS TO. See TAXATION, 2.

CHAUFFEUR

LIABILITY OF EMPLOYER TO. See MASTER AND SERVANT, 1.

CHURCHES. See TRUSTS AND TRUSTEES, 5.

CIRCUITY OF ACTION. See PAYMENT, 2.

CITIES. See MUNICIPAL CORPORATIONS.

CITY COURT

OF BRIDGEPORT. See COURTS, 2.

CLASS

GIFT TO. See WILLS CONSTRUED, 18.

CODICIL

AS RATIFICATION OF WILL. See WILLS, PROBATE OF, 4.

COLLATERAL ATTACK. See ATTACHMENT, 8; COURTS, 3; LANDLORD AND TENANT, 2.

COLLISION

BETWEEN AUTOMOBILES. See HIGHWAYS, 1.

ON HIGHWAY. See APPEAL TO THE SUPREME COURT, 11; NEGLIGENCE, 15, 17, 18; NONSUIT.

COMBINATION

OF INDIVIDUALS. See LABOR UNIONS, 1–5.

COMMERCE

REGULATION OF. See RAILROADS.

COMMISSIONS. See BROKERS.

COMMITTEES AND REFEREES.

1. It is not within the province of a committee to whom a cause is referred to find and report the facts, to pass upon a demurrer, that being an interlocutory matter which should be disposed of by the court before the reference is made. *Second North School District's Appeal*, 193.

2. The facts relied upon to show the relevancy and materiality of questions excluded by a committee, and the harmful nature of the rulings, should be stated in the committee's report; otherwise the remonstrant should ask to have the report recommitted to include them. He cannot accomplish this end by stating them himself in his remonstrance. *Ib.*

IRREGULARITY IN CONDUCT OF. See EMINENT DOMAIN, 1, 2, 4.

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COMMON CARRIERS. See CHARGE OF COURT, 6; MOTOR-VEHICLES, 3, 4; SALES, 11–17; STREET RAILWAYS.
COMMON COUNTS. See SALES, 7.
COMMON PLEAS COURTS. See COURTS, 2.
COMPENSATION COMMISSIONERS. See WORKMEN'S COMP. ACT.
COMPLAINT
AMENDMENT OF. See PLEADING, 2, 6.
COMPROMISE AND SETTLEMENT. See EASEMENTS, 1, 2.
OF EMPLOYER'S CLAIM FOR DAMAGES AGAINST THIRD PERSON. See WORKMEN'S COMPENSATION ACT, 11.
COMPUTATION
OF TIME. See PAUPERS.
CONCEALMENT
OF MATERIAL FACTS. See ESTOPPEL.
OF STOLEN GOODS. See PERJURY, 3.
CONCLUSION
OF FACT BY TRIAL COURT. See APPEAL TO THE SUPREME COURT, 17.
CONDEMNATION PROCEEDINGS. See EMINENT DOMAIN.
CONDITIONAL SALES. See MOTOR-VEHICLES, 2.
CONDITIONS
OF DEFEASANCE. See WILLS CONSTRUED, 9–14.
DELIVERY OF NOTE ON. See BILLS AND NOTES, 3.
PRECEDENT. See PAYMENT, 1; SALES, 6.
TO VESTING OF LEGACY. See WILLS CONSTRUED, 16–21.
OF PURCHASE OF FIRE APPARATUS. See MUNICIPAL CORPORATIONS, 7.
CONDUCT
OF COUNSEL IN ARGUMENT. See TRIAL, 3.
IN CROSS-EXAMINATION. See TRIAL, 2.
CONFESSION
OF ACCUSED. See HOMICIDE, 1–18.
CONFLICT OF LAWS
CONTRACT OF EMPLOYMENT; WHAT LAW GOVERNS. See WORKMEN'S COMPENSATION ACT, 8.
CONSENT
TO POLES AND WIRES IN HIGHWAY. See TELEPHONE COMPANIES.
CONSIDERATION
ADEQUACY OF. See CONTRACTS, 21.

CONSPIRACY.

Upon prosecution for a conspiracy to commit rape, and for an assault with intent to commit rape, the State claimed that the accused, a New York lawyer, desiring to secure evidence against the wife of his brother in order to defeat her suit in New York for a separation from her husband for his cruelty and nonsupport, entered into a conspiracy with others to lure her to New Haven on a pretended business errand, and to have one of the conspirators ravish her there forcibly and against her will, while the others were suddenly to break into the room and discover her in that situation. No evidence was offered that the accused personally assaulted the woman,

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CONSPIRACY—*Continued.*

and his guilt, if any, was that of an accessory. Upon an appeal from a conviction upon each of these charges, it was *held* that however much the accused might merit severe punishment for the part he had taken in the conspiracy, the State had palpably failed to prove that the essential element of an intent to rape was involved in any combination of the parties, or that the accused aided or abetted in any act which had that design in view. *State* v. *Triplett*, 47.

See also LABOR UNIONS, 1–5.

CONSTABLES. See SHERIFFS AND CONSTABLES.

CONSTITUTIONAL LAW. See EXTRADITION; TAXATION, 8.

CONSTRUCTION

OF CHARGE TO JURY. See CHARGE OF COURT, 2.

OF CITY CHARTER. See MUNICIPAL CORPORATIONS, 2.

OF COMPLAINT. See PLEADING, 4.

OF CONTRACT. See CONTRACTS. See also LANDLORD AND TENANT, 1; SPECIFIC PERFORMANCE, 4.

OF MEMORANDUM OF SALE. See STATUTE OF FRAUDS, 7.

OF NOTICE OF INJURY. See HIGHWAYS, 2, 3.

OF STATUTES. See STATUTES. See also TAXATION, 9, 10, 18.

SUIT FOR, OF WILL. See WILLS CONSTRUED, 5.

OF WILL. See WILLS CONSTRUED.

See also WILLS, PROBATE OF, 1.

CONTEST

OF WILL; FORFEITURE OF LEGACY. See WILLS CONSTRUED, 1–5.

CONTRACTS.

Written guaranty construed; liability of defendant.

1. In a so-called written guaranty the defendant promised to be responsible to the plaintiffs for $1,275, the contract price for electrical work on three houses which were being built for one Ruderman, "in the event of there not being enough money fifty days after the entire completion of the three houses." *Held* that the completion of the houses was not a condition precedent to the existence of the defendant's liability, but merely fixed the date at which the ability of the premises to respond to the plaintiffs' demand was to be ascertained; and that inasmuch as the houses after having been partly destroyed by fire were not completed but were abandoned to a mortgagee, the impossibility of the plaintiffs getting their pay out of the houses thereupon became an accomplished fact. *Goldfarb* v. *Cohen*, 277.

Same; building contract; performance prevented.

2. The amended complaint counted not only on the guaranty, but also charged the defendant with liability as the real owner of the houses and the undisclosed principal in the plaintiffs' contract with Ruderman. In this aspect of the case the defendant insisted that there could be no recovery until the contract had been fully performed, and that the destruction of the plaintiffs' work by fire be-

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CONTRACTS—*Continued.*

fore its completion cast the loss upon them. *Held* that this contention was inapplicable; that the action was not on the contract but on the promise which the law implied where the full performance of the special contract had been prevented by the fault of the person for whom the work was to be done. *Ib.*

Same; building burned; recovery by contractor.

3. A contractor working on a structure which is owned by his employer and the continued existence of which is essential to the full performance of the contractor's work, is entitled to recover the value of his work and material which have become a part of the building before its destruction by fire, if destroyed without his fault and before the completion of his contract. *Ib.*

Same; liability upon either of two grounds.

4. One who is in fact the secret owner of buildings for work upon which he appears as a mere guarantor, is liable to the contractor, after the latter discovers that fact, either as owner or as guarantor. *Ib.*

Same; evidence of oral statements by defendant.

5. Evidence of statements made by the defendant when the written guaranty was delivered were received to show the circumstances under which it was given, and as tending to show that the defendant was the real owner of the premises. *Held* that there was no error in this ruling. *Ib.*

Same; evidence de insurance and fire loss.

6. Inquiry was made of Ruderman as to whether the houses were insured and whether the fire loss had been paid. *Held* that these questions were relevant, and that while the finding did not show what, if any, answer was made to the latter question, a negative answer, if made, supplied a reason for the abandonment of the property to the mortgagee and also a basis for an inference that the inability to collect the insurance, and therefore to complete the houses, was due to some fault or neglect of the owner. *Ib.*

Same; value of property excluded.

7. Ruderman was asked what the value of the property was as far as the buildings had progressed at the time of the fire. *Held* that this question was properly excluded, the plaintiffs having had no opportunity to redeem before the fire and not being bound to redeem at any time. *Ib.*

Builder prevented from completing contract; recovery.

8. A building contractor who has been wrongfully prevented by the owner from completing his contract, is entitled to recover as damages not only his expenditures theretofore incurred in the partial completion of the structure, but also such profits as he would have realized had his undertaking been fully performed; and the measure of such profits would be the contract price, less the cost of the labor and material required to complete the building. *Warner* v. *McLay*, 427.

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CONTRACTS—*Continued.*

Same; items of recovery; instruction insufficient.

9. In the present case the jury were instructed, in substance, that the plaintiff was entitled to recover his necessary expenditures and also a reasonable profit upon his contract, which might be ten per cent, as claimed by the plaintiff. *Held* that this instruction was clearly insufficient for the guidance of the jury upon the question of profits. *Ib.*

Same; amounts paid to subcontractor.

10. A subcontractor testified as to the amount the plaintiff had paid him for work and materials upon the job. *Held* that this evidence was plainly admissible in support of the allegations of the complaint respecting damages. *Ib.*

Abrogation or modification.

11. A valid contract can be abrogated or modified only with the consent of both parties. *Trowbridge* v. *Jefferson Auto Co.*, 569.

Same; positive refusal to perform.

12. An unequivocal refusal to perform a contract unless the other party, who is not in default, will consent to a modification of its terms, is a breach for which damages are recoverable. *Ib.*

Same; excuses tender by other party.

13. Such a repudiation excuses the other party from making a tender, and authorizes him to treat the agreement as rescinded and to sue in damages. *Ib.*

Same; refusal not justified; tender excused.

14. The defendant sold and agreed to deliver a new automobile to the plaintiff for $1,295, and credited him with $400 for his old car which it received. Later it refused to deliver the new car unless the plaintiff would accept $250 for the old one, which he declined to do. *Held* that the defendant's refusal was without justification, and that under the circumstances the plaintiff was excused from tendering the balance of the purchase price before rescinding the contract and suing for damages. *Ib.*

Same; irrelevant inquiry on cross-examination.

15. That inasmuch as the controlling issue upon the trial was whether the defendant had broken its contract, the fact that the plaintiff might have bought a car from a relative of his and saved payment of the commission, was not a relevant or material subject of inquiry, and the exclusion of a question upon the plaintiff's cross-examination, directed to that end, was not a sufficient reason to interfere with a judgment for the plaintiff. *Ib.*

Recovery on a cost basis plus percentage.

16. In an action upon an express contract for work and labor and materials furnished, to be paid for upon a cost basis plus a percentage, the fact that the work was worthless or useless is no defense. *Rich* v. *Johnston*, 600.

Public policy, when a question of law.

17. Where all the facts bearing thereon are undisputed, the question

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CONTRACTS—*Continued.*

whether a given act or contract is contrary to public policy or not, is one of law. *Hanford* v. *Connecticut Fair Asso.*, 621.

Same; holding baby show excused by epidemic.

18. A fair association having agreed to give a baby show upon its grounds under the direction and management of the plaintiffs, is excused from the fulfilment of its contract by the outbreak of an epidemic of infantile paralysis which admittedly made the holding of such an exhibition highly dangerous to the public health of the community; for the holding of the proposed show under such circumstances would, as matter of law, be contrary to public policy, and therefore the abandonment of the enterprise upon such a contingency must be treated as an implied qualification of, or exception to, the absolute undertaking of the association. *Ib.*

What restriction of trade is lawful.

19. Agreements in restraint of trade, so-called, if reasonable in respect to time and place, are not unlawful. *Milaneseo* v. *Calvanese*, 641.

Same; contract not unlawful on its face.

20. A promise not to engage in a certain kind of business for three years in a given town, is not unlawful on its face; and if claimed by the promissor to be invalid, when sued for a breach thereof, the facts and circumstances relied upon to support such claim must be pleaded. *Ib.*

Same; pleading inadequacy of consideration.

21. Whether the consideration for a promise is adequate or not is a conclusion of law upon the facts alleged; and therefore the allegation that the consideration for the defendant's promise was "grossly inadequate," is insufficient, in the absence of any averment of fact or circumstance justifying such conclusion. *Ib.*

TO SELL BRASS TURNINGS. See SALES, 11–17.

APPLICATION OF INSURANCE MONEY. See LANDLORD AND TENANT, 11.

OPTION TO BUY LAND. See VENDOR AND VENDEE, 1–5.

DE SALE OF LAND. See VENDOR AND VENDEE, 6–10.

WHAT LAW GOVERNS. See WORKMEN'S COMPENSATION ACT, 8.

TO MAKE LEASE. See LANDLORD AND TENANT, 6–8.

TO SELL MILK; EFFECT OF QUARANTINE. See SALES, 10.

See also AGENCY, 2; ATTACHMENT, 6, 7; BAILMENT; BILLS AND NOTES, 1, 3, 4; BROKERS; GUARANTY; JUDGMENT, 3, 4; LABOR UNIONS, 1–5; LANDLORD AND TENANT, 1; MECHANICS LIENS, 2; SPECIFIC PERFORMANCE.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CONVERSION

OF PROPERTY. See SALES, 5.

CORONERS

CONFESSION TO. See HOMICIDE.

CORPORATIONS.

Promoter's services and expenses; payment.

1. A corporation is under no obligation to pay for services rendered

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CORPORATIONS—*Continued.*

and expenses incurred in promoting its incorporation, unless required to do so by statute or by its charter. It may, however, recognize the equity and propriety of a claim for such services and expenses, and may issue shares of its stock in payment therefor, provided such issue is made in good faith and for value received, and is not prohibited by statute. *United German Silver Co.* v. *Bronson*, 266.

Same; recognition by action of directors.

2. In the present case the directors of the plaintiff company, acting in good faith but not in conformity with a vote of the stockholders that the balance of the company's stock should be issued for cash only, voted that the defendant, who was also a director and the president of the company, should be given the fifty shares of stock for which he had subscribed, in full payment for valuable services theretofore rendered and expenses incurred by him in behalf of the company—which in fact were worth more than $2,500, the par value of his stock—and for similar services and expenses in the future. About ten months later the directors passed a resolution calling upon the defendant to pay cash for this stock and subsequently the corporation brought this action to recover the par value of the fifty shares. *Held* that inasmuch as the services and expenses were found to have been of benefit to the corporation and were reasonable in amount and were not gratuities in fact or in intent, the action of the directors in paying for them with corporate stock would have operated as a sufficient recognition or adoption of them by the corporation, had it not been for the vote of the stockholders that stock should be issued only for cash. *Ib.*

Same; stockholders' vote; waiver by corporation.

3. That a compliance with this vote might be waived by the corporation, and was waived by it by instituting and maintaining this suit to recover the par value of the stock with full knowledge of the circumstances attending its issue; and that therefore the action of the directors became effective by way of adoption. *Ib.*

Issue of stock; failure to make prescribed record.

4. The Corporation Act of this State (Public Acts of 1903, Chap. 194, § 12) provides that shares of stock can be issued only for cash or its equivalent, and that if paid for otherwise than by cash a record of the kind of payment must be made upon the books of the corporation. *Held* that the failure of the directors to make the prescribed record in a given case did not raise a presumption that the stock was issued for cash. *Ib.*

Implied promise of recipient to pay for stock.

5. The law will imply a promise to pay the par value of stock, a certificate for which, issued by the corporation to the recipient in his own name, is delivered to and accepted by him; and this promise may be enforced by and in the name of the corporation. *Ib.*

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CORPORATIONS—*Continued.*

Promoter's services and expenses; adoption of contract.

6. A corporation may obligate itself to pay for sevices and expenses incurred in promoting its incorporation, in case of a contract made by a promotor before its incorporation, by adopting the contract, either expressly or impliedly. *Ib.*

Same; express and implied adoption.

7. Express adoption of such a contract is by vote or resolution of the proper authority. Implied adoption is by acts, conduct, or acquiescence, such as would estop the corporation from denying that it had adopted the contract. *Ib.*

Same; adoption of contract is safeguarded.

8. The law has placed certain safeguards about the adoption of the contract of the promotor in behalf of a corporation subsequently incorporated. Its adoption must be within its corporate powers and for its benefit, and the contract must be reasonable and good faith shown in its making and in its adoption. *Ib.*

Same; what essential in absence of antecedent contract.

9. Where there is no antecedent contract, the services performed and expenses incurred must be found to be of corporate benefit, to be reasonable in amount and not to have been mere gratuities. *Ib.*

Same; retention of benefits by corporation.

10. Inasmuch as a corporation is powerless to reject services and expenses incurred prior to its incorporation, its mere retention of the benefits arising therefrom cannot be the basis for an estoppel of its right to deny its adoption of, and its liability to pay for, such services and expenses. *Ib.*

FOREIGN TRUST COMPANY CANNOT ACT HERE AS ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS.

See also FRAUD, 2; STATUTE OF FRAUDS, 6; TAXATION, 1, 3, 11–13, 16–18; WATERS AND WATERCOURSES.

CORRECTION

MOTION TO CORRECT FINDING. See APPEAL TO THE SUPREME COURT, 1.

APPLICATION TO RECTIFY APPEAL. See APPEAL TO THE SUPREME COURT, 5, 6.

CORROBORATION. See HOMICIDE, 2, 18.

COSTS.

The question of costs in an equitable action is one entirely within the discretion of the court. *Shaw* v. *Jackson*, 345.

COURT OF COMMON PLEAS. See COURTS, 2.

COURT OF PROBATE. See PROBATE COURT.

COURTS.

1. In an action to recover damages for personal injuries, the complaint originally asked for $1,000, which was the limit of the court's jurisdiction; but before trial the plaintiff was allowed to amend the *ad damnum* clause so that it claimed "$1,000 damages, trebled." Upon the trial judgment was rendered for the plaintiff for $800. *Held* that the allowance of the amendment, not being within the

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COURTS—*Continued.*
power of the court, must be treated as a nullity, and therefore as ineffective to oust the court of its jurisdiction, at least as against a non-objecting defendant who saw fit to go to trial upon the merits of the case. *Avery* v. *Ginsburg*, 209.
2. The right of appeal from the City Court of Bridgeport to the Court of Common Pleas, given by § 119 of the city charter (15 Special Laws, p. 493), was repealed by the omission of that provision from the Act of 1917 (17 Special Laws, p. 1005) amending that section of the charter. *Aston Motor Car Co.* v. *Mannion*, 568.
3. A jurisdictional defect may be taken advantage of at any time, and directly or collaterally. *Equitable Trust Co.* v. *Plume*, 649.
JURISDICTION OF SUPERIOR COURT; SALE OF CHURCH PROPERTY. See TRUSTS AND TRUSTEES, 5–9.
ON APPEAL FROM COMPENSATION COMMISSIONER. See WORKMEN'S COMPENSATION ACT, 4.
See also INJUNCTION; MARSHALLING ASSETS.
COVENANTS. See ADJOINING LANDOWNERS, 2; SPECIFIC PERFORMANCE.
TO PAY RENT. See LANDLORD AND TENANT, 3.
CREDIBILITY
OF WITNESSES. See CHARGE OF COURT, 5; JURY, 1; PERJURY, 3; TRIAL, 2.
CREDIT. See ACTION, 2.
EXTENDIBLE BY BANK NOT LIMITED. See GUARANTY, 2.
TO WHOM GIVEN. See FINDING OF FACTS; SALES, 8, 9, 18.
CRIMINAL LAW. See CONSPIRACY; HOMICIDE; PERJURY.
CROSS-EXAMINATION
OF WITNESS. See TRIAL, 1, 2.
CUSTOMS AND USAGES. See SALES, 12.

DAMAGES.
A plaintiff is entitled to nominal damages at least, if a previous determination of the equitable issues in the case has necessarily adjudicated in his favor all the facts upon which his claim for damages rests. *Max Ams Machine Co.* v. *International Asso. of Machinists*, 297.
NOT RECOVERABLE FOR BREACH WITHIN STATUTE. See STATUTE OF FRAUDS, 3–5.
NOT ALLOWED FOR BREACH OF UNENFORCIBLE CONTRACT. See VENDOR AND VENDEE, 4.
RECOVERABLE BY BUILDING CONTRACTOR. See CONTRACTS, 8–10.
FOR CAUSING DEATH. See DEATH.
SETTLEMENT WITH THIRD PERSON OF EMPLOYEE'S CLAIM FOR. See WORKMEN'S COMPENSATION ACT, 11.
CHAUFFEUR NOT ENTITLED TO INDEMNITY. See MASTER AND SERVANT, 1.
FOR LIBEL. See LIBEL AND SLANDER, 2–6.

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DAMAGES—*Continued.*
FOR REFUSAL TO PERFORM. See CONTRACTS, 12.
RECOVERABLE ON ACCOUNT OF STRIKE. See LABOR UNIONS, 6–9.
FOR MAINTAINING TELEPHONE SYSTEM. See TELEPHONE COS.
See also APPEAL TO THE SUPREME COURT, 11; ASSAULT AND BATTERY, 1; EMINENT DOMAIN, 3, 5; FRAUD, 4.
DAMS. See TAXATION, 1.
DEAF MUTES. See HOMICIDE, 2.
DEATH.
1. With respect to damages, the jury were told that so far as they could, they were to base them upon the loss that would come to the estate of the decedent by reason of his untimely death, or in other words to award a sum which would fairly compensate for the loss of net earnings during the period of the decedent's expectancy after he reached twenty-one. *Held* that while this instruction did not contain all the elements of damage, it did the defendants no harm; and that the evidence was sufficient to sustain the verdict of $5,000. *Schrayer* v. *Bishop*, 678.
2. The estate of a decedent whose death is caused by negligence, is entitled to some damages for the death alone, without considering the decedent's expectation of life or his probable accumulations. *Ib.*
OF LEGATEE. See WILLS CONSTRUED, 17.
WITHOUT ISSUE. See WILLS CONSTRUED, 9–14.
DEATH BENEFITS. See INSURANCE, 5–7.
DEATH DUTIES. See TAXATION, 3, 4.
DEBTOR AND CREDITOR. See ACTION, 2; ATTACHMENT, 5; GUARANTY; MARSHALLING ASSETS; TAXATION, 3–11.
DECEDENTS
ESTATES OF. See TAXATION, 3, 6, 14, 15.
DECLARATIONS
OF ACCUSED. See HOMICIDE, 12.
OF ADJOINING LANDOWNER. See EASEMENTS, 1, 2.
OF INJURED PERSON TO PHYSICIAN. See EVIDENCE, 8.
DECREE. See JUDGMENT.
OF PROBATE. See PROBATE COURT, 2; TRUSTS AND TRUSTEES, 1–4.
DEDICATION
OF PROPERTY TO PUBLIC USE. See EMINENT DOMAIN, 7.
DEEDS. See ATTACHMENT, 9.
BOND FOR. See SPECIFIC PERFORMANCE.
OF ECCLESIASTICAL SOCIETY. See TRUSTS AND TRUSTEES, 5–9.
DEFAMATION. See LIBEL AND SLANDER.
DEFEASANCE
CONDITIONS OF, IN WILL. See WILLS CONSTRUED, 9–14.
DEFICIENCY
IN QUANTITY OF GOODS DELIVERED. See SALES, 11–13.
DEGREES
OF CRIME. See HOMICIDE, 16.

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DELIVERY
TO CARRIER. See SALES, 15.
OF GOODS SOLD. See SALES, 2–4, 6.
OF NOTE ON CONDITION. See BILLS AND NOTES, 3.
PLACE OF. See STATUTE OF FRAUDS, 7.
TO SUBVENDEE. See SALES, 5.
DEMAND
FOR RENT. See LANDLORD AND TENANT, 5.
DEMURRER. See APPEAL TO THE SUPREME COURT, 18; ATTACHMENT, 12; COMMITTEES AND REFEREES, 1; HIGHWAYS, 2, 3; PLEADING, 2, 3, 6; TELEPHONE COMPANIES; WATERS AND WATERCOURSES, 3.
DEPENDENCY
OF SON ON FATHER. See WORKMEN'S COMPENSATION ACT, 15, 16.
DEPOSITIONS
UPON APPLICATION TO RECTIFY APPEAL. See APPEAL TO THE SUPREME COURT, 5.
DEPOSITS
IN BANK, WHERE TAXABLE. See TAXATION, 11–13.
DESCRIPTION
OF PLACE AND CAUSE OF INJURY. See HIGHWAYS, 2, 3.
OF PROPERTY. See ATTACHMENT, 4.
DEVIATION
FROM DIRECT ROUTE, BY SERVANT. See MASTER AND SERVANT, 9.
DIRECTING VERDICT. See VERDICT.
DIRECTORS
AUTHORITY OF. See CORPORATIONS.
DISCLAIMER
OF TITLE. See EASEMENTS, 2.
DISCOUNTS
BY BANK. See GUARANTY.
DISCRETION
SUIT AGAINST RECEIVER A MATTER OF. See RECEIVERS.
DE COMMENTS IN CHARGE. See APPEAL TO THE SUPREME COURT, 25.
DE COSTS. See COSTS.
DE CROSS-EXAMINATION OF WITNESS. See HOMICIDE, 4.
DE EVIDENCE. See APPEAL TO THE SUPREME COURT, 22.
DE INSTRUCTIONS TO JURY. See CHARGE OF COURT, 10.
DE POSTPONEMENT. See APPEAL TO THE SUPREME COURT, 32.
DE SEPARATE TRIALS. See HOMICIDE, 1–3.
OF TRUSTEES. See TRUSTS AND TRUSTEES, 7.
DISOBEDIENCE
OF ORDER OF COURT. See TRUSTS AND TRUSTEES, 4.
DISSOLUTION
OF EXCESSIVE ATTACHMENT. See ATTACHMENT, 10–12.
DISTRIBUTION
REVOCATION OF ORDER OF. See PROBATE COURT, 2.
REFERENCE IN WILL TO STATUTE OF. See WILLS CONSTRUED, 7.
OF TRUST FUND. See TRUSTS AND TRUSTEES, 2–4.

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DOCKET
ERASING CASE FROM. See APPEAL TO THE SUPREME COURT, 28; PLEADING, 8.
MOTION TO RESTORE CASE TO. See APPEAL TO THE SUPREME COURT, 28.
DOMICIL.
An inhabitant of Connecticut does not cease to be such by a temporary residence for three years in another State. *Shaw* v. *Jackson*, 345.
TAX ON PERSONALTY FOLLOWS. See TAXATION, 11–13.
See also LIMITATION OF ACTIONS; PROCESS, 1.
DOUBLE TAXATION. See TAXATION, 18.
DRAFT-FINDING. See APPEAL TO THE SUPREME COURT, 7, 34, 35.
DRAFTS. See SALES, 12, 13, 17.
DURESS
TAX PAID UNDER MORAL. See TAXATION, 8.

EARNINGS
OF BUILDING CONTRACTOR. See MECHANICS LIENS, 2.
EASEMENTS.
1. Statements by an owner of land adjoining that of the plaintiffs', respecting his alleged encroachments, made in the course of an interview with the attorney for the plaintiffs with a view to an amicable settlement or compromise, are prima facie privileged communications and inadmissible in evidence against him. *Cartenovitz* v. *Conti*, 546.
2. During such interview, area-ways connected with the defendant's building were claimed to be encroachments upon the plaintiffs' property; to which the defendant replied that he knew nothing as to that, as the area-ways were there when he bought the property. *Held* that such statement did not tend to prove a disclaimer of any title or interest in the land occupied by the area-ways, but rather the reverse. *Ib.*
3. By the undisputed possession for more than fifteen years of that part of the air occupied by a fire-escape projecting beyond the face of a building and extending over the boundary line, and of the space occupied by the swing of the blinds attached to such building, without the license or consent of the owners of the adjoining property, the owner of such building acquires by adverse possession the right to maintain the fire-escape and to have the blinds swing as they had been wont to do. The ouster thereby effected is not one of the soil, but only of the space above it. *Ib.*
4. The evidence in the present case reviewed, and certain findings relative to adverse possession, corrected as requested by the appellant. *Ib.*
ECCLESIASTICAL CORPORATION
CONVEYANCE BY. See TRUSTS AND TRUSTEES, 5–9.
EDUCATION
BEQUEST FOR. See TAXATION, 2.

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EMINENT DOMAIN.

Irregularity not fatal to award, when.

1. An irregularity in the conduct of appraisers from which no substantial injustice results, is not a ground for setting aside their award. *Milford Water Co.* v. *Kannia*, 31.

Same; examination of public records.

2. It is not irregular for appraisers in condemnation proceedings to examine public records which are admissible in evidence and are afterward admitted, though such inspection is made in the absence of the parties. *Ib.*

Measure of landowner's compensation.

3. The just compensation to which a landowner is entitled in condemnation proceedings, is the value of the land taken (including in a proper case the damage to the rest of his land), considered with reference to the uses for which the land is then adapted; and therefore an inquiry as to how many quarts of bottled drinking water the landowner would have had to handle *per diem*, in order to make the business of its sale a feasible one, is properly excluded, in the absence of any evidence that the waters of the brook proposed to be taken possessed special qualities for drinking purposes, or that there was any available market for its sale. Such evidence is too remote and speculative as bearing on the value of the respondent's land. *Ib.*

Same; inquiries of landowner; bias not shown.

4. In the present case one of the appraisers having heard that a cow was mired in the land proposed to be taken, asked the respondent about it when he was a witness. *Held* that this afforded no basis at all for a claim of bias or injustice. *Ib.*

Same; excluding question to real estate expert.

5. A real estate expert called by the respondent was asked by the respondent's own counsel whether he had not in conversation appraised the premises at a higher valuation than that to which he had just testified. *Held* that there was no error in excluding this question. *Ib.*

Property once devoted to one public use.

6. Property already devoted, or about to be devoted, to one public use, cannot be taken for another inconsistent public use, unless such taking be authorized either expressly or by clear implication. *East Hartford Fire District* v. *Glastonbury Power Co.*, 217.

Same; property not protected from condemnation.

7. A general intent to devote the property at some indefinite future time to some public use, is not, however, sufficient to protect it from condemnation. *Ib.*

Compliance with charter requirements essential.

8. In taking land *in invitum* for public use, a municipality must comply with all statutory or charter requirements, and this must appear upon the face of the proceedings. *Crawford* v. *Bridgeport*, 431.

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EMINENT DOMAIN—*Continued.*

Same; layout by committee held invalid.

9. The layout of a highway enlargement and extension by a committee appointed by the common council pursuant to § 59 of the Revised Charter of the City of Bridgeport (Special Laws of 1907, p. 518), is an essential step in the proceedings prescribed by the charter for the establishment of such an improvement; and the mere perfunctory approval and signing of a city engineer's report, separately and at different times, by individuals who had not then been appointed as such committee by the common council, and who, after their appointment, did not meet together or take any action whatever with reference to the subject, does not constitute a valid layout by the committee. *Ib.*

Same; neglect to give notice a fatal defect.

10. An amendment of the charter (Special Laws of 1917, p. 845, § 8) provided that before proceeding to assess benefits and damages for any public improvement, the board of appraisal should cause written notice, containing the names of the landowners affected by the proposed improvement, to be filed and recorded in the town clerk's office; and that no assessment thereafter made should be effective except as to those named in such notice. *Held* that it was competent for the legislature to prescribe the prerequisites to the acquisition of land for public use, and that neglect of the board of appraisal to give the required notice was a fatal defect, of which a landowner, unless estopped, might take advantage upon appeal from the assessment proceedings. *Ib.*

Same; landowner not estopped.

11. That there was no ground for any claim of estoppel or of waiver in the present case. *Ib.*

See also WATERS AND WATERCOURSES.

ENCROACHMENTS

ON ADJOINING LAND. See EASEMENTS, 1–3.

ENDORSEMENT

UNCONDITIONAL, OF NOTE. See BILLS AND NOTES, 3.

EQUALITY

OF KNOWLEDGE. See FRAUD, 2.

EQUITY. See INJUNCTION; MARSHALLING ASSETS.

ERASURE

FROM DOCKET. See APPEAL TO THE SUPREME COURT, 28; PLEADING, 8.

ERROR, WRIT OF. See SUMMARY PROCESS.

ESTATES

OF DECEDENTS. See TAXATION, 3, 6, 14, 15.

REDUCING A FEE TO A LESSER ESTATE. See WILLS CONSTRUED, 8.

ESTOPPEL.

To constitute an estoppel there must have been a representation or concealment of material facts, knowingly made, to one ignorant thereof, with intent that the latter should act in reliance upon it, and the achievement in fact of such intent. *Crawford* v. *Bridgeport*, 432.

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ESTOPPEL—*Continued.*
See also ATTACHMENT, 6–9; CORPORATIONS, 7, 10; EMINENT DOMAIN, 10, 11; LANDLORD AND TENANT, 4; STATUTE OF FRAUDS, 5; SURETY.
EVIDENCE.
Loss of writings; secondary proof.
1. It is for the trial court to determine whether the evidence of the loss of writings is sufficient to admit secondary proof of their contents. *State* v. *Castelli*, 59.
Finding of value in former action.
2. A finding in a former action as to the value of certain real estate, is not admissible as evidence of its value in a subsequent suit between different parties. *Mills* v. *Davis*, 155.
Personal injuries; not confined to medical testimony.
3. In passing upon the nature and extent of the plaintiff's personal injuries, a trial court is not confined to the medical testimony. *Avery* v. *Ginsburg*, 209.
Authenticity of writing signed by rubber stamp.
4. Orders for goods signed by a rubber stamp may be shown to be authentic or genuine by other evidence than their signatures, and prima facie proof of their authenticity is all that is required to render the orders admissible in evidence. *Max Ams Machine Co.* v. *International Asso. of Machinists*, 297.
Judicial notice; reference to almanac.
5. Courts take judicial notice of the coincidence of the days of the week with the days of the month, and of the latter with those of the year, and may refer to an almanac for this purpose. *Schmidt* v. *Manchester*, 551.
Judicial notice is superior to evidence.
6. Judicial notice takes the place of proof, and as a means of establishing facts it is superior to evidence. *Ib.*
Inquiry calling for hearsay.
7. A plaintiff's witness was asked if he told some one that the stairway upon which the plaintiff had fallen was defective. *Held* that this called for an answer which was plainly hearsay, and that the question was properly excluded. *Smith* v. *Hausdorf*, 579.
Statement to physician de cause of accident.
8. A statement as to what caused the accident, made by the plaintiff to her physician, is a mere narrative of a past event and objectionable as hearsay. *Ib.*
Photograph; preliminary question for trial judge.
9. Whether a photograph is a correct representation of the premises as they appeared at the time of the accident, is a preliminary question of fact to be decided by the trial judge before the admission of the photograph in evidence. *Ib.*
Same; photograph properly excluded.
10. In the present case the alleged defective stairway had been fixed up or repaired before the picture was taken, and the trial court ex-

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EVIDENCE—*Continued.*
cluded the photograph. *Held* that it could not be said there was error in such ruling. *Ib.*
Parol evidence of technical terms of contract.
11. Parol evidence is admissible to explain technical or incomplete terms in a written agreement, if such explanation is not inconsistent with the words of the writing. *Falletti* v. *Carrano*, 636.
See also AGENCY, 1; APPEAL TO THE SUPREME COURT, 2, 4, 6, 9, 20, 22, 25, 26, 33; ASSAULT AND BATTERY, 2; ASSIGNMENT; ATTACHMENT, 6; BILLS AND NOTES, 3; CHARGE OF COURT, 1–6, 11; CONTRACTS, 5–7, 10, 15, 16; EASEMENTS, 1, 2, 4; EMINENT DOMAIN, 2–5; FRAUD, 3, 4; HOMICIDE; JUDGMENT, 3, 4; LABOR UNIONS, 7–9; LANDLORD AND TENANT, 2, 3, 12; LIBEL AND SLANDER, 7–10; NEGLIGENCE, 14; PERJURY; SALES, 11–13; STATUTE OF FRAUDS, 7; TRIAL, 1, 2; VERDICT; WILLS, PROBATE OF, 2.
EXAMINATION
OF WITNESS; CONTRADICTION. See TRIAL, 1.
EXCEPTIONS
TO FINDING. See APPEAL TO THE SUPREME COURT, 1, 20.
EXCEPTIONS, BILL OF. See APPEAL TO THE SUPREME COURT, 13, 19.
EXCESSIVE DAMAGES. See APPEAL TO THE SUPREME COURT, 11; ASSAULT AND BATTERY, 1.
EXCUSE
FOR NONPERFORMANCE. See CONTRACTS, 18.
EXECUTION
OF CODICIL CONFIRMING WILL. See WILLS, PROBATE OF, 3.
NOTICE OF LEVY. See ATTACHMENT, 3, 4.
OF WILL. See WILLS, PROBATE OF, 2.
OF WRITING. See SURETY.
EXECUTORS AND ADMINISTRATORS.
1. The common law of this State does not preclude a corporation from serving as an executor or administrator; but under the provisions of Chapter 131, §§ 1 and 2, and Chapter 194, § 81, of the Public Acts of 1903, no foreign trust company can act as administrator in this State, though it may act as the executor of a Connecticut resident if named by the latter in his will, after it has appointed in writing the Secretary of State as its attorney to receive service of process; and therefore a judgment or decree of a Court of Probate appointing a foreign trust company as an ancillary administrator or executor of a nonresident decedent is beyond its jurisdiction and is a nullity. *Equitable Trust Co.* v. *Plume*, 649.
2. The qualification of an administrator or executor in a foreign jurisdiction does not give him the right to administer upon assets here, or to sue for a debt due here: he must first take out ancillary administration. He may, however, lawfully collect assets in this State if they are voluntarily delivered to him. *Ib.*
3. An appointment of an administrator or executor by a Court of

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EXECUTORS AND ADMINISTRATORS—*Continued.*
Probate in this State is conclusive of the appointee's right to act as such, provided the court had jurisdiction to render such judgment. *Ib.*
EXPENSES OF ADMINISTRATION. See TAXATION, 14, 15.
FOREIGN TAXES PAID BY. See TAXATION, 5, 14, 15.
EXEMPLARY DAMAGES. See FRAUD, 4; LIBEL AND SLANDER, 3–5.
EXHIBITIONS
BABY SHOW. See CONTRACTS, 18.
EXHIBIT
WRITTEN CONFESSION AS. See HOMICIDE, 9.
EXPECTANCY
OF LIFE. See DEATH.
EXPENSES
IN ADMINISTERING ESTATE. See TAXATION, 14, 15.
EXPERT TESTIMONY. See EMINENT DOMAIN, 5.
EXPUNGING. See PLEADING, 5.
EXTENSION
OF TIME OF PAYMENT. See ACTION, 2.
EXTRADITION.
1. To constitute one a fugitive from justice, within the meaning of that expression in the Federal Constitution (Art. 4) and laws of Congress relating to interstate extradition, two things are essential: first, that having been in the demanding State he has left it and is within the jurisdiction of another; and second, that he incurred guilt before he left the former State and while he was bodily present therein. *Taft* v. *Lord*, 539.
2. In the present case a man living in New York with his wife and children, after making financial provision for their temporary support, came to this State to look for a place where he could establish a home, intending to send for them to join him here, which he did about a month later. After a short residence in this State the parents quarreled, and the wife and children returned to New York, while the husband and father continued to live here. Since their return to New York he had not provided in any way for the support, nurture or education of the children, in alleged violation of a statute of that State, for which he was indicted there, and his extradition demanded. *Held* that the conduct of the father prior to leaving the State of New York was in no respect criminal, and that his offense, if any, against the laws of that State, was one which had its conception and consummation while he was bodily present in this State; and therefore that he was not subject to extradition as a fugitive from justice. *Ib.*

FELLOW-SERVANTS. See MASTER AND SERVANT, 6; WORKMEN'S COMPENSATION ACT, 5.
FIGHTING
INJURY TO EMPLOYEE WHILE. See WORKMEN'S COMPENSATION ACT, 10.

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FINDING OF FACTS.
An express finding that the original credit was given to the defendant is not essential, if the facts as detailed preclude the possibility of any other rational conclusion. *Cordner Co.* v. *Manevetz*, 587.
BY COMPENSATION COMMISSIONER. See WORKMEN'S COMPENSATION ACT, 4.
CONSTRUCTION OF. See APPEAL TO THE SUPREME COURT, 26.
CORRECTION ALLOWED. See EASEMENTS, 4.
REFUSED, WHEN. See APPEAL TO THE SUPREME COURT, 7.
CONFLICT WITH DRAFT-FINDING. See APPEAL TO THE SUPREME COURT, 34.
IN FORMER ACTION INADMISSIBLE, WHEN. See EVIDENCE, 2.
HARMLESS ERROR. See APPEAL TO THE SUPREME COURT, 10.
INTENT INFERRED, WHERE. See WAIVER, 2.
IN CASE TRIED TO JURY. See APPEAL TO THE SUPREME COURT, 4–6.
MOTION TO CORRECT. See APPEAL TO THE SUPREME COURT, 1.
AFFECTED BY VIEW OF PREMISES. See APPEAL TO THE SUPREME COURT, 20.
See also LIBEL AND SLANDER, 9; MASTER AND SERVANT, 3, 4, 7; RAILROADS, 10; SALES, 4, 8, 9.
FIRE
LOSS OF BUILDINGS BY. See LANDLORD AND TENANT, 10, 11.
EMPLOYEE INJURED BY, WHILE ASLEEP. See WORKMEN'S COMPENSATION ACT, 7.
FIRE DEPARTMENT. See MUNICIPAL CORPORATIONS, 7.
FIRE DISTRICT. See TAXATION, 16.
FIRE ESCAPES. See EASEMENTS, 3.
FIRE INSURANCE. See INSURANCE, 1–4. See also LANDLORD AND TENANT, 11.
FLOWAGE ACT. See WATERS AND WATERCOURSES, 1, 2.
F. O. B.
AGREEMENT IMPLIED FROM. See SALES, 16.
FOREIGN CORPORATIONS
CANNOT ACT HERE AS ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS.
FORFEITURE. See LANDLORD AND TENANT, 4.
OF LEGACY. See WILLS CONSTRUED, 1–5.
OF MONEY PAID. See SPECIFIC PERFORMANCE, 4.
FORGERY. See PAYMENT, 1.
FORMER ADJUDICATION. See JUDGMENT, 3, 4; NEGLIGENCE, 22.
FRATERNAL BENEFIT SOCIETIES
CHANGE OF BENEFICIARY. See INSURANCE, 5–7.
FRAUD.
1. In an action to recover damages for false representations as to the financial condition of a corporation whose worthless stock the plaintiff was thereby induced to purchase, the trial judge in his charge referred to one of the defendants as a director and secretary of the company, when as matter of fact he was its secretary but

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FRAUD—*Continued.*

not a director. *Held* that this reference was clearly an inadvertence which could not have misled the jury or worked any harm to the defendants. *Gallon* v. *Burns*, 39.

2. The defendants contended that inasmuch as the plaintiff had an opportunity to examine the books of the company and failed to do so, he could not recover for their false representations as to its financial condition. *Held* that the principle thus invoked, if accepted as the law of this State, was nevertheless subject to the qualification that the person deceived must have stood upon an equal footing with those making the false representations,—a condition which did not exist in the present case, as the defendants were stockholders and, either as officers or directors, had full knowledge of the extent of the company's business and of its financial status, while the plaintiff had no information whatever upon that subject. *Ib.*

3. The plaintiff had settled a foreclosure suit brought against her, with funds furnished by the defendants, who were her attorneys, in return for which she had conveyed to them certain real estate, and she now sued them for fraud in inducing her to make the arrangement, alleging that it was in their own financial interest and in violation of their duty to her. The defendants denied the fraud, and averred that the settlement was voluntarily and intelligently made by the plaintiff with full knowledge of all the facts; and the jury returned a verdict in their favor. Upon the cross-examination of one of the defendants he was asked if he did not know that the plaintiff had a valid defense to the foreclosure suit. *Held* that this inquiry was immaterial unless the fact sought to be elicited formed a part of the defendants' plan to cheat and defraud the plaintiff; and that under the pleadings it was not relevant for that purpose. *Mills* v. *Davis*, 154.

4. Upon her direct-examination the plaintiff was asked what expenditures she had made in the prosecution of this case, and upon objection the question was excluded. *Held* that unless offered to prove exemplary damages, the ruling was correct; and that if otherwise, it was harmless, as the verdict was for the defendants and the jury were not called upon to consider the question of damages. *Ib.*

See also INJUNCTION.

FRAUDS, STATUTE OF. See STATUTE OF FRAUDS.

FUGITIVE FROM JUSTICE. See EXTRADITION.

FUTURE DELIVERY. See AGENCY, 2.

GOOD CHARACTER

OF ACCUSED. See CHARGE OF COURT, 11; HOMICIDE, 19.

GRANTS

BY LEGISLATURE TO RAILROAD COMPANY. See RAILROADS.

GRATUITY. See PARENT AND CHILD.

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GUARANTY.

1. Notice to a guarantor by a bank that it has accepted his guaranty is not essential when the writing was prepared by the bank and after it had been signed was handed to the borrower who delivered it to the bank as authorized by the guarantor; for the whole form and environment of the transaction indicates that the bank invited the execution of a guaranty which, unless rejected because of the signer's financial irresponsibility, was intended by both parties to become effective on delivery. *Hartford-Ætna National Bank* v. *Anderson*, 643.
2. The guaranty in question was not to cover notes in excess of $10,000 outstanding at any time. *Held* that this was clearly a limitation of the guarantor's liability, and not a restriction upon the credit which the bank might extend to the borrower. *Ib.*
3. That assuming the bank was negligent in discounting notes to the amount of $40,000, this defense was unavailing to the guarantor under his limited liability; and furthermore, that the guarantor himself was negligent in not keeping himself informed as to the amount borrowed, inasmuch as it was within his power to terminate his liability, except as to notes then outstanding, at any time upon written notice to the bank. *Ib.*

See also CONTRACTS, 1, 2, 4, 5.

HARMLESS ERROR. See APPEAL TO THE SUPREME COURT, 10, 30, 33; ASSIGNMENT; CHARGE OF COURT, 5, 9; DEATH; FRAUD, 1, 4; NEGLIGENCE, 13.

HARTFORD, CITY OF

CHARTER CONSTRUED. See MUNICIPAL CORPORATIONS, 1, 2.

HEARSAY EVIDENCE. See APPEAL TO THE SUPREME COURT, 9; EVIDENCE, 7, 8; LABOR UNIONS, 8.

HIGHWAYS.

1. Although one is driving an automobile on his own side of the road he is nevertheless bound to exercise reasonable care to avoid a collision with an automobile approaching from the opposite direction; but whether he should have turned out still further in a given case cannot be determined as matter of law; that must depend upon what an ordinarily prudent man would have done under like circumstances,—a question properly submitted to the jury. *Wing* v. *Eginton*, 336.
2. In an action for a personal injury alleged to have been caused by a defective highway, the written notice to the town, dated October 2d, 1915, stated that the plaintiff, while walking along the sidewalk or side path on the north side of Hartford Road near the James Loomis place, so-called, on Tuesday evening, September 28th, stepped into a gully, which, as the plaintiff had been informed, had existed at that place for several months, and fell down, suffering severe sprains and breaking one or more of the ligaments of her foot. Upon a demurrer to this notice it was *held* that the place,

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HIGHWAYS—*Continued.*

cause, and nature of the injury were sufficiently described, and that the statement as to the time, while not full and complete, was not so indefinite as to render it absolutely invalid, especially when read, as it must be, in connection with the date at the head of the notice. *Schmidt* v. *Manchester*, 551.

3. That in determining the legal sufficiency of the notice, it was essential to consider the Act of 1917 (Chap. 66), which provides that certain unintentional inaccuracies, unless misleading, shall not invalidate the notice. *Ib.*

BYSTANDER IN, KILLED. See NEGLIGENCE, 1.

PRESUMPTION DE ANOTHER'S CONDUCT IN. See NEGLIGENCE, 16.

DEFECTS IN. See MUNICIPAL CORPORATIONS, 3, 4.

LAYOUT OF, IN CITY; CHARTER REQUIREMENTS. See EMINENT DOMAIN, 8–10.

CONDITION OF, AS TO LIGHTS. See NEGLIGENCE, 14.

PEDESTRIAN IN, MUST USE HIS SENSES. See NEGLIGENCE, 2–5.

POLES AND WIRES IN. See TELEPHONE COMPANIES.

FALLING OVER TELEGRAPH POLE LYING IN GUTTER. See NEGLIGENCE, 20–22.

See also STREET RAILWAYS.

HOMICIDE.

Trial of accused jointly indicted.

1. In the interest of justice, those who are jointly indicted are ordinarily to be tried together; and the mere fact that evidence will be offered against one which is inadmissible against the other or others, does not necessarily require a separate trial for each. The question is still one for the exercise of a sound discretion, the controlling consideration being whether a joint trial is likely to result in substantial injustice to either of the accused. *State* v. *Castelli*, 58.

Same; deaf mutes; confessions by each.

2. Upon a prosecution for murder in the first degree, each of the two accused, who were deaf mutes, had made a full written confession of facts which, if legally corroborated, was sufficient to convict its author of that crime. *Held* that in view of the precautions taken in the admission of their confessions, and again in the charge of the court, it could not be assumed that the jury were improperly influenced by any corroborative effect given to evidence inadmissible against one of the accused which was received as against the other only; and that the trial court's denial of a motion by one of the accused for a separate trial was not an abuse of its judicial discretion. *Ib.*

Same; joint trial; discretion of trial court.

3. Ordinarily the decision of a trial court upon a preliminary and collateral question of fact will be reversed only for clear and manifest error; and this rule is equally applicable to the determination of the question whether substantial injustice is or is not likely to result from a joint trial of persons jointly indicted. *Ib.*

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HOMICIDE—*Continued.*

Confessions; threats or inducements; discretion.

4. Upon the preliminary issue as to whether confessions of the accused were procured by threats or inducements, the trial court may in its discretion allow leading questions and questions calling for conclusions of fact. *Ib.*

All confessions are admissible.

5. All statements in the nature of confessions are admissible, notwithstanding their supersession or merger in a final and detailed confession made in writing to the coroner. *Ib.*

Same; influenced by action of associate.

6. A confession made by one of the accused is not rendered inadmissible because he was undoubtedly influenced in making it by seeing his associate engaged in making a similar statement, which, he was truthfully informed, gave the whole story of the homicide. *Ib.*

Confession after warning; voluntary rehearsal.

7. Having once been fully warned that anything he might say might be used against him, and having then made a full confession, one of the accused a week later, upon request, voluntarily rehearsed the steps taken by him and his associate at the scene of the murder. *Held* that evidence of such rehearsal was admissible against him without proof of another and further warning. *Ib.*

Confessions; charge of court de their value.

8. After the confessions had been received in evidence, following the proof of their voluntary character and after the State had rested, one of the accused testified, in his own defense, that an officer had struck him repeatedly with a piece of hose before he made his statement. *Held* that under these circumstances the trial court properly charged the jury that if they found the accused were frightened or forced to make their confessions by the conduct or abuse of the officer having them in charge, they should disregard the statements as of no value. *Ib.*

Confessions as exhibits may go to jury-room.

9. No error is committed in treating written confessions as exhibits, and in allowing them, like any other exhibits, to go to the jury-room. *Ib.*

Secondary proof; loss of writings for court to decide.

10. It is for the trial court to determine whether the evidence of the loss of writings is sufficient to admit secondary proof of their contents. *Ib.*

Writings showing hostility to deceased.

11. Papers taken from the person of one of the accused tending to show unfriendly or hostile relations between himself and his wife whom he was charged with having murdered, are admissible in evidence against him. *Ib.*

Statements inconsistent with innocence.

12. The statements or declarations of an accused inconsistent with

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HOMICIDE—*Continued.*

his plea of innocence—like any other relevant fact inconsistent with such plea—are admissible as evidence against him. *Ib.*

Jury not misled by simple inadvertence.

13. Having explained to the jury at great length what "reasonable doubt" meant, the trial court at one point in its charge used the phrase "considerable doubt" instead of the usual formula. *Held* that the jury could not have been misled by this inadvertence. *Ib.*

Duty of jury to recall the evidence; charge.

14. It is the duty of the jury and not of the court to remember the evidence and claims of the parties correctly, and if they are so informed, the omission of the court to call their attention to some single bit of evidence or claim is not reversible error. *Ib.*

Court need not follow language of requests to charge.

15. The trial court is not bound to use the phraseology of counsel in preference to its own in stating familiar propositions of law to the jury. *Ib.*

Conduct held not to reduce degree of crime.

16. A husband who, on his own story, suspects his wife is going to commit adultery and follows her to another city, seventy miles away, conceals himself in a closet armed with a deadly weapon awaiting the materialization of the expected provocation, and then kills her, cannot claim that his crime is thereby reduced from murder to manslaughter. *Ib.*

Testimony of accomplice; relevancy to confession.

17. While one of two jointly accused cannot be convicted upon the unsupported testimony of the other, yet if the other chooses to testify in his own defense, his testimony, though not that of a full witness, is relevant so far as it tends to prove or disprove the existence of the crime outlined in the former's confession. *Ib.*

Corroboration of confessions by each accused.

18. The evidence in the present case reviewed and *held* to abundantly corroborate the confessions made by each of the accused. *Ib.*

Evidence of other unconnected like murders.

19. Upon a prosecution for murder by poison, evidence of other unconnected murders committed by the accused, by similar means, is generally inadmissible. Such evidence ordinarily has no direct tendency to prove the specific crime charged, but only indicates that the accused is possessed of a bad character or of a disposition to commit crimes of that nature; and its admission in chief violates the rule of policy which forbids the State from attacking the character of the accused except in rebuttal, and from proving it even then by evidence of particular acts. On the other hand, this rule of policy has no application whatever to evidence of any crime which directly tends to prove that the accused is guilty of the specific offense for which he is on trial. *State* v. *Gilligan*, 526.

Same; evidence admissible; for limited purpose.

20. Evidence of other murders may, however, be admitted in certain

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HOMICIDE—*Continued.*

cases, for the limited purpose of excluding the existence of an innocent intent upon the part of the accused in administering the poison, as well as to eliminate the probability of accident and mistake in its administration. But in every such case it must appear that the act is equivocal, that is, that its commission by the accused is consistent with an innocent as well as with a criminal intent; and also that the accused did commit the act. *Ib.*

Same; evidence inadmissible in present case.

21. In the present case the accused was indicted for murder in administering arsenic to the decedent in his food, which she prepared and served to him while an inmate of a home kept by her for aged and infirm persons; and the evidence of the State connecting the accused with the death, not only tended to negative the probability of accident or mistake, but rendered it practically impossible for the jury to reach any other conclusion than that of guilt if they accepted the State's claims as true. *Held* that under these circumstances the admission in chief of the evidence of the other murders, including the financial transactions attending them, as indicative of motive, was as unnecessary as it was objectionable, and constituted ground for a new trial. *Ib.*

Same; theory of suicide; evidence excluded.

22. The State also claimed this evidence, and the trial court admitted it, for the purpose of excluding the theory of suicide. *Held* that for this purpose the evidence was irrelevant and inadmissible. *Ib.*

HUSBAND AND WIFE. See ASSAULT AND BATTERY, 2; HOMICIDE, 16; INSURANCE, 7; WILLS CONSTRUED, 17, 20.

IMPLIED CONTRACTS. See BROKERS; CORPORATIONS, 5; SALES, 16.

INCOME TAX. See TAXATION, 5.

INDEMNITY

CHAUFFEUR NOT ENTITLED TO, AGAINST EMPLOYER. See MASTER AND SERVANT, 1.

CITY'S RIGHT TO SUE FOR. See NEGLIGENCE, 22.

INDEPENDENT CONTRACTORS. See MASTER AND SERVANT, 3, 6–8.

INDICTMENT AND INFORMATION. See HOMICIDE, 1–3.

INDORSEMENT

UNCONDITIONAL, OF NOTE. See BILLS AND NOTES, 3.

INDUCEMENT

TO CONFESS. See HOMICIDE, 4–6, 8.

INHABITANTS. See DOMICIL; PAUPERS; PROCESS, 1.

INHERITANCE TAX. See TAXATION, 2–6, 14, 15.

INJUNCTION.

While courts of equity have power to relieve against judgments at law and in some instances are bound to do so, they will not act lightly but only where some well-defined, independent, equitable ground exists for restraining the enforcement of the judgment—such as

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INJUNCTION—*Continued.*
fraud or accident whereby the complainant has been injured. *Fort Orange Barbering Co.* v. *New Haven Hotel Co.*, 144.
See also ADJOINING LANDOWNERS, 4; LABOR UNIONS, 7, 8.
INSPECTION
OF PREMISES BY TRIAL JUDGE. See APPEAL TO THE SUPREME COURT, 20.
INSTALMENTS
OF SALARY OR WAGES. See JUDGMENT, 3, 4.
INSTRUCTIONS
TO JURY. See CHARGE OF COURT.
INSURANCE.
1. A title to property, or a lien upon or possession of it, is not essential to the existence of an insurable interest therein. It is sufficient to constitute such an interest, that one derives a benefit from the existence of the property or would suffer a loss by its destruction. *Plum Trees Lime Co.* v. *Keeler*, 1.
2. In the present case the plaintiff, who was a lessee of a lime kiln which was in a dilapidated condition, having constructed several new buildings upon the premises at a cost to it of about $2,500, and being bound by its lease to keep the buildings in good repair, insured for $1,200 those which it had built, but by a mistake, occasioned by the insurance company, the policy was taken out in the name of the defendant landowner, who received the insurance money after the buildings had been destroyed by fire, although he had refused, at the plaintiff's request, to take out any insurance upon his own buildings. *Held* that the plaintiff had an insurable interest in the property; and that the defendant was to be regarded as a mere custodian or trustee of the insurance moneys for the benefit of the plaintiff, who was equitably entitled to them. *Ib.*
3. A trust is implied when, as in this case, it is deducible from the transaction as a matter of intent. *Ib.*
4. The defendant claimed that he was entitled to a set off for the expenses incurred by him in a former suit in collecting the insurance moneys now in question. *Held* that this claim was not well founded, since the defendant could not properly have recovered attorney's fees in that suit. *Ib.*
5. While the beneficiary named in a death-benefit certificate, issued by a fraternal benefit association and providing for a change of beneficiary, takes nothing more than a mere expectancy, this is not necessarily true of the beneficiary named in an ordinary life insurance policy, although the right to change the beneficiary in a prescribed manner is reserved therein. *Neary* v. *Metropolitan Life Ins. Co.*, 488.
6. The method prescribed in an ordinary life insurance policy for changing the beneficiary named therein, must be complied with, in order to render an attempted change effective against the rights of the original beneficiary. *Ib.*

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INSURANCE—*Continued.*

7. In the present case a wife joined with her husband in an application for a policy of insurance upon his life, in which she was named as the beneficiary. The policy, which was issued as requested, provided that the insured might designate a new beneficiary by a written notice filed at the home office accompanied by the policy itself, the change to take effect upon its indorsement upon the policy by the company. A written notice of a change of beneficiary was left with the local agent and transmitted by him to the company, but the policy remained in the hands of the wife who paid all the premiums and had no knowledge of any attempt to change the beneficiary until after her husband's death. *Held* that under these circumstances the insurance company was bound to see that the terms of the policy were complied with before assenting to a change of beneficiary; and that the change attempted was not effective to deprive the wife of her rights as the original beneficiary under the policy. (*One judge dissenting.*) *Ib.*

INTENT

OF ACCUSED. See HOMICIDE, 20, 21.

OF PARTIES DE USE OF CELLAR. See LANDLORD AND TENANT, 13.

AN ELEMENT IN ESTOPPEL. See ESTOPPEL.

TO MAKE LEASE. See LANDLORD AND TENANT, 6–8.

TO RAPE. See CONSPIRACY.

ANTAGONISTIC STATUTE. See STATUTES, 2.

TO USE WATERS OF A STREAM. See WATERS AND WATERCOURSES, 3.

TO CREATE TRUST IMPLIED, WHEN. See INSURANCE, 3.

IN WAIVER. See WAIVER.

INTEREST.

Certain trunks bought by the defendants were not to be paid for by them until all had been sold, and this had not occurred when the plaintiff began her action. *Held* that the plaintiff was not entitled to interest on the amount of the judgment ($15.50) for this item. *Schwartz* v. *Dashiff*, 135.

See also BILLS AND NOTES, 2; VENDOR AND VENDEE, 10.

INTERPLEADER.

Where the contested issues involve not only the rights of the parties respondent in a fund which the plaintiff brings into court, but also the personal liability of the plaintiff in addition, it is error to allow him counsel fees upon the theory that the case is one of interpleader. *Stone* v. *Moomjian*, 477.

INTIMIDATION. See LABOR UNIONS, 5.

INTOXICATING LIQUORS.

Chapter 263 of the Public Acts of 1917, approved May 10th, 1917, permits the county commissioners to grant a renewal license to sell liquor, for a period not later than the first Monday of the *second month* after a town shall have voted no license; while Chapter 322, approved May 16th, 1917, declares that the license vote of a town "shall become operative" on the first Monday of *the month next*

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INTOXICATING LIQUORS—*Continued.*

succeeding that in which it was had. *Held* that the two Acts were plainly irreconcilable, and that the county commissioners had no authority to renew a license to sell beyond the date when the no-license vote became "operative" under the terms of the later Act. *Young's Appeal*, 516.

USE OF, BY LEGATEE. See WILLS CONSTRUED, 17, 20.

ISSUE

DYING WITHOUT. See WILLS CONSTRUED, 9–14.

ISSUES

FACTS NOT WITHIN. See PLEADING, 1.

LIMITED TO VALIDITY OF WILL. See WILLS, PROBATE OF, 1.

JITNEY. See MOTOR-VEHICLES, 3.

JOINT TORT FEASOR. See ASSAULT AND BATTERY, 2.

JUDGES

JURISDICTION OF, TO DISSOLVE EXCESSIVE ATTACHMENT. See ATTACHMENT, 10–12.

DE ASSESSMENT OF BENEFITS AND DAMAGES. See MUNICIPAL CORPORATIONS, 1.

JUDGMENT.

1. A decree touching separate and distinct matters, if erroneous as to one of them only, may be upheld as to the others. *Morse* v. *Ward*, 286.
2. A decree of a Court of Probate required a trustee to file his final account, and to turn over the balance of the fund to a certain person named therein. *Held* that these orders were separate and distinct, and that the one relating to the final account was valid and legal, even if, as the parties agreed, the Court of Probate exceeded its powers with respect to the other. *Ib.*
3. A former judgment for the recovery of instalments of salary or wages then due under a contract with the defendant, is not a bar to a subsequent action to recover damages for the defendant's breach of the contract, since the causes of action are different; and therefore a transcript of the evidence which was given in the first action is not admissible in the second, for the purpose of showing that the former judgment was for the same cause as that alleged in the second action. *Viall* v. *Lionel Manufacturing Co.*, 341.
4. The record in the former action was laid in evidence. *Held* that this established the execution and validity of the contract in question, and that such action was for salary due and not for breach of contract, in so far as that issue was one of fact. *Ib.*

See also APPEAL TO THE SUPREME COURT, 15; ATTACHMENT, 5, 8, 10–12; DAMAGES; EVIDENCE, 2; EXECUTORS AND ADMINISTRATORS, 3; INJUNCTION; LANDLORD AND TENANT, 2, 3.

JUDGMENT-FILE. See APPEAL TO THE SUPREME COURT, 15.

JUDICIAL NOTICE. See EVIDENCE, 5, 6.

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JURISDICTION
ONCE ACQUIRED, FREE FROM INTERFERENCE. See RECEIVERS, 2.
OF JUDGE TO DISSOLVE EXCESSIVE ATTACHMENT. See ATTACHMENT, 10–12.
OF COURT. See COURTS.
OF PROBATE COURT. See EXECUTORS AND ADMINISTRATORS; PROBATE COURT; TRUSTS AND TRUSTEES, 1–4.
TO ORDER SALE OF CHURCH PROPERTY. See TRUSTS AND TRUSTEES, 5–9.
OF DEMANDING STATE. See EXTRADITION.
TO SET ASIDE DIRECTED VERDICT. See VERDICT, 2.
JURY.
1. It is within the province of the jury to determine the credibility of witnesses. *Tierney* v. *Martone*, 93.
2. A party who fails to call the attention of the court at the time to alleged misbehavior of a juror, thereby waives his right to object to such conduct. *Mills* v. *Davis*, 155.
See also APPEAL TO THE SUPREME COURT, 2, 12, 25; CHARGE OF COURT, 9; HOMICIDE, 14; LANDLORD AND TENANT, 13.
JUS DISPONENDI. See SALES, 14, 15.
JUSTICE OF THE PEACE. See LANDLORD AND TENANT, 2.
JUSTIFICATION
OF DEFENDANT, FOR DEFAMATORY PUBLICATION. See LIBEL AND SLANDER, 7.

KNOWLEDGE. See NOTICE.
IMMATERIAL, WHEN. See WARRANTY.

LABOR UNIONS.
1. Individuals may work for whom they please and quit work when they please, provided they do not violate their contract of employment. Combinations of individuals have similar rights, but because of the liability of others to injury from the concerted action of numbers, the exercise of such rights is subject to certain restrictions. *Cohn & Roth Electric Co.* v. *Bricklayers Union*, 161.
2. The members of labor unions may, by agreement between themselves, refuse to work, or to continue to work, with nonunion men provided such action is taken in their own interest and not for the primary purpose of injuring another or others, and the means employed are neither unlawful nor opposed to public policy. *Ib.*
3. The upbuilding or strengthening of a labor union is a legitimate end, to accomplish which its members may lawfully refuse to work with nonunion employees; althought in so doing they contemplate the probability of injury to an open-shop contractor or his employees. *Ib.*
4. Such refusal does not deprive an employer of his legal option to engage such men as he pleases, where plenty of nonunion men, qualified for the desired work, are available in that locality. Under

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LABOR UNIONS—*Continued.*

such circumstances, and in the absence of a finding to that effect, the cessation of work by the defendants cannot be regarded as the cause of the employer's breach of his contracts. *Ib.*

5. Employees having the legal right to refuse to work, or to continue to work, with nonunion help, may lawfully notify their employers or contractors that a strike will follow if nonunion men are employed upon the same jobs, as they did in the present case; and the giving of such a notice would not ordinarily constitute a violation of the intimidation statute (§ 1296), though it might upon a different state of facts. *Ib.*
6. A recovery for expenditures made by a manufacturer whose workmen were out on strike, for special officers, watchmen and guards for the protection of the plant and its equipment, because of the alleged illegal acts and conduct of the strikers, should be limited to those incurred prior to the commencement of the action. *Max Ams Machine Co.* v. *International Asso. of Machinists*, 297.
7. It is to be assumed that strikers will conform to the terms of an injunction order forbidding the commission of specified illegal acts by them, and therefore their former employer cannot recover for expenses incurred by him for protecting the plant, in the absence of competent evidence that the defendants have in fact continued to commit, or threatened to commit, such illegal acts after the issuance of such order. *Ib.*
8. While mere hearsay evidence or rumor that the strikers are to continue their illegal acts, may be sufficient to justify the employer, acting in his own interest and from his own standpoint, in continuing his expenditures for special officers and guards, it does not furnish a basis for charging such expenditures to the strikers; to accomplish that result, the plaintiff must prove that the striking defendants, or some of them, by their acts, conduct, speech or otherwise, furnished reasonable ground for the belief that past wrongdoing was to be continued notwithstanding the injunction. *Ib.*
9. Acts, words, or conduct, to constitute agencies of coercion, as the law employs that term, must not only be calculated to induce one to act against his free will and judgment, but must also be intended to so operate. *Ib.*

LANDLORD AND TENANT.

Tenant not "compelled to vacate" through sale.

1. A landlord agreed that if through his sale of the premises his tenant "was compelled to vacate," he should receive $50 and his moving expenses up to $14. A year later the house was sold, and the purchaser, after installing gas, raised the rent from $14 to $25 a month, which the tenant could not afford to pay and so hired another house. *Held* that in the absence of any finding that the increase in the rent was arbitrary or unreasonable, the tenant could not be said to have been "compelled" to leave the premises because of

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LANDLORD AND TENANT—*Continued.*
their sale, and therefore could not recover the $50 and his moving expenses. *Ains* v. *Hayes*, 130.

Summary process; justice's judgment; collateral attack.

2. In this State the action of summary process is regulated by statute (§§ 1078–1088), and the judgment of a justice of the peace therein has the same effect as a common-law judgment in other cases. His record imports verity and its statements cannot be collaterally questioned. *Fort Orange Barbering Co.* v. *New Haven Hotel Co.*, 144.

Same; effect of judgment for landlord.

3. A waiver of the forfeiture incurred by a tenant for a breach of his covenant to pay rent, is a good defense in an action of summary process brought by the landlord to enforce such forfeiture; but a judgment in such action in favor of the landlord is conclusive against the existence of the alleged waiver, and therefore a court of equity will not reopen that question when called upon for relief. *Ib.*

Waiver of forfeiture; estoppel; expenditures by tenant.

4. The rule that by failing to declare a forfeiture of a lease when the landlord has the right to do so, he thereby waives the forfeiture, rests upon the ground of estoppel, and is applicable only in cases—unlike the present—in which the lessee has incurred large expenditures or made valuable improvements in reliance that the landlord will continue of the same mind and will not assert his technical right to insist upon a forfeiture. *Ib.*

Same; demand and re-entry not essential, when.

5. No demand for rent nor re-entry for condition broken is essential before bringing an action of summary process, if the lease so provides. *Ib.*

Writing, whether lease or agreement to lease.

6. Whether a memorandum or informal writing constitutes a lease or only an agreement to make a lease, is to be determined by the intent of the parties as gathered from the language used when read in the light of the attendant circumstances. *Garber* v. *Goldstein*, 226.

Same; intent; memorandum as lease.

7. An understanding between the parties—as in the present case—that a formal lease is to be executed in the future, does not necessarily and as matter of law preclude the memorandum or informal writing evidencing the terms of the undertaking, from being treated as a lease, if it is clear that the parties so intended. *Ib.*

Same; error in charge; jury deprived of main issue.

8. In the present case the trial court instructed the jury that the memorandum signed by the defendant was a lease, unless the parties had agreed that a formal lease was to be executed thereafter, and left that question to the jury, who found, by their verdict for the plaintiff, that there was no such agreement,—a conclusion which was directly contrary to the undisputed evidence. *Held* that this

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LANDLORD AND TENANT—*Continued.*

instruction, which practically took the main issue in the case away from the jury, was erroneous and prejudicial to the defendant. *Ib.*

Monthly payments held not to be "rent".

9. By the terms of its contract with the original lessee, the plaintiff, a tenant of undeveloped mining property containing tungsten-bearing minerals, agreed not only to make the monthly payments of rent required by the terms of the original lease, but also to make payments of not less than $500 each month, which were to be credited by its landlord on the purchase price of the property, in case the tenant elected to buy it and completed the purchase; otherwise they were "to be paid and received as consideration for the current monthly enjoyment of the rights and privileges hereby granted." *Held* that the $500 monthly payments were not "rent," within the meaning of §4045 of the General Statutes, which excused the tenant from the payment of rent for a tenement which was, without his fault or neglect, so injured as to be unfit for occupancy. *Tungsten Co.* v. *Beach*, 519.

Same; mining property not a "tenement."

10. That the premises in question were not occupied as a "tenement" within the meaning of the statute, especially as the fire, which destroyed the old and dilapidated buildings, did not render the premises unfit for occupancy for the purpose of developing the mine and extracting ore therefrom, which was obviously an important consideration in the minds of the contracting parties. *Ib.*

Same; fire insurance; application of proceeds to restoration.

11. The owner of the premises agreed to carry a reasonable amount of fire insurance on the leased premises and to apply the amount received of the insurance company in the event of a fire, to the restoration of the property destroyed. He neglected however to take out any insurance. *Held* that if the application of a reasonable amount toward the cost of restoration by the owner, would be of no avail or benefit to the tenant unless the tenant expended a much larger sum from its own pocket, a court of equity would not compel the owner to go ahead in the restoration of the property, in the absence of an allegation or finding that the tenant had obligated itself to make the necessary supplemental expenditure. *Ib.*

Lease of upper rooms; use of cellar; parol evidence.

12. In an action by a tenant against his landlord for personal injuries caused by an alleged defective cellar stairway used by the tenants of the building in common, parol evidence is admissible to show that the cellar, although not mentioned in the written lease, was in fact provided by the landlord and was intended by the parties to be used as an appurtenance to the rooms upon the upper floors occupied by the respective tenants. *Brundrett* v. *Rosoff*, 698.

Same; how tenant used cellar left to jury.

13. The trial court left it to the jury to determine whether the plaintiff tenant used a portion of the cellar as an appurtenance to his five

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LANDLORD AND TENANT—*Continued.*
rooms upon the top floor of the building, or only as a mere licensee through the courtesy of the landlord, and the jury decided this question adversely to the defendant. *Held* that the intention of the parties respecting the use to be made of the cellar was a question of fact, and that its submission to and determination by the jury left no basis for the defendant's claim of nonliability upon the theory that the plaintiff was a mere licensee. *Ib.*
See also INSURANCE, 2; STATUTE OF FRAUDS, 1, 2.
LAST CLEAR CHANCE. See NEGLIGENCE, 17–19.
LATERAL SUPPORT. See ADJOINING LANDOWNERS.
LAW OF THE ROAD. See APPEAL TO THE SUPREME COURT, 11; HIGHWAYS, 1.
LEADING QUESTIONS. See HOMICIDE, 4.
LEASE. See INSURANCE, 2; LANDLORD AND TENANT; STATUTE OF FRAUDS, 1, 2.
LEGACIES
FORFEITURE OF. See WILLS CONSTRUED, 1–5.
LETTER
CONFIRMING ORAL SALE. See SALES, 11, 16.
LEVY
OF EXECUTION. See ATTACHMENT, 3–5.
LIBEL AND SLANDER.
Charge of adultery is actionable.
1. Words, spoken or written, charging one with adultery, are actionable *per se*. *Craney* v. *Donovan*, 236.
Proof of publication; presumption of malice.
2. Proof of the mere publication of defamatory words gives rise to a legal presumption that they were false and made without lawful excuse, that is, that they were malicious; and hence the plaintiff, in the absence of proof of the truth of the charge or that it was a privileged communication, is entitled to general damages. *Ib.*
Same; malice in fact; damages.
3. If the plaintiff, in an action for libel, proves malice in fact, he may recover not only general or compensatory damages, but in addition so-called punitive or exemplary damages, which under the rule in this State are limited to the expenses of litigation less the taxable costs. All these damages, however, are in reality but indemnification for the injury. *Ib.*
Same; compensation is basis of action.
4. Compensation and not punishment is the foundation of our actions for slander and libel; and therefore instructions which permit the jury to increase the actual or compensatory damage according to the degree or amount of actual malice shown to have been exhibited by the defendant, are erroneous and prejudicial, especially when coupled with an instruction which practically leaves the amount of damages to be awarded in such contingency to the unlimited discretion of the jury. *Ib.*

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LIBEL AND SLANDER—*Continued.*

Same; malice as affecting damages.

5. While the presence of malice in fact is a circumstance which may enhance the injury suffered by a plaintiff, and for that reason justify an award of larger damages than would otherwise be proper, his recovery is still to be measured in all cases by the actual injury he has sustained; in other words, the presence or absence of malice in fact is of importance only in its effect upon the real injury to one's character or reputation. It results from this principle that the terms "aggravation" and "mitigation," when applied—as is frequently the case—to actual damage or compensation, are misleading and confusing; for it is impossible to increase or to diminish actual or compensatory damages. *Ib.*

Same; future damages.

6. Damages which are reasonably certain to accrue in the future may properly be taken into account in actions for defamation. *Ib.*

Privileged occasion; proof of actual malice.

7. While the existence of a privileged occasion casts upon the plaintiff in an action for libel the burden of proving express or actual malice upon the part of the defendant in publishing the defamatory matter, it has no other or further effect, and therefore affords no justification for a publication which is shown to have been actuated by express malice and to have been made for the purpose of injuring the plaintiff's character and reputation. *Moynahan* v. *Waterbury Republican*, 331.

Same; falsity and malice for jury.

8. Whether the published statements are false and malicious or not, is a question of fact for the trier upon all the evidence in the case. *Ib.*

Same; evidence held to warrant finding of malice.

9. The evidence in the present case reviewed and *held* to warrant a finding of express malice. *Ib.*

Same; evidence of conditions before time of libel.

10. Evidence of conditions and occurrences observable in a municipal almshouse prior to the time referred to in the alleged libel, is not admissible to prove the truth of the charges made therein. *Ib.*

LICENSES

CHARACTER OF TENANT'S OCCUPATION. See LANDLORD AND TENANT, 13.

TO SELL LIQUOR. See INTOXICATING LIQUORS.

LIENS. See MECHANICS LIENS.

INSURABLE INTEREST. See INSURANCE, 1, 2.

LIFE INSURANCE. SEE INSURANCE, 5–7.

LIMITATION OF ACTIONS.

General Statutes, § 1125, provides that the time during which a defendant shall be "without this State," shall be excluded in computing the period within which an action may be brought against

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LIMITATION OF ACTIONS—*Continued.*
him. *Held* that a resident of this State who took an apartment with his wife in New York but kept a residence here with his mother for fourteen years until her death, where he spent three days a week for a considerable portion of each year, and where his name remained on the voting list and he sometimes voted, was not "without this State" so as to prevent the running of the statute of limitations. *Dorus* v. *Lyon*, 55.
See NEGLIGENCE, 21, 22.
LIQUOR LICENSE. See INTOXICATING LIQUORS.
LOSS
OF EARNINGS. See DEATH.
OF WRITTEN PROOF. See HOMICIDE, 10.
OF RIGHT TO ASSERT TITLE. See STATUTE OF FRAUDS, 5.

MACHINERY
ATTACHMENT OF. See ATTACHMENT, 1–4.
MALICE. See LIBEL AND SLANDER.
MANSLAUGHTER. See HOMICIDE, 16.
MARSHALLING ASSETS.
As a general rule a court of equity will not marshal securities between two creditors unless it appear that they are creditors of the same debtor, that there are two funds belonging to that debtor, and that but one of them has the right to resort to both funds. *Stone* v. *Moomjian*, 477.
MASTER AND SERVANT.
1. It is assumed that one who accepts employment as a chauffeur is familiar with the ordinary parts of an automobile, and is a competent driver. Accordingly, if the brakes on his car become defective and fail to hold, and because of such defect the car runs into and injures a pedestrian, the employer is not liable in damages to his employee for expenses incurred by the latter in defending himself against a prosecution for reckless driving and for assault and battery; for under such circumstances the defect in the brakes is at least as obvious to the operator as to the owner of the car, who therefore is under no legal obligation to warn the driver of the danger, nor to instruct him in matters which, it may fairly be supposed, he understands as well as, if not better than, his employer. *Plasikowski* v. *Arbus*, 556.
2. For negligence in the performance or nonperformance of a master's duty toward his servant, whereby the latter is injured, the servant is entitled to recover damages, whether the specific act of neglect be that of the master himself or one of his agents. *Nichols* v. *Hubbell*, 611.
3. The defendant, a corporation, undertook to make certain alterations and repairs upon its property, including the construction of a brick oven for baking japanned ware, which collapsed and injured the plaintiff, a carpenter, while he was removing the woodwork

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MASTER AND SERVANT—*Continued.*

supporting the arched roof, after the mortar and cement had set and hardened. The fall was due to the faulty and impractical design of the roof, the arch being too flat, and with no provision for cross-rods or buttresses to enable the side walls to resist the thrust of the arch. The defendant's representative employed M, a building contractor, to supervise the changes, including the construction of the oven, at a *per diem* compensation plus an allowance of fifty cents per day for each man he employed to work upon the job, and the plaintiff was hired and paid by such supervisor with money furnished by the defendant's representative, but the latter retained and exercised the power to direct what should be done and the control of those employed upon the work. The plaintiff had judgment for $6,500 damages, and upon an appeal by the defendant it was *held* that certain conclusions reached by the trial court, in so far as they were inferences or conclusions of fact, were reasonable and proper and were warranted by the evidence. *Ib.*

4. That the trial court was also fully justified in finding that the defendant's representative was responsible for the faulty design which was the cause of the accident. *Ib.*
5. That even if M had been in fault in the first instance in erecting the oven in conformity with a defective design and specifications, that fault would not have availed the defendant; as the selection of design and the furnishing of construction specifications were matters which lay within the field of the master's duty, for negligence in the performance of which the defendant master would be liable. *Ib.*
6. That in respect to design and specifications, M was the agent and representative of the defendant, and not a fellow-servant of the plaintiff. *Ib.*
7. That the ruling that M was not an independent contractor was correct upon the facts as the trial court had found and was justified in finding them. *Ib.*
8. An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of his work. *Ib.*
9. After delivering a motor-truck load of merchandise, the defendants' servant, on his return trip, about half past twelve o'clock, deviated from the direct route to go to his own home for dinner, and while so doing collided with the plaintiff's intestate, a boy of fifteen, who was riding a bicycle in the opposite direction. Evidence offered by the plaintiff, though contradicted by the defendants, tended to prove that the servant had for two years or more been accustomed to use the motor-truck to go to his dinner with the knowledge and consent of the defendants' manager. *Held* that under these circumstances the defendants could not complain of the charge of the trial court which permitted the jury to determine

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MASTER AND SERVANT—*Continued.*
as a question of fact whether the servant was acting within the scope of his employment at the time of the accident. *Schrayer* v. *Bishop*, 677.
See also LABOR UNIONS; NEGLIGENCE, 12; WORKMEN'S COMPENSATION ACT.
MATERIALITY
OF TESTIMONY. See PERJURY.
MATERIALS. See CONTRACTS, 16.
FURNISHED FOR BUILDING. See CONTRACTS, 3, 8, 10.
LIEN ON. See MECHANICS LIENS.
MECHANICS LIENS.
1. In apportioning, among lienors, the balance due from the owner of a building to the original contractor, all mechanics or materialmen who have given notice of their intention to claim liens and have seasonably filed their certificates, stand upon the same footing and share in the fund pro rata (§ 4138), notwithstanding one of them may be entitled, because of a payment made to the original contractor by the owner after having received notice of such claim, to enforce his lien for such further sum, not exceeding the amount of such payment, as may be necessary to satisfy his claim in full. *Stone* v. *Moomjian*, 476.
2. Lienors are in no true sense creditors of the owner of the building; their contract relations are with the contractor, whose earnings, in the hands of the owner, constitute the fund to which they are entitled by statute to look for the satisfaction of their claims. *Ib.*
MEDICAL TREATMENT.
DUTY OF INJURED PERSON DE. See NEGLIGENCE, 13.
MEMORANDUM
ESSENTIAL, WHEN. See STATUTE OF FRAUDS, 1, 2, 7.
AS LEASE. See LANDLORD AND TENANT, 6–8.
MILK. See SALES, 10.
MINES AND MINING. See LANDLORD AND TENANT, 9–11.
MISTAKE
OF INSURER. See INSURANCE, 2.
MONEY PAID BY. See PAYMENT.
IN INDORSING NOTE. See BILLS AND NOTES, 3.
IN SURRENDER OF NOTES. See BILLS AND NOTES, 1.
IN ADMINISTERING POISON. See HOMICIDE, 19–22.
RELIEF AGAINST. See INJUNCTION.
MONEY PAID. See PAYMENT.
RECOVERY OF TAXES. See TAXATION, 7–10.
MORTGAGES. See ATTACHMENT, 9; SPECIFIC PERFORMANCE, 2, 3; STATUTE OF FRAUDS, 4, 5.
MOTIONS
TO CORRECT FINDING. See APPEAL TO THE SUPREME COURT, 1.
TO ERASE FROM DOCKET. See PLEADING, 8.
FOR POSTPONEMENT. See APPEAL TO THE SUPREME COURT, 32.

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MOTIONS—*Continued.*

TO REOPEN JUDGMENT AND RESTORE ACTION. See APPEAL TO THE SUPREME COURT, 28.

MOTIVE

OF ACCUSED. See HOMICIDE, 19–22.

MOTOR-VEHICLES.

1. One may be the "owner" of a motor-vehicle, within the meaning of that word in § 2 of Chapter 231 of the Public Acts of 1915, requiring the registration of such vehicles, although another has the strict legal title. *Brown* v. *New Haven Taxicab Co.*, 252.
2. In the present case evidence was offered that the automobile was bought by and for the plaintiff with money advanced to him therefor by one M, who took a conditional bill of sale directly from the vendor to secure him, M, for his loan, and that the plaintiff had been in the exclusive use and possession of the car and received its earnings from the date of its purchase until its injury by the defendant in a collision. *Held* that this evidence entitled the plaintiff to go to the jury upon the question of his ownership of the automobile. *Ib.*
3. Public-service automobiles are required by § 24 of Chapter 333 of the Public Acts of 1917, to display distinctive number-plates and to have interior lights; and § 1 of the same Act prescribes that a public-service automobile shall include any motor-vehicle operated as a jitney, "and any motor vehicle used for the purpose of soliciting and receiving passengers upon any public highway and carrying such passengers upon the payment of an individual fare." *Held* that upon a prosecution for a violation of § 24, it was incumbent upon the State to prove that the automobile in question, not being a jitney, was used for the purpose of soliciting, receiving and carrying passengers for hire; and that an instruction that it was enough for the State to show merely that the accused had accepted and carried a passenger for hire, was erroneous and prejudicial. *State* v. *Shiffrin*, 583.
4. Solicitation need not be evidenced by the voice, nor involve importunity or personal persuasion: any acts or conduct intended and calculated to invite the patronage of expectant passengers amounts to solicitation, as that term is used in the statute. *Ib.*

See also APPEAL TO THE SUPREME COURT, 11; BAILMENT, 2; CONTRACTS, 14, 15; HIGHWAYS, 1; MASTER AND SERVANT, 1; NEGLIGENCE, 1, 15; NONSUIT; VERDICT, 4; WORKMEN'S COMPENSATION ACT, 5.

MUNICIPAL CORPORATIONS.

1. Under the provisions of the charter of the city of Hartford (6 Special Laws, p. 743, § 5, 7 Special Laws, p. 527, §§ 1, 5, 7), the judge of the Court of Common Pleas, upon an appeal to him from an assessment of benefits and damages for a public improvement, has no jurisdiction to determine any other question than that raised by the appeal, that is, whether the assessment complained

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MUNICIPAL CORPORATIONS—*Continued.*

of is inequitable and unjust to the appellant; and therefore he has no power to decide whether or not the original assessing board in its proceedings complied in all respects with the charter requirements. *Second North School District's Appeal*, 193.

2. The language of city charters differs so greatly, that cases involving the construction of one charter are not authoritative in interpreting others. *Ib.*
3. Whether a municipality is negligent or not in permitting a defect in a sidewalk which, while not glaring or pronounced is something more than a trifling inequality in its surface, to remain for years in that condition, is a question of fact for the jury under all the surrounding circumstances. *Fitch* v. *Hartford*, 365.
4. While a municipality is bound to anticipate and provide for all defects and obstructions in a highway which may reasonably be expected to arise in the performance of work by a licensee for his own private benefit, it is not an insurer of the safety of travelers on its highways, and therefore is not bound at its peril to provide in advance against unnecessary and unexpected dangers such as may be created by the negligence of its licensee; its duty is only to use reasonable care in ascertaining such neglect and in averting its harmful consequences. *Ib.*
5. In this State the authority of an agent to act in behalf of a town must be expressly conferred either by statute or by a vote of the town: such agents have no implied or general powers. *Thomas Motor Car Co.* v. *Seymour*, 412.
6. One who undertakes to deal with a town through the medium of committees or other municipal agents, must take notice, at his peril, of the scope and measure of their powers. *Ib.*
7. In the present case the defendant town voted to appropriate $4,000 toward purchasing a chemical and hose truck, provided the balance necessary to purchase it be obtained from other sources; and appointed a committee to buy such truck as they should judge most suitable, when the necessary funds had been secured. *Held* that no authority to make the purchase was conferred upon the committee until the necessary funds had been obtained; that the burden of proving the fulfilment of this condition rested upon the plaintiff company which sought to hold the town responsible for $5,500, the price of the truck in question; and that for its failure to make such proof the plaintiff was properly nonsuited. *Ib.*

BRIDGEPORT; APPEAL FROM CITY COURT OF. See COURTS, 2.

LAYOUT OF HIGHWAY; CHARTER REQUIREMENTS. See EMINENT DOMAIN, 8–10.

DEFECTIVE STREET. See NEGLIGENCE, 20–22.

See also TRUSTS AND TRUSTEES, 5; WATERS AND WATERCOURSES.

MURDER. See HOMICIDE.

MUTE. See HOMICIDE, 2.

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NAVIGABLE WATERS. See RAILROADS.
NEGLIGENCE.
Verdict for plaintiff upheld on evidence.
1. The plaintiff's intestate, while standing in the street, was killed by the fall of a trolley-pole, which was alleged to have been caused by the negligence of the driver of the defendant express company's automobile-truck, in allowing the vehicle to become entangled in a sagging wire attached to the pole and thus pulling the pole down upon the decedent. *Held* that in view of the evidence disclosed by the record a verdict for the plaintiff was not an unreasonable conclusion. *Hott* v. *New Haven*, 29.
Pedestrian to use his senses in crossing street.
2. In crossing a street a pedestrian is bound to make a reasonable use of his senses for his own protection. *Barber* v. *Great Atlantic & Pacific Tea Co.*, 214.
Same; plaintiff's verdict properly set aside.
3. In the present case the plaintiff, while crossing a well-lighted and unobstructed city street, either did not see the defendant's sleigh approaching, or, if he did, heedlessly stepped in front of it and was injured. *Held* that in either event the jury could not reasonably have found that the plaintiff was in the exercise of due care, and therefore that the trial court did not err in setting aside a verdict in the plaintiff's favor. *Ib.*
Crossing street railway; use of faculties.
4. In crossing a street-railway track one is bound to make a reasonable use of his faculties to avoid being injured. *Casey* v. *Connecticut Co.*, 233.
Same; plaintiff's verdict properly set aside.
5. In the present case the plaintiff, while crossing an empty quiet street in the middle of a block about 10:30 o'clock on a fair evening, stepped in front of a rapidly moving trolley-car and was struck and injured. *Held* that the trial court was justified in setting aside a verdict in his favor. *Ib.*
Use of due care a question of fact for jury.
6. Whether one has exercised that degree of care which a reasonably careful and prudent man would have used under like circumstances, is a pure question of fact for the jury, and their verdict upon conflicting evidence will not be disturbed. *Pins* v. *Connecticut Co.*, 310.
Same; use of flag by intestate; instructions to him.
7. The plaintiff claimed that his intestate, an employee of an oil company, while painting one of its cars upon a track in its yard, was struck and killed either by being caught between two cars or by being knocked down and run over when an engine and several other cars backed into the car ahead and drove it against the car upon which he was at work. The oil company and the railroad company each contended that the accident happened otherwise, and that even on the plaintiff's version, the decedent should have protected himself by placing a blue flag in the track in front of the car upon

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NEGLIGENCE—*Continued.*

which he was at work, as required by an alleged rule and practice of the yard. *Held* that assuming the flag system was in existence at the time of the accident, it must further appear that the intestate had been instructed regarding it before he could be charged with negligence. *Campbell* v. *New York, N. H. & H. R. Co.*, 322.

Same; whose duty to place flag, question for jury.

8. That inasmuch as there appeared to be a conflict in the testimony as to whether it was the duty of the decedent or of the foreman of the repairmen to place the flag, that question was one for the jury. *Ib.*

Same; whether decedent had been instructed de flag.

9. That it was also for the jury to determine whether the decedent had been instructed as to the rule respecting the use of a flag. *Ib.*

Same; trial court not bound to set aside plaintiff 's verdict.

10. That the evidence respecting the place and manner of the accident was not so overwhelmingly in favor of the contention of the defendants as to require the trial court to set aside the verdict for the plaintiff. *Ib.*

Same; no duty upon railroad company.

11. That there was no duty upon the railroad company to see that the decedent was not working upon or near the cars to be moved; and that the facts in evidence, upon any theory of the case, failed to support the conclusion that all or any of the railroad crew were negligent. *Ib.*

Same; railroad crew not servants of oil company.

12. The trial court charged the jury that the railroad crew while operating the train within the yard of the oil company were the latter's servants, and directed a verdict for the railroad company. *Held* that the ground of this instruction was erroneous: that merely telling the railroad conductor where the incoming cars were to be placed in the yard, and which were the outgoing cars, was not such an exercise of direction or control upon the part of the oil company as to make the train crew its servants. *Ib.*

Duty of person injured as to his cure; harmless error.

13. The duty which one personally injured through the negligence of another, owes to the latter, is not merely to act in good faith in procuring medical advice and treatment—as the jury were instructed in the present case—but the exercise of ordinary care in efforts to effect a cure. Such an instruction is harmless, however, if it appears that the plaintiff did all that careful and prudent conduct required in consulting a physician of good standing and in following his advice as to treatment. *Flint* v. *Connecticut Hassam Paving Co.*, 576.

Condition of street on other nights as to lights.

14. The trial court excluded a question as to whether the street at the place of the accident was unlighted on other nights than the one on which the plaintiff was injured. *Held* that so far as appeared from

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NEGLIGENCE—*Continued.*

the record this ruling was correct, the condition of the highway as to lights on other evenings not being material; and that a similar inquiry was properly excluded with respect to the conditions of lights between the date of the injury and the time of the trial. *Ib.*

Error in directing a verdict for defendant.

15. The plaintiff while riding on the tailboard of his employer's motor-truck, or while in the act of resuming his seat thereon which he had temporarily left to follow the truck on foot over a bridge, was injured by a head-on collision between the truck and a trolley-car of the defendant. By direction of the trial court the jury returned a verdict for the defendant, and the plaintiff appealed. *Held* that the existence of contributory negligence, which was the main defense, was not so clearly established by the evidence as to warrant the withdrawal of that issue from the jury's consideration, and that the trial court was therefore in error in directing a verdict for the defendant. *Strosnick* v. *Connecticut Co.*, 594.

Same; presumption de conduct of drivers on highway.

16. A third person has a right to assume that those in control of vehicles which are rapidly approaching each other upon the highway in plain sight, will act as ordinarily prudent men should, and to regulate his own conduct in view of such assumption. *Ib.*

Last-clear-chance doctrine inapplicable.

17. In an action for personal injuries caused by a collision with a trolley-car on a highway crossing, the trial court after instructing the jury as to negligence and contributory negligence, voluntarily and without any request, told them that notwithstanding the negligence of the plaintiff in placing himself in a dangerous situation, the defendant would be liable if its motorman by the exercise of ordinary care could have avoided hitting the plaintiff but failed to do so; as in that case the accident would be the result of the motorman's negligence as an intervening cause. *Held* that there was nothing in the situation as disclosed by the evidence which warranted any reference to the so-called doctrine of the last clear chance or supervening negligence, and that its importation into the case improperly opened a door for the plaintiff's escape from the consequences of his own negligence, if the jury were satisfied that he had been negligent. *Fine* v. *Connecticut Co.*, 626.

Same; instruction too general and vague.

18. That the instruction as given was so vague and general that the jury could have derived no accurate understanding of the rule they were called upon to apply. *Ib.*

Same; conditions of last-clear-chance rule.

19. The last clear chance or supervening negligence doctrine applies only where the following conditions co-exist: first, the injured party must have already come into a position of peril; second, the injuring party must then or thereafter have become aware, or should in the exercise of ordinary prudence have become aware, not only

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NEGLIGENCE—*Continued.*
of the other's peril but also that the latter cannot, or will not, escape therefrom; third, that the injuring party subsequently has the opportunity by the exercise of reasonable care to save the other from harm; and fourth, that he fails to exercise such care. *Ib.*

Contributory negligence properly left to jury.

20. The plaintiff's intestate, while walking along a city street, stumbled and fell over a telegraph pole which had been left in the gutter near the curb. It was raining slightly and the weather was misty. *Held* that the question of contributory negligence was properly left to the jury to determine as one of fact. *McEvoy* v. *Waterbury*, 664.

Statute of limitations a valid defense.

21. After the case against the city had been pending for more than a year, the telegraph company, which owned the pole, was made a codefendant, and pleaded the statute of limitations. *Held* that this was a valid defense and justified the trial court in directing a verdict in favor of the telegraph company. *Ib.*

Same; right of city to indemnity from telegraph company.

22. That such verdict and judgment thereon could not affect the city's right to sue the telegraph company for indemnity, since that cause of action was altogether different from that involved in the present suit, and one which would not accrue until the liability of the city to the plaintiff had been finally adjudicated. *Ib.*

Collision; charge of court de care demanded of each.

23. Respecting the duty of a boy injured while riding a bicycle in the highway, the jury were instructed that he, too, was bound to use reasonable care, but that the law did not ordinarily ask of a boy the same care that it expected from a man; that the boy must exercise such degree of care as might reasonably be expected from an ordinarily prudent boy of his years similarly circumstanced; that he could not be heedless, but was bound to use his faculties and do what he reasonably could to avoid threatened danger. *Held* that these instructions correctly defined the duty of the plaintiff's intestate. *Schrayer* v. *Bishop*, 678.

Error in refusing to set aside a nonsuit.

24. In an action for negligently killing the plaintiff's intestate, a nonsuit was granted upon the ground that the decedent, a boy about eleven, had failed to exercise ordinary care. *Held* that the evidence, much of which was uncontradicted, would have supported a verdict for the plaintiff, and that the trial court erred in refusing to set aside the nonsuit. *Dessureault* v. *Maselly*, 690.

See also APPEAL TO THE SUPREME COURT, 11; BAILMENT, 2; CHARGE OF COURT, 6; DEATH, 2; GUARANTY, 3; HIGHWAYS, 1; MASTER AND SERVANT, 1–5; MUNICIPAL CORPORATIONS, 3, 4; NONSUIT; VERDICT, 4.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NOMINAL DAMAGES. See DAMAGES.

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NONRESIDENTS. See DOMICIL.
NONSUIT.
A judgment of nonsuit is properly rendered if the evidence—as in the present case—unmistakably shows that the plaintiff's negligence was the proximate cause of the collision between his automobile and the defendant's trolley-car, and does not disclose a situation in which the plaintiff can successfully appeal to the doctrine of supervening negligence. *Petrillo* v. *Connecticut Co.*, 235.
See also MUNICIPAL CORPORATIONS, 7; NEGLIGENCE, 24.
NOTES. See BILLS AND NOTES.
NOTICE. See KNOWLEDGE.
OF ACCEPTANCE. See GUARANTY, 1.
OF AUTHORITY OF AGENTS. See MUNICIPAL CORPORATIONS, 5–7.
OF APPEAL, NOT REQUIRED WHEN. See APPEAL TO THE SUPREME COURT, 29.
OF HEARING BY APPRAISERS. See EMINENT DOMAIN, 10.
TO BANK. See GUARANTY, 3.
OF CHANGE OF BENEFICIARY. See INSURANCE, 5–7.
OF NONENFORCEMENT OF CONTRACT PROVISIONS. See VENDOR AND VENDEE, 8.
OF INJURY. See HIGHWAYS, 2, 3.
OF LEVY OF EXECUTION. See ATTACHMENT, 3, 4.
OF CLAIM OF LIEN. See MECHANICS LIENS, 1.
OF INTENDED STRIKE. See LABOR UNIONS, 5.

OBSTRUCTIONS
IN HIGHWAY. See MUNICIPAL CORPORATIONS, 4; STREET RAILWAYS.
OCCUPANCY
OF LEASED PREMISES. See LANDLORD AND TENANT, 9, 10.
OFFICER'S RECEIPT. See ATTACHMENT, 6, 8; SURETY.
OFFICERS. See SHERIFFS AND CONSTABLES.
OPEN-SHOP. See LABOR UNIONS, 1–5.
OPTION
TO PURCHASE LAND. See VENDOR AND VENDEE, 1–5.
OF TENANT TO PURCHASE. See LANDLORD AND TENANT, 9.
OF VENDEE OF LAND. See SPECIFIC PERFORMANCE, 4.
ORDER. See JUDGMENT, 1, 2.
OF PROBATE COURT. See PROBATE COURT, 2; TRUSTS AND TRUSTEES, 1–4.
FOR SALE OF CHURCH PROPERTY. See TRUSTS AND TRUSTEES, 5–9.
ORDINARY CARE. See NEGLIGENCE; STREET RAILWAYS.
OUSTER
OF SPACE ABOVE SOIL. See EASEMENTS, 3.

PARENT AND CHILD.
Personal services in planting, raising and harvesting crops for the joint or common benefit of the family, rendered by one of several adult children who, with their aged father, live together as one

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PARENT AND CHILD—*Continued.*

household upon his farm, are presumably gratuitous, in the absence of an express agreement of the father to pay therefor; and the same is true of moneys expended by such son for grain, feed, and labor performed on the farm, especially if the father, in operating the farm and in maintaining the entire family, spent several times the amount contributed by the son. *Burke* v. *Burke*, 306.

PARKS

AMUSEMENT. See WORKMEN'S COMPENSATION ACT, 12–14.

PAROL EVIDENCE. See EVIDENCE, 11; SALES, 11–13; STATUTE FRAUDS, 7.

PARTIES

DEFECT OF. See WILLS CONSTRUED, 15.

PARTY WALLS. See ADJOINING LANDOWNERS.

PASSENGERS. See STREET RAILWAYS.

SOLICITATION OF, BY CARRIER. See MOTOR-VEHICLES, 3, 4.

PAUPERS.

General Statutes, § 2469, relating to the settlement of paupers, provides, among other things, that no inhabitant of any town in this State shall gain a legal settlement in any other town unless he shall have "resided" four years "continuously" in such town. *Held* that in computing this period of four years, the time spent in another town in an insane hospital to which the person in question was committed, was to be excluded, inasmuch as the statute contemplated an actual, stated residence, and not one resting in theory or presumption. *Chaplin* v. *Bloomfield*, 395.

PAYMENT

1. A condition precedent to the recovery of money paid by mistake, is a finding that the receiver ought not in equity and good conscience to retain it. Accordingly, the payment, under mistake, of a forged note, by its purported maker, does not entitle him to recover the sum so paid, if that amount was in fact due from him to the one to whom it was paid. *O'Neil* v. *Manufacturers National Bank*, 667.

2. To avoid circuity of action and useless expense, the law does not require the payment of money by one to another which the latter is bound to immediately refund. *Ib.*

TO ORIGINAL CONTRACTOR BY OWNER. See MECHANICS LIENS, 1.

FORFEITURE PROVISION CONSTRUED. See SPECIFIC PERFORMANCE, 4.

OF INSTALMENTS OF PURCHASE PRICE. See VENDOR AND VENDEE, 6–10.

OF PROMOTOR'S SERVICES. See CORPORATIONS.

OF TAXES UNDER PROTEST. See TAXATION, 7–10.

WAIVER OF, AS CONDITION PRECEDENT. See SALES, 6.

See also BILLS AND NOTES, 1, 2.

PERFORMANCE

AGREEMENT TO SELL MILK DAILY. See SALES, 10.

OF BUILDING CONTRACT. See CONTRACTS, 2, 3.

BY DELIVERY TO SUBVENDEE. See SALES, 5.

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PERFORMANCE—*Continued.*
OF DUTY. See MASTER AND SERVANT, 2, 5.
BY LICENSEE OF WORK IN HIGHWAY. See MUNICIPAL CORPORATIONS, 4
REFUSAL OF, A BREACH. See CONTRACTS, 12.
PERJURY.
1. Whether alleged perjured testimony was material or not, is a question of law. *State* v. *Greenberg*, 657.
2. Testimony that tends of itself, or in connection with other evidence, to influence the result, directly or indirectly, is material. *Ib.*
3. Upon a prosecution for receiving and concealing stolen goods, a son of the accused, who was called in his behalf, testified that at the time of the alleged theft he, the witness, was in Hornell, New York, which witnesses for the State afterward contradicted, stating that they had talked with him concerning the theft at his father's warehouse at the time in question. *Held* that under these circumstances the son's testimony as to his whereabouts was material, since it affected, or might have affected, his credibility as a witness. *Ib.*
PERPETUITIES. See WILLS CONSTRUED, 3, 18; WILLS, PROBATE OF, 3.
PERSONAL INJURIES. See WORKMEN'S COMPENSATION ACT.
FROM COLLISION WITH TROLLEY-CAR . See VERDICT, 4.
EVIDENCE OF, NOT LIMITED TO MEDICAL TESTIMONY. See EVIDENCE, 3.
DUTY OF INJURED PERSON. See NEGLIGENCE, 13.
NOTICE OF. See HIGHWAYS, 2, 3.
TO TENANT. See LANDLORD AND TENANT, 12.
PERSONAL PROPERTY
WHERE TAXABLE. See TAXATION, 11–13.
PERSONS
RIGHTS OF, TO LABOR. See LABOR UNION, 1–5.
PHOTOGRAPHS
AS EVIDENCE. See EVIDENCE, 9, 10.
PLEADING.
1. An allegation of fact which is admitted by both parties is not in issue and therefore is not a matter for the jury's determination. *Garber* v. *Goldstein*, 226.
2. Under the rules (Practice Book, p. 247, § 155d) a plaintiff has the right to file an amended complaint within twenty days after a demurrer to the original complaint has been sustained. *Goldfarb v. Cohen*, 277.
3. A demurrer, although in form addressed to the whole complaint, is properly overruled if it reaches only one of two or more separate causes of action therein alleged. *Ib.*
4. The allegations of a complaint are to be interpreted in the light of a "more specific statement" made by the plaintiff, and the denials of the answer, subsequently filed, are to be given a like interpretation and co-extensive effect, although the answer does not expressly refer to such statement. *Seymour* v. *Norwalk*, 293.

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PLEADING—*Continued.*
5. Matters which, if material at all, are evidential only, may very properly be expunged from a pleading. *Ib.*
6. An immaterial amendment of a complaint furnishes no adequate reason for refiling a defense which has once been adjudged insufficient on demurrer. *Viall* v. *Lionel Manufacturing Co.*, 342.
7. Under our present system of pleading and rules of practice (General Statutes, § 609, Practice Book, p. 250, § 160), a defense that the suit when brought was premature, must be raised by a plea of some kind, otherwise it is not open to the defendant to urge that objection. *Libretto* v. *Serifini*, 380.
8. A motion to erase a cause from the docket should address itself solely to the facts of record, and not contain affirmative allegations requiring proof. *Equitable Trust Co.* v. *Plume*, 649.

See also APPEAL TO THE SUPREME COURT, 27; ATTACHMENT, 12; BROKERS; CHARGE OF COURT, 6; CONTRACTS, 2, 10, 20, 21; COURTS, 1, 3; FRAUD, 3; INTERPLEADER; NEGLIGENCE, 21; TELEPHONE COMPANIES; VENDOR AND VENDEE, 10; WATERS AND WATERCOURSES, 3; WILLS, PROBATE OF, 1.

POISON
MURDER BY. See HOMICIDE, 19–22.

POSSESSION
OF GOODS SOLD. See SALES, 15.
OF TANGIBLE PROPERLY BY RECEIVER. See RECEIVERS, 2.

POSTPONEMENT
MOTION FOR. See APPEAL TO THE SUPREME COURT, 32.

PRACTICE. See PLEADING, 7.

PRELIMINARY EVIDENCE. See EVIDENCE, 1, 9, 10; HOMICIDE, 3, 4, 10.

PREMATURE ACTION. See ACTION; ATTACHMENT, 12.

PRESUMPTION
DE CORRECTNESS OF STATEMENT IN CHARGE. See APPEAL TO THE SUPREME COURT, 26.
DE ANOTHER'S CONDUCT IN HIGHWAY. See NEGLIGENCE, 16.
DE LOCATION. See RAILROADS, 4.
DE EXERCISE OF OPTION. See VENDOR AND VENDEE, 3.
DE KNOWLEDGE OF STATUTE. See APPEAL TO THE SUPREME COURT, 21.
DE ISSUE OF CORPORATE STOCK. See CORPORATIONS, 4.
DE COURSE FOLLOWED BY TRIAL COURT. See APPEAL TO THE SUPREME COURT, 9.
DE MEANING OF WORDS. See STATUTES, 1.
FROM USE OF DEFAMATORY WORDS. See LIBEL AND SLANDER, 2.

PRINCIPAL AND AGENT. See AGENCY.

PRINCIPAL AND SURETY. See SURETY.

PRIOR ADJUDICATION. See JUDGMENT, 3, 4; NEGLIGENCE, 22.

PRIVILEGED COMMUNICATIONS. See EASEMENTS, 1, 2; LIBEL AND SLANDER, 2, 7.

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PROBATE COURT.

1. In this State the jurisdiction of Courts of Probate is entirely statutory; and in the exercise of this jurisdiction they possess only such powers as are necessary to the performance of the duties imposed upon them by law. *Massey* v. *Foote*, 25.
2. Under General Statutes, § 203, authorizing probate courts to modify or revoke *ex parte* orders or decrees before appeal, a Court of Probate is powerless to revoke an order of distribution made by it upon notice to the parties and after an appeal therefrom has been taken. Such a decree can be reversed or modified only upon appeal. *Ib.*

JURISDICTION. See TRUSTS AND TRUSTEES, 1–6.

LACK OF. See EXECUTORS AND ADMINISTRATORS.

See also JUDGMENT, 1, 2.

PROCESS.

1. One may be a resident in two or more States at the same time; and the house in which a resident of this State habitually spends three days in the week for fourteen years, except when away on trips and vacations, is his "usual place of abode" (§ 571) for the purpose of serving process upon him. *Dorus* v. *Lyon*, 55.
2. In a house occupied by two or more tenants, the door opening from the common passageway into the separate apartment of each tenant is the "outer door" of his home, which an officer serving civil process has no right to open and enter against the known will of the occupant. *Fourette* v. *Griffin*, 388.
3. The fact that the tenant was in the hall or common passageway when she refused to allow the officer to enter her apartment is immaterial, inasmuch as one's dwelling-house is not only for his own personal protection but also for the protection of his property therein while it is used as a residence. *Ib.*

See also SHERIFFS AND CONSTABLES.

PROFITS

WHEN RECOVERABLE AS DAMAGES. See CONTRACTS, 8, 9.

PROMISSORY NOTES. See BILLS AND NOTES.

PROMOTORS

SERVICES OF. See CORPORATIONS.

PROTEST

TAX PAID UNDER. See TAXATION, 7–10.

PROVINCE OF COURT AND OF JURY. See APPEAL TO THE SUPREME COURT, 2; CHARGE OF COURT, 5, 9; HIGHWAYS, 1; JURY, 1.

PROVOCATION

FOR KILLING. See HOMICIDE, 16.

PROXIMATE CAUSE. See NONSUIT.

PUBLIC ACTS. See STATUTES REFERRED TO OR COMMENTED ON.

PUBLICATION

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PUBLIC HEALTH. See CONTRACTS, 18.

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PUBLIC IMPROVEMENTS
ASSESSMENT FOR; JURISDICTION ON APPEAL. See MUNICIPAL CORPORATIONS, 1.
LAYOUT OF HIGHWAY. See EMINENT DOMAIN, 8–11.
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QUARANTINE
OF PRODUCTS OF A PARTICULAR FARM. See SALES, 10.
QUESTIONS OF FACT.
The question to whom credit was originally given in a sale is always one of fact. *Fleischer* v. *Wein*, 372; *Cordner Co.* v. *Manevetz*, 587.
See also APPEAL TO THE SUPREME COURT, 25; ATTACHMENT, 11; JUDGMENT, 4; LANDLORD AND TENANT, 13; LIBEL AND SLANDER, 8; MASTER AND SERVANT, 3, 9; MOTOR-VEHICLES, 2; MUNICIPAL CORPORATIONS, 3; NEGLIGENCE, 6, 8–10, 20; SALES, 3; WAIVER, 2.
QUESTIONS OF LAW. See APPEAL TO THE SUPREME COURT, 30; CONTRACTS, 17, 18, 21; FINDING OF FACTS; LANDLORD AND TENANT, 7; PERJURY, 1; WAIVER, 2.

RAILROADS.
Title to soil under navigable waters.
1. The title to the soil under the navigable waters of a cove below low-water mark is in the State as trustee for the public, subject to whatever privileges or franchises adjoining proprietors may have. *New York, N. H. & H. R. Co.* v. *Armstrong*, 349.
Same; grant to railroad company for public use.
2. Subject to the paramount right of Congress to control the navigation of those waters in the regulation of commerce, the State may grant or dispose of the land thereunder for any public use, when that can be done without substantial impairment of the general interest. *Ib.*
Same; effect of grant on riparian proprietors.
3. The grant of such land for the construction of a railroad thereon is for an undoubted public purpose, and the acceptance of the grant by the railroad company puts an end, *pro tanto*, to the rights of adjoining riparian proprietors in such land. *Ib.*
Same; extent of railroad company's location.
4. In the present case the railroad company was authorized and empowered (4 Private Laws, p. 967) to locate, construct and finally complete a single, double or treble railway from some suitable point in New Haven to some suitable point in New London, and to lay

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RAILROADS—*Continued.*

out its road "not exceeding six rods wide" through its whole length. In 1851 a single-track road was laid out, located and constructed, and in 1892 another track was added. Across the tide waters of Shaw's Cove near New London these tracks were built upon piles and wooden trestles. Apparently there was no vote of the railroad company designating any particular layout or location, or defining its width, except that the center line of the road as constructed was the center or middle line of its right of way. *Held* that under these circumstances there was no presumption that the railroad company had located its right of way to the full width permitted by its charter. *Ib.*

Same; actual occupation the width of railroad location.

5. That actual occupancy by the railroad company within the limits of the six-rod strip had determined, up to the present time, the width of the railroad location, including in it, however, such additional space adjoining the trestle and piling as might be reasonably required for its security and support, or for that of a more solid and permanent viaduct should that be substituted. *Ib.*

Same; exclusion of riparian owners.

6. That the grant suspended all right of entry by adjoining riparian owners upon the six-rod strip over the navigable waters of Shaw's Cove; and that in the present case such suspension would continue in force until an abandonment of the grant by the railroad company. *Ib.*

Same; right of location not exhausted.

7. That the plaintiff had not exhausted its right of location by laying two of its tracks at different times, inasmuch as the charter clearly contemplated future growth and necessities and a gradual utilization of the six-rod strip. *Ib.*

Same; option as to further location; abandonment.

8. That the question whether the plaintiff had abandoned its right of option to make a further location, while of great public importance, was one of fact upon which the trial court had not passed. *Ib.*

Same; grant limited to railroad uses and purposes.

9. That the grant was limited to railroad uses and purposes, and conferred upon the plaintiff no riparian rights which were incident to the ownership of uplands; and that no such riparian rights were vested in the plaintiff by virtue of a city vote or by a deed from an individual. *Ib.*

Same; rights of riparian owners how far affected.

10. The defendants owned upland to the north and west of the plaintiff's trestle, and had filled in the intervening space and built thereon an oil plant; and on the southeasterly side of the trestle, and within the six-rod strip, had recently erected a platform to which gasoline and oil, intended for sale, were to be carried by three large pipes running through the railroad trestle and piling. *Held* that assuming the defendants and their predecessors were riparian owners con-

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RAILROADS—*Continued.*

tiguous to the six-rod strip, a finding that they had either been compensated for any injury to their rights as such owners or had abandoned such rights, was a reasonable inference of fact as to that part of the six-rod strip over which the plaintiff had in fact laid out its railroad, but not as to the rest of the strip, upon which the railroad company had not exercised its right of location. *Ib.*

Same; duty of railroad company as to gas and oil pipes.

11. That under its grant, the space occupied by the railroad company was permanently devoted to its exclusive use for railroad purposes; that the use which the defendants proposed to make of the railroad property was inconsistent with its control by the railroad and dangerous to public safety; and that it was the plaintiff's imperative duty to keep such pipes, although not attached to the trestle, away from its location. *Ib.*

See also NEGLIGENCE, 7, 11, 12.

RAPE. See CONSPIRACY.

RATIFICATION

BY EMPLOYER, OF EMPLOYEE'S SETTLEMENT WITH THIRD PERSON. See WORKMEN'S COMPENSATION ACT, 11.

OF WILL BY CODICIL. See WILLS, PROBATE OF, 3.

REAL-ESTATE AGENTS. See BROKERS.

REASONABLE CARE. See NEGLIGENCE.

REASONABLE TIME

FOR DELIVERY OF GOODS. See SALES, 2–4.

FOR EXERCISE OF OPTION TO BUY LAND. See VENDOR AND VENDEE, 2, 3.

FOR WITHDRAWAL OF RESCISSION. See VENDOR AND VENDEE, 9.

REASONS OF APPEAL. See APPEAL TO THE SUPREME COURT, 8, 14, 23, 24.

RECEIPT

FOR PROPERTY ATTACHED. See SURETY.

AS MEMORANDUM OF LEASE. See STATUTE OF FRAUDS, 2.

RECEIVERS.

1. The question whether a court will permit its receiver to be sued is largely a matter of discretion. *Davis* v. *Holden*, 96.

2. There is no reason why a court which is already in possession of tangible personal property claimed to be owned by an intervening petitioner, should allow such claimant to sue its receiver for such property in another court, since that situation is controlled by the well-established rule that where a court has once acquired jurisdiction over a particular subject-matter, it retains that jurisdiction free from interference by any other court. *Ib.*

RECITALS

OF OFFICER'S RECEIPT. See SURETY.

RECORDS

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OF JUSTICE OF THE PEACE. See LANDLORD AND TENANT, 2.

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REDEMPTION
OF MORTGAGE. See STATUTE OF FRAUDS, 4.
REDUCTION
OF EMPLOYER'S LIABILITY. See WORKMEN'S COMPENSATION ACT, 11.
RE-ENACTMENT
IN PART ONLY. See STATUTES, 3.
RE-ENTRY
FOR CONDITION BROKEN. See LANDLORD AND TENANT, 5.
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TO PERFORM, A BREACH. See CONTRACTS, 12.
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FOR FINDING; OMISSION OF LEGAL QUESTIONS. See APPEAL TO THE SUPREME COURT, 35.
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RESTORATION
OF BURNED BUILDING. See LANDLORD AND TENANT, 11.
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RESTRAINT OF TRADE. See CONTRACTS, 19–21.
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RETURN
OF OFFICER. See ATTACHMENT, 2.
REVOCATION
OF ORDERS OR DECREES. See PROBATE COURT, 2.
RIGHT OF WAY. See RAILROADS, 4–11.
RIPARIAN OWNERS. See RAILROADS; TAXATION, 1.
RISK
OF LOSS DURING TRANSIT. See SALES, 11–14, 17.
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SALES.
Transfer of ownership implied in a sale.
1. A "sale" implies an ownership in the thing sold and a transfer of that ownership or title to another. *State* v. *Mad River Co.*, 35.
Delivery within a reasonable time, when.
2. The law implies that a vendor shall deliver the goods sold within a reasonable time, in the absence of any agreement as to the time of delivery. *Rochester Distilling Co.* v. *Geloso*, 43.
Same; ordinarily a question of fact.
3. What constitutes a reasonable time in a given case is ordinarily a question of fact dependent upon the terms of the sale and all the other attendant circumstances. *Ib.*
Same; vendor's delay not unreasonable.
4. In the present case the defendant bought fifteen barrels of whiskey in bond, for which he gave $109 in cash and eighteen notes of $30 each, payable to the plaintiff at intervals of thirty days. The plaintiff agreed to send the defendant certain advertisements of this particular brand of whiskey, including six watches, but none of this had been received when the first note became due, and thereupon, and for this alleged reason, the defendant returned the certificates for the whiskey in bond, none of which had been withdrawn, and demanded a return of the cash and notes he had given. *Held* that upon the facts disclosed by the record the trial court was warranted in finding that the plaintiff's delay in shipping the advertising matter was not unreasonable, and in its conclusion that such delay did not justify the defendant's attempt to cancel or rescind the agreement. *Ib.*
Delivery to subvendee proper, when.
5. The delivery of personal property by its owner to one who had agreed to buy it of the first vendee, if intended by the owner as a performance of his original contract, will be so treated, and will

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SALES—*Continued.*

prevent him from thereafter suing the subvendee for a wrongful conversion of the property. *White* v. *Lansing Chemical Co.*, 186.

Payment as condition precedent may be waived.

6. Payment of the purchase price as a condition precedent to the consummation of a sale by a delivery of the property, is one that can be waived. *Ib.*

Common counts; plaintiff entitled to judgment.

7. The plaintiff sold packing to the defendant under an agreement that the defendant should pay therefor twenty-three cents per pound, with a two per cent discount for cash in ten days. The contract further provided that the defendant should be the general distributing agent for the packing and that profits and losses should be divided equally between the parties. The defendant received and paid for several shipments, but later refused to make further payments, claiming that the packing was not merchantable nor as represented by the plaintiff, a claim which the trial court found to be untrue. It did not appear from the finding that there were any losses or profits. *Held* that under these circumstances judgment was properly rendered for the plaintiff for the unpaid shipments, in an action upon the common counts for goods sold and delivered. *Libbey* v. *Lonergan Co.*, 230.

To whom credit was extended a question of fact.

8. The question to whom a vendor of goods extended credit, is one of fact, and its determination by the trial court is final unless the conclusion reached is legally inconsistent with the subordinate, evidential facts, or is one which could not reasonably be drawn from them. *Fleischer* v. *Wein*, 372.

Same; conclusion of trial court sustained.

9. In the present case the trial court found, upon conflicting evidence, that credit had been given by the plaintiff to the defendant's father, who owned the store when and where the goods were sold and delivered, and not to the defendant himself. *Held* that this conclusion was not inconsistent with the evidential facts, nor was it an unreasonable deduction from them. *Ib.*

Contract to sell milk; quarantine on farm; its effect.

10. Performance by a vendor of an absolute and unconditional agreement to sell and deliver daily at his farm a certain number of quarts of milk of a specified quality, is not excused nor rendered illegal merely because his cattle and all the products of his farm are afterward quarantined, if the contract does not require that the milk shall be produced on the farm or from any particular stock. *Whitman* v. *Anglum*, 392.

Oral sale; confirming letter; parol evidence.

11. The plaintiff sued to recover the value of an alleged deficiency of nearly 40,000 pounds in three carloads of brass turnings or chips, bought by its assignor of the defendant in Pennsylvania at the rate

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SALES—*Continued.*

of 15½ cents per pound. It appeared from uncontradicted testimony that there was a considerable shortage in the metal upon its arrival in New Haven, and the material question was whether the loss should fall upon the plaintiff or upon the defendant. The transaction was an oral one, followed by a letter from the defendant to the buyer "to confirm our verbal sale to you this day of . . . our accumulation of brass turnings (not less than 200 tons) at 15½¢ per lb. . . . f. o. b. cars Wilmerding, Pa. Terms sight draft on arrival at destination." *Held* that whether the letter embodied all the terms of the antecedent contract, obviously could not be determined until it was known what those terms were, and therefore the objection that parol evidence to vary the terms of the letter was inadmissible, was not well taken and should not have been sustained. *Alderman Brothers Co.* v. *Westinghouse Air Brake Co.*, 419.

Same; pointing out metal; custom of trade.

12. That testimony was properly admitted to show that the accumulation of brass turnings, in a pile by itself on the floor, was pointed out to the buyer at or before the making of the contract; and that evidence of the seller's agent as to the entire transaction was admissible, including the custom of the trade respecting the sale of scrap metal to persons without established credit, and also the real reason for using the expression "sight draft on arrival at destination." *Ib.*

Same; evidence of shortage in weight.

13. That in view of the evidence before the trial court it did not err in admitting testimony as to the fact and amount of the shortage in the weight of the turnings upon their arrival in New Haven, as compared with the weight called for by the bills of lading and sight drafts; though assuming that such evidence tends to prove only a loss in transit and not a deficiency in shipment, it might or might not be admissible upon a new trial, depending upon the conclusiveness of the evidence then received as to the time the parties intended the title to the goods to pass. *Ib.*

Same; when title passes; reservation of jus disponendi.

14. Where there is a present sale or an unconditional contract to sell specific goods, in a deliverable condition, at an agreed price per pound, the title passes at once (Sales Act, § 19, Rule 1; § 22), and the risk of loss during transportation falls upon the buyer. Under such circumstances the drawing of a bill of lading to the seller's own order reserves to himself the *jus disponendi*. *Ib.*

Same; delivery to carrier and its effect.

15. A delivery to a carrier in accordance with § 46 of the Sales Act is a delivery to the buyer within § 22, notwithstanding the fact that because of the seller's reservation of the *jus disponendi*, a right also contemplated by the Act, the buyer cannot have posession of the goods until the seller is paid. *Ib.*

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SALES—*Continued.*

Same; meaning of f. o. b.

16. The expression f. o. b. in a letter confirming an oral contract of sale indicates an agreement of the buyer to pay the freight from the place named. *Ib.*

Same; risk of loss during transit; error in charge.

17. In the present case the bills of lading, with sight drafts attached, were drawn to the defendant's own order, were indorsed by the defendant in blank, and were forwarded by mail to the defendant's agent. *Held* that an instruction which placed the risk of loss during transportation upon the defendant seller, because of the form of the bills of lading, was erroneous and harmful. *Ib.*

To whom credit was extended a question of fact.

18. The question to whom credit was originally given in a sale is always one of fact. *Cordner Co.* v. *Manevetz*, 587.

See also AGENCY, 2; BROKERS; CONTRACTS, 14, 15; FINDING OF FACTS; STATUTE OF FRAUDS, 7; VENDOR AND VENDEE.

SECONDARY EVIDENCE. See HOMICIDE, 10.

SECURITIES. See MARSHALLING ASSETS.

SEPARATE TRIALS. See HOMICIDE, 1–3.

SERVICE

OF PROCESS. See PROCESS; SHERIFFS AND CONSTABLES.

SERVICES

OF ADULT CHILD. See PARENT AND CHILD.

OF PROMOTOR. See CORPORATIONS.

SET-OFF AND COUNTERCLAIM. See INSURANCE, 4.

SETTING ASIDE VERDICT. See VERDICT.

SETTLEMENT. See PAUPERS.

SHERIFFS AND CONSTABLES.

An officer who has a lawful writ to serve is not bound to declare that fact until his authority is questioned; although in the orderly performance of his duties it may be better to impart that information to all who are directly interested. *Tierney* v. *Martone*, 93.

See also PROCESS.

SIDEWALKS

INJURIES FROM DEFECTS IN. See MUNICIPAL CORPORATIONS, 3, 4.

SITUS

OF PERSONAL PROPERTY. See TAXATION, 11–13.

SLANDER. See LIBEL AND SLANDER.

SOLICITATION

OF PASSENGERS. See MOTER-VEHICLES, 3, 4.

SPECIFIC PERFORMANCE.

1. A property owner who has executed a bond for a deed must be prepared at the appointed time and place to give the conveyance agreed upon, or show a legal excuse for his failure; otherwise he is in no situation to ask for a specific performance of the agreement. *Stierle* v. *Rayner*, 180.

2. A promise to convey certain real estate by a good and sufficient

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SPECIFIC PERFORMANCE—*Continued.*

warranty deed containing the usual covenants, calls for a clear, unincumbered title; and therefore is not fulfilled by a deed which transfers the property subject to an outstanding mortgage. *Ib.*

3. In the present case the property owner was unable to get into communication with the prospective purchaser between the date of their agreement and the time fixed for its consummation, when the latter did not appear. *Held* that this did not justify the owner in failing to take any steps to pay off the mortgage and thus enable her to transfer a clear title at the appointed time; and that because of such failure she could not properly ask a court of equity to specifically enforce the agreement against the defendant, the prospective purchaser. *Ib.*

4. The contract in suit required payment at once of $100, and near its close provided that if the defendant should fail to pay as agreed he should forfeit all claim to the premises and all moneys paid pursuant to the agreement. *Held* that this provision for a forfeiture was inserted to secure the performance of the contract by the prospective purchaser, and not to give him an option whether to perform or to lose what he had already paid on the purchase price. *Ib.*

CONTRACT HELD UNENFORCIBLE . See VENDOR AND VENDEE, 4.

SPIRITUOUS LIQUORS. See INTOXICATING LIQUORS.

STATE'S ATTORNEY

ARGUMENT OF. See TRIAL, 3.

STATUTE OF FRAUDS.

1. An oral lease for two years is within the statute of frauds and is not actionable unless evidenced by a sufficient memorandum in writing. *Garber* v. *Goldstein*, 226.

2. A writing in the form of a receipt for a given sum of money as a deposit on a store (giving street and number), and stating the duration of the term, the rent to be paid, the name of the lessee, and which is signed by the defendant landowner, is a sufficient memorandum to take the case out of the statute of frauds. *Ib.*

3. It is now well settled that no action can be maintained for the direct enforcement of an agreement which is within the statute of frauds, and no damages can be recovered for its breach. *DeLucia* v. *Witz*, 416.

4. The plaintiff claimed damages for an alleged breach of an oral promise of the defendant to release a fourth mortgage, owned by him, upon such portions of the plaintiff's land as the plaintiff might at any time redeem from the operation of three prior mortgages which were then in process of foreclosure. *Held* that such an agreement was one for the sale of real estate or an interest therein, for a breach of which no action at law would lie. *Ib.*

5. The plaintiff claimed that in relying upon the defendant's promise he had lost his right to redeem the earlier mortgages, and that the defendant, who did redeem them, had thus acquired an uncon-

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STATUTE OF FRAUDS—*Continued.*

scionable advantage. *Held* that upon an equitable proceeding the evidence might be such as to estop the defendant from asserting an absolute title to the property, and thus, in effect, to restore to the plaintiff all that he had lost; but that such a case was not the one now before the court. *Ib.*

6. An oral promise by the president of a trucking corporation to pay for oil to be furnished to its drivers pursuant to his request, is an original undertaking and not one within the statute of frauds. *Cordner Co.* v. *Manevetz*, 587.
7. In the present case there was a memorandum of sale of 50 barrels of "Daisy flour in 98 lot, at 8.90, to be taken from the car, terms cash." *Held* that the place of delivery was not so indefinite as to render the contract void under the statute of frauds, at least until the trial judge had brought to his aid in its interpretation all the light afforded by the collateral facts and circumstances, in proof of which parol evidence should have been received. *Falletti* v. *Carrano*, 636.

STATUTE OF LIMITATIONS.

Until a cause of action accrues the statute of limitations does not begin to run. *McEvoy* v. *Waterbury*, 664.

STATUTES.

1. The words of a statute are presumed to have been used in their ordinary signification; but the context, the history of legislation upon that subject, the effect of the statute under different interpretations, and all the circumstances and conditions under which the Act was passed, are to be considered in determining its construction. *Corbin* v. *Baldwin*, 99.
2. Where two statutes are clearly antagonistic, the later one must be taken to express the final legislative intent. *Young's Appeal*, 516.
3. A re-enactment of certain portions only of an existing statute, in an amending Act which purports to be a substitute for the former, effectually repeals the provisions of the original Act which are omitted from the substitute. *Aston Motor Car Co.* v. *Mannion*, 568.
4. A construction of a statute which leads to double taxation should be avoided, as also one which imposes taxes upon property which cannot possibly receive any benefit therefrom. *Williams Brothers Mfg. Co.* v. *Naubuc Fire District*, 672.

CONFLICTING. See INTOXICATING LIQUORS.

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STOCK
ISSUE OF, FOR PROMOTOR'S SERVICES. See CORPORATIONS.
STOCKHOLDERS. See FRAUD, 2.
STOLEN GOODS
CONCEALMENT OF. See PERJURY, 3.
STREET RAILWAYS.
While the occupants of a street-railway car are being guided by its conductor through a wooded path around an obstruction in the highway caused by a public improvement, the relation of passenger and carrier continues, and the railway company is bound to exercise ordinary care, at least, to see that the path is made reasonably safe for such travel. *Pins* v. *Connecticut Co.*, 310.
See also NEGLIGENCE, 15, 17, 18; NONSUIT; VERDICT, 4.
STRIKES. See LABOR UNIONS.
SUCCESSION TAX. See TAXATION, 2–6, 14, 15.
SUICIDE
EVIDENCE INADMISSIBLE. See HOMICIDE, 22.
SUMMARY PROCESS.
Proceedings in, reviewable by Supreme Court only upon a writ of error. *Fort Orange Barbering Co.* v. *New Haven Hotel Co.*, 144.
See also LANDLORD AND TENANT, 2–5.
SUPERIOR COURT. See COURTS.
SUPERVENING NEGLIGENCE. See NEGLIGENCE, 17–19; NONSUIT.
SURETY.
As a rule a surety cannot deny the truth of the recitals contained in an obligation signed by him, unless they were inserted by mistake. He may, however, question the legality of the execution of the instrument. *McNerney* v. *Downs*, 139.
See also BILLS AND NOTES, 4; CONTRACTS, 1, 2, 4.
SURRENDER
OF NOTES PREMATURELY. See BILLS AND NOTES, 1.

TAXATION.
Company conserving flow of stream not a "seller" of water.
1. A company which has no title to the waters of a stream but merely controls its flow in its natural channels by means of reservoirs and dams, so as to avoid waste in times of freshet and a shortage in times of drouth, for the benefit of its stockholders who are lower riparian owners, is not taxable under the provisions of § 11 of Chapter 292 of the Public Acts of 1915, since its business is not the "selling" of water, which is one of the conditions essential to its taxation under this Act. *State* v. *Mad River Co.*, 35.
Gifts to educational and charitable uses.
2. The long-established public policy of the State not to impair the usefulness of gifts to educational and charitable uses by subjecting them to taxation, may doubtless be set aside by legislation, but the intent to do so will not be deduced from doubtful or ambiguous expressions. *Corbin* v. *Baldwin*, 99.

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TAXATION—*Continued.*

Same; recipients of " State aid " exempt.

3. Chapter 332, § 3, of the Public Acts of 1915, provides that all property owned by a resident of this State at his decease, which passes by will to Connecticut corporations or institutions which receive "state aid," shall be exempt from so-called inheritance or succession taxes. *Held* that "state aid" as thus used, was not to be restricted to pecuniary assistance extended by the State by way of direct appropriations, as contended by the Tax Commissioner, but included help and assistance afforded by the State of whatever kind and by whatever means or method it might be furnished; and therefore that local corporations or institutions, whose property, because of its devotion to the use and service of the public, was exempted by the legislature from ordinary taxation, were the recipients of "state aid," and, as such, were not subject to the payment of death duties under the terms of the Act. (*Two judges dissenting.*) *Ib.*

Same; " death duties " rather than taxes.

4. Strictly speaking, the imposts required by the Act of 1915 are not taxes upon persons or property, but rather death duties levied by the State in the course of the settlement of estates of decedents as an incident to the devolution of title by force of its laws. *Ib.*

Succession tax; items to be deducted.

5. In computing the amount of an estate for the purpose of determining the succession tax, the following items should be deducted: sums paid by the executors as inheritance taxes in another State, taxes paid to the municipality of the decedent's domicil, and the amount of income tax paid to the Federal government. *Ib.*

Same; how tax should be figured.

6. In the present case the Court of Probate figured the tax at eight per cent upon the net estate, about $715,000, passing to persons or corporations in class C. *Held* that this was erroneous: that the tax upon $49,500 should have been figured at five per cent, on $200,000 at six per cent, and upon the balance at seven per cent, as required by § 6 of the Act of 1915. *Ib.*

Refusal to pay tax not in the interest of State.

7. It is not to the interest of the State that those whom it seeks to tax should have to refuse to pay their taxes in order to test their validity. Such a course, if largely followed, might cause a serious inconvenience to the State in the discharge of its governmental obligations. *Underwood Typewriter Co.* v. *Chamberlain*, 199.

Same; payment under protest not voluntary when.

8. A property owner who, with knowledge of the facts, voluntarily pays a tax assessed upon him or his property, cannot recover the amount so paid, even though the Act under which the tax was laid afterward turns out to be unconstitutional. But if the payment is made under protest and in order to avoid the burdensome penalties prescribed by the Act for its nonpayment, such payment is not, in

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TAXATION—*Continued.*

contemplation of law, voluntary, but one made under moral duress arising from the coercive features of the Act; and therefore the property owner is not prevented by such payment from subsequently attacking the constitutionality of the Act in a suit to recover the money so paid. *Ib.*

Same; Act of 1915, §§ 27 and 28 remedial in character.

9. Sections 27 and 28 of Chapter 292 of the Public Acts of 1915, providing for an application for relief to the Superior Court by any corporation aggrieved by the tax laid against it under Part IV of the Act, and prescribing the powers and duties of the court thereon, are remedial in their character and entirely independent of and separable from the other provisions of the Act. *Ib.*

Same; scope of remedy afforded.

10. These sections (27, 28) were intended, not to limit the relief to a mere mathematical calculation affecting the amount of the tax—an act purely administrative in its nature—but to give the taxpayer adequate remedy at law, and entitle him to a review of the entire proceedings *de novo*, and to a determination of whether any part of the tax is unjust or illegal. *Ib.*

Bank deposits in New York taxable here when.

11. As a general rule, the *situs* of personal property for purposes of taxation is the residence of its owner; and under our law (General Statutes, §§ 2323, 2328, 2329, Public Acts of 1907, Chap. 184, id. 1915, Chap. 153) this rule is applicable to New York bank deposits owned by a Connecticut manufacturing corporation and used here for its corporate purposes in connection with its local business. Such a deposit creates the relation of debtor and creditor, and the depositor is taxable not on the money which he no longer owns, but only on the intangible right to repayment on demand by check. *Bridgeport Projectile Co.* v. *Bridgeport*, 316.

Same; possibility of double taxation.

12. The fact that the State in which the deposits are made may use its power of control over the person of the debtor as a means of compelling the nonresident depositor to pay a second tax upon the same credit, does not impair the right of the State in which the depositor resides and in which the credit is employed from taxing such property. *Ib.*

Same; basis of the right to tax here.

13. This right to tax rests not only on the doctrine that movables follow the person of the owner, but also on the protection which the State affords to the privileges and business of its own corporations, in return for which they are justly bound to contribute to its support. *Ib.*

Succession tax; "expenses of administration" to be deducted.

14. In ascertaining the net amount of the estate of a decedent domiciled in Connecticut, for the purpose of computing the succession or inheritance tax under the provisions of Chapter 332 of the Public

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TAXATION—*Continued.*

Acts of 1915, taxes paid by the executor or administrator to other States, and to the United States under the Revenue Act of September 8th, 1916, as amended by the Act of Congress passed March 3d, 1917, are to be treated as "expenses of administration" and to be deducted from the appraised value of the estate. *Corbin* v. *Townshend*, 501.

Same; "administration expense" includes what.

15. Any expenditure arising by operation of law which is a charge against, or which must be paid out of, the estate, is an "administration expense" within the meaning of that expression as used in § 5 of the Act of 1915. *Ib.*

Manufacturing company; location of "goods kept on hand."

16. In assessing a manufacturing company upon the "average amount of goods kept on hand" during the preceding year (General Statutes, § 2342), the taxing power of a fire district is confined to the value of the goods which were actually within its limits, and does not extend to the entire product of manufacture, most of which, like the greater part of the plant itself, was not within the district. *Williams Brothers Mfg. Co.* v. *Naubuc Fire District*, 672.

Same; separate "establishments" in different districts.

17. Section 2329 provides that when a corporation shall have two or more establishments for transacting its business in different towns or taxing districts, it shall be assessed and taxed for every such establishment, and for the personal property attached thereto or connected therewith, in the town or taxing district in which such establishment is located. *Held* that "establishment" as thus used meant those agencies which served for transacting the business of the corporation; and therefore any building in which any part of the business of the corporation was carried on was an "establishment" within the meaning of the statute. *Ib.*

Construction leading to double taxation to be avoided.

18. A construction of a statute which leads to double taxation should be avoided, as also one which imposes taxes upon property which cannot possibly receive any benefit therefrom. *Ib.*

TELEGRAPH COMPANIES

LEAVING POLE IN HIGHWAY GUTTER. See NEGLIGENCE, 20–22.

TELEPHONE COMPANIES.

In an action in the nature of trespass to recover damages for maintaining and operating a telephone system in the highway in front of the plaintiff's premises, the complaint is demurrable if it fails to allege the nonconsent of the person who owned the land at the time the wires and poles were erected; since the consent of the then owner precludes the erection from constituting an invasion of his rights, and thereafter both he and his successor in title are remitted to the remedy prescribed in § 3907 of the General Statutes, and cannot maintain an action at law for trespass. *Mitchell* v. *Southern New England Telephone Co.*, 633.

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TENDER
EXCUSED WHEN. See CONTRACTS, 13, 14.
OF PAYMENTS UNDER CONTRACT. See VENDOR AND VENDEE, 8–10.
TENEMENT. See PROCESS, 2, 3.
TESTAMENTARY CAPACITY. See WILLS CONSTRUED, 3.
TESTAMENTARY TRUSTS. See TRUSTS AND TRUSTEES, 1–4.
TIME
COMPUTATION OF. See PAUPERS.
FOR EXERCISE OF OPTION TO BUY LAND. See VENDOR AND VENDEE, 2–5.
TITLE
TO AUTOMOBILE. See MOTOR-VEHICLES, 1, 2.
CONTRACT CALLING FOR CLEAR. See SPECIFIC PERFORMANCE, 2, 3.
DEVOLUTION OF, BY LAW. See TAXATION, 4.
INTEREST OF ASSURED. See INSURANCE, 1, 2.
OF LEGATEE UNDER WILL. See WILLS CONSTRUED, 9–14.
LOSS OF RIGHT TO ACQUIRE. See STATUTE OF FRAUDS, 4, 5.
OF MORTGAGEE AFTER PAYMENT. See ATTACHMENT, 9.
CREATED BY PAYMENTS OF INSTALMENTS OF PURCHASE PRICE. See VENDOR AND VENDEE, 6.
TO ADJOINING LAND. See EASEMENTS, 2.
TO REAL ESTATE. See CONTRACTS, 2, 4, 5.
TO RETAINING WALL. See ADJOINING LANDOWNERS.
TO SOIL UNDER NAVIGABLE WATERS. See RAILROADS.
TIME OF VESTING OF. See SALES, 13, 14.
TOBACCO
USE OF, PROHIBITED. See WILLS CONSTRUED, 17, 20.
TOWNS. See MUNICIPAL CORPORATIONS.
TRANSPORTATION
OF EMPLOYEES. See WORKMEN'S COMPENSATION ACT, 5.
TRESPASS. See ADJOINING LANDOWNERS, 2–4; TELEPHONE COMPANIES.
TRIAL.
1. A defendant may contradict any statement of fact made by a witness for the plaintiff upon his direct examination, with or without laying a foundation for such contradiction upon cross-examination. *Rich* v. *Johnston*, 599.
2. A witness for the plaintiff having testified upon his direct examination that he had been discharged from the defendant's employment for forgetting to lock up a dog, was asked upon his cross-examination if it was not for dishonesty, and answered in the negative. The defendant failed to follow up this insinuation of dishonesty, and the trial court in its charge criticised counsel for making such an apparently unjustifiable imputation. *Held* that such criticism was quite proper, as the cross-examiner was not attacking the credit of the witness—in which case he might have been precluded from contradicting the answer—, but was attempting to show that the witness had testified falsely on his direct examination, a fact open

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TRIAL—*Continued.*
to proof by the defendant at any time during the introduction of his evidence. *Ib.*
3. The accused complained of certain remarks of the State's Attorney as improper and prejudicial. *Held* that the statements made did not so far exceed the limits of fair advocacy as to entitle the accused to a new trial. *State* v. *Greenberg*, 658.
OF ACCUSED JOINTLY INDICTED. See HOMICIDE, 1–3, 17.
OF APPEALS FROM COMPENSATION COMMISSIONERS. See WORKMEN'S COMPENSATION ACT, 4.
See also CHARGE OF COURT, 9; JURY, 2.
TRUSTS AND TRUSTEES.
1. The broad general authority conferred upon Courts of Probate to require testamentary trustees "to account for and concerning the estates intrusted to their charge" (General Statutes, § 191), is not limited or restricted by the provision in § 383, that such trustees shall file annual accounts. *Morse* v. *Ward*, 286.
2. The "final account" of a testamentary trustee necessarily precedes the disposition of the trust fund, and does not involve a determination of those who are to take it thereafter, though when those are known the trustee may make distribution to them and file a report thereof. *Ib.*
3. The jurisdiction of the Court of Probate over a testamentary trust fund and of the accounts of the trustee, continues until the approval of the final account, the ascertainment of those who are to take the trust property, and the return of its distribution to them by the trustee has been filed and accepted. *Ib.*
4. A testamentary trustee cannot justify his disobedience of an order of court requiring him to file his final account, merely because the order also directed him to turn over the fund to one to whom, as the trustee was advised by counsel, it did not belong; as his first duty is obedience and an appeal from the decree affords him ample protection. *Ib.*
5. In 1862 an ecclesiastical society conveyed its church property in Hartford to three persons, "in trust" for its own use and occupation as a place of worship, and "in further trust" to sell and convey the land and building when, in the concurrent opinion of the grantors and grantees, it should be for the best interest of the society; and in case of such sale, then to invest the avails in another house of worship for its use. The deed also provided that in case of the death of either of the three grantees, the remaining trustees might fill the vacancy. All of the trustees are dead and none of them appointed a successor or made any conveyance of the premises. In 1898 the Court of Probate for the district of Hartford, upon application of the society, appointed three trustees to fill the vacancies, one of whom is still living. The City of Hartford made an offer for the property, and certain members of the society brought this application to the Superior Court praying for an order for the sale

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TRUSTS AND TRUSTEES—*Continued.*

of the property, or for the appointment of trustees to carry out the purposes of the trust. *Held* that the provisions of § 1034 of the General Statutes applied to the situation, inasmuch as there had been "a change of circumstances" since the creation of the trust, in consequence of which its execution "in exact accordance with the terms of the deed" had become impossible; and therefore the Superior Court had jurisdiction to appoint successors to the original trustees to carry out the purposes expressed in the deed; and that such appointees might sell and convey the church property provided they concurred with the society that such a sale was for its best interest. *Babcock* v. *African Methodist Episcopal Zion Soc.*, 466.

6. That the Court of Probate had no jurisdiction to appoint trustees in 1898, since the statute (§ 249) relied upon to justify such appointment expressly provided that it should not apply where provision "is made by law" for the contingency of the death of the original trustee; and that § 1034 supplied such provision. *Ib.*

7. That the terms of the trust did not confer any personal discretion upon the original trustees which was not also given to their successors. *Ib.*

8. Aside from the statutory provision (§ 1034) for filling a vacancy caused by the death of a trustee, the plaintiffs claimed that this contingency had been provided for, in the present instance, by the terms of the trust deed itself. *Held* that a determination of this question was unnecessary. *Ib.*

9. A trust will not be allowed to fail for want of a trustee to administer it. *Ib.*

See also BAILMENT, 1; INSURANCE, 2, 3; JUDGMENT, 2; RAILROADS, 1; WILLS CONSTRUED, 2, 3, 7, 16–21.

UNDISCOVERED PRINCIPAL. See CONTRACTS, 2, 4.

USAGES. See SALES, 12.

USELESS FORMALITY. See PAYMENT; VENDOR AND VENDEE, 8.

VALUE

EVIDENCE OF, EXCLUDED. See EMINENT DOMAIN, 5.

TOO REMOTE. See EMINENT DOMAIN, 3.

FALSE STATEMENTS DE. See FRAUD, 2.

FINDING OF, IN FORMER ACTION, INADMISSIBLE, WHEN. See EVIDENCE, 2.

OF WORK AND LABOR. See CONTRACTS, 16.

VENDOR AND VENDEE.

Reciprocal option of little value.

1. An option to purchase land for a given sum if the owner desires or elects to sell it for that amount, is of but little value as a contract, since it cannot be enforced by either party against the will of the other. *Saraceno* v. *Carrano*, 563.

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VENDOR AND VENDEE—*Continued.*

Time for exercise of option to purchase.

2. An option to purchase land under an absolute agreement to sell must be exercised within a reasonable time, if no time is prescribed in the agreement; and the same rule applies to an owner who has the option to sell or not. *Ib.*

Same; long continued refusal to sell; presumption.

3. An owner will be presumed to have elected not to sell his property after refusing to part with it for nine years or more. *Ib.*

Same; double, unenforceable option.

4. In the present case the plaintiff agreed to convey her land to the defendant for $11,200 when she might "elect" to do so, "meaning and intending to give to" the defendant "the option upon the purchase of said property, if" the plaintiff "at any time should desire to sell said property." *Held* that this created a double option: a promise to sell at the plaintiff's option to the defendant at his option; that such an agreement was manifestly unenforceable either by an action for specific performance or for damages for its breach, unless the plaintiff elected to sell and the defendant to buy at the same time; and that inasmuch as the plaintiff had retained her property for nine years or more, it would be presumed that she had made her choice and elected not to sell. *Ib.*

Options; time essence of agreement.

5. In all contracts to convey property at the option of the buyer or the seller, time is of the essence of the agreement. *Ib.*

Equitable interest acquired by paying instalments.

6. Payment of instalments of the price of land under a written agreement for its purchase and sale in that way, creates an equitable interest in the vendee or his assignee. *Grippo* v. *Davis*, 693.

Prescribed weekly payments waived.

7. A provision in the contract requiring weekly payments is one which may be, and is, waived by the vendor by accepting without objection payments made in varying amounts and at irregular times, generally monthly, continued for a period of several years. *Ib.*

Same; recalling waiver; notice to vendee

8. The waiver of a contract provision respecting the time within which instalments of the purchase price of land must be paid, does not preclude the vendor from subsequently insisting upon the renewal or enforcement of this provision as to future payments; but before this is done notice thereof must in fairness be given to the purchaser, with a reasonable opportunity to comply upon his part. A mere refusal to accept a payment tendered at the customary time, coupled with notice that the vendor rescinded the contract, is wholly nugatory. Under such circumstances the vendee is excused from tendering the weekly payments called for by the contract, since the vendor's conduct has made it clear that such a tender would be a useless act. *Ib.*

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VENDOR AND VENDEE—*Continued.*

Same; remedies of vendee.

9. In such a situation the vendee may either wait a reasonable time for the vendor to withdraw his rescission, or insist at once upon the contract provisions and make the payments accordingly, or he may, as in the present case, tender in full the balance of the purchase price. *Ib.*

Same; payment of price admitted; tender; interest.

10. The admission of an averment that the plaintiff tendered the "entire balance of the purchase price" to the defendant, precludes the latter from claiming that the tender was inadequate for failing to include interest. *Ib.*

SALE OF CHURCH PROPERTY. See TRUSTS AND TRUSTEES, 5–9.

See also SPECIFIC PERFORMANCE.

VERDICT.

1. It is quite within the province of a trial court to set aside, as unreasonable, a verdict which is founded solely upon the testimony of a single witness which is not only unsatisfactory and improbable in itself, but is at variance with that of other witnesses and with facts and circumstances established beyond question. *Hantmann* v. *Ryan*, 216.

2. A trial judge has jurisdiction to set aside a verdict, although directed by him, if he afterward becomes satisfied that his instruction was erroneous and that the verdict is against the evidence. *Brown* v. *New Haven Taxicab Co.*, 252.

3. A verdict is properly directed where the conclusion reached is the only one to which the jury could reasonably have come upon the evidence before them. *Greenhill* v. *Connecticut Co.*, 560.

4. In the present case the plaintiff sought to recover damages for personal injuries caused by a collision between his automobile and a trolley-car. *Held* that the evidence, viewed in the most favorable light for the plaintiff, would not have warranted the jury in reaching a conclusion that he was free from contributory negligence at the time of the collision, and that there was therefore no error in directing a verdict for the defendant. *Ib.*

5. The Supreme Court of Errors has no power to set aside a verdict of the jury rendered upon conflicting evidence. *Pins* v. *Connecticut Co.*, 310; *State* v. *Greenberg*, 658.

AGAINST EVIDENCE. See APPEAL TO THE SUPREME COURT, 13; LANDLORD AND TENANT, 8.

UPHELD ON EVIDENCE. See NEGLIGENCE, 1.

DIRECTING VERDICT. See APPEAL TO THE SUPREME COURT, 13; NEGLIGENCE, 12, 15, 21.

SET ASIDE. See APPEAL TO THE SUPREME COURT, 19; NEGLIGENCE, 3, 5.

SUSTAINED. See NEGLIGENCE, 10.

See also APPEAL TO THE SUPREME COURT, 2, 12; ASSAULT AND BATTERY, 2.

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VESTING OF ESTATES
IN AFTER-BORN CHILDREN. See WILLS CONSTRUED, 18.
CONDITIONS PRECEDENT IN WILL. See WILLS CONSTRUED, 16–21.
RULE PREFERS EARLY. See WILLS CONSTRUED, 9.
VIEW
OF PREMISES; FINDING AFFECTED BY. See APPEAL TO THE SUPREME COURT, 20.
VOLUNTARY PAYMENT. See TAXATION, 7–10.

WAIVER.
1. A waiver is the intentional relinquishment of a known right. *Crawford* v. *Bridgeport*, 432.
2. As a general rule a waiver, which is the intentional relinquishment of a known right, must be found as a fact; but where the intent, though not expressly found, is the necessary inference or conclusion from the specific facts detailed in the record, the intent may be inferred as a matter of law. *Grippo* v. *Davis*, 693.
OF FORFEITURE. See LANDLORD AND TENANT, 3, 4.
OF LEGATEES UNDER WILL. See WILLS CONSTRUED, 3, 4.
OF PAYMENT AS CONDITION PRECEDENT. See SALES, 6.
OF PRESCRIBED WEEKLY PAYMENTS. See VENDOR AND VENDEE, 7, 8.
See also APPEAL TO THE SUPREME COURT, 23; CORPORATIONS, 3; EMINENT DOMAIN, 11; JURY, 2.
WALLS. See ADJOINING LANDOWNERS.
WARNING
TO ACCUSED ABOUT TO CONFESS. See HOMICIDE, 7.
OF DEFECTS. See MASTER AND SERVANT, 1.
WARRANTY.
Upon the simple question of whether the plaintiff had warranted his preparation for trees to be harmless and effective, his knowledge or lack of knowledge of its injurious character is not material; and therefore an instruction to the jury which imposed upon the losing defendant the burden of proving not only the warranty in fact, but also that the plaintiff knew or ought to have known that the preparation was injurious, is misleading and harmful. *Rich* v. *Johnston*, 599.
WATERS AND WATERCOURSES.
1. An existing water-power, created and maintained under the provisions of the Flowage Act (General Statutes, §§ 982–991), is not for that reason protected from condemnation by a municipality under a general authority from the legislature to take the waters of any stream in that locality for its water-supply; at least when such water-power is not employed in some other public use at the time of the proposed taking. *East Hartford Fire District* v. *Glastonbury Power Co.*, 217.
2. A legislative grant to a private corporation of the limited powers which may be exercised by an individual under our Flowage Act,

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WATERS AND WATERCOURSES—*Continued.*
does not impair or modify *pro tanto* the general authority of condemnation theretofore conferred upon the municipality. *Ib.*
3. In the present case it did not appear from the allegations of the answer, which was demurred to, that the respondent had done any work in constructing its authorized railway, or in generating electricity, or in developing its water-power, although twelve years had elapsed since it received its charter; and furthermore, it did appear from the charter of the respondent that its present intent to make use of the stream for generating electricity for public distribution and as the motive power for its railway, as alleged in its answer, might be subsequently changed, and the water-power applied to manufacturing, quarrying, or mining for its own private purposes. *Held* that under these circumstances it could not be said that the property had been devoted to a public use, and that it was, for that alleged reason, exempt from condemnation for a municipal water-supply. *Ib.*
See also EMINENT DOMAIN, 3; RAILROADS; TAXATION, 1.
WILLS CONSTRUED.
Forfeiture of legacy for contesting validity of will.
1. While provisions for the forfeiture of legacies if the legatee attacks the validity of the will, are sustained without any exception in many of the States, the rule in this and some other jurisdictions is, that a will-contest made by a legatee in good faith and for reasonable cause, will not work a forfeiture of his legacy. This rule rests upon a sound public policy, in that it tends to disclose the truth and thereby advance the cause of justice, and thus helps to secure a devolution of property in accord with both statutory and common law. *South Norwalk Trust Co.* v. *St. John*, 168.
Same; forfeiture clause held enforceable.
2. Having created a trust fund for the benefit of his children, eight in number, a testator provided that if any one of them should contest the probate or operation of his will, the provision in behalf of such beneficiary should be null and void, and the amount thus forfeited should enure to the benefit of the others. *Held* that the forfeiture clause was valid and enforceable although there was no gift over. *Ib.*
Same; appeal from probate a violation of will.
3. That an appeal from probate taken by all the children upon the alleged ground of a lack of testamentary capacity in the testator, constituted a violation of this clause of his will, and in the absence of any finding of the existence of a reasonable cause or ground for such a contest, worked a forfeiture of all their rights under the will, notwithstanding their stipulation in the Superior Court to confine the issue to the question of whether or not the trust in their behalf was in violation of the law against perpetuities. *Ib.*
Same; consent of beneficiaries unavailing.
4. That the law would not permit the clearly expressed intent of the

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WILLS CONSTRUED—*Continued.*

testator to be nullified by the waiver or consent of his beneficiaries. *Ib.*

Same; suit to construe will not a contest of its validity.

5. A suit to determine the legal construction of a will is not a breach of the ordinary forfeiture clause, since its object is not to render the will void but to ascertain its true meaning. *Ib.*

"Heirs" no longer a technical word unless so intended.

6. The word "heirs" has so often been used in a will to include all those who would inherit either real or personal estate, that there is no longer any good reason for insisting upon its technical significance, that is, as limited to those who would inherit real estate only, unless the intention to use it in that sense is apparent. *Morse* v. *Ward*, 408.

Same; "heirs at law"; statute of distribution.

7. In the present case a testatrix left all her property in trust for the benefit of her three sons during their lives, and upon the death of the survivor it was to be "divided equally among the heirs at law" of said sons "according to the laws of distribution of intestate estates" in this State. None of the three sons left issue, but two of them left widows, and a fourth son, who had died before the execution of the will, left one son who survived the testatrix. *Held* that the words last quoted referred to the persons who were to take under the statute of distribution, and thus gave to the term "heirs at law" its secondary and not uncommon meaning; and that under this construction the property passed in three equal parts to the wives or widows of the two sons and to the sole grandchild. *Ib.*

Fee once given not to be cut down to lesser estate, unless.

8. Although an absolute estate once given by will may be cut down to a lesser interest by subsequent provisions clearly showing an intent to diminish the gift, yet in order to have that effect the qualifying language must not be of doubtful meaning or uncertain in its indication of the testamentary purpose. *Meriden Trust & Safe Deposit Co.* v. *Squire*, 440.

Same; fee held to vest in first taker on attaining majority.

9. In the present case a testatrix, who died April 1st, 1914, gave the residue of her property, which comprised by far the larger part of it, in equal shares and in fee simple to her son George and to her granddaughter Ruth, the latter's share, together with its increase, to be paid to her when she reached twenty-one. The same section of the will then provided that in the event of Ruth's death, either before or after the decease of the testatrix, without lawful issue living at the time of her (Ruth's) decease, her portion should go to George in fee; and also "provided further," that if at Ruth's death without lawful issue or descendants thereof then living, George should not be living and should have left no lawful issue or descendants, the residue of the estate should go in equal portions

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WILLS CONSTRUED—*Continued.*

to specified ecclesiastical corporations and a library. The will was executed in April, 1908, when the testatrix was about seventy-five years old; George was then nearly fifty-one, and Ruth, who was the daughter of a deceased daughter, was twelve, and has never married. At that time George had one child, a daughter, who was married in 1910 and has two children, one born in 1911 and one in 1914. In a suit to construe the will the main question was whether the reference to Ruth's death "without issue living at the time of her decease," in the first proviso, and her death without "lawful issue or descendant thereof at the time of her decease," in the second proviso, meant her death whenever that might occur, or her death within a limited time; and if the latter, what that period was. *Held* that it could not be supposed that the testatrix, in creating a contingency upon which her son should take the granddaughter's share, contemplated one that in the ordinary course of nature would not occur until long after the son's death; that it was more probably her intention, in the first proviso at least, to confine or limit the operation of the defeasance clause embodied therein, to the period during which Ruth's share was to remain in the executor's hands awaiting her arrival at full age; and that such a conclusion was aided by the familiar principles of law which encouraged the early vesting of estates, preferred the first to the second taker, and looked with disfavor upon defeasance provisions. *Ib.*

Same; defeasance conditions impossible.

10. That the second proviso, standing alone, could have no direct or immediate effect in defeating the titles upon which the residue of the estate was now held, since the conditions of defeasance therein prescribed had become impossible of fulfilment by the death of George leaving issue surviving at his death; and therefore that no right, title or interest in the residue of the estate could pass to the ecclesiastical societies and library named in this clause as contingent donees. *Ib.*

Same; title held absolute and indefeasible.

11. That the title by which George held his half of the residue became absolute and indefeasible in his estate immediately upon his death leaving surviving issue. *Ib.*

Same; second proviso entitled to consideration.

12. That the second proviso was, however, to be considered in connection with the first in arriving at the testatrix's meaning and intent, in so far as that might be uncertain or ambiguous with reference to the disposal of Ruth's share. *Ib.*

Same; share absolute in first legatee.

13. That while the decease of Ruth "without lawful issue or descendant thereof living at the time of her decease," as prescribed in the second proviso, did seem to convey the idea of a longer outlook than that required for Ruth to reach her majority, viz, nine years, it did not necessarily follow that the two provisos had refer-

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WILLS CONSTRUED—*Continued.*

ence to the same point of time, and that the first must therefore be extended to Ruth's death whenever that might occur; that in view of the inequalities and complications which would be likely to arise from such a construction, as well as the general scheme of the will to treat the two branches of the family, each represented by one person, with substantial equality, it certainly could not be said that Ruth's absolute estate previously given by the will, had been intentionally cut down to the extent claimed by those in opposition; and that having reached her majority, Ruth now had an absolute title to her share, and the right to receive it from the executor. *Ib.*

"Dying without issue" means what.

14. Unless otherwise explained by its context, the phrase "dying without issue" means without issue living at such death. *Ib.*

Advice not given de future contingencies.

15. This court will hesitate to give advice in the construction of wills with respect to contingencies which have not arisen, and especially so if the persons whose interests would be involved are not, or may not be, in existence. *Holmes* v. *Connecticut Trust & Safe Deposit Co.*, 507.

What conditions a testator may and may not impose.

16. As a general rule, a testator has the right to impose such terms as he pleases upon a beneficiary as conditions precedent to the vesting of an estate in him, or to the enjoyment of a trust estate by him as beneficiary. He may not, however, impose conditions that are uncertain, unlawful, or opposed to public policy. *Ib.*

"In event of the death of" legatee; death when?

17. A testator who died in February, 1915, gave the bulk of his property, consisting of personal estate only, in trust, to pay over the net income to his son *C* during his life, upon condition that he abstain from the use of liquor and tobacco, and that he spell the family name as the testator and his ancestors spelled it, T-y-r-r-e-l. The seventh paragraph then provided that "in the event of the death of" *C*, the income should be equally divided between *C's* two children, Florence and Bertha, under the same conditions upon which *C* took it, and that if they married, such conditions should apply to and be observed by their husbands; also that if more children were born to *C*, all were to share alike in the income. In paragraphs eight and nine further limitations over were made upon the death of one or both of *C's* children, and for the ultimate vesting in absolute ownership of the fund when all the life uses had terminated. *C* died intestate in June, 1917, leaving a widow and the two children above named. Florence married and her husband is also living. In a suit by the trustee for a construction of the will, it was *held* that the testator, in referring to *C's* death, meant his death at any time, whether before or after his own decease. *Ib.*

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WILLS CONSTRUED—*Continued.*

Gift to class, opening for after-born children.

18. That the gift of income in equal shares to Florence and Bertha was certainly unobjectionable, if taken by itself; and that the inclusion of after-born children, if any, did not contravene the rule against perpetuities, since the gift to all children was to a class and would have vested in the two living at *C's* death and opened to let in after-born members. *Ib.*

Separate alternative gifts; contingency impossible.

19. That even if the gift to unborn children were invalid, it would not vitiate the bequest of income to Florence and Bertha, since the two provisions embodied separate, alternative gifts, the latter being a substitute for the first in the contingency of after-births—a contingency which never occurred and which by *C's* death had become impossible, thus leaving the substitutionary provision as though it never had existed. *Ib.*

Use of liquor and tobacco by legatee prohibited.

20. That the conditions respecting the use of liquor and tobacco were lawful so far as the beneficiaries of the income were themselves concerned, but were opposed to public policy and void in so far as they were made dependent upon the conduct of the beneficiaries' husbands. *Ib.*

Conditions de spelling of family name.

21. That the condition relating to the spelling of the family name, while not happily expressed, was sufficiently definite to be valid and enforceable as against Florence and Bertha; and that it was unnecessary to determine now whether every one who might hereafter be entitled to some share of the income of the trust fund would be affected by this condition. *Ib.*

WILLS, PROBATE OF.

1. Upon an appeal from probate alleging testamentary incapacity, the sole statutory issue before the Superior Court is the validity of the written instrument purporting to be a will, and not its interpretation or construction. *South Norwalk Trust Co.* v. *St. John*, 168.

2. The attestation by subscribing witnesses which the statute (§ 293) makes a prerequisite to the execution of a valid will, is designed to enable them to testify with certainty that the alleged testator put his name upon the identical piece of paper to which they attached their own signatures; and therefore a writing presented in court as a will does not satisfy the statutory requirements if it appears from the evidence of the so-called witnesses that the supposed maker did not sign the paper in their presence, and that for aught they know it was a mere blank sheet when they placed their own names upon it. *Pope* v. *Rogers*, 248.

3. A testamentary provision which contravened the statute against perpetuities which was in existence when the will was made, is val-

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WILLS, PROBATE OF—*Continued.*
idated when the will is ratified and confirmed by a codicil executed after the repeal of the statute. *Morse* v. *Ward*, 408.
WITNESS
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WORKMEN'S COMPENSATION ACT.
"Course of employment"; duration.
1. A personal injury may arise out of and in the course of one's "employment," within the Workmen's Compensation Act, although suffered before actual work begins or after it has ceased. *Carter* v. *Rowe*, 82.
Same; injury before beginning actual work.
2. In the present case the plaintiff reported at the defendants' boat, upon which he had agreed to work, at the appointed hour, and was then informed that the boat would sail six hours later and that he might use the intervening time as he pleased. Accordingly he left his luggage on the boat and went ashore, returning about an hour before the boat was to sail, and in passing through the defendants' premises in the dark, over a reasonable route, fell and received the injuries for which he claimed compensation. *Held* that under

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WORKMEN'S COMPENSATION ACT—*Continued.*

these circumstances the injury arose out of and in the course of the plaintiff's "employment." *Ib.*

Procedure; identity of questions raised.

3. In the present case the reasons of appeal alleged that the Compensation Commissioner erred "in holding" this and that "upon the evidence"; while the questions reserved by the Superior Court for advice omitted the phrase "upon the evidence." *Held* that the questions raised upon the appeal and upon the reservation were identical, despite these slight differences in form of expression. *Swanson* v. *Latham*, 87; *Osterhout* v. *Latham*, 91.

Appeal; case to be decided on Commissioner's finding.

4. Upon an appeal from an award of the Compensation Commissioner the cause is not to be retried *de novo* in the Superior Court, but is to be decided upon the finding as made by the Commissioner, unless that is challenged by the appeal and is found erroneous by the court, whose power to correct is similar to that exercised by this court over the finding of the trial court upon a proper appeal therefrom. *Ib.*

Injury while returning from work.

5. A workman whose contract required his employer to pay the expense of his transportation to and from his home while engaged in work out of town, was killed at a railroad crossing while going home after his day's work in an automobile owned and driven by a fellow workman which had been engaged by the employer for that purpose. *Held* that the accident arose out of and in the course of the decedent's employment, within the meaning of that expression in the Workmen's Compensation Act; and that the master was liable not only for the death of this particular workman, but also for that of the owner and driver of the car who was killed at the same time. *Ib.*

"In the course of his [employee's] employment."

6. An injury to an employee may be said to arise "in the course of his employment" when it occurs within the period of his employment, at a place where he reasonably may be, and while he is reasonably fulfilling the duties of his employment, or is engaged in doing something incidental to it. *Richards* v. *Indianapolis Abattoir Co.*, 274.

Same; employee burned after falling asleep.

7. An employee after having worked outside in wintry weather for several hours, came in, and while awaiting his opportunity to use a freight elevator to carry up beef for his employer, sat down in front of the fire-box of the boiler, fell asleep, and a few minutes thereafter was awakened by finding his greasy clothing on fire. *Held* that upon these facts the commissioner, and the Superior Court upon appeal, properly ruled that the plaintiff's injury arose "out of and in the course of his employment," within the meaning of that expression in our Workmen's Compensation Act. *Ib.*

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WORKMEN'S COMPENSATION ACT—*Continued.*

Contract in N. Y. made with reference to Connecticut law.

8. A contract of employment made in New York but having sole and specific reference to a job to be performed in Connecticut, comes within the operation of the Workmen's Compensation Act of this State, in case of personal injury to the employee while at work here pursuant to such employment. *Banks* v. *Howlett Co.*, 368.

When injury "arises out of" an employment.

9. An injury "arises out of" an employment, within the meaning of that expression in our Workmen's Compensation Act, when it occurs in the course of the employment and is a natural and necessary incident or consequence of it, though not foreseen or expected. Such an injury may arise either directly from the employment or as incident to it, or from the conditions and exposure surrounding the employment. *Jacquemin* v. *Turner & Seymour Mfg. Co.*, 382.

Same; rule applied; quarrel and fight.

10. Injuries which are likely to occur because of the character of the business or of the conditions under which it is carried on, and which were, or should have been, contemplated by the employer, are properly held to "arise out of" the employment; but a personal injury to an employee resulting from a quarrel and fight with another employee over a ladle for pouring molten metal, which each desired to use at once in order to finish his work and get away for the day, is not one which "arises out of" his employment; at least in the absence of a finding of the existence of some reasonable causal connection between such injury and the employment or the conditions under which it is pursued. *Ib.*

Injury due to third person; rights of employer.

11. An employee whose injury, arising out of and in the course of his employment, is due primarily to the wrongdoing of a third person, may voluntarily settle his claim for damages with the tort-feasor; but in that event his employer is entitled to ratify the settlement and to have the amount so paid applied in discharge or reduction, as the case may be, of his liability for compensation. This principle results from the legal relation of the parties created by Chapter 288, § 2, of the Public Acts of 1915, amending § 6 of our Workmen's Compensation Act, although the statute in stating the rule refers in terms only to the apportionment and application of compulsory payments made by the tort-feasor after his legal liability has been established by a judgment. *Rosenbaum* v. *Hartford News Co.*, 398.

"Regular" and "casual" employees.

12. Although the business of running an amusement park and pavilion and transporting persons and express matter in boats in connection therewith, may not require the constant daily attendance and service of all of one's employees, yet if each of them has stated duties to perform whenever called upon, for which he receives a fixed wage, and none of them have any other occupation, they are

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WORKMEN'S COMPENSATION ACT—*Continued.*
to be treated as "regular" and not as "casual" employees, in determining whether their employer is subject to the provisions of Part A of our Workmen's Compensation Act. *Boyle* v. *Mahoney*, 404.

Same; musicians employed by park lessee.

13. In the present case the management gave dances twice a week in suitable weather in the pavilion, for which an orchestra of at least three performers was supplied by two different leaders under a contract made with one of them for each occasion. *Held* that these facts were sufficient to sustain the finding of the Compensation Commissioner that the musicians were in the employ of the owner or lessee of the amusement park and pavilion, notwithstanding the leader of each orchestra furnished the men and stipulated what compensation they should receive. *Ib.*

Same; drowning "in course of employment."

14. The evidence in the present case reviewed and *held* to warrant the inference, drawn by the Compensation Commissioner, that the decedent, an employee, was drowned while attempting to get into his employer's boat in the course of his employment, and not while he was in the act of showing off his prowess or skill as a swimmer. *Ib.*

Who are not to be classed as "dependents."

15. Without attempting to phrase a complete and exhaustive definition of the word "dependent," as used in our Workmen's Compensation Act, it may be said in a broad and general way, that aside from those conclusively presumed to be dependents by the statute, no one whose financial resources are sufficient, unaided, to sustain himself and family in a manner befitting his class and position in life, is entitled to be regarded as a dependent or partial dependent. While a claim of dependency is not to be defeated by mere proof that the claimant can by the exercise of his best endeavors support himself and family by his own unaided efforts, yet, inasmuch as it is not the purpose of the law to give aid and comfort to slackers in respect of their obligations as members of society, such a claim will meet defeat if it appears that the claimant, by the expenditure of such efforts as under all the circumstances ought fairly and reasonably to be expected of him, is able to support himself and family in a manner suitable to his or their station. *Gherardi* v. *Connecticut Co.*, 454.

Same; son held not a "dependent" of his father.

16. In the present case the plaintiff, a single man twenty-two years old, claimed to be a "dependent" of his father, who died while employed as a lineman of the defendant. The son had been working steadily for three months prior to his father's death and continued to do so down to the time of the hearing before the Compensation Commissioner eleven months thereafter, earning thirteen dollars per week and during all of this period was self-supporting. He was not physically strong and at times had been irregular in his work,

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WORKMEN'S COMPENSATION ACT—*Continued.*
and when idle his father had helped him financially, but there was no evidence of such assistance for several months next prior to his father's death. *Held* that inasmuch as the claimant was apparently capable of earning enough to support himself and his idle periods were due to parental indulgence and folly, he was not a "partial dependent" within the meaning of the Workmen's Compensation Act. *Ib.*
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OF ERROR. See SUMMARY PROCESS.

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